COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 29, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0149-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DERRICK STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: JAMES A. WENDLAND, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Derrick Stewart appeals his conviction for intentionally causing bodily harm to a child, as a party to the crime, after a trial by jury. The prosecution charged that Stewart had ordered a gang beating of a sixteen-year-old gang member who had reported a gang member shoplifting incident to police. By postconviction motion, Stewart claimed that the prosecution

had unconstitutionally withheld exculpatory evidence, in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). Prosecution witnesses Wurtz and Daley testified at the postconviction hearing that they either did not see or did not recall seeing Stewart at the scene of the gang beating. The prosecutor allegedly had such information before trial. On appeal, Stewart makes three arguments: (1) the prosecution violated the ***Brady*** rule; (2) trial counsel's failure to learn of witnesses Wurtz and Daley was ineffective counsel; and (3) trial counsel's failure to impeach prosecution witness Moore with a prior conviction was ineffective counsel. We reject these arguments and therefore affirm Stewart's conviction.

The testimony Stewart claims was exculpatory ***Brady*** evidence does not require a new trial. Courts will not grant a new trial for ***Brady*** evidence unless it would have probably changed the trial's outcome. *See* ***United States v. Bagley***, 473 U.S. 667, 682 (1985). Witnesses Wurtz and Daley testified that they did not know who ordered the gang beating; they also did not see or recall seeing Stewart at the crime scene. None of this would have refuted the other evidence that Stewart ordered the gang beating. Stewart did not pursue an alibi defense, and he could have ordered the gang beating despite his absence from the scene. Moreover, Wurtz's and Daley's testimony would not have significantly impeached the other witnesses who had stated Stewart was at the crime scene. While such contradictions on noncollateral matters may sometimes have significant impeachment value, *see* ***McClelland v. State***, 84 Wis.2d 145, 160-61, 267 N.W.2d 843, 850 (1978), Wurtz's and Daley's missing testimony was too equivocal in terms of Stewart's presence to effect a direct and effective contradiction of other witnesses. For the same reasons, Stewart has not met the prejudice prong of the ***Strickland*** ineffective counsel standards. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Likewise, Stewart cannot claim ineffective counsel concerning trial counsel's failure to impeach prosecution witness Moore with one of Moore's prior convictions. This evidence would have had no significant bearing on the outcome of the case. Under the circumstances, the additional prior conviction was little more than immaterial, cumulative evidence. *See* ***State v. Echols***, 175 Wis.2d 653, 677-78, 499 N.W.2d 631, 638-39 (1993); ***State v. Lenarchick***, 74 Wis.2d 425, 448, 247 N.W.2d 80, 92-93 (1976). Here, Moore was already impeached by two other prior convictions. Further, Moore's gang beating conviction itself and his plea bargain in the matter furnished additional impeachment. Inasmuch as Moore's credibility had already suffered considerable damage, his other prior conviction would have added only marginal impeachment value to Stewart's defense. We are satisfied that Moore's other prior conviction would not have had a reasonable possibility of changing the trial's outcome, and Stewart therefore has not shown ineffective trial counsel under prejudice prong of the ***Strickland*** standards.

By the Court.—Judgment and order affirmed.

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