COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1449-CR **Cir. Ct. No. 2006CF6613**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARNEST JEAN JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JEFFREY A. CONEN, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Earnest Jean Jackson appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide as party to a crime and mutilating a corpse, and from an order denying his motion for

postconviction relief.[1] Jackson claims he was denied the effective assistance of counsel. We affirm.

BACKGROUND

¶2 The background facts are those testified to at the second trial by Jackson's co-actors (Gary Campbell, Juwan Noble, and Shanika McAfee) and are included to provide context for Jackson's ineffective assistance of counsel claims. Additional facts are included later in the opinion as necessary to decide the issues raised on appeal.

¶3 On December 23, 2003, Jackson killed Matthew Crockett at Noble's apartment because he believed that Crockett had stolen $20,000 to $35,000 from Jackson several months earlier. When Jackson learned that Crockett was in town and at Noble's apartment, he picked up Campbell and drove to Noble's. On the way, Jackson called Noble and directed him to leave the front door to his apartment unlocked.

¶4 When Jackson entered the apartment, he and Campbell jumped Crockett. Jackson pulled out a pistol and hit Crockett in the head with it. A struggle ensued, and the three wrestled over the gun. Jackson got the gun away from Crockett, pistol-whipped Crockett several times, and then directed Noble and Campbell to restrain Crockett. Jackson then covered Crockett's head with a plastic bag and duct taped it. Jackson retrieved two syringes from his car,

[1] The Honorable Jeffrey A. Wagner presided over the first and second trial and ordered that judgment be entered. The Honorable Jeffrey A. Conen denied Jackson's postconviction motion.

purportedly filled with acid, returned to Noble's apartment, and injected Crockett with the contents of the syringes.

¶5 When it appeared that Crockett was dead, Jackson wrapped Crockett's body in a blanket, and Jackson, Campbell, and Noble placed the body in the trunk of Jackson's car. Jackson and Campbell then drove the body to the home of Jackson's on-again-off-again girlfriend, McAfee. Jackson and Campbell then drove to an area north of Milwaukee, where they dumped and burned the body. Later, concerned that the body might be discovered, Jackson directed McAfee to drive himself and Campbell back to where they had previously dumped the body. McAfee did so, and the three retrieved the body and returned it to McAfee's home. Once back at McAfee's home, Jackson and Campbell took the body to the garage where Jackson used several knives from McAfee's kitchen to cut off Crockett's head and hands. Jackson and Campbell then drove the body, now missing its head and hands, over the Illinois border, where they dumped it and burned it again.

¶6 Criminal charges were brought against Jackson on December 14, 2006. A jury trial commenced on July 16, 2007, but ended in mistrial. The second trial commenced on October 15, 2007.

¶7 Following the second trial, a jury found Jackson guilty of first-degree intentional homicide as party to a crime and mutilating a corpse. He was sentenced to life imprisonment without the possibility of extended supervision on the homicide count and to five years of initial confinement followed by five years of extended supervision on the mutilating-a-corpse count, to be served concurrently.

¶8 Jackson filed a motion for postconviction relief, alleging that his trial counsel was ineffective. The trial court denied his motion,[2] and Jackson appeals.

STANDARD OF REVIEW

¶9 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶10 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is "a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

[2] In lieu of issuing a detailed written order denying Jackson's postconviction motion, the trial court adopted the analysis set forth in the State's brief as its own. The court did not hold a ***Machner*** hearing, finding that even if Jackson's trial counsel had been deficient "there is not a reasonable probability that the outcome of the trial would have been any different given the strength of the other evidence of guilt in this case." *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶11 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious so as to deprive him or her of a fair trial and a reliable outcome, ***Johnson***, 153 Wis. 2d at 127, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶12 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

DISCUSSION

¶13 Jackson alleges he was denied the effective assistance of counsel because his trial counsel failed: (1) to move for dismissal on double jeopardy grounds; (2) to object to the medical examiners' testimonies on Sixth Amendment grounds; (3) to cross-examine Nina Wheeler about alleged inconsistencies between her testimony at the first trial and her testimony at the second trial; and (4) to object to portions of Detective Scott Gastrow's testimony on hearsay grounds. We will address each of Jackson's claims in turn.

