COURT OF APPEALS
DECISION
DATED AND RELEASED

November 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0045-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Marlon Arms,

Defendant-Appellant.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Marlon Arms appeals from the judgment of conviction, following a jury trial, for kidnapping (party to a crime), two counts of first-degree sexual assault, armed robbery (party to a crime), and carjacking (party to a crime). He also appeals from the trial court order denying his motion for postconviction relief. Arms argues that he received ineffective assistance of counsel and that he was denied a fair and impartial trial when the

court allowed the State to resume direct examination of the victim after the defense had already begun its cross-examination. We reject his arguments and affirm.

On August 18, 1994, Arms and his accomplice forced the victim back into her own car, drove her to a park, and sexually assaulted her numerous times. The victim identified Arms and his accomplice at a lineup and again at trial. Additionally, Arms and his accomplice were found driving the victim's car when they were arrested the next day. Arms did not testify at trial and offered an alibi defense.

Arms argues that counsel was ineffective for entering into a stipulation reflecting only the crime laboratory's findings of semen from a few locations on the victim's body. Arms claims that not only should defense counsel have stipulated that there was sperm on the victim's face but also that there was no sperm in what Arms alleges were other "crucial areas where it would be expected that sperm would be found given the degree of assault alleged."

In order for a defendant to prove that he or she did not receive effective assistance of counsel, the defendant must show that trial counsel's performance was deficient and that "the deficient performance prejudiced the defense." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to show that trial counsel's performance was prejudicial, the defendant must prove that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *See* ***id.*** In other words, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different but for the error. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while we independently review "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial." ***State v. Johnson***, 153 Wis.2d 121, 127-128, 449 N.W.2d 845, 848 (1990). We need not address both the deficient performance and prejudice prongs if a defendant cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697.

We do not address the performance prong here because even if we were to find deficient performance by trial counsel, we would not conclude that any of the alleged errors raised by Arms are prejudicial. First, as the State argues, given that alibi was the defense, there was no strategic reason for the defense to attempt to impeach or undermine the crime lab evidence. Because Arms's defense theory was alibi, the stipulation, and any errors in the stipulation, were not relevant. Second, what Arms argues should have been pursued was still available for argument given that it was merely the "flip side of the coin"—where the semen was not found versus where it was found. Finally, Arms's protests about the state crime lab's account of where semen was not found, which was not mentioned in the stipulation, miss the mark. There was no testimony that there was any ejaculation by the assailants other than in connection with the penis-to-mouth assaults. In sum, Arms has not demonstrated how a more complete stipulation would have affected the result of the case.

Arms next claims that his counsel was ineffective for not advising him that he had a right to testify. Arms's trial counsel testified at the ***Machner*** hearing that he discussed with Arms the possibility of Arms testifying and that they both agreed that he would not testify. The trial court found as a fact that there was such a discussion. Those findings are not clearly erroneous.[1]

Finally, Arms also argues that he was denied a fair and impartial trial when the court allowed the State to resume direct examination of the victim after the defense had already begun its cross-examination. The defense had begun its cross-examination, only asking the victim one question, which the victim did not answer, before the trial court interrupted the questioning in order to handle another case. When trial was to resume, the State requested that it be allowed to elicit more testimony from the victim to "make sure that part of [the victim's] testimony respecting the sex acts is clear." Over defense counsel's objection, the trial court allowed the State to continue questioning the victim as

[1] Arms argues that this court should declare a bright-line rule that a colloquy with a defendant must be had at the time of trial prior to acceptance of a waiver of his or her right to testify. Although this court has expressed its opinion that such a colloquy certainly is the better practice, we also have concluded that it is not required. ***State v. Simpson***, 185 Wis.2d 772, 779, 519 N.W.2d 662, 664 (Ct. App. 1994); ***State v. Wilson***, 179 Wis.2d 660, 672 n.3, 508 N.W.2d 44, 48 n.3 (Ct. App. 1993), *cert. denied*, 115 S.Ct. 100 (1994).

to how many times she was assaulted by each defendant and in what way. The trial court stated:

> I was unclear myself as to the number of sex acts. She gave me the number of sex acts, two acts of sexual intercourse by each [defendant] and two acts of mouth-to-penis acts, but I think the D.A. is correct, it should be clarified somewhat and I'll allow the D.A. to do so.

The continued questioning by the State clarified that contrary to the victim's prior testimony, there had been one act of vaginal intercourse and one act of oral intercourse with respect to each assailant.

Section 906.11, STATS.,[2] gives a trial court latitude in the conduct of the trial allowing for the kind of flexibility challenged here. Arms fails to show that this amounted to a misuse of discretion. *See* ***State v. Wolverton***, 193 Wis.2d 234, 261, 533 N.W.2d 167, 177 (1995), *cert. denied*, 116 S.Ct. 828 (1996).

By the Court. – Judgment and order affirmed.

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

---

[2] Section 906.11(1), STATS., provides:

> The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.