COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2012

Diane M. Fremgen
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. 2011AP1550-CR

Cir. Ct. No. 2008CF4268

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC DOMINIQUE LESUEUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and REBECCA F. DALLET, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Eric Dominique Lesueur appeals the judgment entered after a jury found him guilty on seven counts of second-degree recklessly endangering safety, while armed, and possessing a firearm although a felon, *see*

WIS. STAT. §§ 941.30(2), 939.63 & 941.29(2)(a). He also appeals the order denying his motion for postconviction relief.[1] Lesueur claims: (1) the prosecutor violated discovery orders by not giving him a CD recording of the police interview of Darrell Nicholson, Sr. (a victim and State witness) until the second day of trial; (2) his trial lawyer gave him constitutionally deficient representation by not asking for the CD recording; and (3) the trial court erroneously exercised its discretion by letting a State witness, Anthony Vaughn, testify that he had two prior convictions when he actually had three. We affirm.

I.

¶2 In August of 2008, police arrested Lesueur for endangering safety by shooting a gun at a group of seven people, injuring two. Anthony Vaughn, one of the seven victims, identified Lesueur as the shooter. Nicholson, another of the seven victims, called 911 to report the shooting. When police arrived, however, they arrested Nicholson for carrying a concealed weapon after they found a handgun in his truck. The police interviewed Nicholson and recorded the interrogation. The police report summarized the interview, and provides as pertinent:

> Someone started firing shots so he ran away. He never saw who fired the shots, and he ran to the other end of the block. He then ran back to the store and saw his brother, Jemell, trying to put his son, Darrell Jr[.] into a car. He realized that Darrell Jr[.] had been shot, but he [did] not know how bad he was hurt at that time. Darrell Sr[.] then saw his pistol, lying on the ground. He picked it up got into his green ford truck. He called 9-1-1 from his cell phone and reported the shooting. The police Operator told

[1] The Honorable Patricia D. McMahon presided over the jury trial and sentencing; the Honorable Rebecca F. Dallet handled the postconviction motion.

> him to stay on the scene. While he was talking to the operator, he put the gun under his back seat. The police responded and he told the officers where his gun was. Mr. Nicholson denies that he fired his gun, and he did not see who did fire his gun. He stated that he does not know who dropped his gun or why.
>
> I recorded this interview using a digital audio recorder. I transferred the recording to CD and placed the CD on inventory.

¶3 On the second day of Lesueur's jury trial, Nicholson testified:

- He closed his liquor store with the help of his brothers, his son, and his employee, Anthony Vaughn.
- They "all proceeded to leave out about 9:30" p.m. when they "heard one shot go off. And after that … there was several shots that started to go off."
- At first, he did not recognize the shooter, but when there was a break in the shooting, he noticed his "son was shot" so they "got him in the car" and "[w]hen I got ready to get in the truck, an individual came out … and started shooting at me." He then saw that the shooter was Lesueur.
- He told police that Lesueur was the shooter at the scene "when the detecs [*sic*] had me sitting there talking, about maybe 15 minutes after the shooting."

Vaughn testified:

- He was helping close the store and as he was locking up he heard "[j]ust a bunch of shots, whole lot of shots."

- "At first, I didn't know where any of the shots [were] coming from there was so many of them."
- "I stepped in my little doorway. I was looking. Then that is when I see [*sic*] Gold standing across the street next to the day care over there changing clips." "Then I seen him shoot again, yes."
- "Gold" "is what everybody called" Lesueur.
- When asked "have you been convicted of a crime?" he answered "Yeah. … Twice."

¶4 As we have seen, the jury convicted on all counts. Lesueur's postconviction motion argued for the first time that if the Nicholson CD recording had been turned over before trial, the defense lawyer could have used it to impeach Nicholson's trial testimony. The trial court denied the motion, finding that Lesueur had not established prejudice because: (1) the defense had the report summarizing the CD that could have been used to impeach Nicholson; (2) Lesueur's trial lawyer had the CD recording during the trial, and thus had "enough time that he could have still used [the CD] to whatever extent he wanted to use it"; and (3) the CD recording focused mostly on Nicholson's gun, "about who was shooting Darrell Nicholson's gun. … There's no discussion … except in a very limited way of who was shooting at" the seven victims.

II.

A. *CD Recording*.

¶5 Lesueur wants a new trial because, according to him, the prosecutor breached its obligation under the discovery statute, *see* WIS. STAT. § 971.23(1)(e),

by not giving Nicholson's recorded interview to the defense until the second day of trial.[2] The only discussion about the recorded interview during the trial was at

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[2] WISCONSIN STAT. § 971.23 provides, as pertinent:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> (a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.
>
> (b) A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.
>
> (bm) Evidence obtained in the manner described under s. 968.31(2)(b), if the district attorney intends to use the evidence at trial.
>
> (c) A copy of the defendant's criminal record.
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.
>
> (e) Any relevant written or recorded statements of a witness named on a list under par. (d), including any audiovisual recording of an oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.
>
> (f) The criminal record of a prosecution witness which is known to the district attorney.

