

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 6, 2012

Diane M. Fremgen
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. 2011AP1006-CR

Cir. Ct. No. 2008CF335

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY E. SPOERL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Anthony Spoerl appeals a judgment convicting him of two counts of reckless endangerment and two counts of criminal damage to property. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. He contends his counsel was

ineffective for failing to call an expert witness or present a learned treatise to support counsel's argument that Spoerl's confession was unreliable because Spoerl suffers from Asperger's syndrome, a form of autism. Spoerl also requests a new trial in the interest of justice based on the same challenge to the reliability of his confession. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The jury convicted Spoerl of the four charges based on evidence that he fired bullets into two residences. When interviewed by police, seventeen-year-old Spoerl initially denied knowing anything about the incidents. He later admitted shooting into a field and into the ground and trees. He eventually admitted that he and an accomplice each fired four shots. Spoerl identified where they left the weapon and where they stood when they fired the shots. Regarding other crimes discussed during the sixty- to ninety-minute interview, Spoerl continued to deny any involvement.

¶3 Spoerl's mother testified that Spoerl had autism and took special education classes. In rebuttal, sergeant Neil Rabas testified that as a school liaison officer he had been able to communicate with most special education students. He did not observe any difficulties that any of the police officers had communicating with Spoerl. Rabas also testified that when Spoerl admitted having the gun and shooting it in the field, Spoerl's head dropped into his hands and he was upset and sorry. The prosecutor cited Spoerl's display of emotion as a factor confirming the validity of Spoerl's confession.

¶4 In his closing argument, Spoerl's trial attorney, Alan Tarnowski, suggested Spoerl's confession was the result of police tactics. He did not use the word "autism" in his argument. In rebuttal, the prosecutor argued that there was

no evidence or expert testimony linking Spoerl's autism to false confessions and no explanation why Spoerl still denied other offenses.

¶5 At the postconviction hearing, Tarnowski testified that his overall strategy was to challenge the confession by claiming it was false and induced by police tactics. He considered hiring an expert on false confessions, Dr. Eric Lund, but ultimately decided against it fearing that examination by an expert might result in Spoerl making self-incriminating statements as he had during a suppression hearing. Tarnowski also decided against presenting a learned treatise because he thought doing so could trigger an interview of Spoerl. Spoerl's postconviction counsel offered two learned treatises relating to false confessions. The treatises mentioned interrogation of suspects with mental problems, but did not specifically refer to autism or Asperger's syndrome.

¶6 The circuit court denied Spoerl's postconviction motion, finding that trial counsel did not perform deficiently. The court found that Tarnowski had a reasonable strategic decision not to engage an expert or present a learned treatise. The court noted that it had entered a pretrial order disallowing evidence that Spoerl was a suspect in other crimes. Use of an expert witness or learned treatise may have resulted in the court reversing its ruling and admitting that evidence because Spoerl's continued denial of involvement in the other offenses would be made more relevant if the State were required to refute evidence that Spoerl's confession was unreliable due to his autism.

DISCUSSION

¶7 A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that it prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient

performance is based on an objective standard of reasonableness as measured against prevailing professional norms. *Id.* at 688. Counsel's strategic decisions made after thorough investigation of the law and facts are virtually unchallengeable. *Id.* at 690. To establish prejudice, Spoerl must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

¶8 Spoerl's claim of ineffective assistance of trial counsel fails for several reasons. First, the claim that counsel was ineffective for failing to call an expert witness or present a learned treatise on false confessions is precluded by *State v. VanBuren*, 2008 WI App 26, ¶¶17-19, 307 Wis. 2d 447, 746 N.W.2d 545. Counsel's performance could not fall below the objective standard of reasonableness as measured against prevailing professional norms because there is no published Wisconsin case stating that expert testimony on false confessions is admissible and authorities elsewhere are split. *Id.*

¶9 Second, Spoerl did not present an expert witness at the postconviction hearing. Without evidence of what the expert would have said or how he would have been cross-examined, we cannot conclude that counsel was deficient or that the defense was prejudiced by the failure to call that witness.

¶10 Third, Spoerl failed to establish prejudice from his counsel's conduct. While the learned treatises speak generally of the phenomenon of false confessions and the effect of youth and mental disorders on interrogation, the treatises do not specifically address the significance of autism or Asperger's syndrome, and Spoerl offers no explanation for his ability to maintain his innocence regarding other crimes. Spoerl also fails to explain how the factors

recited in the articles relate specifically to his confession. The evidence presented at the postconviction hearing does not undermine our confidence in the outcome.

¶11 Finally, Spoerl has not established grounds for granting a new trial in the interest of justice. Under WIS. STAT. § 752.35 (2009-10), this court may grant a new trial in the interest of justice when the real controversy has not been fully tried or when it is probable that justice has miscarried for any reason. *State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Although Spoerl alludes to both grounds, he argues that the real controversy was not fully tried due to the absence of evidence on false confessions. Even assuming the evidence would have been admissible, we conclude that the controversy was fully and fairly tried. To the extent that Spoerl argues that a miscarriage of justice has occurred, we are not persuaded that retrial would produce a different verdict. *See id.*

By the Court.—Judgment and order affirmed.

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

