

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

August 19, 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.

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

**No. 96-1004-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DONALD EDWARD WESTON,**

**DEFENDANT-APPELLANT.**

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Donald Edward Weston appeals from a judgment of conviction after a jury found him guilty of two counts of first-degree intentional homicide while armed and one count of attempted first-degree intentional homicide while armed. He also appeals from an order that denied his postconviction motion for relief. Weston raises four issues for review: (1) whether

he was denied effective assistance of trial counsel; (2) whether the trial court erroneously exercised its discretion when it excluded evidence that he alleges established his defense, thereby violating his constitutional right to present his defense; (3) whether he was denied his right to confront and cross-examine a witness regarding specific instances of the witness's conduct under § 906.08(2), STATS.; and (4) whether the trial court erred when it admitted his confession at trial. We reject his arguments on these issues and affirm.

### **I. BACKGROUND.**

The State filed a criminal complaint alleging the following facts. Weston went to an apartment on the City of Milwaukee's north side. Outside he met Lervon Campbell, who was also going to the apartment. Weston and Campbell entered the apartment, talked to its occupants, and then Weston went into the kitchen to light a cigarette. When he exited the kitchen he pulled out a revolver and shot Sheldon Taylor in the head while Taylor sat in a chair. Weston then fired the handgun at Terrance J., a juvenile, wounding him. Terrance J. fired a handgun back at Weston, hitting him three times. Weston left the apartment to reload his revolver. He then went back to the front of the apartment building just as Valerie Brown ran from the building screaming. Weston chased Brown and shot her in the head. Both Taylor and Brown died from the gunshot wounds; Terrance J. survived. Weston was arrested and he gave a statement to police admitting the above actions.

Weston's case proceeded to a jury trial and he was convicted of all counts. He later filed a postconviction motion alleging, among other things, that he received ineffective assistance of trial counsel. The trial court held an evidentiary hearing at which Weston's counsel testified about his actions during

Weston's trial. After the hearing, the trial court denied Weston's postconviction motion. Further facts are discussed with the specific issues raised by Weston in his appeal.

## II. ANALYSIS.

Weston first argues that he received ineffective assistance of trial counsel. He posits two areas of concern about his trial counsel's performance. First, he argues that his trial counsel was ineffective when he believed Wisconsin law precluded an inquiry into a key State witness's juvenile adjudications, that the witness was charged with possession of a weapon arising out of this incident, that the witness was arrested as a homicide suspect in this incident, and that the witness was on probation. Second, Weston argues that his trial counsel was ineffective when counsel failed to make an offer of proof of Weston's testimony about a robbery that occurred two weeks prior to the homicides. Weston asserts that this testimony would have supported his theory of defense, and, by failing to make an offer of proof, his trial counsel did not preserve for appeal the trial court's exclusion of that testimony. We address each allegation separately.

### *A. Ineffective Assistance of Counsel Standard of Review.*

For a defendant to succeed in an ineffective assistance of counsel claim, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show that counsel's performance was both deficient and prejudicial. *Id.* at 687. If a defendant fails to show one prong, this court need not address the other prong. *See State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

To show that counsel's performance was deficient, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

*Id.* at 689. Thus, because of the difficulties in making such a post hoc evaluation, "the court should recognize that counsel is *strongly presumed* to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

"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.'" *Sanchez*, 201 Wis.2d at 236, 538 N.W.2d at 76 (citation omitted). "The *Strickland* test is not an outcome-determinative test. In decisions following *Strickland*, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *State v. Smith*, \_\_\_ Wis.2d \_\_\_, \_\_\_, 558 N.W.2d 379, 387 (1997) (citations omitted).

In reviewing the trial court's decision, we accept its findings of fact, its "underlying findings of what happened," unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance was

deficient and prejudicial” *de novo*. *State v. Johnson*, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990) (citation omitted).

1. Failure to cross-examine State witness.

In his postconviction motion, Weston alleged that he was deprived of his right to effective assistance of counsel because his trial counsel failed to impeach Terrance J. with evidence of his prior juvenile adjudications and with evidence that he had been charged with “possession of a weapon by a juvenile for the events that took place during the incident for which Mr. Weston was on trial.”