A. Double Jeopardy

¶14 Jackson first contends that his trial counsel was ineffective because he failed to move to dismiss all charges after the court granted the defense's motion for mistrial. Jackson believes that the court would have been obligated to

grant a motion to dismiss the charges because he contends the prosecutor intentionally and in bad faith failed to disclose the contents of a conversation captured by wire between McAfee and Jackson. We disagree.

¶15 McAfee testified for the State at Jackson's first trial. Later that day, defense counsel learned from McAfee that she had been cooperating with police in connection with a drug investigation (involving Jackson but unrelated to Crockett's murder) and "was wired" during one of her visits with Jackson while he was in custody on other charges. The defense had not been previously notified by the prosecutor either that McAfee had been wired or that a tape of her conversation with Jackson existed.

¶16 Jackson moved for a mistrial because the State failed to disclose the existence of the wire tap, pursuant to WIS. STAT. § 971.23 (2007-08),[3] and Jackson had reason to believe the wire tap may have included exculpatory statements. *See* ***id.*** ("Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant …: (a) Any written or recorded statement concerning the alleged crime made by the defendant …[;] (e) Any relevant written or recorded statements of a witness …[; and] (h) Any exculpatory evidence."). The State argued that less severe alternatives were available and that a mistrial was unnecessary. The court granted the defense's motion for a mistrial.

¶17 To complete the record, after the court had granted the motion for mistrial, homicide detectives Scott Gastrow and Erik Villarreal testified on the record. Detective Gastrow testified that in May or June 2006 a detective from the

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

drug investigation unit had given him a disk containing the conversation between Jackson and McAfee retrieved from the wire.[4] Detective Gastrow stated that he never listened to the disk because the detective who gave it to him "indicated … that there was nothing on it." He did not place it in the homicide file that was given to both the State and the defense because he "didn't believe it had any evidentiary value to the case whatsoever." Detective Villarreal testified that he was aware that McAfee had worn a wire as part of a drug investigation but that he did not recall informing the prosecutor of that fact, and he did not make a report of that knowledge.

¶18 "The double jeopardy clause of both the federal and state Constitutions protects a defendant's right to have his or her trial completed by a particular tribunal and protects a defendant from repeated attempts by the State to convict the defendant for an alleged offense." ***State v. Jaimes***, 2006 WI App 93, ¶7, 292 Wis. 2d 656, 715 N.W.2d 669. "However, when a defendant successfully requests a mistrial, the general rule is that the double jeopardy clause does not bar a retrial because the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal." ***Id.***

¶19 The court has carved out an exception to this general rule, finding that the double jeopardy clause bars a retrial "when a defendant moves for and obtains a mistrial due to prosecutorial overreaching" which requires the defendant to demonstrate that: (1) the prosecutor's action was intentional—in other words, the prosecutor had a "culpable state of mind" and "an awareness that his activity would be prejudicial to the defendant"; and (2) "the prosecutor's action was

[4] Neither of the parties has informed this court of the actual contents of the disk.

designed either to create another chance to convict … or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial." ***Id.***, ¶8 (citation and one set of quotation marks omitted).

¶20 "Determining the existence or absence of the prosecutor's intent involves a factual finding, which will not be reversed on appeal unless it is clearly erroneous." ***Id.***, ¶10. Here, the trial court held that "there is no evidence that the State intentionally withheld evidence from the defense." That finding is not clearly erroneous.

¶21 Jackson argues that the actions of the detectives are imputed upon the prosecutor and that because the detectives' failure to disclose the information was intentional—because they knew about the disk prior to trial and made a conscious choice not to disclose it to the prosecutor—the prosecutor's failure to disclose was also intentional. Jackson's argument unravels in a number of respects.

