COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0296-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

COREY A. CHATFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 SCHUDSON, J. Corey A. Chatfield appeals from the judgment of conviction for two counts of physical abuse of a child—intentional causation of bodily harm, party to a crime, in violation of WIS. STAT. §§ 948.03(2)(b) and

939.05 (1997-98),[1] following a jury trial, and from the order denying his motion for postconviction relief. He argues that trial counsel was ineffective in three respects. We affirm.

I. BACKGROUND

¶2 Chatfield and Catina Moore, the woman with whom he was living and the mother of the abused children, were charged, as parties to the crimes, with two counts of the Class D felony, physical abuse of a child—intentional causation of bodily harm, for their abuse of Janice, age six, and Raylon, age eight. The trial evidence established that Chatfield and Moore deprived the children of food, physically punished them and further deprived them of food for what they considered as the children's "stealing" of food from the refrigerator, and allowed them to become malnourished.[2]

¶3 Shortly before the trial scheduled for Chatfield and Moore, the trial court granted the State's motion to amend the charges against Moore, and Moore then pled guilty to two counts of the Class D felony, physical abuse of a child—reckless causation of great bodily harm, party to a crime, in violation of WIS. STAT. §§ 948.03(3)(a) and 939.05. Called by the defense at Chatfield's trial, however, Moore testified that she had pled guilty to "physically abusing [her] two children," without specifying the charges to which she had actually pled.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Dr. Angela Carron, a pediatrician who had examined the children while employed at the Child Protection Center of Children's Hospital of Wisconsin, testified that Janice was moderately malnourished and Raylon was severely malnourished.

Chatfield's lawyer never asked Moore to specify the charges to which she had pled, and the jury never was informed of the actual amended charges.

¶4 Chatfield brought a postconviction motion claiming, in part, that counsel was ineffective for failing to: (1) "request a lesser[-]included[-]offense jury instruction of Reckless Physical Abuse to a Child Causing Bodily Harm"; (2) "object to the State's improper cross-examination of [Moore] regarding [her] having pled guilty to physically abusing her children"; and (3) request a limiting instruction informing the jury that Moore's guilt could not be used as evidence against him. On the latter claims, the court provided a written decision and order denying postconviction relief. On the first claim, however, the trial court conducted an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W. 2d 905 (Ct. App. 1979).

¶5 Trial counsel testified at the ***Machner*** hearing: (1) that he had pursued an investigation in support of the possible theory that Chatfield's conduct was neglectful or reckless, not intentional; and (2) that he had proposed plea agreements to the prosecutor, consistent with that theory. Counsel testified that many times, in the course of preparing for trial, and briefly, during a ten-minute conference in the bullpen just before the trial began, he had conferred with Chatfield about the lesser-included offense and corresponding jury instruction. He acknowledged, however, that he did not recall ever revisiting that subject with Chatfield during the trial—at the close of evidence, preceding the instructions, or at any point after their bullpen conference.

¶6 Trial counsel also testified that he and Chatfield discussed the differences between the charged offenses, lesser-included ones, and other offenses with which Chatfield could have been charged, and that Chatfield, while willing to

negotiate a plea agreement involving lesser offenses, consistently indicated that, if the case were to be tried, he wanted it tried only on the original charges. At the ***Machner*** hearing, counsel explained that he and Chatfield had discussed the lesser-included-offense instruction at "various points throughout [his] representation," and counsel repeatedly said that Chatfield had decided to be tried only on the original charges. For example, counsel testified:

> We originally had a trial date significantly sooner than August [3, 1998, when the trial began]. We talked about the jury instructions for the various offenses at that time. We revisited that issue in July prior to the trial, and Mr. *Chatfield decided that he did not want to give the jury the option of finding him guilty of recklessness because he wanted the higher standard of proof required in intent*.

(Emphasis added.)

