COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2008

David R. Schanker
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. 2007AP1270-CR **Cir. Ct. No. 2003CF352**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. ALEXANDER,

DEFENDANT-APPELLANT.

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

Before Dykman, Vergeront, and Bridge, JJ.

¶1 VERGERONT, J. Michael A. Alexander appeals the judgment of conviction for first-degree intentional homicide in violation of WIS. STAT.

§§ 939.62(1) (2001-02)[1] and 940.01(1), attempted first-degree intentional homicide in violation of WIS. STAT. §§ 939.32, 939.62(1), and 940.01(1), and two counts of recklessly endangering safety in violation of WIS. STAT. §§ 939.62(1), 939.63(1), and 941.30(1), all while armed as a repeat offender. Alexander contends he received ineffective assistance of counsel on seven different grounds and he asserts four claims of circuit court error. We conclude that Alexander received effective assistance of counsel. We also conclude there was no circuit court error or erroneous exercise of discretion. We therefore affirm the judgment of conviction.

BACKGROUND

¶2 A jury convicted Alexander of charges stemming from an altercation at a night club during which Alexander shot and killed Therrick Roberts, shot and wounded Brian Childress, shot and wounded Calvin Thomas, and fired other shots that missed the club patrons. At trial, a number of patrons and employees of the night club testified, all of whom witnessed or were involved in the incident to varying degrees. Alexander testified that the gun was not his, he took the gun from Childress, who confronted him with it, and he fired the gun at Roberts and Childress in self-defense.

¶3 The jury returned a verdict of guilty of first-degree intentional homicide while armed as a repeater, attempted first-degree intentional homicide while armed as a repeater, and two counts of recklessly endangering safety while armed as a repeater. Alexander moved postconviction for a new trial on the

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

grounds of ineffective assistance of counsel and circuit court error. The court concluded that Alexander had not established defense counsel's deficient performance and that there had been no circuit court error.

DISCUSSION

I. Ineffective Assistance of Counsel

¶4 A defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient because he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must also show that counsel's deficient performance prejudiced the defense. ***Id.*** Because it is necessary to establish both deficient performance and prejudice, we reject a claim of ineffective assistance of counsel if either one of these components has not been established. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶5 To establish that an attorney's performance was deficient, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. The court's inquiry is highly deferential because it is "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." ***Id.*** at 689. Therefore, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** (citation omitted).

¶6 To establish prejudice, the defendant must show that the deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶7 We review a circuit court's ruling on an ineffective assistance claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We accept the circuit court's findings of fact unless they are clearly erroneous but independently review whether the constitutional requirement for ineffectiveness is met. ***Id.*** at 127-28.

A. Tape-Recorded Statements

¶8 Alexander moved the court, under WIS. STAT. § 908.045(6),[2] to admit tape recorded statements of two witnesses to the shooting, Jasmine Tucker and Latoya Locket, who were unavailable because of military service in Afghanistan. Tucker's statement was that she saw Alexander get punched, he then began to shoot, he ran out of the bar still shooting, and he made a motion with his arm as if he were emptying bullets from the gun. Locket's statement was that Alexander was involved in a fight, left the club, returned to the club, and was involved in a second fight, after which he pulled out a gun; she heard a shot after she saw the gun. The prosecutor did not object to Alexander's motion and the recorded statements were played for the jury.

[2] WISCONSIN STAT. § 908.045(6) provides for a hearsay exception if the declarant is unavailable and the statement, although not covered by any of the other hearsay exceptions listed in the section, has "comparable circumstantial guarantees of trustworthiness."

¶9 Alexander contends that the admission of these recorded statements constituted deficient performance by defense counsel because the statements contained "damaging and unchallenged perceptions and memories … without any material advantage to the defense." At the ***Machner***[3] hearing, counsel explained that his purpose in presenting these statements was to "try and point out the conflicting versions [of what happened that night] to show that in the split seconds that this happened in the dark bar that it was amongst all the confusion and noise, nobody really knew or could say for certain what had actually happened." Counsel acknowledged that he felt the Tucker statement was more beneficial to his client than the Locket statement. However, he testified that he felt the prosecution would not agree to admit one without the other and it was overall a better decision to admit both statements rather than neither.

