

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 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. 2005AP740-CR

Cir. Ct. No. 2002CF99

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUANE G. CARPENTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Duane Carpenter appeals a judgment convicting him of kidnapping, false imprisonment, and possession of a firearm by a felon. He also appeals an order denying his postconviction motion. He argues that: (1) the trial court erred by denying Carpenter's motion to exclude any evidence of

Carpenter's prior convictions; (2) the court improperly allowed the prosecutor to read into the record the victim's preliminary hearing testimony; and (3) the court misused its discretion when it imposed concurrent sentences totaling twenty years' initial confinement and ten years' extended supervision. Because we conclude the first and third issues lack merit and the second issue was not properly preserved, we affirm the judgment and order.

¶2 Carpenter was charged with kidnapping and falsely imprisoning his estranged wife, Jodi, and threatening her with a gun. Jodi died before trial and her preliminary hearing testimony was read to the jury without objection. Defense counsel introduced other statements Jodi made to witnesses regarding the incident. Carpenter testified on his own behalf, denying the allegations. Based on the trial court's denial of Carpenter's motion in limine to exclude any evidence of his prior convictions, Carpenter's attorney elicited on direct examination that Carpenter had been convicted of six crimes. Other witnesses gave varying accounts of the incident and the source of an injury to Jodi's throat, and Carpenter's purchase of a gun. The jury convicted Carpenter of all charges.

¶3 The trial court properly exercised its discretion when it allowed evidence of Carpenter's prior convictions. Carpenter argues that the convictions should have been excluded because they were "old." Whether to admit prior convictions into evidence to attack a witness's credibility is left to the trial court's discretion. *See State v. Smith*, 203 Wis. 2d 288, 295, 553 N.W.2d 824 (Ct. App. 1996). The court should consider the lapse of time since the conviction, the witness's rehabilitation, the gravity of the crime, and whether the crime involved dishonesty. *Id.* at 295-96. The evidence should be excluded if its probative value

is substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 906.09.¹

¶4 Carpenter's convictions were highly relevant as they relate to his credibility and to an element of felon in possession of a firearm. Carpenter's convictions occurred between 1972 and 1982. One of the crimes, theft, the oldest of the offenses, involves dishonesty. The sheer number of offenses suggests lack of rehabilitation. A person who has been convicted of a crime is presumed less likely to be a truthful witness than a person who has not been convicted. *See State v. Kruzycki*, 192 Wis. 2d 509, 524, 531 N.W.2d 429 (Ct. App. 1995). The more often one has been convicted, the less truthful he is presumed to be. *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). In addition, because Carpenter was charged with possession of a firearm by a felon, the State was required to prove that he had a prior felony conviction, regardless of the lapse of time since the conviction. The brief mention of his six prior convictions does not create a prejudicial effect that substantially outweighs the probative value of this evidence.

¶5 We need not determine whether the trial court properly allowed the prosecutor to read Jodi's preliminary hearing testimony to the jury because that issue was not properly preserved for appeal. Error may not be predicated on a ruling that admits evidence unless a timely objection or motion to strike appears of record. *See* WIS. STAT. § 901.03(1)(a). Carpenter notes that this trial occurred before the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Therefore, any objection concerning Carpenter's right to cross-examine

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

witnesses would have been overruled. Making objections that are overruled is a prerequisite for challenging evidentiary rulings on appeal. A subsequent change in the law does not relieve a party of his obligation to make a contemporaneous objection to preserve an issue for appeal.

¶6 Finally, the trial court properly exercised its discretion when it sentenced Carpenter to twenty years' initial confinement and ten years' extended supervision. The court appropriately considered the seriousness of these offenses, Carpenter's prior convictions including violent offenses, his past prison experience, lack of truthfulness in his trial testimony, gambling and alcohol problems and a pending charge of domestic abuse that exhibited a pattern of violence and criminality. *See State v. Tew*, 54 Wis. 2d 361, 367-68, 195 N.W.2d 615 (1972). Because Carpenter had "been through the system," and the court knew of no other programs that might successfully rehabilitate him, the court appropriately imposed a substantial sentence. The sentence is not so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

By the Court.—Judgment and order affirmed.

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

