COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2004AP2635-CR **Cir. Ct. No. 1993CF931495**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE S. DAVIS,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Willie S. Davis appeals from the order denying his postconviction motion filed on September 8, 2004, and the judgment of conviction entered on September 17, 1993, after a jury convicted him of first-degree intentional homicide, party to a crime, contrary to WIS. STAT. §§ 940.01(1),

939.63 and 939.05 (1993-94),[1] and attempted armed robbery, party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) and 2., 939.32, and 939.05 (1993-94). Davis contends that: (1) it was fundamentally unfair to instruct the jury on a conspiracy theory on the attempted robbery charge because the crime of conspiracy to attempt does not exist; (2) pretrial statements by Davis to the police were admitted in violation of the Fifth Amendment privilege against self-incrimination; and (3) trial counsel rendered ineffective assistance by failing to impeach a witness for the prosecution with prior convictions. We conclude that the trial court did not err in giving the jury a conspiracy instruction; the Fifth Amendment was not violated; and trial counsel did not render ineffective assistance. Therefore, we affirm.

I. BACKGROUND.

¶2 On March 4, 1993, at approximately 2:00 a.m., seventeen-year-old Davis and his friend Frederick Watson arrived at an after-hours pool hall, called the This And That Pool Hall, located at 1000 West North Avenue, in the City of Milwaukee. The two men were let in by Walter Walls, who was in charge of opening the door to only people who knew someone already inside.

¶3 At the pool hall, many of the patrons were gambling and Davis and Watson took part in a dice game. After approximately one and one-half hours, Davis and Watson ran out of money and left the pool hall. They returned about forty-five minutes later and were again let in by Walls. Watson reentered the dice game and, after losing again, spoke with his cousin, Barron Hogans, and asked

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

him for more money. Watson became upset when Hogans refused to give him money, and Watson stated that he was going home to get more money and that he would be back. Watson and Davis again left the pool hall.

¶4 After the two men got inside Watson's car, Watson told Davis he was going to rob the pool hall and asked Davis if he would take part in the robbery. Davis responded that he did not know. The two then drove to Watson's residence where they picked up a rifle similar to an AK-47. They then drove to another residence where they picked up a .38 caliber revolver. At this point Davis told Watson he would participate in the robbery. Watson gave the revolver to Davis and told him it was loaded. Watson then told Davis that they would enter the pool hall and that he, Watson, would fire three shots, and that all Davis would have to do would be to point the revolver at patrons.

¶5 The two men returned to the pool hall approximately thirty minutes after they had left and knocked on the door. Walls again opened the door, but saw the barrel of the rifle and proceeded to try to push the door shut. Watson, who was holding the rifle, forced his way in and fired a shot into the pool hall. Watson tried to walk past Walls, at which point Walls grabbed the rifle and a struggle ensued between Watson and Walls. Davis was standing by the door. Walls appeared to be winning the struggle when Watson uttered "shoot him, shoot him." Davis fired one shot. The struggle between Walls and Watson continued and Watson repeated "shoot him, shoot him." Davis fired a second shot. One of the two shots hit Walls. Walls yelled out in pain and fell to his knees. Watson and Davis ran out of the pool hall. Walls was pronounced dead at the scene.

¶6 Watson was arrested the same day. Police searched Watson's residence and recovered the .38 caliber revolver in a heating duct, and a portion of

the gun stock from the rifle inside a tire. The same day, police also recovered the rifle under a sofa cushion in Davis's mother's house. The following day Davis was arrested at a local hotel. That evening, Davis was interrogated by a detective about his involvement in the events at the This And That Pool Hall.

¶7 After the jurisdiction of the Children's Division was waived, Davis was charged as an adult with first-degree intentional homicide, party to a crime, and attempted armed robbery, party to a crime. He pled not guilty, and the case proceeded to trial.

¶8 On July 26, 1993, the trial began. The same morning a hearing was held on a ***Miranda-Goodchild***[2] motion previously filed by Davis's defense counsel, seeking to exclude Davis's statement to the detective from being introduced. At the hearing, the detective testified that on March 5, 1993, he interrogated Davis at the police station. He testified that the interrogation began at 6:00 p.m., was interrupted from 8:30 p.m. until 9:00 p.m. when Davis was called to stand in a line-up, and continued from 9:00 p.m. until 10:00 p.m. The trial court found that the ***Miranda*** requirements were complied with and that Davis gave a knowing waiver, and thus determined that the State could introduce the statement at trial if it wanted to. In making its determination, the trial court summarized the facts and, among other things, made a finding that "[w]aiver was taken [at] approximately 8:30 pm."