¶7 Additional evidence established that Chatfield continued to decline to request a lesser-included-offense instruction. At the ***Machner*** hearing, trial counsel was asked, "[W]hen you were talking with Mr. Chatfield after the jury instruction conference and showing him the jury instructions on intentionally causing great bodily harm, … did Mr. Chatfield tell you that he wanted the lesser-included offense also given to the jury?" Counsel answered, "No." And the trial record reflects the following colloquy after the jury instruction conference:

> THE COURT: … Are those the stipulated instructions?
>
> [PROSECUTOR]: Yes, Judge.
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: And if—there's not going to be any request for any lesser-included; is that correct?
>
> [PROSECUTOR]: That's correct.
>
> [DEFENSE COUNSEL]: That's correct.
>
> THE COURT: … And I assume that was done—is done for strategic reasons.
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Is that correct, sir?

[DEFENSE COUNSEL]: That's correct.

¶8 Chatfield also testified at the ***Machner*** hearing. He acknowledged that he and trial counsel discussed the possibility of a lesser-included-offense instruction several times prior to trial and "probably" twice on the day the trial began. He also acknowledged that, both prior to the opening day of trial and on the day the trial began, counsel explained the elements of the original and lesser-included charge, and the differences between them. Chatfield, however, disputed counsel's account of what he advised counsel in those discussions. Chatfield maintained, "I told him that I thought … it made more sense to offer the lesser included, and that's what I wanted, because it would just—I felt that was a more fair thing for them to find me guilty on." Further, Chatfield testified that he "never" advised counsel that he "wanted the jury to have the higher burden of proof regarding the charges of intentional physical abuse." He also said he believed the jury was going to be instructed on the lesser-included offense and that, indeed, the jury was going to deliberate on both the original charge and the lesser-included offense for each count.

¶9 Following the ***Machner*** hearing and the submission of the parties' written arguments, the trial court provided an oral decision. Emphasizing the colloquy confirming that, for strategic reasons, no lesser-included instruction was being requested, the postconviction court concluded that, based on portions of the trial record, the ***Machner*** hearing record, and the court's evaluation of the credibility of the witnesses at the hearing: "[T]here's no question in the [c]ourt's mind that Mr. Chatfield wanted to proceed to trial on the higher burden and it was his choice to do so. No other conclusion could be made based upon the entire record in this case."

II. DISCUSSION

¶10 Chatfield first argues that trial counsel was ineffective for failing to request a lesser-included-offense instruction on physical abuse of a child—reckless causation of bodily harm. Further, Chatfield essentially argues that, even accepting the postconviction court's implicit finding that counsel's account of the pretrial discussions about the lesser-included-offense option was credible, and notwithstanding those discussions, counsel's failure to revisit the issue of whether to request the instruction, during the trial or at its conclusion, constituted ineffective assistance. We disagree.

¶11 In ***State v. Ambuehl***, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988), a case presenting an ineffective-assistance claim comparable to the one in the instant case, this court reiterated:

> A person charged with a state crime has a right to effective assistance of counsel under the sixth amendment to the United States Constitution and under Wis. Const. art. I, sec. 7.
>
> To demonstrate ineffective assistance of counsel, a defendant must establish (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Both the performance and the prejudice components are mixed questions of fact and law. We must accept the trial court's factual findings if they are not clearly erroneous. If the facts are established, whether counsel's performance was deficient, and whether a deficient performance was prejudicial, are questions of law which we determine without deference to the views of the trial court.
>
> The test for deficient representation is whether "counsel's representation fell below an objective standard of reasonableness." Nevertheless, our "scrutiny of counsel's performance must be highly deferential." We must attempt
>
> > to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time…. [We] must indulge a strong

> presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Id. at 350-51 (citations omitted). Additionally, and of particular importance to the instant case, we declared:

> No case is cited to us for the proposition that after the initial decision [not to request a lesser-included-offense instruction] is made on consultation with the accused, counsel must under all circumstances again confer with the client. We reject so broad a proposition.
>
> ….
>
> We refuse to hold that, as a matter of law, it is always unreasonable for counsel to presume that the client's pretrial decision not to request a lesser-included instruction will be the same after all the evidence is in. The strength of the client's opposition … is a factor which defense counsel may consider when all the evidence has been presented whether again to discuss with the client a lesser-included[-]offense instruction.

