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**DISTRICT I**

June 20, 2023

*To*:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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Jennifer L. Vandermeuse
Electronic Notice

Steven Zaleski
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You are hereby notified that the Court has entered the following opinion and order:

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2021AP1539-CR State of Wisconsin v. Gerald A. Brown, Jr. (L.C. # 2018CF4220)

Before Brash, C.J., Donald, P.J., and White, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Gerald A. Brown, Jr., appeals from a judgment of conviction and from an order denying his postconviction motion without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

Around 2:15 a.m. on September 3, 2018, C.R.D.'s grandson woke him up because someone was knocking on their door. C.R.D. got up and looked out the peephole. He saw R.J.,

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

someone who was staying at the residence. When C.R.D. opened the door for R.J., Brown and another individual came into the home, both armed with semi-automatic handguns. Brown asked where N.C. was; evidently, N.C. owed Brown money. C.R.D. stated that N.C. was not in the residence and he did not know where she was. Brown then asked where N.C.'s three-year-old child was. C.R.D. answered that the child was asleep in the bedroom. Brown told C.R.D. to take him to the child; C.R.D. complied because he did not want anyone to get hurt. Brown picked up the sleeping child and left the residence with the other individual. They got into a red minivan with the child and drove away. C.R.D. identified Brown in a photo array twelve hours later.

An Amber Alert was issued. The child was safely located. The State filed a criminal complaint on September 6, 2018, charging Brown with one count of kidnapping with a dangerous weapon and one count of possession of a firearm by a felon. An arrest warrant for Brown was issued; he was not immediately located.

In February 2019, a patrolling Milwaukee police officer observed an SUV run a red light and make an illegal U-turn. The officer activated his lights and siren, and the SUV sped away. The officer declined to initiate pursuit due to icy road conditions. About a block away, though, the SUV fishtailed and slid into a snowbank. The driver exited the SUV and fled on foot. The officer followed, also on foot, eventually apprehending Brown.

Brown was transported to the District 7 police station, where he was initially booked under the false name he had given to police. Brown was then transported to the Criminal Justice Facility, where the sheriff's department identified him through fingerprints as Brown. He was returned to District 7 to be booked under the correct information. The transporting officer

parked in the secured garage and began putting equipment in a locker. Brown, handcuffed and shoeless, fled out a side door of the garage. He was pursued and apprehended.

The State issued an amended criminal complaint, adding three flight-related charges to the two existing abduction-related charges: attempting to flee or elude an officer, escape from custody, and resisting or obstructing an officer. Brown moved to sever the abduction charges from the flight charges. After the motion was denied, Brown pled guilty to the three flight charges and went to trial on the two abduction charges. Pre-trial, Brown attempted to have evidence related to the flight charges excluded from his trial, but the trial court ruled that the evidence was admissible. The jury convicted Brown of the two abduction-related charges—kidnapping and possession of a firearm by a felon. The trial court later imposed concurrent and consecutive sentences totaling over twenty-four years of imprisonment.

Brown filed a postconviction motion, seeking a new trial on the grounds that he "received ineffective assistance of counsel in that trial counsel failed to investigate, properly disclose, and utilize alibi evidence." After briefing, the trial court denied the motion without a hearing. Brown appeals, raising two issues: whether the trial court properly denied his postconviction motion for a new trial without a hearing and whether the trial court erred in allowing flight-related evidence at the abduction trial.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts is a question of law we review *de novo*. *See* ***id.***, ¶9. If the motion does not raise sufficient facts, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that

the defendant is not entitled to relief, then the decision whether to grant a hearing is committed to the circuit court's discretion. *See* ***id.***

To demonstrate ineffective assistance of counsel, "the defendant must prove (1) that trial counsel's performance was deficient; and (2) that this deficiency prejudiced the defendant." *See* ***State v. Dillard***, 2014 WI 123, ¶85, 358 Wis. 2d 543, 859 N.W.2d 44. An attorney is deficient if he "'made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted; one set of internal quotation marks omitted). Prejudice is "defined as a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *See* ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶43 (citation omitted). The movant must prevail on both prongs to secure relief. *See* ***Allen***, 274 Wis. 2d 586, ¶26.

Brown's ostensible alibi witness was his friend, Adrianna Rote. According to Rote, she lived with Brown in Janesville at the time of the abduction, and N.C. had been staying with them for several weeks. The day before the abduction, N.C. supposedly took Rote's vehicle and a safe, which belonged to Brown, containing several thousand dollars. Within an hour of the abduction on September 3, 2018, a Milwaukee detective contacted Rote and asked to speak with her about a "kidnapping which could potentially involve her [friend], Brown." Rote told the detective that the day before, she and Brown had an argument about N.C. staying with them; N.C. took Rote's vehicle and the safe around noon; N.C. also took Rote and Brown's cell phones; and Rote had reported her vehicle stolen to Janesville police, but not the money. Several

hours later on September 3, Rote called the detective back, informing the officer that Brown could not have taken the child because he was with her all night.