(continued)

the end of the second day when the trial court asked if the defense had any witnesses:

> [Defense lawyer]: There are a couple of detectives.
>
> I was given a CD of Mr. Nicholson's recorded statement. I did have the police report; however, I'm going to have to get in touch with the detective that took this, Chicks, and have him come in for --
>
> THE COURT: We won't be playing the recording unless you have a transcript.
>
> [Defense lawyer]: Right.
>
> THE COURT: Do you have a transcript?
>
> [Defense lawyer]: No. I understand that. I haven't listened to it yet.
>
> THE COURT: You haven't?
>
> [Defense lawyer]: I didn't get it until today.
>
> THE COURT: Okay.
>
> [Defense lawyer]: So depending on what I hear --
>
> THE COURT: Surprises me. I thought I asked if you had the discovery. That is certainly part of the discovery. I'm just taken aback.
>
> [Defense lawyer]: Right. I guess I was --
>
> THE COURT: Didn't know it was recorded? It's required to be recorded.
>
> [Defense lawyer]: This is Mr. Nicholson, Sr.
>
> THE COURT: Oh, Mr. Nicholson, Sr.

> (g) Any physical evidence that the district attorney intends to offer in evidence at the trial.
>
> (h) Any exculpatory evidence.

> [Defense lawyer]: Right.
>
> THE COURT: Okay. But there was no indication in the discovery that it was recorded.
>
> [Defense lawyer]: There was. I was unaware. I didn't have that. Mr. Nicholson from the report that I got his testimony is different from what is in the report, so I'm going to try to verify that through the recording that I have not heard yet.
>
> THE COURT: He'll let you listen to it tonight. If you want to play it, you'll have to have a transcript.
>
> [Defense lawyer]: I understand.

As this excerpt shows, Lesueur's trial lawyer did not assert a discovery violation or seek sanctions under § 971.23. Accordingly, he did not preserve the discovery obligation issue for appeal, and we limit our review to whether the lawyer was constitutionally ineffective. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'") (quoted source omitted); *see also* ***State v. Jones***, 2010 WI App 133, ¶25, 329 Wis. 2d 498, 512–513, 791 N.W.2d 390, 398 (unobjected-to alleged trial-court error).

¶6 As we have noted, Lesueur also asserts that his lawyer gave him constitutionally deficient representation by not objecting to the discovery violation or getting the CD recording before trial. To establish constitutionally ineffective representation, a defendant must show: (1) deficient representation; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was

deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show 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.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted).

¶7 Further, we need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. Finally, our review of an ineffective-assistance-of-counsel claim is mixed. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A circuit court's legal conclusions whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we review *de novo.* ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. If those legal conclusions are based on facts found by the circuit court, those findings of fact will not be disturbed unless they are clearly erroneous. ***Id.***, 153 Wis. 2d at 127, 449 N.W.2d at 848.

¶8 Lesueur did not establish ***Strickland*** prejudice. As noted by the trial court, the defense lawyer "had an opportunity to play [the recording] that evening, he's given an opportunity to call witnesses, essentially, if he wanted to … could have brought back in Mr. Nicholson, Sr. to ask more questions. So he had enough time, he could have so used it to whatever extent he wanted to use it." Moreover, the trial court found that the salient aspects of the recorded interview were merely

cumulative to the information in the police summary of the recorded interview, which had been turned over before trial and could have been used to impeach Nicholson. The contents of the CD recording were largely inconsequential; thus, not having the recording before trial did not make a difference and does not make the trial unreliable. Lesueur had a fair trial, and there is no reasonable likelihood of a different outcome on a retrial if the defense lawyer obtained the CD recording earlier.

B. *Vaughn's prior criminal convictions.*

¶9 WISCONSIN STAT. RULE 906.09(1) provides that a witness's credibility may be attacked by "evidence that the witness has been convicted of a crime[.]" This reflects the law's recognition that a person "who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11, 14 (1971). Under RULE 906.09(2), "[e]vidence of a conviction of a crime … may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

¶10 "Whether to admit prior conviction evidence for impeachment purposes under Rule 906.09 is a matter within the discretion of the trial court[,]" ***State v. Smith***, 203 Wis. 2d 288, 295, 553 N.W.2d 824, 827 (Ct. App. 1996), and we will uphold discretionary decisions when the trial court applied the correct law to the pertinent facts and reached a reasonable determination, *see* ***State v. Gary M.B.***, 2004 WI 33, ¶19, 270 Wis. 2d 62, 76, 676 N.W.2d 475, 483. In balancing relevance and prejudice, the trial court considers: (1) lapse of time; (2) rehabilitation or pardon of the person convicted; (3) seriousness of the crime,

(4) whether the prior conviction involved dishonesty, and (5) frequency of conviction. ***Id.***, 2004 WI 33, ¶21, 270 Wis. 2d at 78–79, 676 N.W.2d at 483–484.

¶11 Here, the trial court looked at Vaughn's prior convictions: "2003 battery, 2002 battery and a '96 insurance fraud which was an unemployment compensation insurance case." It found: "we do have a very old '96 conviction…. And I think that here we have a lapse, and then we have two convictions in 2002, in 2003, and then nothing for a period of time. I think that's a relevant factor. We don't have a lifetime criminal here." The trial court noted that the old conviction "was a misdemeanor," and concluded that "two is the more appropriate factor under all the considerations that we have."

¶12 The trial court considered the appropriate factors and engaged in a balancing test to reach a reasonable determination. The 1996 misdemeanor conviction was too old and too distant from the other convictions to be counted. The trial court properly exercised its discretion.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.