COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1647-CR **Cir. Ct. No. 2003CF909**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYDALE R. MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: GERALD C. NICHOL and RICHARD G. NIESS, Judges. *Affirmed*.

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 DEININGER, J. Raydale Mitchell appeals a judgment convicting him of aggravated battery in violation of WIS. STAT. § 940.19(4) (2003-04)

(causing great bodily harm while intending to cause bodily harm).[1] He also appeals an order denying his motion for postconviction relief in which he sought a new trial, alleging that he received ineffective assistance from his trial counsel, or if a new trial was denied, resentencing. We conclude Mitchell has not met his burden to show that his counsel provided ineffective representation. He has also not persuaded us that the circuit court erroneously exercised its sentencing discretion. Accordingly, we affirm the appealed judgment and order.

BACKGROUND

¶2 Mitchell and a friend, while both were intoxicated, got into a fight in a Madison parking lot. The friend suffered an acute subdural hematoma that required surgery.[2] Police arrested Mitchell shortly after the incident on the basis of information provided by eyewitnesses to the fight who told police that they saw the victim fall face down after being hit by Mitchell. The State charged him with aggravated battery with intent to cause great bodily harm, WIS. STAT. § 940.19(5), and first-degree reckless injury, WIS. STAT. § 940.23(1), both counts alleging habitual criminality under WIS. STAT. § 939.62(1)(c).

¶3 Mitchell and his counsel discussed possible theories for a defense. Mitchell insisted that he hit the victim in self-defense after being hit several times himself. His counsel believed self-defense was not a viable strategy because, based on their statements to police, two State witnesses would likely testify that

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The victim died three months after the incident from unrelated medical causes. He was thus not available to testify at trial.

Mitchell was the primary aggressor. Counsel testified at the postconviction hearing that he concluded a better defense strategy would be to attempt to show that Mitchell did not intend to cause great bodily harm to the victim. In counsel's view, if the State's witnesses testified as expected, the defense could argue what counsel labeled "preemptive self-defense," that is, because the victim verbally assaulted Mitchell and threatened him harm, he hit the victim only to prevent or stop a fight, without intending to cause the victim great bodily harm.

¶4 Mitchell and his attorney also discussed what witnesses might be helpful in implementing the defense strategy at trial. Counsel suggested calling Mitchell's girlfriend and another acquaintance of Mitchell's, both of whom were present during the fight. Mitchell testified at the postconviction hearing that he opposed calling these witnesses because he anticipated they might give testimony that would undermine his self-defense theory. Also, contrary to his counsel's advice, Mitchell wanted to take the stand and testify that he hit the victim in self-defense.

¶5 At trial, the State first called a neurosurgeon who performed surgery on the victim following the fight. The surgeon testified that he uncovered a large blood clot that he said was consistent with trauma or a blow to the victim's head. The doctor testified the injury could have been fatal and he opined, based on the nature of the victim's head and facial injures, that the injuries resulted from more than one blow and might have been caused in part by the victim's fall to the pavement. The emergency room nurse who treated the victim after the fight testified that, in response to her question about how he was injured, the victim said that "he got jumped" in a parking lot and that he got "hit with fists."

¶6 The State next called a bystander who witnessed the fight. He testified that, on the night of the incident, he was visiting a friend not far from the parking lot where the fight took place. He said that he saw "two guys fighting" but he could not tell what the argument was about. In partial contradiction of his earlier statements to police, he described the fight at trial as follows: "I saw the tall guy [the victim] hit the short guy [Mitchell] first and the short guy hit him back. I guess it was breaking up. Trying to stop each other from fighting. That's when he [Mitchell] hit him." The witness also testified that the "short guy" hit the "tall guy" on the jaw and the tall guy fell, hitting the pavement "pretty hard" and that, at the time the victim sustained the injurious blow, he was trying to "walk off."

¶7 A detective who investigated the incident testified that the bystander-witness told her shortly after the incident that he heard one of the combatants say to the other "you tricked on me." She explained that the phrase meant in slang terms "[y]ou lied to me, or you said something about me, or you said something to someone about me." The witness also told the detective "the taller of the two males [the victim] was defending himself," and that "the taller male was backing away from the shorter male [Mitchell], who was swinging at the taller male."

¶8 The victim's girlfriend of eleven years, testified next for the State. She said that three days before the day of the fight, she, Mitchell and the victim went to a bar in Wisconsin Dells where Mitchell broke into the coin box of a gambling machine and took some cash. They were apprehended as they were leaving the Dells and Mitchell was arrested and jailed. Two days later, she, the victim and Mitchell's girlfriend went to Portage to bail Mitchell out of the Columbia County Jail. At the courthouse, the victim's girlfriend and the victim

got into an altercation, which resulted in the victim being arrested and jailed. After the two women went back to Madison to get more money, Mitchell's girlfriend first bailed out the victim and then Mitchell.

