

**COURT OF APPEALS
DECISION
DATED AND FILED**

FEBRUARY 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2290-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY M. BRANDT,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Jerry Brandt appeals judgments convicting him of enticing Heidi B. to enter his car for purposes of prostitution, enticing, kidnapping and sexually assaulting Heidi B. on another occasion, and enticing Nicole M. into his car for purposes of sexual contact. Each of the girls was thirteen years old at the time of the incidents. Brandt argues that the trial court improperly denied his

postconviction motion without a hearing. The postconviction motion alleged that Brandt's trial counsel was ineffective because he failed to impeach the victims with evidence of their prior delinquency adjudications, failed to call a witness who was unable to identify Brandt from a photo lineup and failed to investigate the existence of a written sublease and introduce it at trial. He also argues that the sublease qualifies as newly discovered evidence. We reject these arguments and affirm the judgments and order.

To establish ineffective assistance of counsel, Brandt must show that his counsel's performance was deficient and that the defense was prejudiced by the deficiency. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When considering Brandt's allegations of prejudice, this court must consider whether trial counsel's errors, if any, were so serious as to deprive Brandt of a fair trial, a trial whose result is reliable. *Id.* at 687. This court need not address both components of the *Strickland* test if Brandt fails to prove either one of them. *Id.* at 697.

We conclude that Brandt failed to establish any prejudice from his trial counsel's performance. Therefore, we will not review whether counsel's performance was inadequate. No postconviction hearing was necessary because Brandt's motion failed to establish any basis for relief regardless of any evidence he might present in support of the motion and regardless of his trial counsel's strategy. See *State v. Bentley*, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996).

Trial counsel's failure to elicit evidence that Heidi and Nicole had been adjudicated delinquent in the past does not undermine this court's confidence in the reliability of the trial. The jury was fully aware that each of these juvenile

complainants committed acts that could result in a delinquency determination. Evidence of a formal adjudication of delinquency against Heidi was not necessary in light of her testimony that she ran away from home and engaged in acts of prostitution. Nicole also testified that she ran away from home and was truant from school many times. She also testified that she “did something” and “got picked up by the police” while “on the run” at the time she told the police about Brandt. Information that this conduct resulted in a formal delinquency adjudication would have added little to the jury’s assessment of the complainants’ credibility.

Brandt also failed to establish any prejudice from his trial counsel’s failure to call a witness who could not identify Brandt from a photo lineup. That witness, Nicole’s friend, allegedly rode in the backseat of a car driven by Brandt when Nicole sat in the front seat. No crime is alleged to have occurred on that occasion. Nicole testified that she recognized Brandt from a previous incident in which he attempted sexual contact with her after offering her a ride. She recognized him by a characteristic birthmark on his cheek. The fact that the jury did not hear that the backseat passenger could not identify him after having seen him only once on an occasion in which no crime was committed does not undermine this court’s confidence in the verdict.

Trial counsel’s failure to discover the existence of a sublease and introduce it at trial did not prejudice Brandt. Brandt argues that, “Given the various problems of the defendant’s credibility, including his mannerisms and prior conviction, any evidence that would tend to corroborate his testimony would have been extremely valuable.” We conclude that corroboration of one nonessential detail in his testimony would not have affected the jury’s assessment of his credibility. Whether Brandt sublet an apartment is a collateral matter of no

significance. The lease would have been inadmissible under § 906.08(2), STATS., because it is extrinsic evidence on a matter of no consequence. None of the crimes charged involved the apartment in question. Whether Brandt actually subleased the apartment would not establish whether he stayed there or whether Heidi ever stayed there. No witness disputed that Brandt had a sublease for the apartment. In fact, a witness confirmed his subleasee interest. Evidence tending to establish that Brandt did not lie about this inconsequential question, if admissible at all, would not have affected any reasonable jury's assessment of the credibility of Brandt or his accusers. Because the existence of the lease is entirely inconsequential, it also does not meet the test for newly discovered evidence. *See State v. Brunton*, 203 Wis.2d 195, 200, 552 N.W.2d 452, 455 (Ct. App. 1996).

By the Court.—Judgments and order affirmed.

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