¶22 First, we have held that "an officer's wrongful [actions] will not be imputed to the prosecutor in the absence of evidence of collusion by the prosecutor's office intended to provoke the defendant to move for a mistrial." ***Id.***, ¶12. Here, Jackson has not alleged any collusion between the State and the detectives. To the contrary, Jackson admits that "there was testimony that no law enforcement officer disclosed [the existence of the wire tap disk] to the District Attorney's office prior to the trial." Because he has not demonstrated that the prosecutor's office colluded with the detectives in an attempt "to provoke the defendant to move for a mistrial," and because the evidence demonstrates exactly the opposite, the double jeopardy clause is not implicated. *See* ***id.*** This alone is enough to defeat Jackson's claim.

¶23 Second, we can also infer that the failure to disclose was not designed "to provoke a mistrial" because the prosecutor opposed the defense's request for a mistrial. *See* ***id.***, ¶8. That is, the failure to disclose the disk was not "designed … to create another chance to convict … 'or to prejudice [Jackson's] rights to successfully complete the criminal confrontation.'" *See* ***id.***, ¶¶8, 10 (stating that "[t]he trial court could reasonably infer that, had a mistrial been the goal of the prosecutor, he would not have opposed the motion") (citation omitted).

¶24 Third, even if Jackson had been able to establish that the detectives' actions in this case could be imputed upon the prosecutor, he has presented no evidence that the detectives failed to disclose the contents of the wire with "an awareness that [their] activity would be prejudicial to the defendant." *See* ***id.***, ¶8. The only evidence on record of the detectives' state of mind is Detective Gastrow's testimony that he never listened to the disk because the detective who gave it to him "indicated … that there was nothing on it," and that he did not place it in the homicide file that was given to both the State and the defense because he "didn't believe it had any evidentiary value to the case whatsoever." This evidence is certainly not demonstrative of a culpable state of mind, and Jackson has provided no evidence to the contrary.

¶25 Even if his trial counsel had moved to dismiss the complaint, the motion would have been denied. Accordingly, Jackson cannot demonstrate that his trial counsel's failure to file the motion was "outside the wide range of professionally competent assistance" or that "the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 690, 694. Therefore, he cannot establish that his trial counsel was ineffective in that regard.

B. Confrontation Clause

¶26 Next, Jackson asserts that he was denied effective assistance of trial counsel because his trial counsel failed to object to Dr. Christopher Poulos' and Chiara Wuensch's testimonies. Jackson contends that both medical experts based their testimonies on reports they did not personally prepare and acted as mere conduits for the individuals who did prepare the reports. Because the individuals who prepared the reports did not testify, Jackson contends that his Sixth Amendment right to confront the witnesses against him has been violated. We disagree.

¶27 "Determining whether a court's action violated a defendant's confrontation right is a question of constitutional fact." ***State v. Barton***, 2006 WI App 18, ¶7, 289 Wis. 2d 206, 709 N.W.2d 93. While we do not upset the trial court's findings of historical facts unless they are clearly erroneous, determining whether those facts fulfill constitutional mandates is a question of law we review independently. ***Id.***, ¶8.

¶28 In ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, the Wisconsin Supreme Court held that "[a] defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another."[5] ***Barton***, 289 Wis. 2d 206, ¶20. More specifically, ***Williams*** held that a defendant's confrontation rights are

[5] Two years after the Wisconsin Supreme Court decided ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, the United States Supreme Court decided ***Crawford v. Washington***, 541 U.S. 36 (2004), which reinvigorated the restrictions on the admissibility of hearsay evidence imposed by the confrontation clause. In ***State v. Barton***, 2006 WI App 18, ¶17, 289 Wis. 2d 206, 709 N.W.2d 93, we ruled that ***Crawford*** did not overrule ***Williams*** in any way.

satisfied by "the presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders [his or] her own expert opinion." ***Id.***, 253 Wis. 2d 99, ¶20. The court noted that "[t]he critical point … is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another."[6] ***Id.***, ¶19.