¶10 Tucker's statement that Alexander was punched before the shooting was helpful to Alexander's claim of self-defense. Counsel's assessment that the prosecutor would not agree to the admission of one statement without the other was reasonable because the statements were taken under the same circumstances and there is no apparent reason that one would be admissible and not the other. Counsel's conclusion that the better course was to have the jury hear both statements rather than neither statement is the type of strategic choice courts do not second guess. ***Strickland***, 466 U.S. at 690. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶11 We conclude counsel's strategic decision regarding the statements was rational and therefore not deficient.

B. Demonstration of Tucker's Shooting Gesture

¶12 Alexander contends that defense counsel was deficient because he failed to object to Police Sergeant Cary Joholski's repeating a gesture he testified was made by Tucker while giving her recorded statement. Specifically, he demonstrated a motion that, he testified, Tucker made while she was describing Alexander shooting. Alexander contends that defense counsel should have objected to this gesture on hearsay grounds and confrontation clause grounds.

¶13 Counsel testified that he did not have a specific reason for not objecting; it simply did not occur to him to object. However, we judge the reasonableness of an attorney's conduct by an objective standard. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (citing ***Strickland***, 466 U.S. at 687-88).

¶14 Regarding the confrontation clause, Alexander does not explain why it is implicated given that the sergeant testified at trial and was cross-examined. To the extent Alexander is resting his objection to the sergeant's gesture on an inability to confront Tucker, we have already concluded it was not deficient performance for defense counsel to move for the admission of her statement.

¶15 Regarding the hearsay contention, Alexander does not sufficiently develop an argument. Sergeant Joholski's gestures were derived from Tucker's recorded testimony, which is undoubtedly hearsay, but admissible because of the parties' stipulation. This recorded statement, properly before the jury, described in detail the motion that Joholski imitated during his testimony. In his briefs on

appeal, Alexander simply asserts that the reenactment by Joholski was outside of the scope of his motion he does not explain why this is so. Alexander makes a brief, conclusory statement that Joholski's gesture was "hearsay" as well as "hearsay within hearsay." However, he does not mention the definition of hearsay[4] and explain how that applies in this particular situation.

¶16 We conclude that defense counsel was not deficient for failure to object to Joholski's gesture on confrontation-clause grounds, and that Alexander has not developed an argument explaining how defense counsel was deficient for failing to object to the gesture on hearsay grounds.

C. Submission of a Lesser-Included Charge

¶17 Alexander contends that defense counsel was deficient because he did not discuss with him whether to seek a lesser-included charge of second-degree intentional homicide at the close of evidence. Alexander relies on ***State v. Ambuehl***, 145 Wis. 2d 343, 357, 425 N.W.2d 649 (Ct. App. 1988), for the proposition that reappraisal of the pretrial decision not to seek a lesser-included offense is "required" in the "cold light" of trial evidence somehow affecting that decision.

¶18 Alexander overstates our holding in ***Ambuehl***. We stated there: "We refuse to hold that, as a matter of law, it is always unreasonable for counsel to presume that the client's pretrial decision not to request a lesser-included instruction will be the same after all the evidence is in." ***Id.*** However, we need

[4] A hearsay statement "is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion." WIS. STAT. § 908.01(1).

not decide what ***Ambuehl*** requires in this case because Alexander's own testimony at the ***Machner*** hearing was that counsel conferred with him and recommended a lesser-included offense at the close of evidence. Alexander also testified that defense counsel "probably" said he recommended this choice because of Alexander's own damaging testimony. The circuit court found that defense counsel did discuss this decision with Alexander. Therefore the factual premise to Alexander's argument on this point has been resolved against him by the circuit court, and we accept the circuit court's finding. *See* ***Johnson***, 153 Wis. 2d at 127.

D. Cross-Examination of Alexander on the Whereabouts of a Witness

¶19 As part of his claim of self-defense, Alexander testified that he was hit in the face with a glass bottle and that his friend, Crystal Carpenter, pulled pieces of glass out of his face when they returned home. During cross-examination, the prosecution asked Alexander about Carpenter's whereabouts and why she had not testified at trial. Defense counsel objected to this line of questioning, but stated no specific ground, and the objection was overruled.