¶9 At trial, the detective testified that he interviewed Davis shortly after he was arrested, and that Davis gave a full account of what had transpired the

[2] ***Miranda v Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

night of the incident. The detective also testified that Davis admitted firing the shot that killed Walls, but that Davis denied having done so intentionally.

¶10 Davis took the stand in his own defense. He repeated what he had told the detective on March 5, 1993, about the night of the shooting. Davis again admitted firing the shot that killed Walls, and again denied that the shooting was intentional. He testified that after Watson's initial shot, when Watson and Walls were already engaged in the struggle and Watson yelled to him "shoot him, shoot him," he was standing by the door with the gun pointed down toward the ground. He then testified that the first time the gun "went off" he was standing in the doorway and was pushed backwards by the door: "And as I was walking up that's when the door had hit me. And then the gun had went off. I fell back a couple steps." He explained that the second shot was also not fired intentionally, but that after Watson had yelled "shoot him, shoot him" a second time, the gun again went off because Walls was holding on to Davis's arm: "And then Walter had grabbed my arm and he was pulling, pulling at my arm. And then I fired the [gun.]"

¶11 Lael Bivins, a patron at the pool hall on the night in question, testified that he saw the entire incident transpire and that there was nothing obstructing his view from where he was standing – presumably because he, unlike the other patrons, did not run for cover when the shooting started. He testified that he saw Davis shoot Walls. When asked whether he was gambling and drinking that night, Bivins testified that he was neither gambling nor drinking. The proprietor of the pool hall, Chris Harris, and another patron, Louis Robinson, testified, however, that Bivens was indeed both drinking and gambling on the night in question.

¶12 A ballistics expert testified that the revolver recovered by police was the weapon which fired the bullet recovered from Walls's body. The expert also testified regarding trigger pull: the amount of weight or pressure required to cause the hammer in the firearm to fall and strike the primer. The single action mode trigger pull – when the hammer is pulled back and put into a locked position – was four and a half pounds. The double action mode trigger pull – when the hammer is not pulled back – was twelve pounds. The expert also testified that the revolver has mechanical, internal safeties which assure that it is not enough to merely exert pressure on the trigger, but for the firearm to fire, the trigger must be pulled all the way back and held in position. He also testified that he performed tests on the gun which proved that the safeties were functioning properly and that it could not have been discharged in any other manner, such as by dropping it, pounding on it, or bumping it.

¶13 After the court read the jury instructions, the district attorney asked the court to add a conspiracy instruction to the party to the crime instruction on the attempted armed robbery charge. Over Davis's attorney's objection, the trial court granted the State's request and proceeded to instruct the jury as follows:

> Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime may be charged with and convicted of the commission of the crime although he did not directly commit it.
>
> As applicable to this case, a person is concerned in the commission of a crime if he, (a), directly commits the crime, or, (b), intentionally aids and abets in the commission of it or, (c), is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of … any other crime which is committed in pursuit of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime.

> However, such party is not concerned in the commission of a crime if he voluntarily changes his mind and no longer desires that the crime be committed, and notifies the other party concerned of his withdrawal within a reasonable time before the commission of a crime so as to allow the other person also to withdraw.

¶14 The jury found Davis guilty of both first-degree intentional homicide and attempted armed robbery. Davis was sentenced to life imprisonment with a parole eligibility date in 2016 for the homicide, and to five years' imprisonment for the robbery, to be served concurrently. On September 17, 1993, Davis filed a notice of intent to pursue postconviction relief; however, initially no notice of appeal was timely filed. On June 24, 2003, this court granted Davis's *pro se* petition, and ordered Davis's appeal rights reinstated under WIS. STAT. RULE 809.30. On August 27, 2004, through new appellate counsel, Davis filed a postconviction motion under RULE 809.30(2), which the trial court denied on September 8, 2004. This appeal follows.

II. ANALYSIS.

A. Attempted Armed Robbery as Co-Conspirator

¶15 Davis contends that it was fundamentally unfair and a violation of basic due process to instruct the jury on a conspiracy theory with respect to the attempted armed robbery charge because there is no such crime as conspiracy to attempt.

