

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1615-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL W. NIPPLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Roggensack, JJ.

DYKMAN, P.J. Daniel W. Nipple appeals from a judgment convicting him of failing to act to prevent bodily harm to his child, contrary to § 948.03(4)(b), STATS., and from an order denying his postconviction motion for a new trial. Nipple first argues that his trial counsel was ineffective for failing to

raise several objections to the admission of two taped interviews Nipple gave to the police, which contained several damaging statements about Nipple's criminal history and his current probation status. Nipple also argues that his trial counsel failed to thoroughly review the two audio tapes and remove these references before the tapes were played to the jury. In addition, Nipple asserts that the trial court erred in not conducting an in camera inspection of the two tapes before it allowed the jury to hear them. We agree that Nipple's trial counsel was ineffective for not taking available steps to exclude this damaging evidence, and we also agree that the trial court erred when it failed to conduct an in camera inspection of the two tapes. Accordingly, we reverse and remand with instructions for a new trial. Because we reverse on these grounds, we need not consider Nipple's other allegations.

BACKGROUND

On November 5, 1995, Daniel Nipple was caring for his two-month-old daughter, Mercedes, while his wife, Shannan Nipple, was at work. At approximately 10:00 p.m. that night, Daniel noticed that Mercedes was having problems breathing. He ran to the home of his mother, Mary Carpenter, who lived just down the street and was trained in cardiopulmonary resuscitation (CPR). Mary came to Nipple's home and performed CPR on Mercedes, while Mary's husband called 911.

When the emergency medical service arrived at the Nipple home, they found Mercedes semi-conscious. They transported her to the Monroe Hospital emergency room, where a computer assisted tomography (CAT) scan revealed a subdural hematoma. Mercedes was then transferred to the pediatric intensive care unit of University Hospital in Madison for further neurological

observation. Once she arrived at the University Hospital, the doctors discovered that Mercedes also had a recently broken left tibia, as well as nine older bone fractures.

The police were called to investigate the causes of Mercedes' various injuries. As part of the investigation, the police interviewed Shannan and Daniel Nipple, along with other family members who often cared for the child. Detective Mark Samelstad of the Monroe Police Department later interviewed Daniel Nipple again on two separate occasions. The first interview occurred at the Green County Jail on November 14, 1995, where Nipple was being detained on a probation hold for his alleged involvement in the abuse of his child. The second interview occurred on December 5, 1995, when Nipple was no longer in custody. Both of these interviews were tape recorded.

During these interviews, the detectives asked Nipple many questions about his wife and his daughter, and whether he had ever observed any incidents of abuse. Nipple denied abusing his daughter and denied having any knowledge that his wife or any other member of his family had abused her.

The detectives used various techniques during these interviews to elicit information from Nipple. They confronted him with alleged inconsistencies between what he had told them at the hospital, and what other family members had told them about what they believe occurred that night. In particular, the detectives pressed Nipple to admit statements that his mother and sister said he had made to them about what happened. They also informed him that the doctors and medical experts who examined Mercedes believed that her injuries were caused by an adult and not by the child's brother pulling her off the couch, which is what Nipple initially believed caused his child's injuries. The detectives also

hinted to Nipple that someone was going to be charged with child abuse, and that he and his wife were suspects.¹

During these interviews, the detectives suggested that if Nipple did not abuse his child, he should provide information to assist them in finding the person who did. In particular, they asked Nipple if he ever observed his wife being “rough” with Mercedes. Nipple stated that he had.

The first instance that Nipple discussed was when Shannan angrily swept dishes and other items from an end table with her right arm while dangling Mercedes under her left arm. A glass ash tray, a glass candle, three glasses and a coffee cup were broken in the process. The second instance was when she carelessly dropped Mercedes onto a sofa bed after she became frustrated with caring for the child in the middle of the night. The final instance occurred when Shannan dropped Mercedes’ car seat roughly onto the floor while Mercedes was strapped into the seat, sending it skidding across the floor. Nipple, however, insisted that he never observed Shannan do anything that would have caused Mercedes’ various injuries.

