COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 93-3253-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. LONG,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: GEORGE NORTHRUP, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

DYKMAN, P.J.[1] Donald L. Long was convicted of first-degree intentional homicide as a party-to-a-crime resulting from the death of his son, Wesley. The trial court denied his postconviction motions, and he appeals.

[1] This case, originally taken under submission by the court in November 1994, was

We previously considered some of the facts of this case in ***State v. Jackie Long***, No. 93-3235-CR, unpublished slip op. (Wis. Ct. App. Mar. 23, 1995). There, we affirmed the conviction of Jackie Long, Donald Long's wife, of the same crime for which Donald Long was convicted. Long argues that we should reverse his conviction because: (1) the trial court erroneously exercised its discretion by joining (or failing to sever) Donald and Jackie Long's cases for trial; (2) the trial court improperly admitted evidence of other bad acts; (3) the trial court failed to instruct the jury as to the other bad acts evidence; (4) the party-to-a-crime instruction was improper; (5) the information and the party-to-a-crime instruction allowed the jury to convict under an invalid theory of the law; and (6) he was denied effective assistance of counsel. We reject these arguments and therefore affirm the judgment and post-trial order.

We take the facts from our opinion in ***State v. Jackie Long***.

> On January 2, 1992, Donald and Jackie Long called emergency medical technicians to their residence in Mazomanie. On arrival, the technicians found the Longs' infant son, Wesley, unresponsive, pulseless and not breathing. Donald Long told the technicians that he had been asleep on a sofa with Wesley on his stomach and had accidentally fallen to the floor, possibly landing on top of the child. He said that although Wesley cried after the incident, he eventually calmed down and was put to bed. The medical personnel immediately took Wesley to University Hospital in Madison where, despite efforts to resuscitate him, he died.
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> An autopsy performed by Dr. Robert Huntington on January 2 revealed that Wesley had multiple cranial and rib fractures (in varying stages of healing) which Huntington considered to be inconsistent with Donald Long's explanation of the child's injuries. Huntington confirmed to the police that, because of

(..continued)
reassigned to the author for opinion preparation on August 28, 1996.

> the number of injuries and their relative stages of healing, he believed Wesley's death was a homicide.
>
> The Longs were charged with first-degree intentional homicide, each as a party to the crime, and the cases were consolidated for trial. The jury found both guilty, and the trial court sentenced [Donald] Long to life in prison with parole eligibility in thirty years and denied [his] motions for postconviction relief. Other facts will be discussed in the body of the opinion.

I. Improper Joinder

The trial court granted the prosecutor's motion to join Donald and Jackie Long's cases for trial. Long complains that this resulted in the jury hearing voluminous bad acts evidence pertaining only to Jackie Long, prejudicing him. But he did not object to the joinder on this basis until his postconviction hearing.

In a pretrial letter to the court, Long objected to the State's joinder motion. He argued that in a joint trial, the defendants could only avoid a conviction by blaming each other for their baby's death, and that § 971.12(3), STATS., required separate trials if either of two defendants had given a statement implicating the other co-defendant. He repeated the first of these reasons at a pretrial hearing on the State's motion.

To be considered timely, objections must be made prior to the return of the jury verdict. ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 457, 523 N.W.2d 274, 281 (Ct. App. 1994). A party cannot wait until after receiving an unfavorable verdict, then raise an objection or state different grounds in the motions after verdict. ***Id.*** at 458, 523 N.W.2d at 281. In ***Behning v. Star Fireworks Mfg. Co.***, 57 Wis.2d 183, 187, 203 N.W.2d 655, 658 (1973), the court said:

> We have uniformly held that failure to make a timely objection precludes a party, as a matter of right, to subsequently raise the point. Ordinarily, it is

> necessary to make a timely objection, and again to renew the objection on a motion for a new trial, to give the trial judge an opportunity to correct a possible error.

Long's brief asserts that "[i]n pre-trial motions, it became clear that a substantial line of evidence relevant only to, and admissible only against Jackie Long, would be introduced." Had Long wanted to make the argument then that he now makes on appeal, he could have done so. Had he done so, the trial court could have addressed the objection. With information as to the nature and extent of the evidence relevant only against Jackie Long, the trial court could have decided to sever the two trials. Having not moved to sever the two trials for the reason now asserted, Long has waived the issue of whether the trial court erroneously exercised its discretion by refusing to sever the trials because of evidence admitted solely against his wife.