¶9 The two couples returned to Madison, stopping on the way to purchase some alcohol. They first went to the apartment where the victim and his girlfriend were staying and consumed some beer. The victim's girlfriend testified that Mitchell also drank hard liquor and smoked crack cocaine. The four next went to a bar where they continued to drink. The victim's girlfriend testified she saw Mitchell engage in an argument with a patron at the bar and that he was also "jumping around" and "dancing." After about two hours at the bar, the victim drove the two couples to where Mitchell and his girlfriend resided.

¶10 According to the victim's girlfriend, on the way, Mitchell and the victim began arguing. Mitchell called the victim a "snitch," insisting that "if it wasn't for [the victim], … he wouldn't have been arrested" for the incident at Wisconsin Dells. The victim responded that it had been Mitchell's idea to break into the coin box and that Mitchell was the one who committed the theft. The two couples arrived at the parking lot in Madison where the fight was soon to occur at about 1:00 a.m. As Mitchell and the victim got out of the car, Mitchell was shouting at the victim, blaming him for his arrest. Mitchell's girlfriend also got out of the car, leaving only the victim's girlfriend remaining in the car. Through an open car door, the victim's girlfriend saw Mitchell strike the victim "very hard." She called 911 on a cell phone and, while waiting for help to arrive, walked with the victim to an apartment to tend to his wounds. As she cleaned the wounds, she noticed a big bump on the left side of his forehead. The victim's condition quickly worsened and he was taken to a hospital.

¶11 On cross-examination, the victim's girlfriend maintained that the victim never hit Mitchell and that Mitchell attacked first. Mitchell's attorney impeached her with an earlier statement to the police that she did not know who threw the first punch.

¶12 The next State witness, a City of Madison detective, interviewed Mitchell shortly after the fight. She testified that Mitchell explained the argument between him and the victim was a dispute over $150 that Mitchell, through his girlfriend, had loaned the victim for the purpose of bailing the victim out of the Columbia County Jail. When the victim refused to pay back the debt, Mitchell became "upset," but he claimed that it was the victim who initiated the physical confrontation by putting his hands on Mitchell's upper chest and pushing him. Mitchell told the detective that "[the victim] hit him in the face with a closed fist, at the left corner of his mouth. After that, … [the victim] hit him a second time with a closed fist on the right side of his face and his cheek." Mitchell also stated that he thought he was about to be hit again and this is when he said to himself "I'm going to knock him out," explaining to the detective that "he had to defend his manhood, that he was there in front of both his girl friend and [the victim's] girl friend, as well as their onlookers." Mitchell said he backed away to avoid the victim's punches and, although he knew he could have walked away from the situation, "he felt like he was in a corner." Mitchell related that he then delivered a punch that he called a "one hitter-quitter" and saw the victim fall "dead out face down on to the pavement." In response to a question whether she noticed any injuries on Mitchell, the detective stated that Mitchell had a "circular, very shallow abrasion" on his right cheek, a swollen upper lip and a few other minor injuries.

¶13 At the conclusion of the State's case-in-chief, Mitchell's attorney informed the court that he would call two witnesses, Mitchell's girlfriend and

another acquaintance, and that he and the defendant had not agreed as to whether the defendant would also testify. Mitchell's girlfriend added several details to the victim's girlfriend's account of the fight and its prelude. She testified that, when she, the victim and the victim's girlfriend went to Portage to bail Mitchell out, the victim hit his girlfriend and she started crying, which led to the victim's arrest. Mitchell's girlfriend also testified that when the two couples were at the bar prior to the men's fight, the victim exhibited violent behavior toward a patron "threatening that he was going to get his gun, shoot up us mother fuckers and everything."

¶14 When the four arrived at the parking lot, Mitchell's girlfriend saw an acquaintance of Mitchell's approach the car. Mitchell gave the man some documents relating to his arrest in Wisconsin Dells, and, after reviewing them, the acquaintance told the victim that "he was a snitch…. Mitchell got mad and hit [the victim] on the back of his head." According to Mitchell's girlfriend, right before he was hit, the victim told Mitchell that "he was going to fuck him up." Her account continued that, in response to this verbal threat, Mitchell hit the victim with an open hand and then the victim hit Mitchell in the face. She said that the fight ended when Mitchell hit the victim causing him to fall to the ground, after which she and Mitchell left the parking lot.

¶15 Defense counsel next called Mitchell's acquaintance who had also witnessed the fight. Identifying himself as Mitchell's cousin,[3] this witness testified that, when the car with the four passengers arrived at the parking lot, he

[3] Mitchell denied during his testimony that the man was his cousin, saying that he was a long-time acquaintance to whom he was not related in any way.

heard the two men argue about a police report regarding an incident in another county. When the men got out of the car, the witness reviewed the police report and accused the victim of "telling on [his] cousin." He testified that his "cousin threw the first punch" but that it did not connect. He witnessed the two men exchange "fighting words back and forth" and, shortly thereafter, his "cousin threw another punch and [he] saw [the victim] going down." The acquaintance then "pushed [his] cousin back and told him chill out." The witness also said that he saw Mitchell hit the victim only once.

