

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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. 2009AP2724-CR

Cir. Ct. No. 2007CF205

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICARDO E. MARINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Ricardo E. Marinez appeals a judgment convicting him of three counts of repeated first-degree sexual assault. He also appeals an order denying his motion for postconviction relief. Marinez contends that his trial attorney was ineffective for failing to introduce any alternative theory as to how

one of the three minor victims contracted chlamydia, and that the circuit court erred in allowing evidence that Marinez fled from police on the night of his arrest. We conclude that trial counsel was not ineffective and that the circuit court properly exercised its discretion in admitting the flight evidence. Accordingly, we affirm.

Background

¶2 In May 2007, the State charged Marinez with sexually assaulting his children, A.E.M. and A.T.M., and his stepchild, K.L.A. Prior to trial, the State filed a notice of intent to introduce evidence that Marinez fled from police on the night of the arrest, leading police on a high-speed car chase and then fleeing on foot, and that he was apprehended with apparently self-inflicted stab wounds in his abdomen. Marinez objected to admission of the evidence, and the circuit court initially held that the evidence was not admissible. On the first day of trial, the State again moved to introduce the flight evidence. In support, it alleged that police interviewed members of the Marinez household between 4:00 p.m. and 8:30 p.m. on May 18, 2007, and made contact with Marinez's mother at Marinez's residence at approximately 7:30 that evening. The State also asserted that Marinez explained his subsequent flight by stating that he ran from police because he "[had] warrants." The State argued that, because Marinez had no warrants out for his arrest, this statement implied that Marinez knew there was a pending sexual assault investigation against him. Marinez again objected to admission of the flight evidence. The circuit court found that the flight evidence was admissible to establish Marinez's consciousness of guilt.

¶3 The State's evidence at trial included in-court testimony by all three of the minor victims; previously videotaped interviews of the children by a

forensic interviewer; evidence that one of the victims, Marinez's five-year-old stepdaughter, had tested positive for chlamydia; evidence that Marinez was tested twice for chlamydia, first testing positive and then, with a more accurate method, testing negative; and the details of Marinez's flight from police before his arrest.

¶4 Marinez testified in his own defense, stating that he had never sexually assaulted any of the children. He stated that he was tested for chlamydia, but to his knowledge he never received a positive result. He also explained that his flight from police was prompted by his belief that he could be arrested for a previous unpaid traffic ticket, and that he injured himself when he ran into a barbed-wire fence.

¶5 The State asserted in its closing argument that the primary evidence in the case was the children's testimony. The State asserted that other supporting evidence included the chlamydia evidence and the flight evidence. Marinez's counsel argued that the State had not proved that the assaults had occurred. Counsel specifically highlighted the lack of any physical evidence, which he contended necessarily would have been present based on the children's allegations of both vaginal and anal penetration at very young ages. He also argued that the flight evidence did not support an inference of guilt in this case, and that the more reliable evidence indicated that Marinez did not have chlamydia. The State argued in rebuttal that the facts indicated that Marinez ran from the police and stabbed himself based on his guilt in this case, and the fact that the five-year-old victim had chlamydia was physical evidence that she had been sexually assaulted. The jury found Marinez guilty of all three counts of sexual assault, and the circuit court entered a judgment of conviction.

¶6 Marinez filed a postconviction motion, arguing that he was denied his right to the effective assistance of counsel at trial because his attorney was ineffective for failing to introduce any evidence that Marinez's brother, Alexander Marinez,¹ was a possible source of the five-year-old victim's chlamydia infection.² The circuit court held a *Machner*³ hearing on the motion. At the hearing, Marinez's trial counsel testified that the defense he pursued at trial was that Marinez did not do the acts the State accused him of doing, and that the State could not prove that he did. Counsel stated that he was aware at the time of trial that Alexander had also been charged with sexually assaulting the same minor victims. Counsel also agreed that it was likely that Marinez had informed him that Alexander had taken antibiotics during the relevant time period, which is the normal treatment for chlamydia, although counsel did not specifically remember. Counsel stated that he checked Alexander's court file and spoke with Alexander's attorney looking for any indication that Alexander had chlamydia, and discovered none. Counsel stated that he made no effort to introduce any evidence that Alexander may have been the source of the victim's chlamydia infection.

¶7 The circuit court denied Marinez's postconviction motion. Marinez appeals his judgment of conviction and the order denying his postconviction motion.

¹ Because Marinez and his brother share a surname, we refer to his brother as Alexander.

² Marinez also asserted in the postconviction motion that trial counsel was ineffective for failing to introduce testimony by Marinez's mother after she informed trial counsel that one of the victims told her that the abuse had not occurred. Marinez does not pursue this argument on appeal.

