**COURT OF APPEALS DECISION DATED AND FILED**

**October 1, 2002**

**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. 01-3155-CR** **Cir. Ct. No. 00-CF-1**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RANDY A. SCHILL,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments 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. Randy Schill appeals judgments convicting him of second-degree sexual assault, kidnapping, and battery, all as a repeat offender. He also appeals an order denying his motion for postconviction relief. He argues that he received ineffective assistance of counsel because his attorney failed to introduce Debra's urinalysis report showing a negative result for Rohypnol, a

"date rape" drug, to dispute the State's theory that Schill drugged Debra. He further argues that he is entitled to a new trial in the interest of justice on the sexual assault and kidnapping charges. We affirm the convictions.

## Facts

¶2 When the victim, Debra, was on her first date with Schill, they went to a comedy club, a bar and a casino. She estimated she had approximately four to five beers during the course of the evening and felt no sign of intoxication. Debra testified that sometime after 2 a.m., while at the casino, Schill left her sight on two occasions and each time returned with coffee. After drinking the coffee, Debra began to experience a severe headache, memory impairment and pain when she attempted to keep her eyes open.

¶3 Debra could not remember leaving the casino, but testified that she remembered "seeing green in front of me and a pack of red Marlboro cigarettes and a green box of Advil. I don't see anything else but just that." She could not remember where she was when she saw these things.

¶4 Debra's next memory was of being cold and in "sheer pain." She looked to see the source of the pain and saw Schill behind her. She saw that they were both naked and she was on her hands and knees; Schill was behind her and the pain was in her buttocks or genital area. Schill was making a back and forth movement with his arms and when Debra attempted to pull away, he grabbed her hips and told her he was not done with her yet.

¶5 Debra testified that "[e]very time I looked at something, it had an aura around it," her head was severely pounding and her body felt like it had been

hit by a truck. She said she "didn't feel like I was really there. Like I couldn't move."

¶6 Debra's next memory was of Schill asleep sitting up on a bed to the right of her in a motel room. Her clothes were scattered on the floor and his were on a chair. She still had a severe headache and saw an aura around things. She woke Schill and he took her to her car.

¶7 When she arrived home, she discovered bite marks on her body and a severe bite on her left breast. She described the injury to her nipple, "It looked like it was almost bitten off. It was all open and bleeding, and it was like drainage coming out. It hurt to have my bra on." She told her sister that she thought she had been raped.

¶8 The following day she went to a hospital where a sexual assault nurse confirmed Debra's reported injuries, including "one reddened area just below the urethra, that would be her left side, that was reddened and abraded." The nurse confirmed the presence of semen on her body. A crime lab scientist identified to a reasonable degree of scientific certainty semen found on hosiery Debra had been wearing that night was Schill's. A urinalysis tested negative for Rohypnol, a "date rape" drug.

¶9 When defense counsel cross-examined Debra, he asked if she knew whether "some foreign substance [was] found in your bloodstream?" The prosecutor objected on hearsay grounds and the court sustained the objection. Next, defense counsel inquired: "Is there anything that has come to your attention to lead you to believe that there was some substance inserted into any drink you had that night?" After the prosecutor's hearsay objection, the court permitted

Debra to answer with respect to her own personal knowledge. She testified: “Then I would have to say no.”

¶10 Schill testified he had been convicted of crimes on seven prior occasions. He insisted that he never procured coffee for Debra but that she obtained her own. He admitted various forms of sexual activity in a motel room but maintained that it was consensual. He testified that Debra did not appear to be incapacitated or unconscious but that she removed all of her clothing except her bra, which he unhooked. He testified that they kissed and engaged in “small talk.”

¶11 On cross-examination, the prosecutor asked Schill several questions related to the State’s theory that Schill drugged Debra. For instance, the prosecutor asked Schill what he had put in Debra’s coffee. Schill denied putting anything in her coffee and testified that she got her own coffee. The prosecutor asked, “Mr. Schill, she didn’t try to get away because you gave her some drugs; isn’t that right?” to which Schill replied, “Wrong.” The prosecutor later asked, “you knew the only way you were going to get sex that night is if you used some kind of substance on that woman; is that true?” Schill answered, “No, it’s not.” Later, on redirect, Schill testified that during questioning, officers alleged that he had drugged Debra and “I told them to take her to the hospital and test for drugs, that I didn’t drug nobody ….”

¶12 Defense counsel presented evidence to the effect that after leaving the casino, the two had visited a convenience store with a green countertop where Debra purchased cigarettes and Advil. The convenience store clerk on duty during the time in question recalled nothing unusual that evening with respect to customer behavior.

¶13 The State's theory was that circumstantial evidence showed Schill put some unknown substance in Debra's coffee, thereby rendering her unconscious. During closing arguments, the prosecutor stated: "We don't know exactly what she was given, something happened to her that caused her to go in and out of consciousness during this incident. That's where the lack of consciousness comes into play in this case." He argued:

> I don't know what kind of drug he put in or what he put in there for sure. He did something to her and that's the circumstantial evidence in this case. Now, again, we don't know the exact effects of this drug, except that it affected her memory. We don't know what kind of drug this was where it creates an amnesia effect or an effect where you can function where you don't have consciousness ….

