**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 20, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP2441-CR** **Cir. Ct. No. 2007CF314**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID W. FREE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. A jury convicted David W. Free of first-degree recklessly endangering safety, aggravated battery by use of a dangerous weapon, false imprisonment and substantial battery. The trial court denied his motion for postconviction relief. Free seeks a new trial on the bases of ineffective assistance

of trial counsel, prosecutorial misconduct, newly discovered evidence and that reversal is warranted by the cumulative effect of those errors and in the interest of justice. We disagree with Free and affirm the judgment and order.

¶2 After an evening out, Free and his girlfriend, Cassandra Sax, went back to Sax's house. An argument begun earlier immediately turned physical. Each blamed the other. Sax claimed that Free hit her in the face so hard that it knocked her down, and as she got up he stabbed her with something sharp, then would not let her call for help or leave her bedroom for four hours. Free claimed that Sax slapped him first, and that he hit her in response, causing her to spin around and fall onto the kitchen counter, apparently landing on something sharp, and that she refused medical care beyond the first aid he gave her. Sax did not know what the sharp object was and Free claimed he saw nothing on the counter.[1] Sax ended up with a black eye, a chipped tooth, a chest wound and, according to the examining cardiothoracic surgeon, a punctured lung from the stab wound. Free ended up with criminal charges: attempted first-degree homicide, aggravated battery by use of a dangerous weapon, substantial battery and false imprisonment.

¶3 The trial took five days. The jury rejected the attempted first-degree homicide charge, finding Free guilty instead of the lesser-included charge of first-degree recklessly endangering safety. It also found him guilty of the remaining three counts. Free's newly appointed counsel moved for postconviction relief. The motion alleged only that trial counsel had been ineffective for failing to retain

[1] The wound was consistent with one made by a knife. A knife set on the counter later was noted to be missing a knife. A bladeless handle matching the handles of other knives in the set was found on the kitchen floor and put into evidence.

and call a medical expert who could rebut the State's case, but did not state what that expert would have established. The court denied the motion. Free appealed.

¶4 Free then retained new postconviction counsel and this court permitted his appointed counsel to withdraw and allowed Free to dismiss his appeal and file a new postconviction motion alleging ineffective assistance of postconviction counsel, among other issues. He sought a new trial or modification of his thirty-year sentence. The trial court denied the motion and Free appeals.

¶5 Free first claims that the prosecutor knew or should have known that assertions and suggestions made before the jury were false and that this misconduct denied him his due process right to a fair trial. Whether prosecutorial misconduct occurred and whether such conduct requires a new trial is left to the discretion of the trial court. ***State v. Bembenek***, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983). This court will not reverse unless the trial court erroneously exercised its discretion. ***Id.***

¶6 Prosecutorial misconduct violates due process if it "poisons the entire atmosphere of the trial." ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996) (citation omitted). Reversal on this basis is drastic and should be approached with caution. ***Id.*** It is the defendant's burden to establish intentional prosecutorial misconduct. ***State v. Harrell***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978).

¶7 Free's specific misconduct complaint stems from Sax's rebuttal testimony on the fourth day of trial. Free contends that, up to that point, Sax had maintained that the stabbing occurred so quickly that she had not observed his hands or the object used. In her rebuttal testimony, however, Sax testified that Free stabbed her "like this," demonstrating a motion the trial court described as

"[m]uch as one would swing a hammer." Defense counsel attempted to parlay Sax's new description into a credibility issue:

> Now she's telling us that she did see the hand and that the only thing she didn't see was the weapon in the hand. But she saw the action of stabbing. Now, this is an important detail. You may recall when that came up for the first time ever yesterday—

¶8 The prosecutor objected, hinting that Sax previously had made similar statements, but that they were kept from the jury under rules of evidence that prior consistent statements are not admissible. The prosecutor reiterated that implication in closing arguments, stating that "all the times she may have said that on previous occasions to people and it was the same arm motion, same situation, it doesn't get to be brought before you" and that it was "unfair" for defense counsel to suggest otherwise. The trial court rejected Free's claim of prosecutorial misconduct because the instances were "of such *de minimus* effect so as not to affect the outcome of the trial." We agree.

¶9 We presume the jury followed the court's instructions to base its verdict solely on the evidence received during the trial, that closing arguments are not evidence, and to disregard any suggestion in the arguments about any facts not in evidence. *See* ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 709 N.W.2d 497 (Ct. App. 2005). Further, the prosecutor's suggestion that Sax had made prior "hammer-swing" comments could not have bolstered Sax's credibility because such comments contradicted her earlier testimony and did not jibe with the severity of the wound. Indeed, the jury's rejection of the attempted homicide charge confirms that it did not buy Sax's late-stage description of the assault.

