

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 27, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 2005AP513-CR**

**Cir. Ct. No. 2002CF42**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DONALD F. SHEFFEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Donald F. Sheffey appeals a judgment convicting him of ten counts of failing to pay child support for a period of more than 120 days and one count of failing to pay child support for a period of less than 120 days. He also appeals an order denying his motion for postconviction relief.

Sheffey argues that: (1) he was not allowed to present evidence in support of his claim of prosecutorial vindictiveness; (2) the additional charges brought by the State were vindictive; (3) he received ineffective assistance of counsel; (4) the evidence was insufficient to convict him; and (5) a new trial should be granted in the interest of justice. We affirm.

¶2 Sheffey first argues that the circuit court should have allowed him to present evidence in support of his claim that the prosecutor acted vindictively in bringing additional charges after the first case against him ended in mistrial. However, Sheffey *was* allowed to present evidence in support of his claim of vindictive prosecution. He brought a motion to dismiss before the second trial began on the grounds that additional charges were brought against him due to prosecutorial vindictiveness. The motion was addressed at a hearing held November 4, 2003, at which Sheffey testified and was allowed to provide evidentiary support for his claims. He also argued prosecutorial vindictiveness in his postconviction motion, which was heard at a hearing on February 15, 2005. Because Sheffey was allowed to present evidence and argument in support of his claim, we reject this argument.

¶3 Sheffey next argues that the circuit court erred in concluding that he had not established a presumption of vindictiveness. “[T]he United States Supreme Court’s prosecutorial vindictiveness decisions ‘have all been rooted in a relatively simple proposition: one may not be punished for the exercise of a *protected* right.’” *State v. Johnson*, 2000 WI 12, ¶38, 232 Wis. 2d 679, 605 N.W.2d 846. Thus, for example, a mistrial caused by a hung jury did not trigger the presumption because “there [was] no realistic likelihood that the defendant was being punished for exercising a protected right, because the defendant did not bring about the need for a retrial by exercising a protected right.” *Id.* The

defendant “bears the burden of establishing that under the circumstances of his case a realistic likelihood of vindictiveness exists, giving rise to a presumption of vindictiveness.” *Id.*, ¶33. “Once a presumption of vindictiveness is established, the prosecutor may rebut it with an explanation of the objective circumstances that led the prosecutor to bring the additional charges.” *Id.*, ¶45.

¶4 Sheffey has not shown that a presumption of vindictiveness applies because he has not shown that his exercise of a protected right caused the mistrial. *See id.*, ¶38. The trial court declared a mistrial because the State had improperly exercised its preemptory challenges. The mistrial did not result from Sheffey exercising his rights, but rather the circuit court’s *sua sponte* decision that the State’s preemptory challenges were improperly based on gender. Even if Sheffey had shown a presumption of vindictiveness, however, the prosecutor would have been able to rebut the presumption because he had a reason for bringing the additional charges. Because the prosecutor realized that Sheffey was going to argue as an affirmative defense that he was unable to provide support due to physical disability, the prosecutor added charges to cover additional periods of time because Sheffey was not disabled during those periods. Therefore, this claim fails.

¶5 Sheffey next argues that he received ineffective assistance of trial counsel. To substantiate a claim of ineffective assistance of counsel, a defendant must prove that counsel performed deficiently and that the defendant was prejudiced by counsel’s performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show acts or omissions of counsel that are “outside the wide range of professionally competent assistance.” *Id.* at 690. To prove prejudice, “[t]he defendant must show that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶6 Sheffey contends that trial counsel's performance was deficient because counsel did not obtain certified copies of his Oklahoma medical records to introduce at trial. At the postconviction motion hearing, counsel testified that Sheffey was vague about the dates he had seen doctors and the locations where he had been seen. Because counsel could not "pin him down," counsel was unable to obtain certified copies of the medical records forty days prior to trial, as would be required to introduce the records at trial. Counsel also testified that he had worked extensively with Sheffey's mother in an attempt to get the records, but she was ultimately unable to provide him certified copies within the appropriate time frame. Finally, counsel testified that he had planned to have Sheffey's mother and girlfriend testify at trial about Sheffey's medical problems, but Sheffey's mother did not want to come and his girlfriend decided not to come at the last moment. Although Sheffey's testimony at the postconviction motion hearing was at odds with counsel's testimony, the circuit court was the arbiter of witness credibility. *See State v. Daniels*, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983). Counsel's testimony about the medical records, which the circuit court decided was more credible than Sheffey's testimony, undercuts any claim that counsel performed deficiently.

¶7 Sheffey next argues that there was insufficient evidence to support the convictions. When we review the sufficiency of the evidence to support a conviction, we "may not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Williams*, 2002 WI 58, ¶74,

253 Wis. 2d 99, 644 N.W.2d 919. There was no dispute that Sheffey did not, in fact, pay support. Sheffey contended that he was unable to provide support for medical reasons, but the jury had ample evidence from which it could conclude that Sheffey knew he was obligated to provide support and had not proved that he was medically unable to do so. The jury simply did not believe Sheffey's testimony about his medical condition. Viewed most favorably to the conviction, the evidence was more than sufficient to support the verdict.

¶8 Finally, Sheffey argues that he is entitled to a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (2003-04).<sup>1</sup> Because this case was fully and fairly tried, we reject Sheffey's argument that he is entitled to a new trial in the interest of justice. *See State v. Shomberg*, 2006 WI 9, ¶38, 709 N.W.2d 370.

*By the Court.*—Judgment and order affirmed.

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

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

