

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP2598-CR

Cir. Ct. No. 2011CF3604

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMEGA CHARLES MERCHANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Kessler, Brennan and Bradley, JJ.

¶1 PER CURIAM. Omega Charles Merchant appeals from a judgment of conviction entered after a jury found him guilty of three counts of

second-degree sexual assault of a child under the age of sixteen. *See* WIS. STAT. § 948.02(2) (2011-12).¹ Merchant also appeals from an order denying his postconviction motion without a hearing. Merchant claims that his trial counsel was ineffective for failing to object to testimony describing Merchant’s reaction to police prior to his arrest. Alternatively, if the testimony was admissible, Merchant claims his trial counsel was ineffective for failing to present evidence that Merchant had reasons independent from the allegations in this case for his reaction to the police. We disagree and therefore affirm.

I. BACKGROUND

¶2 In 2011, the State charged Merchant with one count of second-degree sexual assault of a child under the age of sixteen. In an amended information, the State added three more counts of second-degree sexual assault of a child under the age of sixteen.

¶3 According to the complaint, Merchant, who was twenty-seven years old, and the victim, who was fourteen at the time of the offenses, first “met” on Facebook. The two texted back and forth and also spoke on the phone. Merchant eventually invited the victim to his home. One of the visits was around May 14, 2011. After watching television, Merchant and the victim had sexual intercourse. The complaint further alleged three additional incidents around June 2011 when the victim went to Merchant’s house and the two had sexual intercourse.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 At trial, the victim testified about three incidents of having sexual intercourse with Merchant at his residence. Other witnesses for the State corroborated Merchant's relationship and contacts with the victim, including testimony about the silver car Merchant was seen driving with the victim inside.

¶5 The jury also heard testimony from an officer regarding Merchant's attempt to flee from police.

[Prosecutor]: So when you got to this location at 1406 North 23rd Street, what did you do?

[Police Officer]: Officer Piontkowski stayed outside on the outside containment. Myself and Officer Shull went to the apartment door and listened initially.

[Prosecutor]: What did you hear when you listened at the door?

[Police Officer]: We heard a male speaking and a female speaking.

[Prosecutor]: After you listened at the door and heard a male and a female voice, what did you do?

[Police Officer]: We knocked.

....

[Prosecutor]: Was the door answered when you knocked?

[Police Officer]: No, not initially. I believe a few minutes went by, all the voices went silent. There's no answer. We started knocking louder. Eventually we did get a response.

[Prosecutor]: Tell us about what happened after you had been knocking now for several minutes?

[Police Officer]: A female spoke to us through the door.

[Prosecutor]: Did she open the door?

[Police Officer]: No, she asked who it was.

[Prosecutor]: And what did you say?

[Police Officer]: I said it was the police department.

[Prosecutor]: And then what happened?

[Police Officer]: We said can you open the door. She said, no, I don't live here. I can't open the door.

[Prosecutor]: What happened then?

[Police Officer]: We advised her we believe a fugitive is in your apartment there named Omega Merchant, and she needed to open the door immediately.

[Prosecutor]: Then what happened?

[Police Officer]: Then there was silence again, no response for about 10, 15 minutes. We were banging on the door, kicking on the door, not enough to kick it in, but just enough to make some noise. A lot of times it gets people to come to the door because it's just irritating after a while.

[Prosecutor]: Was it effective?

[Police Officer]: No, it was not, not in this case.

[Prosecutor]: So what did you do?

[Police Officer]: [Officer] Shull stayed at the apartment door. I went outside to kind of look at the windows to see if I could see in at all. And there was one window to the apartment with an air conditioner unit in it. And I could notice some drapes above the air conditioner that appeared to be open a little bit so I climbed on a ledge, and I was able to get a view into the apartment.

[Prosecutor]: What did you see?

[Police Officer]: I saw Omega Merchant.

....

[Prosecutor]: What did you do then when you saw Mr. Merchant inside the apartment?

[Police Officer]: He saw me looking through the window. He took off into the bedrooms in the back. So I thought he may be attempting to escape or to arm himself. Through experience, it's never a good thing when a fugitive sees you and runs in a house so I w[e]nt to push in the air conditioner.