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Standard Of Review

¶8 Whether trial counsel’s performance was constitutionally ineffective presents a mixed question of fact and law. See *State v. Maloney*, 2005 WI 74, ¶15, 281 Wis. 2d 595, 698 N.W.2d 583. “We will not disturb the circuit court’s findings of fact unless they are clearly erroneous. However, the ultimate determination of whether the attorney’s performance falls below the constitutional minimum is a question of law subject to independent appellate review.” *Id.* (citations omitted). We review a circuit court’s evidentiary ruling for an erroneous exercise of discretion. *State v. Quiroz*, 2009 WI App 120, ¶20, 320 Wis. 2d 706, 772 N.W.2d 710.

Discussion

¶9 Marinez contends that he was denied the effective assistance of counsel at trial because his attorney did not present the defense theory that the five-year-old victim had contracted chlamydia from Alexander rather than from Marinez. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defendant is denied his right to the effective assistance of counsel at trial if counsel’s performance is deficient and counsel’s deficiency prejudices the defendant). He asserts that trial counsel’s defense theory—that the children had not been sexually assaulted at all—was unreasonable in light of the physical evidence that the five-year-old victim had contracted chlamydia. Marinez contends that, because his trial counsel pursued an untenable defense, counsel’s performance was necessarily deficient. He contends that he was prejudiced by counsel’s omission because it was vital to his defense to present an alternative theory of how the five-year-old contracted chlamydia, and the failure to present any alternative theory directly led to his conviction. The State responds that trial counsel’s performance was not

ineffective because of the absence of evidence that Alexander had chlamydia. The State contends that because the five-year-old victim had alleged only hand-to-genital contact by Alexander, it would have been unreasonable to assert that Alexander was the source of her infection.⁴ The State also asserts that trial counsel reasonably declined to pursue a strategy of arguing that the victims truthfully reported that Alexander assaulted them yet falsely reported that Marinez assaulted them.

¶10 To establish that trial counsel's performance is constitutionally deficient, a defendant must show that counsel's conduct "'fell below an objective standard of reasonableness' considering all the circumstances." *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). Here, Marinez asserts that his trial counsel's performance was deficient for failing to establish an alternative theory as to how the five-year-old victim contracted chlamydia. He contends that counsel's performance was deficient for failing to introduce the existing evidence that Alexander may have been the source of the chlamydia or pursuing further evidence supporting that theory. There are two problems with this argument. First, the record does not reveal any significant evidence supporting a finding that Alexander had chlamydia. The only possible evidence on this point that Marinez identifies is: (1) Alexander lived in the Marinez household during the time of the sexual assaults alleged in this case; (2) Alexander was also charged with sexually assaulting the children during that time period; (3) Marinez believed that it was likely Alexander had been sexually assaulting the children; and (4) Alexander had been prescribed antibiotics for a

⁴ There was expert testimony at trial that the transmission of chlamydia requires genital-to-genital or genital-to-oral contact.

purported cyst infection, which would have also treated a chlamydia infection, if it existed. Thus, there was no direct or persuasive evidence that Alexander had chlamydia. Second, even if this evidence would have supported a finding that Alexander was a possible alternative source of the victim's chlamydia infection, or if further research would have revealed additional evidence supporting that theory, we do not agree with Marinez that such a strategy would have been more reasonable than the one counsel pursued at trial. We agree with Marinez that his trial counsel's defense strategy was not perfect in that it did not explain how the victim contracted chlamydia. However, this does not lead to the conclusion, as Marinez asserts, that it would have been more reasonable to advance the defense theory that Alexander had sexually assaulted the children.

¶11 Had trial counsel pursued the defense theory that Alexander was the source of the victim's chlamydia infection, the defense would have had to argue that the children's allegations of abuse against their uncle, Alexander, were truthful, while similar, simultaneous allegations against their father, Marinez, were fabricated. Like the defense pursued at trial, this theory is obviously flawed, particularly because part of the State's case was that each of the children had the ability to distinguish between the truth and lying, and the defense has never asserted any motive for the children to fabricate the allegations against Marinez. Additionally, a defense theory that Alexander had sexually assaulted the children and infected the victim with chlamydia would not have necessarily established that Marinez did not also assault the children, particularly when the children's allegations against their uncle and father overlapped. We conclude that, while counsel's defense strategy at trial was not ideal, it was not less reasonable than the

strategy that Marinez claims counsel should have pursued.⁵ Thus, we are not persuaded by Marinez's argument that counsel's performance was deficient.

¶12 Moreover, even if we were to conclude that counsel's performance was deficient, we would conclude that the deficiency did not prejudice Marinez's defense. To establish prejudice, "[i]t is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.' Rather, the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Carter*, 324 Wis. 2d 640, ¶37 (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. We conclude that Marinez is unable to make that showing here.

