COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 00-1469-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRUCE W. ACKERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Menomonie County: ROD W. SMELTZER, Judge. *Affirmed in part and cause remanded with directions.*

¶1 HOOVER, P.J. .[1] Bruce W. Ackerman appeals his conviction on one count of fourth-degree sexual assault, contrary to WIS. STAT. § 940.225(3m). He contends that the trial court erroneously exercised its discretion by ruling that Ackerman could be impeached by admissible evidence of his three prior criminal convictions. Ackerman also asserts that his trial counsel was ineffective because he referred to the complainant as "victim number five" under circumstances where the jury would otherwise not know of alleged incidents involving Ackerman and others.

¶2 This court rejects Ackerman's ineffective assistance claim because he does not demonstrate prejudice. This court agrees, however, that the trial court misapplied the law by admitting the impeachment evidence without exercising discretion. At the postconviction hearing, the trial court ruled that it did not err by allowing proof of prior convictions and therefore it did not reach the issue whether the error was harmless. Ackerman contends on appeal that it was prejudicial because, but for the admission of the impeachment evidence, he would have testified and rebutted key elements of the victim's testimony. However, contradictory evidence was given at the postconviction motion hearing concerning whether the admission of the prior convictions was instrumental in Ackerman's decision not to testify. Therefore, this court remands to the trial court to make a finding whether Ackerman decided to waive his right to testify due to its evidentiary ruling on the admissibility of the prior convictions.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 Ackerman operated a tattoo and body piercing parlor. He was accused of having sexual contact with Monica Stouff on two separate occasions during the three-day process of applying a tattoo to Stouff's upper right thigh. The State charged Ackerman with one count of fourth-degree sexual assault. Ackerman pled not guilty and demanded a jury trial.

¶4 Ackerman brought a motion in limine to exclude evidence of his three prior convictions.[2] Ackerman's attorney, John Leonard, argued that the impeachment value of the convictions was substantially outweighed by its undue prejudicial effect. Leonard also asserted that Ackerman would not testify at trial if the court ruled that he could be impeached with his prior convictions. The trial court held that Ackerman's prior convictions would be admissible because the "standard in criminal trials [is] that the previous criminal record of defendants can come in."

¶5 A police report referred to Stouff as "victim number five." Ackerman did not want the jury to know that he was alleged to have victimized four other customers. He therefore moved before trial to prohibit any reference to Stouff as victim number five. The motion was granted. During Stouff's cross-examination, however, while reading from the police report, Leonard himself "mistakenly" referred to "victim number 5." Ackerman objected, and the trial

[2] The State argues that Ackerman only moved in limine to exclude one of his three convictions, thereby waiving his objection on appeal to the other two. While his written motion in limine refers to only one conviction, this court's review of the record establishes that Ackerman's counsel addressed all three convictions at the hearing. There is nothing in the record to indicate that the State objected to expanding the inquiry to cover convictions not identified in the written motion. As the State itself concedes, failure to object in the trial court constitutes waiver.

court directed Leonard to speak with Ackerman. Leonard, however, continued his cross-examination, until the trial court again advised him to speak to Ackerman.

I. Evidence of Ackerman's Prior Convictions

A. Admissibility Determination

¶6 On appeal, Ackerman first argues that the trial court erred by failing to follow the proper procedure for determining whether to admit prior conviction evidence to impeach the witnesses, including the defendant. He argues that the court was required to exercise its discretion as to each witness and conviction. Thus, he contends the trial court erred because its

> ruling was not based on any analyzation of individual convictions. The trial court made its ruling before knowing how many convictions the defendant had, what the convictions were for or when the convictions were entered. The trial court did not analyze whether the convictions should be excluded because the probative value was outweighed by unfair prejudice.

Instead, Ackerman argues, the trial court ruled that any conviction may be admissible for impeachment purposes. This court agrees that the trial court erred by not considering the proper factors before deciding whether to admit evidence of prior convictions as to any potential witness.

¶7 Evidence that a witness has been convicted of a crime is admissible to attack the witness's credibility. *See* WIS. STAT. § 906.09(1).[3] It is apparent

[3] WISCONSIN STAT. § 906.09 provides in pertinent part:

> (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 party cross-examining the witness is not concluded by the witness's answer.

