COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP229-CR **Cir. Ct. No. 2008CF601**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMIAH FELTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jeremiah Felton appeals a judgment of conviction for first-degree intentional homicide and an order denying his postconviction motion. Felton seeks a new trial either in the interest of justice or because his trial

counsel was ineffective. Both theories rely on the same two premises: the jury was not apprised of expert testimony on shaken baby syndrome that contradicted that of the State's experts, and the prosecutor incorrectly stated during closing argument that a jailhouse informant could not receive anything in return for his testimony. We conclude that Felton fails to demonstrate that his proffered expert testimony substantially conflicted with the State's case and that the prosecutor's statement was not sufficiently harmful. We therefore affirm.

BACKGROUND

¶2 At approximately 7:30 p.m. on a Monday, Felton's three-month old son, Jeremiah Jr. (J.J.), was rushed to the hospital when his mother heard him "making funny noises" and observed something wrong with his eyes. The evening before, J.J. had been at the park with ten other family members. He spent part of Monday in Felton's care. However, that morning, J.J spent time with his mother before she went to work, and several people were in and out of the house throughout the day. Doctors determined the infant had a number of injuries, including a skull fracture on the right side of his head, brain bleeding, and retinal bleeding. J.J. died three days later.

¶3 At trial, the State's theory was that Felton severely shook J.J. and then swung his body, slamming his head against a door. The State presented the testimony of a jailhouse informant, Douglas House, who claimed Felton confessed to him. House testified that Felton told him J.J. slipped and got soap in his mouth during a bath, and started crying. Felton could not quiet J.J. and, out of frustration, swung J.J. into the bathroom door, hitting the right side of his head just above the ear. Felton immediately knew J.J. was injured, and told House he was going to blame it on his girlfriend's sister.

¶4 The State also presented testimony from three doctors: Dr. John Taylor—the admitting doctor; Dr. Ralph Vardis—the treating doctor; and Dr. Mark Witeck—the medical examiner who performed J.J.'s autopsy. Doctors Taylor and Vardis testified extensively concerning their opinions that J.J. suffered injuries from being shaken, particularly observing that the eye bleeding indicated shaking. Doctor Taylor explained that the eye and brain bleeding could not have resulted from a fall; it had to result from repetitive forces. Both doctors opined that J.J.'s injuries were consistent with being shaken and then slammed into a hard object. Doctor Taylor believed the shaking would have been "significant" and "vigorous." Doctor Vardis variously opined that the shaking was "profound," "violent," "severe," and "violent and angry and intentional," and observed that this was one of the most severe cases of shaken baby syndrome he had ever seen. He allowed that some brain bleeding was due to the skull fracture, but opined most was caused by the shaking. Ultimately, Dr. Vardis determined J.J.'s cause of death was shaken baby syndrome, which resulted in an absence of cerebral blood flow.

¶5 Doctor Witeck's autopsy report, on the other hand, did not mention shaking or shaken baby syndrome. Instead, he concluded J.J.'s cause of death was blunt force trauma at the location of the skull fracture. At trial, though, he agreed the eye bleeding was consistent with shaking and all of the injuries were consistent with swinging J.J. into an object such as a door.

¶6 The State's doctors also offered their opinions as to whether J.J.'s injuries could have resulted from a fall. Doctor Taylor testified the injuries were sustained from a force equal to that of a car accident, could not have resulted from a fall down stairs; and could "absolutely not" have resulted from a person falling while holding a baby. When asked whether the injuries could have resulted from

falling from the top of a ladder at a playground, he responded it was "very unlikely," "extraordinarily unlikely," and there was only a "miniscule possibility." Doctor Vardis testified, to a reasonable degree of scientific certainty, that J.J.'s injuries could not have resulted from a fall of two to five feet. Further, he opined J.J.'s injuries could be caused by a fall only if it was from the top of a one- to two-story building. Doctor Witeck similarly opined that the skull fracture could only be caused by a fall if from a one- to two-story building. He also testified the injuries were "not at all" consistent with a baby J.J.'s size falling from a standing position.

¶7 Finally, two of the State's doctors testified concerning the period of time where a baby might appear normal following a brain injury. Doctor Taylor testified the delay could theoretically be up to a full day, but would be "much more likely closer" to the time of presentation at the hospital. He agreed J.J.'s injury might have occurred between 1:00 and 6:00 p.m., but opined it was likely one to two hours before J.J.'s 7:35 arrival at the emergency room. Further, considering J.J.'s reported behavior that day—feeding normally in the morning and settling down after crying around 3:00 p.m.—Dr. Taylor concluded the injury could not have occurred at the park the day before, and had to have occurred after 3:00 p.m.

¶8 Doctor Vardis testified the baby might appear normal for up to twenty-four hours. He variously indicated moderate shaking would allow for a delay of twelve to fifteen or twelve to twenty-four hours, but more severe shaking would present in under twelve hours. He opined that in this serious case, a maximum of two to three hours would have transpired before J.J. showed signs of injury. Further, Dr. Vardis could "state with certainty" that the injury did not occur on Sunday.

