COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP771-CR **Cir. Ct. No. 2008CF291**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH R. PEITZMEIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. A jury found Kenneth R. Peitzmeier guilty of physical abuse of a child, recklessly causing bodily harm, for injuries to T.M.P., his four-and-a-half-month-old daughter. He appeals the judgment of conviction and the order denying his motion for postconviction relief. We affirm.

¶2 T.M.P.'s mother brought T.M.P., who was unable to move her left arm, to pediatrician Dr. Jennifer Brault. The baby's "very sore" arm, multiple bruises in various stages of healing, periorbital swelling, subconjunctival hemorrhage, and bulging fontanelle led Dr. Brault to suspect child abuse. She sent T.M.P. to the emergency room. A left clavicle fracture, a possible femur fracture, and two, perhaps three, right-side skull fractures were identified.

¶3 Peitzmeier was charged only in relation to the skull fractures. He gave police and physicians several oral and written accounts of the source of the injuries. He first said he had propped her on the couch while he was on the phone and she rolled off onto the floor. Later he said that T.M.P. also had fallen a week or ten days before the tumble from the couch. He described lying on the couch with T.M.P. on his chest and said he fell asleep, causing her to roll off and strike her head on the metal part of a "bouncy chair."

¶4 Peitzmeier later gave Detective Matt Walsh and social worker Mary Fournier another explanation. He said that, while overtired from a lack of sleep, he grew frustrated with T.M.P.'s fussing and accidentally "forcibly placed" or "tossed" her into her crib "with more force than usual," so that she struck her head on a hard plastic mobile. He subsequently recanted the written statement of that account, claiming it was suggested to him by Fournier, and that he had lied, even at the risk of jail, so that the child could remain with her mother instead of being placed in foster care. The jury returned a guilty verdict.

¶5 Postconviction counsel filed a no-merit report. This court rejected it and ordered a hearing to address several potentially meritorious issues. After the hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), the trial court denied the motion in a comprehensive written decision.

¶6 On appeal, Peitzmeier contends: (1) defense counsel, Attorney Katherine Kruger, ineffectively failed to move to suppress his incriminating statements and to hire a medical expert to offset the State's expert medical testimony; (2) the trial court erroneously exercised its discretion in admitting other-acts evidence; (3) the failure to object to the admission of his incriminating statements was plain error; (4) her ineffective assistance was structural error; and (5) the interests of justice warrant a new trial. We address each in turn.

Ineffective Assistance of Counsel

¶7 To establish ineffective assistance of counsel, Peitzmeier must demonstrate that both Kruger performed deficiently and that the deficiencies prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Demonstrating deficient performance requires proof that counsel "'made errors so serious that [she] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citation omitted). Demonstrating prejudice requires showing that her "errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id.*** (citation omitted). We accord counsel great deference and make every effort to avoid a determination of ineffectiveness based on hindsight. ***Id.***

A. Motion to Suppress Statements

¶8 Peitzmeier contends Kruger should have moved to suppress his inculpatory statements because they were the result of coercion and false promises. He asserts he went along with the "fabricated … crib scenario" only because, threatened with T.M.P.'s removal from the home, he felt "coerc[ed] … into saying whatever it would take" to keep her with her mother, he did not want to implicate the mother in T.M.P.'s injuries, and police promised not to arrest him.

¶9 "[T]o justify a finding of involuntariness, there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Owens***, 148 Wis. 2d 922, 931, 436 N.W.2d 869 (1989) (citation omitted). Noting that the prospect of prison is inherent in a child abuse investigation, the court found that if Peitzmeier felt coerced by it, it was "purely a self-imposed pressure … involv[ing] no improper pressure from law enforcement" Self-imposed coercive elements do not negate the voluntariness of his statements. *See* ***State v. Lackershire***, 2007 WI 74, ¶63, 301 Wis. 2d 418, 734 N.W.2d 23. Peitzmeier's additional claim that he confessed to avoid implicating T.M.P.'s mother also did not destroy the voluntariness of his statements. *See* ***Drake v. State***, 45 Wis. 2d 226, 233, 172 N.W.2d 664 (1969).