(continued)

from § 906.09's scheme that whether to allow prior-conviction evidence for impeachment purposes is within the trial court's discretion. *See also* ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). When deciding whether to admit evidence of prior convictions for impeachment purposes, a trial court should consider whether from the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, the involvement of dishonesty or false statement in the crime, the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice. *See* ***State v. Kuntz***, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991) (citing Judicial Council Committee Note, 59 Wis. 2d at R181 (1974)).[4]

¶8 This court reviews a trial court's admission of evidence for misuse of discretion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises its discretion when it correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion. *See* ***Kuntz***, 160 Wis. 2d at 745-46. Generally, the trial court's

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> (2) Exclusion. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
>
> (3) Admissibility of conviction or adjudication. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

[4] "The most significant feature of the rule is the requirement that the evidence of conviction be excluded if the judge determines that its probative value is outweighed by the danger of unfair prejudice. It is a particularized application of s. 904.03." Judicial Council Committee Note, 59 Wis. 2d at R180 (1974)). This is because "there is apparent a growing uneasiness that impeachment in this form not only casts doubt upon his credibility 'but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community.'" ***Id.*** (citation omitted).

ultimate decision to admit or deny evidence is itself deemed discretionary. However, in this case the record, at least, compels the conclusion that the trial court viewed WIS. STAT. § 906.09(1) as mandating limited admission of prior crimes evidence.[5] When a trial court admits evidence because it construes an evidentiary rule as mandatory, it cannot be deemed to be exercising discretion. In any event, the trial court errs if it misapplies the law or applies a wrong legal standard. *See* ***State v. Tarantino***, 157 Wis. 2d 199, 207-08, 458 N.W.2d 582 (Ct. App. 1990).

¶9 This court now applies these principles to the trial court's ruling on the admissibility of prior-conviction evidence. The court observed at a pretrial motion hearing, when the subject was first broached, that the general rule is that the question whether a person has been convicted of a crime is restricted to asking, "Have you ever been convicted of a crime and, if so, how many?"

¶10 On the morning of the trial, the subject was again addressed. Leonard advised the trial court that the issue of Ackerman's prior convictions was "a major issue in this case, Judge, because if it does not come in, the defendant testifies. If it comes in, the defendant does not testify." The court responded that it is "pretty standard in criminal trials that the previous criminal record of defendants can come in, [be]cause it comes in in a very limited fashion, and that is the standard question: Have you ever been convicted of any crimes. Yes. How many? That's it. Done."

[5] This court is bound by the record made by the trial court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1981).

¶11 Leonard then explained to the court that a witness who could testify to such things as how often the victim was in the shop and other "setting" evidence that was unavailable and, therefore, Ackerman was the only other witness who could testify to these facts. But, Leonard asserted, he could not call his client if the prior convictions were admitted. He then stated:

> Your ruling is more prejudicial to the defendant than three convictions are probative because those convictions have nothing to do with sex or tattooing or art. They have to do with things like non-support … and I don't see how they are relevant in this case … I don't see how they cannot be more prejudicial to him than probative of what he would have to say.

¶12 After the prosecutor informed the trial court that there were also convictions for battery and witness intimidation, which she characterized as "indicative," she then stated her belief "that it is the rule that you can ask have you ever been convicted of a crime? How many times?" In response the trial court held:

> That is the rule. The court's going to allow that by the State.
>
> If … you choose to put Mr. Ackerman on the stand, [the prosecutor] has the right to make that inquiry … I find that it's – that that's standard in these types of criminal-type case[s] that you can ask have – has the defendant been convicted of any crimes and how many.
>
> It's restricted to that. Just as it is any witness the State puts on, that you can make the inquiry have they been convicted of a crime, which is going to come in as well.
>
> So, both parties, the State and the defense, [are] protected by – it's a fair playing field. Both – The inquiry is made both of victims and of defendants. So, in that case, that's the ruling of the court and we'll proceed accordingly.

¶13 From this record, this court finds inescapable the conclusion that the trial court ruled on Ackerman's objection under a misapprehension of the law. While it is true that there is a presumption that criminal convictions are admissible to impeach,[6] *see* ***Kuntz***, 160 Wis. 2d at 750, the trial court must still exercise its discretion under the statute's framework and applicable case law. If there was any indication that the trial court exercised discretion, this court could review the record in an attempt to sustain the trial court's decision.[7] This is so even if the trial court gave no reasons for its discretionary ruling.[8] In this instance, however, there is no such indication. Rather, the trial court misconstrued a presumption as a "standard" or rule, by holding that prior convictions are admissible to impeach as long as the initial examination is confined to the fact and number of convictions. The trial court relied on an erroneous understanding of an evidentiary rule. It therefore erroneously exercised its discretion because it made an error of law. *See* ***Pophal v. Siverhus***, 168 Wis. 2d 533, 546, 484 N.W.2d 555 (Ct. App. 1992).