¶16 Whether a jury instruction violated a defendant's due process rights is a question of law. ***State v. Pettit***, 171 Wis. 2d 627, 639, 492 N.W.2d 633 (Ct. App. 1992). As such, it is a question this court decides independently without deference to the trial court's decision. ***Id.***

> Relief is not warranted unless the appellate court is "persuaded that the instructions, when viewed as a whole,

> misstated the law or misdirected the jury" in the manner asserted by the challenger. Where a criminal defendant claims that the jury instructions violated constitutional due process, the issue is whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the defendant's rights. In making that assessment, we consider the challenged portion of the instructions in context with all other instructions provided by the trial court.

State v. Foster, 191 Wis. 2d 14, 28, 528 N.W.2d 22 (Ct. App. 1995) (citations omitted).

¶17 To support his contention that conspiracy to attempt is not a crime, Davis relies on two cases: ***People v. Iniguez***, 116 Cal. Rptr. 2d 634 (Cal. Ct. App. 2002), and ***United States v. Meacham***, 626 F.2d 503 (5th Cir. 1980). In ***Iniguez***, the defendant had been charged with and pled guilty to a "conspiracy to commit attempted murder." 116 Cal. Rptr. 2d at 636. The California Court of Appeals held that:

> "Every person who attempts to commit any crime, but fails ..." is guilty of a crime. Such a criminal attempt consists of two elements: "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." Attempted murder, therefore, consists of the specific intent to commit the crime of murder coupled with a direct but ineffectual act done toward its commission.

Id. (footnotes omitted). The court noted that "the crime of attempted murder requires a specific intent to actually commit the murder, while the agreement underlying the conspiracy pleaded to contemplated no more than an ineffectual act." ***Id.*** Rationalizing that "[n]o one can simultaneously intend to do and not do the same act," the court concluded that "conspiracy to commit attempted murder, is a conclusive legal falsehood." ***Id.***

¶18 ***Meacham*** involved a defendant who had been charged with "conspiracy to attempt to import marijuana" and "conspiracy to attempt to distribute marijuana." 626 F.2d at 507. The relevant statutory language read "attempts or conspires." ***Id.*** at 508. The Court of Appeals for the Fifth Circuit held that it "d[id] not believe Congress intended to create four discrete crimes with the three words 'attempts or conspires'": "conspiracy, attempt, conspiracy to attempt and attempt to conspire." ***Id.*** In holding that the provision did not authorize conspiracy-to-attempt prosecutions, the court expressly declined to decide whether it is possible to prosecute the "crime of conspiracy to attempt in instances where separate provisions make both the conspiracy and the attempt criminal offenses." ***Id.*** at 509. The court then referred to conspiracy to attempt as a "conceptually bizarre crime," ***id.***, and in a footnote noted "it would be the height of absurdity to conspire to commit an attempt, an inchoate offense, and simultaneously conspire to fail at the effort," ***id.*** at 509, n.7.

¶19 Davis argues that ***Iniguez*** and ***Meacham*** show that conspiracy to attempt is a legal absurdity in Wisconsin. He first claims that in Wisconsin "[c]onspiracy requires a specific 'intent that a crime be committed,'" WIS. STAT. § 939.31, and that "an attempt is by definition a crime which has not been completed," *see* WIS. STAT. § 939.32(3). On this basis he asserts that, as in ***Iniguez***, and ***Meacham***, this leads to the absurd conclusion that "if an attempt is the object of a conspiracy, the actor would be required to simultaneously intend to commit a crime and intend the crime not be completed." We disagree.

¶20 In Wisconsin, there are two possible avenues through which a defendant may be found guilty of conspiracy: one is liability founded on the straight conspiracy statute as a substantive inchoate crime under WIS. STAT.

§ 939.31,[3] and the other is conspiracy as an avenue to party-to-a-crime liability under WIS. STAT. § 939.05(2)(c).[4]

¶21 Our supreme court explained this distinction in ***State v. Nutley***, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *overruled on other grounds by* ***State v. Stevens***, 26 Wis. 2d 451, 132 N.W.2d 502 (1965). The case involved the

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[3] WISCONSIN STAT. § 939.31 provides:

> **Conspiracy.** Except as provided in ss. 940.43(4), 940.45(4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

[4] WISCONSIN STAT. § 939.05 provides:

> **Parties to crime. (1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> (2) A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime….

