

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2002

Cornelia G. Clark
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. 01-2672-CR

Cir. Ct. No. 00 CM 9771

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD R. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J. Donald R. Davis appeals from a judgment of conviction after a jury found him guilty of one count of knowingly violating a domestic abuse injunction order, contrary to WIS. STAT. § 813.12(8) (1999-2000).¹ Davis also appeals from an order denying his postconviction motion. He claims

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that he received ineffective assistance of trial counsel and therefore should be granted a new trial. Because Davis did not meet the requisite standard to prove ineffective assistance of counsel, this court affirms.

I. BACKGROUND

¶2 On November 11, 2000, Davis was charged with two counts of knowingly violating a domestic abuse injunction order. Habitual criminality penalty enhancers were added to the crimes pursuant to WIS. STAT. § 939.62. Following a jury trial on March 13, 2001, Davis was found guilty of one count of knowingly violating a domestic abuse injunction order and was acquitted on the other count.

¶3 Davis and the victim, Barbara Johnson, had previously been involved in a relationship for about three and one-half years, living together at various periods for two years. After the relationship turned violent, Johnson obtained a temporary restraining order which was in effect on October 27, 2000.

¶4 Johnson testified that on the evening of October 27, 2000, she received two phone calls from Davis. In the first call, Davis told Johnson that he would be waiting for her on her porch when she got home from work because “he thought him [sic] and his friends would like to come to West Allis to have some fun” Twenty minutes later, Davis called again. This time a friend of Johnson’s answered the phone. Johnson could hear Davis screaming into the phone that he was going to kill Johnson’s friend. The caller ID also displayed the same pay phone number that had been displayed during the first call. Johnson called the police.

¶5 Later that night, Davis phoned Johnson at work and threatened to kill her. The police officer that reported to the scene described Johnson as upset and the officer had to escort Johnson home from work that evening.

¶6 During the trial, the State and defense entered into a stipulation whereby if Davis chose to testify, he could be asked whether he had ever been convicted of a crime and, if so, how many times. Davis was to answer, “Yes” and then respond, “Three.” The three prior convictions were for misdemeanor offenses.

¶7 Davis chose to testify and, when asked by the State if he had ever been convicted of a crime, he answered, “Yes.” When asked how many times, he responded, “Three.”

¶8 During closing argument, the State asked the jury whether they were going to believe the victim or “a three-time convicted felon.” Defense counsel promptly objected to the State’s use of words. Counsel did not move for a mistrial.

¶9 On September 17, 2001, Davis filed a postconviction motion requesting a new trial based on an ineffective assistance of counsel claim. Davis claimed that his attorney was ineffective for failing to move for a mistrial when the State referred to Davis as a “three-time convicted felon” in its closing argument. Davis’s previous convictions were for misdemeanors, not felonies. Davis further claims that his attorney was ineffective for not clarifying to the jury that his previous convictions were for misdemeanors. Finally, Davis claims his attorney was ineffective for failing to request a curative instruction from the trial court.

¶10 On September 27, 2001, the trial court denied Davis's postconviction motion without an evidentiary hearing. He now appeals.

II. ANALYSIS

A. *Ineffective Assistance.*

¶11 In order to prove that he received ineffective assistance, Davis must satisfy a two-pronged test: (1) he must show that his counsel provided deficient performance; and (2) he must show that counsel's conduct was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, Davis must identify specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. To prove prejudice, Davis must demonstrate that counsel's deficient performance was so serious that he was deprived of a fair trial, a trial in which the results are reliable. In other words, there must be a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

¶12 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination 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. *Id.* at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶13 Davis failed to prove that counsel's performance was deficient and that the defense of his case was prejudiced by the alleged deficiencies. Davis's claim is that his counsel was ineffective for failing to move for a mistrial when the prosecutor mistakenly referred to him as a "three-time convicted felon," for failing to promptly inform the jury that his three prior convictions were misdemeanors, and for failing to request that the trial court give a cautionary instruction in this regard. This court is not persuaded.