¶16 Mitchell then took the stand. He described the coin box theft in Wisconsin Dells three days before the fight. According to Mitchell, he was not angry at the victim for shifting the responsibility for the theft onto Mitchell because he had offered, as they were getting away from the bar where the theft had occurred, to take full responsibility for the crime if they were apprehended. Mitchell said that the real reason he was angry with the victim was because the victim refused to pay him back the $150 bail money that Mitchell, through his girlfriend, had lent him. On the day that Mitchell and the victim were bailed out of jail, the victim was "acting wild," according to Mitchell, and did not show any intention to pay him back.

¶17 Mitchell described the events leading up to the fight as follows. When the two men were released, the two couples drove to Madison, stopping on the way to purchase liquor. They first went to the victim's and his girlfriend's residence where Mitchell witnessed the other couple smoke cocaine. He claimed that he did not use any drugs. The four then went to a bar where they drank some more. As they were leaving, Mitchell noticed that the victim's girlfriend's face was red and he thought this was because the victim had hit her. When the two couples arrived at the parking lot, Mitchell thought the victim was getting out of

the car to attack him. He recalled that both he and the victim were "extremely intoxicated."

¶18 Mitchell then gave the following account of the fight:

> He got out for a fight and I told him several times that I don't want to fight you. I was like, I am your friend. Why would you want to fight me after I bonded you out of jail? If I hated you, I would have left you in jail.
>
> ….
>
> When he pulled up when we was arguing back and forth, I got out, then he got out. And he was like, if you want to fight, we get it on. I said, man, I don't want to fight. I ain't trying to fight you. I want you to pay my money back and I said forget the money. He pushed me…. He pushed me and then he stole (sic) on me.
>
> ….
>
> … When he pushed me, my feet was down. [The victim] knew I was in no condition, because I recently fell down the stairs in Green Bay and tore some ligaments in my right feet (sic).
>
> ….
>
> So after he got to swinging on me, hit me, I panicked once I seen the blood. Blood started and I panicked. And it was just my instinct. I swung and I hit him. And when I hit him, he fell. I was shocked how easily he fell. And I was like, I told you I ain't want to fight. And I walked off and that was it.

Mitchell summarized that "[a]fter [the victim] hit me three times, I hit him one time and the fight was over."

¶19 On cross-examination, the prosecutor grilled Mitchell regarding why other witnesses would give accounts that differed so widely from his. He also highlighted differences between Mitchell's in-court account and what he had told the detective. The prosecutor concluded by asking Mitchell, "You're telling this

jury under oath, as God is your witness, that somebody put … [the victim's girlfriend, the detective who interviewed Mitchell, and Mitchell's acquaintance who witnessed the fight], somebody put them up to coming up here and lying? I want to know who that was?" Mitchell replied, "Your guess is as good as mine, sir."

¶20 At the jury instruction conference, the State requested that the jury be instructed on one lesser included offense for each charged offense: aggravated battery with intent to cause bodily harm, WIS. STAT. § 940.19(4), as a lesser offense to aggravated battery with intent to cause great bodily harm; second-degree reckless injury, WIS. STAT. § 940.23(2), as a lesser offense to first-degree reckless injury. The court agreed and instructed jurors on all four charges, as well as giving instructions on self-defense and provocation. *See* WIS JI—CRIMINAL 805, 815. The jury acquitted Mitchell of reckless injury in either degree and of aggravated battery with intent to cause great bodily harm. Thus, his only conviction was for the lesser included charge of aggravated battery with intent to cause bodily harm, as a repeater, for which the court sentenced him to eight years' imprisonment, with five years of initial confinement and three years of extended supervision.

¶21 Mitchell moved postconviction for a new trial, claiming that his trial counsel rendered ineffective assistance in several regards. Alternatively, he sought resentencing. The circuit court denied the motion.[4] Mitchell appeals,

[4] Former Circuit Court Judge Gerald C. Nichol presided at Mitchell's trial and imposed sentence. Judge Nichol's successor, Circuit Court Judge Richard G. Niess, denied Mitchell's motion for postconviction relief.

renewing his claims that his trial counsel was ineffective and that the trial court erroneously exercised its sentencing discretion.

ANALYSIS

Ineffective Assistance of Counsel

¶22 Mitchell contends his trial counsel rendered ineffective assistance in four regards: (1) by calling two witnesses who testified that Mitchell struck the victim first, thus contradicting Mitchell's claim that he acted in self-defense after the victim struck him first; (2) by allegedly conducting the defense under the erroneous view that Mitchell could be "completely exonerated" if the defense could demonstrate that Mitchell did not intend to cause great bodily harm; (3) by allegedly conceding during closing argument that, if jurors did not find Mitchell acted in self-defense, they should find him guilty of the lesser offense, aggravated battery with intent to cause bodily harm; and (4) by failing to present medical records to confirm Mitchell's testimony that he had injured his foot prior to the fight.

