

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2007

David R. Schanker
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. 2006AP2149

Cir. Ct. No. 2003CF6154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY DONALD LEISER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM W. BRASH, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Jeffrey D. Leiser appeals *pro se* from an order¹ denying his WIS. STAT. § 974.06 (2005-06)² postconviction motion in which he argues that postconviction counsel was ineffective for failing to raise ineffective assistance of trial counsel when trial counsel failed to: (1) object to defendant's absence during a discussion between the trial court, the State and defense counsel regarding a jury question; (2) object to allegedly improper remarks made during the State's closing argument; and (3) call the victim's father as a witness at trial.

¶2 Because we determine that Leiser's absence from the discussion regarding the jury question was harmless error, that the remarks made by the State during its closing argument were proper and did not constitute prosecutorial misconduct, and because we further determine that Leiser was not prejudiced by trial counsel's failure to call the victim's father as a trial witness, we affirm.

BACKGROUND

¶3 Leiser was arrested and charged with sexually assaulting two of his girlfriend's (now-wife's) granddaughters, who were ages eight and nine at the time of the alleged assaults. He was convicted after a jury trial of first-degree sexual assault of the eight-year-old, and acquitted on the charges regarding the nine-year-old. Through postconviction counsel, Leiser filed a motion for a new trial, alleging ineffective assistance of trial counsel. The trial court denied the motion

¹ The trial in this matter was presided over by the Honorable Michael B. Brennan. Due to judicial rotations, the Honorable William W. Brash heard and decided the present WIS. STAT. § 974.06 motion.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

without a hearing. Leiser appealed and this court affirmed. Leiser petitioned the Wisconsin Supreme Court for review, which was denied.

¶4 Leiser then filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06, alleging ineffective assistance of postconviction counsel for not challenging additional actions or inactions of trial counsel, and again requesting a new trial. The trial court denied his motion without a hearing. Leiser appeals. Additional facts will be included in the discussion section of this opinion as needed.

DISCUSSION

¶5 Ordinarily, all grounds for relief under WIS. STAT. § 974.06 (including issues involving ineffective assistance of trial counsel) must be raised in the original, supplemental or amended postconviction motion before the trial court in order to be preserved for appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Issues not raised in the first such motion are waived, “*unless* the court ascertains that a ‘sufficient reason’ exists” for the failure to raise the issue. *Escalona-Naranjo*, 185 Wis. 2d at 181-82 (emphasis in original). In some circumstances, ineffective assistance of postconviction counsel may justify defendant’s failure to raise issues of ineffective assistance of trial counsel or other constitutional or jurisdictional issues. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶6 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel’s performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 369 N.W.2d 711 (1985) (adopting *Strickland* two-prong test for analyzing ineffective

assistance of counsel claims); *see also State v. Johnson*, 133 Wis. 2d 207, 222-23, 395 N.W.2d 176 (1986) (expanding on use of *Strickland* test); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (test for ineffective assistance of counsel as set forth in *Strickland* and *Johnson* to be applied to challenges of ineffectiveness under the Wisconsin Constitution).

¶7 An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting *Strickland*, 466 U.S. at 687). Performance is deficient if it falls outside the range of professionally competent representation. *Pitsch*, 124 Wis. 2d at 636-37. We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances, *see id.*; *Strickland*, 466 U.S. at 688, and we indulge in a strong presumption that counsel acted reasonably within professional norms. *Pitsch*, 124 Wis. 2d at 637. We review the attorney's performance with great deference and "the burden is placed on the defendant to overcome the strong presumption that counsel acted reasonably within professional norms." *Johnson*, 153 Wis. 2d at 127. Generally, when a defendant accepts counsel, the defendant delegates to counsel the tactical decisions an attorney must make during a trial. *State v. Brunette*, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998) (citation omitted). "Review of the performance prong may be abandoned '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice....'" *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (citing *Strickland*, 466 U.S. at 697).

¶8 As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the

defendant must show that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. *Id.*

¶9 A claim of ineffective assistance of counsel presents a mixed question of fact and law. *State v. O'Brien*, 223 Wis. 2d 303, 324-25, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *Id.* However, the ultimate question of ineffective assistance is one of law, subject to independent review. *Id.* at 325.

