COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP883-CR **Cir. Ct. No. 2006CF723**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERBERT AMBROSE DARDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Vergeront, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Herbert Darden appeals a judgment of conviction for one count of attempted first-degree murder and one count of armed robbery, and from the order denying his postconviction motions. Darden claims that his

trial counsel was ineffective, entitling him to a new trial. We disagree and therefore affirm.

BACKGROUND

¶2 In January 2006, David Barber was walking to his girlfriend's house in Beloit at around 9:00 p.m. Barber was approached by a man dressed all in black, including a hoodie, ski mask and hat. Due to the man's distinctive gait, or limp, Barber suspected that the man was a person he knew who went by the street name "Burglar."

¶3 Burglar approached Barber, put a gun to Barber's head and demanded money. After Barber gave Burglar all his money, Burglar demanded that Barber pull down his pants and move to another place. Instead of complying, Barber grabbed Burglar's hand that held the gun and the two began to struggle. Barber testified that in the course of the struggle, the ski mask came down and Barber was able to confirm from seeing his hair and part of his face that the man was in fact the man he knew as Burglar.

¶4 When the pair disengaged, Burglar shot Barber in the chest. As Barber was trying to run away, he was shot twice more. After making his escape and calling his aunt, Barber was taken to a hospital where he gave a statement to the police.

¶5 While being treated at the hospital, Barber was shown a photo array and, although he still only knew the man as "Burglar," he identified Darden's picture as that of his assailant. Darden's photo was in the array because Barber's mother, Jaqueline Barber, told police that the man known as Burglar was Darden. However, while she also knew Darden as Burglar, Jaqueline did not know

Burglar's name to be Herbert Darden from her own first-hand knowledge, but rather, she learned his name from a friend, Antoneisha Lyles, after making a telephone call from the hospital.

¶6 Darden was found guilty of attempted first-degree murder and armed robbery following a jury trial. Darden moved the circuit court for postconviction relief on the basis of ineffective assistance of counsel. The court denied Darden's motion following a ***Machner***[1] hearing. Darden appeals.

DISCUSSION

¶7 Darden claims ineffective assistance of his trial counsel on the grounds that counsel: (1) failed to adequately object to "escape evidence" because the objection was not specifically based upon what he claimed to be our holding in ***State v. Miller***, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999); (2) failed to call Antoneisha Lyles as a witness to testify that she did not tell Barber's mother that Burglar was Darden; and (3) failed to call Sarah Scales as a witness to testify that Darden did not limp.

¶8 To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was both deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. We need not address both

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

aspects of the ***Strickland*** test if the defendant fails make a sufficient showing on either one. *See* ***id.*** at 697.

¶9 Our review of an ineffective assistance of counsel claim presents a mixed question of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** The court's legal conclusions, whether counsel's performance was deficient and, if so, prejudicial, are questions of law that we review de novo. ***Id.*** at 128.

A. Objection to "Escape Evidence"

¶10 On the second day of the jury trial, the State called Officer Marshon Henderson, an investigator with the Robbins, Illinois police department to testify. Before Henderson was sworn in by the court, Darden's trial attorney objected to Henderson's anticipated testimony, and explained his understanding that Henderson would testify that while Darden was being held in police custody for the charges underlying this case, as well as charges resulting from an unrelated case for domestic disturbance, Darden escaped. Darden's counsel objected to the introduction of the escape as inadmissible flight evidence on two different grounds.

¶11 First, calling it "improper character evidence," Darden's trial counsel objected under WIS. STAT. §§ 904.03 and 904.04 (2009-10),[2] that the evidence is not relevant and that, to the extent that it is relevant, any relevance is

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

outweighed by the danger of "unfair prejudice." Trial counsel further argued that the escape was not evidence of flight at all, since Darden was recaptured in Rockford, Illinois, near the Wisconsin border and he was "coming back to Rock County" to face the charges.

¶12 Darden argues on appeal that counsel was deficient for not making a specific objection that there were "independent reason[s] for flight known by the court which [could not] be explained to the jury because of [their] prejudicial effect upon the defendant," under the precedent of ***Miller***, 231 Wis. 2d at 460. Darden's argument is without merit.

¶13 It is well established that evidence of "'an accused's flight or related conduct is generally admissible against the accused as circumstantial evidence of consciousness of guilt and thus of guilt itself.'" ***Id.*** (citation omitted). In reviewing the law on admissibility of flight evidence in ***Miller*** we quoted a Mississippi case, ***Liggins v. State,*** 726 So.2d 180, 183 (Miss. 1998): "Evidence of flight is inadmissible where there is 'an independent reason for flight known by the court which cannot be explained to the jury because of its prejudicial effect upon the defendant.'" ***Miller***, 231 Wis. 2d at 460. This single statement is the basis of Darden's argument.

¶14 At the ***Machner*** hearing, Darden's trial counsel stated that he was familiar with ***Miller*** and deliberately decided not to utilize that case in his objection. Counsel explained:

> Well, I thought that the ***Miller*** case was more helpful to the State than to the defense, actually. I thought—when you look at that case, the trial judge in ***Miller*** allows the evidence to come in under similar facts situations as this particular case, so I thought, if anything, ***Miller*** would help the State as opposed to the defense.