¶10 Likewise, no improper promises induced Peitzmeier's statements. Peitzmeier testified at the ***Machner*** hearing that Walsh promised he would not arrest him. Walsh testified at trial, however, that he told Peitzmeier he would not arrest him at home; that promise was kept. Peitzmeier himself testified at trial that when he gave the "crib statement" to Walsh at his apartment, Walsh said he could go to the hospital as "[h]e wasn't arresting me there."

¶11 The trial court found incredible Peitzmeier's claim at the ***Machner*** hearing that he did not think he would be arrested after admitting to child abuse and found, in light of Peitzmeier's extensive criminal record and having been ***Mirandized***,[1] that he knew his statements could be used against him. The findings are not clearly erroneous, *see* WIS. STAT. § 805.17(2) (2013-14),[2] and it is for the

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

court to resolve questions of credibility between witnesses who give conflicting testimony as well as contradictions in a single witness's testimony, *see* ***Owens***, 148 Wis. 2d at 930. In addition, the court stated that it would have denied a motion to suppress Peitzmeier's statements. Counsel is not ineffective for failing to bring a meritless challenge. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶12 We therefore reject his added claim of "plain error" and "structural error." Counsel's decision not to bring a motion to suppress noncoerced statements is not plain error because it was not fundamental, obvious, and substantial. *See* ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. If the court would have denied the motion to suppress the statements, it also likely would have overruled an objection to their admission.

B. Medical Expert

¶13 Pietzmeier proceeded on an accident defense. Dr. Thomas Valvano, one of the State's medical experts, testified at a child in need of protective services (CHIPS) proceeding that T.M.P.'s skull fractures could have resulted accidentally when she rolled off Peitzmeier's chest and hit the metal portion of the "bouncy chair." Anticipating that he would testify similarly at trial, defense counsel made limited efforts to locate an expert and ultimately did not retain one. At trial, the State's medical experts all testified that T.M.P.'s injuries were not consistent with an accident.

¶14 The trial court found that Kruger's "cursory" efforts to secure an expert amounted to deficient, but not prejudicial, performance. The State contends it was not deficient because Kruger based her strategy on what she reasonably expected Dr. Valvano's testimony to be based on his sworn CHIPS testimony.

¶15 We will sidestep addressing whether counsel's performance was deficient because we agree with both the trial court and the State that the failure to retain an expert was not prejudicial. *See* ***Johnson***, 153 Wis. 2d at 128 (we may avoid the deficient performance analysis altogether if the defendant has failed to show prejudice).

¶16 Peitzmeier contends that Dr. Richard Tovar, who testified for the defense at the ***Machner*** hearing, could have refuted medical testimony relevant to the timing of and force required to cause T.M.P.'s injuries. He also would have disputed the existence of T.M.P.'s femur and third skull fractures and the testimony that the skull heals differently than other bones. We disagree that Dr. Tovar's testimony was so significant as to undermine the jury's verdict.

¶17 The charges arose from the skull fractures; if there were two or three is not critical to ascertaining whether the injuries were accidentally caused, which was the issue, and a broken femur was not the subject of the trial. Similarly, the rapidity of the skull's healing process goes only to determining when the injury occurred; some of the time frames testified to, including Peitzmeier's, overlapped; many were estimates. Dr. Tovar disagreed with Drs. Brault and Valvano's testimony to the effect that forcefully tossing the baby into the crib could have fractured her skull, but neither had opined about the necessary degree of force.

¶18 Dr. Tovar opined that T.M.P.'s injuries were inconsistent with being caused accidentally and would have required significantly more force than was possible in Peitzmeier's crib account.[3] Assuming the jury would have accepted

[3] Dr. Tovar did not speak to Peitzmeier. He apparently got information about the crib scenario from Peitzmeier's statement to police.

Dr. Tovar's testimony, it could have allowed for an inference that someone besides Peitzmeier was responsible—if the jury also believed Peitzmeier's account. Another reasonable inference, though, is that Peitzmeier downplayed the amount of force he used or was otherwise untruthful in explaining how the baby was injured. As the jury is free to believe some witnesses and disbelieve others, *see* ***State v. Sarinske***, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979), it could have rejected Peitzmeier's account altogether. We will not second-guess a jury's credibility determinations. ***Id.***

¶19 Peitzmeier also asserts that Dr. Tovar's testimony proves that Kruger pursued a prejudicially unreasonable defense and essentially deprived him of a defense. Peitzmeier's argument is something of a Catch-22: Kruger ineffectively failed to retain an expert but retaining one would have proved the futility of his accident defense—the stance he maintained from the outset through sentencing. The overall evidence was such that the absence of Dr. Tovar's testimony does not undermine our confidence in the outcome.