¶29 Dr. Poulos was a highly qualified expert in the field of forensic pathology—someone "who specializes in conducting autopsies or post mortem examinations, and in so doing … attempt[s] to determine a cause … of death." He testified that he was an assistant medical examiner in Milwaukee County and that as an assistant medical examiner his job was "primarily composed of conducting autopsies and assigning cause and manner of death." In doing so, he sometimes visits homicide scenes and "collect[s] evidence." He further testified that he had been personally involved in forty-seven autopsies in Milwaukee County, and approximately 225 during his fellowship training. He had completed four years of medical school, completed a five-year residency in anatomic clinical pathology, and completed a one-year fellowship in forensic pathology. Dr. Poulos had completed and passed the forensic fellowship board examinations and the U.S.

[6] Jackson relies on ***Melendez-Diaz v. Massachusetts***, 129 S. Ct. 2527 (2009), for the proposition that he has a "right to confront the actual experts who analyze forensic evidence" and that "[a]nything less than confrontation of the actual experts is insufficient" to satisfy his Sixth Amendment rights. First, we note that Jackson did have the opportunity to confront the expert who actually analyzed the blood and created the DNA profile here. Second, we need not determine the effect of ***Melendez-Diaz*** on Jackson's appeal because ***Melendez-Diaz*** was decided after Jackson's trial and Jackson's trial counsel cannot be deficient for failing to "forecast changes or advances in the law." *See* ***Lilly v. Gilmore***, 988 F.2d 783, 786 (7th Cir. 1993); *see also* ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis. 2d 595, 698 N.W.2d 583.

medical licensing exam. The court found Dr. Poulos to be a qualified expert in the area of forensic pathology, and Jackson did not object to that finding.

¶30 Dr. Poulos testified that in his opinion, Crockett's body was burned post-mortem, the body's head and hands had been cut off, and the cause of Crockett's death was undetermined. He testified that his opinions were based "both upon the report [compiled by pathologist Mark Witeck] and [Dr. Poulos'] interpretation of the photographs taken at the time."

¶31 Dr. Poulos testified that he concluded that Crockett's body was burned *after* he was killed based upon the apparent charring where the head had been severed from the body and the low levels of carbon monoxide in the blood. More specifically, he testified that in his opinion, the low levels of carbon monoxide in the body's blood "indicate that the burning took place after the person had been dead and stopped breathing and therefore could not inhale the carbon monoxide to accumulate it in [his] blood." And he testified that charring on the body's neck could only occur if the neck had been severed from the body prior to burning. While both facts were contained within the autopsy report, the conclusions drawn from those facts were Dr. Poulos' own based upon his experience and training.

¶32 Like the author of the autopsy report, Dr. Poulos determined that the cause of death was undetermined. However, he testified that while he agreed with that conclusion his determination was based "on [his] own expertise." In other words, Dr. Poulos independently concluded, based upon the facts set forth in the autopsy report and his own training and experience, that the cause of death was undetermined.

¶33 Finally, Dr. Poulos' conclusion that the head and hands were cut off of the body was based on "tool marks" observed by the author of the autopsy report on the body's wrists. Dr. Poulos testified that the "tool marks" or "cuts within the skin" provided "evidence of some sort of an instrument such as a knife or a saw blade, most probably a knife being used to cut in tool marks or the characteristic[] impression these leave in the bone." While the evidence of the marks was contained in the autopsy report, the conclusion as to the cause of the marks was Dr. Poulos' own, based on his experience and training.

¶34 Because Dr. Poulos' testimony did not violate Jackson's confrontation rights, Jackson's trial counsel was not deficient in failing to object to the testimony. Even if trial counsel had been deficient, however, Jackson has not demonstrated prejudice.[7] Dr. Poulos' testimony that the cause of death is undetermined certainly does not harm Jackson's case. And the remainder of his testimony—that the body's head and hands had been cut off, and that the body was burned after Crockett was killed—is cumulative. Both Campbell and Noble testified in great detail to those same facts.