After hearing Weston’s counsel’s testimony at the evidentiary hearing, the trial court made the following relevant findings of fact: (1) that the defense at trial was that Terrance J. started shooting first and that Weston responded in self-defense and that Weston contended that Terrance J. believed that Weston was involved in a prior robbery in the apartment; (2) that counsel “testified that he did not consider utilizing [Terrance J.’s] prior juvenile commitment for impeachment purposes because he believed its usage was impermissible under the Juvenile Code;” and (3) that counsel “testified that he was aware that [Terrance J.] had been charged with possession of a weapon by a child as a result of the incident involving the defendant, ... but that he was not certain if [Terrance J.] was on probationary status or juvenile supervision status at that time.”

The trial court then concluded that, even assuming that the above actions constituted deficient performance given a criminal defendant’s right to impeach the credibility of a witness under *Davis v. Alaska*, 415 U.S. 308 (1974) and its progeny, Weston had not shown the necessary prejudice under *Strickland*. We agree.

We detect grave faults in trial counsel's performance on this issue, particularly counsel's admission at the evidentiary hearing that he was not familiar with *Davis v. Alaska* and its holding. The question, however, is whether counsel's performance by not attempting to impeach the credibility of Terrance J. with his juvenile adjudications and with the arrest and charge arising out of this incident "renders the result of the trial unreliable or the proceeding fundamentally unfair." *Smith*, \_\_\_ Wis.2d at \_\_\_, 558 N.W.2d at 387 (citations omitted).

The trial court concluded that, given the totality of the evidence and the testimony of the other witnesses at the trial, Weston had not shown the necessary prejudice. The trial court found, among other things, that Terrance J.'s testimony at trial was consistent with his original statement to police and that the jury was aware of some of Terrance J.'s prior criminal conduct through the testimony of Lervon Campbell. We agree, and adopt the trial court's conclusion on this issue. Weston has not shown that his trial counsel's actions prejudiced him within the meaning of *Strickland*.

2. Failure to make offer of proof.

Weston next alleged that he received ineffective assistance of counsel when his trial counsel failed to make an offer of proof after the trial court excluded Weston's testimony about a robbery that allegedly occurred at the crime scene three weeks prior to the shooting. The trial court concluded that Weston had not shown the necessary prejudice because after the trial court reviewed the transcript it concluded that information on the alleged robbery was disclosed to the jury anyway. We agree.

The record reflects that Weston testified on direct examination about the alleged robbery at the apartment "and the feelings that were generated by the

[apartment] occupants' belief that [Weston] had robbed them.” Given this testimony, there was no prejudice created by counsel's performance.

***B. Evidentiary rulings.***

Weston contends that the trial court made several evidentiary rulings that he alleges violated his right to present a defense. We conclude that the trial court's rulings were either proper exercises of discretion or that any erroneous rulings were harmless.

A trial court possesses great discretion in determining whether to admit or exclude evidence. *State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). We will reverse such a determination only if the trial court erroneously exercises its discretion. *Id.* “A proper exercise of discretion consists of the court applying the relevant law to the applicable facts in order to reach a reasonable conclusion.” *State v. Jackson*, 188 Wis.2d 187, 194, 525 N.W.2d 739, 742 (Ct. App. 1994).

Whether a defendant's right to present a defense was violated is, however, a question of “constitutional fact” that we review *de novo*. *State v. Heft*, 185 Wis.2d 288, 296, 517 N.W.2d 494, 498 (1994). “The due process rights of a criminal defendant are ‘in essence, the right to a fair opportunity to defend against the State's accusations.’” *Evans*, 187 Wis.2d at 82, 522 N.W.2d at 560 (citation omitted). The right to present evidence “is rooted in the Confrontation and Compulsory Process Clauses of the United States and Wisconsin Constitutions.” *Id.* at 82-83, 522 N.W.2d at 560. While the rights granted by the Confrontation and Compulsory Process Clauses are fundamental and essential to achieving the constitutional objective of a fair trial, *see Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973), there is no constitutional right to present irrelevant evidence, *see*

*Jackson*, 188 Wis.2d at 196, 525 N.W.2d at 743, nor is it reversible error to exclude cumulative evidence. See *State v. Morgan*, 195 Wis.2d 388, 441, 536 N.W.2d 425, 446-47 (Ct. App. 1995).

