

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 1999

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. 97-1967-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TROY SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

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

PER CURIAM. Troy Sanders appeals from a judgment of conviction for arson and from orders denying his postconviction motions. There are two issues: (1) whether his trial counsel was ineffective; and (2) whether the court erroneously granted the State's motion for a continuance. We affirm.

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *See id.* at 697. 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. *See id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *See id.* We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

We focus on the prejudice element. Sanders argues that his trial counsel was ineffective by not investigating and presenting the testimony of Marilyn White. This case was tried to the court. Sanders argues that White's testimony could have formed a basis for the court to conclude that White committed the crime. After hearing White's testimony at the postconviction hearing, the court branded this theory "preposterous." In light of the fact that the motion was heard by the same judge who tried the case, our confidence in the outcome is not undermined; we conclude that the court would have rejected the "preposterous" theory at trial had it been presented.

Sanders also argues that we should exercise our discretionary authority and reverse the judgment under § 752.35, STATS. He claims that the real controversy was not fully tried because the fact-finder did not hear White's testimony. However, as we discussed above, the fact-finder *did* hear her testimony, albeit at a postconviction hearing. We are satisfied that the controversy was fully tried.

After initial briefing in this appeal was complete, Sanders moved for permission to return to the trial court for a supplemental postconviction motion. We granted the remand, the trial court denied the postconviction motion, and the motion has now been the subject of supplemental briefing. All the additional issues relate to the trial court's granting of the State's motion for a postponement of the trial based on the unavailability of a witness who the State asserted was not competent.

Sanders argues that he had a right to be present at the continuance hearing but was not. However, even if he had such a right, violation of that right is harmless error. *See State v. Peterson*, 220 Wis.2d 474, 487-90, 584 N.W.2d 144, 149-51 (Ct. App. 1998). Sanders has not shown any reason to believe his presence would have affected the outcome of the hearing, or how he was prejudiced by the delay of the trial.

Sanders argues that the trial court should have rejected the State's affidavit about its reason for believing the witness was not competent as hearsay. He also argues that his trial counsel was ineffective by not opposing the alleged hearsay. We reject these arguments. Sanders cites no authority that prevents the court from accepting hearsay for this purpose. Nor does he provide any reason to believe the affidavit was incorrect.

Sanders argues that the court should have denied the continuance motion because insufficient evidence of the witness's unavailability was presented. We conclude the decision to grant the continuance was reasonable.

By the Court.—Judgment and orders affirmed.

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