Constitutional right to be present at conference concerning jury questions

¶10 Leiser argues that postconviction counsel was ineffective for failing to challenge the effectiveness of trial counsel when trial counsel failed to object to Leiser's absence during a discussion between counsel and the trial court concerning questions sent by the jury to the trial court. Leiser argues that he should have been allowed to be present for the discussions regarding the jury questions and that by not being present he was deprived of his constitutional right to be present at his own criminal trial.

¶11 The defendant's constitutional right to be present during substantive portions of his criminal trial is grounded in the Sixth and Fourteenth Amendments to the United States Constitution and in Article I, Section 7, of the Wisconsin Constitution. *State v. Anderson*, 2006 WI 77, ¶¶38, 40, 291 Wis. 2d 673, 717 N.W.2d 74. In Wisconsin, a defendant also has a statutory right to be present during his trial which is codified in WIS. STAT. § 971.04.³ "The interpretation and

³ WISCONSIN STAT. § 971.04, entitled, "Defendant to be present," states in pertinent part:

(continued)

application of a constitutional provision and a statute are questions of law” and our review is *de novo*. *Anderson*, 291 Wis. 2d 673, ¶37 (footnote omitted).

¶12 When a violation of a defendant’s constitutional or statutory right to be present at any portion of his trial proceedings is alleged, the State, as beneficiary of any error, has the burden of persuasion. *Id.*, ¶45. The *Anderson* court discussed whether that burden shifted to an appellant if the issue was raised as an ineffective assistance of counsel claim. *Id.*, ¶¶48-64. The supreme court, after reviewing supreme court and court of appeals decisions spanning twenty-three years, concluded that the burden of persuasion did not shift. *Id.*, ¶¶63-64. Accordingly, we need not determine whether postconviction or trial counsel was ineffective, but rather we review directly whether the failure of the trial court to have Leiser present during the discussion of the jury questions was error. *Id.* If

(1) Except as provided in subs. (2) [misdemeanor proceedings] and (3) [when defendant voluntarily absents self from proceedings], *the defendant shall be present:*

- (a) At the arraignment;
- (b) *At trial;*
- (c) During voir dire of the trial jury;
- (d) At any evidentiary hearing;
- (e) At any view by the jury;
- (f) When the jury returns its verdict;
- (g) At the pronouncement of judgment and the imposition of sentence;
- (h) At any other proceeding when ordered by the court.

(Emphasis added.)

so, we must next determine whether the error was harmless. *Id.*, ¶64. If the error is harmless, Leiser is not entitled to a new trial. *Id.*

¶13 In this case, the jury sent out questions requesting to rehear the testimony of two of the State’s witnesses. The trial court met with the State and defense counsel to discuss the questions. As to the jury’s second request, the trial court, with both the State and defense counsel agreeing, decided to refer the jury to WIS JI—CRIMINAL 58.⁴ As to the first request, however, the testimony requested by the jury to be reread was lengthy. Despite the length, the State requested that it be reread, while defense counsel asked that this request be handled in the same manner as the second request by only referring the jury to WIS JI—CRIMINAL 58. The trial court decided that it would not have the testimony reread to the jury and would instruct the jury to reread WIS JI—CRIMINAL 58. This entire discussion was not on the record and Leiser was not present during the discussion. There is no dispute that the trial court answered the jury questions by referring the jury to WIS JI—CRIMINAL 58 without any knowledge or input from Leiser.

⁴WISCONSIN JI—CRIMINAL 58 (eff. Apr. 2000), as modified by the court for this case (modifications are in italics), states:

**58 TRANSCRIPTS NOT AVAILABLE FOR
DELIBERATIONS; READING BACK TESTIMONY**

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. You may ask to have specific, *very short* portions of the testimony read back to you; *one question, one answer or two questions and two answers, but for example, we do not have the time or the financial abilities to have an entire witness’s testimony transcribed on the short notice of a trial. Accordingly, you should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.*

¶14 Grounded in both the United States and Wisconsin constitutions is a defendant's right to be present at all substantive portions of his criminal trial. *Anderson*, 291 Wis. 2d 673, ¶¶38, 40. Under WIS. STAT. § 971.04(1)(b), Leiser "shall be present ... at trial." Accordingly, the trial court's failure to have Leiser present during the discussion of the jury's question was error.

