

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
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.

No. 99-1484-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. BAERTSCHI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. David Baertschi appeals from a judgment convicting him of one count each of intentionally causing bodily harm to a child by conduct which creates a high probability of great bodily harm (Count One), recklessly causing bodily harm to a child (Count Two), and intentionally causing

bodily harm to a child (Count Three). Baertschi also appeals from an order denying his postconviction motion to vacate the judgment of conviction and requesting a new trial based upon claims of ineffective assistance of counsel and in the interest of justice or, in the alternative, requesting sentence modification. He argues trial counsel was ineffective for failing to prevent the introduction of evidence of Nicholas W.'s serious injuries that Baertschi claims his conduct could not have caused. He also argues that trial counsel failed to consult with him before asking for a lesser-included offense instruction. Baertschi maintains that a new trial is warranted in the interest of justice because the admission of evidence relating to the serious injuries he allegedly did not cause was prejudicial and denied him a fair trial. Furthermore, Baertschi contends that the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh sentence. We reject Baertschi's claims and affirm the judgment and order.

BACKGROUND

¶2 Baertschi was charged with three counts of child abuse. Counts One and Two involved Nicholas W. and Count Three involved Michael W., his girlfriend's sons who were two and one-half years and four years old respectively. The charges stem from a child abuse investigation conducted after Nicholas was taken to a hospital emergency room upon sustaining injuries from an alleged fall down basement stairs. He was diagnosed with bruises to his face and back, a skull fracture, a sub-dural hematoma, and retinal hemorrhages. The investigation subsequently revealed that Baertschi habitually threw tennis balls, from a close distance and with force, at the boys' head and chest. Counts One and Three were predicated upon this conduct. At trial Baertschi disputed whether some of the more serious injuries occurred from that conduct. Count Two involved an incident

in which Baertschi placed Nicholas barefoot into the bed of a pickup truck that had been sitting out in the sun.

¶3 At the trial's conclusion Baertschi's counsel requested that the lesser-included instruction of intentionally causing bodily harm be given with regards to Counts One and Three. Baertschi was found guilty of the lesser-included offense as to Count Three and guilty of the other counts as charged. He filed a postconviction motion seeking to vacate the judgment and for a new trial and, in the alternative, requested sentence modification. The trial court denied the motion.

ANALYSIS

New Trial Based Upon Ineffective Assistance of Counsel

¶4 Baertschi first contends that he is entitled to a new trial because he was denied the effective assistance of counsel. The trial court rejected this claim concluding that counsel employed a reasonable strategy in deciding not to attempt to exclude the serious injury evidence, that counsel did, in fact, confer with Baertschi and that Baertschi agreed to request the lesser-included offense instruction.

¶5 Whether counsel's performance was deficient, and, if so, whether the deficient performance prejudiced Baertschi's defense, are questions of law that we review de novo. See *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determinations of what the attorney did, or did not do, however, are factual and will be upheld unless they are clearly erroneous. See *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986).

¶6 To establish ineffective assistance of counsel Baertschi must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Our scrutiny of counsel's performance is highly deferential and Baertschi must overcome a strong presumption that counsel acted reasonably within professional norms. *See id.* at 689. Strategic choices made after counsel's thorough investigation of the facts and law are nearly unchallengeable. *See id.* at 690. To establish prejudice Baertschi must show a reasonable probability that, but for counsel's deficient performance, the trial's result would have been different. *See State v. Johnson*, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). A reasonable probability is one sufficient to undermine this court's confidence in the outcome of the trial. *See id.*

¶7 We first conclude that Baertschi has not overcome the presumption that his counsel's decision to allow the admission of evidence of Nicholas' serious injuries constituted a reasonable trial strategy. The State claimed that the injuries were caused by the force of the thrown tennis balls. Counsel testified that he believed there was room to explore with the doctors on cross-examination the theory that those injuries were not caused by the thrown tennis balls and that the jury could conclude that Baertschi's conceded conduct could not have resulted in the types of serious injuries Nicholas sustained. Counsel could reasonably choose to approach this evidence on cross-examination as a means of undermining the State's case, rather than trying to exclude it.

¶8 Baertschi also contends that counsel was ineffective because he did not consult with Baertschi in regard to seeking a jury instruction for a lesser-included offense. Both Baertschi and trial counsel testified at the *Machner*

hearing.¹ Baertschi testified he was not consulted prior to the submission of the lesser-included instruction and that, if he had been consulted, he would have taken his chances of being convicted on the greater charge. Trial counsel testified that although he could not specifically recall consulting with Baertschi, it was always his practice to do so.