1. Terrance J.'s knowledge of drug sales in apartment.

During cross-examination, Weston's counsel asked Terrance J. whether he and Weston sold drugs together. Terrance J. answered, "No." Counsel then asked him whether Weston and the victim, Taylor, sold drugs from the apartment. The State objected and the trial court sustained the objection on relevancy grounds. Counsel then asked, "Were drugs to your knowledge sold from the premises at apartment number eighteen?" Terrance J. answered, "Not to my knowledge." The State objected to the question; the trial court sustained the objection on relevancy grounds and ordered the jury to disregard the answer.

Weston argues that the evidence was relevant to his defense because he alleged that Terrance J. was the security man for the drug house. Although we may have ruled differently than the trial court had we been faced with this issue below, the trial court validly exercised its discretion here because the evidence was only marginally probative and, further, it was cumulative to other evidence presented at trial. See RULE 904.03, STATS. The jury could reasonably infer from the evidence presented that the apartment was a known drug house and that Terrance J. was involved in this activity. Moreover, Campbell testified that he had seen Terrance J. with drugs in the apartment.

2. Campbell's testimony about Terrance J.'s role in drug operation.

Campbell testified that he had seen Terrance J. with a gun in the apartment at times prior to the night of the shooting. Further, he testified that Terrance J. kept the gun near a love seat in the apartment or carried it. Weston's counsel then asked Campbell, "When you would visit Apartment Number 18 and [Terrance J.] was on the love seat, was it your understanding that he was guarding something?" The State objected; the trial court sustained the objection on relevancy grounds. Counsel then asked, "Do you know why [Terrance J.] kept the gun on occasion between the cushions on the love seat?" The State objected on relevancy grounds and because the question was speculative. The trial court sustained the objection on those grounds.

Weston's counsel's questioning on this issue was inartful and counsel never fully clarified the defense theory underlying these questions. Thus, at the time this examination occurred, the trial court was in the dark on any potential relevancy to Weston's theory. Accordingly, the trial court could properly limit the examination. There was no erroneous exercise of discretion.

3. Campbell's testimony about contact with alleged drug supplier.

Weston's counsel attempted to attack Campbell's credibility and bias by asking about contacts that Campbell had had with the drug supplier for the apartment after the shooting. The trial court permitted Weston's counsel to explore this issue in his cross-examination of Campbell. Campbell acknowledged that after the shootings he had talked to the drug supplier. Weston's counsel then asked Campbell how many times he had met with the drug supplier after the shooting. The State objected, and the trial court sustained the objection on relevancy grounds.

We conclude that this evidence was marginally relevant in that the number of contacts between Campbell and the drug supplier after the shooting could be probative of Campbell's bias or motive to fabricate. Nonetheless, we conclude that the exclusion of this evidence was harmless error. The jury was aware that Campbell was a drug user and that Terrance J. and the drug supplier were involved in selling drugs. Hence, there is no reasonable possibility that the exclusion of this evidence contributed to Weston's conviction. See *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985) (discussing harmless error analysis).

#### 4. Expert evidence on effects of cocaine.

Weston attempted to introduce the testimony of a toxicologist who had prepared a report on Valerie Brown. Counsel posited that the report showed that Brown had a peak level of cocaine in her system when she died and this stimulant would have caused severe agitation. He argued that the expert testimony would support the defense theory that Brown was agitated and that she was shot when she attempted to take the gun from Weston. The State objected to the expert testimony, arguing that it was not relevant because it was conceded that Brown was agitated because she had just witnessed a fatal shooting and was running from Weston. The trial court sustained the objection, concluding that Brown's agitated condition was not disputed and, further, that the only purpose of the evidence would be to impugn Brown's reputation.

"Expert testimony is admissible only if it is relevant." *State v. Pittman*, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79, cert. denied, 510 U.S. 845 (1993). In addition, relevant expert evidence must also "assist the trier of fact to understand the evidence or determine a fact in issue." RULE 907.02, STATS.;

*Pittman*, 174 Wis.2d at 267, 496 N.W.2d at 79. A trial court’s ruling on whether the evidence will assist the trier of fact is also a discretionary determination. *Id.* at 268, 496 N.W.2d at 79.

The trial court could validly conclude that the only proffered use of the evidence—that is, to show that Brown was agitated, was unnecessary because that issue was not contested. Without a more extensive offer of proof on the need for the toxicologist’s testimony, the trial court could properly exclude that testimony. *See id.*

***C. Right to cross-examine on witness’s background.***

Weston next argues that his rights to cross-examination and confrontation were violated when the trial court prevented his lawyer from questioning Campbell about his four prior charges for obstructing an officer and his charge for burglary that was pending at the time of the trial. We conclude that Weston’s constitutional rights were not violated by the exclusion of this evidence.