shootings of two police officers where one died and the other was seriously wounded. ***Id.*** at 536. Three defendants, Nutley, Nickl and Welter, were convicted of both murder and attempted murder, even though only Welter actually shot the victims. ***Id.*** at 536, 557-60. Citing WIS. STAT. § 939.31 (1963-64),[5] Nutley and Nickl argued that, under a conspiracy theory, their sentences were excessive. ***Id.*** at 560-61. The court rejected their argument and held that although "there is little evidence that Nutley or Nickl aided or abetted Welter in this crime [under § 939.31,] the jury could reasonably predicate their liability upon the conspiracy theory of sec. 939.05(2)(c), Stats." ***Id.*** at 559. The court explained its reasoning for rejecting the argument and the distinction between § 939.31 and § 939.05:

> This argument ignores the distinction between conspiracy as a substantive *inchoate* crime, and conspiracy as a theory of prosecution as a principal for a substantive *consummated* crime. If the defendants had agreed to kill the officers, and did only one thing to carry out this plan but short of shooting to kill or to attempt to kill, they could have been convicted under the terms of sec. 939.31 of a conspiracy to commit murder and the sentencing provisions of this statute would have been relevant. Here they were convicted of a substantive crime, in part, at least, on the theory that they were conspirators and hence were guilty, as principals, of the crimes charged.

Id. at 561 (emphasis in original); *see also* ***State v. Moffett***, 2000 WI App 67, 233 Wis. 2d 628, 608 N.W.2d 733.

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[5] In ***Nutley***, the court referred to the 1964 version of WIS. STAT. § 939.31. With the exception of the penalties involved, the statute is identical to today's version, and reads:

> with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime

¶22 This court recently affirmed the principle set forth in ***Nutley*** in ***State v. Jackson***, 2005 WI App 104, 281 Wis. 2d 137, 701 N.W.2d 42, a case very similar to the one before us now and one that had not yet been published before this case was appealed. In ***Jackson***, Jackson was charged with attempted armed robbery, party to the crime. ***Id.***, ¶2. The trial court instructed the jury on the conspiracy aspect of party-to-a-crime under WIS. STAT. § 939.05(2)(c), and the jury found Jackson guilty. ***Jackson***, 281 Wis. 2d 137, ¶¶1, 5. Relying on ***Iniguez*** and ***Meacham***, Jackson argued that the crime of conspiracy to attempt does not exist and that a jury instruction on a conspiracy theory violated his due process rights. ***Jackson***, 281 Wis. 2d 137, ¶¶7-9. We rejected the argument for the following reasons:

> Jackson was charged with and convicted of the substantive crime of attempted armed robbery as a party to *that* crime. That "conspiracy" was the party-to-a-crime avenue by which his criminal liability attached, does not make him guilty of a non-existent crime. Armed robbery is a crime. Attempted armed robbery is a crime. Under the evidence looked at in a light most favorable to the jury's verdict, Jackson set into motion an armed-robbery scenario that culminated in the crime of attempted armed robbery because of the intervention of things beyond his and his accomplices' control. He was thus guilty of the substantive crime of attempted armed robbery as a *principal* by virtue of Wis. Stat. § 939.05(2)(c). The trial court did not err in instructing the jury, and did not violate Jackson's right to due process.

Jackson, 281 Wis. 2d 137, ¶12 (citations omitted; emphasis in original).

¶23 For the same reasons we rejected Jackson's argument, we now reject Davis's. Davis was never charged with, or convicted of, conspiracy to commit attempted armed robbery. Instead, he was charged with, and convicted of, the substantive crime of attempted armed robbery, as a party to the crime. *See* ***id.*** Similarly, the jury instruction that the State requested, and that the trial court gave,

was an instruction on the party-to-the-crime theory of liability under WIS. STAT. § 939.05, not conspiracy as an inchoate crime under WIS. STAT. § 939.31. Armed robbery is a crime, and so is attempted armed robbery, which means that, like in ***Jackson***, the fact that conspiracy was the party-to-a-crime avenue by which his criminal liability attached, does not make Davis guilty of a non-existent crime, but instead means that Davis was guilty of the substantive crime of attempted armed robbery as a principal via § 939.05(2)(c). ***Jackson***, 281 Wis. 2d 137, ¶12.