B. Harmless Error

¶14 Evidentiary errors are subject to a harmless error analysis. *See* ***McLemore v. State***, 87 Wis. 2d 739, 757, 275 N.W.2d 692 (1979). Generally, an error is harmless if there is no reasonable possibility that it contributed to the

[6] This is true even for misdemeanors that do not involve dishonesty. *See* ***State v. Kuntz***, 160 Wis. 2d 722, 752-53, 467 N.W.2d 531 (1991).

[7] The only arguable suggestion that the trial court may have exercised discretion, albeit incorrectly, is in its reference to "a fair playing field." Taken in context, however, this is a reference to the effect of what the trial court perceived to be the rule as opposed to the consequence of its discretionary application.

[8] This court will uphold the discretionary decision of the circuit court if the record supports the trial court's evidentiary ruling, even if the court may have given the wrong reason or no reason at all. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility is one that is sufficient to undermine confidence in the outcome of the proceeding. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial. *See* ***Dyess***, 124 Wis. 2d at 544 n.11.

¶15 Ackerman argues that there is a reasonable possibility that the error contributed to the conviction and was therefore not harmless. At the postconviction motion hearing, Ackerman asserted that had he testified, he would have described his friendship with Stouff and her boyfriend and denied any wrongdoing. He would have contradicted other elements of Stouff's testimony. He further asserts that:

> The state's entire case rested on whether to believe Stouff beyond a reasonable doubt as compared to Ackerman. Because of the court's erroneous decision regarding the admissibility of Ackerman's prior convictions Ackerman did not testify. As a result, the jury only heard one side of the story. Had the court properly exercised its discretion in this regard Ackerman would have testified and it is possible the jury would have believed him rather than Stouff (or at least not believed Stouff beyond a reasonable doubt).

¶16 Thus, Ackerman claims the error is not harmless because it prevented him from testifying. The flaw in Ackerman's reasoning is the assumption that if the trial court properly exercised its discretion, it would not have admitted the prior convictions, thus opening the way to testify. Ackerman offers no reason why this assumption is sound. Yet, to conclude that Ackerman has not shown that the error was not harmless misapplies the burden. Despite Ackerman's invalid syllogism, the *State* must prove that the trial court's error in failing to exercise discretion was harmless.

¶17 The State argues that there is a basis in the record to support a ruling that the prior-conviction evidence was admissible upon an exercise of discretion. This argument addresses admissibility, not a harmless error analysis. In any event, the State argues that there is a presumption that a person who has been convicted of a crime would be a less truthful witness. *See* ***Liphford v. State***, 43 Wis. 2d 367, 371, 168 N.W.2d 549 (1969). Moreover, the trial court was advised of the nature of the three convictions.[9] The State's brief further asserts that "the trial court had some indication that at least one of the convictions was recent" due to statements Leonard made at the initial appearance.[10] The State's position is without merit. To sustain the court's ruling based upon a misapplication of the law would be tantamount to this court exercising discretion, which it has no authority to do. *See* ***Barrera v. State***, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980). This court thus rejects the State's position. That does not, however, conclude the issue.

¶18 This court perceives that the evidence received at the postconviction motion hearing raises the possibility that the trial court's ruling in fact caused Ackerman to waive his right to testify. In order to demonstrate that the evidence gives rise to conflicting inferences in this regard, it is necessary to recount the record at length.

¶19 Both Leonard and Ackerman testified at the hearing. Leonard indicated that he had three or four somewhat lengthy discussions with Ackerman concerning whether he should testify. Leonard was concerned that Ackerman's

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[9] Not only the fact, but the number of such convictions is relevant evidence. *See* ***State v. Kruzycki***, 192 Wis. 2d 509, 524-25, 531 N.W.2d 429 (Ct. App. 1995)

[10] Ackerman does not refute this contention in his reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

three convictions would jeopardize his strategy of impeaching Stouff's credibility.[11] Leonard also testified that "I felt that Bruce has a tendency to talk a long time once started, and he tends to ramble a bit and get a little excited. And I felt that he would—would not be difficult to effectively impeach had he taken the stand." Leonard was further concerned that the prosecutor could make Ackerman look insensitive to women. Implicit in Leonard's testimony was his concern that Ackerman would offend the jurors. Finally, Leonard anticipated that Ackerman "would fall for whatever bait the prosecutor put in front of him and strike out at things which would make him angry."