¶20 Alexander contends on appeal that defense counsel was deficient for failing to properly object to this line of questioning and for failing to request a curative instruction and move for a mistrial. He lists a number of grounds for an objection, but we discuss only the one on which he presents a developed argument.

¶21 Alexander asserts that this line of questioning unconstitutionally shifted the State's burden of proof under WIS. STAT. § 940.01(3)[5] by suggesting to

[5] WISCONSIN STAT. § 940.01(3) provides:

(continued)

the jury that Alexander had to prove beyond a reasonable doubt that the facts constituting self-defense did exist. We conclude that the prosecutor's questions on the whereabouts of and lack of testimony from Carpenter were permissible and therefore defense counsel was not deficient for failure to object to it, to request a curative instruction, or to move for a mistrial. We base this conclusion on ***State v. Patino***, 177 Wis. 2d 348, 382, 502 N.W.2d 601 (Ct. App. 1993).

¶22 In ***Patino***, the defendant was accused of stabbing a victim, and he claimed he did so in self-defense. ***Id.*** at 375. On appeal, he asserted that the prosecutor's cross-examination of him about defense counsel's limited questioning of two trial witnesses shifted the State's burden of proof. ***Id.*** at 377. He made the same assertion about the prosecutor's comment in closing argument on defense counsel's limited questioning of a witness at the preliminary hearing. ***Id.***

¶23 We concluded in ***Patino*** that "[a] prosecutor's comment by questioning or argument about the shortcomings of the defense evidence does not, *per se*, constitute a shifting of the burden of proof." ***Id.*** at 379. In reaching this conclusion, we adopted the approach of the Seventh Circuit in ***United States v. Sblendorio***, 830 F.2d 1382, 1390-94 (7th Cir. 1987), which we decided was sound. ***Patino***, 177 Wis. 2d at 382. In ***Sblendorio***, the prosecutor's closing argument emphasized the defendant's failure to call several witnesses, suggesting that this failure supported an inference that the witnesses would not have

---

> **(3)** BURDEN OF PROOF. When the existence of an affirmative defense under sub. (2) has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt under sub. (1).

supported the defendant's version of events. 830 F.2d at 1390-91. In ***Patino***, we interpreted ***Sblendorio*** to hold:

> [I]t was permissible for the prosecutor to…imply that the failure of the defendant to present available evidence (other than the defendant's testimony) in opposition to the government's witnesses supported an inference that the government's witnesses were reliable….

Patino, 177 Wis. 2d at 382 (citing ***Sblendorio***, 830 F.2d at 1392). The ***Sblendorio*** court reasoned that a defendant's decisions about evidence other than his or her own testimony did not implicate the defendant's privilege against self-incrimination, and that asking the jury to draw inferences from the evidence—including the absence of a witness whom the defendant could have produced if he or she wished—did not alter the burden of proof or penalize the exercise of a constitutional right. ***Sblendorio***, 830 F.2d at 1391, 1393-94. The ***Sblendorio*** court explained that the prosecutor still carries the burden at all times and an inference is simply a way to carry the burden. ***Id.***, 1391.

¶24 Following ***Patino***, we conclude the prosecutor's cross-examination of Alexander did not go beyond the permissible purpose of implying that his failure to present Carpenter as a witness supported an inference that she would not corroborate the version of events to which he testified. Therefore, counsel was not deficient for failure to object on this ground, to move for a mistrial, or to request a curative instruction.

E. Prosecutor's Bolstering of a Witness's Credibility

¶25 Antwane Harrington's testimony was the most damaging evidence to Alexander's claim of self-defense, and, specifically, to Alexander's testimony that he took the gun from victim Childress. Harrington testified that Alexander was

involved in an altercation inside the club, that Alexander went to the trunk of a car and stuck "something" in his waistband, that Alexander pulled the gun from his own beltline, and fired it.