¶24 It is hence clear that Davis's insistence that "[c]onspiracy requires specific 'intent that a crime be committed…'" is flawed because it observes only that WIS. STAT. § 939.31 provides an avenue to conspiracy, and ignores WIS. STAT. § 939.05. Davis's reliance on ***Iniguez*** and ***Meacham*** is likewise misplaced, because in arguing that they apply to this case, Davis ignores the fact that both cases concern only the inchoate crime of conspiracy, not conspiracy as party to a crime, and are thus wholly irrelevant to this case.

¶25 The trial court did not erroneously instruct the jury, and did not violate Davis's right to due process.[6]

[6] The State presents lengthy alternative arguments for why the rationale Davis invokes for concluding that conspiracy to attempt is not a crime, does not invalidate use of the co-conspirator theory of liability in this case, namely that: (1) the rationale is faulty insofar as Wisconsin law is concerned, for under Wisconsin law, specifically ***Berry v. State***, 90 Wis. 2d 316, 326, 280 N.W.2d 204 (1979), failure is not an element of attempt, and, therefore, the crime of conspiracy to attempt does not require the actor to simultaneously intend to commit a crime and to fail to commit that crime; and (2) under Wisconsin law, liability under the co-conspirator theory of liability for an offense is not limited to the crime intended, but rather extends to any other crime that is a natural and probable consequence of the intended crime. Because Davis bases his argument only on the fact that his due process rights were violated by the jury instruction on conspiracy, alleging that there is no such crime as conspiracy to attempt, and because we hold that Davis's argument fails because he was neither charged with nor convicted of conspiracy to attempt and that he mistakenly points to WIS. STAT. § 939.31 when the correct statutory section is WIS. STAT. § 939.05, we need not address the alternative arguments presented by the State.

*B. **Miranda** Issue*

¶26 Davis next argues that his pretrial statement to police was admitted in violation of his Fifth Amendment privilege against self-incrimination. He claims that on March 5, 1993, the day he was arrested, police began interrogating him at approximately 6:00 p.m., but that he was not read, and did not waive, his ***Miranda*** rights, until 8:30 p.m. Davis bases this argument entirely on the finding the trial court made that the "[w]aiver was taken [at] approximately 8:30 pm." He asserts that because he made incriminating statements before he waived his ***Miranda*** rights, and because the record does not show which parts of the statement were taken before 8:30 p.m., his entire statement to the police must be suppressed under ***Missouri v. Seibert***, 542 U.S. 600 (2004).[7] We disagree.

¶27 It is a well-settled principle of appellate review that an argument not made at the trial court is waived and will generally not be reviewed for the first time by an appellate court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Davis never made an argument alleging a violation of his Fifth Amendment rights for not being given, and not waiving his ***Miranda*** rights prior to giving incriminating statements, either at trial, at the hearing on the ***Miranda-Goodchild*** motion, or in his postconviction motion. Davis therefore waived his right to make this Fifth Amendment argument, and is now precluded from presenting it. *See* ***Huebner***, 235 Wis. 2d 486, ¶10.

[7] In ***Missouri v. Seibert***, 542 U.S. 600 (2004), the United States Supreme Court held that a suspect's Fifth Amendment rights are violated when a law enforcement officer interrogates a suspect while in custody, elicits a confession, informs the suspect of his ***Miranda*** rights, and then elicits the same confession. ***Id.*** at 615-16.

¶28 However, even assuming that Davis had not waived the argument by failing to raise it at the trial court, his Fifth Amendment argument still would not have been successful. An appellate court will not upset a circuit court's findings of fact unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The transcript of the hearing on the ***Miranda-Goodchild*** motion reveals the following exchange on direct examination between the detective and the district attorney about the detective's interview with Davis on March 5, 1993, regarding the events at the This And That Pool Hall:

> Q Do you know approximately what time on March 5th that was?
>
> A That was approximately six p.m.
>
> ….
>
> Q When you first encountered Mr. Davis, did you tell him why it was that you were questioning him?
>
> A Yes, I did.
>
> Q What did you tell him; you recall?
>
> A Advised Mr. Davis he was under arrest for homicide and that we wanted to talk to him about his involvement in the crime.
>
> Q Did you advise him of those things that I refer to as the Miranda warnings?
>
> A Yes, I did.
>
> Q How did you do that?
>
> A I read them to Mr. Davis from the form that I used.
>
> (Whereupon, State's Exhibit No. 1 was marked for identification).
>
> Q I am handing you what's been marked as State's Exhibit No. 1 for identification purposes. Can you tell me what that is, please?

