COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP720-CR **Cir. Ct. No. 2004CF5026**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRONEY CROSS,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Troney Cross appeals from a corrected judgment of conviction for attempted first-degree intentional homicide as a party to the crime, and from a postconviction order summarily denying his motion for a new trial. The issue is whether trial counsel was ineffective for failing to impeach a

principal prosecutorial witness with his three prior convictions. We conclude that Cross has not established, in the context of the entire record, that trial counsel's failure to impeach that witness with his three prior convictions was prejudicial to the defense while considering that witness's multiple credibility problems and his role as the getaway driver who was not at the scene of the shooting. Therefore, we affirm.

¶2 Cross, Gerald T. Porter and Jermaine A. Ward were initially charged with conspiracy to commit armed robbery; Cross and Porter were also charged with the attempted first-degree intentional homicide of Robert Owens.[1] Ward implicated Cross (by repeating hearsay attributed to Porter) as the shooter in a statement to police, although at trial, Ward told the jury that he lied about that and other things in his statement. According to Ward, while he was with Porter, Cross telephoned and asked Porter to drive him to a specific destination for a robbery. Once at that location, Cross and Porter got out of the car and Ward took the wheel and drove off because he could not find parking; approximately fifteen minutes later, Cross telephoned Ward to pick them up. Porter was bleeding, so Ward drove them to the hospital. Ward later identified Cross and Porter as those involved in the Owens shooting.

¶3 The State called as trial witnesses, several Milwaukee Police Department officers and detectives, a state narcotics agent, Ward and Owens. Cross also testified in his defense. The prosecutor, Porter's defense counsel and Cross's trial counsel repeatedly emphasized Ward's numerous false statements.[2]

[1] The conspiracy charge was dismissed against all three men prior to trial.

[2] During closing argument, the prosecutor acknowledged Ward's credibility problems by telling the jury, "I think you can believe a little bit of what [Ward] says."

At trial, Ward admitted he lied about a number of things because he thought he "was going to go home or get cut loose or the charges dropped." The trial court strongly suspected that Ward was not telling the truth and sternly reminded him (outside the presence of the jury) of the penalties for perjury. Ward also admitted that he was not at the scene of the crime, and "d[id]n't have a clue" about what happened insofar as Cross, Porter and the victim were concerned.[3]

¶4 The jury found Cross guilty of attempted first-degree intentional homicide as a party to the crime, in violation of WIS. STAT. §§ 940.01(1)(a) (2003-04), 939.32 (amended Feb. 1, 2003) and 939.05 (2003-04). The trial court imposed a thirty-year sentence, comprised of seventeen- and thirteen-year respective periods of initial confinement and extended supervision. Cross filed a postconviction motion pursuant to WIS. STAT. RULE 809.30(2)(h) (2005-06), for a new trial, alleging that his trial counsel was ineffective for failing to impeach Ward with his three prior convictions.[4] The trial court summarily denied the motion, ruling that trial counsel's failure to do so was not prejudicial in the context of the totality of the testimony. Cross appeals.

¶5 WISCONSIN STAT. § 906.09(1) provides as a general rule that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible." The reason for this rule is that it "reflects the longstanding view in Wisconsin that 'one who has been convicted of a crime is less likely to be a truthful witness than one who has

[3] That quotation is from Cross's trial counsel, however, Ward responded that he did not ("have a clue").

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

not been convicted.'" ***State v. Kuntz***, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991) (citation omitted).

¶6 While discussing the possibility of such an inquiry at trial, Ward asked the trial court "[w]hat [his] past convictions got to do with anything[,]" to which the trial court responded that

> [t]hey can only be used for the limited purpose of impeaching your credibility. So the only two questions that could be asked are have you ever been convicted of a crime, and you would respond yes, and then the question is how many times, and you would say three times. So that's as far as that question and answer can go.

During Ward's testimony, however, he was not asked about his prior convictions. Cross contends that his trial counsel was ineffective for failing to expose Ward's three prior convictions, which Cross claims would have also shown Ward's propensity to be an untruthful witness. Cross further argues that the three prior convictions were significant to a jury's assessment of Ward's credibility "because 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).

¶7 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents

> only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶8 Cross claims that his trial counsel was ineffective for failing to impeach Ward with his prior convictions. To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

> ¶9 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. However, the ultimate conclusion of whether the attorney's conduct resulted in a violation of the right to effective assistance of

> counsel is a question of law, and we do not give deference to the trial court's decision.

State v. Johnson, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986) (citations, brackets and internal quotation marks omitted).

¶10 Both defense counsel aggressively cross-examined Ward and repeatedly exposed his numerous credibility problems. At trial, Ward admitted that he had repeatedly lied to the police, and his trial testimony was repeatedly called into question. Even the prosecutor was compelled to admit that Ward had been less than truthful on several occasions. Furthermore, trial counsel emphasized how Ward remained in the car while Cross and Porter had gone to see Owens, and how Ward could not offer any direct testimony about how Owens was shot. The jury was told by Owens and then by Cross (albeit in contradictory versions) how Owens was shot.

¶11 Cross contends that he is entitled to a new trial for trial counsel's failure to impeach Ward on his prior convictions pursuant to ***State v. Smith***, 203 Wis. 2d 288, 302, 553 N.W.2d 824 (Ct. App. 1996). We disagree; this case is distinguishable from ***Smith***. First, in ***Smith***, defense counsel sought to question the prosecution's lead witness about her prior convictions and the trial court denied the motion in a decision in which "the heart of [its] ruling [wa]s contrary to Wisconsin law"; at oral argument, the State "reluctantly conceded" that the trial court's exclusion of that impeachment evidence was based on an erroneous application of Wisconsin law. ***Id.*** at 296-97. Second, the credibility of the lead witness in ***Smith*** was seemingly the "'linchpin' of the State's case against Smith." ***Id.*** at 300-01. Although Ward was a significant witness against Cross, Ward's testimony was not the "linchpin" of the prosecution's case; Ward was not even an eyewitness to Owens's shooting. Third, there were no eyewitnesses to the

shooting in ***Smith***, ***id.*** at 292; both Cross and Owens testified as eyewitnesses to the shooting in this case. For many reasons, this case is distinguishable from ***Smith***.

¶12 The jury had to have been aware of Ward's credibility problems. Any further impeachment of Ward would have been merely cumulative because Ward was not an eyewitness to the shooting, the only offense for which Cross was on trial. We independently conclude that Cross has not "*affirmatively* prove[n,]" in the context of the entire record, the prejudice necessary to establish that his trial counsel provided him with ineffective assistance for failing to impeach Ward with his three prior convictions. *See* ***Wirts***, 176 Wis. 2d at 187.

By the Court.—Judgment and order affirmed.

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