¶10 Even if the prosecutor's remarks were improper, we conclude that they did not "so infect[] the trial with unfairness as to make the resulting

conviction a denial of due process." ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted). Nor do we believe the remarks detrimentally changed the result the jury reached. *See* ***Taylor v. State***, 52 Wis. 2d 453, 460, 190 N.W.2d 208 (1971) (alleged misconduct is harmless if, without it, the same result would have been reached by the jury on the facts presented).

¶11 Free next contends that newly discovered evidence, in the form of postconviction motion hearing testimony of forensic pathologist Dr. Jeffrey Jentzen, entitles him to a new trial. Dr. Jentzen testified based on his review of the complaint, Sax's medical records, photographs of her injuries, her rebuttal testimony and the trial testimony of Dr. Paul Werner, Sax's cardiothoracic surgeon. Although he agreed with Dr. Werner that the knife pierced Sax's skin and subcutaneous tissue, went past her ribs and penetrated her chest cavity, Dr. Jentzen characterized the wound as a relatively shallow, horizontal slash wound that was not consistent with Sax's testimony that she was stabbed in a downward, hammer-swing motion. Dr. Jentzen also disagreed with Dr. Werner that the knife definitely punctured Sax's lung because the resulting bleeding and pneumothorax were more minor than he would expect to see with a lung puncture. He opined that the pneumothorax could have resulted from air entering the chest cavity through the chest wound.

¶12 We accept that the Dr. Jentzen evidence constitutes newly discovered evidence because Free discovered it postconviction, was not negligent in seeking it, and it is material and not cumulative. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). What we must determine, though, is whether hearing the new evidence would have led the jury to have a reasonable doubt as to Free's guilt. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. This presents a question of law. *See* ***id.***, ¶33.

¶13 Cardiothoracic surgeon Dr. Werner formed his opinion based on physically examining Sax; pathologist Dr. Jentzen based his on a record review. Even if a jury would give more weight to Dr. Jentzen's testimony and find that a slash wound did not penetrate her lung, it would not change the result of the trial.

¶14 The new evidence would not convince a jury to believe Free's defense. Free claimed that after he struck Sax in the eye, she spun around, fell onto something sharp on the counter—what, he did not know—and "slithered" to the floor. Falling onto a sharp object would be more consistent with a stab wound; slithering to the floor would be more consistent with a vertical slash wound.

¶15 The new evidence also would not change Free's convictions for recklessly endangering safety or aggravated battery. To find him guilty of recklessly endangering safety, the jury had to find that he knowingly created an unreasonable and substantial risk of death or great bodily harm under circumstances which showed utter disregard for human life. *See* WIS. STAT. §§ 939.24(1) and 941.30(1) (2009-10)[2]; *see also* WIS JI—CRIMINAL 1345. Even if the jury was persuaded that the wound was a "slash," it indisputably penetrated Sax's skin, subcutaneous fat and muscle, and chest cavity. Dr. Jentzen's opinion would not have led jurors to harbor reasonable doubt that, with little additional force, a far more damaging wound could have been inflicted such that Free was aware that his action posed an unreasonable and substantial risk of great bodily harm, if not death, and evinced utter disregard for Sax's life.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶16 To find Free guilty of aggravated battery, the jury had to find that he intentionally caused Sax great bodily harm. *See* WIS. STAT. § 940.19(5). Great bodily harm is bodily injury that either creates a substantial risk of death or causes serious permanent disfigurement, permanent or protracted loss or impairment of a bodily function, or other serious bodily injury. WIS. STAT. § 939.22(14). The phrase "other serious bodily injury" allows a jury to find "great bodily harm" when injuries it deems "serious" have occurred. *See* ***La Barge v. State***, 74 Wis. 2d 327, 332-34, 246 N.W.2d 794 (1976); *see also* ***Cheatham v. State***, 85 Wis. 2d 112, 124, 270 N.W.2d 194 (1978) (stating that the line between "great bodily harm," which requires "serious" injury, and "bodily harm" is not mathematically precise but is one a jury is capable of drawing).

¶17 Whether slashed or stabbed, Sax was cut with sufficient force to penetrate her chest cavity. Further, the jury heard that she complained to Free that she could not breathe, that she bled profusely and that her chest wound required her transfer from Kenosha to the care of a cardiothoracic surgeon in Milwaukee, the insertion of a chest tube to drain the accumulating blood and a three-day hospital stay. We have no doubt the jury still would have been satisfied that Free intentionally caused Sax "serious bodily injury."

¶18 Free next contends that his trial counsel, Mark Nielsen, rendered ineffective assistance. To prevail on this claim, Free must show that Nielsen's performance was deficient and that he was prejudiced as a result of this deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis. 2d 642, 679 N.W.2d 893. To prove deficient performance, Free must identify Nielsen's specific acts or omissions that fell "outside the wide range of professionally competent assistance." *See* ***Taylor***, 272 Wis. 2d 642, ¶13 (citation omitted). To show prejudice, he must demonstrate

that Nielsen's errors were so serious that the result of the proceeding was unreliable. *See* ***id.***

¶19 Both prongs of the ***Strickland*** test involve mixed questions of law and fact. ***Taylor***, 272 Wis. 2d 642, ¶14. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** Whether counsel's performance was deficient and prejudicial are questions of law, however, on which we do not defer to the decision of the trial court. ***Id.*** If Free fails to prove either deficient performance or prejudice, his entire ineffective assistance of counsel claim fails. *See* ***id.***; *see also* ***Strickland***, 466 U.S. at 697.