¶9 Following trial, Felton moved for postconviction relief, asserting the State inaccurately told the jury that House could not receive any benefit in return for his testimony, and that the jury should have heard expert medical testimony that would have conflicted with that of the State's witnesses. Both contentions were presented alternatively as ineffective assistance of counsel or interest of justice arguments. Following an evidentiary hearing, the court denied Felton's motion.

DISCUSSION

¶10 Felton seeks a new trial in the interest of justice, contending the real controversy was not tried. *See* WIS. STAT. § 752.35.[1] We may conclude the real controversy was not fully tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, or if it improperly heard evidence that sufficiently clouded a crucial issue. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). If we conclude the real controversy was not tried, we may grant a new trial without finding the probability of a different result on retrial. ***Id.*** However, "[o]ur discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We exercise it "only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶11 Alternatively, Felton argues his trial counsel was ineffective. To prevail on this claim, Felton must demonstrate that counsel's performance was

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

deficient and that he suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If either prong is not shown, we need not address the other. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). To prove deficient performance, Felton must show that counsel's act or omission was "objectively unreasonable." *See* ***State v. Oswald***, 2000 WI App 2, ¶63, 232 Wis. 2d 62, 606 N.W.2d 207. Prejudice exists if there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. ***O'Brien***, 223 Wis. 2d at 324. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** We defer to the circuit court's factual determinations, but independently assess whether the facts demonstrate deficient performance and prejudice. ***Id.*** at 324-25.

Prosecutor's statements during closing argument

¶12 Felton argues the State inappropriately asserted that House could receive no benefit in exchange for his cooperation. Trial testimony indicated the only arguable favor House received in exchange for testifying was that detective Robert Haglund looked into House's concern that police were harassing his son and daughter. Haglund informed House that police were merely watching a nearby property. House received no consideration in the case that was pending against him while in jail with Felton. Accordingly, in closing argument, the State argued:

> What House is testifying to has to be the truth …. [W]hat did he get for testifying …? The answer is nothing. Absolutely nothing. Is there a case pending against him? No. Long gone. Over. Done with. There's nothing that House was going to gain by testifying. Because his case was over. It was done. … [M]aybe … even a criminal like Doug House, can do the right thing once in a while.

¶13 Felton's trial counsel, however, argued the State was wrong. Counsel told the jury:

> State said, well, his case is settled. He didn't get any concessions. Cooperation with law enforcement, that matter can be reopened any time for a sentence modification. So the fact that he hasn't received any benefit yet, it might be 'cause we had to wait for this case to go forward. Doesn't mean he's not getting it. It means he hasn't gotten it yet.

¶14 In rebuttal, however, the State's second prosecutor asserted that not only had House not received consideration before testifying, but he could not receive any benefit in the future. The prosecutor stated:

> Mr. House has absolutely nothing to gain here. He was honest with you. His case is closed. He can't receive anything for his testimony at this point.
>
> ....
>
> [H]e won't gain anything, no advantages from the [S]tate. Just a lightening of his conscience.
>
> ....
>
> And he's received no consideration for this. His case is closed. Once again, it's done.

¶15 Felton argues the second prosecutor's statement, that House could not receive any future advantage from his testimony, was false. Felton argues the prosecutor knew or should have known that House might obtain a sentence reduction for his cooperation. He directs us to ***State v. Doe***, 2005 WI App 68, ¶¶1, 8-10, 280 Wis. 2d 731, 697 N.W.2d 101, where we recognized that substantial assistance to law enforcement after sentencing was a valid reason for sentence modification. Further, Felton emphasizes House did, in fact, seek and receive a sentence reduction in exchange for his cooperation in this case. The State acknowledged House's assistance, but neither objected to, nor supported, House's

request. The court reduced House's term of confinement from two and one-half years to one year.

¶16 While we agree the prosecutor's statement that Felton could not secure any future consideration for his testimony was improper, we conclude it was not prejudicial. That is, we do not believe there is a reasonable probability that it affected the outcome of the trial. Therefore, Felton's argument, that his trial counsel was ineffective for not objecting, fails. Similarly, the statement did not sufficiently cloud the issue of House's credibility so as to conclude the real controversy was not tried.

¶17 While House's testimony was significant, the State's case did not hinge on it. Indeed, the second prosecutor prefaced his comments about House by arguing:

> This case was strong enough without House. Does he, perhaps, put the final—final piece of the puzzle together? Yes. Perhaps he does. But you've heard all the medical testimony and you've heard all the other testimony of these witnesses, and certainly, this case does not hinge on Mr. House.

The State apparently recognized that House had inherent credibility issues based on his criminal history. House testified he was currently in prison and had "nine or ten" criminal convictions. Moreover, the effect of the State's misleading statement was diminished by Felton's attorney's explanation that House could, in fact, still seek a sentence modification in the future.

