

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1619-CR

STATE OF WISCONSIN

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. No. 2007CF1260

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALEX A. LABOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS AND KATHLEEN B. STILLING, Judges. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Alex Laboy appeals from a judgment convicting him of second-degree reckless homicide in the death of his five-week-old daughter and from a circuit court order denying his postconviction motion seeking a new

trial.¹ On appeal, Laboy argues that he was denied due process, a fair trial, a unanimous verdict and the effective assistance of trial counsel. We reject these claims and affirm.

¶2 On October 27, 2007, five-week-old Autumn stopped breathing and later died. A hospital examination revealed bleeding within her skull and multiple rib and collar bone fractures. An autopsy later confirmed that Autumn died of a head injury. The treating physician opined that the head injury occurred shortly before Autumn died and that such an injury can result from severe shaking, blunt force impact or a combination of the two. The jury convicted Laboy of second-degree reckless homicide.

¶3 Laboy raised numerous postconviction challenges. The circuit court denied Laboy's request for a new trial and concluded that he was not prejudiced by his trial counsel's representation.

¶4 To succeed on his ineffective assistance of counsel claim, Laboy had to show that counsel's representation was deficient and that the deficiency prejudiced him. *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Whether counsel's performance prejudiced

¹ The Honorable J. Mac Davis presided over the trial and entered the judgment of conviction. The Honorable Kathleen B. Stilling presided over the postconviction motion and entered the order denying that motion.

the defendant is a question of law, which we review *de novo*. **Moats**, 156 Wis. 2d at 101.

¶5 Postconviction, Laboy argued that he was deprived of a fair trial and due process when evidence was admitted that he allegedly abused Autumn's brother and accidentally dropped Autumn. Allegations that Laboy abused Autumn's brother came in through taped telephone conversations between Laboy, who was in jail, and the mother of Autumn and her older brother. In those conversations, Autumn's mother repeatedly accused Laboy of abusing both of her children, Laboy either expressly or impliedly admitted that he killed Autumn, and they fought over the circumstances that resulted in the charges against Laboy. Laboy further contended that his trial counsel should have objected to this evidence and this evidence should have been the subject of a limiting instruction.

¶6 The circuit court determined that Laboy's trial counsel performed deficiently in relation to evidence that Laboy abused Autumn's brother and accidentally dropped Autumn. However, the circuit court concluded that Laboy was not prejudiced by his counsel's failure to object to the evidence or seek a limiting instruction. The mother testified at trial that she had never seen Laboy abuse her children, she knew that a medical examination revealed no signs that her son had been abused, and she had no concerns, before Autumn's death, about leaving her children alone with Laboy. And, even if Laboy accidentally dropped Autumn on an earlier occasion, there was no evidence at trial that Autumn was injured in this incident.

¶7 The circuit court's prejudice analysis also considered the totality of the evidence against Laboy: the mother denied that she injured Autumn and there was no evidence that she had done so, the medical evidence established Autumn's

cause of death, Laboy confessed to police and to Autumn's mother that he had abused Autumn and caused her death, Laboy attempted to accuse another of abusing Autumn and causing her death, and Laboy lacked credibility. The court concluded that counsel's deficient performance did not undermine confidence in the verdict.

¶8 We reject Laboy's appellate arguments that the recorded telephone conversations with Autumn's mother misled the jury or drove the jury's decision to convict him. We agree with the circuit court's conclusion that trial counsel's approach to this evidence did not prejudice Laboy.

¶9 Postconviction, Laboy also challenged the trial testimony of James Barkley, Laboy's fellow inmate at the Waukesha County Jail. Barkley testified that Laboy told him he shook a crying Autumn so hard that she was not breathing when he put her down. Barkley further testified that Laboy was concerned that he would be accused of abuse because he accidentally dropped Autumn on an earlier occasion. Laboy contended that Barkley's testimony amounted to impermissible other acts evidence. The circuit court found that trial counsel effectively impeached Barkley and that Laboy was not prejudiced by Barkley's testimony because the evidence of Laboy's guilt was very strong. We reject Laboy's appellate arguments that Barkley's testimony either misled the jury or drove the jury's decision to convict him. We agree with the circuit court that trial counsel's approach to this evidence did not prejudice Laboy, particularly when weighed against the evidence of Laboy's guilt.

¶10 Laboy next argues that the jury should have received a unanimity instruction because questions from the jury during deliberations suggested that the jury was considering other instances of criminal conduct, not just the October 27

conduct that allegedly caused Autumn's death. Laboy also claimed that trial counsel was ineffective for not requesting a unanimity instruction.

¶11 During deliberations, the jury asked the circuit court to clarify the phrase "on or about" as it related to the date of the crime. The jury also sought clarification of the second element of the charge relating to Laboy's awareness of the risk he created by his conduct. Laboy's trial counsel suggested that the jury's questions indicated that it was focusing on conduct that occurred in the days and weeks before October 27. The court found that the jury's note did not permit an inference that the jury was focused on conduct that occurred weeks before October 27. The circuit court did not give a unanimity instruction.