¶14 During the prosecutor's closing argument, the following occurred:

[PROSECUTOR:] And I'm asking each and every one of you to use your own judgment in evaluating all their demeanors. Do you believe the defendant, a three time convicted felon -- or convicted criminal?

[DEFENSE COUNSEL:] Objection. Excuse me. That should be that he's a convicted criminal.

THE COURT: Just so it's clear that was a misstatement.

[PROSECUTOR:] He's a convicted criminal. I'm very sorry for that mistake.

¶15 As evident from this excerpt, defense counsel immediately objected to the misstatement and the trial court instructed the jury that the prosecutor's statement was erroneous. The jury had already been instructed that the closing arguments of the attorneys are not evidence, and the evidence that Davis had been previously convicted of a crime was not to be used for any purpose other than as it pertained to his credibility as a witness. It is presumed that the jury will follow the instructions of the court. *State v. Williamson*, 84 Wis. 2d 370, 396, 267 N.W.2d 337 (1978).

¶16 The trial court ruled that under the foregoing circumstances, any further instruction in this regard would have been redundant and unnecessary. The

trial court decided that the timely objection by defense counsel, the instruction by the trial court, and the apology by the prosecutor sufficiently cured the improper statement.

¶17 The assertion by Davis that the trial court allowed the jury to continue believing that Davis had been convicted of three felonies is erroneous. The record reveals that the jury was advised that Davis was convicted of three crimes and that the prosecutor erred in her statement. Accordingly, this court rejects Davis's suggestion that defense counsel was deficient for failing to move for a mistrial, or seek further clarification of the prosecutor's statement.

¶18 Davis also does not meet the second prong of the *Strickland* test and cannot establish that the prosecutor's misstatement prejudiced his defense. First, the jury was instructed that Davis's criminal record was received solely because it bears upon the credibility of the defendant as a witness. Second, the jury was instructed that the closing argument of counsel is not evidence. Third, the prosecutor properly used the prior conviction evidence solely to question Davis's credibility. Finally, the jury found Davis not guilty on count two, which was virtually identical to count one. This demonstrates that the jury did not conclude that if Davis committed all the other crimes, then he probably committed the crime for which he was on trial and, if he did not, then he ought to be convicted anyway.

¶19 Rather than considering Davis a felon or misdemeanor, the jury convicted Davis on the count that the State proved beyond a reasonable doubt and acquitted Davis on the count that the State did not prove beyond a reasonable doubt. This clearly shows that the misstatement by the prosecutor did not

prejudice Davis. Thus, Davis has not satisfied the second prong of the *Strickland* test.²

B. Request for a New Trial.

¶20 Davis urges this court to grant him a new trial under the discretionary reversal statute, WIS. STAT. § 752.35, which allows an appellate court to reverse a judgment if it appears from the record that the real controversy has not been fully tried or that justice has been miscarried. This court declines Davis's invitation.

¶21 Davis's acquittal on the second count negates his argument that the jury convicted him solely based on incorrect information about his prior record. Moreover, because the charges were substantially similar, it is highly likely that the jury properly weighed the evidence presented rather than making a prejudiced decision based on misinformation received from the prosecutor.

¶22 Furthermore, in Wisconsin, a witness' prior criminal convictions are deemed relevant for impeachment purposes and a jury may consider such prior convictions in determining the credibility of a witness' testimony. WIS. STAT. § 906.09; *Nicholas v. State*, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). Regardless of the prosecutor's misstatement, the proper rationale of the statute was met. For the purpose of the statute, criminal convictions are not divided into felonies and misdemeanors. The law assumes that all crimes, regardless of their

² Davis also contends that the trial court should have conducted an evidentiary hearing on his ineffective assistance claim. This court disagrees. The record conclusively shows that Davis is not entitled to relief and, therefore, the trial court properly denied the motion without an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 309-11, 313-18, 548 N.W. 2d 50 (1996).

status, are deemed relevant in assessing credibility. In using criminal convictions to assess credibility, a jury would most likely treat a felon and a misdemeanor similarly—they are both convicted criminals. Thus, Davis has failed to convince this court that the real controversy was not tried or that there was a miscarriage of justice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

