COURT OF APPEALS DECISION DATED AND FILED

August 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-1773-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. MURRELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

CURLEY, J. David M. Murrell appeals from a judgment entered, following a jury trial, convicting him of five counts of first-degree reckless injury while armed, party to a crime, contrary to §§ 940.23(1), 939.63(1)(a)2 & 939.05, STATS. Murrell also appeals from a trial court order denying his motion for a new trial based upon allegations of ineffective assistance of counsel and newly

discovered evidence. Murrell claims that the trial court erred in denying his motion for a new trial because his trial counsel provided him with ineffective assistance: (1) by failing to impeach Christopher Davis, one of the State's witnesses, with Davis's prior inconsistent testimony and with the testimony of eyewitness Danny DeNeal; (2) by failing to locate and to adduce the testimony of eyewitness Brian Horton; and, (3) by failing to adequately investigate Murrell's criminal history, resulting in the exposure of false and otherwise inadmissible evidence about his background. Murrell also claims that the trial court erred in denying his motion for a new trial because newly discovered evidence provided by eyewitness Linda Williams entitled Murrell to a new trial. We conclude that Murrell was not prejudiced by the allegedly deficient performance of his trial counsel, and that Williams's testimony does not create a reasonable probability of a different result at a new trial. Therefore, we affirm the trial court's judgment and order.

I. BACKGROUND.

As the trial court stated in its postconviction written decision,

> Murrell was convicted by a jury of five counts of first degree reckless injury while armed as a party to a crime arising out of his involvement in a sensational shooting incident that occurred in the now-defunct Roxbury's nightclub on Milwaukee's northwest side in which five people were shot and injured. Murrell (a/k/a "Shake") was charged and tried together with co-defendant Carl Owens (a/k/a "Buck"). A witness, Jermaine Burrage, had identified Murrell as the shooter and placed Owens with Murrell just prior to and at the time of the shooting. Other witnesses had indicated that Owens had been involved in an altercation with some of the victims and the victims' associates just prior to the shooting.
>
> The case was tried to a jury on April 17-22, 1995. The evidence at trial established that Murrell was in the Roxbury's bathroom shooting dice during the initial

altercation between Owens and others at the nightclub; that the altercation appeared to have been settled without incident; that Owens went into the bathroom after the altercation and told Murrell that there was some "drama" (translation: a fight) and asked him for "the strap" (translation: a gun); that Murrell pulled a gun from under his sweater, worked the slide to prepare it to fire, emerged from the bathroom and started shooting repeatedly into the crowd; that five people were shot and injured; that Murrell left the nightclub in the melee that ensued, was chased by a security guard [Davis], and threw a gun to the ground during the chase; that this gun was later positively linked to cartridge casings found inside the nightclub in the general vicinity of the shooting; and that the security guard's chase of Murrell ended when Murrell nearly ran into a responding Milwaukee police squad and was arrested.

Many of the facts concerning what occurred inside the nightclub came from Jermaine Burrage, the brother of one of the victims, who testified that he was in the nightclub bathroom just prior to the shooting and heard the brief exchange between Buck and Shake about the "drama" and the "strap". Burrage, in fact, was the only eyewitness to the actual shooting who testified. Despite the fact that the nightclub was full of people, Burrage was the only person who testified that he actually saw the shooting. Two of the five victims were able to testify as to the altercation which preceded the shooting; none of the victims was able to say he saw or could identify the shooter.

Burrage testified that after overhearing the discussion between Murrell and Owens in the nightclub bathroom, he saw Murrell take out a gun, work the slide, exit the bathroom and shoot repeatedly into the crowd. He said he did not see Owens at any time after the brief exchange in the bathroom, and specifically did not see him at the time of the shooting or afterward.

Christopher Davis, a private security guard employed by the nightclub, testified about chasing Murrell outside the nightclub; about Murrell throwing down the gun; and about taking note of the gun's position and continuing the chase until Murrell was arrested by the police. Police witnesses testified about the recovery of the gun and the cartridges, and a crime lab expert linked the gun to the fired cartridges, which were found inside the club near the general area where the shooting occurred.

Ultimately, the only evidence linking Owens to the shooting was Jermaine Burrage's testimony that Owens asked Murrell for a "strap" because of some "drama" (it appeared that Burrage was expected to place Owens at

> Murrell's side at the time of the shooting, but he did not); as a result, a motion to dismiss the case against Owens based upon lack of proof beyond a reasonable doubt against him was made and granted at the close of the evidence. The case went to the jury against Murrell only, and he was convicted on all counts. On August 14, 1995, he was sentenced to seventy-five years in prison.

We would only add the following facts to the trial court's description of Murrell's trial. First, Milwaukee Police Officers David Arndt and Sergeant Gregory Hensen testified that they saw Davis chase Murrell and that Davis told them, after Murrell was apprehended, that he saw Murrell drop a gun. Second, a security videotape admitted at trial showed a man who appeared to be clutching his side leaving the nightclub. Third, Davis testified that as Murrell was leaving the nightclub after the shooting, he appeared to be attempting to conceal a weapon underneath his sweater, and Detective Leroy Shaw testified that the person shown on the videotape clutching his side appeared to be Murrell. Finally, there was testimony given at trial concerning a group called the "One Way Boys," of which some of the victims and some of the people involved in the altercation were members. Mario Burrage, one of the victims, testified that the "One Way Boys" was just a group of friends, but at the postconviction hearing, Murrell's attorney testified that the "One Way Boys" was a local gang.

Following his conviction, Murrell filed a motion for a new trial on the grounds of ineffective assistance of counsel and newly discovered evidence. Murrell was represented at trial by Attorney Ronald Hendree, who was preceded by two attorneys, Attorney Michael Orzel and Attorney Diedre Peterson. In his postconviction motion, Murrell claimed, *inter alia*, that Attorney Hendree provided him with ineffective assistance because he: (1) failed to impeach Davis, the security guard who chased Murrell from the nightclub, with Davis's prior

inconsistent testimony and with the testimony of eyewitness Danny DeNeal, another nightclub security guard; (2) failed to locate and to adduce the testimony of eyewitness Brian Horton; and, (3) failed to adequately investigate Murrell's criminal history.