Id. at 355-57 (citation and footnote omitted).

¶12 Chatfield points out that, as counsel confirmed at the ***Machner*** hearing, he had advised counsel of his desire to plead guilty to lesser offenses, and counsel had unsuccessfully attempted to negotiate the case on that basis. Chatfield contends, therefore, that counsel knew of his willingness to accept conviction on lesser offenses and should have recognized that Moore's guilty pleas and trial testimony were significant developments altering the status of his case. Thus, Chatfield argues, counsel's questioning of Moore should have revealed that she had pled to lesser offenses than those with which he was charged, and that the specific evidence of her exact pleas, in turn, would have provided a substantial basis for seeking the lesser-included-offense instruction.

¶13 Chatfield's argument is fatally flawed. First, the offenses to which Moore pled guilty were not lesser-included offenses of the offenses originally charged. *See* ***State v. Rundle***, 166 Wis. 2d 715, 719, 480 N.W.2d 518 (Ct. App. 1992). Second, Chatfield's argument is also defeated by four interrelated factors, the first three of which are grounded in the postconviction court's implicit finding that trial counsel's ***Machner*** hearing account of his discussion with Chatfield was credible, and the fourth of which supports counsel's account: (1) Chatfield consistently maintained his desire to be tried on the original charges; (2) Chatfield failed, at any time during the trial or prior to the instructions, to advise counsel of any change in that desire; (3) Chatfield desired, for strategic reasons, to be tried on the original charges in order to require the State to prove intent rather than neglect or recklessness—a strategy that remained tenable, regardless of Moore's pleas and testimony; and (4) the trial court's final colloquy with counsel confirmed that, for strategic reasons, neither side was requesting a lesser-included-offense instruction.

¶14 The decision whether to request the lesser-included-offense instruction was Chatfield's, not his trial counsel's. ***Ambuehl***, 145 Wis. 2d at 355. And Chatfield's decision not to seek one was not unreasonable; indeed, it was consistent with his persistent denial of criminal *intent*, and with his trial testimony—that he withheld food from the children as a disciplinary measure, and that he did not notice that they were malnourished. Therefore, although trial counsel most prudently could have confirmed Chatfield's decision not to request a lesser-included instruction with one final discussion following the close of the evidence at trial, that record reveals that he had no reason to believe that Chatfield might have changed his mind. And when Chatfield said nothing in response to the trial court's final inquiries on the subject, trial counsel could have reasonably concluded that Chatfield's position remained the same as always: he did not want

a lesser-included-offense instruction. Therefore, we conclude, trial counsel's performance was not deficient.

¶15 Chatfield next argues that trial counsel was ineffective for making an agreement with Moore's attorney that he would not question Moore regarding the exact nature of her plea agreement, and for failing to expose the specifics of Moore's pleas to the jury. On this claim, the trial court did not order a ***Machner*** hearing. Instead, in a written decision and order partially denying Chatfield's motion for postconviction relief, the court explained:

> [Chatfield] suggests that because of [Moore's] testimony [that she pled guilty to physically abusing her children], the jury was allowed to draw the inference that the defendant was also guilty of similar conduct. The trial court instructed the jury that evidence that a witness was convicted of a crime only beared [sic] upon the credibility of the witness and could not be used for any other purpose. The jury is presumed to follow the instructions it is given. For this same reason, trial counsel's alleged failure to request a limiting instruction based upon Moore's testimony regarding her guilt and failure to question her about the level of culpability for her conviction does not undermine confidence in the outcome of the case.

(Record reference omitted.)