¶20 Kruger's trial strategies and decisions do not constitute structural error, a "defect affecting the framework within which the trial proceeds, … infect[s] the entire trial process and necessarily render[s] a trial fundamentally unfair." ***State v. Travis***, 2013 WI 38, ¶54, 347 Wis. 2d 142, 832 N.W.2d 491 (citations omitted).

"Other-Acts" Evidence

¶21 Peitzmeier argues that the court erroneously exercised its discretion because it allowed the State to introduce evidence of all of T.M.P.'s injuries without engaging in the necessary three-prong other-acts analysis set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Under that framework, the

court must assess whether: the evidence is offered for an acceptable purpose, WIS. STAT. § 904.04(2); the evidence is relevant, WIS. STAT. § 904.01; and 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, WIS. STAT. § 904.03. ***Sullivan***, 216 Wis. 2d at 772-73.

¶22 "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold its decision if it examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Id.***

¶23 We are not persuaded that the court admitted the evidence of T.M.P.'s other injuries as other acts. It expressly stated the evidence was allowed in as evidence of "battered child syndrome" under ***State v. Johnson***, 135 Wis. 2d 453, 457-58, 400 N.W.2d 502 (Ct. App. 1986). Rather than being introduced to establish that Peitzmeier inflicted the other injuries, the evidence was offered only to show that they were not the product of accident.

> The demonstration of battered child syndrome "simply indicates that a child found with [serious, repeated injuries] has not suffered those injuries by accidental means." Thus, evidence demonstrating battered child syndrome helps to prove that the child [suffered injury] at the hands of another and not by falling off a couch, for example; it also tends to establish that the "other," whoever it may be, inflicted the injuries intentionally. When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries.

Estelle v. McGuire, 502 U.S. 62, 68 (1991) (citations omitted; first alteration in original). The court again clarified that Peitzmeier was being tried only for the skull fractures, not the bruises, femur and clavicle fractures, or bleeding or swelling of her eye.

¶24 Even if looked at as other-acts evidence, our independent review of the record sustains the court's ruling that the evidence was admissible. *See* ***Sullivan***, 216 Wis. 2d at 781. The pediatrician's concern about T.M.P.'s other injuries led to the discovery of her skull fractures, supplying context or a more complete explanation of the case, an acceptable purpose under WIS. STAT. § 904.04(2). *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983); ***Sullivan***, 216 Wis. 2d at 772.

¶25 The evidence was relevant to show that T.M.P.'s injuries were a product of child abuse, rather than accident. *See* ***Estelle***, 502 U.S. at 68; ***Sullivan***, 216 Wis. 2d at 772. Its probative value substantially outweighed its prejudicial impact because the court instructed the jury it must not consider this evidence to conclude that Peitzmeier acted in conformity with a certain character trait with respect to the charged offense. *See* WIS. STAT. § 904.03; ***Sullivan***, 216 Wis. 2d at 772-73.[4] Jurors are presumed to have followed the instructions. ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

[4] The court fashioned a jury instruction that encompassed the concepts of battered child syndrome and other-acts evidence. It read:

> Evidence has been presented regarding other injuries to [T.M.P.] for which the defendant is not on trial. Evidence of injuries to [T.M.P.] other than linear skull fractures was heard in court. The other injuries are not to be used to identify who caused the skull fractures. It is only to be used to consider whether the skull fractures were caused by accident.

(continued)

¶26 The court examined the relevant facts, applied a proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. The evidence was properly admitted under either theory.

¶27 Finally, as an alternative to his other claims, Peitzmeier asks this court to order a new trial in the interest of justice. He contends that the cumulative effect of counsel's errors, especially the failure to retain an expert, prevented the real controversy from being tried. Because Peitzmeier failed to demonstrate either that counsel's performance was deficient or, if arguably so, that it prejudiced his defense, we conclude that the issue of his guilt or innocence was fully tried. We deny his request for a new trial.

By the Court.—Judgment and order affirmed.

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

> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.
>
> You may consider this evidence only for the purpose I have described giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person or that the defendant caused these injuries above and for either of those reasons is guilty of the offense charged.