

FILED
04-02-2024
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STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT III

Case No. 2023AP2013-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TOMMY JAY CROSS,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND A DECISION AND ORDER DENYING
A POSTCONVICTION MOTION,
ENTERED IN BROWN COUNTY CIRCUIT COURT,
THE HONORABLE TAMMY JO HOCK, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

During an altercation in a parking lot involving four people, Tommy Jay Cross drove directly at the victim twice. The first time he damaged the victim's car and bumped him; the second time he hit the victim in the leg, causing severe injuries and amputation. A jury found Cross guilty and he was convicted of first-degree reckless injury and first-degree recklessly endangering safety, both using a dangerous weapon. After a hearing, the circuit court denied Cross's motion for a new trial. On appeal, Cross raises two issues:

1. Was Cross entitled to a new trial based on his claim that the court improperly exercised its discretion when it instructed the jury on count one for first-degree reckless injury, related to the privilege of defense of others and provocation?

The circuit court answered: No.

This Court should affirm.

2. Was Cross entitled to a new trial because his counsel performed ineffectively by not impeaching the victim with his prior convictions?

The circuit court answered: No. Even if his counsel performed deficiently, Cross was not prejudiced.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. The State agrees with Cross that neither is necessary because this Court can decide the issues based on well-settled law, the record in this case, and the parties' briefs.

INTRODUCTION

Cross went to his wife's workplace after she called, told him that A.B.¹ was harassing her, and Cross could hear an altercation. Cross drove his car at a high rate of speed into the parking lot towards A.B., who was standing with his friend by his car, hitting the car and bumping A.B., who fell on the ground. A.B. then grabbed a gun out of his car and pointed it at Cross's car. As Cross backed up, A.B. went to break up the fight between his friend and Cross's wife. Cross again drove toward A.B., hitting him and severely injuring his leg, resulting in amputation above his knee. The State charged Cross with first-degree reckless injury using a dangerous weapon for the second time Cross hit A.B., and first-degree recklessly endangering safety using a dangerous weapon for the first time. After a jury trial, Cross was convicted of count one and the lesser-included offense of second-degree recklessly endangering safety on count two. Cross seeks a new trial on two grounds. First, he claims that the jury instructions on defense of others and provocation were improper because they did not allow him the privilege of defending his wife if Cross provoked A.B.'s alleged attack on her. Second, he alleges that his counsel was ineffective for not impeaching A.B. with his prior convictions. After a hearing, the court correctly denied both claims. Cross forfeited his claim that the jury instructions were improper by agreeing to the instructions. In any event, the court's instructions correctly informed the jury about the law. Moreover, Cross failed to show counsel was deficient or that he was prejudiced. Even if counsel had impeached A.B., Cross would have been convicted based on all the testimony and the video evidence. Cross is not entitled to a new trial.

¹ The State uses the victim's initials to identify him, in order to protect his privacy. Wis. Stat. § (Rule) 809.86(4).

STATEMENT OF THE CASE

Criminal charges. When police responded to a report of weapons and an accident involving a vehicle and pedestrian, A.B. was on the ground in a parking lot near pools of blood, with a severely injured leg: the skin and muscle were “twisted and ripped” and the bone was “completely shattered.” (R. 2:2.) At the scene, A.B.’s friend Jennifer² told police that A.B. had been “ran over,” and A.B. admitted he shot at the vehicle that hit him and that his gun was in his truck. (R. 2:2.) In interviews, Jennifer and A.B. told police that they had an altercation with Shenelle McGrew in the parking lot after work, and McGrew’s husband/boyfriend, later identified as Cross, drove into the parking lot in a blue car straight at A.B., hitting A.B.’s car and making contact but not injuring A.B. (R. 2:2–4.) After A.B. got his gun and pointed it at Cross’s car, he backed up; then, while A.B. tried to break up a fight between Jennifer and McGrew, Cross drove straight towards A.B. again, accelerating right before hitting him, causing him to fly through the air and land on the ground, and splitting open his leg. (R. 2:3–5.) A.B. shot his gun towards Cross’s car because he thought it was going to back over him, but it drove away. (R. 2:5.)

Cross told police that when McGrew called him after work, Cross could hear a male voice arguing in the background, who he assumed was A.B. (R. 2:7.) Cross drove to the parking lot, saw McGrew and A.B. arguing, and thought A.B. had a gun, so he drove his car towards A.B. and knocked him down. (R. 2:7–8.) Cross said he saw A.B.

² Although not technically required, the State uses a pseudonym to identify the victim A.B.’s friend, who was a witness to the Cross’s crimes, to protect her privacy. See Wis. Stat. § (Rule) 809.86(4).

loading the gun and holding McGrew, not allowing her to leave and striking her in the face with his gun; Cross was afraid that A.B. was going to kill her, so Cross drove toward A.B. and hit him, “to protect his wife from being shot.” (R. 2:8.) McGrew told police that she left work early talk to Jennifer, A.B. became involved, they all started fighting, and Cross drove up and ran A.B. over, “because [A.B.] had the gun.” (R. 2:8–9.) After Cross hit A.B., McGrew heard gun shots, she got in the car with Cross, and he said he had been shot. (R. 2:9.)

A surveillance video showed three people fighting in the parking lot near a white car, the fight breaking up, one person going back to the white car, and the other two walking to a light-colored SUV. (R. 2:5.) While the two people are standing by the SUV and the other person is “three car lengths away,” a blue car is driving toward one of the people near the SUV’s driver’s side door, coming close to hitting him, then backing up. (R. 2:5–6.) The other two people begin to fight again, while the person who was almost hit is holding something in his right arm fully extended, the blue car appears to accelerate towards him, he disappears, the SUV is shaking as if it had been struck as the blue car drives away. (R. 2:5–6.)

The State initially charged Cross with one count of first-degree reckless injury, use of a dangerous weapon, related to the second hit that injured A.B.’s leg. (R. 2; 26.) An amended information added count two for first-degree recklessly endangering safety, use of a dangerous weapon, related to the first time Cross drove towards A.B. (R. 61.)