¶35 Wuensch was a highly qualified DNA analyst employed by the Wisconsin state crime lab. Her primary duties included "receipt and handling of

[7] Jackson argues that he does not need to demonstrate prejudice because "[a] denial of cross-examination, and hence the confrontation clause, is a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (Citing ***Davis v. Alaska***, 415 U.S. 308, 318 (1974).) Jackson is mistaken. First, Jackson raises an ineffective assistance of counsel claim, and not a confrontation clause claim. It is well established that a defendant must demonstrate prejudice with respect to the trial as a whole to succeed on an ineffective assistance of counsel claim. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 680 (1986). Second, the United States Supreme Court has clarified that while some constitutional errors are so compelling that a showing of prejudice is not required, "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *See* ***id.*** at 682.

evidence, examining those items of evidence for the presence of biologicals, … [and] writing reports of [her] conclusions and presenting them in court." She testified she had a bachelor of science degree in biology, and had taken additional course work in genetics, microbiology, and organic chemistry. She also undergoes laboratory proficiency testing twice a year to ensure she is testing properly. The court found Wuensch to be an expert in the area of forensic DNA analysis, and Jackson did not object to that finding.

¶36 The majority of Wuensch's testimony was based upon reports she personally prepared as the lead DNA analyst in this case. She testified that she had examined blood swabs taken from Noble's apartment and compared them to a sample of Crockett's mother's blood. Her comparison demonstrated a parental relationship between Crockett's mother and blood found on the kitchen wall in Noble's apartment. Jackson does not object to this testimony.

¶37 Instead, Jackson objects to Wuensch's testimony regarding the hit report written by state crime lab analyst Daniel Haase. Wuensch testified that she was familiar with the report and felt comfortable, based upon her training and experience, explaining it. The report was generated by entering the DNA profile Wuensch created (based upon the blood swabs retrieved from the wall of Noble's apartment) into a national database that determined whether that profile matched another in the system. The database indicated that the DNA profile from Noble's apartment wall and the DNA profile from the body found in Illinois matched.[8]

[8] The parties stipulated that "the Lake County Major Crime Task Force did take a blood sample from the unidentified body [found in Illinois] and that blood sample was then given to the FBI where [a] DNA profile was obtained and this profile was then included in the [n]ational missing persons DNA data base."

Based upon her own calculations, Wuensch testified that the chance that the DNA profile found on the wall did not belong to the human remains found in Illinois was one in twenty-three quintillion. She testified that, in her opinion, the samples "came from the same individual with the exception of identical siblings."

¶38 The hit report created by Haase merely reported whether the DNA profile created by Wuensch matched any other profiles in the system. Wuensch did not act as a mere conduit for Haase, but instead testified to her opinion based on the database's finding that the profile she collected matched the profile collected from the human remains found in Illinois. She was interpreting the findings in the report that were compiled based upon her work. Based upon her training and experience, she independently concluded that the remains found in Illinois belonged to the individual whose blood sample was found on the wall of Noble's kitchen—who she determined to be Crockett. She did not act as mere conduit for the opinions of others not present at the trial.[9]

¶39 Because Wuensch's testimony did not violate Jackson's right to confront the witnesses against him, his counsel did not act deficiently for failing to object to the testimony.

[9] In passing, Jackson also argues that neither "Haase's nor Witeck's reports were admissible. They were both inadmissible hearsay, even if there is proper peer review testimony. The jury sought to review all of the statements. These reports were improperly presented to the jury." That is the entirety of Jackson's argument regarding the admissibility of the experts' reports. The argument is completely undeveloped and therefore we decline to consider it further. *See* ***State v. Butler***, 2009 WI App 52, ¶17, 317 Wis. 2d 515, 768 N.W.2d 46.

C. Impeachment of Wheeler

¶40 Next, Jackson argues that his trial counsel was ineffective for failing to cross-examine Wheeler, Crockett's ex-girlfriend and the mother of his son, about the source of Crockett's money. Jackson believes that Wheeler's testimony at the first trial was inconsistent with her testimony at the second trial, and undercuts the State's theory that Jackson killed Crockett in retribution for a theft. We disagree.