II. Bad Acts Evidence

Long asserts that the trial court erroneously exercised its discretion by permitting a voluminous amount of bad acts evidence to be given to the jury. He particularly objects to evidence that when he was twelve years old, he spanked two children for whom he was babysitting, causing bruises. He argues that the trial court failed to address the relevance of the bad acts evidence and failed to balance the danger of unfair prejudice against the probative value of the evidence. *See* § 904.03, STATS.[2] But Long specifically agreed that the State could admit much of this evidence. In a written response to the State's motion for a ruling on its proposed introduction of the bad acts evidence, Long conceded:

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[2] Section 904.03, STATS., provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> With regard to evidence concerning the children named Scott, Amber, Anthony and Wesley, Donald Long will not object to its introduction using Wis. Stats. 904.04(2) as a basis for objection. He does reserve the right to object to such evidence on other bases, such as relevance.

Relevant evidence is defined in § 904.01, STATS., as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Long does not now directly argue that the bad acts evidence was admitted to prove Long's character. And that is notable, for even if the bad acts evidence was irrelevant, it could not be prejudicial absent an assertion that it was introduced to show Long's character. But the significant problem with his present complaint as to the relevance of the evidence and the trial court's asserted failure to balance the danger of unfair prejudice of the evidence against its probative value is that he did not object to the admission of the evidence when it was introduced.

In his reply brief, Long concedes that he did not object to the bad acts evidence. He asserts that this is because the trial court's decision to join his and his wife's cases affected his strategy. He also argues that because the trial court intended to allow bad acts evidence concerning a battery Long committed when he was twelve years old, it would have permitted the State to show any bad acts evidence it wished.

When the trial court ruled on the State's motion to admit the bad acts evidence, it told Long that its ruling was not final:

> And while I'm making a general ruling, as with any motion in limine, a lot of that is going to be subject to how things progress at trial....
>
> ....

> ... I recognize also that by ruling as I am on the, for lack of a better term, the ***Whitty*** evidence, that there is a gray area there. And that some of the individuals that may be called to testify on some of the so-called ***Whitty*** evidence may be touching upon areas that the State feels are subject to the motion in limine. And we'll have to deal with that, I guess, as that occurs.

In ***Wingad v. John Deere***, 187 Wis.2d 441, 457, 523 N.W.2d 274, 280 (Ct. App. 1994), the defendant objected at pretrial to evidence because it was undated and unpublished. As here, the objection that the evidence was irrelevant and that the probative value of the evidence was outweighed by the danger of unfair prejudice was not made until post-trial motions. We said:

> A party cannot wait until after receiving an unfavorable verdict, then raise an objection or state different grounds in the motions after verdict. John Deere's objection to the learned treatises on relevancy grounds in the motions after verdict was untimely because it prevented the trial court from reviewing the relevancy of the evidence before it was presented to the jury. Because John Deere objected to the learned treatises on different grounds and did not object or move to strike in a timely manner, its objection to the learned treatises was waived.

Id. at 458, 523 N.W.2d at 281.

We reject Long's proffered excuse that he did not object to the bad acts evidence because the trial court's decision to join the cases affected his strategy and because objection would probably be futile. Long has failed to provide authority supporting these assertions or to develop them. We conclude that Long has waived any objections to the other acts evidence. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

III. ***Whitty*** *and Cautionary Instructions*

Citing WIS J I—CRIMINAL 275, Long asserts that the trial court failed to describe each other act that the jury could consider. The instruction reads: "Specifically, evidence has been received that the defendant (describe act). If you find that this conduct did occur ...." Long also complains that the jury instructions did not limit the use of the bad acts evidence to the party against whom it was introduced nor did the instruction link the act to the issue or issues the jury was to decide. Finally, Long argues that the trial court failed to give the jury WIS J I—CRIMINAL 122. This instruction explains that the jury must be satisfied that the evidence is sufficient *as to each defendant* before it returns a guilty verdict as to both defendants.

Long did not object to the instructions that were given, nor did he request other instructions. In ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988), the supreme court concluded that the court of appeals has no authority to directly reach unobjected-to instructions. However, we have discretionary authority under § 752.35, STATS., to consider waived issues. ***Vollmer v. Luety***, 156 Wis.2d 1, 13, 456 N.W.2d 797, 803 (1990).