At Murrell's probation revocation hearing, Davis gave testimony which was inconsistent with his testimony at trial. DeNeal gave statements to the police after the shooting and to an investigator after trial, and testified at the postconviction hearing. Although DeNeal's statements were mutually inconsistent, each statement was also inconsistent with Davis's trial testimony. Attorney Hendree, however, failed to impeach Davis with either his prior inconsistent statements or with DeNeal's statements.

Horton, a convicted felon who was imprisoned with Murrell at the time of the postconviction hearing, testified at the postconviction hearing that he was standing next to Murrell at the nightclub when the shots were fired, and that he was positive that Murrell was not the shooter. Attorney Hendree, however, did not locate Horton or adduce his testimony at trial.

Finally, during Murrell's testimony at trial, a dispute arose concerning the number of Murrell's prior convictions. As a result of the dispute, Murrell testified concerning the nature of his convictions and told the jury that he disagreed with the judge concerning the number of his convictions. Murrell claimed in his postconviction motion that his testimony was prejudicial and would have been avoided if Attorney Hendree had completely investigated Murrell's criminal history and accurately determined the number of his prior convictions.

After considering the evidence, however, the trial court concluded that some of Attorney Hendree's actions were deficient, but that none of Attorney

Hendree's actions prejudiced Murrell. Consequently, the trial court found that Attorney Hendree was not ineffective.

Murrell also claimed that he was entitled to a new trial on the grounds of newly discovered evidence. Attorney Hendree testified that, on or about October 25, 1995, while he was representing Linda Williams's brother, Williams visited Attorney Hendree at his office. During their conversation, Williams asked Attorney Hendree what kind of cases he had handled in the past and Attorney Hendree mentioned the Roxbury Club situation. Attorney Hendree testified that, when he mentioned the Roxbury Club, Williams asked if that was the guy they call "Shake" (Murrell), and when Attorney Hendree indicated that it was, Williams stated that "he didn't shoot the guy." Attorney Hendree testified that Williams told him that she knew Murrell was not the shooter because she was standing there and she saw "Buck" (Owens) pull out a gun and shoot the people. Attorney Hendree also testified that Williams told him specifically that Murrell did not have a gun and was gambling that night.

Williams also testified at the postconviction hearing. Her testimony, however, was inconsistent with Hendree's and the trial court concluded that her testimony was incredible. Based largely on that conclusion, the trial court determined that it was not reasonably probable that had Williams testified at trial a different result would have occurred. Therefore, the trial court concluded that Murrell was not entitled to a new trial on the grounds of newly discovered evidence.

Murrell now appeals from both the judgment of conviction and the trial court's order denying his motion for a new trial.

II. ANALYSIS.

A. Ineffective Assistance of Counsel.

1. Standard of Review.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington****,* 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant's contention will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id***. We will "strongly presume" counsel to have rendered adequate assistance. ***Id***.

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. In order to succeed, "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." ***Id***. at 694. If this court concludes that the defendant has not proven one prong, we need not address the other prong. See ***id***. at 697.

> In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to

> dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

2. Failure to impeach Davis with his prior inconsistent testimony.

Murrell claims that his trial counsel was ineffective for failing to impeach Davis with his prior inconsistent testimony. We disagree.

On February 10, 1994, Davis, the security guard who chased Murrell from the nightclub after the shooting, testified at Murrell's probation revocation hearing. During the hearing, the attorney for the Department of Corrections asked Davis, "When you chased him (Murrell), did he drop anything? Did you see him drop anything?" and Davis responded,

> I can't say that I actually saw him drop it. One of the officers – One of the doormen made me aware that he dropped it, and immediately after the bouncer called out and said, "He dropped it, he dropped it." I looked down, and lo and behold, it was there on the ground ....

Later, during Murrell's then-counsel's cross-examination of Davis, the following exchange occurred:

> Q. Okay. Did you ever actually observe David Murrell with a gun in his possession?
>
> A. No, I didn't.
>
> Q. You didn't actually see David Murrell drop a gun.
>
> A. No, I didn't.

At Murrell's trial, however, on direct examination by the prosecutor, Davis stated that he did see Murrell drop the gun. Specifically, after the prosecutor asked Davis, "Where did he (Murrell) run?" Davis responded:

> He ran towards the parking area, and he was running toward the parked cars. I asked him to stop again, and then at that point I saw him bring something out, and he shot it on the ground which was a gun, and he tried to toss it up under one of the cars there ….

Additionally, the following exchange occurred during Attorney Hendree's final recross-examination of Davis:

> Q. You never saw him (Murrell) with a gun at any point, did you?
>
> A. Yes, I did.
>
> Q. You indicated you saw him throw a gun outside?
>
> A. Yes, I did.
>
> Q. Try to get it underneath the car but couldn't?
>
> A. Yes, I did.

Murrell claims that Attorney Hendree's failure to impeach Davis at trial with the inconsistent statements he made at Murrell's probation revocation hearing regarding whether he saw Murrell drop the gun provided the prosecution an "incalculable advantage" which "undermines confidence in the verdicts." Murrell bases this claim on his assertion that Davis was "perhaps *the* crucial state's witness" and that Davis's testimony that he saw Murrell drop the gun was "the decisive feature of the entire case." Murrell claims that he was prejudiced by Attorney Hendree's failure to impeach Davis with his prior testimony because Davis's trial testimony linked Murrell to the gun, but his prior testimony, had it

been used to impeach Davis, would have severed the link between Murrell and the gun. We are not persuaded.

First, although Davis was an important witness for the State, he was not the only important witness for the State. Jermaine Burrage, for instance, was a very important part of the State's case against Murrell. Burrage, the only eyewitness to the actual shooting, testified at trial that, prior to the shooting, he went into the bathroom of the Roxbury club and Murrell was in the bathroom. Burrage testified that Owens entered the bathroom "real fast" and "hyper like" and told Murrell "to give him the strap (the gun) because it's drama (something is going on)." Burrage then saw Murrell remove a black automatic pistol from his sweater, pull back the slide, and leave the bathroom. Burrage testified that he waited about five to ten seconds, followed after them, and saw Murrell start shooting five to six times. Burrage testified that he was able to see Murrell fire the gun because he was standing behind Murrell, a little to the side, and could see the gun in Murrell's hand. Burrage's testimony was obviously crucial to the State's case, and would not have been affected by any further impeachment of Davis.