Jury trial. At the three-day trial on February 1–3, 2022, the State called 11 witnesses. (R. 168; 169; 170.) An eyewitness to the May 27, 2021 incident saw a truck hit A.B. and heard him screaming that couldn’t feel his leg, and then heard gunshots. (R. 168:86–87.) A foreman who worked with A.B. and McGrew saw them arguing near the

entrance in the cafeteria around 10:00 p.m., heard McGrew threaten A.B., and took A.B. to the side so he would “chill out.” (R. 169:6–9.) Another employee who saw the argument between A.B. and McGrew described that she heard A.B. say, “call your boys, you know, I’m not scared.” (R. 169:18–19.)

Law enforcement testimony established that when officers arrived at the parking lot of American Foods at 10:12 p.m., A.B. was laying on the concrete with a bloody and injured leg. (R. 168:75–76, 80–82.) The parking lot surveillance videos starting at 10:10 p.m. showed McGrew in a white car and A.B. and Jennifer walking towards A.B.’s truck, when a blue car drove into the parking lot straight towards A.B.’s vehicle. (R. 168:99–102.) The video then showed that A.B. went around to the passenger side and then to the rear of his car, with his right arm extended holding something, and after the blue car backed up, A.B. went to the driver’s side of the vehicle, not holding anything, where two women were fighting as Cross’s vehicle approached and hit A.B. (R. 168:112–15.)

Detective Kevin Kempf, who arrived at the scene shortly after the incident, saw McGrew’s white Jeep and A.B.’s gold Tahoe, which had a Taurus G2 gun on the front seat, and took a cellphone video of the parking lot surveillance video so he could immediately review it. (R. 169:22–27, 30–33.) Based on Kempf’s extensive, “frame by frame” review of the surveillance videos, the first altercation between A.B., Jennifer, and McGrew occurred at 10:11 p.m. and lasted for less than a minute before the parties separated, McGrew walked back to her white Jeep and picked up her phone, and A.B. and Jennifer walked towards A.B.’s Tahoe. (R. 169:51–53, 70–71.) Eighteen seconds later, at 10:12 p.m., while McGrew was 30 to 40 feet away from A.B.’s car and “separated” from Jennifer and A.B., Cross’s blue vehicle drove into the parking lot, going at

a “high rate of speed” making it appear to be “airborne,” drove “in a direct line towards where [A.B.’s] vehicle [was] parked,” and appeared to make contact with A.B. (R. 169:49, 53, 65–66; 71–74.) Cross’s vehicle hit A.B. twice, the second strike caused damage to the driver’s side fender and wheel well of A.B.’s vehicle. After the second strike A.B. landed on the ground in front of his Tahoe, injured, and fired shots towards Cross’s blue vehicle. (R. 169:80–83.)

Cross’s vehicle was located at his residence on May 27, 2021, with bodily tissue on and damage to the front bumper and the driver’s side front tire. (R. 168:198–99, 235–40; 169:26.) Shell casings at the scene, from bullets fired from a Taurus G2, were found in front of the Tahoe, indicating that the gun was fired from that location. (R. 169:34, 62.)

A.B.’s testimony. A.B. drove to work with Jennifer on May 27, 2021, at 9:00 a.m., and they both worked overtime until 10:00 p.m. (R. 168:136–39.) After A.B. punched out and was waiting for Jennifer in the cafeteria near the building’s exit, he and McGrew, who also worked there, had a verbal altercation, during which McGrew said that “her boyfriend was coming” to “fuck [him] up,” before she left the building a little before 10:00 p.m. (R. 168:140–41.) A.B. left with Jennifer a few minutes later and walked towards A.B.’s car, when McGrew, whose car was parked to the left of A.B.’s car, ran across the parking lot towards them, punched A.B. in the face “multiple times,” and then McGrew and Jennifer started fighting. (R. 168:144–47.) A.B. broke up the fight and he and Jennifer walked to A.B.’s vehicle just before 10:12 p.m.; as they were standing on the driver’s side of A.B.’s car, Cross, in a blue car, drove into the parking lot “at full speed” with the “engine revving.” (R. 168:147–48, 150–52, 179.) Cross drove directly into the driver’s side fender of A.B.’s car, broke the wheel well, and “tried to hit” A.B., who was able to jump out of the way but was hit,

causing him to fall on the ground in front of his car. (R. 168:151–53, 180.)

A.B. got up, went to the passenger side door, opened it, and retrieved his gun out of his car, because Cross hit him with his car and A.B. “was scared for [his] life.” (R. 168:153–54.) After A.B. pointed his gun at Cross and Cross began to “back off,” backing his car up several feet, A.B. put his gun away and went around the rear of his vehicle to the back driver’s side door where Jennifer and McGrew were fighting again, intending to break up their fight by grabbing both women. (R. 168:153–56.) A.B. denied that he hit McGrew with his gun or pointed it at her. (R. 168:181–82.) While A.B. had his back towards Cross’s car, he heard Cross’s car coming “again full speed.” (R. 168:154, 157.) A.B. turned around and tried to jump away, but Cross’s car hit A.B. in the left leg; as A.B. “hit the ground” in front of his vehicle, he “realized that [his] leg was gone.” (R. 168:158, 182, 189.) A.B. saw reverse lights and thought that Cross was going to back up and run him over, so he took his gun out of his sweatshirt and started shooting at Cross’s car, firing seven shots. (R. 168:158–60.) After Cross drove away, officers and paramedics arrived and A.B. was transported to the hospital, where he had multiple surgeries and his left leg was amputated. (R. 168:161–62.)

Jennifer’s testimony. Consistent with A.B., Jennifer testified that on May 27, 2021 she rode to work in the morning with A.B. in his gold Tahoe, worked overtime, punched out at 10:02 p.m., and met A.B., who told her that McGrew was “talking about doing something.” (R. 168:203–206.) In the parking lot, Jennifer heard McGrew, who was parked 20 feet away from A.B.’s car, saying “Here they come right here,” before she got out of her car, “got into [A.B.’s] face” and hit Jennifer, who “fell backwards” and then hit McGrew back. (R. 168:208–10.) After they stopped fighting and went back to their cars,

Jennifer and A.B. were standing on the driver's side of A.B.'s truck when Cross drove straight toward A.B. and hit A.B.'s car on the front driver's side. (R. 168:211–14.) Jennifer saw A.B. go to the passenger side of his car, she and McGrew began fighting again on the driver's side, A.B. came around the car from behind and tried to “pull [them] apart,” and A.B. was again hit by Cross's vehicle, which “split his leg open.” (R. 168:214–15.) Jennifer did not see A.B. with a gun, pointing a gun, or hitting McGrew with a gun. (R. 168:215.) After Cross's car drove toward them “at full acceleration,” there “was a real loud boom,” the Tahoe shook, A.B. “screamed out ‘my leg,’” and “fired off his gun” while he was laying on the ground. (R. 168:216–17.)