Citing ***State v. Brooks***, 124 Wis.2d 349, 354, 369 N.W.2d 183, 185-86 (Ct. App. 1985), Long asks us to review the jury instructions because the error is plain and affects his substantial rights. Section 901.03(4), STATS., a supreme court rule, sets out the plain error rule: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." But ***Brooks*** precedes ***Schumacher*** and ***Vollmer***, and is a court of appeals decision. It can hardly affect the supreme court's discussion of § 805.13, STATS., in ***Schumacher*** and ***Vollmer***, in which the court said that we had no power to review unobjected-to jury instructions. We conclude that we do not have the power to review unobjected-to jury instructions for plain error.

Long also asks us to review these instructions, despite his waiver, because the asserted errors in the instructions prevented the real controversy from being tried. "Real controversy not tried" is one of the two reasons that permit us to review errors under § 752.35, STATS., which permits discretionary reversals by the court of appeals. If we reverse under § 752.35 because the real controversy was not tried, we need not conclude that there is a substantial probability of a different result at a second trial. ***State v. Grobstick***, 200 Wis.2d 242, 254, 546 N.W.2d 187, 191 (Ct. App. 1996). However, the real controversy in this case concerned the part Long played in the death of his son. This issue was

the focus of the entire trial. The State introduced much evidence to show that Wesley's death was not accidental and that both of his parents either directly caused his death or stood by when they could have acted to prevent the actions that eventually led to the death. Both Long and his wife introduced evidence which tended to show that each was not involved in the death in any way. We are to exercise our statutory power of discretionary reversal infrequently and judiciously. ***State v. Ray***, 166 Wis.2d 855, 874, 481 N.W.2d 288, 296 (Ct. App. 1992). Our review of the record does not convince us that the real controversy was not tried. The asserted defects in the jury instructions do not persuade us otherwise.

IV. Party-to-a-Crime Instruction

A.

Long asserts that the trial court gave a party-to-a-crime instruction which was pertinent only to a negligent homicide case. Again, Long did not object to this instruction, and, as we have explained, we may not directly review it. But this instruction pertains to the entire controversy surrounding this case. We therefore inquire into Long's assertions pursuant to our power of discretionary reversal found in § 752.35, STATS.

The part of the instruction to which Long now objects reads:

> It is not essential that the ultimate harm which resulted was unforeseen or intended by the actor. It is sufficient that the ultimate harm is one which a reasonable person would foresee as being reasonably related to the acts of the defendant.

But the language to which Long objects is only a small part of the court's instructions on party-to-a-crime. The instructions explain aiding and abetting liability and conspiracy liability. Taken as a whole, the instructions accurately portray party-to-a-crime liability. We are to consider instructions as a whole to determine whether the jury was misled. ***Savina v. Wisconsin Gas Co.***, 36 Wis.2d 694, 703, 154 N.W.2d 237, 241 (1967). Even the section of which Long complains correctly states a portion of party-to-a-crime liability. In ***State v.***

Cydzik, 60 Wis.2d 683, 697, 211 N.W.2d 421, 429 (1973), the court upheld the defendant's conviction despite his assertion that he only set out with his accomplice to rob a service station, not to murder the attendant. The fact that the defendant did not pull the trigger was not relevant. The court said: "But legal intent may be inferred from conduct. One is presumed to intend the natural and probable consequences of his act." ***Id.*** at 697, 211 N.W.2d at 429-30. The language to which Long objects conveys this meaning. It does not instruct the jury that negligent conduct may form the basis for a first- degree intentional homicide conviction. The party-to-a-crime instruction did not prevent the real controversy from being tried.

B.

Long argues that the party-to-a-crime instructions, coupled with the information, permitted the jury to convict him if it found that he had injured Wesley, whether or not the injury led to Wesley's death. Long did not object to the instruction, and we therefore cannot directly consider his assertion. ***Schumacher***, 144 Wis.2d at 409, 424 N.W.2d at 680. We have already considered the instructions on party-to-a-crime and have concluded that they did not prevent the real controversy from being tried. Adding the information to the instructions makes no difference. The information alleged only that Long, as a party-to-a-crime, caused the death of Wesley. There was no real dispute that Wesley died as a result of one or two skull fractures, not as a result of other injuries he had received. We will not exercise our § 752.35, STATS., power of discretionary reversal.

