COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2011

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. 2011AP539-CR **Cir. Ct. No. 2009CF1514**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMAR REDMOND,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jamar Redmond appeals from that portion of a judgment, entered upon a jury's verdict, reflecting his conviction on one count of repeated sexual assault of the same child. Redmond also appeals from an order denying his motion for postconviction relief without a hearing. Redmond claimed

that he received ineffective assistance of trial counsel when counsel failed to make proper objections to, or otherwise seek to limit, evidence that Redmond pulled out a knife when police arrived to arrest him for the sexual assault. We agree with the circuit court that trial counsel was not ineffective, so we affirm.

BACKGROUND

¶2 Redmond's niece alleged that between October 2004 and February 2008, Redmond sexually touched her on multiple occasions. Specifically, she told police that he would remove his clothes, pull down her pants and underwear, and instructed her to say, "Fuck me," while he put his penis on her buttocks. The niece was between six and nine years old when the touching occurred.

¶3 Redmond's sister—his victim's mother—called police, then confronted Redmond. Redmond grabbed a butcher knife, which he had in his possession when police arrived. He waved the knife at police, then fled, then confronted police a second time. Redmond was arrested after Officer Robert Thiel shot him, causing him to drop the knife.

¶4 Redmond was charged with the repeated sexual assault, but also with one count of second-degree recklessly endangering safety for brandishing the knife at police. Prior to trial, Redmond entered a guilty plea to the endangering safety charge. The State agreed not to use the count to impeach Redmond if he testified.

¶5 During opening statements, the State made reference to the knife. Redmond objected, and the circuit court held a sidebar. Later, the circuit court made a record of the conference, noting that it perceived Redmond to have been objecting on the grounds that he had already entered a plea to the reckless

endangerment charge. Redmond confirmed that was the ground for his objection. The circuit court overruled the objection, explaining that the evidence was relevant, and it noted that it would continue to overrule the objection.

¶6 During the trial, Thiel testified that he responded to Redmond's duplex home to assist in apprehending a suspect. He first encountered Redmond in the stairwell leading to the upper unit, where Redmond was confronting another officer. The other officer was asking Redmond questions, trying to identify him, when Redmond pulled out the knife and swung it at Thiel. When Thiel began to unholster his weapon, Redmond fled down the stairs. Thiel pursued, giving commands to drop the knife. Redmond went around a corner. As Thiel rounded the corner, Redmond was coming back at him, still swinging the knife. Thiel again gave an order to drop the knife, then shot Redmond when he failed to comply. Redmond dropped the knife down a stairwell leading to the basement and was subdued and arrested.

¶7 Redmond did not object to any of Thiel's testimony, nor did he request any cautionary instructions for the jury. The jury convicted Thiel of repeated sexual assault, and the circuit court sentenced him to seven years of initial confinement and eight years of extended supervision, with a consecutive year of each for the reckless endangerment.

¶8 Redmond filed a postconviction motion alleging ineffective assistance of counsel. He complained that counsel failed to file a motion *in limine* seeking to limit the scope of Thiel's testimony. Redmond contended that Thiel should have only been allowed to testify about Redmond's flight down the stairs and that everything else was too prejudicial. He asserted that because trial counsel failed to properly object to the knife evidence, counsel waived Redmond's right to

appeal. Redmond also complained that trial counsel deprived him of his right to an "unbiased jury" by not requesting a cautionary instruction. Redmond requested a postconviction hearing on counsel's performance.

¶9 The circuit court denied the motion. It explained that it would not have granted a motion to restrict Thiel's testimony, nor would it have sustained an objection to limit the evidence. It explained that the entire context of Redmond's behavior was "necessary and relevant" to explain what occurred. The circuit court also rejected the need for a limiting instruction, as the jury was instructed only on the crime of repeated sexual assault, not reckless endangerment. Accordingly, the circuit court concluded that there was no ineffective assistance, and it denied Redmond's motion without a hearing. Redmond appeals.