McGrew's testimony. After the State rested (R. 169:94), McGrew, who had been with Cross for 10 years and had three children with him, testified that when she left work on May 27, 2021, she saw A.B. near the exit door. (R. 169:105–107.) A.B. called her “a bitch” and told her to leave Jennifer alone, referred to “on BD,” or “Black Disciple,” which McGrew knew was “gang related,” and said he “was going to have his sisters to jump” her. (R. 169:105–107; 115–16.) McGrew admitted that in her sworn statement to police, she said A.B. walked past her and looked at her “weird,” and did not report these alleged threats. (R. 169:130–34.) McGrew moved her car to where she could see the exit because she “wanted to talk to” Jennifer when she and A.B. came out, and called Cross to tell him that A.B. had threatened her. (R. 169:118–19.) A.B. and Jennifer came out, McGrew walked up to them, they started fighting by McGrew's car, and when the fight broke up, McGrew stayed by her car and Jennifer and A.B. walked towards their car. (R. 169:120–22.) Then, McGrew saw Cross drive in and pull “close to them,” A.B. “pulled the gun out” and “aimed it at” Cross, and Cross backed up. (R. 169:123–24.) McGrew then walked to A.B.'s car, started fighting with Jennifer again,

and A.B. came around from the passenger side of his car, hit McGrew in the face with his gun, and pointed it at her. (R. 169:125–26.) While her eyes were closed, McGrew heard “tire sounds” from Cross’s car, A.B. screaming, and as she ran back towards her car, McGrew heard gunshots. (R. 169:126.) Cross drove toward her and told her to get into the car; when she got in, she saw Cross had been shot and he drove them to the hospital. (R. 169:126–27.) In a photo taken after the incident, McGrew had a cut on her forehead between her eyebrows that she said was caused by A.B. hitting her with the gun before he pointed it at her and said he was going to kill her. (R. 169:128–29.)

After a colloquy (R. 169:98–100), Cross testified that, on the night of the incident, McGrew was at work and called him at home shortly after 10:00 p.m. “really upset.” (R. 169:179.) McGrew told Cross that A.B. had threatened her by approaching her, saying “on BD,” that “he would pop her,” and that he would “have his sisters jump her.” (R. 169:179–80.) Cross knew that “on BD” referred to the “street gang” called “Black Disciples,” which was “very dangerous stuff.” (R. 169:180.) Cross could hear a “commotion,” and did not know what was going on, so he told McGrew he was on his way to meet her. (R. 169:181, 204–205.) While driving for five minutes to American Foods, Cross stayed on the phone with McGrew, heard “a scuffle” and a male voice, and thought McGrew was “getting her butt kicked” because she was not responding to him. (R. 169:181–83, 205–206.)

When Cross arrived, he “pulled in pretty quickly,” saw A.B. and Jennifer by A.B.’s truck, and “pulled up very close” to A.B. (R. 169:184–85, 208.) Cross did not intend to hit A.B., but believed that he “might have bumped him,” although earlier in a police interview, Cross said that when he drove in, he “hit the guy.” (R. 169:184–85, 210.) Cross explained that he hit A.B. with his car because A.B. was a “threat” who

Cross wanted to get “out of the way” and “separate” from McGrew, who was “[t]here to nine feet” away from A.B. (R. 169:184–85, 211.) The video showed that at the time of the first strike, McGrew was on the other side of the black car that was parked between her and A.B.’s Tahoe, further than three to nine feet away. (R. 169:210–211.) After the first strike, Cross “backed up a few feet,” saw A.B. go to the passenger side of the vehicle, and, while McGrew and Jennifer were having “a catfight” near the driver’s side rear tire, A.B. came around the back of the truck, “with his arm extended with a gun,” and “pointed the gun directly at [Cross’s] head.” (R. 169:186, 212–13.) Cross saw A.B. walk over to McGrew and Jennifer, hit McGrew “in the forehead with the gun,” aim the gun at her, and say, “I’ll kill this bitch.” (R. 169:186–87, 214–215.) Cross put his car in drive and drove it “straight at” A.B., striking him at an angle, because A.B. was pointing the gun at McGrew, Cross “feared for her life,” and he wanted to protect both himself and her. (R. 169:187–88, 216–17.) After Cross turned around to get McGrew and stopped next to the black car parked a couple stalls away, waiting for McGrew, he heard gunshots. (R. 169:189–92, 218.) As Cross took off, he was hit twice with bullets before McGrew got into the car and they drove out of the parking lot and to the hospital. (R. 169:192–94.)

Jury instructions. During the jury instruction conference, Cross’s counsel Attorney David R. Hassel asked for jury instruction Wis. JI–Criminal 830, Defense of Others: Force Intended or likely to Cause Death or Great Bodily Harm, for both count one and count two. (R. 169:238.) The court concluded that there was no basis for the defense of others jury instruction on count two, recklessly endangering safety, related to the first time Cross hit or tried to hit A.B., even viewing the evidence most favorably to the defense. (R. 169:255–56.)

Next, the court and the parties had extended discussions on the appropriate jury instructions for count one, first-degree reckless injury—the second time Cross hit A.B., resulting in A.B.’s loss of his left leg—and, in particular, related to whether the jury should be given the Wis. JI–Criminal 830 as requested by Hassel, and if so, also the provocation instruction for defense of others, Wis. JI–Criminal 835. (R. 169:256—310.) After the court noted that the testimony at trial confirmed that A.B. pointed the gun at Cross after A.B. was hit the first time, and that there was conflicting trial testimony about whether, after that, A.B. pointed or hit McGrew with his gun, the court and the parties discussed at length the instructions for the privilege of defense of others and provocation by McGrew and Cross. (R. 169:300–321.)