Nipple was eventually charged with one count of failing to protect his daughter from bodily harm, contrary to § 948.03(4)(b), STATS.² At trial, the State presented medical testimony concerning the nature and extent of Mercedes’ injuries, the testimony of Nipple’s mother and sister, the testimony of the doctor

¹ At trial, Detective Samelstad testified that he did not suspect Nipple of abusing Mercedes, but that he used these techniques or tactics to convince Nipple to say something that would incriminate his wife.

² Shannan Nipple was later charged and convicted of causing Mercedes’ injuries. Her subsequent conviction was later reversed on appeal. See *State v. Nipple*, No. 98-0945-CR, unpublished slip op. (Wis. Ct. App. Nov. 5, 1998).

who had performed a two-month check-up on Mercedes just days before Mercedes stopped breathing, and the two audio tapes of Nipple's interviews with the police.

Nipple's attorney objected to the State's plan of playing the interview tapes to the jury. The first objection came after the November 14 tape was played, and the jury heard Detective Samelstad refer to Nipple's probation officer. Nipple's attorney requested that the court give an admonitory instruction to disregard the statement after the tape was played. The court agreed to do so. However, that instruction was never given because Nipple's attorney withdrew his request later during the trial.

Similarly, Nipple's attorney objected to the admission of the December 5 tape because it also contained inadmissible evidence regarding Nipple's criminal background. The trial court decided to have the parties edit all references to Nipple's criminal conviction from the tape before it was played for the jury. However, during the editing process, Nipple's attorney failed to remove all such references to his client's criminal conviction and probation status, and he later moved for a mistrial due to his error. The trial court denied the motion and decided instead to admonish the jury to disregard the references.

Nipple was ultimately convicted of failing to protect his daughter from bodily harm and was sentenced to five years in prison. He filed a postconviction motion arguing that his attorney had been ineffective in failing: (1) to argue that the prejudice of playing the tapes outweighed their probative value; (2) to redact all portions of the tapes that specifically referred to Nipple's prior criminal history; and (3) to request that the court conduct an in camera inspection of the tapes prior to presenting them to the jury. At the *Machner*

hearing,³ the trial court denied Nipple's motion, concluding that trial counsel's representation did not prejudice the trial's outcome. Nipple now appeals.

DISCUSSION

I. *Ineffective Assistance of Counsel*

In order to prove a claim for ineffective assistance of counsel, a defendant must establish that: (1) trial counsel's performance was deficient; and (2) the deficient performance prejudiced the outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985); *see also State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding *Strickland* analysis applied to ineffectiveness claims under state constitution). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. *See Strickland*, 466 U.S. at 698. The circuit court's findings of fact will not be reversed unless they are clearly erroneous. *See Pitsch*, 124 Wis.2d at 633-34, 369 N.W.2d at 714. However, whether counsel's conduct was deficient and whether it was prejudicial to the defendant is a question of law that we review de novo. *See id.* at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See Strickland*, 466 U.S. at 687. The defendant must overcome a strong presumption that his or

³ *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

her counsel acted reasonably within professional norms. *See State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990).

To prove prejudice, a defendant must show that counsel's errors were so serious that he or she was deprived of a fair trial and a reliable outcome. *See Strickland*, 466 U.S. at 687. In order to succeed, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See id.* at 669.

Nipple points to several instances that he believes show his counsel's ineffectiveness. One of those instances was when his counsel failed to eliminate all references to Nipple's prior conviction and probation status from the interview tapes before they were played to the jury. The first reference to Nipple's probation was on the November 14 tape, when Detective Samelstad said to Nipple:

Okay one other thing regards your probation officer, I don't know what he's going to do Dan. And I hope you believe [Investigator Kosek] and I when we say we had no idea that they were going to arrest you yesterday or have you picked up yesterday. I don't know what [your probation officer] intends on doing. I have no idea, and I ain't going to venture a guess.

At the hearing, after this portion of the tape was played for the jury, Nipple's trial counsel asked that the court give an admonitory instruction that the jury should not consider the statement in its deliberations. The trial court agreed and left it to the parties to agree on what instruction should be given to the jury, as well as when the instruction should be given.