¶15 Even if the failure of the trial court to have Leiser present during the discussion of the jury questions was error, we must next determine whether the error was harmless. In reviewing a trial court's decision regarding a violation of a defendant's right to be present at trial under a harmless error analysis, we noted in *State v. Peterson*, 220 Wis. 2d 474, 584 N.W.2d 144 (Ct. App. 1998):

We believe that the correct view of the law, as stated in both *State v. McMahon*, 186 Wis. 2d 68, 88, 519 N.W.2d 621, 629 (Ct. App. 1994), and *State v. David J.K.*, 190 Wis. 2d 726, 736, 528 N.W.2d 434, 439 (Ct. App. 1994), is that a violation of the defendant's right to be present "does not automatically entitle [the defendant] to a new trial; such error may be found to be harmless beyond a reasonable doubt." In *McMahon*, the court communicated with the jury on five occasions without the defendant's presence or a waiver. Nevertheless, the court concluded that such error was harmless because the defendant's counsel was present, and because none of the communications suggested anything of such a substantive nature that the defendant's presence could have been of assistance. Similarly, the court in *David J.K.* did not find prejudice in the violation of the defendant's right to be present where the defendant did not credibly advance any contribution his presence would have had.

We acknowledge that neither *McMahon* nor *David J.K.* explicitly applied its holding to a statutory violation, but rather discussed only constitutional violations. However, we see no reason to create a distinction in the present context between a statutory violation and a constitutional violation.... Instead, we hold that violations of § 971.04, Stats., like violations of a defendant's constitutional rights to be present, are subject to harmless error analysis.

Peterson, 220 Wis. 2d at 488-89 (citations omitted). In *State v. Shomberg*, 2006 WI 9, 288 Wis. 2d 1, 709 N.W.2d 370, the Wisconsin Supreme Court reaffirmed the test for harmless error, stating:

The test for harmless error was set forth by this court in *State v. Harvey*, 2002 WI 93, ¶ 46, 254 Wis.2d 442, 647 N.W.2d 189. Applying the test laid out by the United State [sic] Supreme Court in *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999), the *Harvey* court articulated the harmless error inquiry as whether it is “‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?’” “In other words, if it is ‘clear beyond a reasonable doubt that a rational jury would have [rendered the same verdict] absent the error,’ then the error did not ‘contribute to the verdict,’” and is therefore harmless.

Shomberg, 288 Wis. 2d 1, ¶18 (citations omitted).

¶16 As noted above, the trial court concluded that it would not have any testimony reread to the jury, despite the jury’s request to have the testimony reread, and the State’s request for the same. Rather, the trial court decided that the requested testimony was too lengthy, it overruled the State’s request, and it instead, as requested by defense counsel, referred the jury to WIS JI—CRIMINAL 58.

¶17 In *State v. David J.K.*, 190 Wis. 2d 726, 528 N.W.2d 434 (Ct. App. 1994), the defendant challenged his exclusion from *in camera* voir dire of potential jurors in which his trial counsel was present, and which he did not affirmatively waive his right to be present. *Id.* at 735-36. The court concluded that defendant’s exclusion from the voir dire was error, but that the error was harmless. *Id.* at 736-37. The court reasoned that:

[A] defendant’s presence is required as a constitutional condition of due process only to the extent that a fair hearing would be thwarted by his absence. Further, the

denial of a defendant's right to be present at a particular stage of trial does not automatically entitle him or her to a new trial; such error may be found to be harmless beyond a reasonable doubt.

Id. at 736 (citations omitted). While a determination of whether a constitutional violation occurred is a question which we review *de novo*, we review “the trial court’s findings of historical or evidentiary facts ... under the clearly erroneous standard.” *Id.* at 738. Accordingly, in *David J.K.*, the trial court found that the defendant and his counsel had agreed to a certain strategy and that “those jurors would have sat on the jury even had [the defendant] been present in chambers.” *Id.* Based upon this review, we concluded that the trial court’s findings were not clearly erroneous and that as a result, since the jurors would have ended up in the jury whether the defendant was or was not present during the *in camera* voir dire, we determined that the error was harmless. *Id.*

¶18 As in *David J.K.*, Leiser’s trial counsel was present during the jury question discussion and Leiser never affirmatively waived his right to be present. Accordingly, we concluded that the trial court erred and Leiser’s constitutional and statutory right to be present at trial was violated. However, also like the court in *David J.K.*, upon our review of the factual findings of the trial courts, we conclude that the error was harmless. During the trial, the trial court, in setting forth its reasoning on the record from this off-the-record discussion, specifically stated:

There was a note received at approximately 11:35 a.m. The note posed two questions. It’s actually probably a total of four questions. Each of the two questions had a subpart, seeking testimony or review of testimony concerning Nicole [] [the mother of the victim] and Mackenzie [] [the eight-year-old victim], and the sequence with which she came to know of the allegations. I had an off-the-record discussion with Miss Shelton [prosecutor] and Mr. Anderson [defense counsel]. The court’s judgment

was consonant with the parties with regard to Question 2, that the response would be to have to refer the jury to Jury Instruction 58, that because they were talking about a long tract of testimony that it could not be read back to them, and that they would have to rely on their collective memory.

