**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

June 12, 1997

**NOTICE**

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

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

**Nos. 96-0659-CR**
**96-0734-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CLIFTON L. WATTS,**

**DEFENDANT-APPELLANT.**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES GULLEY, A/K/A JOHN SYPE, A/K/A THOMAS PURIFOY,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and orders of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Clifton L. Watts and James Gulley appeal from judgments of conviction and orders denying their motions for postconviction relief. The issues are whether the trial court erred by not excluding certain prosecution evidence because it had not been provided in discovery and whether their counsel were ineffective by not objecting to certain comments by the prosecutor during closing argument. We affirm.

A jury convicted the appellants of several counts of first-degree recklessly endangering safety, contrary to § 941.30(1), STATS. The prosecution's theory of the case was that the appellants fired a rifle into the Shipp residence. The State's investigators recovered a .22 caliber bullet from the residence, but could link only a rifle of a different caliber to the appellants. The appellants moved before trial to exclude evidence of the rifle because there was no evidence linking it to the crime. In opposing that motion, the State revealed for the first time that Eric Shipp would testify that he had fired a .22 caliber weapon into the wall at some earlier time. The appellants requested that Shipp's testimony be excluded because it had not been provided in discovery. The trial court declined to exclude the evidence, but offered a continuance. The appellants rejected that offer and proceeded to trial.

It is important to note that the State did not have any written record of Shipp's statement. The statement was made to an assistant district attorney after the initial investigation. The attorney reported the statement to a police officer, but neither of them made a written record of it.

The appellants argue on appeal that Shipp's testimony should have been excluded under § 971.23(7), STATS., 1993-94, which imposes upon the parties a continuing duty to disclose discoverable material and further provides that the court "shall exclude any … evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply." The appellants argue that Shipp's statement was discoverable under § 971.23 and should have been provided to them under the continuing duty.

As the State points out, the appellants are vague about precisely which part of § 971.23, STATS., makes Shipp's statement discoverable. In their reply brief, the appellants acknowledge this argument but do not rebut it. We see nothing in that statute that would require the State to create a written record of Shipp's statement and then provide it to the appellants. Section 971.23(7) provides only for the exclusion of evidence not presented for inspection or copying "required by this section." Because that section did not require the disclosure of the Shipp statement, the statement need not be excluded under that section.

The appellants also argue that their counsel were ineffective by failing to object to certain statements made by the prosecutor during closing argument that could arguably be read as comments on the fact that they did not testify. To establish ineffective assistance of counsel, defendants must show that counsel's performance was deficient and that such performance prejudiced their defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

We need not address both components of the analysis if defendants make an inadequate showing on one. ***Strickland***, 466 U.S. at 697. As did the circuit court, we assume, for the purpose of addressing this argument, that the prosecutor's comments were improper and that counsel's failure to object was deficient performance. We turn to the question of prejudice. To demonstrate prejudice, 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

We conclude that there is not a reasonable probability that the result of the proceeding would have been different in this case, for a combination of several reasons. First, the jury was told three times that defendants have a right not to testify and that the jury may not consider the defendants' exercise of that right. Defense counsel told jurors this during voir dire and again during closing argument, and the jury instructions included an instruction to this effect. Second, the prosecutor's comments were relatively brief, as compared to the totality of the trial and argument presented to the jury. Finally, the case against the appellants, while not without problems, was reasonably strong.

*By the Court.*—Judgments and orders affirmed.

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