COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2598-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO M. SETTLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Antonio Settles appeals a judgment of conviction and an order denying his postconviction motion. The issues are whether the circuit court erred by admitting certain evidence as an excited utterance, whether trial counsel was ineffective for not objecting when this evidence differed at trial from what was described before trial by the prosecutor and whether trial counsel

was ineffective in stipulating to the response the circuit court gave to certain jury questions. We affirm.

¶2 Settles was charged with possession of a controlled substance with intent to deliver and obstructing an officer. His case was tried to a jury, which convicted him on both counts. According to police testimony at trial, police stopped a vehicle traveling without headlights. In addition to the driver, the car held two small children. The driver presented a high school identification card apparently bearing the name Antonio Settles. Using that name, the officers learned that Settles's operating license was revoked. Based on that information, police searched the driver and recovered cocaine. The driver then fled. The car was registered to Willie Winters. Officers went to her residence and asked who was driving her car. She said Antonio Settles was and that the children in the vehicle were hers.

¶3 Settles's defense at trial was that he was not the driver. Before trial, the State said that Winters would not be testifying, and it sought a ruling on whether it could introduce Winters's statement that Settles was driving her car. In describing the expected testimony, the prosecutor said that after the officers told Winters "we have your car" with two children in it, Winters responded by saying that Settles had the car. Settles objected on hearsay grounds. The court ruled that the testimony was an exception to the hearsay rule, as an excited utterance under WIS. STAT. § 908.03(2) (1999-2000).[1] The court reasoned that Winters's

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

statement about Settles having the car was in response to the startling news that police now had the car, with her children in it.

¶4 The excited utterance exception to the hearsay rule is based on the spontaneity of statements given under circumstances which are stressful to the declarant. ***State v. Moats***, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990). Such statements are believed to be trustworthy. ***Id.*** The decision about whether to admit a statement as an excited utterance is left to the discretion of the circuit court. ***Id.*** at 96. Settles argues that the court erroneously exercised its discretion in admitting Winters's statement. We disagree. Based on the information that had been presented to the court at the time of its ruling, *e.g.*, the officers had told her they had her car and two children, it was reasonable to conclude that Winters's statement was an excited utterance because her two children had been in her car when Settles drove off in it.

¶5 At trial, however, the police testimony about Winters's statement was somewhat different. The officer testified that he first had Winters identify herself; then he asked her who was driving her car, to which she replied that Settles was. The officer asked if she had children, and she said she did and they were with Settles. Only then did the officer explain that the children were left in the vehicle when the driver fled, and at that point Winters "became very distraught and upset."

¶6 Settles's trial counsel did not object to this testimony or point out to the court that it was not consistent with the prosecutor's earlier description. Accordingly, Settles argues that his trial counsel was ineffective for failing to object, seek a limiting instruction or move for a mistrial.

¶7 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if a defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's deficient performance, 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.***

¶8 The circuit court denied Settles's postconviction motion without a hearing. This is appropriate if the motion fails to allege facts which, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). We conclude that Settles failed to allege facts sufficient to show prejudice. Even if his trial counsel had revived his hearsay objection at trial when the testimony turned out to be different, we are satisfied that the circuit court would still have admitted Winters's statement and could have reasonably done so. Although the officer's testimony suggests that Winters did not become *visibly* upset until after she had already said Settles was driving her car, it would be reasonable to infer that Winters came under the stress of a startling event or condition as soon as police appeared at her door and questioned her about who was driving her car. A person in Winters's position could believe, from that question alone, that she was going to receive bad news of some sort, whether it was news of an accident, a crime, or some other matter in which police are typically involved. That her children had been left in the car would further add to her concern.

¶9 Settles's final argument is that his trial counsel was ineffective in his handling of two of the questions the jury asked during deliberation. The jury asked: "Who was involved at the beginning of the jury selection as possible defense

witnesses?" and "[W]hy was Willie Jean Winters not called to testify by either side?" The court stated that counsel had stipulated to give the following answer to these questions: "[R]ely on your collective memories." Settles argues that counsel should not have joined in this stipulation because the jury's questions related to matters that were not in evidence, appeared to be attempts by the jury to speculate about witnesses who were not called and what those witnesses would have said. Instead, he argues, the court should have advised the jury that it was not to speculate about these matters, rather than implying, as he asserts it did, that these questions were proper subjects for the consideration of its "collective memories."

¶10 We conclude that any deficient performance by counsel was not prejudicial. Given the eyewitness identifications of Settles as the driver of the car, there is no reasonable probability that the verdict was affected by whatever further discussion the jury may have had on why certain witnesses were not called at trial. In addition, we note that Settles's trial counsel directed the jury's attention to Winters's absence, when he asked during closing argument, "Where was she the last two days?" and said, "We'll never know what was said by Willie Jean Winters. She didn't bother to come and tell us." This suggests that Settles's trial counsel may have believed that the jury's consideration of these questions was more likely to benefit Settles, rather than be prejudicial.

By the Court.—Judgment and order affirmed.

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