

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 8, 2008**

David R. Schanker  
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. 2007AP80**

**Cir. Ct. No. 2002CV389**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**JOHN S. SPAULDING AND HEATHER A. SPAULDING,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**TOM W. PRUDHOMME AND WASTE MANAGEMENT OF WISCONSIN, INC.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Marinette County:  
DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. John and Heather Spaulding appeal a judgment following a jury trial finding Tom Prudhomme not liable for a vehicular collision. The Spauldings argue: (1) the circuit court erred by allowing testimony that John Spaulding threatened to kill a witness named James Orzel; (2) the court erred by

allowing the defense to question Spaulding concerning criminal convictions; and (3) a new trial is warranted in the interests of justice. We reject these arguments and affirm.

#### FACTUAL BACKGROUND

¶2 Spaulding was a sawyer who was employed as an independent contractor at Dumke Forest Products in Peshtigo. When the accident occurred, Spaulding was travelling back to the Dumke plant after picking up saw blades in Menominee, Michigan. The parties presented conflicting testimony as to how the accident happened, as well as the nature and extent of Spaulding’s alleged injuries.

¶3 The trial was postponed following the deposition of Orzel, a former employee of Spaulding. Orzel testified at his deposition that his roommate, Kenneth Hoffman, told Orzel of the threat he overheard Spaulding make. Peshtigo police conducted an investigation about the claimed threat and then referred the matter to the Marinette County District Attorney. Because of that pending investigation, the trial was adjourned.

¶4 In addition, Spaulding filed a motion in limine to preclude evidence that he threatened to kill Orzel. The circuit court denied the motion on the first day of trial. At trial, Hoffman testified Spaulding stated during a conversation that if Orzel “screwed up this case for him, that he would kill him.” Orzel eventually

testified at trial about what physical work activities he saw Spaulding perform at the sawmill post-accident.<sup>1</sup>

¶5 During a pretrial conference, and again during trial, there was a discussion on the issue of Spaulding's criminal record, which consisted of operating while intoxicated and operating after revocation traffic offenses, possession of controlled substances, carrying a concealed weapon, theft, and receiving stolen property. On the first day of trial, defense counsel indicated to the court that they intended to cross-examine Spaulding on his past criminal record. The court concluded the traffic offenses could not be used for impeachment as they were not crimes, the concealed weapon conviction did not go to honesty, and the possession was too remote in time. However, the court concluded the theft and receiving stolen property convictions involved dishonesty. The court stated in part as follows:

I'm going to allow him to be impeached with the two theft convictions and the receiving stolen property. Even though those are old, they go directly to dishonesty or false statement.

So you can ask the question: Have you ever been convicted of a crime? The proper answer should be: Yes. The follow-up question should be: How many times? And the proper answer should be: Three.

¶6 During cross-examination, Spaulding was asked whether he was ever convicted of a crime. Spaulding answered, "yes." However, when asked

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<sup>1</sup> Orzel testified that he worked for Spaulding for about three weeks on a daily basis and that he saw Spaulding work with his hands "above the chest area ... every day ... [s]everal times a day, in fact," and single-handedly use tongs to move a wet oak log from nine to eleven feet long, and push heavy carts filled with wood. Orzel testified, "It didn't seem like he had anything wrong with his arm."

how many times, Spaulding answered, “I don’t know off hand. You have to read them to me.” At that point, the court allowed further inquiry as to the nature and dates of the offenses.

#### DISCUSSION

¶7 Spaulding first argues the circuit court erred by allowing testimony that he threatened to kill Orzel. Spaulding has not cited any legal authority whatsoever in support of this argument. We need not consider arguments unsupported by reference to legal authority. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). However, even on the merits, the argument fails. The circuit court appropriately balanced the factors in WIS. STAT. § 904.03.<sup>2</sup> The court correctly concluded this issue went to the very heart of Spaulding’s credibility. The court also properly rejected Spaulding’s argument that the testimony concerning the threat would “distract the jury from issues of causation, liability and damages.” The court stated:

I’m going to deny this motion in limine. I understand we might get a little bit far afield. I don’t think it will be too far afield. It won’t confuse the jury. I think they will understand why they are hearing that testimony and we have to allow the jury to make the decision as to who they’re going to believe here.

It sounds to me from what I’m hearing, this is largely going to be a credibility contest about, I suppose, all of the issues in this case. So I think it’s important that the jury hear that and they can filter through it and they can decide what’s what.

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<sup>2</sup> References to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶8 The circuit court did not erroneously exercise its discretion by allowing the testimony concerning the threat. As the court correctly noted, Orzel and Hoffman were available for cross-examination, and Spaulding in fact attempted to impeach both of them. Moreover, Spaulding called Bradley Mech to testify at trial. Mech testified that he overheard the conversation by Spaulding concerning Orzel, and denied that Spaulding said anything about killing Orzel. The jury simply found Orzel's and Hoffman's testimony more credible.

¶9 Spaulding next argues the court erred by allowing defense counsel to impeach Spaulding on his prior convictions. Spaulding is mistaken. The court carefully considered Spaulding's convictions and concluded that three crimes were relevant. The court then appropriately weighed the probative value of the testimony against any unfair prejudice or confusion of the issues. *See* WIS. STAT. § 906.09. As the circuit court noted during the hearing on Spaulding's motion for a new trial, the introduction of specific information about Spaulding's criminal record was the direct result of Spaulding's failure to testify on cross-examination as to the number of times he had been convicted. The court stated:

[I]t's Mr. Spaulding's fault that we ever got to that point. He should have known the answer. He was told the answer.

¶10 Had Spaulding answered truthfully and accurately, as the circuit court expressly invited him to do, in response to questions concerning prior criminal convictions, further inquiry into the nature of the convictions would not have been permitted. *See State v. Hungerford*, 54 Wis. 2d 744, 748, 196 N.W.2d

647 (1972). However, when Spaulding stated, “I don’t know,” he opened the door to more specific inquiry as to the nature and date of the offenses.<sup>3</sup>

¶11 Finally, Spaulding requests a new trial in the interests of justice. Spaulding’s argument is not developed. We will not abandon our neutrality to develop arguments. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). This court also is satisfied the real controversy was fairly tried.

*By the Court.*—Judgment affirmed.

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

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<sup>3</sup> We note that after Spaulding testified, “I don’t know,” defense counsel proceeded to inquire of Spaulding about crimes beyond the three crimes upon which the court ruled it would allow impeachment. The transcript of the hearing on the motion for new trial reveals the circuit court was troubled by counsel’s actions at trial. The court stated: “we all knew that Mr. Baird was in an area that he wasn’t supposed to be.” The court characterized counsel’s actions in this regard as: “the bigger problem that I see in this area....” Although the court sustained an objection to the questioning, and a cautionary instruction was given to the jury, we also consider counsel’s tactics to be cavalier at best, but more likely improper. We admonish defense counsel in that regard.