A This is the form that I used that I after advising Mr. Davis of his Miranda warnings is the State of Wisconsin Department of Justice constitutional rights form.

….

Q Can you tell me whether or not Mr. Davis did or said anything to indicate to you that he understood the rights that you read to him?

A Mr. Davis indicated that he understood his Miranda warnings.

Q Did you do anything or did you have him do anything to document that understanding?

A Yes. I asked him if he understood them, would he fill out the sheet he just read, and he proceeded to fill it out by signing his name, Willie Davis. And then at the waiver section, do you understand each of these rights, he indicated "yes" and wrote his initials.

Realizing that you have these rights, do you wish to consult an attorney, he indicated "no", then initialed it. And then, realizing you have these rights, do you wish to answer questions or make a statement now without an attorney present, and he indicated "yes" and he initialed it.

….

Q And did he indicate to you that he understood that?

A Yes, he did.

….

Q Approximately how long did the interview with Mr. Davis take place?

A We talked from six p.m. and we ended the interrogation at 10 p.m.

….

Q Were you and [another interrogating detective] the only two people who were with him during that four-hour questioning period?

A Mr. Davis was, stood in a line-up from 8:30 to 9:00 p.m. which [the other detective] was with him, but other than that, no.

THE COURT: So you didn't have a questioning all this period from six to ten. You also did other things?

THE WITNESS: Yes, sir. We stopped for line-up at 8:30, and we resumed the interrogation again at 9 p.m.

Q That was from six to 8:30 and from nine to 10 p.m.; is that what you're telling us?

A Yes.

¶29 At the conclusion of the hearing, after finding that the ***Miranda*** requirements had been complied with and that Davis gave a knowing waiver, the court determined that the State could introduce the statement at trial if it so wished. In making this determination, the court summarized the testimony and stated "[w]aiver was taken [at] approximately 8:30 pm."

¶30 Contrary to Davis's assertion, nothing in the above testimony by the detective indicates that Davis waived his ***Miranda*** rights at 8:30 p.m. Indeed, the testimony does not give an indication of the time at which the waiver was given.[8]

[8] On January 18, 2005, this court issued a written order granting the State's motion to supplement the appellate record with the written waiver form that Davis completed during the interrogation on March 5, 1993, and the written statement Davis executed after he waived his ***Miranda*** rights. Both documents had been introduced as exhibits at trial. After some difficulties locating the exhibits, the State filed a status report indicating that it had located copies of the two documents. On February 22, 2005, this court issued an order holding the State's status report in abeyance and directing Davis to file a response, if any, no later than March 8, 2005. Davis did not file a response. As a result, on March 24, 2005, this court ordered the two documents to be included in the record. The written statement clearly shows that Davis was given his ***Miranda*** warnings at the very beginning of the interrogation because the first sentence reads: "6:00 pm Subject was advised of his Miranda Warnings which he states he understands."

(continued)

What the testimony does show, by contrast, is that at 8:30 p.m. there was a break in the interrogation because Davis stood in a line-up from 8:30 p.m. to 9:00 p.m. Therefore, the trial court's finding that the waiver was taken at 8:30 p.m. was clearly erroneous. *See* ***Pitsch***, 124 Wis. 2d at 634.

¶31 Thus, even if Davis had not waived the Fifth Amendment argument by failing to raise it at the trial court, it would still have been unsuccessful because the trial court's finding was clearly erroneous and no part of the statement Davis made should have been suppressed.

C. Ineffective Assistance of Counsel

¶32 Finally, Davis also argues that his trial counsel was ineffective for failing to impeach witness Lael Bivins with his prior convictions.

¶33 To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***Pitsch***, 124 Wis. 2d at 633. To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a

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The written statement in question was not introduced at the hearing on the ***Miranda-Goodchild*** motion but this court may nonetheless properly consider it. ***State v. Begicevic***, 2004 WI App 57, ¶3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293 ("When reviewing a suppression ruling, we are not limited to the record before the circuit court at the time of the suppression ruling. Other information produced before or after the suppression hearing may be used to support the circuit court's decision.").

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." ***Id.*** at 694.

¶34 Our supreme court has described the standard under which this court is to review claims of ineffective assistance of counsel as follows:

> A claim of ineffective assistance of counsel presents a mixed question of law and fact. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo.

