

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2335

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY A. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Gregory Allen appeals an order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06.¹ Allen argues

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that: (1) postconviction counsel was ineffective by failing to argue that trial counsel was ineffective by failing to present facts surrounding the admission of the other acts evidence; (2) he was denied due process of law because postconviction and trial counsel were ineffective; (3) postconviction counsel was ineffective by failing to argue that trial counsel was ineffective by failing to argue that the State violated Allen's Fifth Amendment right to remain silent; and (4) the State improperly responded to the merits of his claim, thereby conceding all issues. We disagree and affirm the order.

BACKGROUND

¶2 In 1996, Allen was convicted of second-degree sexual assault, burglary and kidnapping. Postconviction counsel filed a motion for postconviction relief on the grounds that the trial court improperly admitted other acts evidence relating to: (a) another sexual assault Allen allegedly committed, and (b) Allen's late-night prowling. The trial court denied the motion. Allen appealed and we affirmed Allen's judgment of conviction.²

¶3 Allen then filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06. The circuit court denied the motion. This appeal followed.

STANDARD OF REVIEW

¶4 When we review this type of claim of ineffective assistance of postconviction counsel, we ultimately focus on the performance of trial counsel and, in effect, apply the two-pronged *Strickland*³ test. *State ex rel. Flores v.*

² *State v. Allen*, No. 98-0665-CR (Dec. 8, 1998) (per curiam).

³ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

State, 183 Wis. 2d 587, 619-20, 516 N.W.2d 362 (1994). To establish that postconviction counsel was ineffective, a defendant must show both that the underlying conduct of trial counsel was deficient and the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court will not disturb the trial court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous. *State v. Knight*, 168 Wis. 2d 509, 514 n. 2, 484 N.W.2d 540 (1992). Whether counsel's performance was deficient and prejudicial are a questions of law we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶5 Counsel is presumed to have acted properly, so that a defendant must demonstrate that the attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment. *Id.* at 687-91. To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. *Johnson*, 153 Wis. 2d at 129.

DISCUSSION

I. OTHER ACTS EVIDENCE

¶6 Allen argues that his postconviction counsel was ineffective by failing to argue that trial counsel was ineffective by failing to present the facts surrounding the admission of other acts evidence. Allen contends that there were

distinct differences between the other acts and the charged offense and that trial counsel and postconviction counsel did not adequately raise these differences. He claims this failure is prejudicial because there is a reasonable probability that the same individual did not commit both the other act and the charged offense.

¶7 Several principles governing WIS. STAT. § 974.06 control the disposition of Allen's appeal. First, the scope of a § 974.06 motion is limited to jurisdictional or constitutional issues. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 177, 517 N.W.2d 157 (1994) (quoted source omitted). "The motion must not be used to raise issues disposed of by a previous appeal." *Id.* Issues that have already been finally adjudicated, waived, or not raised in a prior postconviction motion cannot be raised in a § 974.06 motion unless there is "sufficient reason" for failing to raise them in the original, supplemental or amended motion. *Id.* at 181-82.

¶8 In Allen's previous appeal, we concluded that the trial court properly exercised its discretion when it admitted the other acts evidence. We analyzed the admission of the evidence under the standards set forth in *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998), and concluded that admission was proper to show identity, preparation and plan. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Allen has litigated this issue before and therefore is barred from relitigating it.

II. DUE PROCESS

¶9 Allen argues that he was denied his due process rights because trial and postconviction counsels' representation was ineffective. He contends that

evidence of his prowling lowered the State's burden of proof. Specifically, Allen argues that trial counsel was ineffective by failing to: (1) inform the jury how the victim's description of her assailant differed from Allen's appearance; (2) present to the jury several inconsistent descriptions given by the victim; and (3) deal with the other acts evidence relating to Allen's prowling.

A. Victim's Description

¶10 Allen contends that trial counsel was ineffective by failing to inform the jury that the victim's description of her assailant differed from Allen's appearance and that postconviction counsel was ineffective by failing to point out this specific error.

¶11 Again, Allen is seeking to relitigate an issue that has already been litigated. In his prior appeal, we concluded "[t]rial counsel did cross-examine the victim to show discrepancies between her original description of the assailant and Allen's actual appearance as well as her failure to identify him from a photo array or at the preliminary hearing." *State v. Allen*, No. 98-0665-CR at 3-4 (Dec. 8, 1998) (per curiam). We conclude that Allen has already litigated this issue and is barred from relitigating it despite the fact that he now labels it a due process violation.

B. Identification of Allen

¶12 Allen further argues that if trial counsel had identified for the jury several inconsistent descriptions given by the victim about her assailant, the jury would have had reasonable doubt of Allen's guilt.