¶26 Harrington testified that he had been convicted of crimes on three previous occasions. Apparently to counteract the negative effect on Harrington's credibility, the prosecution elicited testimony from Harrington regarding a previous occasion on which he received a certificate for helping the police apprehend a robbery suspect. Alexander contends that this evidence of Alexander's past "good deeds" was irrelevant under WIS. STAT. § 904.01, unfairly prejudicial under WIS. STAT. § 904.03, and constituted inadmissible character evidence under WIS. STAT. § 904.04.[6] According to Alexander, defense counsel was deficient for failing to move for a mistrial once this improper testimony was elicited.

¶27 The very short section of Alexander's brief devoted to these assertions fails to adequately develop an argument in support of any one of them. In any event, we conclude defense counsel's conduct was not deficient. The jury heard testimony that Harrington had been convicted of crimes on three prior

[6] WISCONSIN STAT. § 904.04 provides in relevant part:

> **Character evidence not admissible to prove conduct; exceptions; other crimes. (1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> **….**
>
> (c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

occasions and that on one additional occasion Harrington had provided helpful information to the police, for which he received a certificate. As we have already explained, even though defense counsel testified that he did not have a strategic reason, we employ an objective standard. *See* ***McMahon***, 186 Wis. 2d at 80. A reasonable defense attorney could conclude that Harrington's giving information to the police on one occasion would not diminish the negative effect that three prior criminal convictions would have on the jury's opinion of his credibility. Therefore, it was reasonable for defense counsel to ignore this statement, instead of objecting to it or moving for a mistrial and thereby drawing increased attention to the "good deed."

F. Alexander's Prior Incarceration

¶28 On direct examination defense counsel asked Alexander if he had been convicted of a crime and Alexander answered "once." Counsel then asked if he had been incarcerated as a result and whether he had completed his GED while incarcerated, and Alexander answered yes to both questions. Alexander contends this line of questioning constituted deficient performance because the information elicited was of no positive value to the defense. Instead, Alexander asserts, it presented damaging information and exposed him to cross-examination that otherwise would have been off limits.[7] The only damaging evidence on cross-examination he refers to is his testimony that he was incarcerated for thirty months.

[7] Alexander also asserts that defense counsel elicited damaging testimony about his gang activity. However, Alexander provides no record cites and does not otherwise specify what this testimony was or how it was damaging. We therefore do not address this contention.

¶29 Defense counsel admitted at the postconviction hearing that it was a "mistake" to elicit the GED information the way he did, in the context of Alexander's incarceration. Assuming without deciding that it was deficient performance for defense counsel to elicit the fact that Alexander was incarcerated, we conclude it was not prejudicial. The fact that Alexander had been convicted of a crime was inevitably going to be elicited by the prosecutor if defense counsel did not bring it out on direct. *See* WIS. STAT. § 906.09. Any additional negative impact on Alexander's credibility from the fact of his incarceration would not be significant in light of the other evidence that provided a basis for questioning his credibility. This includes the evidence that he fled the scene, lied to the police, and did not mention to the police that he acted in self-defense.

¶30 We are satisfied there is not a reasonable probability that the result of the trial would have been different had the jury not heard Alexander was incarcerated for thirty months.

G. The Cumulative Effect

¶31 Alexander contends that the cumulative effect of counsel's errors entitle him to a new trial. However, except for the question on Alexander's incarceration, we have concluded there was no deficient performance; and on that point we have concluded there was no prejudice. Therefore Alexander is not entitled to a new trial under ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305 (in determining whether a defendant has been prejudiced, we assess the cumulative effect of counsel's deficiencies). Nor are there grounds for a discretionary reversal under WIS. STAT. § 752.35.

II. Circuit Court Error

¶32 Alexander's challenges to the circuit court's rulings assert both constitutional error and erroneous exercise of discretion. We review the former de novo, ***State v. Horngren***, 2000 WI App 177, ¶7, 238 Wis. 2d 347, 617 N.W.2d 508; the latter we affirm if the court applied the correct law to the relevant facts and reached a reasonable result. ***Staskal v. Symons Corp.***, 2005 WI App 216, ¶15, 287 Wis. 2d 511, 706 N.W.2d 311.