State v. Thiel, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305 (citations omitted). We thus review the question de novo.

¶35 Davis claims he was prejudiced by trial counsel's failure to present evidence of Bivins's prior convictions because the trial came down to whether the jury believed Bivins's or Davis's version of the events and such evidence would have cast doubt on Bivins's testimony. This, he alleges, created a reasonable probability sufficient to undermine confidence in the outcome of the trial. He requests reversal of his judgment and a remand for a new trial. We again conclude he is not entitled to relief.

¶36 For this court to review a claim of ineffective assistance of counsel, a postconviction ***Machner*** hearing on that claim is required. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). During a ***Machner*** hearing, the trial counsel testifies and the postconviction court determines whether trial counsel's performance was in fact deficient. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). Because no

Machner hearing was held, it is impossible for this court to conclude that Davis's trial counsel's performance was deficient, as required by ***Strickland***. Hence, because "the lack of a ***Machner*** hearing prevents our review of trial counsel's performance," a new trial is not a remedy available to Davis. ***Curtis***, 218 Wis. 2d at 555. Instead, the only relief available would be for this court to remand for a ***Machner*** hearing.

¶37 A remand for a ***Machner*** hearing is necessary, however, only if this court determines that the second prong of ***Strickland*** – prejudice – is satisfied. ***State v. Trawitzki***, 2001 WI 77, ¶43, 244 Wis. 2d 523, 628 N.W.2d 801. In other words, Davis must show that, had the trial counsel impeached Bivins, the outcome would have been different. *See* ***Strickland***, 466 U.S. at 694.

¶38 "When there is strong evidence supporting a verdict in the record, it is less likely that a defendant can prove prejudice." *See* ***Trawitzki***, 244 Wis. 2d 523, ¶45. Davis admitted firing the shot that killed Walls, but denies doing so intentionally. He claims the first shot was fired because the gun simply "went off" when he was pushed by the door, and that the second shot was fired because Walls was pulling his arm. Bivins's testimony about the shooting is for the most part consistent with Davis's, with the exception of the fact that Bivins's testimony lacks any mention of Davis being pushed by the door or Walls pulling Davis's arm as reasons for the gun going off. Indeed, Bivins did not testify that Davis intentionally shot Walls after Watson yelled, "Shoot him, shoot him," but stated only that "a shot was fired" and that "another shot was fired." Thus, it does not appear as though Bivins's testimony constituted strong evidence that Davis intentionally shot Walls. *See* ***id.***

¶39 By contrast, the ballistics expert did provide testimony that strongly indicated that the shooting was intentional. *See* ***id.*** Particularly significant was his testimony that the single and double action mode trigger pulls were four and a half pounds and twelve pounds respectively; that the revolver had safeties which assured that, in addition to exerting pressure on the trigger for the firearm to fire, the trigger had to be pulled all the way back and held in position; and that tests indicated that the safeties were functioning properly and that the revolver could not be discharged in any other manner, such as by dropping it, pounding on it, or bumping it. Based on only the ballistics expert's testimony and Davis's own admission that he fired the shots, the jury could have found Davis guilty beyond a reasonable doubt. Because Davis's and Bivins's testimonies were similar in many respects, it was the expert testimony, not Bivins's testimony, which showed that the shooting was intentional. Thus, Davis was not prejudiced by trial counsel's failure to impeach Bivins. *See* ***id.***

¶40 Further, this court has held that a defendant is not prejudiced by defense counsel's failure to impeach a key witness with prior criminal convictions if the jury already had reason to question the witness's credibility. *See* ***State v. Tkacz***, 2002 WI App 281, ¶22, 258 Wis. 2d 611, 654 N.W.2d 37. Bivins testified that he was neither gambling nor drinking on the night in question, while Harris and Robinson both testified that Bivins was doing both. This gave the jury ample basis to discredit Bivins's testimony. *See* ***id.*** Indeed, the fact that Bivins's statement regarding an event on the night of the killing was in direct contradiction with those of Harris and Robinson questions his credibility more directly than prior convictions would. Therefore, it is unlikely that the convictions would have materially influenced the jury's credibility assessment. ***Id.***

¶41 Because we conclude that Davis has not satisfied the burden to prove that this failure prejudiced his defense, we dispense with the inquiry as to whether his trial counsel's failure amounts to deficient performance. *See* ***Trawitzki***, 244 Wis. 2d 523, ¶43. Accordingly, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.