¶12 Postconviction, Laboy argued that the jury should have received a unanimity instruction and that trial counsel should have requested such an instruction. The circuit court considered whether there was evidence from which the jury could have found that injuries inflicted prior to October 27 caused Autumn's death. Medical experts testified that Autumn suffered a catastrophic brain injury as a result of being shaken with impact. While there was evidence at trial of other, prior head injuries, broken ribs and a broken clavicle, there was no testimony that these injuries caused Autumn's death. The postconviction court also found that trial counsel made the court aware of her unanimity concerns even if the court did not give an instruction.

¶13 We agree with the circuit court. The State claimed that Laboy shook Autumn so hard on October 27, 2007, that he caused brain damage and death. The circuit court instructed the jury that Laboy was charged with second-degree reckless homicide and allegedly recklessly caused Autumn's death "on or about Saturday, October 27, 2007." The jury instructions informed the jurors that they

were looking at conduct that occurred on or about October 27, 2007, not at some undefined time in the past. The jury is presumed to follow the instructions it receives. *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. There is no reasonable basis to believe that the jury was considering conduct other than that which caused Autumn's death.²

¶14 Laboy's final claim on appeal relates to the testimony of Detective Steven Torn. Postconviction, Laboy argued that the detective offered improper expert testimony when he testified that based upon his training and experience, he could tell that Laboy was telling the truth when he confessed to shaking Autumn. Laboy argued that he had no notice that the State intended to elicit expert opinion from the detective. Laboy further argued that trial counsel should have objected to the detective's testimony.

¶15 During direct examination by Laboy's trial counsel, Detective Torn recounted Laboy's appearances on November 2, 5 and 7 at the Menomonee Falls Police Department. On November 2, Laboy appeared at the department and said he wanted to take the blame for Autumn's death even though he claimed he did not harm her. Laboy did not provide any details or a confession, and he left the department.

² For this reason, we reject Laboy's reliance upon inmate Barkley's testimony and the telephone conversations between Laboy and Autumn's mother as evidence of other abuse incidents which the jury could have been considering during deliberations. As the circuit court reasoned in denying Laboy's postconviction motion, there was no evidence before the jury that anything other than Laboy's severe shaking of Autumn on or about October 27 caused Autumn's death.

¶16 On November 5, Laboy returned to the police department. He appeared stressed and claimed that he caused Autumn's death. Laboy again declined to provide details establishing his involvement in Autumn's death, and he left the department.

¶17 On November 7, Laboy made his third appearance at the department. He appeared stressed and did not appear to be eating or sleeping properly. Laboy started offering details about the circumstances surrounding Autumn's death. On cross-examination by the prosecutor, the detective described the change in Laboy's demeanor when he started implicating himself in Autumn's death: “[l]ike letting hot air out of a balloon, you know, a big sigh of relief. He had all this stress and tension built up in him, and through my years of interviews and experience I – I've learned that once they tell the truth, it all comes out, they can relax again.” The prosecutor asked the detective whether there was tension involved in lying. The detective responded: “Well, definitely between the guilt of doing it and the guilt of lying, um, a lot of stress and tension builds up in the person.” Detective Torn testified that he did not believe that Autumn's mother caused her death. Laboy's trial counsel did not object to this testimony.

¶18 On re-cross-examination, the prosecutor asked whether the detective “had some training and experience in identifying signs of deception when a person's talking with you.” The detective answered, “Yes.” The prosecutor then asked “[b]ased on your training and experience, did you see any sign that told you the defendant was giving a false confession on November [7,] 2007?” The detective responded, “No.” Laboy's counsel did not object to this testimony.

¶19 The circuit court determined that the State properly inquired after Laboy's demeanor and that the detective made general comments about how a

suspect relaxes after telling the truth, not specific comments about Laboy. While counsel should have objected to this testimony, the circuit court concluded that counsel's deficient performance did not prejudice Laboy because the evidence of Laboy's guilt was strong. We previously commented upon the strong evidence of Laboy's guilt, and we agree with the circuit court's conclusion that Laboy was not prejudiced by counsel's failure to object to the detective's testimony.

¶20 We also agree with the State on appeal that Detective Torn's testimony was proper as an invited response. *State v. Wolff*, 171 Wis. 2d 161, 168-69, 491 N.W.2d 498 (Ct. App. 1992). Earlier in the trial, Laboy elicited the same type of evidence from Officer Harding, who responded to Autumn's medical emergency on October 27.

¶21 During her cross-examination of Officer Harding, Laboy's counsel inquired whether Laboy seemed extremely worried about Autumn (he was), whether the officer thought at the time that Laboy was covering anything up (the officer did not think so), whether the officer was experienced at detecting deception (he was), and whether the officer thought Laboy was honestly conveying information to the police (the officer thought he was). Laboy's counsel opened the door to testimony by law enforcement officers about assessing a witness's demeanor. The prosecutor's inquiry of Detective Torn regarding his ability to detect deception was a fair and invited response to Laboy's counsel's cross-examination of Officer Harding on the same topic.

¶22 We affirm the conviction because Laboy was not prejudiced by his trial counsel's performance, and he was not deprived of a fair trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.