

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 2003

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. 02-1546-CR

Cir. Ct. No. 98-CF-795

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRADARIO L. BRIM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Fradario Brim appeals a judgment convicting him of attempted first-degree intentional homicide and as a felon possessing a handgun, both as a repeater. He also appeals an order denying postconviction relief. The issues are whether Brim received effective assistance from counsel, whether the trial court improperly allowed the State to try this and another

prosecution jointly, and whether the trial court erroneously exercised its sentencing discretion. We affirm on all issues.

¶2 The State charged Brim in connection with the shooting of Plaze Anderson on March 24, 1998. In a separate proceeding, the State charged Brim as a party to the first-degree intentional homicide by shooting of Anthony First on January 7, 1998. The State believed that Anderson and First were friends and fellow gang members, that Brim aided in the shooting death of First, and then shot Anderson after Anderson confronted him about First's death. Consequently, the State moved to join the prosecutions as involving similar and connected acts. The trial court granted the motion, and later denied Brim's motion to sever the prosecutions.

¶3 At trial the State presented testimony from Anderson and other eyewitnesses that Brim shot Anderson several times, and kept firing while Anderson was crawling away after the first shot hit him. Brim presented testimony that Anderson was shot in a gunfight involving several persons, and that Brim was an unarmed bystander who was himself shot. The jury found Brim guilty, but acquitted him in the First homicide. At sentencing, the trial court imposed the maximum sentences available, consecutive 55 and 8-year prison terms.

¶4 In postconviction proceedings, Brim alleged that trial counsel performed ineffectively because he failed to produce exculpatory testimony from Kirby Bennett and Mark Brooks. At the postconviction hearing, Bennett testified that he saw Anderson threatening Brim with a gun one or two days before the shooting. He also testified that Anderson was acting aggressively toward Brim on the day of the shooting, and that he saw at least two armed men present on the premises where Anderson was shot. He did not, however, see Anderson shot.

Trial counsel testified that he did not call Bennett because evidence that Anderson was threatening Brim was relevant only to a defense theory of shooting in self-defense, whereas Brim's defense consisted of testimony that Brim was not even armed during the incident. Additionally, Bennett told counsel that Brim was armed when the earlier confrontation occurred, and counsel did not want that testimony before the jury. Counsel added that Bennett did not tell him anything about the day of the shooting itself.

¶5 As for Brooks, counsel testified that he tried to locate Brooks before trial but could not. Brooks testified to the contrary, saying that he did talk with counsel before trial. He further testified that he saw Anderson acting aggressively toward Brim just before the shooting. However, he, too, did not see the subsequent shooting.

¶6 The trial court found counsel's testimony credible and concluded that he reasonably chose not to call Bennett, and that the testimony of Bennett and Brooks would not have changed the outcome even if they had testified at trial consistently with their postconviction testimony. This appeal followed that ruling.

¶7 To prove ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *Id.* at 636-37. Prejudice results when there is a reasonable probability that but for counsel's errors the result of the proceeding would have differed. *Id.* at 642. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions

in the exercise of reasonable professional judgment. *Id.* at 637. Whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law. *Id.* at 634.

¶8 We conclude that trial counsel effectively represented Brim. Counsel reasonably choose not to call Bennett, because Bennett offered testimony possibly helpful to a self-defense theory, but of no relevance to the defense that was actually presented at trial. Additionally, his testimony could have prejudiced Brim because it would have placed him in possession of a handgun a day or two before the shooting, undermining Brim's testimony that he was unarmed. Furthermore, the testimony Bennett had to offer on the circumstances of the shooting itself was of marginal value. He did not see the shooting, and could not say who shot Anderson if Brim did not.

¶9 Counsel cannot be faulted for Brook's failure to testify. The trial court believed counsel about his unsuccessful but reasonable efforts to locate Brooks, and that credibility determination is not subject to review. *See State v. Fields*, 2000 WI App 218, ¶11, 239 Wis. 2d 38, 619 N.W.2d 279. Even if Brooks had testified, he, too, did not see the shooting and could not have measurably helped Brim's defense.

¶10 We also conclude that Brim suffered no prejudice from joinder of the two prosecutions. None certainly occurred on the homicide charge, for which Brim was acquitted. In this case, he contends that joinder forced him to testify about the Anderson shooting, when he might not have if the cases had been tried separately. As the State points out, this contention is contrary to his argument to the trial court, which stressed his desire to testify in this case, and his unwillingness to testify in the First prosecution. His argument is also speculative,

as he “might” not have testified, and it was unaccompanied by any reasons why Brim might have declined to testify in this case. Several witnesses testified to seeing him shoot Anderson. Brim was the only witness to testify that he had no weapon and fired no shots.

¶11 Brim also contends that the jury might have reached a compromise verdict. Nothing of record suggests as much, and this contention is also nothing more than speculation. The evidence against Brim in the First case was weak, and the evidence against Brim in this case was very strong. The jury appears to have properly considered the evidence and followed the trial court’s instructions in each case.

¶12 Finally, we conclude the trial court properly exercised its sentencing discretion. The trial court primarily considered the nature and seriousness of the crime, in which Brim shot his victim numerous times even as the victim crawled away; Brim’s history of repeated violent and/or criminal acts beginning at an early age, including the attempted shooting of a twelve year old; his failure to benefit from long periods of confinement as a juvenile and as an adult; his inability to refrain from criminal activity during his brief periods of release from custody; and the need to protect the public from future criminal behavior. These were proper factors to consider. *See State v. Borrell*, 167 Wis. 2d 749, 773-74, 482 N.W.2d 883 (1992). The trial court fully explained its reliance on them, and the resulting maximum sentences are reasonable under the circumstances. Although Brim contends that the trial court should have given more weight to mitigating circumstances, the weight given to any sentencing factor is particularly within the trial court’s discretion. *See State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984).

By the Court.—Judgment and order affirmed.

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

