COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1740-CR **Cir. Ct. No. 2006CF535**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEO MANUEL DIAZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Leo Diaz appeals a judgment of conviction for two counts of solicitation of first-degree intentional homicide. He contends the trial court erred by prohibiting him from impeaching one of the State's witnesses with

evidence of prior convictions. We conclude the court properly excluded the evidence and affirm.

Background

¶2 Blaine Denny, an employee at a storage facility and a former police officer, rented a unit to two Hispanic males on May 24, 2004. Denny found their behavior suspicious and contacted police. He later identified Diaz as one of the renters.

¶3 Based on Denny's information, police obtained a search warrant for the storage unit and discovered over one hundred pounds of marijuana. Sergeant Todd Delain from the Brown County Sheriff's Department investigated Diaz's involvement in trafficking those drugs. Diaz implicated himself and was charged with conspiracy to deliver THC, a felony with a possible prison term of up to fifteen years.

¶4 In July 2005, while Diaz was an inmate at the Brown County jail, Maurice Withers arrived and was housed in an adjoining cell. The cellblock had a common area with a television where the inmates were allowed to congregate. Diaz allegedly approached Withers, told him about the pending drug case and expressed a desire to have Denny and Delain killed to beat the case. Diaz offered Withers $10,000 to kill Delain and $5,000 to kill Denny. Diaz further promised Withers a BMW and employment with a Mexican drug cartel. Diaz gave Withers instructions on how to find Denny, information on how to kill Denny, and details on how to avoid being detected. Diaz also gave Withers information about Delain, including his badge number and a physical description. Withers made contemporaneous notes of the encounter and reported this solicitation to the jail

staff. The investigation, which included audiotaping a conversation between Diaz and Withers, resulted in the solicitation of homicide charges against Diaz.

¶5 After a jury was selected, Diaz moved to admit, for impeachment purposes, evidence of Withers' prior convictions. Diaz argued there were thirteen; the State had counted ten. However, the court denied the motion as untimely. The trial proceeded and Withers testified, but Diaz did not. The jury convicted Diaz on both counts.

Discussion

¶6 Evidence of a witness's prior convictions is admissible for the purpose of attacking that witness's credibility. WIS. STAT. § 906.09(1).[1] Wisconsin law presumes a person convicted of a crime is less likely to be a truthful witness than a person who has not been convicted. ***State v. Kruzycki***, 192 Wis. 2d 509, 524, 531 N.W.2d 429 (Ct. App. 1995).

¶7 Whether to allow evidence of prior convictions for impeachment purposes is within the trial court's discretion. ***Id.*** at 525. A court properly exercises its discretion by applying accepted legal standards to facts of record and using a rational process to reach a reasonable conclusion. ***Id.***

¶8 Here, Diaz[2] brought his motion to admit evidence of Withers' prior convictions the day of trial, after the jury had been selected. The court denied the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The State also brought a motion regarding impeaching witnesses with prior convictions. Like Diaz, the State waited until just before trial, and the court denied both sides' motions.

motion as untimely, stating, "I believe the requirement is it is made at pretrial, and it hasn't been made at pretrial…. I'll deny the motions for not being timely made…." Diaz contends the court's decision on timeliness "is not the law."

¶9 There is no statutory requirement that a motion to admit evidence of a witness's prior convictions be brought before trial and, to the extent the trial court may have thought there was such a statutory rule, it was in error. However, the circuit courts have authority to adopt and apply local rules. *See* ***Community Newspapers, Inc. v. City of West Allis***, 158 Wis. 2d 28, 32, 461 N.W.2d 785 (Ct. App. 1990) (superseded by Supreme Court Rule on other grounds). Thus, the State argues that Diaz's motion was properly denied on the basis of a local rule requiring motions on the admission of evidence to be "filed and heard no later than 7 days prior to the time set for the trial." BROWN COUNTY, WIS., CIR. CT. RULE 502 (April 1999).

¶10 Diaz has declined to file a reply brief in this matter and, as such, we deem the matter conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Even on the merits, however, Diaz does not prevail. A local rule is valid so long as it does not conflict with the statutes. *See* ***Community Newspapers***, 158 Wis. 2d at 32-33. We conclude that RULE 502 does not conflict with WIS. STAT. § 906.09. It does not revoke the right to impeach witnesses with evidence of prior convictions. It merely establishes a timeline for the relevant motions and, indeed, we suspect the rule was created to avoid a situation just like the one in this case.

¶11 Diaz is correct to note that, in determining whether to admit or exclude the prior conviction evidence, the court is to engage in a balancing test to evaluate whether the probative value of the evidence is outweighed by possible

prejudice. *See* WIS. STAT. § 906.09(2); *see also* ***State v. Smith***, 203 Wis. 2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996). Requiring a motion be brought prior to trial allows the trial court time for thoughtful, considered application of the balancing test that Diaz insists is so crucial and, depending on the decision, may foreclose the need for a jury altogether. In other words, RULE 502 promotes judicial economy. In fact, the authority to create local rules derives from the courts' inherent power to control disposition of cases before them. ***Community Newspapers***, 158 Wis. 2d at 32. A motion seeking to admit evidence at the eleventh hour diminishes the court's ability to make a reasoned application of the balancing test.

¶12 Moreover, the evidence of Withers' prior convictions goes only to his credibility, not directly to any disputed elements of the crimes themselves. Viewing the trial as a whole, there was no reasonable possibility the lack of impeachment evidence contributed to the conviction. Because this incident took place in jail, the jury would likely have inferred Withers had some sort of prior record, even if they could not fully infer the extent. Withers' testimony was consistent with his contemporaneous notes and with statements he gave to investigators. The audio recording of a conversation between Diaz and Withers further corroborated Withers' trial testimony. Withers had no motive to fabricate facts—there is nothing to indicate he received any consideration for his cooperation. Finally, Withers testified to multiple facts that he could only have learned from Diaz, such as the names of the key witnesses in the drug case, Denny's informant identification number and address, Delain's badge number, and the existence of the drug cartel and the extent of Diaz's involvement in it.

¶13 Thus, even if the trial court erred and should have allowed Diaz to impeach Withers, we conclude any such error was harmless. There was no

"reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

By the Court.—Judgment affirmed.

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