¶9 A trial court's determinations of what an attorney did or did not do, and the basis for the challenged conduct are factual determinations that will be upheld unless they are clearly erroneous. *See State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). After both Baertschi and counsel testified, the trial court found that counsel did confer with Baertschi and that, as a result of the consultation, Baertschi agreed that counsel should request the lesser-included jury instruction. The trial court, and not this court, must resolve conflicting inferences and factual disputes and determine the weight and credibility of witnesses. *See Fidelity & Deposit Co. v. First Nat'l Bank*, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980). This court's duty is to search for evidence to support a finding by the fact finder, not to search for evidence to support a decision that could have been reached but was not. *See Meurer v. ITT General Controls*, 90 Wis. 2d 438, 450-51, 280 N.W.2d 156 (1979). We conclude the record supports the trial court's factual determination that trial counsel consulted with Baertschi about the lesser-included instruction. Because Baertschi has failed to make an adequate showing of deficient performance, we need not address the prejudice component of his ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 697.

¹ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

New Trial In the Interest of Justice

¶10 Baertschi asserts that he is entitled to a new trial in the interests of justice. He claims that he was denied his right to a fair trial when the State introduced the testimony concerning Nicholas' serious injuries. WISCONSIN STAT. § 752.35 (1997-98)² permits this court to grant relief if we are convinced that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried. In order to establish that the real controversy has not been fully tried, Baertschi must convince us that the jury was precluded from "considering 'important testimony ... [bearing] on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *State v. Darcy*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Baertschi must convince us that "there is a 'substantial degree of probability that a new trial would produce a different result.'" *Darcy*, 218 Wis. 2d at 667 (quoting *State v. Caban*, 210 Wis. 2d 598, 611, 563 N.W.2d 501 (1997)).

¶11 Baertschi does not develop argument that directly addresses either of the standards for granting a new trial. Although he argues that the evidence was highly inflammatory and extremely prejudicial, he does not explain how the jury was either precluded from considering important evidence or how the admitted evidence clouded a crucial issue in this matter. He does not explain how a new trial would produce a different result. His assertions are conclusory and undeveloped. Baertschi simply restates his earlier argument regarding the

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

admission of the evidence of Nicholas' serious injuries, an argument that we have rejected. We decline to address an issue that has not been adequately briefed and for which the facts have not been adequately developed to allow us to make a reasoned determination. See *Shannon v. Shannon*, 150 Wis. 2d 434, 446, 442 N.W.2d 25 (1989).

Sentence Modification and Reduction

¶12 Finally, Baertschi contends that the trial court erroneously exercised its sentencing discretion by imposing the maximum sentences for his convictions. Baertschi was sentenced to a total of seventeen years in prison. He argues that the sentence was improper and unduly harsh because the trial court relied upon an incorrect assumption in the Presentence Investigation Report (PSI) that he engaged in life-threatening abuse and that both the PSI and the trial court placed undue emphasis on Nicholas' serious injuries when sentencing him.

¶13 We conclude that Baertschi's challenge to his sentence is without merit. We review sentencing determinations under the erroneous exercise of discretion standard. See *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). A court properly exercises its discretion when it considers the relevant facts, applies the proper legal standard, and reaches a conclusion that a reasonable judge would reach. See *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). Because the trial court is in the best position to consider the relevant sentencing factors and the defendant's demeanor, we are generally reluctant to interfere with its sentencing discretion and we presume the trial court acted reasonably. See *Harris*, 119 Wis. 2d at 622.

¶14 The record shows the court properly exercised its sentencing discretion by considering the gravity of the offense, Baertschi's character, and the

need to protect the public. *See Harris*, 119 Wis. 2d at 623. As to the gravity of the offense, the court remarked that it had not seen a case where a child had been abused as much as Nicholas was in a three- to four-week period. As to Baertschi's character, the court acknowledged his graduation from high school and consistent employment history, but also pointed out his history of failed relationships with women that ended with restraining orders against him, a lack of responsibility demonstrated by his numerous arrests for operating after revocation, and his lengthy history of drug and alcohol addiction. The court also considered the PSI agent's position that Baertschi continued to deny his responsibility for the children's abuse. We conclude that the record of the sentencing hearing demonstrates a careful, reasoned exercise of discretion based upon proper sentencing considerations.

¶15 Furthermore, we conclude that any improper assumption reflected in the PSI report was mitigated by Baertschi's opportunity to extensively cross-examine the agent who wrote the PSI report. The hearing transcript indicates that on cross-examination, counsel specifically addressed the agent's assumptions about Nicholas' serious injuries and the agent's belief that Baertschi caused those injuries. The record does not reflect that the trial court placed undue emphasis on the severity of Nicholas' injuries when sentencing Baertschi. We conclude that the trial court properly exercised its sentencing discretion in imposing the maximum sentence for Baertschi's convictions.

By the Court.—Judgment and order affirmed.

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