Long also contends that the jury instructions allowed his conviction if his participation amounted only to knowledge of his wife's acts which caused Wesley's death. Long's failure to object to the instructions prevents us from directly addressing this assertion. ***Schumacher***, 144 Wis.2d at 409, 424 N.W.2d at 680. However, we will consider his contention under our § 752.35, STATS., power of discretionary review. We do so because Long is arguing that Wisconsin law does not permit "omission liability" for first-degree intentional homicide. Though this would not usually be raised by an attack on jury instructions, if Long is correct, the real controversy would not have been tried.

Long argues that ***State v. Rundle***, 176 Wis.2d 985, 500 N.W.2d 916 (1993), prohibits "omission liability" in child abuse cases. Before addressing this assertion, we will consider ***State v. Williquette***, 125 Wis.2d 86, 370 N.W.2d 282 (Ct. App. 1985), *aff'd*, 129 Wis.2d 239, 385 N.W.2d 145 (1986). We said:

> Here, Williquette allegedly knew that her husband repeatedly abused their children, yet she did nothing to prevent future occurrences. If she had been present at the time of the abuse, therefore, the state could prosecute her for aiding and abetting. Her knowing failure to intervene would reasonably indicate an intent to assist the perpetrator. Similarly, Williquette allowed the abuse to continue when she failed to intervene, despite knowledge of a pattern of abuse in her absence. Inaction in this situation supports an inference of an intent to assist the crime.

Id. at 91, 370 N.W.2d at 285.

The supreme court affirmed ***Williquette***, but on a different theory. Justice Bablitch would have affirmed on a theory of aiding and abetting. ***State v. Williquette***, 129 Wis.2d 239, 262, 385 N.W.2d 145, 155 (1986) (Bablitch, J., concurring). The majority, however, did not reach this issue. ***Id.*** at 243 n.2, 385 N.W.2d at 147. Our decision as to aiding and abetting is therefore precedential on the aiding and abetting issue.

We return to ***Rundle***. Long asserts that ***Rundle***, which addressed the recently revised child abuse statute, § 948.03, STATS., prohibits charging "omission liability" under the aider and abettor statute, § 939.05(2), STATS. But this reading of ***Rundle*** is too expansive.

Effective July 1, 1989, the legislature adopted a new child abuse statute, § 948.03, STATS. Section 948.03(2) prohibits intentional causation of bodily harm to a child, § 948.03(3) prohibits reckless causation of bodily harm to a child, and § 949.03(4) prohibits failing to act to prevent bodily harm to a child, or "omission liability." In ***Rundle***, the State charged Kurt Rundle with aiding and abetting his wife in intentionally and recklessly causing bodily harm to a child, contrary to § 948.03(2) and (3). 176 Wis.2d at 987-88, 500 N.W.2d at 916-

17. The State was thus attempting to convict Rundle of violating § 949.03(2) and (3), but was doing so by using § 939.05(2), STATS., the omnibus aiding and abetting statute.

The supreme court did not permit this use of § 939.05(2), STATS. It reasoned that because the legislature had adopted a version of "omission liability" in § 948.03(4), STATS., which required that the State prove some conduct, either verbal or overt, it made no sense to make § 948.03(4) surplusage by permitting the State to use the omnibus aiding and abetting statute to avoid having to prove this element of the crimes. ***Rundle***, 196 Wis.2d at 1003-04, 500 N.W.2d at 923.

The supreme court found persuasive the "package" concept of § 948.03, STATS. It found the legislative history of this statute helpful. It noted that "[i]n sec. 948.03(4) the legislature has specified which omissions to act are unlawful." ***Rundle***, 176 Wis.2d at 1003, 500 N.W.2d at 923. But that reasoning, while convincing as to the interpretation of § 948.03(4), does not transfer to the question before us, which is whether the omnibus aiding and abetting statute is applicable when the charge is not intentionally or recklessly causing harm to a child, but first-degree intentional homicide, where the victim is a child.

