

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 00-0678-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES TERRY II,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. James Terry II appeals a judgment convicting him on seven criminal charges. His conviction followed a trial to the court. He challenges three evidentiary rulings, and he contends that his conviction on one

count of second-degree sexual assault violated his double jeopardy protection. We affirm on the evidence issues. We reverse the conviction for second-degree sexual assault and remand for resentencing on the remaining charges.

¶2 The State alleged that Terry committed six crimes against P.K. on November 8, 1998, including first- and second-degree sexual assault. He also faced one count of theft from another victim, also on November 8, and two criminal charges from conduct occurring on November 12.

¶3 When Terry was arrested on November 18, 1998, he possessed a bus ticket for his hometown of Des Moines. At trial, the State sought to cross-examine Terry about his planned trip, with the expectation that his answers would provide evidence of flight. The court allowed that line of inquiry, and also allowed the State to cross-examine on the fact that Terry had left Des Moines several weeks earlier, shortly after committing a battery there.

¶4 The court also allowed the State to cross-examine Terry about his November 18 theft of jewelry from a woman, considering it evidence of dishonesty relevant to Terry's credibility. Terry admitted on cross-examination that he stole the jewelry. At the time of trial, he had not been charged with the theft.

¶5 The trial court ultimately acquitted him on the two charges pertaining to his actions on November 12 and found him guilty on the seven remaining charges. Although the first- and second-degree sexual assault counts involved the same act, the court held that the latter was not a lesser-included offense of the former, and denied Terry's double jeopardy challenge. On appeal Terry challenges that ruling, as well as the decisions to allow cross-examination

on his planned trip to Des Moines, on the criminal act Terry committed there, and on the November 18 theft of jewelry.

¶6 Whether to admit evidence is within the trial court's discretion. *See State v. Sullivan*, 216 Wis.2d 768, 780, 576 N.W.2d 30 (1998). We uphold discretionary determinations if the trial court examines the relevant facts, applies the proper legal standard, and uses a rational process to reach a reasonable result. *Id.* at 780-81.

¶7 The trial court properly allowed the State to cross-examine Terry about traveling to Des Moines. Evidence of a defendant's flight, indicating consciousness of guilt, is admissible. *Wangerin v. State*, 73 Wis.2d 427, 437, 243 N.W.2d 448 (1976). Here, the trial court reasonably concluded that inquiry into a planned trip out-of-state, within eleven days of the charged crimes, might produce such evidence.

¶8 The trial court also properly allowed inquiry into Terry's battery in Des Moines. Evidence of bad acts is admissible for a variety of purposes, so long as it is not used to prove a person's bad character. WIS. STAT. § 904.04(2) (1997-98).¹ In this case the State did not inquire about the battery to prove Terry's bad character, but to strengthen the inference that his planned trip was flight, by showing Terry's willingness to face arrest and prosecution elsewhere just to get out of Madison. The trial court therefore properly allowed the State its line of inquiry.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶9 Even if the trial court erred by allowing the State to question Terry about the Des Moines trip and the battery there, the result was harmless. The State's questions to Terry failed to elicit any testimony from him that his planned return to Des Moines was a flight from prosecution here, or that he knew he faced criminal charges in Des Moines. Under any reasonable view of the evidence presented at trial, Terry's answers to the State's questions did not contribute to the verdict.

¶10 The trial court properly admitted testimony concerning Terry's November 18 theft of jewelry. WISCONSIN STAT. § 906.08(2) allows cross-examination of a witness concerning specific instances of conduct that are probative of truthfulness or untruthfulness and not remote in time. In Terry's view, theft is not proof of untruthfulness unless accompanied by misrepresentation. We disagree. The trial court reasonably concluded that theft under the circumstances presented demonstrated a propensity for untruthfulness.

¶11 The State concedes that the trial court erred by convicting Terry of first-degree and second-degree sexual assault based on the same act. Under the Wisconsin and United States Constitutions, no one may be punished twice for the same offense. These constitutional provisions (and WIS. STAT. §§ 939.66 and 939.71) allow conviction for either a crime or a lesser-included crime, but not both. See *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932). Second-degree sexual assault is a lesser-included crime of first-degree sexual assault. *State v. Price*, 111 Wis. 2d 366, 377, 330 N.W.2d 779 (Ct. App. 1983). Accordingly, Terry's conviction for second-degree sexual assault is reversed.

¶12 The State disputes Terry's demand to be resentenced. The State contends that vacating the second-degree assault sentence is sufficient because the

second-degree assault conviction had no effect on the remainder of his sentence. We conclude that the better course is to vacate all of the sentences imposed on Terry and remand for a resentencing on the remaining six counts. *See State v. Gordon*, 111 Wis. 2d 133, 146, 330 N.W.2d 564 (1983).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