....

[Prosecutor]: So once you saw Mr. Merchant and then you saw him go into the back and you were concerned by his behavior, then what did you do?

[Police Officer]: Pushed in the air conditioner.

[Prosecutor]: And what did you do, then?

[Police Officer]: Once the air conditioner fell in the window, it fell inside to the living room. I was—it happened all within a split second. The air conditioner fell in, and I was just about to yell in, Omega, come out with your hands up and I have my pistol up, and immediately the window shut almost taking my head off and it locked. A female in the house wound up shutting it and locking it on me.

[Prosecutor]: Then what did you do?

[Police Officer]: I believe either I got on the radio right away and told Officer Shull on the air what had happened; that Omega Merchant I saw him in there, and that he ran in the back. Either I did that or ran to Officer Shull and told him in person. I can't recall. But then we wound up forcing entry.

[Prosecutor]: Once you—did you actually get into the apartment, then?

[Police Officer]: We did. I think Officer Shull kicked in the door.

[Prosecutor]: And what did you find when you got into the apartment?

[Police Officer]: We called out for Omega Merchant to surrender. He came out from the back bedroom. He did have his hands up, and he surrendered to us and was taken into custody without further incident....

....

[Prosecutor]: How would you describe Mr. Merchant's demeanor when you saw him through the window?

[Police Officer]: Definitely tried to elude capture.

Merchant's trial counsel did not object to this testimony.

¶6 After the State rested, the defense moved to dismiss all four counts. The circuit court granted the defense’s motion as to one of the counts because the victim’s testimony supported only three incidents.

¶7 Merchant’s mother, his sister, and his brother then testified for the defense. Merchant testified on his own behalf and denied that he ever had sexual relations with the victim.

¶8 After approximately twenty minutes, the jury found Merchant guilty of three counts of second-degree sexual assault of a child. He was sentenced to five years of initial confinement and three years of extended supervision on each count, to run concurrently.

¶9 Counsel originally filed a no-merit report. After this court requested a supplemental report, counsel responded and advised that she wished to file a postconviction motion. We dismissed the appeal without prejudice and extended the deadline for counsel to file a motion or notice of appeal.

¶10 Merchant then filed a postconviction motion asserting that trial counsel was ineffective for failing to object to “flight evidence”—the testimony describing Merchant’s reaction to the police. In the alternative, Merchant argued that trial counsel was ineffective for failing to present evidence that Merchant had reasons independent from the allegations in this case for his reaction to the police; namely, a child support warrant for his arrest and concerns regarding jury duty.

¶11 The circuit court denied the motion without a hearing. It explained in its written decision:

Having seen the trial and observed the witnesses, [t]here is no question in the court’s mind that the defendant *was* guilty of the sexual assaults beyond a reasonable

doubt. Even if the flight evidence had not been admitted, there is simply not a reasonable probability the jury would have acquitted the defendant of the sexual assault charges.

(Emphasis in original.)

II. ANALYSIS

¶12 On appeal, Merchant renews his postconviction claims of ineffective assistance of trial counsel. 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. To satisfy the prejudice prong, a defendant must demonstrate that counsel’s deficient performance was “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687. In other words, there must be a showing “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.” *Id.* at 694. We need not address both aspects of the *Strickland* test if the defendant fails to make a sufficient showing on either one. *See id.* at 697.

¶13 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.

¶14 Evidence of flight is generally admissible as circumstantial evidence of guilt. See *State v. Quiroz*, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710. However, “[e]vidence 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.’” *Id.*, ¶25 (citation and one set of quotation marks omitted). Thus, “when a defendant points to an unrelated crime to explain flight, the [circuit] court must, as it must with all evidence, determine whether to admit the flight evidence by weighing the risk of unfair prejudice with its probative value.” *Id.*, ¶27.

¶15 Here, even if Merchant’s trial counsel was deficient for failing to object to the flight testimony, we conclude that there was no prejudice due to the overwhelming evidence of Merchant’s guilt.