A. Questions on Whereabouts of Witness

¶33 Alexander contends the circuit court erroneously exercised its discretion when it failed to sustain defense counsel's objection to the prosecutor's questioning of Alexander regarding Carpenter. As we discussed in paragraphs 19-24, *supra*, this line of questioning was not impermissible burden shifting. Therefore, the circuit court properly overruled the objection.

B. Taped Statements

¶34 As discussed earlier, defense counsel stipulated to the admission of tape-recorded statements of two witnesses who were unavailable at the time of trial. Alexander asserts that, given the "hearsay and otherwise unconstitutional evidence [contained in the recordings]," the circuit court failed to conduct a colloquy to discover whether Alexander "intelligently, knowingly and voluntarily was surrendering his Sixth Amendment right to a confrontation with these witnesses[.]"

¶35 Alexander analogizes this situation to the ones presented in ***State v. Bangert***, 131 Wis. 2d 246, 260, 265-66, 389 N.W.2d 12 (1986) (requiring a colloquy for waiver of rights in a guilty plea), and ***State v. Villarreal***, 153 Wis. 2d

323, 324, 450 N.W.2d 519 (Ct. App. 1989) (requiring a personal waiver of the right to a jury trial).[8] He argues that circuit courts are constitutionally obligated to make a similar inquiry regarding waiver of the right to confront witnesses.[9]

¶36 Alexander cites no case holding that a colloquy is required for waiver of the right to confront a witness. He also does not reply to the State's response based on ***State v. Gove***, 148 Wis. 2d 936, 437 N.W.2d 218 (1989). In ***Gove***, the supreme court concluded that "[defendant], by failing to object, waived any challenge to the trial court's [finding that the witness was not available for confrontation]." ***Id.*** at 938; *see also* ***State v. Ellington***, 2005 WI App 243, ¶¶12-14, 288 Wis. 2d 264, 707 N.W.2d 907 (failure to object to evidence based on confrontation right does not preserve that issue for appeal).

¶37 We are not persuaded by Alexander's conclusory argument that a colloquy in these circumstances is constitutionally required. ***Gove*** and ***Ellington*** indicate the contrary. In addition, as the cases cited by Alexander show, courts have addressed whether a personal waiver or colloquy was necessary to waive a particular constitutional right by focusing on the specific nature of the right at issue. *See, e.g.,* ***Bangert***, 131 Wis. 2d at 260; ***Villarreal***, 153 Wis. 2d at 324. Alexander does not explain, by drawing on the existing case law, why the specific

[8] Alexander also cites to ***Rock v. Arkansas***, 483 U.S. 44, 62 (1987), which holds that hypnotically induced testimony should not per se be excluded from a trial. We do not see how ***Rock*** supports Alexander's claim, and he does not explain.

[9] In his reply brief Alexander cites ***Crawford v. Washington***, 541 U.S. 36 (2004), in support of this argument. Alexander describes ***Crawford*** as "solemnize[ing] a criminal defendant's right to confront his accusers" but does not develop an argument explaining why ***Crawford*** requires a colloquy in this case. We therefore do not address ***Crawford***.

nature of the right to confrontation should require a personal waiver by means of a colloquy.

¶38 We therefore conclude the circuit court did not err in not conducting a colloquy with Alexander on this point.

C. Pretrial Rulings Regarding Harrington

¶39 As noted above, in paragraphs 25-26, *supra*, Harrington's testimony at trial included key elements damaging to the defense and an example of Harrington's past behavior in which he aided police and received an award. Prior to trial, Alexander brought a motion seeking the court's permission to question Harrington regarding his criminal history, past incidents of aiding the DA's office with information, and the testimony of Harrington's ex-girlfriend, who could attest to various examples of criminal behavior by Harrington. Alexander's intent was to show that Harrington had received favorable treatment from law enforcement in the past and that he was fabricating his testimony in the hopes of favorable treatment in the future. The circuit court denied this motion. The circuit court concluded there was no basis to believe Harrington had fabricated his testimony in expectation of favorable treatment from the district attorney's office. The circuit court arrived at this conclusion based on statements from the prosecutor that Harrington's statements did not result in any favorable treatment from the district attorney's office or police in the past, and that his pending charges occurred after he testified in the preliminary hearing in this case. The circuit court did not allow testimony from Harrington's ex-girlfriend regarding Harrington's prior conduct because it concluded that conduct had no bearing on whether he would testify truthfully.