The prosecutor later argued that Debra's testimony supported the inference that "something's placed in a drink somewhere, either at the bar, at the comedy club, but more likely in the coffee at the casino." He argued further that the case boiled down to a case of credibility.

¶14 Schill's attorney argued at closing that Debra had falsely accused his client because she was hoping to reconcile with her estranged husband and, when she lunched with him two days after her date with Schill, she needed to provide an innocent explanation for the hickeys on her neck.

¶15 Defense counsel emphasized the State's burden of proof beyond a reasonable doubt and argued that the State failed to prove that Schill had drugged Debra as it claimed. He maintained that the evidence indicated consensual sexual

activity and that Debra's attempted reconciliation with her estranged husband was her motive to falsify.[1] He further argued:

> Now, it's [the prosecutor] who tells you that [Schill] must have slipped her something in the coffee. Ladies and gentlemen, there is absolutely no evidence in the record to corroborate it. None. Where is the medical evidence that we've heard from the stand up here, even from the nurse who examined her … as to the question of whether or not there's anything in her bloodstream?
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> There she is in St. Elizabeth's Hospital, as close as she can get to a needle to extract some blood, under the circumstances wherein she's describing the events of the preceding day or two to the nurse and to the doctor, have we heard a thing from the state of the question of whether or not there was a blood draw or whether there was [sic] any results from that blood draw or whether there's anything positive whatsoever to corroborate [the prosecutor]'s notion that, in fact, he slipped her something in the drink? They have a perfect, 24-carat-gold opportunity to obtain some evidence on that question, and the direct and responsive answer to the question, as you well know, it is no.

Counsel pointed out that the detectives, the doctor and the nurses failed to obtain any medical evidence to support the claim that Debra had been drugged. He argued that they "[d]idn't do their job, and therefore, presented [the prosecutor], like it or not, with an absence of evidence …." The jury convicted Schill as charged.

¶16 At the postconviction hearing, an analyst with the state crime lab testified that thirty-nine hours after she drank the coffee, Debra's urine tested negative for one particular drug, "Rohypnol." He stated that eight to seventy-two hours was the very outside range that Rohypnol might be detected after ingestion,

[1] Debra's husband testified at trial that the two had been separated at the time of her date with Schill and were reconciled at the time of trial.

depending on numerous factors, including the amount ingested, the person's size, how hydrated the subject was and the sensitivity of the testing instruments. He further testified that a negative urinalysis did not rule out that Debra had ingested Rohypnol. He explained: "They could have taken a very small amount, and it's conceivable they could be negative by the time that urine was collected." The scientist also explained that Rohypnol was only one possible substance used to facilitate sexual assaults:

> The other main one [is] G.H.B. … gamma hydroxy-butyrate … [t]hat is used or purportedly used for date rape. Ketamine is another one. There's [sic] all kinds of possibilities, other drugs, that could be used to sedate somebody: barbiturates, some of the opiates, even some old chlorohydrate. There's [sic] a lot of possibilities.

¶17 The test used to screen for Rohypnol would not detect many of the other drugs described and many would be detectable for considerably shorter time periods. G.H.B., for example, would be detectable for only about twelve hours. Of the numerous date rape drugs, the scientist believed G.H.B and Ketamine were more available than Rohypnol.

¶18 Schill's attorney testified that he had read the report indicating the absence of Rohypnol in Debra's urine and discussed it with Schill. He explained that he met several times with Schill in the county jail and discussed the defense strategy. Defense counsel had two discussions with Schill on the subject of how to proceed with the laboratory report. Counsel realized that there was no corroborating evidence to support the State's theory that Debra had been drugged.

¶19 Counsel further explained that when the court sustained a hearsay objection to his question of Debra's knowledge of the urinalysis, he decided not to pursue the introduction of the lab report. He testified that his theory of defense

had little or nothing to do with the question whether Debra had been drugged. Counsel testified:

> The theory of the defense was that she was a congenital liar, and she was constructing a story to satisfy the explanation or to provide an explanation for the hickeys that were apparent on her throat … that her husband with whom she was attempting to reconcile had also seen or had been told about by those kids, so the, the thrust of the defense had to do with credibility. It had to do with whether or not the sex was consensual ….

¶20 The court concluded that Schill had not demonstrated ineffective assistance of counsel. It determined that the negative urinalysis was probative only of whether Rohypnol was administered, stating: "It doesn't prove that the victim was not drugged in some other way. It just eliminates one of many perhaps dozens of possibilities." The court concluded that evidence of the lab report would not have changed the result at trial and did not undermine its confidence in the verdict. The trial court denied Schill's postconviction motion.

