

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2134-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES E. POWELL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Brown and Snyder, JJ.

SNYDER, J. James E. Powell appeals from a judgment of conviction and an order denying postconviction relief. Powell was found guilty as a party to the crime of robbery contrary to §§ 943.32(1)(b) and 939.05, STATS.¹ Powell claims that the trial court erred by: (1) ruling on the number of prior

¹ He was also charged and convicted as a repeater contrary to § 939.62(2), STATS.

convictions which would be admissible without examining the record or articulating which convictions were considered, (2) refusing to compel the prosecution to disclose a witness' criminal record to defense counsel, and (3) refusing to allow defense counsel to impeach a witness after the witness failed to acknowledge the agreed-upon number of prior convictions. Because we conclude that the trial court erroneously exercised its discretion and that the resulting error was prejudicial, we reverse and remand for a new trial.

It is undisputed that Tim Jackson and his brother, Michael Jackson, robbed a gas station and then ran some distance to a car driven by Powell.² Police subsequently received an anonymous phone call which focused the robbery investigation on the Jackson brothers. They were questioned separately by the police and both initially denied any involvement in the robbery.

Michael changed his initial denial of any involvement and stated that prior to the robbery, "James [Powell] mentioned robbing someplace." Based on Michael's statement, Powell was questioned by police. Although he admitted being with Tim and Michael on the night of the robbery, he claimed to be unaware of either the plan to rob the store or the actual robbery. He told police that he first became aware of the robbery while in the car on the way back to Tim and Michael's apartment when Tim said they had just pulled a "caper."

² Prior to Powell's trial, both Tim and Michael pled guilty.

Tim and Michael both testified for the State at Powell's trial. Tim testified that all three of them had been drinking and using cocaine prior to the robbery. He testified that they had consumed approximately two cases of beer in the six- to eight-hour period before the robbery. When questioned about the robbery, Tim stated, "I couldn't say for 100 percent sure what exactly - what I said. So I definitely couldn't say what Michael or James had said about this, about the situation." He also admitted on cross-examination that he had difficulty remembering what was going on around him and that the robbery itself was "spur of the moment."

When asked directly whether Powell was aware of the robbery when he and Michael returned to the car, Tim said, "At that particular moment, at that time, I would say no" He also explained that Powell parked on the street instead of pulling into the gas station parking lot because his car had no reverse gear.

Michael's testimony at trial also controverted the earlier statement he had given the police, which had implicated Powell. Michael testified on direct that he and Tim had talked about needing money and he had said to his brother, "I know this store we can hit." He further testified that while the three of them were riding around in Powell's car, he and Tim told Powell to pull over and wait. He also stated that even as he and Tim walked into the store, "[W]e didn't know whether we were going to do it or not." He testified that at the time of the earlier statement he had given the police implicating Powell, he thought that Powell had turned them in and he wanted to get back at him.

Prior to the testimony of Tim and Michael, a hearing was held to determine the admissibility of any prior convictions for impeachment purposes. At that hearing, the prosecutor noted that Tim had two Wisconsin convictions and acknowledged that "he also has contact in Illinois." However, the prosecutor did not acknowledge that he possessed Tim's presentence report. Based on its questioning of Tim and his admission of several Illinois battery convictions, the trial court concluded that three convictions would be admitted for impeachment purposes.

Defense counsel objected, stating that the absence of a record check or presentence report made it impossible to determine the correct number of prior convictions. The prosecutor then admitted to having a copy of Tim's presentence report and conceded that it listed "many offenses." After the prosecutor offered a verbal synopsis of the contents of the report, the trial court stated that four prior convictions would be admissible. Tim objected to this, and the trial court then unilaterally ruled that Tim had three prior convictions. Defense counsel objected and requested a copy of the presentence report; the trial court denied that request.

When Tim testified and was asked on direct examination how many prior convictions he had, he responded, "Well, 2 or possibly 3. All depends on how you look at it." Although defense counsel again requested a copy of the presentence report in order to impeach the witness as to the nature of the prior convictions, the trial court denied that request and instructed the jury that "Mr. Jackson has 3 convictions." No further questioning regarding the

number or nature of the prior convictions was allowed. At the close of trial, the jury returned a guilty verdict and this appeal followed.

A trial court's determination about which convictions are admissible for impeachment purposes is discretionary. *State v. Kuntz*, 160 Wis.2d 722, 753, 467 N.W.2d 531, 543 (1991). However, the State concedes that the trial court did not make an adequate record of how it determined that Tim should admit to three prior convictions. A proper exercise of discretion is the product of a rational mental process which states the facts of record and the law relied upon. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981). Because the trial court did not examine the presentence report and specify which convictions would be admitted for impeachment purposes, it erroneously exercised its discretion.

Powell's second claim of error rests upon the State's failure to disclose information in its possession about the number and nature of Tim's out-of-state convictions. He contends that this thwarted the "legal process for impeaching a key prosecution witness by prior convictions."

