**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

NOVEMBER 14, 1995

**NOTICE**

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.

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

**No. 95-0098-CR-NM**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**RALPH C. HARALSON,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Ralph Haralson appeals from a judgment of conviction for attempted burglary, operating a vehicle without the owner's consent, and possession of burglarious tools. Haralson's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Haralson has filed a lengthy response. Upon consideration of the report, the response, and an independent review of the

record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

The no merit report first addresses the issue of whether the evidence was sufficient to support the convictions. Counsel's discussion of the evidence tracks Haralson's concerns about the absence of fingerprint evidence, the arresting officer's identification of Haralson as the person he chased from the stolen vehicle, the disparity between the officer's observation that the suspect was wearing brown pants and the fact that Haralson was wearing blue jeans when he was arrested, and the trial court's misstatement that the homeowner had observed the suspect's gender and race. We conclude that counsel's analysis of these contentions as being without merit is correct.

The conviction will be sustained unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). This was a trial to the court. Where the trial court acts as the finder of fact and there is conflicting testimony, the court is the ultimate arbiter of the witnesses' credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979).

Here, the owner of the stolen vehicle testified that he did not give anyone permission to use his vehicle and that the tools found in the car were not his. The homeowner testified that at 3:00 a.m. he heard noises in his house and investigated. He discovered a basement window broken and then observed a person run from the area. The person was wearing a dark jacket and dark cap with a bill. The homeowner observed the person enter a blue GM vehicle. This information was relayed to the police. In responding to the call, the arresting officer gave chase to a blue Pontiac. The car crashed into a tree and the officer observed a black man, wearing a dark jacket, dark baseball cap, and brown pants, exit the vehicle. The officer gave chase and testified that he only lost sight of the man for a half-second, at the most. The officer observed the man dive under the front of a car in a driveway. Haralson was pulled out from under the car.

Haralson testified that he had been drinking that evening and was driven to the area by some acquaintances. When Haralson exited the vehicle to relieve himself, police sirens and flashing lights approached. The car in which Haralson was riding left without him. Haralson found himself alone in the neighborhood. He hid under the car to avoid contact with police because he was on probation.

The evidence was sufficient to support the convictions. The fact that police officers did not take fingerprints at the home, inside the car, or from the tools does not render other evidence of guilt insufficient. In light of other sufficient credible evidence, the lack of physical evidence linking Haralson to the house, car or tools is without consequence.

The disparity in the officer's observation that the suspect was wearing brown pants and the fact that Haralson was wearing jeans does not render the officer's testimony incredible. As the trial court noted, the suspect was observed as wearing dark clothing. Blue jeans fit that category, especially in the dark of night.

Further, the officer's testimony about being able to keep the suspect in sight is not inherently incredible. Through a number of distance and speed estimations in his response, Haralson suggests that the officer's testimony was internally inconsistent and subject to the need for corroborating evidence. Although the officer's estimation that the suspect was out of sight for only a half-second may be an underestimation, it is certainly not out of the realm of possibility. Given that the chase occurred in the dead of night and under circumstances where the officer was confident that he had not lost the suspect, the trial court could find that Haralson was the person who exited the stolen vehicle. Factfinders are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life. *See* ***De Keuster v. Green Bay & W. R.R. Co.***, 264 Wis. 476, 479, 59 N.W.2d 452, 454 (1953).

It is true that the trial court misspoke when it stated that the homeowner had observed the suspect's gender and race. The homeowner testified that he could not tell whether the person was male or female or that person's race. However, this portion of the homeowner's testimony was not the

linchpin of the trial court's finding of guilt. The most important link the homeowner provided was the suspect's dark clothing and entry into a blue GM vehicle. The officer observed that the suspect's race when the suspect exited the vehicle after the crash. The trial court's misstatement was harmless.

The next potential issue raised by both the no merit report and Haralson's response revolves around an alleged violation of the witness sequestration order. On the first day of trial, the trial court ordered witnesses to be sequestered. The next day of trial was held more than three months later. On that day the prosecutor was observed in the hall outside the courtroom with three police officers who would be testifying. Haralson's trial counsel raised the potential violation at the start of the proceeding. However, as the no merit report reflects, the record is not clear whether or not there was a violation of the sequestration order.

