COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

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

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No. 96-0820-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JENNIFER VIAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Jennifer Vian appeals from a judgment convicting her of two counts of recklessly causing bodily harm to a child, and one count of recklessly causing great bodily harm to a child. She also appeals from the order denying her postconviction motion. The issues are whether the trial court erred by denying her

motion to sever the charges for trial, and whether Vian received effective assistance from trial counsel. We reject her arguments on these issues, and affirm.

The State charged Vian with causing great bodily harm to her infant child S.L.V. in November 1991, causing bodily harm to S.L.V. in March 1992, and causing great bodily harm to her infant son K.D.V. in December 1993 or January 1994. Vian moved to sever the charges and the trial court denied her motion. At trial, during the voir dire, the district attorney stated to the jury panel that they would "also hear testimony of Jennifer Vian and what she said she did and did not do to the children." Counsel did not object to what Vian characterizes as a prejudicial comment, given the fact that she had no intention of testifying during the trial, and in fact did not do so.

At the close of evidence, the court proposed a lesser-included instruction on one of the two great bodily harm charges. Counsel, allegedly without consulting Vian, did not object and the court gave the proposed instruction. The jury found Vian guilty on the lesser-included offense of causing bodily harm on that particular charge, and also found her guilty on the two remaining charges as well.

In her postconviction motion, Vian argued that counsel negligently failed to object during voir dire, and should have consulted her on the proposed instruction. The trial court denied postconviction relief, resulting in this appeal.

The State may join separate charges when they are of the same or similar character, occur over a relatively short period, and the evidence as to each overlaps. ***State v. Locke***, 177 Wis.2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993). The court may order separate trials for the charges, however, if joinder is prejudicial. Section 971.12(3), STATS. The decision whether to grant separate trials based on prejudice is discretionary. We will not find an erroneous exercise of that discretion unless the defendant demonstrates that the failure to sever caused substantial prejudice. ***Id***. at 597,

502 N.W.2d at 894. When evidence of the other joined charges would be admissible as other crimes evidence, the defendant has not shown substantial prejudice. ***Id***.

Vian contends the charges were not of a similar character and were too widely spaced in time to be joined. We disagree. All three counts charged bodily harm, or great bodily harm, to Vian's infant children when they were less than six-months old, and were therefore similar in character despite the varying degree of injury inflicted in each case. Additionally, acts occurring almost two years apart, as these did, can still be considered as occurring over a relatively short period of time. ***Id***. at 596, 502 N.W.2d at 894. Given the closely related nature of the charges, we deem the "relatively short period of time" test satisfied.

Vian also contends that she established that joinder would substantially prejudice her. Again, we disagree. Evidence of other crimes or acts is admissible to show identity or the absence of a mistake or accident. Section 904.04(2), STATS. Evidence of Vian's other two crimes would have therefore been admissible at the trial on any one of the charges, so long as its probative value was not "substantially outweighed by the danger of unfair prejudice." Section 904.03, STATS. We conclude that the trial court did not erroneously exercise its discretion in determining that no unfair prejudice would result from a joint trial on all three charges.

Vian next argues that her counsel was ineffective because he failed to object to the prosecutor's voir dire statement. To obtain relief on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Here, Vian cannot meet either test. Immediately after making the challenged statement, the prosecutor corrected her reference to "testimony" by saying "and I will rephrase that. What she said she did to [her daughter], in reference to the

injuries, and what she said she did to [her son] in reference to the injuries." Additionally, in his own questioning on voir dire, Vian's counsel used a series of questions to inform the jury that innocent defendants may have a variety of reasons for not testifying. Finally, before the jury deliberated the trial court informed it that Vian had a constitutional right not to testify, and instructed the panel not to consider her decision not to testify in reaching its verdict. That, essentially, is what the trial court would have instructed had counsel objected to the prosecutor's statement. For these reasons, we conclude that trial counsel's performance was not deficient and that there was no reasonable possibility that the prosecutor's statement influenced the outcome of the trial.

Vian's final argument is that her counsel was ineffective for failing to consult with her regarding, and for failing to object to, a lesser-included offense instruction on count one. The instruction allowed the jury to find guilt of recklessly causing bodily harm if it could not find great bodily harm. We first note that the trial court found that Vian had not established that counsel had not consulted with her on the issue. Furthermore, we have recently held that counsel's performance is not deficient where counsel has discussed with a client the "general theory of defense," and then independently makes a strategic decision to not request a lesser-included offense instruction. ***State v. Eckert***, 203 Wis.2d 497, 510-11, 553 N.W.2d 539, 544 (Ct. App. 1996). We conclude Vian has not met her burden to show that counsel's performance was deficient for not consulting with her on the giving of a lesser-included offense instruction.

As to counsel's failure to object to the instruction, we note that the jury initially returned verdicts of guilt on *both* the original charge *and* the lesser-included offense. After being reinstructed on their duty with respect to the alternatives, they returned the guilty verdict on the lesser charge. We therefore conclude that Vian has not shown prejudice from the failure to object to the lesser-included offense instruction

inasmuch as it appears that the jury was prepared to convict her of the more serious charge had there not been a lesser alternative.

By the Court.—Judgment and order affirmed.

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