This issue is governed by § 971.25, STATS., which provides for the disclosure of the criminal record of a prosecution witness.³ The application of statutory requirements to undisputed facts presents a question of law which this court reviews de novo. *Sauer v. Reliance Ins. Co.*, 152 Wis.2d 234, 240, 448

N.W.2d 256, 259 (Ct. App. 1989). Section 971.25(1), STATS., provides:

Disclosure of criminal record. (1) The district attorney shall disclose to the defendant, upon demand, the criminal record of a prosecution witness which is known to the district attorney.

The statute's plain language requires disclosure of the criminal record of any prosecution witness. The prosecutor had a copy of Tim's presentence report, but had not disclosed that fact to either the trial court or defense counsel. When defense counsel specifically requested that the State locate the presentence report, the prosecutor was required to disclose the information in it which pertained to Tim's criminal record.

The record shows that defense counsel made repeated attempts to obtain a copy of the presentence report from the State. We conclude that the trial court erred in not compelling the disclosure of a witness' criminal record as mandated by § 971.25, STATS.

The State contends that under *Jones v. State*, 69 Wis.2d 337, 349, 230 N.W.2d 677, 684-85 (1975), the prosecution had no affirmative duty to seek a criminal record from other states. We agree, but note that *Jones* is not

³ This statute is renumbered and amended by 1995 Wis. Act 387, § 31. The revisions are effective January 1, 1997, and do not affect our analysis in this appeal.

controlling in this instance because the presentence report had already been completed and was in the State's possession. The State also argues that § 972.15(4), STATS., which provides that "the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court," precludes any requirement that the report be disclosed.

This argument does not address the required disclosure. At issue is the criminal record of the witness, not the entire contents of the presentence report. At a minimum, the trial court had a responsibility to examine the contents of the presentence report before issuing its ruling denying its disclosure. Had this occurred, the trial court could then have determined how to make Tim's criminal conviction record available to the defense. The trial court erred in not examining the presentence report and in failing to compel disclosure of a witness' criminal record.

Finally, Powell contends that the trial court erred when it precluded impeachment questioning of Tim after he failed to correctly state that he had three prior convictions. Section 906.09(1), STATS., allows for the use of prior convictions to impeach a witness.⁴

⁴ Section 906.09(1), STATS., provides in relevant part:

Impeachment by evidence of conviction of crime. (1) GENERAL RULE. For 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 introduction of evidence with respect to prior convictions lies within the discretion of the trial court. See *State v. Pitsch*, 124 Wis.2d 628, 639, 369 N.W.2d 711, 717 (1985). It is also accepted that the number of prior convictions is relevant evidence on the issue of credibility. *Nicholas v. State*, 49 Wis.2d 683, 688, 183 N.W.2d 11, 14 (1971).

Prior convictions are relevant evidence because the law presumes that one who has been convicted of a crime is less likely to be truthful than one who has not. *Id.* Prior convictions are also relevant because of a presumption that the more often one has been convicted of a crime, the less truthful he or she is presumed to be. *Id.* If a witness answers truthfully and accurately, no further inquiry is possible. *Id.* at 689, 183 N.W.2d at 14. However, an inaccurate or incomplete answer allows the matter to be pursued, and the nature of past convictions may be elicited. See *id.*

Tim's answer, "Well, 2 or possibly 3. All depends on how you look at it," was equivocal. By not responding with the court-imposed number, three, Tim opened the door to defense questioning about the nature of his past offenses. When defense counsel attempted to question Tim with regard to his criminal record, the trial court foreclosed that by expressly informing the jury that Tim had three prior convictions and by prohibiting any further questions about the nature of those convictions. We conclude that this was error.

In sum, we conclude that the trial court erred in determining the number of prior convictions without examining the presentence report, in not compelling the prosecution to disclose Tim's criminal record, and in denying

Powell the right to impeach a key prosecution witness. The remaining issue is whether these errors were prejudicial.

The State maintains that “the jury disbelieved some of Jackson's testimony because they convicted the defendant.” The State then argues that any errors which occurred were harmless because the jury already had ample reason to doubt Tim's credibility. We disagree, concluding that the combination of errors which occurred was not harmless.

An error is not harmless if it has “affected the substantial rights of the party seeking to reverse or set aside the judgment.” *See* § 805.18(2), STATS. In this case, due to the conflicting statements made by both Tim and Michael, the State's case against Powell was largely circumstantial. Although Tim's and Michael's trial testimony seemingly exonerated Powell, the jury also heard testimony about earlier statements Michael had made which implicated Powell. The case against Powell hinged on the credibility of the Jackson brothers, the only witnesses who tied Powell to the robbery. Had Powell been able to impeach Tim with regard to his prior convictions, it is possible Powell could have destroyed the admittedly shaky credibility of one of the State's key witnesses.⁵

We conclude that the trial court's ruling withholding Tim's criminal record and precluding his impeachment with that record denied

⁵ When Powell brought a motion for postconviction relief concerning this and other issues, the trial court commented, “I'll admit that it was a close case on the evidence.”

Powell the right to attack the credibility of a key prosecution witness. This was prejudicial error and requires reversal for a new trial.

By the Court. – Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.