It is not necessary to determine whether the prosecutor's discussion with the police officers about their individual responsibility in the case violated the sequestration order. If no prejudice results from the violation a sequestration order, it is not error to allow the witness to testify or deny a motion for mistrial. ***Nyberg v. State***, 75 Wis.2d 400, 409, 249 N.W.2d 524, 528 (1977). Here, none of the officers had yet testified so there was no obvious attempt to have the officers shape their testimony to match that given by another. *See* ***id.*** The arresting officer testified first. His testimony was heard by the other officer who was permitted to sit with the prosecution at trial as the assisting officer. The third officer was not called to testify. No prejudice resulted from the alleged violation of the sequestration order.

Haralson argues prejudice because, by his reading of the testimony, the arresting officer contradicted the assisting officer about whether the assisting officer helped pull Haralson out from underneath the vehicle. The arresting officer testified first and Haralson contends he started to testify that the other officer was present when Haralson was arrested but "thought better of it" and testified that he alone pulled Haralson from under the car. Not only does Haralson mischaracterize the testimony, the point which he claims is contradictory is minor. The potential credibility clash is too remote to require relief for the alleged violation of the sequestration order. ***Id.*** at 410, 249 N.W.2d at 529. There is no merit to a claim that the trial court erroneously exercised its discretion regarding the alleged violation of the sequestration order.

Haralson's response raises a claim of ineffective assistance of counsel. He claims that counsel failed to present impeaching evidence regarding the arresting officer's observation that the suspect wore brown pants, that counsel failed to emphasize the incredible nature of the arresting officer's testimony that he did not lose sight of the suspect, and that counsel failed to develop the degree of prejudice caused by the alleged violation of the sequestration order.

We conclude that there is no merit to a claim of ineffective assistance of counsel because no prejudice can be shown. To prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) that his or her counsel's action constituted deficient performance and (2) that the deficiency prejudiced his or her defense. ***State v. Hubanks***, 173 Wis.2d 1, 24-25, 496 N.W.2d 96, 104 (Ct. App. 1992), *cert. denied*, 114 S. Ct. 99 (1993). We have already determined that the evidence was sufficient to support the convictions. The disparity in pants color and the inability of the arresting officer to observe Haralson during the chase were highlighted at trial. Given the other evidence which connected Haralson to the crimes, any failure to duly emphasize these points was not prejudicial. Because no prejudice existed, counsel's failure to establish prejudice from the alleged violation of the sequestration order does not prejudice Haralson.

Another potential issue exists which neither the no merit nor Haralson's response raised: whether there would be arguable merit to a challenge of the five, two and two year concurrent prison sentences Haralson received for the convictions. Sentencing is committed to the discretion of the sentencing court and appellate review is limited to determining whether there was a misuse of discretion. ***State v. J.E.B.***, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). Appellate courts have a strong policy against interference with that discretion. ***Id.*** To overturn a sentence, a defendant must show some unreasonable or unjustifiable basis for the sentence in the record. ***State v. Hilleshiem***, 172 Wis.2d 1, 22-23, 492 N.W.2d 381, 390 (Ct. App. 1992), *cert. denied*, 113 S. Ct. 3053 (1993).

The basic factors the trial court should consider in imposing a sentence are the gravity of the offense, the character of the offender, and the need for protection of the public. ***State v. Stuhr***, 92 Wis.2d 46, 49, 284 N.W.2d 459, 460 (Ct. App. 1979). Relevant considerations include the defendant's past

record of criminal offenses, any history of undesirable behavior patterns, the results of a presentence investigation, the defendant's education and employment record, and his need for close rehabilitative control. ***Id.*** The sentence is based on the facts of record and appropriate considerations. We cannot conclude that the sentence is unduly harsh or excessive.

Our review of the record discloses no other potential issues for appeal. We conclude that any further proceedings on Haralson's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Gerald L. Crouse, Jr. is relieved of any further representation of Haralson on this appeal.

*By the Court.*--Judgment affirmed.