With regard to Question No. 1, Ms. Shelton asked we look into reading that testimony back to them. Mr. Anderson thought the response should be that they should rely on their collective memory, the same response to Question No. 2. We looked into whether or not that court reporter could be secured to read that back. We wouldn't be able to do that over the course of the lunch hour because she may have been in a court. Accordingly, the court did reach its judgment to overrule the state's request and to grant the defense request to respond to Question No. 1 in the same way we had responded to Question No. 2.

Additionally, before continuing with the proceedings, the trial court asked each counsel whether they had “[a]nything else for the record” to which both responded “no.” The trial court, in its decision denying Leiser's WIS. STAT. § 974.06 postconviction motion, noted that “there is not a reasonable probability that Judge Brennan would have granted that request [to reread lengthy testimony] given his ultimate ruling and the reasons therefor.” We agree.

¶19 In this case, the testimony which the jury sought to rehear was from the mother of the victim and the victim. This testimony was not favorable to Leiser. Rather, our review of the testimony reveals that this testimony was an explicit recounting of the sexual assault by Leiser on the child victim and a recounting by the mother of her inquiry to the child victim regarding any assault and of the child's tearful recounting of the event to her mother. Also, trial counsel had argued against having the testimony reread, it was the State that was requesting that the trial court grant the jury's request. Additionally, the trial court specifically noted when it made its record on the jury questions and the response,

that the trial court was disinclined to allow a rereading of such lengthy testimony and therefore it overruled the State's request that it grant the jury's request to have the testimony reread to them, and instead agreed with defense counsel that the jury should simply be referred to WIS JI—CRIMINAL 58. Based upon the above, we do not see that it is "clear beyond a reasonable doubt" that the trial court would have acted differently had Leiser been present at the jury question discussion. Accordingly, it is also not clear beyond a reasonable doubt that the jury would have rendered a different verdict absent the error. *See David J.K.*, 190 Wis. 2d at 736. Therefore, we determine that the trial court's error in not having Leiser present during the jury question conference was harmless and Leiser is not entitled to a new trial on that basis.

State's closing argument remarks proper

¶20 Leiser next argues that postconviction counsel was ineffective for not raising as ineffective assistance of trial counsel, trial counsel's failure to object to certain improper remarks made by the State during its closing. Leiser specifically cites to the State's comments regarding the credibility of the defense witnesses, and in particular, the characterization of Leiser's mother's testimony that she knew where her son's hands were at the time of the alleged assaults as being "a patently absurd claim, absurd claim."

¶21 The supreme court has specifically noted that "counsel in closing argument should be allowed 'considerable latitude,' with discretion to be given to the trial court in determining the propriety of the argument." *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury

should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus, we examine the prosecutor's arguments in the context of the entire trial.

State v. Neuser, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citations omitted). "Substantial latitude is given, and we will not throttle the advocate by unreasonable restrictions so long as the comments relate to the evidence." *Draize*, 88 Wis. 2d at 456. We will affirm the trial court's ruling unless the trial court has erroneously exercised its discretion such that it "is likely to have affected the jury's verdict." *Neuser*, 191 Wis. 2d at 136.

¶22 In this case, the State recounted the testimony of various witnesses, and using the criteria set out by the trial court in the jury instruction on credibility, the State specifically noted:

You look also at the reasonableness of the witness's testimony and any possible motives they have for falsifying and you look at whether they can even keep their stories straight and they can't.