¶23 To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense are questions of law, which we decide de novo. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). When analyzing an ineffective assistance claim, this court may choose to address either the "deficient performance" component or the "prejudice" component first. *See* ***Strickland***, 466 U.S. at 697. If we determine a defendant has made an inadequate showing on either component, we need not address the

other. *See* ***id***. We conclude Mitchell's counsel did not render ineffective assistance because none of the four acts or omissions Mitchell cites on appeal constitutes deficient performance.

¶24 To show deficient performance, Mitchell must identify acts or omissions of his trial counsel that were not the result of reasonable professional judgment. *See* ***id***. at 690. Because Mitchell's right under the Sixth Amendment is to a competent lawyer, not to the best lawyer, he must show that counsel's acts or omissions were outside the broad range of professionally competent assistance. *See* ***id***. To succeed on his claim, Mitchell must overcome the strong presumption that his trial counsel employed reasonable professional judgment in making all significant decisions. *See* ***id***. Generally, trial strategy decisions reasonably based in law and fact do not constitute ineffective assistance of counsel. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App.1992).

¶25 The first three instances of allegedly deficient performance cited by Mitchell all involve, either directly or indirectly, a dispute between Mitchell and his trial counsel over defense strategy. As we have explained, Mitchell asserts that he wanted to emphasize his claim of self-defense, which was solely based on his testimony that the victim was the primary aggressor who struck first and that Mitchell's injurious blow was only an effort on his part to end a fight the victim began. Based on the eyewitness statements contained in police reports, however, counsel believed a better strategy was to focus on Mitchell's lack of intent to cause his friend great bodily harm by showing that this was basically a fight between two highly intoxicated men, one of whom, the victim, incited the altercation by his argumentative and threatening behavior, with Mitchell simply reacting in a pre-emptive manner to ward off the other's blows, not intending to harm his friend, and certainly not intending to cause the great bodily harm that resulted.

¶26 The State's case did not come in precisely as planned when the bystander-witness testified, contrary to his earlier statement to police, that the victim had landed the first blow. The State, however, introduced his earlier statement through the detective to whom it was given, and that account of Mitchell striking first was corroborated by the victim's girlfriend's testimony. Moreover, both of the State's witnesses' accounts, as well as Mitchell's own statement to police, tended to show that the fight had ended—or could have ended—before Mitchell delivered what he called in his statement a "one hitter-quitter" punch that sent the victim to the pavement. Having reviewed the trial testimony, we concur with the circuit court's observation in its postconviction decision that "the self-defense claim of Mr. Mitchell was moribund at the time the prosecution rested."

¶27 The test for deficient performance is not whether counsel defended his client in the manner the client desired, or even whether, in hindsight, a different defense strategy might have better served the defendant. Defense counsel may select a particular defense from available alternative defenses. ***Hubanks***, 173 Wis. 2d at 28. Even if, in hindsight, selecting a particular defense appears to have been unwise, counsel's strategic decision does not constitute deficient performance if it was reasonably founded on the facts and law under the circumstances existing at the time the decision was made. *See* ***id***. We conclude that Mitchell's counsel's choice of a defensive strategy meets this standard. Given the State's evidence, it was within the realm of reasonable professional judgment for counsel to conclude that a "pure" self-defense strategy was unlikely to succeed, and that the defendant's best hope was to convince jurors that his client did not intend to injure the victim. To this end, it was also reasonable for counsel to present two witnesses who could supply additional context that would paint the victim as having been at least equally responsible for the "drunken brawl," even if

it meant that some of their testimony would contradict Mitchell's own account of the fight.

¶28 In short, presenting testimony from Mitchell's long-time acquaintance and his girlfriend did not constitute deficient performance because the testimony was reasonably calculated to further a defense that was "founded on rationality of fact and law." *See* ***id***. We thus turn to Mitchell's claim that his attorney conducted the defense under the erroneous view that Mitchell could be "completely exonerated" if the defense could demonstrate that Mitchell did not intend to cause great bodily harm. As evidence of this "erroneous view," Mitchell points to a letter defense counsel wrote to his client in which counsel stated that Mitchell's girlfriend "is firmly on your side in this controversy, and her account of what happened completely exonerates you." Mitchell asserts that counsel's explanation of the letter at the postconviction hearing "is not credible." Determining credibility, however, is the exclusive province of the circuit court, and the circuit court's postconviction decision shows that the court found counsel's postconviction testimony credible.

¶29 Defense counsel testified at the postconviction hearing that his statement in the letter to Mitchell that he could be "completely exonerated" meant exonerated of the charges he was then facing that required the State to show that Mitchell possessed the intent to cause great bodily harm or was criminally reckless with respect to that possible result. Counsel also testified that he was *not* surprised by the State's request for lesser-included offense instructions at the close of evidence because he had discussed the lesser offenses with the prosecutor during plea negotiations prior to trial. The circuit court specifically found counsel's explanation to be credible, stating that "there is only conjecture in the record to the contrary."

