

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

April 30, 1997

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.

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

Nos. 96-1466-CR
96-1467-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN F. DRAVES,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. John F. Draves appeals from a judgment of conviction of causing mental harm to a child contrary to § 948.04(1), STATS., and a judgment of conviction of threatening to injure a public officer contrary to § 943.30(1) and (4), STATS. He also appeals from an order denying his motion for

postconviction relief based on ineffective assistance of trial counsel. We conclude that trial counsel was constitutionally deficient by not objecting to the admission of evidence of Draves' possession of firearms. We reverse the judgments and the order and remand for a new trial.

Draves was charged with causing mental harm to his thirteen-year-old adopted daughter. He was arrested after an occurrence on November 13, 1994, during which he used profanity in calling his daughter a liar and punched a hole in a wall after ordering her to stay in her room until the family returned from church. Other acts alleged included Draves throwing his daughter's clothes in the driveway and driving over them with the car, cutting up her favorite teddy bear, throwing empty soda cans at her, putting her bicycle in the driveway and running over it with the car, showing her naked pictures of her mother which he kept in the garage, threatening to kill her cat, and talking about sexual relations and sexual matters in her presence. After his daughter was removed from his house, Draves was charged with making threats to harm the social worker involved in the case. Draves allegedly told his wife that he would kill or harm anyone who attempted to separate him from his then three-year-old son. Draves directed his wife to convey that threat to the social worker.

At trial, Draves' wife was asked about firearms Draves kept in the house and whether his shotgun was in the house on November 13, 1994. Draves' upstairs tenants testified about incidents in which Draves had displayed a shotgun and handguns to them and told them he had an "arsenal" available to handle any home intruders. A police officer testified that one of the weapons that Draves owned was not a hunting weapon but rather an "anti-personnel weapon" and "[i]t's a weapon used for shooting people." There was evidence that the SWAT Team was utilized to effectuate Draves' arrest because Draves was known to be in

possession of weapons and threats had been made against the social worker. The social worker testified about information imparted to her by the daughter and Draves' wife about weapons in the house. She indicated that Draves' wife was unable to find the shotgun kept in the house the morning after he threatened the social worker. Another police officer indicated that he had observed the shotgun in the house on November 13, 1994. Another officer described the presence of four rounds in the shotgun when he retrieved it from Draves' office. He also recited a telephone answering machine announcement making reference to the family's preparation of weaponry. Trial counsel made no objection to the evidence concerning Draves' possession of firearms.

In seeking postconviction relief, Draves alleged that trial counsel was ineffective for failing to object to the admission of evidence regarding Draves' use and/or possession of firearms. Trial counsel testified that he did not object because his objection to the evidence at the preliminary hearing had been overruled. He believed the evidence was relevant and admissible in any event. He explained that a strategy was developed to deal with the firearms evidence by demonstrating that Draves used the firearms to protect his family and that he was "a good family man, protecting his family with weapons, if necessary."

"To prevail on a claim of ineffective assistance of counsel, a defendant must prove that his [or her] counsel's actions constituted deficient performance, and that the deficiency prejudiced his [or her] defense." *State v. Hubanks*, 173 Wis.2d 1, 24-25, 496 N.W.2d 96, 104 (Ct. App. 1992). The questions of whether counsel's actions were deficient and whether such actions prejudiced the defense are questions of law which we review de novo. *See id.* at 25, 496 N.W.2d at 104-05.

A court considering the performance prong of the test must assess the reasonableness of trial counsel's performance under the facts of the particular case, viewed as of the time of counsel's conduct. *See State v. Marcum*, 166 Wis.2d 908, 917, 480 N.W.2d 545, 550 (Ct. App. 1992). We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). However, the advancement of a strategic reason for the failure to object does not insulate counsel's performance from scrutiny. We will examine counsel's conduct to be sure it is more than just acting upon a whim; there must be deliberateness, caution and circumspection. *See id.* A strategic or tactical decision must be based upon rationality founded on the facts and law. *See id.*

Section 904.03, STATS., provides that evidence may be excluded even when relevant if its probative value is substantially outweighed by the danger of unfair prejudice. *Thompson v. State*, 83 Wis.2d 134, 144, 265 N.W.2d 467, 472 (1978), acknowledges that "cases dealing with other gun evidence are almost uniform in holding that it is error to introduce possession of a gun which was not involved in the crime." In *Thompson*, the court found prejudicial error in the admission of the defendant's possession of a revolver when there was clear evidence that the gun used in the crime was an automatic. *See id.* at 146, 265 N.W.2d at 473.

Here, no guns were used in the commission of the crimes charged. The admission of the possession of firearms not directly linked to the commission of the crimes is prejudicial "for such evidence tends to show, not that [the defendant] committed the crime, but that he is the sort of person who carries deadly weapons." *Id.* at 144, 265 N.W.2d at 472 (quoted source omitted). An

objection should have been made to the evidence of Draves' possession of firearms.¹

The State argues that because Draves himself devised a strategy to explain the possession of firearms to demonstrate his devotion to protect his family, any objection was waived. However, trial counsel believed the evidence was relevant and could not recall doing any research on the prejudicial nature of gun evidence. Draves was uninformed as to applicable law which could have excluded the evidence. He was also misadvised that there was no way to exclude the firearms evidence. We will not hold him to a waiver or to the misguided strategy he asked counsel to pursue.

