COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1508-CR **Cir. Ct. No. 2003CF4783**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEARON DUVALL TRUSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Learon Duvall Truss appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that he received ineffective assistance of trial counsel, and that the circuit court erred when it denied his motion for

postconviction relief without holding a hearing. Because we conclude that Truss did not establish that he received ineffective assistance of counsel, we affirm.

¶2 Truss was convicted in 2004 of fourteen counts that included armed robbery, attempted armed robbery, kidnapping, first-degree sexual assault, and possession of cocaine. He was sentenced to a total of 218 years (163 years of initial confinement, and 55 years of extended supervision). In 2006, he filed a motion for postconviction relief seeking a new trial on the basis that he had received ineffective assistance of trial counsel. The circuit court denied the motion without holding a hearing, and Truss now appeals. Truss once again argues that he received ineffective assistance of trial counsel. He asserts that his trial counsel was ineffective because counsel did not investigate three potential witnesses who would have provided an alibi for Truss and would have rebutted the testimony of one of the sexual assault victims.

¶3 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id***. 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.***

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges

> sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

¶4 Truss alleges that his trial counsel did not investigate or call at trial three potential witnesses: Roderick Buford, Nathaniel Cox, and Cordale Gilmore. He asserts that Buford and Cox would have testified that they had seen Truss with one of the victims of the sexual assault, and that their testimony would have contradicted her testimony that she did not know Truss before he assaulted her. He further asserts that Gilmore's testimony would have provided him with an alibi for the day of the assault of the same victim.

¶5 We agree with the circuit court's conclusion that even if these witnesses had testified, Truss has not established that he was prejudiced by this omission. The evidence of his guilt was overwhelming. His DNA was found on dental floss from the victim's mouth. Sperm and semen that matched his DNA were found on the victim's fleece jacket. The victim alleged that she had been sexually assaulted with a gun. Her DNA was found on a gun, and evidence linked that same gun to Truss. Further, Truss was identified by three victims as the person who attacked them. Cell phones stolen from the victims were used to call Truss's co-defendant. And, Truss confessed to the crimes. Given this evidence,

we conclude that Truss has not established that there is a reasonable probability that the result of the trial would have been different had his trial counsel called these potential witnesses at trial. Our confidence in the outcome of the trial has not been undermined. We also conclude that the circuit court properly decided not to hold a hearing on Truss's motion for postconviction relief. For these reasons, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).