¶30 It is true, as Mitchell points out, that at the instruction conference, in response to the State's request for the lesser included offense instructions, counsel responded, "Your Honor, why is this just being included now?" Mitchell contends this question shows counsel's surprise in learning that the requested lesser offenses could be submitted to the jury. We reject the contention.

¶31 Counsel conceded the prosecutor's assertion at the instruction conference that "earlier in the week … we talked about a possible plea to the lesser included, so this didn't catch him by surprise." Regarding the proposed lesser battery offense instruction, counsel said simply, "I object." As to the proffered lesser included offense instruction on the reckless injury charge, counsel said only, "I'll wait the judgment of the court, Your Honor." We conclude that this portion of the instruction conference transcript can easily be read as showing, not that counsel was surprised by the State's request for lesser-included offense instructions, but that counsel was attempting to preserve the lesser-included offense issue for a possible postconviction challenge. That is, counsel protested the lesser-included instructions, but not too much, perhaps because he recognized the record would support them and that they might even benefit the defendant.

¶32 Thus, we find no merit in Mitchell's claim that his counsel was unaware of the possibility that the State would put lesser included offenses before the jury. This brings us to Mitchell's third allegation of deficient performance, which is that counsel, in his closing argument, "conceded" his client's guilt of aggravated battery with intent to cause bodily harm, the lesser included offense of which the jury found Mitchell guilty. He claims that counsel's argument was the equivalent of tendering a guilty plea without his consent, and that it prevented jurors from concluding that Mitchell should be completely exonerated because the State had not proven that he "caused" the victim's serious injuries. On this last

point, Mitchell asserts that jurors could have concluded, based on the medical testimony, that the victim's serious head injury occurred when his head hit the pavement, not directly from Mitchell's punch.

¶33 We first note that counsel's closing argument did *not* expressly concede Mitchell's guilt of the lesser aggravated battery charge. Here is what he said:

> Now, if you can't find him guilty of aggravated battery with intent to cause great bodily harm [which counsel had just argued the jury could not do], then the instructions say consider aggravated battery with intent to cause bodily harm.
>
> ….
>
> … *If what my client did caused great bodily harm*, then you would have to decide then, that what he meant to do was cause bodily harm.
>
> If your decision is that he meant to cause bodily harm and was not protecting himself, it would appear to me to be logical that this would be the one to consider. *I think he was engaged in self-defense*, but I think both men were extremely drunk and acting very, very childish out there.

(Emphasis added.) Counsel returned to the topic at the conclusion of his argument:

> Frankly, with the aggravated battery with intent to cause bodily harm, *if the jury in its wisdom does not find that my client acted in self-defense*, the logical alternative would be aggravated battery with intent to cause bodily harm.
>
> You have to be candid about these things. I'm trying to be honest with you about it, but I ask that you pay attention to these individual elements because they are extremely important. Thank you, ladies and gentlemen.

(Emphasis added.)

¶34 In our view, counsel's argument clearly communicated a request for acquittal on all charges, while realistically, in view of the evidence at trial, directing jurors to the least serious charge if they concluded Mitchell had caused the victim's serious head injury and had not acted in self-defense. Thus, counsel did *not* concede Mitchell's guilt on the lesser battery offense, but even if he had, counsel's argument did not constitute deficient performance under the supreme court's holding in ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765.

¶35 Defense counsel in ***Gordon***, unlike Mitchell's counsel, made an outright concession of his client's guilt on a lesser charge while arguing for acquittal on more serious charges. The attorney in ***Gordon*** did not even suggest to jurors, as did Mitchell's counsel, that they should acquit on all charges. Rather, Gordon's attorney told jurors that his client was in fact guilty of the lesser charge: "I want to be very clear there is no doubt, there is no question that … Mr. Gordon was subject to arrest for disorderly conduct while armed. Obviously running around the neighborhood with two knives is disorderly conduct and it is disorderly conduct while armed." ***Id***., ¶15. Even with this outright concession of guilt, the supreme court concluded that this was "a reasonable tactical approach under the circumstances, plainly calculated to maintain credibility with the jury and enhance the prospects of acquittal on the two more serious charges." ***Id***., ¶26. The same is true of Mitchell's counsel's argument.

¶36 The supreme court pointed out in ***Gordon*** that a guilty plea waives a defendant's rights to trial, cross-examination, presentation of witnesses, to testify and to a unanimous verdict of guilt beyond a reasonable doubt. The defendant in ***Gordon***, like Mitchell, exercised all of these rights. ***Id***., ¶24. The court thus rejected the defendant's claim that his counsel had effectively tendered a guilty

plea without the defendant's consent. ***Id***. The court also concluded Gordon's counsel had not been deficient in making the argument in question, agreeing with courts from other jurisdictions that, "where counsel concedes guilt on a lesser count in a multiple-count case, in light of overwhelming evidence on that count and in an effort to gain credibility and win acquittal on the other charges, the concession is a reasonable tactical decision and counsel is not deemed to have been constitutionally ineffective." ***Id***., ¶28. We conclude ***Gordon*** controls on the present facts.

