COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP370-CR **Cir. Ct. No. 2012CF1363**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUACEY L. JONES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Quacey Jones appeals judgments convicting him of six counts endangering safety by reckless use of a firearm, five counts of recklessly endangering safety, and one count each of battery and obstructing an officer. He also appeals an order denying his postconviction motion in which he

alleged ineffective assistance of trial counsel. He argues: (1) his trial counsel was ineffective for failing to request severance of the battery count from the other charges and for failing to present evidence of a deal for sentencing considerations between the State and two of its witnesses; (2) the circuit court erred by excluding evidence that the battery victim sold heroin; (3) the State misled or confused the jury by presenting inconclusive DNA evidence; and (4) he is entitled to a new trial in the interest of justice.[1] We reject these arguments and affirm the judgments and order.

BACKGROUND

¶2 The police received a 911 call from Karla Patterson-White claiming a sexual assault was taking place. The dispatcher was suspicious because the cell phone was not "pinging" in the area of the reported sexual assault, and instead was "pinging" in an area where there was a report of shots fired. Police responding to the shots-fired call found bullet holes in a house occupied by J.J. and four other people. The officers located eight shell casings and found seven bullet holes in the house. When police contacted Patterson-White, she initially lied about what happened, but eventually she told them Jones drove her to the scene of the shooting and asked her to call 911 to report a sexual assault at another location. After she did so, Jones got out of the car and opened the trunk. Patterson-White

[1] Jones also contends the jury's finding him not guilty of theft of the gun used in the endangering safety counts is inconsistent with its finding him guilty of shooting the gun. That issue is not adequately developed to merit any consideration. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). The entire argument consists of three sentences and Jones offers no analysis of why acquittal on the theft charge is inconsistent with his firing the gun. The only law he invokes is a conclusory statement that the verdict impacts his right to trial by jury.

then heard several gun shots and, after the shooting stopped, Jones returned to the car with a gun in his hand.

¶3 When J.J. was contacted by police, he reported a battery that occurred four or five hours before the shooting. He testified he was sitting in a car with his ex-girlfriend, M.S., who was then pregnant with Jones' baby. Jones opened the car door and punched J.J. two or three times after discovering M.S. was wearing only a bathrobe. The State contended jealousy motivated both the battery and the subsequent shooting.

DISCUSSION

¶4 To establish ineffective assistance of trial counsel, Jones must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He must allege acts or omissions of counsel that were not the result of reasonable professional judgment. ***Id.*** at 689. To establish prejudice, he must show 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 that undermines our confidence in the outcome. ***Id.*** Because Jones must establish both deficient performance and prejudice, this court need not address both prongs if his showing is insufficient as to either prong. *See* ***id.*** at 697.

¶5 Jones has not established prejudice from his trial counsel's failure to move for severance of the battery charge. As the circuit court noted, severance of the charges would not have affected the evidence presented at each trial. The incidents occurred within four or five hours of each other and involved a common victim and a common motive, scheme or plan: to attack J.J. because of Jones' jealousy. Evidence of the battery would tend to establish the identity of the

shooter. Therefore, evidence of each of the crimes would have been admissible under WIS. STAT. § 904.04(2),[2] and trial counsel's failure to seek severance of the battery charge had no effect on the evidence presented to the jury.

¶6 Jones also faults his trial counsel for failing to investigate whether Patterson-White received consideration from the State in exchange for her testimony. He also speculates that J.J. had a similar "deal," and he accuses the State of withholding information about the alleged deals. Patterson-White was granted use immunity for her testimony in which she admitted initially lying to police, a fact known by Jones' counsel. Jones' argument is based on a handwritten note in Patterson-White's criminal file in which the assistant district attorney wrote "Defendant will testify in trial/schedule after trial date." Jones' trial attorney received an email from the prosecutor two days before Jones' trial stating Patterson-White was charged with obstruction in this case and "is not receiving any consideration for her case." Jones' argument that the delay in sentencing Patterson-White until after Jones' trial is evidence of a "deal" is pure speculation. Jones has not established deficient performance by his trial counsel's reliance on the State's assurance that there was no deal for Patterson-White's testimony. There is no evidence of any deal other than the use immunity. Jones' speculation that J.J. also might have had a deal for sentencing consideration on an unrelated drug charge is also pure speculation. The argument that the State failed to disclose the existence of any deals fails for lack of any proof of any deal.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶7 Jones contends the circuit court improperly prohibited introduction of evidence of the State's witnesses' drug use and J.J.'s sale of drugs. Jones apparently believes evidence of an alternative or additional motive for his attacks on J.J. would have benefitted his defense, although it would not constitute a defense to any of the charges.