As part of their discussion, Attorney Hassel objected to the language in the provocation instruction that the jury “should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack and who does provoke an attack is not allowed to use or threaten force in self-defense or defense of others against that attack.” (R. 169:310–11.) Hassel objected because it “could be read to say that an unrelated retaliation could prevent someone from coming to someone else’s aid.” (R. 169:311.) After further discussion, the court proposed referring to the attack as “alleged,” rather than “the attack,” and “defin[ing] the attack” related to provocation by both McGrew and Cross: that the jury “should consider whether Shenelle McGrew provoked an alleged attack of her” and whether Cross provoked “an alleged attack of him.” (R. 169:316–18.) Ultimately, the court, which wanted to ensure that it gave “the jury the right law” that was “accurately stated,” and the parties agreed that the jury instructions related to defense of others and provocation were: (1) that the jury “should consider

whether” McGrew “provoked the alleged attack on her” and (2) should consider whether Cross “provoked an alleged attack of him.” (R. 169:318–21.) Hassel specifically agreed with these instructions, stating “we finally got it” and “that follows.” (R. 169:320–21.)

The court provided both written and oral instructions to the jury on the privilege of defense of others, use of force intended or likely to cause death or great bodily harm, which followed the Wis. JI–Criminal 830 pattern instruction, as to count one:

Defense of others is an issue in this count. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of Shenelle McGrew; and,
- the defendant believed that Shenelle McGrew was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of Shenelle McGrew; and,
- the defendant’s beliefs were reasonable.

The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to Shenelle McGrew.

(R. 109:9–11; 170:14–15.) The court also instructed the jury orally and in writing on provocation by both McGrew and Cross, following the pattern jury instructions, Wis. JI–Criminal 835, but with the agreed-to changes specifying that the jury should consider any provocation by McGrew related to the alleged attack on her, and any provocation by Cross related to the alleged attack on him:

You should consider whether Shenelle McGrew provoked an alleged attack of her. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

However, if the attack which follows causes the person reasonably to believe that the person is in imminent danger of death or great bodily harm, the person may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless the person reasonably believes every other reasonable means to escape from or otherwise avoid death or great bodily harm has been exhausted.

However, even if Shenelle McGrew had provoked an alleged attack on her, the defendant would still be allowed to act in defense of Shenelle McGrew if the defendant actually and reasonably believed that Shenelle McGrew was entitled to act in her own defense.

You should also consider whether the defendant provoked an alleged attack of him. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense or defense of others against that attack.

(R. 109:11–13; 170:11–12.) Neither the State nor Attorney Hassel objected to these instructions as they were read to the jury. (R. 170:87.)

Verdict and sentencing. The jury found Cross guilty of count one, first-degree reckless injury while using a dangerous weapon; on count two, the jury found Cross guilty of the lesser-included offense of second-degree recklessly endangering safety while using a dangerous weapon. (R. 107; 108; 170:97–98.) The court sentenced Cross on the first-degree reckless injury count to 12 years of initial confinement and eight years of extended supervision, and imposed a concurrent sentence on the second-degree

recklessly endangering safety count of two years of initial confinement and two years of extended supervision. (R. 171:43–44.) The court entered a judgment of conviction reflecting the 20-year sentence. (R. 156.)

Postconviction motion for a new trial and hearing. On April 24, 2023, Cross filed a postconviction motion for a new trial. (R. 188.) Cross alleged two grounds for a new trial that are relevant to this appeal.³

First, Cross alleged that the court incorrectly instructed the jury on count one, first-degree reckless injury, related to defense of others and provocation, that he was not entitled to act in defense of McGrew if Cross provoked A.B.’s attack on McGrew. (R. 188:12.) Cross argued that under Wis. Stat. § 939.48(4), if McGrew had the privilege to defend herself from an attack by A.B., then Cross was permitted to defend her, even if Cross’s actions provoked A.B. “to point a gun at her or strike her with a gun.” (R. 188:14–15.) Cross contended that the court erred by instructing the jury “that Cross had no right to defend McGrew because of Cross’s provocation even if they believed the testimony that AB pointed a gun at her and struck her with it.” (R. 188:15.)

Second, Cross alleged that Attorney Hassel was ineffective for not impeaching A.B. with his three prior criminal convictions. (R. 188:15–16.) Cross contended that Hassel performed deficiently because he did not determine how many prior convictions A.B. to impeach A.B. and requested a *Machner*⁴ hearing “to determine if there was any

³ The third ground, alleging that the State engaged in misconduct because it did not disclose the criminal history of A.B. “and possibly others,” was withdrawn and thus is not raised by Cross on appeal. (R. 209:3.)

⁴ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

tactical reason for Attorney Hassel to not conduct a CCAP check on AB.” (R. 188:18–19.) Cross argued that he was prejudiced because A.B.’s “prior convictions” were “necessary to fully evaluate the evidence in the case,” the video of the incident was “not dispositive,” and “[t]here was conflicting testimony as to what happened after” Cross hit or attempted to hit A.B. the first time “regarding what AB did that was not undisputable given the quality of the video.” (R. 188:19.) Cross sought a new trial on both counts or, alternatively, an order vacating his conviction and sentence for count one “and a new trial ordered for that offense.” (R. 188:19.)

At an evidentiary hearing, Attorney Hassel testified that while representing Cross in this case, he received information from the State regarding prior convictions of testifying witnesses, including A.B., and believed that the defense had a stipulation with the State about which of A.B.’s prior convictions could be introduced at trial. (R. 209:4–8.) When A.B. testified at trial, Hassel did not ask him if he had any prior convictions. (R. 209:8.) Hassel was aware of A.B.’s prior convictions and did not specifically recall why he did not use them to impeach A.B. or if he “made a conscious choice not to.” (R. 209:8–10.) Hassel remembered “the defense theory” that Cross and McGrew knew that A.B. “was a member of a gang,” and Hassel wanted the jury to believe that A.B. had a “gang affiliation,” so during cross-examination, Hassel may have decided that he “was better off letting the jury make their own assumptions about his criminal background.” (R. 209:8–10.) Additionally, A.B. was a “somewhat difficult witness” to cross-examine because “he was missing a limb,” which made him sympathetic to the jury. (R. 209:9.) However, Hassel admitted that may have simply “missed those questions” about A.B.’s prior convictions, but he could not specifically remember. (R. 209:10.) Hassel was an experienced criminal attorney and recalled that the defense theory, based on the

videos and photographs, was that before Cross hit A.B. with his car the second time and injured him, A.B. had pointed a gun at McGrew and hit her in the head with the gun. (R. 209:11–14.)