¶40 In a conclusory fashion Alexander contends the circuit court erroneously exercised its discretion in denying this motion because the denial "violated Alexander's due process rights, his right to confrontation and his right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the Unites States Constitution." Because Alexander does not explain how the court's ruling violated his constitutional rights, we do not address these assertions.

¶41 In ***State v. McCall***, the court stated:

> The extent and scope of cross-examination allowed for impeachment purposes is a matter within the sound discretion of the circuit court. The appellate court should reverse a trial court's determination to limit or prohibit a certain area of cross-examination offered to show bias only if the trial court's determination represents a prejudicial abuse of discretion. No abuse of discretion will be found if a reasonable basis exists for the circuit court's determination.

202 Wis. 2d 29, 35, 549 N.W.2d 418 (1996) (citations omitted).

¶42 We conclude that the court properly exercised its discretion in denying this motion. With regard to inquiry into whether Harrington was motivated by the hope of lenient treatment, it was reasonable for the circuit court to decide there was an insufficient basis for this line of questioning. There was no evidence of past favorable treatment towards Harrington and no evidence that his testimony was going to result in future favorable treatment. Indeed, defense counsel acknowledged in arguing the motion that he had no evidence of this sort.

¶43 Regarding the decision not to allow Harrington's ex-girlfriend to testify to incidents such as Harrington's possession of a gun on several occasions, threatening an individual with a gun, violation of a restraining order, and an incident in which Harrington violated a condition of his bail and left the state to

steal a dog, the circuit court concluded that this "other acts" evidence was not admissible under WIS. STAT. § 906.08[10] because it did not show that Harrington was not a truthful person. On appeal, Alexander does not challenge that ruling but instead argues that Harrington's ex-girlfriend's testimony should have been admitted under WIS. STAT. § 904.04(2).[11] However, Alexander fails to explain the

[10] WISCONSIN STAT. § 906.08(1) and (2) provide:

> **Evidence of character and conduct of witness**. **(1)** OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
>
> (a) The evidence may refer only to character for truthfulness or untruthfulness.
>
> (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> **(2)** SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

[11] WISCONSIN STAT. § 904.04(2) provides in relevant part:

> OTHER CRIMES, WRONGS, OR ACTS. (a) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

permissible purpose for which the testimony should have been admitted under § 904.04(2). We therefore do not address this argument.

D. Evidence of Victims' Propensity for Violence

¶44 Alexander brought a pretrial motion seeking to present evidence regarding the past violent acts of the victims Roberts and Childress. The circuit court denied this motion on the grounds that the past violent acts of the victims were not relevant to a self-defense claim because Alexander was not aware of them at the time of the shooting.

¶45 On appeal, Alexander cites to ***State v. Boykins***, 119 Wis. 2d 272, 350 N.W.2d 710 (Ct. App. 1984), and ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973),[12] in support of his contention that it was constitutional error not to allow him to present other-acts evidence showing the victims' propensity for violence. However, ***Boykins*** and ***McMorris*** do not support Alexander's position. In both cases the defendant sought to present evidence of the victim's past actions that were known to the defendant *before* the charged incident occurred. ***Boykins***, 119 Wis. 2d at 277-78; ***McMorris***, 58 Wis. 2d at 151. Alexander provides no authority that supports a right to present evidence concerning the victims' propensity for violence that the defendant was not aware of at the time of the charged incident. We therefore conclude the circuit court did not err.

[12] Alexander also cites to ***Chambers v. Mississippi***, 410 U.S. 284 (1973), in this portion of his brief, but makes no effort to explain how it supports his claim. We therefore do not address it.

CONCLUSION

¶46 We conclude Alexander received effective assistance of counsel. We also conclude there was no circuit court error or erroneous exercise of discretion. We therefore affirm the judgment of convictions.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.