¶13 The record reveals that trial counsel did cross-examine the victim and asked her about the previous descriptions she had given. Trial counsel

identified the victim's discrepancies and emphasized them during closing arguments. Because trial counsel identified the victim's inconsistent descriptions of her attacker for the jury, we conclude that trial counsel was not deficient. In addition, we note that postconviction counsel raised the issue of whether trial counsel adequately cross-examined the victim in Allen's direct appeal.

C. Prowling

¶14 Allen next argues that his due process rights were violated because admission of evidence relating to his subsequent prowling lowered the State's burden of proof. He contends that trial counsel should have informed the jury that the prowling occurred after the charged offense and that the vehicle the victim described did not match Allen's.

¶15 The admission of other acts evidence relating to Allen's prowling did not lower the State's burden of proof and did not deny him due process. The jury was instructed that the prowling evidence was only to be considered on the issues of preparation, plan or identity and not for assessing Allen's character. The jury was also instructed that the State had to prove each element of the crime beyond a reasonable doubt.

¶16 Additionally, trial counsel was not required to inform the jury that the prowling occurred after the charged crimes because it was obvious from the evidence. The victim testified that the crimes took place on June 26, 1995. There was testimony that the surveillance discovered Allen prowling in October 1995. Therefore, the jury was aware that the prowling occurred after the charged offense.

¶17 There was also no need for trial counsel to inform the jury that the car Allen was driving during the surveillance was different from that seen on the

morning of the crime. There was testimony that police had installed a monitoring device in Allen's Mercury Cougar. However, witnesses saw a Buick Regal in the neighborhood on the morning of the crimes. Allen's ex-girlfriend testified that she owned a Buick Regal and that Allen had access to it. The jury heard evidence that made insignificant the fact that the car Allen was seen driving during surveillance was different than that seen on the morning of the crime.

III. RIGHT TO REMAIN SILENT

A. Fifth Amendment

¶18 Allen argues that the State violated his Fifth Amendment right to remain silent after receiving a *Miranda*⁴ warning. Allen contends that the State's questions were used to suggest a tacit admission of guilt on Allen's part because he did not deny the allegations made against him. Allen further contends that trial counsel was ineffective because he did not object to the State's questioning, and postconviction counsel was similarly ineffective for failing to raise the State's violation in his postconviction proceeding.

¶19 Allen refers to two separate interviews he had with the police. At the first interview, Allen was read his *Miranda* rights. He waived those rights and agreed to talk. An investigator testified that after telling Allen that the investigator was confident Allen had committed the assault, Allen did not make any verbal response. Allen later initiated a second interview. The investigator testified that after asking Allen why he had done the prowling, Allen said he really did not want to talk about it and refused to answer further questions.

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶20 Federal courts have held that if a defendant chooses to speak to law enforcement officers after being given Miranda warnings and then at some point decides not to speak any further, it is permissible for the prosecution to disclose to the jury the defendant's refusal to answer further questions as part of the conversation with the defendant. See *United States v. Harris*, 956 F.2d 177, 181 (8th Cir. 1992). Therefore, we conclude that the State's reference to Allen's refusal to answer further questioning was not a violation of his Fifth Amendment rights.

B. Harmless Error

¶21 Even if postconviction and trial counsel were ineffective by failing to argue that the State had violated Allen's Fifth Amendment rights, that error was harmless. A constitutional error is considered harmless if the court finds that there is no reasonable possibility that the error contributed to the conviction. Constitutional errors relating to use of a defendant's silence can be harmless. *State v. Brecht*, 143 Wis. 2d 297, 316-17, 421 N.W.2d 96 (1988). The relevant factors to consider when determining harmless error include (1) the frequency of the error; (2) the nature of the State's evidence against the defendant; and (3) the nature of the defense. *Id.* at 317.

¶22 The record establishes that the State's references to Allen's silence were isolated. Moreover, the evidence was part of a lengthy description of all of the various statements Allen gave to the police over time. Also, trial counsel attempted to show in his cross-examination of the investigator that Allen had cooperated with the police by speaking to them on numerous occasions.

¶23 The investigator testified that Allen said that he liked to go "window peeking." Additionally, Allen said that he had been at the victim's house but not

on the night of the attack. These admissions were far more incriminating than evidence that Allen remained silent during portions of two police interviews. Allen has not established prejudice from any references to his silence. Therefore, he has not established that either trial counsel or postconviction counsel was ineffective by failing to raise this Fifth Amendment issue.

IV. WAIVER

¶24 Last, Allen argues that the State improperly responded to the merits of his WIS. STAT. § 974.06 motion to the trial court. He contends that all of the State's arguments are without merit and that the State has conceded the issues. We disagree.

¶25 We must affirm the trial court when it reaches the right result, even when that result is reached for the wrong reason. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). This is true irrespective of whether the correct legal argument was made to the trial court. *State v. Truax*, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989).

By the Court.—Order affirmed.

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