Decision denying motion for a new trial and appeal. The court issued a written decision and order denying Cross’s motion for a new trial, holding that the court properly instructed the jury on defense of others and provocation and that Hassel was not ineffective for not impeaching A.B. with his prior criminal convictions because Cross failed to show he was prejudiced. (R. 208:1–14.)

Cross appeals from the judgment of conviction and order denying the motion for a new trial. (R. 210.)

STANDARDS OF REVIEW

“The trial court has broad discretion when instructing the jury, but must exercise its discretion in order to fully and fairly inform the jury of the applicable law.” *State v. Austin*, 2013 WI App 96, ¶ 5, 349 Wis. 2d 744, 836 N.W.2d 833. “Whether there are sufficient facts to warrant the circuit court’s [instruction] is a question of law that this court decides independently.” *State v. Stietz*, 2017 WI 58, ¶ 14, 375 Wis. 2d 572, 895 N.W.2d 796. In other words, “[w]hether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review.” *State v. Ziebart*, 2003 WI App 258, ¶ 16, 268 Wis. 2d 468, 673 N.W.2d 369.

Whether an error is harmless is a question of law which is reviewed de novo. *State v. Harris*, 199 Wis. 2d 227, 256–63, 544 N.W.2d 545 (1996). In determining whether an error is harmless, an appellate court weighs the effect of the trial court’s error against the totality of the credible evidence supporting the verdict. *Id.* at 255.

This Court reviews ineffective assistance of counsel claims under a mixed standard of review. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93. The “factual circumstances of the case and trial counsel’s conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous[.]” *Id.* Whether trial counsel performed deficiently and whether any deficient performance prejudiced the defendant are both questions of law reviewed de novo. *Id.* ¶¶ 38–39.

ARGUMENT

I. Cross is not entitled to a new trial based on his claim that the circuit court improperly instructed the jury on the privilege of defense of others and provocation.

A. The court exercises its discretion when it instructs the jury and a claim that the instruction was improper is forfeited without a contemporaneous objection.

Exercise of discretion and forfeiture by failure to object. In deciding on a jury instruction, “a circuit court has broad discretion.” *State v. Fonte*, 2005 WI 77, ¶ 9, 281 Wis. 2d 654, 698 N.W.2d 594. A circuit court properly exercises its discretion by giving an instruction that “fully and fairly inform[s] the jury of the rules of law applicable to the case and . . . assist[s] the jury in making a reasonable analysis of the evidence.” *Id.* (citation omitted). This Court will not grant relief from erroneous instructions unless it determines that “the instructions, when viewed as whole, misstated the law or misdirected the jury.” *Ziebart*, 268 Wis. 2d 468, ¶ 16 (citation omitted). To determine whether a jury instruction was warranted, this Court views the evidence in the light most favorable to the defense. *State v. Giminski*, 2001 WI App 211, ¶ 8, 247 Wis. 2d 750, 634 N.W.2d 604.

Wisconsin Stat. § 805.13(3), made applicable to criminal proceedings through Wis. Stat. § 972.11(1), provides that at the close of the evidence and prior to closing arguments, the trial court shall hold a jury instruction conference with counsel outside the presence of the jury and inform the parties on the record of the instructions and verdicts it proposes to give to the jury, at which any objections must be made. “Failure to contemporaneously object to jury instructions results in forfeiting review of the jury instructions.” *State v. McKellips*, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258; *State v. Trammell*, 2019 WI 59, ¶ 24, 387 Wis. 2d 156, 928 N.W.2d 564; Wis. Stat. § 805.13(3). This rule applies regardless of whether the complained-of error is an affirmative misstatement or an omission. *See State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267 (holding that the defendant forfeited his right to challenge the omission of a phrase from the jury instructions by failing to object). This Court does not have power to review challenges to jury instructions that were not properly preserved in the trial court. *Id.*⁵

“The purpose of the rule is to give the opposing party and the circuit court an opportunity to correct any error.” *McKellips*, 369 Wis. 2d 437, ¶ 47. “This also helps preserve jury verdicts and conserve judicial resources.” *Id.* Additionally, “requiring parties to raise issues at the trial

⁵ Although an unobjected-to jury instruction is not reviewable, this court may grant relief under its discretionary power to reverse in the interest of justice, or under the rubric of ineffective assistance of trial counsel. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). On appeal, Cross does not make an ineffective assistance or interests of justice claim related to the jury instructions. In any event, as explained in part II.C. of this brief, Cross is not entitled to relief because the jury instructions were not erroneous.

court level encourages diligent preparation and litigation, and discourages parties from ‘build[ing] in an error to ensure access to the appellate court.’” *State v. Saunders*, 2011 WI App 156, ¶ 30, 338 Wis. 2d 160, 807 N.W.2d 679 (citation omitted).

Defense of others and provocation. A person is privileged to defend a third person from harm by another person “under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself . . . provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person’s intervention is necessary for the protection of the 3rd person.” Wis. Stat. § 939.48(4). “Because a defendant asserting the privilege of defense of others is constrained by the principles governing the privilege of self-defense, those principles apply to the analysis of whether a defense-of-others instruction is required.” *Giminski*, 247 Wis. 2d 750, ¶ 12. Thus, as with the privilege of self-defense under Wis. Stat. § 939.48(1), the person claiming the defense of others privilege may use only force believed necessary to prevent or stop the harm to the third party and “may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm.” Wis. Stat. § 939.48(1).

The defense of others has both a subjective and an objective component: the defendant must have actually believed that he was acting to prevent the third party from harm and that belief must have been reasonable. *Giminski*, 247 Wis. 2d 750, ¶ 13. To determine whether the beliefs were reasonable, the factfinder asks “what a person of ordinary intelligence and prudence would have believed in the defendant’s position under the circumstances that existed at the time of the alleged offense.” *Id.* ¶ 15 (citing

Wis. JI–Criminal 830). “The reasonableness of the defendant’s beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.” Wis. JI–Criminal 830 (defense of others pattern jury instruction).