Additionally, Murrell fails to acknowledge the importance of the testimony of Milwaukee Police Officer David Arndt and Sergeant Gregory Hensen. Both officers saw Davis chase Murrell, and both officers testified at trial that Davis told them that Murrell dropped a gun.[1] Their testimony significantly corroborates Davis's testimony that he saw Murrell drop a gun. Also, Detective

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[1] In his postconviction motion, Murrell objected on hearsay grounds to Officer Arndt's and Sergeant Hensen's testimony that Davis told them that he saw Murrell drop the gun. The trial court concluded that Davis's statements to both Officer Arndt and Sergeant Hensen were admissible as excited utterances. Murrell has not renewed his hearsay objections on appeal, and therefore, has waived them. *See* ***State v. Jenkins***, 168 Wis.2d 175, 183 n.2, 483 N.W.2d 262, 264 n.2 (Ct. App. 1992).

Leroy Shaw testified that the person shown on the security videotape who appeared to be clutching his side was Murrell. In combination with Davis's testimony that Murrell appeared to be attempting to conceal a gun underneath his sweater as he left the nightclub, Detective Shaw's testimony provided another link to the State's chain of evidence against Murrell.

Second, other aspects of Davis's trial testimony which did not conflict with his probation revocation hearing testimony implicated Murrell in the shooting. At both the trial and the probation revocation hearing, Davis testified that as Murrell exited the club after the shooting, he appeared to be trying to conceal a weapon under his clothes. Davis also testified at both the trial and the probation revocation hearing that when Murrell came out of the club after the shooting, he was walking in a suspiciously calm and casual manner, so Davis asked him to stop. Davis testified that, instead of stopping, Murrell took off running and Davis proceeded to chase him through the parking lot. These facts further incriminate Murrell because innocent people do not typically take off running when asked to stop by a uniformed security guard. Murrell claims that the fact that he ran after Davis asked him to stop is not probative of his guilt because he was simply "trying to get as far away [from the shooting] as possible." Murrell, however, does not explain why, if he was merely trying to quickly escape danger, he chose, according to Davis, to walk calmly out of the night club and only began running after being asked to stop by a uniformed security guard.

Therefore, although Davis was an important witness for the State, he was not the only important witness. And although Davis's testimony that he saw Murrell drop the gun was incriminating, it was not the only incriminating testimony given by Davis. Consequently, regardless of whether Attorney Hendree

performed deficiently by not impeaching Davis with his prior inconsistent testimony, Murrell was not prejudiced.

3. Failure to impeach Davis with DeNeal's testimony.

Murrell claims that Attorney Hendree was ineffective by failing to interview DeNeal and by failing to call DeNeal as a witness at trial. Again, we disagree.

DeNeal was working as a security guard at the nightclub on the night of the shooting. In his statement to the police, given immediately after the shooting, DeNeal said that he saw a person, who was not Murrell, throw the gun in the parking lot. DeNeal described the man who threw down the gun as a black male, about twenty-six years old, 5'6", medium build, with a shaved head. DeNeal also told the police that he stayed near the dropped gun until the police arrived. He also stated that, as he stopped near the dropped gun, the suspect who had dropped it approached a late 1970's dark-colored Pontiac with tinted windows and gold trim and rims, and that a man in the car stuck a sawed-off shotgun out the window and said: "What you gonna do?" DeNeal stated that he threw up his hands and stepped back to avoid provoking the man with the shotgun, but kept the dropped gun in his sight and watched it until the police arrived.

Investigator Charles Hasse testified at the postconviction hearing that when he interviewed DeNeal after trial, DeNeal read the statement he had given to the police the night of the incident and said that it was true and correct. Hasse testified that, initially, DeNeal told Haase that he did not see who dropped the gun because the gun was already on the ground when he got outside. He then changed his story to say that he saw a short, bald, black male, who was not Murrell, drop the gun. DeNeal then told Haase that the man who dropped the gun

was the same man that he saw in the back seat of a car with a shotgun pointed out the window, and that, when the man was in the car, he was wearing a baseball cap and sunglasses.

At the postconviction hearing, DeNeal testified that he did not see who threw down the gun, and that the gun was already on the ground when he and Davis got outside. DeNeal denied making any statements to the contrary to the police or to Investigator Haase.

Murrell claims that he was prejudiced by Attorney Hendree's failure to call DeNeal as a witness at trial because if DeNeal testified to either version of his story, even if the State impeached DeNeal with the other inconsistent version, the State was faced with a "choice of poisons." If the jury believed the version of DeNeal's story in which he did not see who dropped the gun because the gun was already on the ground when he and Davis ran outside, the jury would have been less likely to believe Davis's claim that he saw Murrell throw the gun. Alternatively, if the jury believed the version of DeNeal's story in which he saw a person, who was not Murrell, drop the gun, the jury would have been even less likely to believe Davis. Murrell's "choice of poisons" theory, however, fails to acknowledge a third reaction which the jury may have had when presented with DeNeal's contradictory stories: the jury may have chosen to disbelieve DeNeal altogether.

Murrell points out that Davis, as well as DeNeal, gave inconsistent accounts of whether he saw Murrell drop the gun. Murrell argues, therefore, that if DeNeal's inconsistencies were sufficient to discredit his credibility, Davis's inconsistencies, if presented to the jury, would have produced the same result. Davis and DeNeal's situations, however, are different. None of DeNeal's versions

of what he saw was corroborated by other witnesses. There was no testimony at trial corroborating DeNeal's statement to the police about a dark-colored Pontiac or a shotgun. There was also no testimony at trial corroborating DeNeal's statement that he stayed near the gun until the police arrived. To the contrary, at trial, Sergeant Hensen, the officer who found the gun after Murrell was apprehended, never mentioned DeNeal being near the gun when it was found.

In any event, as noted earlier, Davis was not the only important witness for the State, and his testimony regarding whether the saw Murrell drop the gun was not the only important testimony which Davis gave at trial. Therefore, even if DeNeal had testified at trial, and the jury had believed either of his stories, it is not reasonably probable that the outcome of Murrell's trial would have been any different.