¶41 At the first trial, Wheeler testified in pertinent part, as follows:

> Q And there came a time that you learned of some money that was taken from Mr. Jackson?
>
> A Yes.
>
> Q Then you called Mr. Jackson to talk to him about that, didn't you?
>
> A Yeah. I was calling him looking for Matt, and he had told me that Matt had got some money from winning gamble games. Asking me did I know of [the] money, and I … didn't know that was what happened at the time. So he was basically trying to get information out of me, but I didn't know that Matt had stole any money from him at the time.
>
> Q Mr. Jackson had asked you whether Matthew had won some money gambling?
>
> A Yes.
>
> ….
>
> Q And when you talked to Mr. Jackson on this money issue, did you tell him that Matthew had suddenly come into a lot of possessions?
>
> A Well, he asked me. He had told me that he won some money gambling. When he asked me, I … told him, yeah, because I thought that's what happened. I didn't know.
>
> ….

> A I didn't know what had happened until he actually came over there and told me that Matt had stole the money from him.
>
> ….
>
> Q Did Matthew tell you what happened?
>
> A After. Yeah. He told me that he took the money or whatever.

¶42 At the second trial, Wheeler's testimony was briefer. Regarding the source of the money, she only testified as follows:

> Q What do you recall [Crockett] purchasing or having at this point?
>
> A I really wasn't around him at the time, but when he came back around me he did have like a lot of clothes and shoes and like video games, stuff like that.
>
> Q Did you become aware of where he got this money?
>
> A Yes.
>
> Q What did you know about?
>
> A After the fact he had let me know that he had took it from Earnest Jackson.

¶43 Jackson argues that his trial counsel was deficient because he failed to impeach Wheeler with her testimony from the first trial. *See* ***State v. Tkacz***, 2002 WI App 281, ¶¶18-25, 258 Wis. 2d 611, 654 N.W.2d 37 (standing for the proposition that an attorney can be ineffective for failing to impeach). Jackson contends that Wheeler's testimony at the first trial—that Jackson told her Crockett obtained his money by gambling—is inconsistent with her testimony at the second trial and undermines the State's theory that Jackson's motive for the murder was retaliation.

¶44 First, Wheeler's testimony at the first trial is not inconsistent with her testimony at the second trial. At the first trial, Wheeler testified that Jackson told her that Crockett came into his money by gambling but that she later learned from both Jackson and Crockett that Crockett stole the money from Jackson. Wheeler believed that Jackson originally told her that Crockett obtained the money by gambling to get other information out of her regarding Crockett. Because the testimony was not inconsistent and does not stand for the proposition Jackson asserts, his trial counsel was not deficient for failing to cross-examine Wheeler about the alleged inconsistencies. *See* ***Strickland***, 466 U.S. at 690.

¶45 Second, even if Wheeler's testimony at the first and second trials was inconsistent, Jackson has not demonstrated that he was prejudiced by his counsel's failure to impeach Wheeler on this point. *See* ***id.*** at 694. Jackson's motive is not critical to his conviction in light of the testimony of his co-actors who testified in detail to Jackson's role in Crockett's murder and the mutilation of his body. To the extent that Jackson's motive may matter, it is sufficiently established by the testimony of his co-actors who stated that Crockett stole $20,000 to $35,000 from Jackson and that the murder was in retaliation for that theft.

D. Detective Gastrow's Hearsay Testimony

¶46 Finally, Jackson argues that his trial counsel was ineffective for failing to object to "McAfee's hearsay statements" offered through Detective Gastrow's testimony.[10] We disagree.

[10] Jackson does not argue on appeal that Detective Gastrow's testimony regarding McAfee's statement denied him his Sixth Amendment right to confront the witnesses against him.

¶47 On December 20, 2004, Detective Gastrow interviewed McAfee about Crockett's murder. The contents of the interview were summarized in a fifteen-page statement. Following the interview, Detective Gastrow read the statement to McAfee, who made changes where necessary. McAfee initialed the changes and then signed the statement.

¶48 The State called McAfee at trial and questioned her about her involvement in disposing of the body, her observations of Jackson after the murder, and Jackson's statements to her about the murder. McAfee answered some of the questions, but testified that she could not recall all of the details of the statement she made to Detective Gastrow. However, she testified that everything she told Detective Gastrow during the interview was true, and that her memory of the events that transpired was "definitely … better" at the time she gave the statement as compared to at trial. The State then introduced portions of McAfee's statement through Detective Gastrow's testimony at trial.