¶37 Mitchell argues, however, that ***Gordon*** is distinguishable, although he does not tell us precisely how. From his argument, it appears Mitchell believes that the evidence of his guilt on the lesser battery charge was less obvious than Gordon's guilt of disorderly conduct while armed. The supreme court noted that Gordon's own trial testimony had established the essential elements of the lesser charge. ***Gordon***, 262 Wis. 2d 380, ¶25. We conclude that the same can also be said of Mitchell's testimony in this case, especially when viewed in light of the testimony of other eyewitnesses to the fight and of the detective who took Mitchell's statement.

¶38 There can be no dispute that the victim suffered "great bodily harm," specifically, a life-threatening head injury that required emergency surgery.[5] Mitchell testified that he struck the victim to stop the fight and saw the victim fall to the pavement. He acknowledged that the blow was delivered "with enough force to get him off me." A detective testified Mitchell told her that, after the

[5] *See* WIS. STAT. § 939.22(14) (defining "great bodily harm" as "bodily injury which creates a substantial risk of death").

victim hit him at least twice, "he said to himself, 'I'm going to knock him out,'" and then he hit the victim with "'a one hitter-quitter,'" which Mitchell described as a "power blow." Thus, jurors heard both Mitchell's in-court testimony and his earlier statement to police, from which the only reasonable inference is that Mitchell delivered a blow that he intended would cause the victim at least "bodily harm," which requires only that a victim suffer "physical pain."[6]

¶39 Mitchell points to the fact that the treating surgeon testified that either a blow to the head or the victim's head hitting the pavement, or a combination of the two, caused the victim's life-threatening injury. Based on this testimony, Mitchell asserts that causation of the victim's serious injury was thus at issue. The assertion lacks merit, however, because, regardless of whether the life-threatening head injury was caused by Mitchell's blow or the victim's subsequent fall to the pavement, in either case, jurors could reasonably conclude only that Mitchell's punch was a "substantial factor" in producing the injury.[7]

¶40 In sum, we conclude that the essential elements of the lesser included charge, aggravated battery with intent to cause bodily harm, were as well established on the present record as was the disorderly conduct while armed charge in ***Gordon***. Accordingly, we conclude that trial counsel's closing argument reflected the exercise of "reasonable professional judgment," ***Gordon***, 262 Wis. 2d 380, ¶22, and Mitchell has not overcome the "strong presumption that counsel

[6] *See* WIS. STAT. § 939.22(4) (defining "bodily harm" as "physical pain or injury").

[7] *See* WIS JI—CRIMINAL 1224 (Aggravated Battery With Intent To Cause Bodily Harm) ("'Cause' means that the defendant's act was a substantial factor in producing the great bodily harm.").

acted reasonably within professional norms" in making the argument at issue. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶41 Before addressing Mitchell's final claim of deficient performance, we note that the reasonableness of trial counsel's professional judgments regarding the proper defense strategy and its implementation is confirmed in part by the result achieved at trial. On the two repeater-enhanced counts charged in the information, Mitchell faced a potential fifty-two years of imprisonment, with a possible thirty-seven years of initial confinement. *See* WIS. STAT. §§ 939.50, 939.62(1)(c), 940.19(5), 940.23(1), and 973.01. On the single charge of which jurors found him guilty, Mitchell's maximum exposure was reduced to ten years' imprisonment with seven years' initial confinement. *See* WIS. STAT. §§ 939.50, 939.62(1)(b), 940.19(4), and 973.01. We again state our agreement with an observation made by the circuit court in its postconviction ruling: "[G]iven that the case for self-defense was iffy at best, trial counsel's strategy to direct the jury to the alternative of the lesser-included offense in order to avoid conviction on the more serious offense[s] not only was a reasonable tactical decision, but even in retrospect was probably the best course of action on this record."

¶42 Finally, Mitchell contends his counsel was ineffective for failing to corroborate Mitchell's testimony by introducing medical records regarding his preexisting foot injury. Mitchell argues that these records would have helped him convince jurors that the victim "initiated the attack on Mitchell knowing that Mitchell had a bad foot and would be limited in his ability to retaliate." He also asserts that this evidence would have created doubt regarding the credibility of the victim's girlfriend, who testified that Mitchell was "jumping around" and dancing at the bar before the fight. Again, we conclude there was no deficient performance in this regard.

¶43 At the postconviction hearing, Mitchell's counsel explained his decision to not present additional evidence relating to Mitchell's foot injury this way:

> These men were standing face-to-face and yelling at each other, and there was no abrupt bodily movement required from [Mitchell's] viewpoint. He stood flat-footed, and [the victim] apparently stood flat-footed and they exchanged blows. I didn't know why an ankle injury would be significant in that instance.