A defendant has a Sixth Amendment right to cross-examine witnesses; this includes the right to attack or impeach the credibility of the witness by revealing “possible biases, prejudices, or ulterior motives of the witness.” *Davis*, 415 U.S. at 315-317. This right is not absolute, however; the trial court retains the ability to limit cross-examination based upon concerns such as repetitive interrogation, obfuscation of the issues, and prejudice. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Weston first argues that he should have been allowed to examine Campbell about four alleged instances where he was charged with obstructing an officer. Weston acknowledged that he only had proof that Campbell was charged

once with obstructing an officer, but maintained that he found three other instances in the State's criminal record files. He was not sure if Campbell had been charged in those cases and knew "very little if anything about those specific instances."

Given the uncertainty surrounding these alleged charges, it was entirely appropriate for the trial court to exclude any questioning on them. A trial court may limit the scope of cross-examination to prevent speculative evidence from being introduced that unfairly prejudices the decision making process of the jury. *See State v. McCall*, 202 Wis.2d 29, 44, 549 N.W.2d 418, 424 (1996). That is what the trial court's ruling did here. Accordingly, there was no error.

Weston next argues that he should have been allowed to cross-examine Campbell about a charge for burglary that was pending at the time of Weston's trial. The trial court ruled that the relevance of such evidence was outweighed by the potential for prejudice, and therefore the evidence was not admissible. *See* RULE 904.03, STATS. The trial court did allow evidence of Campbell's five prior convictions. Weston argues that he was prevented from showing Campbell's potential bias arising out of this pending charge.

A criminal defendant may impeach a State witness by showing that the witness has a pending prosecution for another charge. *See State v. Randall*, 197 Wis.2d 29, 37, 539 N.W.2d 708, 711-12 (Ct. App. 1995). The trial court, however, can exclude such evidence and its implication that there was an agreement between the State and the witness with regard to that testimony, if the claim is entirely speculative. *See McCall*, 202 Wis.2d at 40-41, 549 N.W.2d at 422-23. Moreover, "a defense inquiry based upon this purely speculative theory is too far afield of any rational relationship to the truthful character of the witness or

his testimony to consider it a prejudicial exercise of discretion to exclude the proffered testimony.” *Id.* Weston has provided nothing to substantiate his claim that Campbell’s testimony was biased in favor of the State as a result of an agreement between him and the State. Thus, Weston’s rights of cross-examination and confrontation were not violated. *See id.* at 44-45, 549 N.W.2d at 424.

***D. Admissibility of Weston’s Confession.***

Finally, Weston argues that his confession to police was not admissible “because the confession was not recorded verbatim and because the circumstances surrounding the taking of the confession raise substantial questions about its accuracy and completeness.” (Capitalized in original.) We reject his arguments.

Weston gave two confessions to the police. The first confession is not disputed and Weston alleges that it was consistent with his testimony at trial. Weston contests the second confession, made the next morning to different police detectives, particularly where it differs from the original confession in two important aspects. Both issues relate to whether the shootings of Taylor and Brown were intentional.

Weston argues that the second confession was inadmissible. He argues that it was not a statement under RULE 908.01, STATS., because it was not a verbatim recording of Weston’s statement to the detectives. This argument is specious. Weston’s confession to police clearly falls within the definition of a statement under the rules of evidence. We reject his argument on this point out of hand.

Further, Weston's remaining claims about the reliability and accuracy of his confession arising out of the fact that it was not recorded verbatim all go to the weight that the jury should accord the evidence, not its admissibility. We decline Weston's invitation to require the verbatim recording of confessions made by suspects in custody. The trial court held extensive *Miranda-Goodchild* hearings on the voluntariness of the confession and ruled it admissible. Weston was free to attack the confession evidence by attempting to show that it was unreliable or inaccurate. Accordingly, we can find no error in the admission of the confession.

### III. SUMMARY.

In sum, we conclude that none of the issues raised by Weston on appeal requires a reversal of his conviction. Accordingly, both the judgment and order are affirmed.

*By the Court.*—Judgment and order affirmed.

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