4. Failure to locate and to adduce the testimony of Horton.

Murrell claims that his counsel was ineffective by failing to locate and adduce the testimony of Horton. We do not agree.

Horton, a convicted felon who was incarcerated with Murrell at the time of the postconviction hearing, testified at the postconviction hearing that he was at the Roxbury Club, standing next to Murrell, when the shots were fired. Horton testified that he was "positively sure" that Murrell was not the shooter. The trial court, however, found that Horton was not a credible witness because: (1) he is a convicted felon; (2) as an admitted "associate" of Murrell's, he is motivated to testify in his favor; (3) at the time of the postconviction hearing, he had been incarcerated with Murrell since the offense and had had ample opportunity to acquire a story consistent with Murrell's; and, (4) he did not satisfactorily explain why he did not come forward in any official way with his

information at any time since the shootings. The trial court's credibility determination is a finding of fact which, if not clearly erroneous, must be upheld. *See* ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 714; ***State v. Marty***, 137 Wis.2d 352, 358-59, 404 N.W.2d 120, 123 (Ct. App. 1987), *overruled on other grounds by* ***Sanchez***, 201 Wis.2d at 232, 548 N.W.2d at 74. After reviewing Horton's testimony at the postconviction hearing, we conclude that the trial court's finding that Horton was not credible was not clearly erroneous. Accordingly, in light of the trial court's finding that Horton was not a credible witness, and the strength of the evidence presented at trial against Murrell, we conclude that Murrell was not prejudiced by the lack of Horton's testimony at trial.

5. Failure to adequately investigate Murrell's criminal history.

Murrell claims that Attorney Hendree's failure to adequately investigate Murrell's criminal history constituted ineffective assistance. Again, we do not agree.

Before Murrell testified at trial, a hearing was conducted, outside the presence of the jury, regarding the number of prior criminal convictions Murrell had on his record which would be admissible for purposes of impeachment pursuant to § 906.09(1), STATS. The State contended that there were six prior convictions: two for operating a vehicle without the owner's consent, one for escape, one for possession of a controlled substance, one for fleeing an officer, and one for battery by a prisoner. Murrell contended that he only had four prior convictions because he believed that the convictions for escape and for battery by a prisoner were dismissed. Attorney Hendree asked the State to stipulate to five convictions, as a compromise, which the State refused to do. Subsequently, on direct examination, Murrell testified that he had only four prior convictions

because he believed that the battery by a prisoner and the escape convictions had been overturned. On cross-examination, Murrell maintained that he only had four prior convictions, and explained the circumstances under which he believed that the escape and battery by a prisoner convictions were overturned on appeal. At the postconviction hearing, it was established that, although Murrell's battery conviction had been overturned on appeal and eventually dismissed, Murrell had other prior convictions that were unknown to everyone at trial except Murrell, which resulted in an actual number of six prior convictions.[2] Murrell claims that he was prejudiced by Attorney Hendree's failure to adequately investigate his criminal record because: (1) on direct and cross-examination, the nature of his prior convictions was revealed to the jury; and, (2) by disputing the trial court's conclusion that he had six prior convictions, his credibility was negatively contrasted in the jurors' minds to the trial court's credibility. We disagree.

Although the jury was told the nature of Murrell's prior convictions, Murrell was not prejudiced by that fact. Murrell's convictions, as the trial court noted, were for relatively low-level criminal offenses. Except for the battery by a prisoner, all of his prior convictions were for non-violent offenses. Murrell explained to the jury that the battery by a prisoner conviction had been overturned, and that he had not been convicted of any other violent offenses such as gun charges or shootings. If the jury had not been told the nature of Murrell's prior convictions, the jury may have speculated that the convictions were for more serious offenses, perhaps offenses involving gun violence, such as in this case. By

[2] It is unclear from the record whether Murrell's escape conviction was also overturned. Murrell claims that he later conceded the validity of the conviction. In any event, Murrell does not dispute the fact that he actually had six prior convictions.

explaining the actual nature of his convictions, however, Murrell prevented the jury from engaging in such speculation.

Murrell was also not prejudiced by the fact that he stated that he believed, contrary to the trial court, his battery by a prisoner conviction had been overturned. Murrell claims that because he disagreed with the trial court, the jury "could only have concluded that [he] was a brazen, not to say congenital, liar." Murrell is incorrect. Murrell did not attack either the trial court or the prosecution, but instead, stated that he was merely disputing the number of his prior convictions. Additionally, Murrell was able to explain to the jury why he believed the convictions had been overturned, and the jury was able to consider that explanation when determining Murrell's credibility. Murrell has not shown that his explanation was inherently unbelievable. Therefore, Murrell's disagreement regarding the number of his convictions may have had no effect on the jury's assessment of his credibility.

Finally, even if the jury's assessment of Murrell's credibility had been affected by either the revelation of the nature of Murrell's prior convictions or by Murrell's disagreement with the trial court, Murrell would not have been prejudiced. Murrell told the jury that he regularly engaged in illegal gambling and that he occasionally smoked marijuana. Therefore, even without the evidence of his prior convictions, Murrell's image was tarnished. Consequently, especially in light of the evidence produced against Murrell during his six-day trial, Murrell has not proven that it is reasonably probable, had Attorney Hendree acted differently, that the result of his trial would have been different.

B. Newly Discovered Evidence.

1. Standard of Review.

"A motion for a new trial on grounds of newly discovered evidence is addressed to the sound discretion of the trial court." ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). We will affirm the trial court's exercise of discretion if it has a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record. *See* ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). A trial court may only grant a new trial based on newly discovered evidence when all of the following requirements are met:

> (1) [T]he evidence came to the moving party's knowledge after the trial; (2) the moving party has not been negligent in seeking to discover it; (3) the evidence is material to the issue; (4) the evidence is not merely cumulative to that which was introduced at trial; and (5) it is reasonably probable that a new trial will reach a different result.

Kaster, 148 Wis.2d at 801, 436 N.W.2d at 896 (citation omitted). The defendant bears the burden of proving by clear and convincing evidence that each of the five requirements has been met. *See* ***State v. Brunton***, 203 Wis.2d 195, 208, 552 N.W.2d 452, 458 (Ct. App. 1996).