¶8 The admissibility of evidence is committed to the circuit court's discretion. ***State v. Warbelton***, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W.2d 557. When M.S. began describing the battery incident, the court prohibited her from "out of the blue" volunteering information about J.J. bringing her drugs on the night of the battery. The court left open the possibility of inquiring into the alleged drug transaction if M.S. testified the reason for the battery was because J.J. delivered drugs to her. However, her testimony did not suggest the battery was related to any drug transactions. The circuit court did not prohibit testimony that M.S. used drugs, and she admitted using controlled substances at the time of these incidents.

¶9 The circuit court properly excluded testimony that J.J. supplied drugs to M.S. because it is irrelevant. At the postconviction hearing, Jones' trial counsel testified that her plan of defense was to suggest J.J. was a drug dealer and the shooting incident might have involved some unknown person who was angry because of some drug deal. Counsel believed her planned defense was thwarted by the court's ruing that J.J.'s drug dealing was irrelevant. That potential defense would not have been available regardless of the admissibility of evidence of J.J.'s drug dealing. While drug dealing may have provided a motive for someone to shoot at the house occupied by J.J. and others, Jones had no evidence that this unidentified person had an opportunity or a direct connection to the shooting. *See* ***State v. Denny***, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984).

Therefore, Jones would not have established a "legitimate tendency" that a third person could have committed the crime. *See* ***id.*** Because proving motive alone would not have met the standard set forth in ***Denny***, evidence of a third person's motive was irrelevant and speculative. Because the evidence of J.J.'s alleged drug selling was not relevant, the circuit court properly exercised its discretion when it prohibited that testimony.

¶10 Jones also argues M.S. falsely identified Jones instead of J.J. as her drug supplier[3] and "this error was not corrected." The error was corrected when she was recalled on the second day of trial to clarify any misunderstanding resulting from her interrupted testimony about who supplied her with drugs. She clarified that Jones "never sold me drugs," leaving the implication that, if drugs were a factor in the battery incident, it was J.J. who supplied the drugs.

¶11 Next, Jones contends the State misled or confused the jury by presenting evidence that DNA samples taken from the gun were inconclusive. As the prosecutor explained to the jury in her closing argument, the DNA evidence was admitted for the very limited purpose to show that an analysis was performed. Jones' trial attorney's closing argument pointed out, "There were a combination of four different DNA profiles that were located [on the gun,]" and there was "no link to Mr. Jones." The DNA evidence showed nothing more than an unsuccessful effort by the police to identify the perpetrator of the shooting. Because the DNA

[3] When M.S. described the battery incident, she stated she was in the car with J.J. when Jones arrived. The prosecutor asked what happened when Jones showed up, and M.S. responded, "I bought heroin from him." The prosecutor then asked, "You buy heroin from the defendant?" M.S. answered, "From the defendant?" As the prosecutor began to request a sidebar discussion, M.S. attempted to correct the prosecutor's question, "You said [J.J.], ma'am." After the sidebar, the prosecutor moved to a different topic. After Jones' counsel filed an offer of proof, the court allowed M.S. to be recalled for the purpose of clarifying that Jones did not sell her the drugs.

test did not identify Jones as a person who handled the gun, he was not prejudiced by introduction of that evidence.

¶12 Jones contends a question posed by a juror, "Are you able to use carbon dating to determine the age of the DNA profile?" shows the prejudicial impact of the DNA evidence.[4] The juror's interest in the DNA evidence does not establish any confusion about the conclusion that the test was inconclusive.

¶13 Finally, Jones requests a new trial in the interest of justice. That argument is not developed and appears to be based on the other arguments we reject in this appeal. Jones has not established that the real controversy was not fully and fairly tried or that, because of trial error, it is probable that justice has miscarried and a new trial would produce a different result. *See* ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

By the Court.—Judgments and order affirmed.

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

[4] The question was posed by the juror during the trial and not, as Jones' brief argues, during deliberations.