

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2005

Cornelia G. Clark
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. 2004AP2066-CR

Cir. Ct. No. 2002CF289

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIJAH BROOKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Elijah Brooks appeals a judgment convicting him of repeated sexual assault of the same child, second-degree sexual assault of a child, attempted second-degree sexual assault of a child and possession of a firearm by a felon. He also appeals an order denying his postconviction motion in

which he alleged ineffective assistance of trial counsel due to counsel's failure to move for severance of the firearm charge from the sexual assault charges. The trial court denied the motion, ruling that trial counsel was not ineffective because the court would have denied the motion for severance. Because we conclude that Brooks has established neither deficient performance nor prejudice from counsel's failure to request severance, we affirm the judgment and order.

¶2 To establish ineffective assistance of counsel, Brooks must show both deficient performance and prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's failure to pursue a meritless motion does not constitute deficient performance. See *State v. Cummings*, 199 Wis. 2d 721, 748 n.10, 546 N.W.2d 406 (1996). To establish prejudice, Brooks 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 sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

¶3 The trial court correctly concluded that Brooks' trial counsel was not deficient for failing to move for severance of the weapon's charge because that motion would not have been granted. Two of the three sexual assault victims testified that they delayed telling anyone about the assaults because they were afraid of Brooks because they had seen him with a gun. If the weapons charge had been severed from the other charges, evidence of Brooks' possession of the firearm would have been admitted at the sexual assault trial to explain the delay in reporting the crimes.

¶4 Any possible prejudice to Brooks that was caused by the jury learning he had been previously convicted of a felony was reduced by the parties' stipulation to inform the jury only that he had a prior felony conviction without

informing them of the nature of the conviction. In addition, any prejudice to Brooks that was caused by informing the jury of his prior felony conviction was removed when the court gave a proper cautionary instruction. See *State v. Hoffman*, 106 Wis. 2d 185, 213, 316 N.W.2d 143 (Ct. App. 1982).

¶5 Brooks also failed to show prejudice from his counsel's decision not to request severance. Brooks points to no specific prejudice arising from the failure to sever the charges, particularly in light of the cautionary instruction. Upon our review of the record, our confidence in the outcome is not undermined by the jury's knowledge of Brooks' prior felony conviction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