Rote was called to testify by the State. On re-direct examination, the State asked her whether she recalled speaking to Milwaukee police on the phone. She answered, "[Y]eah. It was at 8 a.m. after he left." On re-cross examination, Brown's attorney had one follow-up question: "You said after he left?" Rote confirmed her answer and defense counsel began further questioning, but the State objected and requested a sidebar. At the sidebar, the State informed the court that it believed defense counsel was attempting to elicit alibi evidence from Rote even though counsel had not provided the required statutory notice.[2] After a discussion with the parties, the trial court agreed that the statute had not been followed and that the question "was likely to elicit that kind of a response in the nature of an alibi." Thus, it disallowed the question.

In his postconviction motion, Brown claimed that "to the extent that [he] wished to rely on alibi as a defense … it was incumbent upon trial counsel to comply with [WIS. STAT.] § 971.23(8)(a)" and his failure to do so was deficient and "objectively unreasonable." Brown further alleged that this deficiency caused prejudice because the State's evidence "cannot be considered overwhelming or even strong[,]" as there was no confession, no biological or physical evidence, no social media evidence, and no co-defendant, and the only direct evidence connecting him to the crime was C.R.D.'s uncorroborated identification.

[2] "If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 30 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known." WIS. STAT. § 971.23(8)(a).

The trial court denied the motion. It stated that Brown's arguments on deficient performance were "weak, but setting that question aside … [Brown] has not met his burden on the prejudice prong." While Brown argued that "there is a reasonable probability that the outcome of the case would have been different" had he been allowed to present Rote's "alibi" evidence, the trial court concluded that such a claim was entirely speculative. Although Brown attempted to minimize the State's evidence by emphasizing what it had not produced, the trial court noted that the State had presented "plenty of compelling, credible evidence including an eyewitness identification and evidence pointing to a clear motive." While Brown attacked C.R.D.'s identification of him, that challenge was not based on anything about C.R.D. in particular but only on general social science theories. In addition, Rote's "alibi" evidence was not only uncorroborated but also facially suspect; Rote did not provide police with the alibi during their 3 a.m. call, when Brown should have been with her. Rote only called the police hours later to provide Brown with an alibi. Indeed, Brown's trial attorney told the jury, "So I don't know where Miss Adrianna Rote comes down on the spectrum of credibility, how much you should weigh for her. In my opinion, not much."

We agree with the trial court. It does not suffice, for purposes of the prejudice analysis in an ineffective assistance claim, to simply claim that an error had some conceivable effect on the outcome of the proceedings. *See* ***Strickland v. Washington***, 466 U.S. 668, 693 (1991). But that is all Brown does. Thus, we are unpersuaded that Brown was prejudiced by his attorney's failure to give notice of an alibi under WIS. STAT. § 971.23.

Brown also argues that the trial court "erroneously exercised discretion in admitting evidence regarding Brown's conduct of attempting to flee or elude, escape and obstruction charges." We review the trial court's decision to admit or exclude evidence for a proper exercise

of discretion. *See* ***State v. Jackson***, 2014 WI 4, ¶45, 352 Wis. 2d 249, 841 N.W.2d 791. To properly exercise discretion, a trial court must examine the relevant facts, apply a proper standard of law, and use a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***State v. Dorsey***, 2018 WI 10, ¶37, 379 Wis. 2d 386, 906 N.W.2d 158.

The trial court concluded that the flight evidence was admissible as other acts evidence under the three-step analysis of ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). However, an other acts analysis was unnecessary in this case. "Analytically, flight is an admission by conduct." ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710. "It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge." ***State v. Neuser***, 191 Wis. 2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted).

Brown contends that the trial court nevertheless erred in allowing evidence of his flight because there were "other reasons" for his flight from police. Specifically, Brown asserted that there were drugs in the vehicle at the time of the traffic stop and that there was an open probation hold. Brown notes that the trial court recognized "the danger of prejudice in informing the jury of [his] probationary status" and the importance of excluding that from the jury, but argues that the trial court then failed to properly weigh the danger of unfair prejudice against the probative value of the flight evidence.

There is no automatic exclusion of flight evidence simply because the defendant could point to an unrelated offense to explain the flight. *See* ***Quiroz***, 320 Wis.2d 706, ¶26. "Rather, when a defendant points to an unrelated crime to explain flight, the trial 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. This is the same balancing test the trial court must employ when deciding whether to admit other acts evidence under ***Sullivan***. *See* ***id.***, 216 Wis. 2d at 772-73 ("Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice[?])." The record reveals that the trial court in fact performed this analysis.

The State had asserted that Brown was likely aware he was wanted in connection with the kidnapping: aside from extensive media coverage, police had spoken with Brown's mother, who said she would communicate with him to turn himself in. The trial court agreed. It further noted that when Brown was approached for the traffic stop, he consciously fled, then gave a false name, then attempted to escape. Thus, while the State's evidence is always prejudicial, the trial court was not persuaded that it would be unfairly so. We agree, and, in any event, "[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court properly exercised its discretion." ***State v. Quiroz***, 2009 WI App 120, ¶20, 320 Wis. 2d 706, 772 N.W.2d 710 (citation omitted). We are satisfied that it did.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*
*Clerk of Court of Appeals*