2. Williams's testimony.

Murrell claims that because Williams's testimony which was presented at the postconviction hearing constitutes newly discovered evidence, the trial court erroneously exercised its discretion by denying his motion for a new trial. We are not persuaded.

At the postconviction hearing, Attorney Hendree testified that, on or about October 25, 1995, while he was representing Williams's brother, Williams visited Attorney Hendree at his office. During their conversation, Williams asked Attorney Hendree what kind of cases he had handled in the past and Attorney Hendree mentioned the case arising from events at the Roxbury Club. Attorney Hendree testified that, when he mentioned the Roxbury Club, Williams asked if that was the guy they call "Shake" (Murrell), and when Attorney Hendree indicated that it was, Williams stated that "he didn't shoot the guy." Attorney Hendree testified that Williams told him that she knew Murrell was not the shooter because she was standing there and she saw "Buck" (Owens) pull out a gun and shoot the people. Attorney Hendree also testified that Williams told him specifically that Murrell did not have a gun and was gambling that night.

Attorney Hendree testified that he believed Williams mainly because she knew Murrell's nickname; she knew about Murrell's habit of gambling in the bathroom; and she was able to describe the scene at the Roxbury Club as it was on the night of the shooting. Attorney Hendree testified that, when he asked Williams why she never came forward with her information, she said, "you know, you don't fuck with the One Way Boys," and explained that she was afraid of the One Way Boys. Attorney Hendree testified that the "One Way Boys" was a gang, and explained that, although "Buck" was not a "One Way Boy," Williams told

him that "Buck" was in a gang on the opposite side of the "One Way Boys," and that "anybody who came forward and said anything catches it from both sides." Attorney Hendree also testified that Williams also said that she did not come forward because she felt no sense of obligation to come forward.

Williams also testified at the postconviction hearing. On direct examination, Williams testified that she actually saw "Buck" holding the gun as it was being fired. On cross-examination, however, Williams testified that she did not actually see "Buck" shoot anyone. All she saw was "Buck" reach inside his jacket, pull out a gun and point it at somebody, and she heard a gunshot only after she turned away from "Buck." Williams testified that she knew "Buck" and "Shake" from the streets and knew that they were friends. Williams testified that she had no idea whether "Buck" or Murrell were gang members, and that Attorney Hendree's testimony to the contrary was incorrect. Williams also testified, contrary to Attorney Hendree's testimony, that she did not see Murrell *at all* on the night of the shooting. Furthermore, Williams testified, contrary to Attorney Hendree's testimony, that she had no idea who the "One Way Boys" were, and that fear of gangs had nothing to do with her decision not to come forward. Williams testified that she did not come forward because she did not feel like she had to, she did not know anything about it, and she had moved out of town about a year after the shooting and did not hear anything about the incident again until her brother told her about it when she moved back from Chicago. Williams testified that, in the year after the shooting, while she was still living in Milwaukee, she never followed the news coverage of the shooting and never talked to any of her friends or acquaintances about it even though she he had been a fairly frequent patron of the Roxbury Club.

Williams testified that her brother told her about Murrell being in prison for the Roxbury shooting after her brother had apparently run into Murrell at Waupun Correctional Institution, where he and Murrell were both incarcerated. Williams testified that she came in to speak to Attorney Hendree approximately "a few days or weeks" after learning from her brother of Murrell's imprisonment for the Roxbury shootings. Williams testified that she asked Attorney Hendree questions about the dismissal of the case against "Buck," and whether "Buck" could still be prosecuted for his involvement in the shooting incident, and that Attorney Hendree told her that "Buck" could no longer be prosecuted.[3] After admitting her knowledge of this information, Williams said that she was "nervous," and began to cry.

After hearing both Attorney Hendree's and Williams's testimony, the trial court denied Murrell's motion, in large part due to the court's finding that Williams's was not credible. The trial court found:

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[3] Murrell claims that "the contention that Williams testified to asking Hendree about Owens'[s] dismissal and to being told that he could not be further prosecuted distorts the record." Williams's exact testimony at the postconviction hearing, in response to the trial court's questioning, was as follows:

> Q. Are you aware that the case was dismissed against (Owens) and he can no longer be prosecuted for his involvement?
> A. I had heard.
> Q. What did you hear and from whom?
> A. I had been asking questions about it from the other lawyer.
> Q. Okay, Mr. Hendree?
> A. I didn't know his name. I'm nervous.

Murrell claims that because the trial court had earlier referred to Attorney Hendree by name in questioning Williams, that Williams reference to "'the other lawyer' could not have referred to [Attorney] Hendree." Murrell is wrong. Williams's answers could reasonably be interpreted as referring to Attorney Hendree as the person whom she questioned and who told her about the fact that Owens could no longer be prosecuted. The trial court made exactly that factual finding, and Murrell has failed to show that the trial court's factual finding is clearly erroneous. Therefore, it must be upheld. *See* ***State v. Yang***, 201 Wis.2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996); Section 805.17(2), STATS.

> Much of Williams' testimony obviously contradicts what Hendree testified Williams told him. Her reasons for not immediately telling the police what she knew, or supposedly knew, are not credible, and are inconsistent with what she told Hendree. Her assertion that she never discussed the shooting with any of her Roxbury's friends or acquaintances is not credible. Her assertion that although she knew "Shake" and "Buck" well enough from the streets but had no knowledge of any gang affiliation by them is not credible, on a common sense level and given what she told Hendree. Her claim of ignorance about the "One Way Boys," given what she told Hendree, is not credible. She said she first heard about "Shakey" being incarcerated for the Roxbury's shooting from her brother, who was serving time with Murrell at Waupun; according to Hendree, however, she first heard about it at the meeting with him concerning her brother's case. Williams knows she is quite safe putting this crime on "Buck' since she knows he can no longer be prosecuted for his involvement in it.