The trial court accepted counsel's explanation, stating its conclusion as follows:

> The problem with the defendant's argument here is that the medical records document only a very minor pre-existing injury to his ankle occurring some 2½ weeks before the altercation, the condition of which dramatically changed both on clinical presentation and by x-ray sometime on the night of the altercation. When that occurred is totally unclear in light of evidence that defendant was vigorously dancing prior to the brawl. Again, counsel's decision not to pursue a defense based upon the defendant's medical records falls w[e]ll inside "the wide range of professionally competent assistance[,]" ***Strickland***, 466 U.S. at 690, and this offers no support for the defendant's ineffective assistance of counsel claim.

¶44 We concur in the trial court's assessment regarding the medical records. The main purpose of introducing the medical records, according to Mitchell, would have been to establish "[the victim's] awareness of Mitchell's foot injury," which Mitchell testified had, in part, motivated the victim to start the fight. Although the medical records might have confirmed Mitchell's trial testimony that he had injured his foot two weeks before the fight, the records would not have established that the victim was aware of the nature and extent of Mitchell's foot injury or why he allegedly chose to pick a fight with Mitchell on the night in question.

¶45 We conclude that the medical records of Mitchell's foot injury would have been tangential at best, and forgoing their introduction was within the bounds of reasonable professional judgment. Moreover, jurors heard at least four eyewitness descriptions of the fight, plus Mitchell's own account of it. The jury thus had ample evidence by which to assess Mitchell's conduct and whether he had acted in self-defense. Quite simply, our confidence in the outcome of Mitchell's trial is in no way undermined by the absence of the medical records in question. Even if counsel's performance had been deficient in this regard, which it was not, Mitchell suffered no prejudice from the absence of the medical records in question. *See* ***Strickland***, 466 U.S. at 687.

Sentencing

¶46 Mitchell claims the circuit court failed to exercise proper sentencing discretion by failing to fully articulate its reasons for imposing the sentence it did, contrary to WIS. STAT. § 973.017(2) and the supreme court's direction in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. We decline to order resentencing because we conclude the record supports the circuit court's exercise of discretion in imposing a sentence of eight years' imprisonment on Mitchell's conviction for aggravated battery with intent to cause bodily harm.

¶47 As we explained in ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20, ***Gallion*** made no "momentous changes" in Wisconsin sentencing law. Thus, a circuit court's sentencing decision is still afforded "'a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Gallion***, 270 Wis. 2d 535, ¶18 (citation omitted). Also, the weight to be given each of the primary sentencing factors remains within the discretion of the sentencing court,

and after considering all of the relevant factors, a court may impose sentence based on any one of the primary factors. *See* ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Finally, ***Gallion*** did not withdraw or modify the "independent review doctrine" set forth in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971), under which we are to review the trial court record to see if it supports the court's sentencing decision. *See* ***id***. at 282 (explaining that when a sentencing judge fails to fully explicate its sentencing rationale, a reviewing court is "obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.").[8]

¶48 At Mitchell's sentencing, the State requested the court to impose the maximum sentence of ten years' imprisonment with seven years of initial confinement and three years of extended supervision. The defendant asked for two years of confinement followed by two years of extended supervision. The author of the presentence investigation (PSI) report recommended four to five years' confinement plus three years' extended supervision. The court imposed the sentence recommended by the PSI author: eight years' imprisonment with five years of initial confinement and three years of extended supervision.

¶49 We agree with Mitchell that the court's sentencing remarks were quite succinct, comprising barely two transcript pages preceding the court's imposition of the sentence. The court stated that it was "obligated to look at

[8] The ***Gallion*** majority noted that it would "neither decide nor address the application of the independent appellate review doctrine." ***State v. Gallion***, 2004 WI 42, ¶18 n.6, 270 Wis. 2d 535, 678 N.W.2d 197. Justice Wilcox said this in his concurrence: "Although the majority states that it is not deciding the application of the independent review doctrine, … this doctrine constitutes an integral part of ***McCleary***. Clearly, if the majority is reaffirming ***McCleary***, this doctrine should continue to apply." ***Id***., ¶80 (Wilcox, J., concurring).

[Mitchell's] character," the "aggravated nature" of the offense, and at "the need of the public to be protected from such acts." The court was thus aware of and considered the three primary sentencing factors. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶58-61. The court then highlighted two of the three primary factors, explaining that Mitchell's character was what it "look[ed] at the most" and that it also considered the nature and effect of Mitchell's offense, "a one-punch KO … [that] took [the victim] right down[a]nd … caused serious injury."

¶50 It is also clear from the court's remarks that it placed great weight on the information and recommendations in the PSI, which the court found to be "thorough and adequate," having "paint[ed] a good picture of" Mitchell's life. The court also stated its agreement "with the PSI that his needs need to be addressed in the correction system with confinement." Finally, as we have noted, the court imposed the sentence recommended by the PSI author. We thus conclude the court adopted the PSI's descriptions of Mitchell, his background, past criminal record and current correctional needs as the primary basis for the sentence it imposed.