¶20 Free identifies four areas of alleged deficiency—first, that Nielsen failed to obtain a stipulation or to cross-examine Sax concerning Free's alleged threats to harm her young daughter. The little girl was spending the night with her father, Sax's ex-husband, and was to be dropped off by 7 a.m. It came out in discovery that Sax said she feared calling the police after the attack because Free threatened to kill her and to "slash [the daughter's] fuckin' throat." Sax later clarified that Free had made such threats on multiple other occasions, most recently about a week earlier, but not on this particular night.

¶21 Before trial, the prosecutor, defense counsel and Free agreed that Sax would testify that she delayed calling the police because Free threatened her and her child but that she would make no reference to when or under what circumstances he allegedly made the threats. The prosecutor agreed to instruct Sax accordingly. Nonetheless, Sax testified on direct that Free told her that night that if she involved the police he would kill her and her daughter and would "slash [the daughter's] fuckin' throat." Sax repeated a toned-down version of that claim on cross-examination.

¶22 Nielsen testified at the postconviction motion hearing that when the agreement "blew up," he "really [did]n't want to get into the question of how often [his] client threatened to slash the little girl's throat." He conceded, however, that he could have had Sax stipulate to the agreed-upon testimony and then impeached her with it, or called the prosecutor as a witness. The trial court found that Nielsen's instantaneous decision was to not object and draw further attention to the statement. That finding is not clearly erroneous and, we conclude, represents a reasonable strategy.

¶23 Free's second ineffectiveness claim stems from Nielsen's acknowledged oversight in not cross-examining Sax regarding admissions contrary to her "hammer swing" allegation. He argues that the "hammer swing" not only contradicts her earlier statements but the more forceful downward swing would have caused a wound unlike and more severe than the one Sax sustained. The trial court found that cross-examination might have brought Sax's credibility into question but that, in view of all the evidence, it would have made no difference in the outcome of the trial.

¶24 We agree. The hammer-swing description was inherently incredible. Thus, even if Nielsen could have capitalized to some extent upon this turnabout in Sax's testimony, we conclude there is no possibility that, in the context of all of the evidence, counsel's failure to do so prejudiced Free.

¶25 Free next asserts that trial counsel deficiently failed to object to the prosecutor's closing argument. We already have concluded the trial result was not impacted because Sax's "hammer swing" testimony itself was not believable and the admonitory instructions cured any error.

¶26 Finally, Free contends that Nielsen was ineffective for failing to investigate whether expert medical testimony was necessary. *See* ***State v. Thiel***, 2003 WI 111, ¶30, 264 Wis. 2d 571, 665 N.W.2d 305. The medical records indicated that Sax's wound was approximately .3 cm deep. Dr. Werner testified at trial, however, that Sax suffered a penetrating wound and that the measurement indicated the depth only of the skin wound, not "where the wound went from there," because the muscle closes up over the wound. Nielsen testified that if he had known that would be Dr. Werner's testimony, he at a minimum would have contacted the nurse who measured the wound and then evaluated whether to engage an expert.

¶27 "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." ***Strickland***, 466 U.S. at 691. Regardless of the nature of the wound, and whether the object penetrated or stopped just shy of Sax's lung, Dr. Jentzen's testimony did not dispute the risk posed by Free's actions or the extent of Sax's injuries. Even if given more weight than Dr. Werner's, we conclude that Dr. Jentzen's testimony would not have raised any reasonable doubt about Free's guilt of the crimes of recklessly endangering safety and aggravated battery. Our confidence in the reliability of the trial is not shaken.

¶28 Free next argues that the cumulative effect of the claimed errors and new evidence makes a different result on retrial reasonably probable. We are unconvinced. Prejudice should be evaluated based on the cumulative effect of counsel's deficiencies. ***Thiel***, 264 Wis. 2d 571, ¶59. Even in combination, trial counsel's alleged errors do not constitute sufficient cumulative prejudice to justify a new trial under ***Strickland***.

¶29 Finally, Free contends that if he does not prevail in his other arguments, the claimed errors' combined effect justifies reversal in the interests of justice under WIS. STAT. §752.35. He asserts that the real controversy was not fully tried, *see* ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990), because "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case," *see* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶30 Free premises his demand for a new trial in the interest of justice on the same arguments that underlie his other claims. For the reasons already given in rejecting those arguments, no basis exists to order a new trial under WIS. STAT. § 752.35.

*By the Court*.—Judgment and order affirmed.

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