The State concedes that there is no basis in the record for the trial court's finding that Williams told Attorney Hendree that she first heard about Murrell's incarceration during her meeting with him (Attorney Hendree). Nevertheless, the trial court's statements reveal ample bases for its determination that Williams was not a credible witness. Murrell, however, claims that the trial court's decision violated the rule announced in ***State v. McCallum***, 208 Wis.2d 463, 561 N.W.2d 707 (1997). In ***McCallum***, a convicted sex offender sought to withdraw his plea on the basis of a recantation by the victim. ***Id.*** at 468, 561 N.W.2d at 708. The circuit court denied the motion, concluding that "there was no reasonable probability that a different result would be reached at a new trial because [the victim's] recantation was less credible than her accusation." ***Id.*** at 474, 561 N.W.2d at 711. The supreme court reversed, finding that the circuit court had applied the wrong standard, and stated: "A reasonable jury finding the recantation less credible than the original accusation could, nonetheless, have a reasonable doubt as to a defendant's guilt or innocence. It does not necessarily

follow that a finding of 'less credible' must lead to a conclusion of 'no reasonable probability of a different outcome.'" ***Id.*** The supreme court, however, continued:

> Less credible is far from incredible. *A finding that the recantation is incredible necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury.* However, a finding that the recantation is less credible than the accusation does not necessarily mean that a reasonable jury could not have a reasonable doubt.

Id. (emphasis added).

In this case, the trial court did not find that the story which Williams gave during the postconviction hearing was "less credible" than prior statements she had made, or "less credible" than the evidence presented by the State at trial. To the contrary, the trial court found that, because of the numerous inconsistencies and contradictions in her testimony, Williams was an incredible witness. We have reviewed Williams's testimony in its entirety and cannot conclude that the trial court's finding that Williams's testimony was incredible is clearly erroneous. Therefore, the trial court's factual finding must be upheld, *see* ***State v. Yang***, 201 Wis.2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996), and necessarily leads to the conclusion that it is not reasonably probable that Williams's testimony would create a different result at a new trial, *see* ***McCallum***, 208 Wis.2d at 474, 561 N.W.2d at 711.

III. CONCLUSION.

We conclude that Murrell was not prejudiced by Attorney Hendree's (1) failure to impeach Davis, one of the State's witnesses, with Davis's prior inconsistent testimony and with the testimony of eyewitness DeNeal; (2) failure to locate and to adduce the testimony of eyewitness Horton; and, (3) failure to completely investigate Murrell's criminal history. Therefore, Murrell is not entitled to a new trial on the ground of ineffective assistance of counsel. We also conclude that Williams's testimony does not make it reasonably probable that a different result would occur at a new trial. Therefore, Murrell is not entitled to a new trial on the ground of newly discovered evidence. Consequently, we affirm the trial court's judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. *(dissenting)*. The majority, spinning the record in critically important ways, misconstrues essential evidence. As a result, the majority offers illogical analysis on the way to its conclusion that counsel's deficient performance was not prejudicial, and that a new trial was not required because of newly discovered evidence.

Unlike the majority, Murrell provides logical arguments, firmly anchored in the evidence. His arguments clearly establish that counsel's performance was deficient in four ways, that counsel's four deficiencies were prejudicial, and that newly discovered evidence required a new trial.

The State concedes that counsel's performance was deficient for failing to impeach Christopher Davis with his probation revocation testimony, and for failing to thoroughly investigate Murrell's criminal record. The State mildly disputes counsel's alleged deficient performance for failing to interview Danny DeNeal and Briant Horton, and failing to call them as witnesses. The State more vigorously argues that the alleged deficient performance was not prejudicial. Prudently, the majority avoids addressing the subject of counsel's obviously deficient performance and, instead, attempts to evaluate whether counsel's errors were prejudicial.

Because the State concedes two of counsel's deficiencies and offers only weak responses on the two others, and because the majority makes no claim that counsel's performance was not deficient, I first would simply note that, for the reasons Murrell presents in his brief, I conclude that counsel's performance was

deficient – not only in the areas the State concedes, but also in the two areas the State disputes. Thus, like the majority, I now "cut to the chase" to address whether counsel's deficiencies were prejudicial.

For the most part, the majority has carefully summarized the evidence and accurately traced Murrell's arguments. Thus, I shall offer supplementary background only where it is essential to explain why counsel's errors were prejudicial. Moreover, because Murrell's brief so persuasively presents his theories, and so comprehensively cites the record to support them, I would also note that even where I do not discuss the details of his arguments (particularly concerning potential witnesses DeNeal and Horton), I do accept his arguments. In this opinion, however, I shall highlight only my most important points of departure from the majority's analysis.

To understand why counsel's deficient performance was prejudicial in every respect Murrell claims, some additional factual background will be helpful. After all, if the evidence against Murrell was strong, the likelihood that prejudice resulted from counsel's deficient performance is less. If, however, the evidence against Murrell was weak, counsel's deficient performance was more likely to have produced prejudice. That is, in a case that is close, or in a case resting on a shaky foundation, even a single significant mistake by counsel may make the difference.

So let us keep in mind that the State's case was uncertain from the start. At first, based on witnesses' accounts of the shooting, Owens was held as the prime suspect; Murrell was released. Subsequently, however, both Owens and Murrell were prosecuted. When, at trial, the charges against Owens were dismissed for lack of evidence, only a very shaky case against Murrell remained.

The shakiness of the case against Murrell began with the State's dubious theory, built from the dubious account of Jermaine Burrage: that Owens came to Murrell in the restroom, interrupted his gambling, told him of some "drama," and asked for the "strap," and that Murrell, for whatever reason, did not give Owens the gun but, instead, left the restroom and immediately fired at numerous people, whether or not he knew whether they were the ones involved in the "drama." As Murrell argues:

> But when all is said and done Burrage's version simply doesn't make sense. Mr. Murrell indisputably was not part of the "struggling" between the two groups. He couldn't have even known who was involved. It defies belief that just because Owens said "there's drama" he would storm out and begin shooting literally at random – even if Owens' inscrutable remark was taken as an invitation to cause trouble, Mr. Murrell wouldn't have even known where to go or whom to shoot at. The real weakness of Burrage's story is its intrinsic implausibility. It's much more likely that whoever opened fire was involved in, or at the very least witnessed, the "struggle." On top of that, virtually every witness who offered an opinion on the subject thought that Owens was a "peacemaker"; and Mr. Murrell was indisputably not even in the area.

Although in these times of senseless gang violence, the State's theory may not have been as entirely implausible as Murrell suggests, still, as even the State concedes, it was anything but a strong foundation on which to build a prosecution.