¶16 The trial court's analysis is dubious. After all, even a jury properly following this instruction could hardly be expected to erase its knowledge of an accomplice's acceptance of guilt. Moore testified that she felt as though "everybody was trying to portray … we was just doing these horrible things" and, as Chatfield reminds us, he and Moore were charged as parties to the crimes. Further, Chatfield argues that because Moore testified she had been convicted of "physically abusing" the two children, the jury was left with the impression that Moore had pled guilty to the very charges for which he was being prosecuted.

Here, however, for a separate reason, we are unable to conclude that counsel was ineffective.

¶17 At the ***Machner*** hearing, Chatfield's postconviction counsel attempted to raise the issue of whether counsel was ineffective for failing to expose the specifics of Moore's plea agreement. The State objected on two grounds: (1) relevance; and (2) the court's written decision had disposed of the issue. The court sustained the objection but also offered postconviction counsel the opportunity to "make [her] record." In response, postconviction counsel did not elicit testimony from trial counsel but, instead, merely commented:

> And, for the record, [trial counsel] is stating that the trial strategy was to not put a lesser-included in front of the jury, he then calls a co[]defendant and has basically the testimony come out that she is—has pled to two counts which could easily be confused with the same two counts that Mr. Chatfield was standing trial for, and to not highlight the difference between those two is in direct opposition to the claimed trial strategy.
>
> And so I would ask this [c]ourt to weigh that in making its final determination on this issue of whether or not the lesser included was to be given.

Later in the hearing, postconviction counsel elicited trial counsel's testimony that, based on an agreement he had made with Moore's attorney, a condition of Moore's status as a witness was that trial counsel "was not to specifically ask [Moore] about what … her plea negotiation was."

¶18 Clearly, postconviction counsel barely addressed the separate claim of ineffective assistance on which she had been invited to make a record. And postconviction counsel's comments could not substitute for trial counsel's testimony addressing: (1) his reason for calling Moore as a witness; (2) whether he had any strategic reason for the way in which he questioned Moore; or (3) his apparent decision not to distinguish, for the jury, the charges to which Moore had

pled from those on which Chatfield was being tried. *See* ***Machner***, 92 Wis. 2d at 804 ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies.").[3]

¶19 Finally, in a related argument, Chatfield contends that trial counsel was ineffective for failing to request a limiting instruction informing the jury that it could not use Moore's guilt as evidence against him. Here again, however, Chatfield failed to elicit postconviction testimony that would allow us to evaluate trial counsel's conduct. Additionally, we note, the trial court did instruct the jury that evidence of Moore's criminal history could be used only to evaluate her credibility, and that Chatfield could only be found guilty if evidence established *his* guilt beyond a reasonable doubt. Together, those instructions provided the substance of what Chatfield asserts should have been conveyed to the jury. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (jury is presumed to follow jury instructions); *see also* ***State v. Amos***, 153 Wis. 2d 257,

[3] We also caution postconviction counsel and the postconviction court to consider the guidance we offered in ***Milenkovic v. State***, 86 Wis. 2d 272, 285 n.10, 272 N.W.2d 320 (Ct. App. 1978):

> We note the authority conferred on the trial judge to direct that an offer of proof be made in question and answer form. We strongly urge trial courts to utilize this procedure whenever practicable. We conclude that offers of proof made in this manner will significantly reduce the possibility that trial counsel will inadvertently fail to offer to prove a crucial fact upon which the conclusion or inference which he seeks to establish necessarily depends. We also believe such a procedure will assist the trial court and any reviewing court in determining whether the evidentiary hypothesis can actually be sustained or the offer is overstated. Although the question and answer method of making an offer of proof may take a little more time, it enables the trial court and reviewing court to approach the evidentiary problem with some confidence that the evidentiary problem really exists.

278, 450 N.W.2d 503 (Ct. App. 1989) ("If [a trial court's] instructions [to the jury] adequately cover the law applied to the facts, a reviewing court will not find error in refusing special instructions even though the refused instructions would not be erroneous.").

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.