DISCUSSION

¶10 Redmond's fundamental claim of error relates to Thiel's testimony about the confrontation in the stairwell that culminated in Thiel shooting Redmond. He complains that this testimony was more prejudicial than probative. However, objections to the admission of evidence must be timely and specifically raised. *See* WIS. STAT. § 901.03(1)(a) (2009-10).[1] Trial counsel here made an objection only during the State's opening statement, and then only on the grounds that Redmond had already pled to the recklessly endangering safety charge arising from that sequence of events. Accordingly, the direct challenge to the admission of the evidence is not preserved for an appeal. *See generally* ***State v. Carprue***, 2004 WI 111, ¶¶36-37, 274 Wis. 2d 656, 683 N.W.2d 31. Redmond thus alleged

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

ineffective assistance of trial counsel for not making timely and proper objections. *See* ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461 ("Because we find waiver … [the challenge] must come under the guise of ineffective assistance of counsel.").

¶11 A defendant claiming ineffective assistance of counsel must show that counsel was deficient and that the deficiency caused prejudice as a result. *See* ***State v. Butler***, 2009 WI App 52, ¶3, 317 Wis. 2d 515, 768 N.W.2d 46 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). To demonstrate deficient performance, a defendant must identify specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To demonstrate prejudice, a defendant must establish that, but for counsel's errors, there is a reasonable probability that the results of the proceedings would have been different. ***Butler***, 317 Wis. 2d 515, ¶3. If a defendant fails to make a sufficient showing on one of the two prongs, we need not address the other. ***Id.***

¶12 We start by rejecting Redmond's claim that trial counsel's lack of objection and resulting waiver deprived him of the constitutional right to an appeal. He asserts that "[w]aiver of a constitutional right through negligence is both deficient performance and per se prejudicial[.]"[2]

¶13 The right to a direct appeal is guaranteed in the Wisconsin Constitution. *See* WIS. CONST. art. I, § 21(1) ("Writs of error shall never be prohibited[.]"). "[A] thread runs through our entire jurisprudence that there not

[2] We note that this argument presumes that defense counsel was negligent; it is not necessary for us to analyze that contention any further in this appeal.

only be a right to appeal, but that the appeal be a meaningful one." ***State v. Perry***, 136 Wis. 2d 92, 99, 401 N.W.2d 748 (1987). Here, Redmond has not been denied the right to a meaningful appeal.[3] Instead, he is estopped from raising a particular issue in that appeal. However, the fact of preclusion—while it may or may not prove to be ineffective assistance of counsel and may or may not merit relief—is not a constitutional deprivation of a right to appeal because, even if the issues had been preserved, a defendant has no right to insist that any particular issue be raised in an appeal.[4] *See* ***Oimen v. McCaughtry***, 130 F.3d 809, 811 (7th Cir. 1997). Thus, our review remains grounded in the ordinary ***Strickland*** analysis.

¶14 Redmond complains that trial counsel failed to object with sufficient specificity to force the circuit court to weigh the prejudice of Thiel's testimony against its probative value. *See* WIS. STAT. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"). Redmond contends that had the circuit court conducted such an analysis, it would have excluded the testimony or, possibly, limited it to the evidence of Redmond fleeing from Thiel on the stairs, omitting any reference to the knife.

[3] This case is unlike ***State v. Perry***, 136 Wis. 2d 92, 401 N.W.2d 748 (1987), where the court reporter's notes were lost in the mail and were a "jumbled mess" when finally received. ***Id.*** at 96. The destroyed notes—which left Perry without transcripts from the testimony of eleven defense witnesses, argument on a motion, admission of exhibits, the State's closing argument, and a portion of the court's instructions to the jury—foreclosed any possibility of meaningful appellate review, entitling Perry to a new trial. ***Id.*** at 96, 107. Yet even ***Perry*** recognized that "not all deficiencies in the record nor all inaccuracies require a new trial." ***Id.*** at 100.