The State suggests that the evidence of Draves' possession of firearms was relevant to both charges to enable the trier of fact to understand the "dynamics of family life in the Draves' household." We summarily reject the notion that Draves' possession of firearms was relevant to the charge of causing mental harm to a child. Even assuming that such possession was relevant to the threat to injure charge, trial counsel's failure to request a limiting jury instruction on the relevancy of the evidence was also deficient performance.²

We next examine whether trial counsel's deficient performance prejudiced Draves. Assessing prejudice requires the ultimate determination of

¹ Trial counsel's reliance on the trial court's ruling on the admissibility of the evidence at the preliminary hearing was a mistake as well. The objection at the preliminary hearing was based on the lack of foundation and assumed that the evidence was relevant. The issue was not litigated at the preliminary hearing so as to constitute the law of the case.

² We do not decide whether the firearms evidence was relevant to the threat to harm a public official charge. That decision is best made by the trial court upon a proper objection and with a proper balancing of relevancy and prejudice.

“whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *State v. Johnson*, 153 Wis.2d 121, 126, 449 N.W.2d 845, 847 (1990) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). The *Strickland* test is not an outcome determinative test. *See State v. Smith*, 207 Wis.2d 259, 277, 558 N.W.2d 379, 387 (1997). All that is necessary is that the defendant establish that the result is suspect; the defendant need not establish that the final result of the proceeding would have been different. *See id.*

We conclude that the firearms evidence prejudiced Draves on both charges. The firearms evidence suggested not that Draves had threatened the social worker, but that she, his wife and the police were fearful that he would carry out the threat. It was character evidence of Draves’ propensity or ability to carry out the threat. It obscured the real question of whether a threat was made with the requisite intent.

Without a limiting instruction as to the relevance of the firearms evidence, the entire evidentiary basis for both convictions was skewed.³ This is particularly true with respect to the evidentiary basis for the conviction of causing mental harm to a child, which was very weak to begin with. Although the daughter’s testimony that Draves verbally assaulted her was corroborated with respect to a few occasions, the evidence basically was a credibility battle between Draves and his daughter. Yet the daughter admitted to having problems with

³ We reject the State’s argument that the firearms evidence was not prejudicial because of the tolerance our society displays for “vigilantism” and because possession of firearms for hunting purposes is accepted in Wisconsin. Such tolerance is a far cry from the use of the evidence in this case, particularly in light of the pointed question to a police officer which elicited a response that the weapon Draves possessed was used “for shooting people.”

telling the truth. The prejudicial character evidence could well have swung the credibility pendulum.

We are not confident in the outcome of the proceeding in light of the prejudicial admission of the firearms evidence. Therefore, we conclude that trial counsel was ineffective for failing to object to that evidence. Draves must be afforded a new trial.

Although we need not address the sufficiency of the evidence claim Draves raises, we note that in response to that claim the State seeks a holding that it was not required to prove Draves' subjective consciousness of the nature of his acts and their possible result. It argues that a subjective mental state is not an element of the crime of causing mental harm to a child.⁴ We do not decide whether the State was required to prove that Draves actually knew of the risk of harm his conduct was creating because the State chose to use the higher burden of proof at trial by failing to raise an objection to the instructions given.⁵ The trial court was not asked to interpret the elements of the offense under § 948.04(1), STATS. Any resolution of the issue at this juncture would be advisory only and we

⁴ The pattern jury instruction was used to instruct the jury that “[t]he fourth element requires that the defendant caused such harm by conduct which demonstrated substantial disregard for the mental well-being of [the child]. This requires that the defendant’s conduct created a substantial and unreasonable risk of mental harm to [the child] and the defendant was aware of that risk.” See WIS J I—CRIMINAL 2116. The State argues that in drafting the pattern instruction, the Jury Instruction Committee ignored § 939.24(2), STATS., which provides that criminal recklessness is an element of the offense only when the terms “reckless” or “recklessly” are used. The State points out that § 948.04(1), STATS., does not use the term “reckless” or “recklessly” in defining the crime of causing mental harm to a child. The State posits that the subjective state of mind of criminal recklessness is not an element of the offense.

⁵ We recognize that according to *State v. Holt*, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985), a respondent may “raise any defense to the appeal even if that defense is inconsistent with the stand taken at the trial level.” That rule has limited application here because resolution of the appeal on the purported alternative grounds requires fact-finding.

do not give advisory opinions. *See Brown v. LaChance*, 165 Wis.2d 52, 58, 477 N.W.2d 296, 299 (Ct. App. 1991).

By the Court.—Judgments and order reversed and cause remanded.

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

