COURT OF APPEALS DECISION DATED AND FILED

January 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1842-CR

Cir. Ct. No. 2006CF65

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL ANTHONY KNUDSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael Knudson appeals a judgment of conviction for taking and driving a vehicle without consent and an order denying his postconviction motion. Knudson argues his trial counsel provided ineffective assistance because she failed to impeach the State's key witness with the number of the witness's prior convictions. We disagree and affirm the judgment and order.

BACKGROUND

¶2 A black Ford F-350 pickup truck was stolen from a dealership in Ellsworth, along with tools, diagnostic equipment, blank keys, key code books, and two F-250 decals that were removed from another truck. The following month, Knudson was stopped by an officer on an Indiana highway. Knudson told the officer he had recently purchased the vehicle he was driving, a black truck bearing F-250 decals.

¶3 The officer searched the vehicle and found an Arkansas title for an F-250 truck Knudson had purchased two months earlier. The vehicle identification number (VIN) on the title matched those found on the truck, but all three VIN plates appeared to have been tampered with. Additionally, the truck had over 50,000 fewer miles showing on the odometer than the title indicated. Law enforcement later matched a hidden VIN on the truck with that of the stolen F-350. Officers then searched Knudson's residence and shed and found many of the items taken from the dealership.

¶4 David Eich testified against Knudson at trial, telling the jury they burglarized the dealership together and replaced the truck's VIN plates with those from a wrecked truck stored in Knudson's shed. However, when first questioned by police, Eich had denied involvement in the burglary, as well as another burglary at a River Falls dealership, suggesting Knudson was responsible for both. Eich later pled guilty to charges stemming from the River Falls burglary, but again told police he was not involved in the Ellsworth burglary. As part of the plea agreement, Eich agreed to testify against Knudson. Eich first admitted involvement in the Ellsworth burglary the day before Knudson's trial.

¶5 Knudson denied involvement in the burglary and testified he purchased the truck from Eich. Knudson introduced a sale contract at trial that was purportedly signed by both men. Eich stated he had never seen the document before, but conceded the signature looked similar to his. Knudson testified he and Eich had found a truck on the internet that Knudson liked, but he had decided not to purchase it after speaking with the owner. Knudson claimed Eich later told him he had purchased the truck and had it delivered to Minnesota. Knudson also testified he believed the truck had been built without any VINs on it.

¶6 Knudson accused Eich of transferring the VIN plates to the truck without his knowledge and stated he did not know how all of the stolen items ended up at his residence. Knudson testified he was in custody during the month preceding the search of his unoccupied residence. Eich testified he learned of Knudson's arrest in Indiana right after it happened. Eich also acknowledged he knew there was a wood chute into Knudson's basement. In her closing argument, Knudson's attorney suggested Eich entered through the chute and planted the stolen goods in the house after Knudson's arrest.

¶7 Prior to trial, the parties stipulated Eich could be impeached with his six prior convictions. However, Eich was never asked at trial whether he had any prior convictions. The jury found Knudson guilty of taking and driving the truck without consent, but acquitted him of the dealership burglary. Knudson argued in a postconviction motion that his attorney was ineffective for not questioning Eich about prior convictions, not arguing Eich's convictions made him less trustworthy, and not requesting the pattern jury instruction regarding the adverse effect of convictions on a witness's credibility. The circuit court denied Knudson's motion without a hearing and he presents the same arguments on appeal.

DISCUSSION

¶8 An ineffective assistance of counsel claim requires the defendant to show both that the attorney performed deficiently and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). However, we need not address the deficient performance prong if we conclude the defendant failed to satisfy the prejudice prong. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). To establish prejudice, the defendant must demonstrate a reasonable probability that, absent the attorney's error, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶9 We conclude Knudson was not prejudiced by his attorney's failure to elicit Eich's testimony that he had six prior convictions. The jury was already aware Eich had a significant criminal history. In addition to Eich's eve-of-trial admission to participating in the Ellsworth dealership burglary in 2005, the jury was aware he was serving a prison sentence in Minnesota at the time of trial in 2007. Eich also testified he had been convicted of burglary and auto theft in 2006 regarding the River Falls dealership. Additionally, Eich testified he had been unable to accompany Knudson on the trip to Indiana in 2005, because he was incarcerated for fleeing.

¶10 Therefore, the jury knew Eich had at least one conviction in Minnesota and two convictions in Wisconsin, had been jailed for other conduct, and admitted to committing the Ellsworth burglary and auto theft. Further, the jurors knew Eich had lied repeatedly to the police about the Ellsworth burglary. Knowledge of the recent and serious nature of Eich's crimes was likely more detrimental to Eich's credibility than simply knowing the number of his prior convictions. Indeed, if a witness is untruthful when asked about the number of prior convictions, only then may questions be asked about each conviction, referring to them by name of the offense. ***Nicholas v. State***, 49 Wis. 2d 683, 688-89, 183 N.W.2d 11 (1971).

¶11 We also reject Knudson's assertion he was prejudiced by his attorney's inability during closing to argue Eich's six convictions made him less trustworthy. Counsel's closing argument was not significantly curtailed. Rather, she extensively challenged Eich's credibility, emphasizing, among other things, Eich's repeated lies to police and the fact he was required to testify as part of his plea deal.

¶12 Eich was also not prejudiced by his attorney's failure to request the jury instruction regarding the effect of the number of prior convictions on a witness's credibility. That instruction states: "This evidence was received solely because it bears upon the credibility of the witness. It must not be used for any other purpose." WIS JI—CRIMINAL 325 (2001). As noted in the instruction's comments, this instruction is merely a limiting instruction envisioned by WIS. STAT. § 901.06.[1]

¶13 The jury was given the general witness credibility instruction, WIS JI—CRIMINAL 300 (2000). That instruction directs jurors to consider eight

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

specific factors bearing on credibility, as well as "all other facts and circumstances during the trial which tend either to support or to discredit the testimony." ***Id.*** The jury was then instructed to use its common sense and life experience to evaluate the testimony. A typical juror might thus conclude the testimony of a witness with a criminal background like Eich's would be less credible.

¶14 Finally, we observe it is unlikely counsel's failure to inquire about the number of Eich's prior convictions affected the outcome of the proceeding because it is apparent the jury already disbelieved Eich's testimony. Eich, admitting his own participation in the Ellsworth dealership burglary, testified Knudson also planned and participated in the break-in. Yet the jury rejected Eich's testimony and acquitted Knudson of the burglary charge, despite the fact many of the stolen items were recovered from Knudson's residence. The truck theft charge did not rely solely on Eich's testimony implicating Knudson. For instance, the jury may have rejected Knudson's explanation of how he came to own the truck and his claimed belief that the truck was originally built without any VIN plates on it.

¶15 This case is distinguished from ***State v. Smith***, 203 Wis. 2d 288, 301, 553 N.W.2d 824 (Ct. App. 1996), where the case was premised on circumstantial evidence and the unimpeached witness provided the linchpin connecting the defendant to the crime. Here, Knudson was caught driving the stolen truck, and Eich's credibility was impeached by evidence of a serious criminal history.

By the Court.—Judgment and order affirmed.

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