Nipple's trial counsel later withdrew his request for a jury instruction, because two hours had passed between the time the jury heard this statement and the time that the instruction was to be given. He did not believe that it would be strategically prudent for him to ask the court to give the instruction at that time.

The second reference to Nipple's criminal background was contained in the December 5 tape. Nipple's attorney requested that the court either exclude the December 5 interview tape from evidence, or that it order that all references to Nipple's criminal background and probation status be removed from the tape. The trial court agreed that the jury should not be made aware of Nipple's prior conviction, and opted to have the references removed from the tape that was to be played for the jury. It left it to Nipple's attorney and the State to agree on exactly what procedure to use to remove those references. Nipple's attorney and the State apparently agreed to review the tape, along with the tape transcripts, and edited those statements from the tape. However, they forget to edit out two of Nipple's statements to the police regarding his prior conviction and probation status. Those statements are as follows:

I mean I know how it looks[,] but I swear on the [B]ible[,] I swear on my son's grave[,] I would never ever abuse any of my kids. It's all, I've done a lot of things[,] I'll admit that[.] *[C]ripes I've been convicted of a felony. I've done time in jail. I've done time in prison. I've been on probation since 1990. You know I've done, I've put a gun to a guy's face. I mean I've done it all I'll admit that[,] but I don't care where you look in them records[,] you'll never find never find anything about abusing a kid.*

(Emphasis added.)

Then, later on the tape, Nipple described a conversation with his wife as follows:

I mean I tried, I tried to leave with the kids. I always told her too. If I go them kids go with me.... I said it ain't gonna be hard for me to prove it. That you're unfit [and] that I can have the kids. I said well sure I got a felony and all this shit so I said hell we both might not even get 'em[,] I said[,] but I'll sure give it a shot.

We first will consider whether Nipple's attorney was deficient in withdrawing his request for an admonitory instruction regarding Detective Samelstad's statement during the November 14 interview that he did not know why Nipple's probation officer had him arrested. Originally, Nipple's attorney requested that the statement be stricken from the record and that the jury be instructed to disregard it. Both the State and the court agreed that such an instruction would be appropriate.

However, the instruction was not immediately given, because one of the State's medical experts had to testify out of order. When Detective Samelstad was recalled approximately two hours later, and the trial court was ready to give the instruction, Nipple's attorney decided to withdraw his request, saying that it was strategically unsound to request an admonitory instruction two hours after the jury heard the statement. He believed, or at least hoped, that the jury had forgotten the statement by that point in the trial, and if it had, he did not want the court to refresh its memory by giving an admonitory instruction.

We will not second guess trial counsel's selection of trial tactics or strategies in the face of alternatives that he or she has considered. See *State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Rather, we "judge the reasonableness of counsel's challenged conduct on the facts of the particular case,

viewed as of the time of counsel's conduct." *Pitsch*, 124 Wis.2d at 636, 369 N.W.2d at 716. We conclude that trial counsel's strategic decision was not unreasonable. We agree that there may have been a chance that the jury ignored, did not understand, or had already forgotten about the statement, and if so, it may have been imprudent to re-introduce the statement through an admonitory instruction.

However, as for the failure to discover and remove all references to Nipple's prior conviction from the December 5 tape, we conclude that Nipple's trial counsel was deficient. Trial counsel was aware that the December 5 tape contained damaging references before the tape was played to the jury, but he failed to make sure that those references were removed before the tape was played to the jury. As a result, the jury heard inadmissible evidence. *See* §§ 904.01-904.04, STATS.

We next look to see whether trial counsel's deficiency prejudiced the outcome of these proceedings. This appears to have been a close case, which was decided entirely on circumstantial evidence.⁴ It is common in these types of cases for a jury to make its decision based on witness credibility. Nipple's statement that he was convicted of a felony for "putting a gun to a guy's face," that he had spent time in jail and prison, and that he was on probation, substantially

⁴ The evidence presented at trial consisted of medical testimony as to the probable cause and severity of Mercedes' injuries, as well as the time period in which they occurred. There was no direct evidence presented that linked Nipple to the abuse of his child. Nipple's mother and sister and a friend of the family were the only non-medical people to testify at trial, and none of them said anything that would indicate that Nipple abused his child or was aware that his wife was abusing the child. And, of course, there were Nipple's two taped interviews with the police. The State's case essentially was that Shannan abused Mercedes, and because Daniel was unemployed or in school during this period of time, he must have been aware that his wife was abusing their infant child.

undermined his credibility. Furthermore, the jury never would have known of these facts had the tapes not been played for the jury. Overall, we conclude that trial counsel's failure to thoroughly edit these statements before the tape was played for the jury is sufficient to undermine our confidence in the outcome of this case.