¶16 As detailed by the State, the evidence demonstrated the victim’s credibility as a witness. She provided detailed testimony of each of her sexual encounters with Merchant at his apartment. Some of the encounters took place during the school day, when instead of going to class the victim would take a bus to Merchant’s apartment. Given her testimony that she remembered having intercourse with Merchant three times—instead of four times, as charged—the circuit court dismissed one of the counts at the close of the State’s case. This could have bolstered her credibility with the jurors by demonstrating a lack of motive to embellish or fabricate. Additionally, the victim admitted that she initially lied to police in an effort to protect Merchant. A police officer who testified for the State corroborated the victim’s testimony in this regard by confirming that she was originally reluctant to talk with him and that she was in “teenage love” with Merchant and did not want to see him get into trouble.

¶17 The victim's mother corroborated the victim's testimony by explaining that she saw a sexually explicit text on the victim's phone from "Mega" telling the victim that she should go to his house and describing what he would do to her. A friend of the victim, Chelsea Moss, testified that she saw Merchant and the victim in a vehicle together on two different occasions and knew that the two were in contact with each other electronically.

¶18 Dominique Moss, Chelsea Moss's older sister and the ex-girlfriend of Merchant and mother of his child, testified that she learned from Chelsea that the victim was communicating with Merchant. Dominique had conversations with the victim about Merchant and saw the two driving around together in a silver vehicle. Dominique further testified that she spoke to the victim's mother about the victim and Merchant, and admitted that she did so both out of concern for the victim and out of anger.

¶19 Meanwhile, the testimony from Merchant's witnesses did little to support his case. As the State highlights, for the entire time period during which the assaults occurred, witnesses for the defense testified that Merchant was not living at his apartment—the place of the assaults—due to a mice infestation. Merchant was living with his mother and he never went to his apartment because he was afraid of mice. Instead, he would send his brother or sister to retrieve clothes or personal items for him and would have his mother check on his apartment.

¶20 Merchant's mother testified that each day when she came home from work in the month of May, Merchant was sitting there waiting for her. However, she acknowledged that she did not know what he did during the day while she was working. Merchant's mother also claimed that her silver Ford Taurus was not

working during the time period when the assaults were alleged to have occurred. In rebuttal, the State called a police officer who testified that Merchant's mother never mentioned Merchant had to drive a vehicle other than the silver Taurus because it was not available for use. Instead, Merchant's mother had told the officer that Merchant started driving the Taurus to and from work at the beginning of June.

¶21 The theory of defense was that the State's witnesses were lying and that Dominique used the victim to frame Merchant after he told her he did not want to be with her anymore. However, during its cross-examination of Merchant, the State got him to admit that he had lied to police when he told them he had never received or sent a text message to the victim. He also acknowledged that he led the victim to believe he was interested in her.

¶22 As both parties noted in their closing arguments, this case amounted to a credibility contest. Merchant, however, overemphasizes the impact of the flight evidence on his credibility given the complete trial record.² Ultimately, there is no reasonable probability that, absent the claimed error, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

¶23 In an alternative argument, Merchant argues that trial counsel was ineffective for failing to present evidence that Merchant had reasons independent from the allegations in this case for his reaction to the police; namely, a child support warrant for his arrest and concerns regarding jury duty. "Judicial scrutiny

² We note that the only time the flight evidence came up was during the testimony of one police officer. The State did not reference it during its opening statement or its closing argument. It came up only during the State's rebuttal argument.

of counsel's performance must be highly deferential ... the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *See id.* at 689 (citation omitted).

¶24 Merchant has not overcome the presumption. To the contrary, we conclude that it was a reasonable strategic choice by trial counsel to decide not to offer evidence of Merchant's child support warrant and his concerns about jury duty insofar as it avoided distracting the jury with issues that could have had negative ramifications for Merchant's case or resulted in jury confusion.

¶25 The circuit court did not err in denying Merchant's postconviction motion without a hearing. It is apparent from the record that Merchant is not entitled to relief, as trial counsel was not ineffective. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 ("[I]f the [postconviction] motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.").

By the Court.—Judgment and order affirmed.

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

