COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP2602-CR **Cir. Ct. No. 2004CF301**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. DAHLBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

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

¶1 PER CURIAM. William Dahlby appeals a judgment convicting him of one count of attempted first-degree intentional homicide and one count of intimidating a victim with force. He also appeals an order denying his motions for postconviction relief. We affirm.

¶2 Dahlby first argues that the circuit court should have disqualified itself from presiding over the trial and postconviction motions under WIS. STAT. § 757.19(2)(d) (2003-04),[1] which provides: "Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when … a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue."

¶3 After trial, Dahlby's counsel discovered that one of the convictions admitted to impeach Dahlby was from a case in which the judge had been involved over twenty years earlier. The judge, who was then a district attorney, had signed the criminal complaint. Dahlby contends that the circuit court was required to interpret facts in the criminal complaint from the prior case in deciding whether all of the convictions should have been admitted at trial for impeachment purposes. We disagree. The "validity or construction" of the complaint from the prior judgment was not at issue; at issue was the *existence* of the prior judgment and, if anything, the facts admitted at the guilty plea or proven at trial. Therefore, WIS. STAT. § 757.19(2)(d) has no application here.

¶4 Dahlby next argues that he is entitled to a new trial because the circuit court erred in admitting evidence of ten prior convictions to impeach him. Whether to admit evidence of prior crimes for impeachment purposes is committed to the circuit court's discretion. ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). The circuit court should consider the lapse of time since the conviction, the rehabilitation or pardon of the person convicted,

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

the gravity of the crime, and the involvement of dishonesty or false statements in the crime. ***Id.*** In light of these factors, the court should determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. ***Id.***

¶5 Dahlby contends that the circuit court did not explicitly consider all of the ***Kruzycki*** factors. We disagree. The record shows that the circuit court carefully considered the proper factors, such as the time that had elapsed since the crimes had been committed and whether the crimes related to honesty or truthfulness. The court applied the proper legal standard to the facts and reached a reasoned and reasonable result. Therefore, the circuit court properly exercised its discretion. *See* ***id.*** ("A court properly exercises its discretion when it correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion.").

¶6 Dahlby next argues that he received ineffective assistance of counsel because his attorney failed to check the accuracy of the prosecutor's allegation that Dahlby had ten prior convictions. Dahlby contends his counsel should have obtained judgments of conviction and the criminal complaints for each of the crimes and, had counsel done so, counsel would have realized that one of the ten convictions was not a crime, but a forfeiture.

¶7 To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "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 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.

¶8 Regardless whether counsel's actions constituted deficient performance, an issue we need not decide, Dahlby has not shown a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. We do not believe that a reasonable jury would have found Dahlby more credible had he admitted to only nine criminal convictions, rather than ten. Although inaccurate information about the number of times a defendant has been convicted might affect the jury's perception in some circumstances, the difference between nine and ten convictions is inconsequential; the jury would be left with the same impression of Dahlby's credibility after hearing either number. As for the argument that counsel would have been able to more effectively argue for exclusion of the convictions, Dahlby has not shown prejudice because he has not persuasively explained why the circuit court would have ruled differently if counsel had the information Dahlby says he should have had.

¶9 Finally, Dahlby argues that he is entitled to a new trial because the prosecutor failed to produce accurate records of his criminal history. *See* WIS. STAT. § 971.23(1)(c). That statute provides that the district attorney must disclose to the defendant information "within the possession, custody or control of the [S]tate" regarding the defendant's criminal record. The State and Dahlby incorrectly jointly stipulated that Dahlby had ten prior convictions, rather than nine. This was not a discovery violation, but an error that both parties apparently made. The prosecutor was not attempting to conceal from Dahlby information she had about Dahlby's criminal record; she just had the wrong information.

By the Court.—Judgment and order affirmed.

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