Where the court instructs the jury on defense of others, the State is permitted to ask the court to give the jury the “provocation” instruction related to defense of others. *See* Wis. JI–Criminal 835; Wis. Stat. §§ 939.48(2) and (4). Under Wis. Stat. § 939.48(2), when “a person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack,” that person “is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm.” And under Wis. Stat. § 939.48(4), one is “privileged to defend a 3rd person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person’s intervention is necessary for the protection of the 3rd person. A person claiming defense of others has that privilege “under the same conditions and by the same means as those under and by which the person is privileged to defend himself” or herself. *Giminski*, 247 Wis. 2d 750, ¶ 12.

Thus, the provocation instruction tells the jury that they “should consider whether” the defendant *or* a third party who was attacked “provoked the attack,” or if the defendant or third party “engage[d] in conduct likely to provoke others to attack, and who does provoke an attack”; if

so, that person the defendant or third party is not allowed to invoke the privilege. *See* Wis. JI–Criminal 835. The pattern instruction also provides optional, explanatory paragraphs that are appropriate when they are supported by the evidence. *Giminski*, 247 Wis. 2d 750, ¶ 12.

B. By agreeing and not objecting to the jury instructions on defense of others and provocation, Cross forfeited his claim that they were improper.

As described, at the jury instruction conference, the court and the parties had significant and lengthy discussions, including about the defense of others and provocation instructions for count one. (R. 169:238–321.) While defense counsel Hassel initially objected to the provocation instructions (R. 169:311), at the conclusion of the conference, both the State and defense counsel Hassel agreed with the defense of others and provocation instructions. (R. 169:320–21.) The written instructions were read to the jury, and neither party objected. (R. 109:11–13; 170:11–12, 87.) Now, Cross contends that he is entitled to a new trial because the court erred by instructing the jury “that Cross had no right to defend McGrew because of Cross’s provocation even if they believed the testimony” by Cross and McGrew “that AB pointed a gun at her and struck her with it. (Cross’s Br. 27.) By not objecting to the instructions, Cross forfeited this claim.

Under Wis. Stat. § 805.13(3), an objection to an alleged error in proposed jury instructions must be made at the jury instructions conference and a “[f]ailure to object at the conference constitutes a waiver of any error in the proposed

instructions or verdict.”⁶ This statute specifically applies to jury instructions given after the close of evidence and requires a contemporaneous objection to preserve an instruction issue for appellate review. Indeed, this Court “has no power to reach an unobjected-to jury instruction because the court of appeals lacks a discretionary power of review.” *Trammell*, 387 Wis. 2d 156, ¶ 25.

Here, at the end of the lengthy and thorough jury instruction conference, the parties agreed on the defense of others and provocation instructions and Hassel had no objection after the instructions were read to the jury. (R. 169:320–21; 170:87.) By agreeing and not objecting to the ultimate instructions given to the jury, Cross forfeited appellate review of whether the court properly instructed the jury on defense of others and provocation.

C. In any event, the jury instructions on the defense of others privilege and provocation, specifying that the jury could consider whether McGrew provoked the alleged attack on her or Cross provoked the alleged attack on him, were proper.

The defense of others instructions agreed to by the parties and given to the jury related to count one allowed

⁶ Although the statute talks about “waiver” of the issue, the more accurate phrasing for the failure to object at the instruction conference is “forfeiture.” See *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining the distinct legal concepts embodied by the terms “forfeiture” and “waiver”); see also *State v. McKellips*, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258 (referring to forfeiture, rather than waiver, of review). Regardless of the terminology, however, the effect of the statute is the same—a party who fails to object to a jury instruction at the conference is precluded from challenging it later.

Cross “to threaten or intentionally use force to defend” McGrew only if he believed that “there was an actual or imminent unlawful interference” with McGrew, that she “was entitled to use or to threaten to use force in self-defense,” and that Cross reasonably believed that the amount of force he used to defend her was “necessary” for her protection. *See* Wis. JI–Criminal 830. (R. 170:10.) With respect to provocation, the jury instructions followed Wis. JI–Criminal 815 and 835, with the agreed upon clarification, instructing that the jury should “consider whether Shenelle McGrew provoked an *alleged* attack of *her*” because if so, she was “not allowed to use or threaten force in self-defense,” unless she reasonably believed that she was “in imminent danger of death or great bodily harm” and had no “reasonable means to escape.” (R. 170:11–12) (emphasis added). Thus, the jury was instructed to consider whether *McGrew* provoked the alleged attack on *her*: A.B. allegedly hitting her with a gun and pointing it at her, which was a question of fact for the jury. The court also instructed the jury that they should “consider whether the defendant provoked an alleged attack of *him*.” (R. 170:12) (emphasis added). In other words, the jury was instructed that they should consider whether Cross provoked the alleged attack on *him*: A.B. pointing the gun at him after Cross drove his car at A.B. the first time. If either McGrew provoked the alleged attack on her (making the privilege of self-defense and thus defense of others unavailable), or Cross provoked the alleged attack on him, Cross was not entitled to assert the privilege of defense of others. This instruction correctly stated the law contained in Wis. Stat. § 939.48.

Contrary to Cross’s claim, the instructions did *not* “preclude[] Cross from acting in defense of McGrew if Cross provoked the attack on McGrew with the first hit” or “[a]t best, the instruction is confusing as to whether Cross could defend McGrew from an attack by AB” that Cross provoked.

(Cross's Br. 25–26.) Rather, and consistent with section 939.48(2)(a), the jury instruction explained that if a person “engages in unlawful conduct of a type likely to provoke others to attack and who does provoke an attack is not allowed to use or threaten force in self-defense or defense of others against that attack.” (R. 170:12.) This provocation instruction is consistent with the statute. It prevented Cross from benefitting from privilege of defense of others if McGrew “provoked an alleged attack of her” (A.B. allegedly threatening her with a gun), or if Cross “provoked an alleged attack of him,” by using his vehicle as a deadly weapon against A.B. the first time. (R. 170:11–12.)