The State's case rested primarily on the testimony of Jermaine Burrage and Christopher Davis. With specific citations to the record, Murrell points to the difficulties in Burrage's account:

> Jermaine claimed that, just prior to the shooting, he went into the bathroom. Owens, according to Jermaine, came in and told Mr. Murrell "to give him the strap because it's drama." Mr. Murrell then supposedly took out a gun from under his sweater, pulled back the slide and left the bathroom with Owens. Jermaine followed after about 5-10

> seconds, and Mr. Murrell, then about thirty feet in front of Jermaine and right in front of the main entrance, supposedly opened fire without further ado. When Mr. Murrell left the bathroom his gun was drawn, which caused "(t)he girls [to go] running and screaming." (None of "the girls" – or anyone else – testified that they saw any such thing. Nor did Jermaine explain how he could have seen this if he didn't leave the bathroom himself for five to ten seconds.) From the time Jermaine saw Owens in the bathroom to the shooting, about 30-60 seconds elapsed.
>
> In a pretrial statement to a detective, though, Jermaine indicated that Mr. Murrell fired "from right by the bathroom door." Jermaine first told the detective that the gun was in Mr. Murrell's left hand, only to change it the next day to the right hand. One eyewitness, Larry Thomas, told the police that Jermaine was in fact by the front door at the time of the shooting. And, although Jermaine had testified at the preliminary hearing that Davis was with Mr. Murrell when the shooting began and that they ran outside together afterward, at trial he denied having seen Owens at all after leaving the bathroom.

(Record references omitted; alterations in original.)

Thus, with the State's shaky theory, and with Burrage's doubtful account, Davis – the witness connecting Murrell to the gun – emerged as the key witness in the case. Quite accurately, Murrell maintains, "Connect Mr. Murrell to the gun and you establish guilt; sever that connection and you establish reasonable doubt."

The State concedes that "it is true that Davis was an important witness for the state." The State argues, however, that Davis's testimony was not so critical because other witnesses provided equally significant testimony tying Murrell to the crimes. But, in addition to Burrage, *those other witnesses were Officer Arndt, Sergeant Hensen, and Detective Shaw, all of whom based their testimony on the information they received from Davis.* Having already commented on the dubious quality of Burrage's account, I now turn to the obvious

flaw in the State's analysis: reliance on the three police officers is tightly tied to their reliance on Davis.

First, as the State acknowledges, Officer Arndt and Sergeant Hensen testified that they "saw Davis chase the defendant, and both officers testified that Davis told them that the defendant dropped a gun." The State then writes that "[t]heir testimony significantly corroborates Davis's testimony that he saw the defendant drop a gun." The State's reasoning, however, is circular – the State actually argues that because Davis told Arndt and Hensen that Murrell dropped a gun, their testimony that Davis told them that he saw Murrell drop a gun corroborates Davis's claim that Murrell dropped a gun. Thus, with nothing more than a circular argument supporting it, the testimony of Officer Arndt and Sergeant Hensen adds nothing to the State's evidence, and does absolutely nothing to diminish the significance of Davis's testimony in this case. In fact, the Arndt/Hensen testimony, entirely dependent on Davis's account to them, accentuates Davis's importance.

Next, the State points to the testimony of Detective Leroy Shaw. But, as we will see, the State's reliance on that testimony is significantly different from the majority's and, even more critically, the majority's reliance is grounded in a gross misunderstanding of the record. The State, quite accurately, writes:

> Detective Shaw testified that he viewed the security camera videotape admitted into evidence. He stated that the tape does not show the shooting, but that it shows a uniformed security guard run out the front door and someone else running out the door shortly thereafter who looks like he is clutching his right arm. *When asked if the freeze frame shot from the videotape is the defendant, Detective Shaw said that he believed it was the defendant. Detective Shaw explained that he believed the freeze frame shot to be the defendant based on the statement Christopher Davis gave to him*, namely: Davis told him

> that he had gone out the door first, which Detective Shaw says the tape shows; then a man clutching his right arm comes out after him, which Detective Shaw says the man in the tape does; Mr. Davis then goes after that man who is eventually apprehended by the police and is the defendant, David Murrell.

(Emphasis added.)

Unfortunately, the majority is not nearly so accurate. It ignores the basis for Detective Shaw's belief. The majority writes, "Detective Leroy Shaw testified that the person shown on the videotape clutching his side appeared to be Murrell," majority, slip op. at 4, and, even more emphatically, that "Detective Leroy Shaw testified that the person shown on the security videotape who appeared to be clutching his side *was* Murrell." Majority, slip op. at 11 (emphasis added). But what was Detective Shaw's testimony? Responding to defense counsel's questions, Detective Shaw testified:

> Q Detective, answer me yes or no. That freeze frame that we've now had the jury looking at, is that David Murrell yes or no?
>
> A I can't say yes or no.
>
> Q Sure you can. All you have to do is say either yes or say no. Do you know for your own information based on your investigation whether or not that's David Murrell in that freeze frame?
>
> ….
>
> A Yes, I believe it is him.
>
> Q No, not what you believe…. Do you have anything from your investigation that has you believe that that is absolutely where you can sit and tell this jury that that is absolutely David Murrell?
>
> A Yes, that is David Murrell.
>
> Q *Based on what, Detective?*
>
> A *Based on the statement of Christopher Davis.*

(Emphasis added.)

Thus, Detective Shaw's identification of Murrell was based entirely on the account provided by Davis.[4] To imply that a security camera videotape added critical evidence identifying Murrell as the shooter, or that Detective Shaw studied a freeze frame from that tape and, based on that frame, independently identified Murrell, is to misrepresent the record and recast the context in which prejudice must be measured.