¶20 Leonard testified that while Ackerman "really did want to testify … he also wanted to defer to my judgment. And, he made the choice of deferring to my judgment as opposed to listening to his …." Leonard asserted that if he had succeeded in keeping Ackerman's convictions out of evidence, he would have advised him to "take the chance." When asked, however, whether the main reason he advised Ackerman against testifying was the convictions and not his concerns about how Ackerman would testify, Leonard stated:

> Well, I would say it's about fifty-fifty, to be perfectly honest with you, because there were times when we practiced when sometimes – I don't know how to describe it – you know, you have to be there. … And I could not have controlled Bruce, I don't think, on the stand. … I don't think the prosecutor would have had much trouble keeping Bruce talking for a very, very long time.

The transcript of the postconviction hearing verifies Leonard's concerns. Ackerman was generally quite verbose.

[11] For example, Stouff was tardy in reporting the incident, her friendship with Ackerman continued after the assault and she had one criminal conviction.

¶21 This said, when asked if he would have advised Ackerman to testify if the court had denied admission of the convictions, Leonard testified that he "would not have opposed – I would not have gave the advice that I gave him. I would have changed my advice, that's true."

¶22 Ackerman testified that he wanted to testify, but Leonard ultimately talked him out of it. When asked if Leonard advised him not to testify because of his convictions or because of other reasons, Ackerman testified, "[w]ell, he just said that I have a habit of talking too much …." Postconviction counsel then asked Ackerman whether he and Leonard discussed the prior convictions, to which he responded, "I – Geez, I don't think – not much. If there was, that wasn't really an issue."

¶23 Earlier in the hearing, the court conducted a lengthy colloquy with Ackerman concerning his willingness to waive the attorney-client privilege. This was to enable Leonard to testify concerning their discussions as to whether Ackerman should testify. During the colloquy, several references were made to the admission of his convictions as perhaps influencing Ackerman's decision not to testify. At the end of the colloquy, the court asked, "[do] you also understand you're—that you're waiving your attorney/client privilege with regard to any of the discussions that you may have had concerning your prior criminal history as far as how that fit in with regard to whether you should testify or not?" Ackerman responded, "[y]eah, I'm kind of curious about that myself."

¶24 At the postconviction motion hearing, the trial court essentially reiterated its earlier statement that a conviction is probative to credibility. Having not concluded that it erroneously exercised its discretion, it did not address harmless error. The trial court did find in another context that Ackerman

ultimately made the decision not to testify. It did not, however, specifically find facts to resolve the discrepancy between Leonard's testimony that Ackerman's convictions made the difference in the advice he gave him, and Ackerman's claim that the convictions did not really influence his decision. Therefore, it is necessary to remand this matter to the trial court to resolve the incongruity. If the court finds that Ackerman's recollection was more reliable, then the error was harmless because the admission of the prior conviction evidence was not the cause of Ackerman's decision not to testify.[12]

C. Ineffective Assistance of Counsel

¶25 Ackerman contends that Leonard's performance was deficient because he exposed the jury to unfairly prejudicial information that had previously been ruled inadmissible upon Leonard's motion. Ackerman also argues that the deficient performance was prejudicial because "the jury then became aware that he had allegedly victimized at least four others. This reference to Stouff as victim number five painted Ackerman as a multiple offender with the propensity to commit such acts." Ackerman's position fails because it is premised upon a fact contrary to the trial court's finding.

¶26 This court addresses two components in determining whether an attorney's actions constitute ineffective assistance. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The first issue is whether trial counsel's performance was deficient. *See* ***State v. Littrup***, 164 Wis. 2d 120, 135,

[12] This court does not suggest that the two accounts are irreconcilable. It may well be, for example, that Ackerman's recollection is correct, whereas Leonard's was influenced by what was initially an argument to the trial court at the time of the hearing on the motion in limine intended to persuade the court not to admit the impeachment evidence.