[4] We agree with the State's observation, in its brief at footnote 1, that under Redmond's logic, failure to object to any objectionable questions would be transformed into a constitutional violation warranting reversal. Such a broad brush is unreasonable.

¶15 Redmond does not dispute that evidence of flight is generally admissible. *See, e.g.*, ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710 ("It is well established that evidence of flight has probative value as to guilt."). He merely contends that too much "evidence of flight" was allowed and the trial court failed to take steps to limit or prevent its admission.

¶16 The circuit court, however, in denying the postconviction motion, explained:

> Even if counsel had filed a motion in limine to limit the evidence, the court would not have granted the motion. Nor would it have sustained an objection brought by counsel during the trial to limit the evidence. The court did not and does not agree that this evidence should have been limited to the defendant running down the stairs as evidence of flight. The jurors were entitled to hear the entire scenario regarding the defendant's response to police officers confronting him about his repeated sexual assault of a child. It was proper to allow the complete contextual evidence to be admitted to allow the State to establish how vehemently the defendant did not want to be placed under arrest and taken to jail in connection with the sexual assault offense. The entire context of the situation was necessary and relevant to what occurred.

¶17 We discern no erroneous exercise of discretion. *See* ***id.***, ¶20. "Analytically, flight is an admission by conduct." ***State v. Winston***, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984). "[E]vidence of flight and *resistance to arrest* has probative value to guilt." ***Wangerin v. State***, 73 Wis. 2d 427, 437, 243 N.W.2d 448 (1976) (emphasis added). "'[T]he fact of an accused's flight … *and related conduct* … are admissible as evidence of consciousness of guilt, and thus of guilt itself.'" ***Gauthier v. State***, 28 Wis. 2d 412, 420, 137 N.W.2d 101 (1965) (emphasis added and quoted source omitted).

¶18 Indeed, this case is quite similar to ***State v. Miller***, 231 Wis. 2d 447, 605 N.W.2d 567 (Ct. App. 1999). Miller and two others devised a plan to steal cocaine from a victim in a fake drug transaction. ***Id.*** at 452-53. Miller shot the victim in the back; the victim died. ***Id.*** at 453. Four days later, a police officer attempted a traffic stop on a car without proper registration. ***Id.*** When the officer activated his lights, the car sped up and swerved into oncoming traffic to evade the officer. ***Id.*** Miller, the driver of the car, was charged with several offenses, including first-degree intentional homicide, fleeing and eluding, and first-degree recklessly endangering safety. ***Id.*** Evidence of the flight from the traffic stop was deemed admissible in the homicide trial as having probative value as to his guilt on the homicide. ***Id.*** at 459-62.

¶19 All of this is to say that because we discern no error in the circuit court's conclusion that evidence of the entire sequence was admissible, trial counsel could not have been ineffective for failing to pursue a meritless challenge to the evidence. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

¶20 Redmond also complains that trial counsel should have requested a limiting or cautionary instruction to the jury about the scope of the flight evidence. He also complains that the postconviction court disregarded the need for a cautionary instruction by its ruling that none was necessary because the jury was instructed only as to the sexual assault, not endangering safety.

¶21 Cautionary instructions are preferred, but are not required unless requested. *See* ***State v. Payano***, 2009 WI 86, ¶100, 320 Wis. 2d 348, 768 N.W.2d 832. The absence of a cautionary instruction can be considered when weighing potentially unfair prejudice against probative value of evidence. ***Id.*** We are not

persuaded that the lack of a cautionary instruction is the deciding factor in the flight evidence's admissibility here. *See* ***id.***, ¶104. We therefore assign no significance to its omission, and we conclude that trial counsel could not have been ineffective for failing to seek such a limiting instruction. *See* ***Swinson***, 261 Wis. 2d 633, ¶59.

¶22 The circuit court committed no error in denying Redmond's postconviction motion without a hearing. Though Redmond asserted he fulfilled the necessary criteria, *see* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996), it is apparent from the record that Redmond is not entitled to relief, as trial counsel was not ineffective.

By the Court.—Judgment and order affirmed.

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