But that is not all. The strength of the State's case is further vitiated by the fact that, even without the impeachment of Davis that would have come had counsel performed effectively, Davis's account was equivocal. Most significantly, under cross-examination by Owens's lawyer, Davis testified:

> Q At the point in time there came a time when you saw Mr. Owens raise his hands and say "I'm cool, I'm cool, this is over with," or words to that effect?
>
> A Yes.
>
> Q How long after that moment in time did you hear shots?
>
> A Just a few seconds, to be totally honest with you.
>
> Q A few seconds might be three to five seconds?
>
> A Yes.
>
> Q All right. Now, *based on where Mr. Owens was present when you heard him say that, and based upon your knowledge of Roxbury, would he have been able to leave that place, go into the bathroom, solicit assistance, and come back out with another person?*

[4] Indeed, the State, unlike the majority, never claimed otherwise. As even the trial court decision denying Murrell's postconviction motion noted, "The State had not attempted to elicit any identification of anyone on the tape during its case," and the prosecutor, in closing argument, explained:

> I didn't show you the videotape because quite frankly just like Detective Shaw told you, it is really not a good video tape. It doesn't show the shooting. If it had been directed towards the bathroom door perhaps it would have been something that we would have considered to be evidentiary and presented to you. But it only shows the door and it is poor quality and the speed is very difficult to decifer [sic].

A *No*.

Q *Wouldn't have been possible?*

A *No*.

(Emphasis added.)

Therefore, not only was Davis absolutely critical to the State's case, but his account was highly questionable *even without the neglected impeachment*. Impeachment of Davis with his inconsistent testimony about whether he ever saw Murrell possess or drop a gun, and with the testimony of DeNeal, almost certainly would have undermined the testimony of an already uncertain witness in an already shaky case. Counsel's deficient performance was clearly prejudicial.

Counsel's failure to clarify Murrell's criminal record also was prejudicial. If counsel had performed properly: (1) the number of Murrell's convictions would have been undisputed before the jury, (2) Murrell would not have been in a credibility contest with the trial judge before the jury, and (3) Murrell's one violent offense would not have been revealed to the jury. As Murrell effectively explains:

> The impact was prejudicial in two discrete ways. First, the jury was exposed to otherwise inadmissible matters that directly bore on Mr. Murrell's character. Battery to a prisoner, for obvious reasons, suggests that Mr. Murrell is uncontrollably dangerous. It is not only a violent offense, it occurred in a supposedly secure setting – if Mr. Murrell couldn't control his violent tendencies while under guard, imagine what he might be capable of in a tavern.
>
> Second, perhaps even more perniciously, Mr. Murrell's credibility was starkly posed against the judge's. As [defense counsel] infelicitously put it, the court had reviewed the records and found a total of six convictions, yet Mr. Murrell was "nevertheless … disputing that[.]" The defense adduced no evidence to back up his claim. The jury could only have concluded that Mr. Murrell was a brazen, not to say congenital, liar. Nor would it have been lost on the jury that the conviction Mr. Murrell desperately disputed was the very one that branded him as

> uncontrollably violent, battery to a prisoner. As it turned out, Mr. Murrell was being perfectly truthful but the jury had no way of knowing it.

The majority's treatment of this issue is illogical and, ultimately, terribly unfair. The majority states:

> If the jury had not been told the nature of Murrell's prior convictions, the jury may have speculated that the convictions were for more serious offenses, perhaps offenses involving gun violence, such as in this case. By explaining the actual nature of his convictions, however, Murrell prevented the jury from engaging in such speculation.

Majority, slip op. at 17. That, of course, could be said in any and every case where, consistent with law, a defendant reveals the number, but not the nature, of criminal convictions. Moreover, had Murrell wanted to reveal the exact nature of the convictions, he, like all defendants who have criminal records and choose to testify, could have done so. In this case, however, Murrell was forced to reveal what, quite obviously, he did not want to reveal.

The majority's illogic then expands:

> Murrell claims that because he disagreed with the trial court, the jury "could only have concluded that [he] was a brazen, not to say congenital, liar." Murrell is incorrect. Murrell did not attack either the trial court or the prosecution, but instead, stated that he was merely disputing the number of his prior convictions. Additionally, Murrell was able to explain to the jury why he believed the convictions had been overturned, and the jury was able to consider that explanation when determining Murrell's credibility. *Murrell has not shown that his explanation was inherently unbelievable. Therefore, Murrell's disagreement regarding the number of his convictions may have had no effect on the jury's assessment of his credibility.*

Majority, slip op. at 17 (emphasis added). Perhaps only Joseph Heller could contribute a more convincing *Catch-22* analysis. Consider what the majority is saying: if Murrell had "shown that his explanation was inherently unbelievable,"

then, and only then, would he have pitted his credibility against that of the judge and been the loser in the credibility contest. On this issue, the majority's rationale is inconsistent with law and simply makes no sense.[5]

Against this backdrop of deficient and prejudicial performance, the discovery of new evidence – a witness who revealed that she witnessed the shootings and would have testified that Murrell was not the shooter – is all the more significant. The State's case – shaky despite the ineffective assistance of counsel, and in shambles with what should have been the effective assistance of counsel – would have been seriously threatened by Linda Williams's testimony. The trial court considered her incredible, but reached that conclusion in keeping with its view of all the trial evidence. The trial court, however, in analyzing the ineffective assistance of counsel claims, was wrong in its assessment of the trial

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[5] The trial court made much of the fact that, at the postconviction hearing, it was ultimately determined that while Murrell was correct about the reversal of the Battery to Prisoner conviction, he was incorrect about the number of convictions. In fact, Murrell had six convictions and, therefore, the trial court suggested that because Murrell did not accurately represent the number of convictions, he could hardly complain about what transpired. The trial court wrote:

> First of all, I find it just a little outrageous for the defendant – the one person in the courtroom with first-hand knowledge of the particulars of his prior record – to complain about this issue His postconviction motion concedes that he had six prior convictions for impeachment purposes. Why, then, did he maintain – before and during his testimony – that he only had four? He can hardly be rewarded with a new trial for his own misrepresentation of his criminal record, even if his counsel insufficiently investigated it.

Nonsense! In countless cases, the parties and the court carefully study the records of criminal convictions, frequently encounter uncertainties in those records, and often cull out convictions that, perhaps, should not be counted. Because of counsel's deficient performance, that process took place too late, resulting in the two-tiered prejudice Murrell so accurately describes.

evidence and, not surprisingly therefore, wrong again in stretching for a credibility call on the newly discovered evidence.

To prevail, Murrell need only score a single point of prejudice. In my estimation, however, he slam-dunks them all. This record is remarkable. This case cries out for a new trial. Accordingly, I respectfully dissent.