COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP764-CR **Cir. Ct. No. 2008CF825**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL D. POTTS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. McGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. The State appeals an order granting Michael Potts a new trial on charges of first-degree intentional homicide, bail jumping and felon in possession of a firearm. Although the parties address numerous issues on

appeal, we conclude one is dispositive. We affirm the order for a new trial because we conclude Potts' trial attorney was ineffective for failing to introduce incuplatory statements by another person that would tend to exculpate Potts.[1]

BACKGROUND

¶2 The parties agree either Potts or Keith Birr shot and killed Artheddius Peeler. Three witnesses testified Potts was the shooter. Mary Staples, the mother of Potts' child, testified Birr was the shooter. The issue could not be resolved by DNA or fingerprint evidence. Birr was not called as a witness after his attorney indicated Birr would assert his Fifth Amendment right not to testify.

¶3 The jury did not hear evidence regarding four statements Birr allegedly made after the shooting. At the postconviction hearing, Ash-Leigh Morin testified she drove Birr from the scene of the shooting and overheard him tell his brother "[t]hat he just dumped a nigga." Staples testified at the postconviction hearing that Birr made three statements to her two or three days after the shooting. She described Birr's emotional state as "[s]till in shock," and crying. She testified Birr said "He wouldn't take away [Staples'] baby's father for something he didn't do." Staples further testified she heard Birr say, "I will never admit to what I did" and "I don't know why everybody's saying it's [Potts] when I was the one who had the gun."

[1] We need not address whether the court properly allowed a juror to testify at the postconviction hearing. The circuit court did not consider the juror's testimony when determining whether this was a close case, and we do not consider that testimony in our review of the prejudice prong of ineffective assistance of counsel. We also need not address other allegations of trial counsel's deficient performance. Those alleged errors are not likely to recur when the case is retried.

DISCUSSION

¶4 To establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice to the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when, in light of all of the circumstances, his acts or omissions were outside the wide range of professionally competent assistance. ***Id.*** at 690. To establish prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694. Whether counsel was ineffective is a question of constitutional fact. We are bound by the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous, but determine deficient performance and prejudice de novo. ***State v. Leighton***, 2000 WI App 156, ¶33, 237 Wis. 2d 709, 616 N.W.2d 126.

¶5 We conclude Potts' trial counsel's failure to introduce Birr's alleged statements constitutes deficient performance that prejudiced the defense. If a reasonable juror believed Morin's testimony that Birr said, "I just dumped a nigga," shortly after a black man was shot and killed, that juror might entertain a reasonable doubt that Potts was the shooter.

¶6 The State contends Potts' attorney did not provide deficient performance and the defense was not prejudiced because Birr's statements were inadmissible hearsay. We disagree. Birr's statement to his brother, overheard by Morin, was admissible under three hearsay exceptions. First, it was an excited utterance. As Birr was being driven from the scene of the shooting, it is likely he made the statement "while under the stress of excitement caused by the event of

condition." *See* WIS. STAT. § 908.03(2) (2011-12).[2] The statement was also admissible under § 908.045(2) and (4) as a statement of recent perception and as a statement against Birr's penal interest.[3]

¶7 The State contends "I just dumped a nigga" is an inherently ambiguous or vague statement that does not expressly admit Birr was the shooter. The State suggests Birr might have only been admitting that he provided the gun. We conclude that is a strained interpretation of Birr's alleged statement given the context in which it was said. The statement strongly suggests Birr was the shooter. By itself, Potts' counsel's failure to establish Birr's unavailability and introduce his statement undermines our confidence in the outcome.

¶8 The three statements Staples alleges Birr made in her presence, although not as incriminating, also would have been admissible over a hearsay objection. Staples described Birr as "still in shock" and crying when he indicated Potts was being blamed for "something [Potts] didn't do." That would constitute an excited utterance. *See* ***Mueller v. State***, 94 Wis. 2d 450, 467, 289 N.W.2d 570 (1980). In addition, in a circumstance where either he or Potts was the shooter, all three of the statements were against Birr's penal interest. Potts' trial counsel's failures to introduce Birr's statements made in Staples' presence further undermine our confidence in the outcome.

[2] All references to the Wisconsin Statutes are to the 2011-12 version.

[3] At the postconviction hearing, the parties stipulated Birr was not available because he would have invoked his Fifth Amendment privilege.

By the Court.—Order affirmed.

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