What the legislature intended as to prosecutions for harming a child does not tell us the legislative intent in first-degree intentional homicide prosecutions where the victim is a child. We are therefore back to our decision in ***Williquette***, which arose when the trial court granted Williquette's motion to dismiss the information. ***Williquette***, 125 Wis.2d at 87, 370 N.W.2d at 283. There, we held that it was sufficient to show that Williquette allegedly knew that her husband had repeatedly abused their children, yet did nothing to prevent future occurrences. ***Id.*** at 91, 370 N.W.2d at 285. That is what the State proved here. The information and instructions of which Long complains therefore did not prevent the real controversy from being tried. He is not entitled to discretionary relief under § 752.35, STATS.

V. Ineffective Assistance of Counsel

Long cites four instances where he believes that trial counsel was constitutionally ineffective, requiring that he be given a new trial. The tests for ineffective assistance of counsel were given in ***Strickland v. Washington***, 466

U.S. 668 (1984), and used in ***State v. Pitsch***, 124 Wis.2d 628, 369 N.W.2d 711 (1985). Constitutional ineffective assistance of counsel requires that trial counsel's performance be deficient, prejudicing the defendant. ***Pitsch***, 124 Wis.2d at 633, 369 N.W.2d at 714. We review the trial court's findings of fact deferentially and may not set them aside unless they are clearly erroneous. Section 805.17(2), STATS. Whether counsel's performance was deficient and whether, if deficient, the deficiency was prejudicial are questions of law, which we decide *de novo*. ***Pitch***, 124 Wis.2d at 634, 369 N.W.2d at 715. Counsel is strongly presumed to have rendered adequate assistance, and the acts complained of must, to be ineffective, be outside the wide range of professionally competent assistance. ***Id.*** at 637, 369 N.W.2d at 716. The ultimate test is whether counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. ***Strickland***, 466 U.S. at 687. We need not undertake the deficient performance analysis if the defendant has failed to show prejudice. ***State v. Wirts***, 176 Wis.2d 174, 180, 500 N.W.2d 317, 318 (Ct. App. 1993).

Long first objects to his trial counsel's failure to object to the bad acts evidence involving other injuries to and neglect of the Long children. The trial court made findings as to this assertion:

> [Defense counsel] did not object to most of the ***Whitty*** evidence once it was admissible, because he believed it helped his client. He testified that he in fact needed a lot of the ***Whitty*** evidence to point the finger at the co-defendant. He did not object to testimony regarding Donald battering Jackie because he felt it showed that Jackie, in anger, took it out on Amber, thereby again pointing the finger at Jackie. [Defense counsel] testified that while he could have objected to some isolated pieces of evidence, they were damaging to Donald only if the jury believed Donald was not telling the truth. His strategy was to show that Jackie was not credible and that Donald was open, straightforward and truthful.

These findings are not clearly erroneous. Our review shows that Long could not realistically show that Wesley died from causes other than trauma. His only hope for acquittal was to convince the jury either that

someone else caused the trauma and that he was not aware of the trauma or that the trauma was the result of accident. The latter was effectively removed as a defense by the State's medical witnesses. It is reasonable, therefore, that trial counsel adopted a theory which shifted the blame to Long's wife. Most of the bad acts evidence pertained to her. And once the trial court had ruled that much of the bad acts evidence was admissible, counsel had to consider whether continued objections, though they were necessary to preserve appellate review, were worth the possible ill effect this might have on the jury. We conclude that trial counsel was not ineffective for failing to object to the bad acts evidence.

Long next asserts that trial counsel was ineffective for failing to request cautionary instructions as to the bad acts evidence. He cites no authority for this position. Assuming that Long is correct and that counsel should have requested a limiting instruction, we conclude that this failure was not prejudicial. For instance, the jury heard evidence that Long's wife told an emergency medical technician on the night of Wesley's death that she had struck Wesley so hard she thought she "slapped his head right off." No jury could believe that this evidence pertained to Donald Long. In essence, WIS J I—CRIMINAL 222 tells a jury that evidence received as to one defendant may only be used against that defendant. This principle is commonly known. A suggestion that the opposite was true would be met with incredulity. If Long was in a position where he could have prevented the abuse of his children by his wife, then the evidence was properly admitted as to him. If he was not, no jury would use it to convict him. We conclude that if trial counsel was ineffective for failing to request WIS J I—CRIMINAL 222, that ineffectiveness was not prejudicial.