Trial counsel's failure to present expert medical testimony

¶18 Felton argues the jury was deprived of expert medical testimony that would have substantially conflicted with that presented by the State. In summary,

Felton's medical testimony argument is as follows. According to the State's experts, baby J.J. was vigorously and intentionally shaken and died from shaken baby syndrome, the injuries could only have occurred while J.J. was in Felton's care, and the injuries could not have resulted from a fall unless J.J. toppled off a one- to two-story building. According to Felton's experts obtained after trial, J.J. did not suffer from shaken baby syndrome, might have been injured up to forty-eight hours prior to displaying symptoms, could have received his injuries from a short fall, and was most likely accidentally injured.

¶19 The preceding paragraph paints two drastically different pictures of expert medical opinions. The paintings, however, appear to be nothing more than clever forgeries. While there are some differences, there is also overlap between the two competing sets of expert testimony. More importantly, though, Felton misrepresents the record.

¶20 For example, on the first page of his statement of facts, Felton claims all three of the State's doctors "concluded that the infant suffered non-accidental trauma." Doctor Witeck, the medical examiner, testified to no such thing—at Felton's provided record citation or anywhere else we could find.[2] In the very next sentence, Felton claims Drs. Vardis and Taylor "concluded the infant died of Shaken Baby Syndrome." Felton's record citation for Dr. Taylor does not support this assertion. Moreover, we reviewed his entire testimony and were unable to find any opinion as to the cause of death. In the next sentence, Felton tells us Dr. Witeck "testified the injuries were caused by violent shaking and slamming of the infant's head against a hard surface." We checked that citation

[2] Further, Felton provided only two supporting record citations; none for Dr. Vardis.

too. Again, we were disappointed. There is nothing resembling the topic of shaking on the page cited, or on the preceding or following page for that matter. In fact, the only testimony we discovered from Dr. Witeck on the issue of shaking was that he stated eye bleeding is *consistent* with shaking. In the next sentence, Felton informs us the "pediatricians testified that the injuries were sustained between 3 and 6 p.m. on the day he was hospitalized, a period during which the infant was alone with Felton." This representation is partially true. However, a review of Drs. Taylor's and Vardis's testimony on the timing issue, set forth accurately in the background section above, reveals this assertion is less than the whole story.[3]

¶21 Felton's loose handling of the facts does not end with his introductory synopsis of the State's evidence. He subsequently repeats his incorrect assertion that Dr. Taylor "testified that [J.J.] died of Shaken Baby Syndrome." He further asserts that the "State's three medical experts all testified that violent shaking caused bleeding and swelling in [J.J's] brain as well as retinal hemorrhages," and that Dr. Witeck agreed that shaking "causes" the kind of eye hemorrhages observed in this case. But Dr. Witeck never testified about shaking causing brain bleeding or swelling,[4] and merely agreed that shaking was *consistent* with eye bleeding.

[3] Although he refers only to Drs. Vardis and Taylor as pediatricians, Felton also provided a record citation to Dr. Witeck's testimony. That citation fails to support Felton's asserted fact. Our review of Dr. Witeck's testimony indicates he never discussed the issue of delayed onset of symptoms after injury.

[4] Additionally, there is no record citation provided in support of that assertion as to Dr. Witeck.

¶22 Additionally, the State emphasizes that Felton's experts' opinions were not so different from the State's as Felton would have us believe. For example, Felton's three experts respectively testified that the delay between head injury and the onset of symptoms would usually be minutes or a few hours, and would not exceed twenty-four hours; could be up to twelve hours, but likely not more than three to six hours; or would be quite short, if any, and the outlier is forty-eight hours. The third doctor further observed that, based on his own study, the average delay is sixty-four minutes. We agree that these opinions are largely consistent with the State's expert testimony.

¶23 In contrast to the State's doctors, Felton's experts testified that J.J.'s skull fracture could have resulted from a fall of two or three feet. However, they also testified that it would be rare for such a fall to cause J.J's constellation of injuries. One acknowledged it was more likely the injuries were nonaccidental, assuming that there was no evidence of either accidental trauma or a pre-existing condition and that someone had admitted to slamming J.J.'s head into a door frame. Another conceded that the nature of the injuries was more indicative of being "struck," although he opined the injuries would have been more severe if J.J. had been swung like a baseball bat into a wall.

¶24 Felton has not persuaded us that the real controversy was not tried or that he was prejudiced by his trial counsel's failure to present expert medical testimony. Indeed, his inaccurate and incomplete recitation of the facts precludes us from making such a determination because, short of independently undertaking a complete review and analysis of the trial and postconviction expert testimony, we are unable to sufficiently comprehend how or to what extent the evidence differed. We need not resolve arguments that are not adequately briefed or properly supported by citation to the record. *See* ***State v. Flynn***, 190 Wis. 2d 31,

39 n.2, 527 N.W.2d 343 (Ct. App. 1994). To the extent Felton's arguments are developed and supported, we are not convinced that the differences in expert medical testimony were significant enough to undermine our confidence in the outcome or prevent the real controversy from being tried. Indeed, regardless of the root cause of J.J.'s injuries—whether accidental or intentional—trial counsel established that other people had custody of him on the day he was admitted to the hospital.

By the Court.—Judgment and order affirmed.

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