

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP2020-CR

Cir. Ct. No. 2002CF410

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. HEWITT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Keith Hewitt appeals from a judgment convicting him of substantial battery as a habitual criminal and an order denying his motion for a new trial. He contends: (1) that he received ineffective assistance of counsel; (2) that he was denied the right to a fair trial because the circuit court

allowed the State to question him about his prior convictions after he admitted the convictions; and (3) that the circuit court should have declared a mistrial when the State mentioned by name one of the victims involved in a prior conviction. We reject his arguments and affirm.

¶2 To substantiate a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that he or she was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. To prove 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." *Id.* at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. The defendant's burden is to show that counsel's errors "actually had an adverse effect on the defense." *Id.*

¶3 Hewitt contends that he received ineffective assistance of counsel due to his counsel's acts and omissions that resulted in the State being allowed to cross-examine him about his prior convictions. Assuming without deciding that counsel's acts and omissions constituted deficient performance, we reject Hewitt's claim of ineffective assistance of counsel because he cannot show prejudice. Hewitt's girlfriend had a fractured jaw, which constitutes "substantial bodily harm" for purposes of a substantial battery conviction. *See* WIS. STAT.

§ 939.22(38) (2003-04).¹ Hewitt’s girlfriend told three different medical professionals that she had been punched in the jaw. She told Dr. Raphael Carboneal, the first doctor to examine her, that her boyfriend Keith had punched her in the jaw, causing her injury. She also told Diane Reese, an emergency room nurse, that she had been punched in the jaw and she told Donna Jenson, another emergency room nurse, that her boyfriend had punched her in the jaw. In addition to the medical personnel, Hewitt’s girlfriend told Sheriff Deputy Annette Pulinsky that Hewitt had punched her in the jaw during a fight. Even though Hewitt’s girlfriend later testified at trial that she thought she broke her jaw when she fell on a log, a medical expert testified that her injuries were consistent with being punched, not with tripping and falling. Given the evidence, Hewitt cannot “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. We therefore reject Hewitt’s challenge to his conviction on the grounds of ineffective assistance of counsel.

¶4 We also reject Hewitt’s claim that he was denied the right to a fair trial due to circuit court error in allowing the testimony about his prior convictions. We do so because “there is no reasonable possibility that [allowing the testimony] contributed to the conviction.” See *State v. Schirmang*, 210 Wis. 2d 324, 332-33, 565 N.W.2d 225 (Ct. App. 1997) (evidentiary errors are subject to a harmless error analysis). We note, too, that Hewitt has not responded to the State’s claim that the error was harmless. His failure to do so constitutes an

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

admission that the State's analysis is correct. *Cf. Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶5 Finally, we reject Hewitt's claim that the circuit court should have declared a mistrial when the State mentioned a victim of a prior conviction by name because Hewitt has not met his burden of showing that the error was so fundamental that a new trial must be granted. *See State v. Street*, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996).

By the Court.—Judgment and order affirmed.

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