¶13 The State's evidence at trial, aside from the chlamydia evidence, included the following: (1) consistent and detailed statements by all three of the minor victims that Marinez had repeatedly sexually assaulted them, either through trial testimony, recorded interviews, or both; (2) testimony by each child that he or she understood the difference between the truth and lying; (3) testimony by police that, on the night of his arrest, Marinez led police on a high-speed car chase and then fled on foot, and was apprehended with deep cuts in his abdomen that he claimed resulted from his running into a barbed-wire fence; and (4) testimony by a medical expert that Marinez's abdominal injuries were consistent with stab

⁵ While Marinez asserts that the chlamydia evidence was the core evidence in the State's case, we note that the State specifically argued that "the primary source of evidence ... in this case is the testimony of the three children." The State then contended that the chlamydia evidence also provided physical evidence of the abuse, classifying the chlamydia evidence as "other evidence ... that further shows [Marinez's] guilt."

wounds rather than injuries from a barbed-wire fence. In light of this evidence, our confidence in the jury verdict is not undermined by any deficient performance by counsel in failing to argue an alternative source of the victim's chlamydia infection.

¶14 Marinez next contends that the circuit court erroneously exercised its discretion in admitting evidence of his flight from police on the night of his arrest. He contends that there was an insufficient link between his flight and the charges in this case to establish that his flight showed his consciousness of guilt. *See Quiroz*, 320 Wis. 2d 706, ¶18 (evidence of flight is generally admissible as probative of guilt). Alternatively, Marinez contends that, even if the flight evidence was relevant, it was unduly prejudicial. *See State v. Miller*, 231 Wis. 2d 447, 460-62, 605 N.W.2d 567 (Ct. App. 1999). The State responds that the record supports the circuit court's exercise of discretion to admit the flight evidence as probative of Marinez's guilt.

¶15 The State offered the following in support of admitting the flight evidence: before his arrest, Marinez resided with his wife and the three minor victims in this case; police interviewed Marinez's wife and the minor victims between approximately 4:00 p.m. and 8:30 p.m. on May 18, 2007; police went to Marinez's residence to arrest Marinez at approximately 7:30 p.m., and spoke with Marinez's mother, who stated that she did not know where Marinez was; at 1:54 a.m. on May 19, 2007, Marinez led police on a high-speed car chase, crashed his car, and then fled on foot; Marinez was apprehended with wounds in his abdomen that he said resulted from running into a barbed-wire fence, but that treating physicians indicated were consistent with stab wounds from a sharp instrument, such as a knife; and Marinez explained that he ran because he had "warrants," although police records indicated he did not have any outstanding warrants for his

arrest. The circuit court admitted the flight evidence as probative of Marinez's guilt, finding that there was sufficient evidence that Marinez fled from police because he anticipated being apprehended for the charges in this case. The court also found that the evidence was not unduly prejudicial.

¶16 We conclude that the circuit court properly exercised its discretion. The facts presented by the State, including the police interviews with Marinez's family and the details of the chase and apprehension, support a finding that Marinez anticipated apprehension on the sexual assault charges. Marinez contends that other facts negate a connection between Marinez's flight and consciousness of guilt: Marinez was stopped for expired license plates, not the charges in this case; and, Marinez asserts, if he had anticipated apprehension on the charges in this case, he would have fled earlier rather than remaining in the area. Marinez contends that the evidence therefore establishes that he did not run from the police based on the charges in this case. However, while this is one inference that may be drawn from the evidence, it is not the only inference that the evidence allows. Marinez was free to argue his interpretation of the evidence at trial, which he did. *See Miller*, 231 Wis. 2d at 460-61. The fact that Marinez disagreed with the circuit court's interpretation of the evidence does not persuade us that the court erroneously exercised its discretion in determining that the evidence was probative of Marinez's consciousness of guilt.

¶17 Next, Marinez contends that the circuit court erroneously exercised its discretion in admitting the flight evidence because that evidence was unduly prejudicial. He contends that the purpose of the flight evidence was to inflame the jury by establishing that Marinez is a reckless, dangerous individual. He also cites *Miller* for the proposition that the flight evidence was inadmissible because he could not explain his independent reason for flight to the jury without causing

undue prejudice. *See id.* at 460 (“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.’” (citation omitted)). Marinez argues that his explanation for his flight—that he was afraid of arrest for other warrants he believed he had for an unpaid traffic ticket—resulted in undue prejudice. He contends this is highlighted by the State’s use of the flight evidence in closing argument to contend that, if Marinez fled from police to avoid arrest for an unpaid traffic ticket, he would go to great lengths to avoid conviction in this case. Again, we disagree with Marinez’s assertion that this establishes that the circuit court erroneously exercised its discretion in admitting the evidence. The circuit court weighed the prejudicial effect of the evidence against its probative value and determined that the evidence was not unduly prejudicial. This was a proper exercise of the circuit court’s discretion, and we have no basis to disturb it on appeal. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

