

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 9, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0725-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM WARNER DAVIS,

Defendant-Appellant.

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

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

PER CURIAM. William Warner Davis appeals from a judgment of conviction, following jury trial, for second-degree reckless injury, contrary to § 940.23(2), STATS. He also appeals from the trial court's order denying his motion for postconviction relief. Davis argues that his trial counsel was ineffective for failing to investigate the extent of the victim's injuries and for

failing to object to the jury instruction on great bodily harm. We reject his arguments and affirm.

During the course of a roommate/tenant dispute, Davis threw industrial-strength drain cleaner containing sulfuric acid into the victim's face. The victim suffered burns and scarring. Photos taken of the victim a few days after the incident were admitted at trial and the victim also showed his remaining injuries to the jury at the time of trial. The exact extent of the permanency of the victim's injuries is uncertain due, in part, to his death prior to the postconviction motion hearing.

The trial court instructed the jury that "great bodily harm means serious bodily injury." Davis argues that trial counsel was ineffective for failing to object to the wording of the instruction because the instruction failed to incorporate the more complete definition of "great bodily harm" either from the pattern jury instruction, *see* WIS J I—CRIMINAL 1252, or from § 939.22(14), STATS. Davis argues that the trial court's instruction, in effect, directed a verdict on the second element of the offense.

At the postconviction motion hearing, Davis's trial counsel explained that he did not actively contest the "great bodily harm" element, but instead focused on Davis's claim of self-defense. Defense counsel stated:

The issue of serious bodily injury was not an issue that I wanted to push, because I felt I would damage the self-defense argument.

It was very clear that [the victim] had had serious burns. I do not know if the scarring would be permanent or not, but when you look at the serious bodily injury I felt that serious bodily injury was a foregone conclusion for anyone who looked at it and looked at the pictures from October vers[u]s the scarring that was present at the time of trial.

So I felt that would damage the self-defense argument. So I ... did not emphasize that through the trial.

In ruling on Davis's postconviction motion, the trial court concluded that the instruction had been adequate. The trial court also stated that defense counsel was "correct, that the serious bodily harm was obvious... And so pursuing that and making an issue out of something that was so obvious and ... would have detracted from the self-defense argument." The trial court concluded Davis's defense counsel had provided effective representation.

Generally, a trial court has broad discretion in choosing the language of jury instructions so long as they fully and fairly inform the jury of the rules of law applicable to the case. *State v. McCoy*, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988). Additionally, when reviewing a trial court's decision on whether a defendant received ineffective assistance of counsel, we employ a mixed standard of review. The defendant must show that counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing the trial court's decision, we accept its findings of fact, its "underlying findings of what happened," unless they are clearly erroneous, while independently reviewing "the ultimate determination of whether counsel's performance was deficient and prejudicial." *State v. Johnson*, 153 Wis.2d 121, 127-128, 449 N.W.2d 845, 848 (1990) (citation omitted).

The trial court's instruction to the jury that "great bodily harm means serious bodily injury" was taken from the pattern instruction for this element of second-degree reckless injury. On this element, WIS J I—CRIMINAL 1252 provides:

"Great bodily harm" means serious bodily injury.

[Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury is great bodily harm.]

In footnote 3 of the comment to this instruction, however, the Wisconsin Criminal Jury Instruction Committee states: “The Committee has concluded that defining great bodily harm as ‘serious bodily injury’ is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed.” Although the comments of the jury instruction committee are not binding authority, we may, nonetheless, consider them persuasive authority. See *State v. Olson*, 175 Wis.2d 628, 642 n.10, 498 N.W.2d 661, 667 n.10 (1993).

Here, the instruction given by the trial court was not incomplete or inaccurate. While the more expanded definition of “great bodily harm” may have been proper, it was not legally necessary. Defining “great bodily harm” as “serious bodily injury” was both fair and accurate. Based on the descriptions of the photographs taken of the victim a few days after the incident that were admitted at trial¹ and based on the description of the victim's injuries at the time of trial, it was well-within the province of the jury to conclude that the “great bodily harm” element of the offense had been satisfied.

Additionally, the trial court never told the jury that it was free to disregard the “great bodily harm” element of second-degree reckless injury. In fact, in addition to the given instruction, the trial court expressly stated that the State was required to “prove every element of the offense charged beyond a reasonable doubt.” Therefore, we reject Davis's argument that the instruction relieved the State of its burden of proof. Further, because we find no error with regard to the jury instruction, we reject Davis's ineffective-assistance-of-trial-counsel claim.

Finally, Davis claims that trial counsel failed to investigate the victim's injuries. Davis, however, makes this assertion in concluding his discussion of trial counsel's alleged ineffectiveness as to the “great bodily harm” jury instruction. Appellate counsel fails to develop this argument or cite any legal authority in support of it. Therefore, we decline to address it. See *State v. Pettit*, 171 Wis.2d 627, 646-647, 492 N.W.2d 633, 642 (Ct. App. 1992).

¹ The photographs were not included in the appellate record.

By the Court. – Judgment and order affirmed.

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