Cross argues that under “the plain language” of Wis. Stat. § 939.48(4), he was allowed “to defend McGrew even if Cross’s own actions prompted AB to point a gun at her or strike her with a gun.” (Cross’s Br. 26.) Cross contends that even if he provoked the incident—A.B. allegedly striking and threatening McGrew with a gun—Cross had the privilege to defend her “if the jury was to accept the testimony of Cross and McGrew” that A.B. threatened McGrew’s life. (Cross’s Br. 26–27.) But Wis. Stat. § 939.48(2)(a) would not allow Cross to defend himself from an attack he provoked, unless Cross reasonably believed that he was in imminent danger of death or great bodily harm and had no reasonable means to escape. These principles apply to whether Cross had the privilege to defend McGrew under the defense of others provision, Wis. Stat. § 939.48(4), which allowed Cross could defend McGrew “under the same conditions and by the same means as those under and by which the person is privileged to defend himself.” *See Giminski*, 247 Wis. 2d 750, ¶ 12.

The court’s instructions regarding defense of others were not mandatory, but rather told the jury that they “should consider” whether McGrew provoked an “alleged attack of her” or Cross provoked an “alleged attack of him.” (R. 170:11–12.) Thus, the instructions were permissive and

allowed the jury to find that Cross had the privilege to defend McGrew if, based on Cross's and McGrew's testimony, the jury believed that A.B. threatened McGrew's life and she was in imminent danger of death or great bodily harm. The court's instructions did not misstate the law, were not confusing, and accurately instructed the jury on defense of others and provocation. Cross fails to show otherwise.

The circuit court correctly denied Cross's motion for a new trial based on his claim that its instructions on defense of others and provocation were erroneous. The court's instructions on count one, first-degree reckless injury while using a dangerous weapon related to the second strike that resulted in the amputation of A.B.'s left leg, were proper because they "did not prevent the jury from concluding that Cross was privileged to defend McGrew if [he] believed [A.B.] attacked her." (R. 208:9.) Applying the instructions given, the jury was able to find that A.B. "escalated the situation or that [A.B.] started a new chain of events once he pointed the gun at Cross," causing Cross to back up, *if* the jury believed that A.B. attacked McGrew and threatened her life by hitting her with the gun or pointing the gun at her. (R. 208:9–10.) Based on the jury's credibility findings and applying the instructions given, the jury "could have acquitted Cross on the defense of others instruction" if it found that A.B. threatened McGrew's life and that Cross's belief that it was necessary to defend her using deadly was reasonable. (R. 208:10.)

The court also determined that "the instructions were specific depending on whose provocation the jury was considering" and properly instructed "that Cross could not claim the defense of others privilege for an attack he provoked of *himself*": when A.B. pointed the gun at Cross. (R. 208:10.) The court concluded that its instructions comported with Wis. Stat. § 939.48(2)(a) and (4), which provide that that if the person provokes an attack on him or

herself, he or she “is not entitled to claim the privilege of self-defense” and limit the defense of others privilege to “the same conditions and by the same means as those under and by which the person is privileged to defend himself.” (R. 208:10.) Applying these instructions, “the jury was still free to acquit Cross if it believed [A.B.] attacked *McGrew*” and could “consider whether McGrew provoked [A.B.] into an alleged attack of *herself*,” in which case Cross could “defend McGrew from [A.B.] if Cross actually and reasonably believed self-defense was available to McGrew.” (R 208:10.) Thus, the instructions “allowed the jury to interpret the facts in any number of ways and to find that Cross was privileged to assert defense of others under those various scenarios other than when disallowed by statute,” did not misstate the law, and “did not violate Cross’ due process rights.” (R. 208:10.)

The court was correct. The jury found Cross guilty of first-degree reckless injury using a deadly weapon after hearing all the testimony, making credibility determinations, and finding that Cross did not have the privilege of defending McGrew by hitting A.B. with his vehicle, severely injuring his left leg and resulting in amputation. The court properly instructed the jury on defense of others and provocation related to count one for first-degree reckless injury using a deadly weapon.

D. Any error in the defense of others and provocation jury instructions was harmless.

If the court incorrectly instructed the jury, any error was harmless because it did not contribute to the verdict. A court’s error in instructing the jury is subject to a harmless error analysis on appeal. *See State v. Beamon*, 2013 WI 47, ¶ 3, 347 Wis. 2d 559, 830 N.W.2d 681. “A harmless error analysis asks whether, based on the totality of the

circumstances, it is clear beyond a reasonable doubt that a rational jury, properly instructed, would have” still found the defendant guilty. *Id.*

Here, the jury did not find Cross guilty of first-degree reckless injury based on the jury instruction, but rather on the evidence, the testimony, and its credibility determinations. There is no possibility that any error in the jury instructions related to the privilege of defense of others and provocation contributed to the verdict. As described, the defense of others instruction made the privilege available, allowing Cross to use force intended to cause great bodily harm to A.B., if Cross reasonably believed there was actual or imminent harm to McGrew; that McGrew was entitled to use force in her own self-defense; and that the deadly force was necessary to protect McGrew from death or great bodily harm. *See Wis. JI–Criminal 830.* The jury made credibility determinations and did not believe McGrew and Cross’s testimony that A.B. threatened McGrew’s life by hitting her with the gun and threatening to kill her while he was breaking up the fight between McGrew and Jennifer. Both A.B. and Jennifer testified that A.B. did not point a gun at McGrew. (R. 168:181–82, 215.) The video evidence supported this: law enforcement testified that the video showed that after he was hit the first time, A.B. went around from the front to the passenger side of his vehicle, then to the rear with his right arm extended holding something (presumably pointing a gun at Cross); after Cross backed up and A.B. went to break up the fight, he did not appear to be holding anything at the time that, Cross’s drove his vehicle towards A.B., hit A.B., and severed his left leg. (R. 168:112–15.)

Thus, after making credibility determinations, the jury found that McGrew and Cross’s testimony was incredible and that McGrew’s life was not endangered so that Cross was privileged to defend her by hitting A.B with his vehicle and severely injuring him. Based on all the evidence, it is

clear beyond a reasonable doubt that a rational jury would have found Cross guilty of first-degree reckless injury regardless of the jury instructions. The court did not erroneously exercise its discretion when it instructed the jury on defense of others and provocation, but even if it did, any error was harmless.

II. Cross failed to show that his counsel provided ineffective assistance because he was not prejudiced by Hassel not impeaching A.B with prior convictions.

A. To prevail on an ineffective assistance claim, Cross had the burden to prove both that counsel performed deficiently by not impeaching A.B. with his prior convictions and that Cross was prejudiced.

