COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3300-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KURT D. FLITCROFT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Kurt Flitcroft appeals from a judgment convicting him on one count of attempted second-degree sexual assault, one count of second-degree sexual assault, and one count of third-degree sexual assault. He also appeals from the order denying him postconviction relief. The issues are

whether he received effective assistance of trial counsel, and whether the trial court erroneously instructed the jury. We affirm.

Flitcroft had sexual contact with Amy N. on July 12, 1995. Amy reported a sequence of one attempted and two completed acts of sexual intercourse that occurred without her consent and by the use of force. As a result, the State charged Flitcroft with two counts of second-degree sexual assault and one count of attempted second-degree sexual assault.

At his preliminary hearing, Amy denied any prior sexual contact with Flitcroft. Later, but several weeks before trial, Amy wrote the prosecutor the following letter:

> THE WITNESS: Okay. Mr. Wambach, I know that you are not going to be happy about receiving this letter, but it is something that I feel I must do. I no longer feel that it is in my best interest to continue with this suit. I'm finding it very hard to go from day to day with the idea of a trial looming over me like some kind of black cloud. No matter what punishment he gets, it won't be enough to get me to sacrifice any more of my life. And the thought of suing him in court and having to explain what happened to even more people who have no business knowing what happened makes me want to throw up. I want to move on with my life. I gotta job and right now my home life is improving. Every step I took towards making the decision improved some little aspect of my life. I've paid dearly for what happened. My marriage suffered, my kids suffered, I suffered. I have no doubts that my life can't withstand that sort of stress again. I know that you can still subpoena me or call and try to get me to reconsider. I know you've got to try, but I won't change my mind. And I really don't think an unwilling witness will do you much good. I am sure our lines got crossed somewhere. He actually believed he was doing what I wanted. He didn't physically harm me, and I'll get over it emotionally. It's not a big enough deal to warrant continuing. If there are any fees accumulated that must be paid in order to drop the case, send us the bill. I am also writing to Mr. Flitcroft. I want him to know that I am dropping the case for my own reasons, not because he

> did nothing wrong. I also want to express the fact that I still do not want to see him. Thank you and I'm sorry.

However, Amy did appear at trial. She testified that Flitcroft forcibly removed part of her clothing on the main floor of her home. He then led her down the stairs by the hand and into the basement. There, he attempted to have sexual intercourse with her but failed. He then moved her from a chair to a bed and had intercourse with her there. He then turned her around and had her gratify him orally. The prosecutor also introduced the above-quoted letter, without objection, and had Amy read it to the jury. Additionally, Amy admitted to a previous sexual encounter with Flitcroft, although she stated that she was too drunk to know whether it was consensual or not.

Flitcroft admitted the sexual encounter with Amy but asserted that it was consensual. He also testified that he had several prior sexual encounters with Amy, all consensual as well. Over his objection, the trial court instructed the jury on the two completed sexual assault charges that it could instead convict Flitcroft on the lesser-included offense of third-degree sexual assault. The jury found Flitcroft guilty on the attempted assault, guilty of third-degree sexual assault on the sexual intercourse charge, and guilty of second-degree sexual assault for the oral/genital contact.

Flitcroft subsequently filed a postconviction motion alleging that counsel ineffectively failed to object when the prosecutor introduced Amy's letter. He contended that the letter was inadmissible hearsay and unduly prejudicial to him. The trial court denied the motion, concluding that trial counsel reasonably allowed introduction of the letter because it also contained exculpatory statements. Flitcroft appeals that determination, and the court's decision to instruct the jury on the lesser-included offense of third-degree sexual assault.

To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Counsel's performance is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. ***Id.*** at 636-37, 369 N.W.2d at 716. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Id.*** at 637, 369 N.W.2d at 716. Whether counsel's performance was deficient is a question of law. ***Id.*** at 634, 369 N.W.2d at 715.

Trial counsel reasonably withheld her objection when the State introduced Amy's letter. The letter states in part "I am sure our lines got crossed somewhere. He actually believed he was doing what I wanted." Under any reasonable view, that statement was exculpatory, and counsel referred to it and quoted it in her opening and closing statements, and in cross-examining Amy. It weakened Amy's credibility because it was noticeably different from her trial testimony, which did not admit to any ambiguity in the situation regarding her consent or Flitcroft's understanding of her nonconsent. Using the letter to challenge that testimony was therefore a reasonable trial strategy, despite other parts of the letter that showed more consistency with Amy's trial statements.

Flitcroft cannot reasonably claim he was aggrieved by the lesser-included offense instruction on third-degree sexual assault. It would have harmed him only if, but for the instruction, the jury would have acquitted on the second of the three charges. In other words, the jury would have had to find that Amy did not consent to the forcible attempted intercourse, that she consented to the intercourse that occurred immediately afterward, and then refused to consent to the forcible oral contact that occurred immediately after that. No reasonable jury

could have made that determination on the evidence presented. Either all three acts were consensual, as Flitcroft testified, or they were not, as Amy testified. Therefore, Flitcroft could only have benefited from the instruction because it allowed the jury to convict on the lesser of two possible charges for what it found to be one of a series of nonconsensual acts.

By the Court.—Judgment and order affirmed.

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