¶15 We agree with the analysis of Darden's trial counsel at the ***Machner*** hearing, that ***Miller*** did not adopt the bright line rule that Darden now suggests. In our holding in ***Miller***, we affirmed the trial court's admission of the flight evidence in that case. ***Id.*** at 461. We specifically held that the determination of admissibility is "left to the discretion of the court." ***Id.*** at 462.

¶16 This is not the first time that we have been asked to determine whether or not ***Miller*** created a bright-line rule that evidence of flight is inadmissible if there is an independent explanation for the flight that cannot be explained to the jury. In ***State v. Quiroz***, 2009 WI App 120, ¶25, 320 Wis. 2d 706, 772 N.W.2d 710,[3] we specifically stated that in citing ***Liggins*** for the proposition that "an independent reason for flight known by the court which cannot be explained to the jury because of its prejudicial effect upon the defendant," this court "in no way adopted an automatic exception to the standard balancing of probative value with risk of unfair prejudice that is to be applied to all evidence." ***Id.,*** ¶25. Although unaware of ***Quiroz***, which was decided two years after the ***Machner*** hearing, Darden's trial counsel was correct in his analysis of ***Miller***, and the form and substance of his objection was consistent with both the holding in ***Miller*** and our later holding in ***Quiroz***. We therefore conclude that counsel's failure to make a specific objection to evidence relating to Darden's escape on the basis of ***Miller*** was far from deficient.

[3] We note with disappointment that, in their briefing of this appeal during the fall of 2011, neither party cited this court to the published ***Quiroz*** opinion**,** which was released in July 2009. Any effort to check the history of ***Miller*** would have revealed ***Quiroz.***

B. Failure to Present Testimony of Lyles and Scales

¶17 Darden also claims that his trial counsel was deficient in failing to present the testimony of Lyles and Scales. Darden argues that these omissions were prejudicial because they pertained to the key issue at trial, Barber's identification of "Burglar" as Herbert Darden.

¶18 Darden asserts that Lyles would have testified that she had not told Jaqueline Barber that the man known as Burglar was Herbert Darden. Darden points to an affidavit attached to his addendum to his motion for postconviction relief,[4] in which investigator Patricia Smith averred that she interviewed Lyles, who said that she did not recall having a conversation with Jackie about Mr. Darden, but that in any event she "did not know Mr. Darden as 'Burglar,' so that she would not have told Jackie that 'Burglar was Mr. Darden's nickname.'"

¶19 At the ***Machner*** hearing, trial counsel testified:

> Strategically, I did not want Antoneisha Lyles to provide any information. I thought that would be more harmful to the case than anything. Antoneisha Lyles was a member of the community, as were the Dardens, and as was Mr. Barber, and in this case the State did not really produce any information to link Mr. Darden to the community, to the particular street that the shooting was on. There's no independent information that Mr. Darden was living in that neighborhood; that he lived on a particular street; that he had family on that street; or a particular street, or he had friends. The only information really linking him to the area of the shooting came from David Barber and, I believe, Jackie Barber. And I was actually glad for that. So the last thing, you know, that I wanted, to do would be to call a

[4] Darden's original motion for postconviction relief raised only the first issue discussed above, the failure to use ***Miller*** as the basis for objecting to evidence of flight. However, Darden's first postconviction counsel withdrew and successor counsel added the addendum to the motion to raise the second issue of failure to call as witnesses Lyles and Scales.

> defense witness who could connect all those people in the community and who could place Mr. Darden, you know, on those streets, which she would have done.

¶20 This explanation fit counsel's defense, which was misidentification. That defense would have fallen apart if it was clear that Barber knew Darden before the incident. Thus, not calling Lyles to testify at trial was a rational strategy and not deficient performance.

¶21 Furthermore, it was of little import whether or not Jaqueline Barber received Darden's name from Lyles. Barber definitively identified Darden as his attacker in the photo array, which of course did not specify the names of individuals pictured. Darden also testified repeatedly that he was "one hundred percent positive" that the person he identified in the picture and again at trial was the person who robbed and shot him. For these reasons, there was little to gain by making an issue of how the unidentified picture of Darden got into the photo array.

¶22 With respect to Scales, Darden argues that his trial counsel was deficient in failing to call her as a witness. Investigator Smith averred that she had interviewed Scales, who told her that she had dated Darden on and off from about October 2005 through about March 2006 and that she never saw him limping or walking with a limp.

¶23 At the ***Machner*** hearing, Darden's trial counsel testified that he had not wanted to make an issue of the limp because it would have opened the door to evidence that Darden had been shot in the leg shortly before Barber was robbed and shot. The limp was not the sole basis of Barber's identification of Darden as his assailant. Barber testified that he saw Darden's hair and part of his face during the struggle. Though the defense attempted to impeach this testimony based upon

its absence from the original statement that Barber gave to the police, the fact is that Barber identified Darden in the photo array without knowing his name. Counsel's judgment that attempting to establish whether or not Darden walked with a limp carried with it more risks than benefits was reasonable and not deficient performance.

CONCLUSION

¶24 For all of the reasons given above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.