

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 15, 1997

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.

NOTICE

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

No. 96-0341-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Anthony Doral Williams,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Anthony Doral Williams appeals from a judgment of conviction for attempted first-degree intentional homicide. See §§ 940.01(1) and 939.32, STATS. He also appeals from an order denying his postconviction motion. Williams contends that he was denied effective assistance of counsel because his attorney failed to request an individual poll of

the jury following its verdict, and failed to introduce the results of a blood-alcohol test taken by the victim.¹ We affirm.

The victim and Williams were acquainted through the victim's niece, who maintained a relationship with Williams and who had spent the night with Williams at the victim's home hours before the shooting. At the time of the shooting, an argument had erupted among the victim, Williams, and others over money. According to the victim, she asked Williams and the others to leave her home. Instead of immediately leaving, Williams chased her and shot her in the face. Blood-alcohol tests were performed on the victim while she was treated at the hospital. She had a blood-alcohol level of .056 percent.

As noted, the jury found Williams guilty of attempted first-degree intentional homicide. Upon return of the jury's verdict, the trial court polled the jurors as a group, asking them whether or not that constituted their verdict:

¹ In Williams's brief, he makes reference to another argument that was raised in his postconviction motion but not explored at the postconviction hearing: that trial counsel was ineffective for failing to object to the State reading into evidence in front of the jury the victim's statement to the police. The State responds that trial counsel did object to the use of that evidence during trial. Williams does not respond to the State's contention. We deem this issue conceded by Williams. See *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

THE COURT: So say you all?

JURORS: Yes.

After completing a general poll of the jury, the trial court asked Williams's trial counsel whether he had anything further for the jury. Trial counsel stated "no" and the jurors were dismissed. The next day one of the jurors contacted Williams's trial counsel with concerns over the guilty verdict. Trial counsel subsequently filed a motion to impeach the jury's verdict. At the hearing on trial counsel's motion, the juror was questioned as to her verdict. The juror testified that she voted guilty "because of peer pressure" and that throughout the deliberations, she felt that Williams was not guilty. The juror, however, did not testify that she would have said "no" if asked, during an individual jury poll, whether "guilty" was her verdict. At the conclusion of the juror's testimony, the trial court denied Williams's motion to impeach the jury's verdict. Williams's appeal does not challenge the denial of this motion.

Williams filed another postconviction motion alleging that trial counsel was ineffective for not individually polling the jurors and for failing to introduce the victim's blood-alcohol test results as impeachment evidence against the victim. At the evidentiary hearing on Williams's motion, trial counsel and Williams testified. The juror did not testify, but her earlier postconviction-hearing testimony was made part of the record. At the conclusion of the hearing, the trial court found that the juror would not have dissented from the verdict if the jury had been polled individually and that trial counsel was not ineffective for failing to introduce the blood-alcohol test results. The motion was, therefore, denied. Williams appeals.

Williams argues that his trial counsel was ineffective. To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *State v. Moffett*, 147 Wis.2d 343, 352, 433 N.W.2d 572, 575 (1989). Whether a counsel's performance was deficient and prejudicial are questions of law we review *de novo*. *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). We need not address both the deficient-performance and the prejudice prongs if the defendant fails to make a sufficient showing regarding one of them. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In order to show prejudice, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (citation omitted).

At the postconviction hearing on an ineffective-assistance-of-counsel claim, the trial court is the ultimate arbiter of the credibility of trial counsel and all other witnesses. See *Dejmal v. Merta*, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980). We will reverse a trial court's findings of fact only if they are "clearly erroneous." *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985).

First, Williams argues that trial counsel was deficient for failing to poll the jury and that this deficiency prejudiced him because had the juror been polled, she would have testified that she did not intend to vote "guilty." Denying Williams postconviction motion, the trial court found:

When I asked her [juror] if she heard me ask the jury was this and is this now your verdict, she said she heard that. She didn't respond. She didn't say no, that's not my verdict

Because she changed her mind after she left here I don't think qualifies to impeach the verdict of the jury....

....

So I've already decided that her change of mind doesn't affect the verdict, and I'm satisfied that at the time, even if the jury had been polled, she would have answered yes, that is her verdict, along with the other jurors.

These findings are not "clearly erroneous." Although the juror testified that she attributed her vote to "peer pressure" and that she agreed that she "merely caved in and voted with the majority" she never was asked nor did she testify

that she would have said “no” if asked during an individual jury poll whether “guilty” was her verdict. The juror was not called to testify at the second postconviction hearing and, therefore, did not offer any additional testimony. It is the defendant's burden to demonstrate that trial counsel's deficient performance prejudiced his or her case. See *Sanchez*, 201 Wis.2d at 232, 548 N.W.2d at 74. A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant. See *State v. Wirts*, 176 Wis.2d 174, 187, 500 N.W.2d 317, 321 (Ct. App. 1993), *cert. denied*, 510 U.S. 894 (1993). Here, Williams asks us to infer that the juror would have said “no” if asked during an individual jury poll whether “guilty” was her verdict. We refuse to draw that inference.

Williams also contends that trial counsel was ineffective for failing to introduce the victim's blood-alcohol test results taken immediately after the shooting. Trial counsel testified at the postconviction hearing that he did not obtain these results, and that had they been produced, he would have sought their introduction as a method of challenging the victim's credibility. Williams contends that the blood-alcohol test results would have established that the victim was drinking prior to the shooting and such drinking could have impaired her ability to identify Williams as the assailant. Our review of Williams's claim demonstrates that the failure to introduce the blood-alcohol test results was not prejudicial. Trial counsel effectively cross-examined the victim on her drinking before the crime took place. Further, there is no evidence in the postconviction record that a blood-alcohol content of .056 percent could inhibit accurate identification of a familiar person standing approximately five feet away.

By the Court.— Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.