473 N.W.2d 164 (Ct. App. 1991). If counsel's performance is deficient, the second issue is whether the deficient performance was prejudicial. *See* ***id.*** If the defendant fails to meet either the deficient performance or prejudicial component of the test, the other component is not addressed. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶27 Deficient performance requires a showing that counsel's representation fell below the objective standard of reasonableness. *See* ***Littrup***, 164 Wis. 2d at 135. A deficiency is prejudicial if it deprived the defendant of a trial whose result is reliable. *See* ***State v. DeKeyser***, 221 Wis. 2d 435, 442, 585 N.W.2d 668 (Ct. App. 1998).

¶28 Whether trial counsel provided ineffective assistance is a mixed question of law and fact. *See* ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The trial court's determination concerning the circumstances of the case, and counsel's conduct and strategy, are factual matters that will be upheld unless clearly erroneous. *See* ***State v. Kalk***, 2000 WI App 62, ¶12, 234 Wis. 2d 98, 608 N.W.2d 428. Whether the attorney's conduct constituted ineffective assistance, however, is a question of law that this court decides de novo. *See* ***Johnson***, 133 Wis. 2d at 216.

¶29 The trial court determined that Leonard's performance was neither deficient nor prejudicial. This court will only consider the prejudice component because the trial court's findings compel the conclusion that the incident had no effect on the trial's results.

¶30 When addressing this issue at the postconviction motion hearing, the trial court recalled the circumstances under which Leonard referred to "Victim

#5." The court noted that it occurred in the midst of a persistent, rapid-fire cross-examination of the victim.[13] Once Ackerman objected to Leonard's question:

> [T]he court was watching the entire courtroom. I was watching the cross-examination of the witness by Mr. Leonard, watching Mr. Leonard and also watching Mr. Ackerman as well as the prosecution. The court was monitoring the courtroom and Mr. Ackerman did not cause undue attention to the fact. In fact, [after] the objection and the response by the court, Mr. Leonard continued talking again, had kind of lessened, I suppose, any impact that that may have had ….[14]

[13] "[Ackerman's attorney] was being persistent and talking rapidly." Leonard himself, during his postconviction testimony, stated, "she was on the stand and I was asking her questions and she was responding, uhm, I think it's fair to say that the cross-examination was fairly intense at that point." Later he testified: "I recall that being a very heated part of the trial and things happening very fast …."

[14] It is usually very difficult at best to sense the courtroom's atmosphere from a transcript. In this instance, however, even before this court read the trial court's postconviction findings, the pace of cross-examination is evident from reading the transcript:

> A. On the third sitting, he didn't ask – he doesn't say nothing about piercing.
>
> Q. So, the two paragraphs then from this document: "Victim #5 had to come in a third time with the cheetah" –
>
> THE DEFENDANT: I object, your Honor.
>
> BY MR. LEONARD:
>
> Q. He told you, "I really think you should get your … pierced." You're saying you didn't say that to Officer Chronis, he just wrote it? He made it up?
>
> A. It was in my report that I wrote. And when I went in for the third time when he touched me, he said, "I'm trying to get you wet."
>
> Q. Well, yes, Ma'am, but here is what I'm asking you about: "I really think you should get your … pierced." According to Chronis's report, he says you told him on the third time as well as the second time –
>
> THE COURT: Okay –
>
> BY MR. LEONARD:

(continued)

¶31 The trial court questioned whether "the jurors had actually picked it up." The court "handled [the situation] very quickly. I didn't draw attention to it." "[Ackerman] handled it very discretely and it was handled and it was taken care of." While acknowledging the "mistake" could have been prejudicial, it found that because of the way it was "handled" it had no effect on the jury, and if it did, any prejudice was harmless.

¶32 Ackerman's prejudice argument rests upon facts that the trial court did not find. Nor does stating such facts demonstrate that the trial court's findings concerning the circumstances of the case and counsel's conduct were clearly erroneous. Because the trial court's finding that Leonard's reference to "victim #5" had no effect on the jury has not been shown to be clearly erroneous, Ackerman has not demonstrated that Leonard's performance was prejudicial. He has therefore failed to show that Leonard's performance was ineffective.

Q. – that that is what the off – that's what Mr. Ackerman said to you. Right?

A. On the second sitting.

Q. Well, you see –

THE COURT: Okay. Counsel, I'm going to ask you to consult with your client. He's raised –

MR. LEONARD: I don't need to consult with my client, Your Honor. He'll be happy to know it's in the report.

THE COURT: Just talk to him. All right. Continue.

Thereafter, the cross-examination is characterized by a series of short questions and answers, again suggesting a rapid exchange.

By the Court.—Judgment and order affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.