Next, Long asserts that trial counsel was ineffective because counsel accepted the prosecution's theory of liability by his misstatements of law during closing argument. This, he argues, led to counsel's failure to request that the jury instructions and information be limited so as to indicate that only Wesley's skull fractures could be used as a basis for criminal liability. But, as we have already concluded, there was no reasonable possibility that the jury could have concluded that Wesley died as a result of injuries other than the two skull fractures. If trial counsel was ineffective for failing to contradict the prosecutor's theory of liability, that failure could not have been prejudicial.

Long argues that counsel was ineffective because he misstated the law to his client's detriment. At one time, Long's counsel told the jury: "It's not

just hindsight. It's that you knew at the time a crime was being committed, to be guilty either as a principal or as a party." This is a slightly different way of arguing that ***State v. Rundle***, 176 Wis.2d 985, 500 N.W.2d 916 (1993), does not permit party-to-a-crime liability in cases of omission liability. In ***Williquette***, however, we held that knowledge and failure to act were sufficient to create omission liability. There was no dispute that Long failed to act to prevent his wife from fracturing Wesley's skull. His defense was that he did not know that his wife was battering Wesley. Under this scenario, it is not ineffective to focus on the matter in contention, which was Long's knowledge. We conclude that Long's counsel was not ineffective for telling the jury that Long could not be convicted if he did not know of his wife's crime.

Long's last assertion of counsel's ineffectiveness is his failure to object to the State's improper closing argument and misstatements of the law. Examples of the State's asserted improper closing argument are misstating the testimony of a doctor, arguing that if Long knew of any act causing injury to Wesley, he was guilty of first-degree intentional homicide, and arguing that Long aided and assisted the commission of crime by failing to take Wesley to the hospital or reporting his wife's crime. Long's counsel also did not object to the prosecutor's statements about Wesley's sister and negative statements about the Long's child rearing misdeeds.

At Long's post-trial motion hearing, his attorney testified that his strategy from the time the trial court decided to admit much other acts testimony was to convince the jury that Long did not know of his wife's abuse of Wesley. He said:

> My thought process was this. I believed the law said that even if [Long] knew, he'd still have to do something affirmative to help with the death of that child before he was party to a crime. Practically speaking, I thought if the jury believed he knew what was happening to Wesley, they'd convict him anyway, whatever the law said. And there'd be no way of telling what the jury had done, except their conviction.

and

> My objection to [the bad acts evidence] was at the beginning. And when it was decided that the whole bag would be introduced, everything that happened in their lives with regards to their children, then my choice was to object to each piece of evidence as it was introduced and to object to the mention of each piece of evidence after it was introduced.... And it seemed to me that that would not only lengthen the trial by five or six weeks, it would also make the jury so unhappy with me that I lost whatever chance I had to convince them.

and

> So, we had time deadlines or time lines showing when the damage arguably happened to all of these children and that Donald wasn't around. So, arguments concerning the damage to those children, if the jury adopted our theory, weren't damaging at all. If the jury didn't accept ours, I don't know that it mattered.

Under defense counsel's theory, it did not matter that the State misstated a doctor's testimony. Counsel noted that the jury was going to hear of some very bad injuries that Wesley sustained and that the only plausible defense was that Long was not there. Our decision in ***Williquette***, that a parent who knows of a spouse's child abuse and fails to intervene evinces an intent to aid the perpetrator, left very little for Long to argue, except that he was not present when the abuse occurred and did not know of it. That is what Long's counsel did.

We have read the same testimony that the trial court heard. The trial court concluded:

There was a theory of defense carefully and consistently followed,

> even if it meant not objecting at those times when the claimed objectional evidence fit the theory of defense. He testified that he believed the jury would be more likely to acquit Donald if they convicted

Jackie and therefore sought to enhance that approach.

We also conclude that Long's counsel's representation was not deficient. With hindsight, we can hypothesize different ways that counsel could have reacted to the State's case. But, given the "omission liability" we approved in ***Williquette***, Long had to convince the jury that he did not know that his wife was injuring Wesley. That was what his attorney attempted to do. The fact that the approach was unsuccessful does not mean that counsel was ineffective. Long is not entitled to a new trial for want of competent defense counsel.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.