Barbara Leiser [defendant's mother] tells us that she was watching as she – in the instance in the summer as she came through the living room to smoke a cigarette that she was actually looking at her son's hands; that's why she knows where they were, and it's just a patently absurd claim, absurd claim. She also claims she was looking out the window the whole time in the fall and is certain that the sister of the defendant, Lisa, was on the bench and consequently this sexual assault couldn't have occurred. Nobody sits and stares non stop [sic] out a window every second

The State concluded its closing argument: "I urge you to look at all the evidence, look at the criteria for determining where the truth lies because this trial is a search for the truth" Nothing in these statements, nor in the rest of the State's closing

argument or rebuttal demonstrate that the State was urging the jury to conclude that Leiser was guilty based upon something besides the evidence presented. Rather, the State specifically recounted testimony given by the various witnesses and then specifically urged the jury to look at all the evidence and determine the truth. “A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors.” *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Taken in the context of the entire argument, we conclude that the State’s remarks regarding Barbara Leiser’s testimony in its closing argument were not improper, and consequently, did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of [Leiser’s] due process” rights. *See Neuser*, 191 Wis. 2d at 136.

¶23 Additionally, the jury was given the instructions regarding their evaluation of the credibility of the witnesses⁵ and that the attorneys’ arguments

⁵ The trial court provided the following jury instruction regarding the determination of witness credibility:

In determining the credibility of each witness and the weight you give to the testimony of each witness consider these factors: whether the witness has an interest or lack of interest in the outcome of the trial, the witness’ conduct, appearance and demeanor on the witness stand, the clearness or lack of clearness of the witness’s recollections, the opportunity the witness had for observing and for knowing the matters the witness testified about, the reasonableness of the witness’s testimony, the apparent intelligence of the witness, bias or prejudice if any has been shown, possible motives for falsifying testimony and all other facts and circumstances during the trial which tend either to support or to discredit the testimony, then give to the testimony of each witness the weight you believe it should receive.

were not evidence.⁶ “We presume that the jury followed the instructions given to them by the trial court.” *State v. Smith*, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992). Because the remarks made by the State during its closing argument were not improper and the jury was properly instructed on how to consider closing arguments, trial counsel was not ineffective for failing to object to them at trial, and hence, postconviction counsel was not ineffective for failing to raise this issue.

Failure to call witness not ineffective assistance of counsel

¶24 Finally, Leiser argues that postconviction counsel was ineffective for failing to raise as ineffective assistance trial counsel’s failure to call the victims’ father, Matthew S., as a witness. Leiser claims that Matthew would have provided key evidence as to the state of mind (“not calm cool and collected”) of the mother when she asked the victims if they had been touched inappropriately by Leiser. However, Leiser presents no evidence whatsoever as to what exactly Matthew would say. Leiser includes no statement or affidavit by Matthew as to what his testimony would have been if he had been called as a witness at trial. Additionally, the State, when questioning the mother at trial, elicited testimony from the mother that she was upset about having to call her mother (Leiser’s girlfriend/now wife) later in the evening and confronting her about the fact that

⁶ The trial court provided the following jury instruction regarding the closing arguments of counsel:

Consider carefully the closing arguments of the attorneys but their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence and decide upon your verdicts according to the evidence under the instructions given to you by the court.

she had not informed her (the victims' mother) that Leiser was a registered sex offender. Consequently, even if trial counsel had put Matthew on the stand to testify that his wife was upset at the time she asked the victims about any inappropriate contact by Leiser, contrary to Leiser's assertion, Matthew's testimony would not have contradicted the other evidence elicited at trial, *i.e.*, that the mother was upset when she was questioning the victims about any possible sexual assault.

¶25 Leiser also argues that Matthew's testimony would have shown that someone was lying because the mother testified that Matthew was not in the room when she first questioned the victims, when at least one of the victims stated that the father "was there." There is no dispute that Matthew came into the room at some point and the mother told him about her conversations with the victims. One of the children's statements, that the father "was there" at the time the mother asked the victims, is not contradictory to the mother's recollection and as such, Matthew's testimony would likely have not changed the result of the trial where the jury found Leiser guilty of sexually assaulting one of the victims and acquitted him as to the second victim.

¶26 A defendant who alleges that his or her attorney was ineffective because the attorney did not do something must show with specificity what the attorney should have done and how that would have either changed things, or at the very least, how the failure made the result either unreliable or fundamentally unfair. *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Here, Leiser provides nothing but his own conclusory statements in support of what Matthew's testimony would have been at trial or how that testimony would have changed the outcome of the trial. Consequently, Leiser cannot meet the prejudice prong of the *Strickland* test as to trial counsel's effectiveness. *Id.*, 466

U.S. at 697. Because trial counsel was not ineffective for failing to call the victims' father as a witness to testify at trial, postconviction counsel was not ineffective for failing to raise this issue.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