¶49 Jackson broadly argues that Detective Gastrow could not testify to "McAfee's hearsay statements" because McAfee's testimony that she did not recall all of the details of her statement to Detective Gastrow did not qualify her testimony as inconsistent with her prior statement under WIS. STAT. § 908.01(4)(a)1.[11] Jackson asserts that a lack of recollection does not qualify as

[11] WISCONSIN STAT. § 908.01(4)(a)1. states: "A statement is not hearsay if … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [i]nconsistent with the declarant's testimony."

"inconsistent" unless the trial court finds that the lack of recollection is made "in bad faith." (Citing ***State v. Lenarchick***, 74 Wis. 2d 425, 247 N.W.2d 80 (1976)).[12]

¶50 Jackson's argument is poorly developed in that he fails to describe what *specific assertions* testified to by Detective Gastrow contained inadmissible hearsay. Jackson spends the entirety of his argument claiming that Detective Gastrow's testimony about McAfee's statement, in general terms and without referencing any particular portion of that testimony, fails to qualify as a prior inconsistent statement under WIS. STAT. § 908.01(4)(a)1. Despite Jackson's failure to identify in his argument *which* portions of Detective Gastrow's testimony he contends amounted to inadmissible hearsay, we will address the four factual details from McAfee's statement that Jackson specifically mentions in his Statement of the Facts: (1) that Jackson's clothes were ripped and disheveled when he arrived at McAfee's home after the murder; (2) that Jackson told McAfee that he killed Crockett; (3) that Jackson told McAfee he killed Crockett over a $20,000 theft; and (4) that Jackson's brother recommended cutting off the body's head and hands.

¶51 The State responds that those portions of Detective Gastrow's testimony about McAfee's statement were admissible under three theories: (1) as prior inconsistent statements under WIS. STAT. § 908.01(4)(a)1.; (2) as statements that are otherwise trustworthy under WIS. STAT. § 908.045(6) (because McAfee was unavailable under WIS. STAT. § 908.04(1)(c) and the statement had significant guarantees of trustworthiness in that she admitted the statement and acknowledged

[12] Because we resolve this appeal on other grounds, we do not decide whether Jackson's interpretation of ***State v. Lenarchick***, 74 Wis. 2d 425, 247 N.W.2d 80 (1976), is correct.

that her answers to the detective were all truthful); and (3) as statements against her penal and social interest under § 908.045(4) (because she admitted to being an accomplice to the mutilation and disposal of the body and exposed herself and her child to Jackson's hatred or revenge).

¶52 We conclude that even if we assume, without deciding, that Detective Gastrow's testimony about McAfee's statement consisted of inadmissible hearsay and trial counsel was deficient for not objecting to that testimony, Jackson still has not, and cannot, meet his burden of showing that he was prejudiced from the testimony's admission. The evidence against Jackson was compelling. Jackson's two accomplices in the murder and mutilation, Campbell and Noble, testified, describing in detail Jackson murdering, burning, and mutilating Crockett's body. Noble's downstairs neighbor testified, corroborating Noble's and Campbell's accounts of some of the circumstances of the murder at Noble's apartment. Crockett's friend, Ayodele Adelokun, testified that he drove Crockett to Noble's home the day of the murder and never saw him again. Crockett's mother testified that she received anonymous tips that Jackson had murdered her son. Jackson's girlfriend, McAfee, testified that she helped Jackson dispose of the body. The experts identified the mutilated body as Crockett's and the blood on Noble's apartment wall as Crockett's.

¶53 Jackson did not testify in his defense. The defense's case consisted of cross-examination of the State's witnesses and a direct examination of a fellow prison inmate of Campbell who testified that Campbell told him he lied to implicate Jackson.

¶54 Accordingly, given that the jury was presented with such strong eye-witness testimony implicating Jackson, Detective Gastrow's recollection of

McAfee's statement was not crucial to the jury's verdict of guilt. Even if trial counsel had succeeded in excluding Detective Gastrow's testimony—that McAfee told him that Jackson's clothes were ripped and disheveled after the murder and that Jackson admitted to murdering Crockett—Jackson has not shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," ***Strickland***, 466 U.S. at 694.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.