“Wisconsin criminal defendants are guaranteed the right to the effective assistance of counsel through the Sixth and Fourteenth Amendments to the federal constitution and Article I, Section 7 of the Wisconsin Constitution.” *State v. Domke*, 2011 WI 95, ¶ 34, 337 Wis. 2d 268, 805 N.W.2d 364. Wisconsin has adopted the United States Supreme Court’s two-pronged Strickland test to analyze ineffective assistance claims. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prevail on an ineffective assistance of counsel claim, the defendant must prove that his counsel’s performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687. If the defendant fails on either prong, the claim fails. *Id.* at 697.

“The defendant does not show the first element simply by demonstrating that his counsel was imperfect or less than ideal.” *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, “[t]o prove deficient performance, a defendant must show specific acts or omissions of counsel

that are ‘outside the wide range of professionally competent assistance.’” *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). There is a strong presumption that counsel acted properly within professional norms, and counsel’s decisions based on a reasonably sound strategy are “virtually unchallengeable,” unless they were “irrational or based on caprice.” *Strickland*, 466 U.S. at 689–91; *Breitzman*, 378 Wis. 2d 431, ¶ 75. This Court can determine that defense counsel’s performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made. *State v. Koller*, 2001 WI App 253, ¶ 53, 248 Wis. 2d 259, 635 N.W.2d 838.

To prove prejudice, “[i]t is not sufficient for the defendant to show that his counsel’s errors ‘had some conceivable effect on the outcome of the proceeding.’” *Domke*, 337 Wis. 2d 268, ¶ 54 (citation omitted). Rather, the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Because the defendant must show both deficient performance and prejudice to establish ineffective assistance, this Court may “avoid the deficient performance analysis altogether if the defendant has failed to show prejudice.” *Johnson*, 153 Wis. 2d at 128.

Under Wis. Stat. § 906.09(1), a witness may be impeached with prior convictions to attack the witness’s “character for truthfulness,” by asking whether he or she has been convicted of a crime and the number of such convictions.” When a defendant alleges counsel was ineffective for not impeaching a witness with prior convictions, courts focus on whether the defendant was prejudiced. For example, the supreme court found no prejudice where the jury had other evidence giving it reason

to question the witness's credibility and such impeachment would have only "incrementally weakened" the credibility of the witness, and other evidence supported the defendant's guilt. *State v. Trawitzki*, 2001 WI 77, ¶¶ 43–45, 244 Wis. 2d 523, 628 N.W.2d 801, *modified on other grounds by State v. Davison*, 2003 WI 89, ¶ 44, 263 Wis. 2d 145, 666 N.W.2d 1. Similarly, this Court held that counsel's failure to impeach a witness with prior convictions was not prejudicial when the jury has an "ample basis to discredit" the witness's testimony. *State v. Tkacz*, 2002 WI App 281, ¶ 22, 258 Wis. 2d 611, 654 N.W.2d 37.

B. After a hearing, the court properly denied Cross's motion for a new trial both because Cross failed to show that Hassel performed deficiently and that he was prejudiced.

In its decision denying Cross's ineffective assistance claim, the court assumed, "without finding, that trial counsel was constitutionally deficient for failing to impeach [A.B.] with his criminal convictions." (R. 208:12.) The court presumably based this on Hassel's testimony at the *Machner* hearing that he may have simply "missed those questions" about A.B.'s prior convictions (R. 209:10.) However, although Hassel did not specifically remember why he did not ask A.B. about his six convictions or if it was "a conscious choice," he articulated a reasonable "defense theory" for not doing so: based on the trial testimony by McGrew and Cross that A.B. had threatened McGrew by making a gang reference to "BD" or the "Black Disciples" (R. 169:105–07; 115–16, 179–80), Hassel hoped the jury would infer that A.B. "was a member of a gang" with a more extensive "criminal background." (R. 209:8–10.) Another articulated reason for not impeaching the victim A.B. with his number of criminal convictions was that A.B. was a sympathetic witness who "was missing a limb," making it delicate to cross-examine him in front of the jury. (R. 209:9.) Thus,

although Hassel testified that he did not remember exactly why he chose not to impeach and that he may have “missed” the impeachment opportunity, he was able to generally explain, based on the defense strategy, why he did not use A.B.’s prior convictions for impeachment. Even without a defined, strategic reason for not impeaching A.B., this Court can conclude that Hassel’s performance as counsel was objectively reasonable. *See Koller*, 248 Wis. 2d 259, ¶ 53.

Moreover, even if Hassel’s performance was deficient, the circuit court correctly denied Cross’s motion because Cross failed to show he was prejudiced. This Court can affirm on this ground because Cross entirely failed to show Hassel’s failure to ask A.B. if he had any prior convictions and how many affected the result of the trial. Cross argues that Hassel’s failure to impeach A.B. “undermined confidence in the verdict” because “[t]he credibility of AB and [Jennifer] compared to Cross and McGrew was important,” there was “conflicting testimony” about whether A.B. hit McGrew with a gun or pointed a gun at her, and the video quality of the incident was “poor.” (Cross’s Br. 32.) Cross’s contention that credibility was “important” is not sufficient to meet his burden to show that he was prejudiced.

Here, the circuit concluded that Cross had failed to meet his burden to show prejudice because A.B. “was thoroughly cross-examined at trial,” including through pertinent portions of the security video that defense counsel used to contradict his testimony and attempt to show A.B. was lying. (R. 208:13.) Hassel’s cross-examination also impeached A.B.’s credibility because it revealed that A.B. had driven to work with a loaded gun and that he “opened fire in the busy parking lot of his own employer.” (R. 208:13.) The jury was able to compare A.B.’s testimony with McGrew and Cross’s testimony and make credibility findings, as well as compare all of the testimony to the security video. (R. 208:13–14.) Based on all the testimony and “the video

evidence, it is impossible to see how the reliability of the entire proceeding could be called into questions simply because” Hassel did not ask A.B. “how many criminal convictions he had.” (R. 208:14.)

The court’s conclusion that Cross failed to show that he was prejudiced because Hassel did not impeach A.B. with his prior criminal convictions is sound. Cross is not entitled to a new trial.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the order denying Cross’s motion for a new trial and the judgment of conviction.

Dated this 2nd day of April 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,822 words.

Dated this 2nd day of April 2024.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 2nd day of April 2024.

Electronically signed by:

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