COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2336-CR **Cir. Ct. No. 2005CF500**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VALCUE O. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Valcue Smith appeals from a judgment of conviction and an order denying his postconviction motion. We affirm.

¶2 Smith was convicted of armed robbery after a trial. The circuit court denied his postconviction motion.

¶3 Smith first argues that the prosecutor made an improper argument during her closing rebuttal argument. The reference in this argument to "family business" is to testimony by a witness who testified that Smith had invited her to join the "family business," meaning robberies. The prosecutor argued:

> [Defense counsel] says this idea of a family business is ludicrous. Andre Smith has 14 prior convictions. The defendant has five prior convictions. There's something going on. Keep that in mind that when they testify, you get to use those prior convictions on their credibility. It's one of the things it tells you. So remember that.

¶4 Smith argues that this passage was improper because the prosecutor's argument falsely implied that some of Smith's convictions were for robberies as part of the "family business." He also argues that this comment violated long-standing law barring the jury's use of convictions for any purpose other than weighing credibility. He argues that we should grant relief on theories of plain error, ineffective assistance of counsel, or in the interest of justice.

¶5 The State responds that the prosecutor's remark properly informed the jury that convictions could be used for credibility. We agree. Although the passage does not start out well, by the end of the paragraph the prosecutor had rehabilitated the remark to a correct description of what the convictions could be used for, and thus the jury would not have understood the argument to be as Smith suggests.

¶6 Smith next argues that his counsel was ineffective by not making sufficient use of additional evidence to undermine the credibility of two witnesses

for the State. We apply the familiar test of deficient performance and prejudice found in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Without attempting to describe that additional evidence here, we are satisfied that counsel was not ineffective. Although Smith appears to argue that the State's case was based mainly on these two witnesses, we note that the evidence also showed that Smith's uncle gave a statement to police saying that he committed the robbery with Smith, and that the uncle had pled no contest to the crime. Although the uncle denied at trial that Smith was his accomplice, he said he could not recall the actual accomplice. We are satisfied that despite counsel's not having used the additional evidence to undermine the other two witnesses counsel was not ineffective.

¶7 Smith next argues that he should be retried due to newly discovered evidence. He argues that the new evidence is the testimony at his postconviction hearing by one of the two witnesses we discussed above. At the postconviction hearing, she testified that her trial testimony was caused by threats and coercion by a police detective. We conclude that this evidence does not satisfy the test for newly discovered evidence. *See* ***State v. Simplot***, 180 Wis. 2d 383, 411, 509 N.W.2d 338 (Ct. App. 1993). The circuit court found her postconviction testimony to be incredible, and therefore it is not reasonably probable that a different result would be reached at a new trial.

¶8 Smith next argues that the State improperly withheld exculpatory evidence from discovery. He argues that the evidence in question is that a police detective met with one of the State witnesses and obtained a handwriting sample. Smith argues that this evidence is exculpatory because it can be inferred from it that the detective considered the witness a suspect in the robbery Smith was convicted of, or in other robberies. However, Smith does not explain what connection a handwriting sample would have to this particular robbery. He does

not suggest that any note or other handwriting was involved in this robbery. Therefore, it does not appear to be exculpatory.

¶9 Finally, Smith argues that, for the several reasons described above, we should reverse in the interest of justice under WIS. STAT. § 752.35 (2007-08).[1] However, having rejected all of those arguments, we see no basis to conclude that reversal is warranted on this ground.

By the Court.—Judgment and order affirmed.

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

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