¶51 Accordingly, we turn to the PSI to see whether it provides facts and assessments that would permit us to sustain the circuit court's sentence. We conclude that it does. The PSI includes various accounts of the aggravated battery offense of which Mitchell was convicted, including Mitchell's own versions of what happened. The report also relates Mitchell's past criminal record, which includes an unspecified juvenile record that resulted in juvenile probation and detention, as well as a stint in a juvenile correctional facility when Mitchell was thirteen. Mitchell's adult record includes two armed robberies in 1988 for which he was sentenced to prison in Illinois, an Illinois felon-in-possession of

weapon/firearm conviction in 1999 that also resulted in a prison sentence, and several recent misdemeanor theft convictions in Wisconsin.

¶52 The PSI describes Mitchell's childhood growing up in a Chicago housing project where he was subjected to being "'jumped' by the gang members" from the other side of the projects. According to the report, Mitchell dropped out of high school and "has no vocational training and very limited employment skills," and his adult employment had been sporadic at best. The report also notes Mitchell's long-term involvement with drugs and alcohol and his lack of treatment for substance abuse or dependency except for one twelve-week program while incarcerated in Illinois.

¶53 The PSI author concluded with her impressions that Mitchell "refuses to take any responsibility" for his past offenses or the present one. She noted that he has been involved with crime and the criminal justice system for "more than half of his entire life." The authoring agent's recommendation for a sentence of four to five years of confinement and three years' extended supervision follows this summary:

> The Defendant in this case seriously injured another person. He caused a man, his friend no less, to have part of his skull removed to alleviate pressure on his brain. He never checked to see how his friend was doing, if he was alright, if he was going to live, if there was anything he could do for the man's family. He continued his life as if nothing happened, which to him it was nothing. He knocked a man senseless, it's how things are done. This Defendant has that mindset engraved. He lives the criminal lifestyle, he wants the criminal lifestyle, and he likes it. This Defendant has no remorse, he has no concept of empathy. He knows right from wrong, but he chooses the easy path.
>
> The Defendant in this case has a lengthy prior record in three states. He commits crimes with weapons and of great violence. He is unremorseful and shows no

> sign of wanting to change his ways. This defendant is dangerous. He is a risk to the community wherever he is living. Confinement is seen as necessary in order to protect that community from further criminal activity by him.
>
> It is entirely possible that the Defendant is in need of correctional treatment. That most likely is AODA treatment. The Defendant is apparently in need of Anger Management and Criminal Thinking as well. It may also benefit the Defendant for him to undergo a psychiatric or psychological evaluation. How effective these programs would be are suspect given the Defendant's preference for his current lifestyle. However, he should have the opportunity to avail himself of these programs or treatment options. But given the Defendant's extreme risk to the community and his inability to avail himself of any of these programs in the community or even in other correctional settings, it is recommended that any treatment needs may most effectively be provided in a confined setting.
>
> As for whether or not incarcerating this defendant would unduly depreciate the severity of his offense? Well, the answer to that should be rather obvious. Granted, according to the Defendant he was never given much opportunity for community supervision. However, he never gave any community a reason to trust him with that much of a privilege. As stated above, this defendant has been involved in criminal activity for over half of his life. Some of that may be due to environment, but a good deal of that is personal choice. This defendant chose to punch another man so hard it knocked that man out causing serious injury to that man. In addition, the Defendant has expressed no real remorse for that man or for that matter any comprehension that what he did affected numerous lives. Therefore, to not incarcerate this defendant would unduly depreciate the severity of his offense.

¶54 There can be no question that the foregoing summary, if delivered by the circuit court from the bench at sentencing, would amply justify the eight-year term of imprisonment the court imposed for Mitchell's present offense.

Having "search[ed] the record," we conclude that "the sentence imposed can be sustained." ***McCleary***, 49 Wis. 2d at 282.[9]

CONCLUSION

¶55 For reasons stated above, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[9] Mitchell also complains that the court erred in stating that Mitchell had been "involved in the gangs" earlier in his life, and that it gave no consideration to what he claims were "mitigating factors" in the offense. We reject these contentions as well. The court's comment about Mitchell's having been "involved in the gangs" was based on the description in the presentence investigation of Mitchell's early years growing up in Chicago housing projects. It is also clear that the court did not impose a harsher sentence because it believed Mitchell was a gang member. Rather, taken in context, the comment shows the court's recognition of Mitchell's difficult childhood: "[Mitchell] came out of the projects of Chicago. And so [he] really got a street education and really didn't get much in the way of schooling, and was involved in the gangs and whatever else you do to survive when you grow up in those projects."

As for the matters in mitigation that Mitchell claims the court failed to consider, some are not necessarily undisputed (e.g., that the victim's injury was caused by his fall to the pavement not by Mitchell's punch; that Mitchell only hit the victim once), and others are simply wrong (e.g., that Mitchell did not have a history of violent criminal activity—his record includes two armed robberies). The remaining allegedly "mitigating" factors cited by Mitchell (e.g., that the victim had also hit Mitchell; that the victim "never sought to prosecute Mitchell and never identified Mitchell as the perpetrator") are of negligible, if any, relevance to the sentencing decision, especially given that, as we have discussed above, the court based its sentence primarily on Mitchell's character and prior record.