II. *In Camera Inspection*

Nipple also contends that the trial court erred in admitting the police interview tapes without first conducting an in camera inspection of them as required under *Wilson v. State*, 59 Wis.2d 269, 289, 208 N.W.2d 134, 145 (1973). In *Wilson*, the supreme court was confronted with a situation in which the trial court admitted into evidence the police interview tapes of the defendant, who had been charged with armed robbery, without first conducting an in camera inspection of those tapes to determine whether the tapes were relevant. The court concluded that the trial court erred in not first inspecting the tapes to determine whether the tapes were relevant. *See id.* It held that, “[a]s a matter of authentication, laying the foundation, and determining relevancy, the court should always listen to the tapes to determine their admissibility.” *Id.* (footnote omitted).

Nipple's trial counsel objected to the admission of these interview tapes on several grounds, one being that they were irrelevant. Without listening to the tapes, the court concluded: “[i]t's clear to this Court that the tape is relevant. There is no question about it, and the questions and answers in this matter are relevant.” *Wilson*, however, requires that trial courts conduct in camera inspections of such tapes. We conclude that the trial court erred by not doing so.

Under *Wilson*, we may reverse if we conclude that the interview tapes are both irrelevant and prejudicial. *See Wilson*, 59 Wis.2d at 288, 208

N.W.2d at 144. Section 904.01, STATS., defines relevant evidence 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. *See also Buttner v. American Honda Motor Co.*, 194 Wis.2d 122, 147, 533 N.W.2d 476, 486 (1995) (any evidence that tends to prove material issue is relevant, and evidence that does not is irrelevant). The fact that Nipple was convicted of a felony, put a gun to a man’s face and was on probation does not make any fact of consequence under § 948.03(4)(b), STATS.,⁵ or any other applicable statute, more or less likely. Therefore, this information is irrelevant.⁶

III. Admonitory Instructions

The State points out that the trial court gave an admonitory instruction to the jury not to consider those portions of the tapes that referred to Nipple’s criminal conviction or his probation status. In *Roehl v. State*, 77 Wis.2d 398, 413, 253 N.W.2d 210, 217 (1977), the supreme court recognized that “[p]ossible prejudice to a defendant is presumptively erased from the jury’s

⁵ Section 948.03(4)(b), STATS., reads as follows:

A person responsible for the child’s welfare is guilty of a Class D felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

⁶ The State concedes that while the trial court erred in not conducting an in camera inspection of these tapes, the error was harmless. We disagree. The test for harmless error is “whether there is a reasonable possibility that the error contributed to the conviction.” *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). For reasons already discussed, we conclude that there is a reasonable possibility that the admission of Nipple’s statement contributed his conviction.

collective mind when admonitory instructions have been properly given by the court.” We are to assume that “a properly given admonitory instruction [will be] followed.” *State v. Leach*, 124 Wis.2d 648, 673, 370 N.W.2d 240, 253-54 (1985). However, in *Pitsch*, the supreme court stated that “[c]ases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant’s constitutional rights” *Pitsch*, 124 Wis.2d at 645 n.8, 369 N.W.2d at 720 n.8 (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985)).

We conclude that this is one of those cases in which an admonitory instruction was insufficient to remove the prejudice. In a close case such as this, where the evidence is circumstantial and the jury is forced to decide guilt based on credibility determinations, we are satisfied that the admonitory instructions were insufficient to remove the prejudice caused by the admission of this evidence. Accordingly, we reverse and remand with instructions for a new trial.

Because we reverse on these grounds, we need not consider Nipple’s other claims as to how his trial counsel was ineffective for not raising certain evidentiary objections to the admission of the tapes, or his claim that the trial court erred in not granting a mistrial.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