## Discussion

1. Ineffective Assistance of Counsel

¶21 Schill argues that trial counsel's investigation and representation was inadequate because he failed to educate himself regarding the significance of the negative Rohypnol test and failed to introduce the test into evidence. In order to demonstrate ineffective assistance of counsel, there must be a showing of counsel's deficient performance and prejudice to the defendant. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). To prove deficient performance, a defendant must show specific acts or omissions that were outside the range of professional competence. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant has the burden to overcome a strong presumption that

counsel rendered adequate assistance. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The attorney's strategic decisions are given great deference, and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***Id.***

¶22 To prove prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Harvey***, 139 Wis. 2d 353, 375, 407 N.W.2d 235 (1987). The court need not address both the deficient performance and prejudice components if the defendant cannot make a sufficient showing on one of them. ***Strickland***, 466 U.S. at 697.

¶23 An ineffective assistance of counsel claim is a mixed question of fact and law. ***Pitsch***, 124 Wis.2d at 633-34. We do not reverse the trial court's factual findings unless clearly erroneous. ***Id.*** Whether counsel's conduct was deficient and prejudicial present questions of law that we review independently of the trial court. ***Id.***

¶24 We conclude that defense counsel's strategy was reasonable. With respect to the sexual assault charge, the State was required to show that Schill knew Debra was unconscious when he had sexual contact or sexual intercourse with her.[2] Counsel testified that he took a two-pronged approach. He elected to

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[2] WISCONSIN STAT. § 940.225(2)(d) provides:

> **(2)** SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class BC felony:

(continued)

highlight the weaknesses of the State's case and make a reasonable case that the sexual activity was consensual. When Debra testified that she was unaware of any drug in her bloodstream, defense counsel elected not to call other witnesses to testify to the testing procedures.

¶25 The record supports counsel's decision. The lab tested only for Rohypnol. At the postconviction hearing, the analyst testified that Rohypnol was one of many possible substances and was not the most common "date rape" drug. Other drugs, such as Ketamine and G.H.B., produce similar effects but were not tested. The analyst also pointed out that a negative urinalysis for Rohypnol does not conclusively establish it was not ingested. Numerous factors weigh on the accuracy of the test results, including the amount of the drug, the hydration of the victim, the victim's size, the precise time of administration and the sensitivity of the laboratory equipment. A negative test for Rohypnol fails to demonstrate Debra was not drugged. Under these facts, it was reasonable for defense counsel to focus on the weaknesses of the State's case and Debra's credibility to attempt to demonstrate the consensual nature of the sexual activity.

¶26 Schill maintains, nonetheless, that even if the negative urinalysis was not totally exculpatory, it bore on the issue of Debra's consent and her credibility. We reject the notion that it necessarily demonstrated consent and credibility, because Debra testified that she had no knowledge of any drugs in her system. First, the negative test result would have reinforced the notion that Debra was

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….

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

testifying honestly. Second, any exculpatory inference that may have been derived from a negative urinalysis could have been countered with evidence regarding the numerous other substances that may have been administered, as well as an explanation why Rohypnol may have been ingested but undetected. The State would have been able to establish that thirty-nine hours after ingestion, other potential substances, such as Ketamine and G.H.B., would have been undetectable. Thus, the prosecutor could have undermined defense counsel's suggestion that the State and medical personnel had been careless in their investigation and had not taken every reasonable step to produce evidence in support of its case.

¶27 Instead, after Debra testified that she had no knowledge of any drugs in her system, counsel took a two-pronged approach. He argued that (1) Debra needed to claim unconsciousness to provide an innocent explanation for hickeys on her neck when she met with her estranged husband, and (2) the hospital staff, law enforcement and the prosecution were sloppy and failed to fully investigate and prove the State's case.

¶28 Under the ***Strickland*** test for deficient performance, professionally competent assistance encompasses a "wide range" of behaviors, and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. In order to be constitutionally adequate, counsel need not present the best defense possible. ***State v. Mosley***, 201 Wis. 2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996). Rather, counsel's strategic decision need merely be reasonable. ***See id.*** Because counsel reasonably decided to highlight the weaknesses of the State's case rather than the inconclusive results of one test, Schill's claim of ineffective assistance of counsel must be rejected.

2. New Trial in the Interest of Justice

¶29 Schill contends that he is entitled to a new trial in the interest of justice because the jury did not have the opportunity to consider the evidence of the negative Rohypnol urinalysis that he claims tended to disprove the State's case. He requests a new trial on both the sexual assault and kidnapping charges. He argues that the issue of drugging was persuasive and that the negative drug test bore on this issue. We are unpersuaded.

¶30 Under WIS. STAT. § 752.35, the court of appeals may in its discretion reverse in the interest of justice when it concludes the real controversy has not been fully tried. In determining whether the parties fully tried the real controversy, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Our power of discretionary reversal is exercised only in exceptional cases. ***Id.*** at 11.

¶31 Schill's theory of defense was that Debra had consensual sex with Schill and then lied about it because of her attempts at reconciliation with her estranged husband. Defense counsel emphasized the flaws in the State's proofs and stressed the lack of medical evidence to support the drugging theory. We are satisfied Schill's defense was fully tried. Had defense counsel introduced a negative Rohypnol test, the State would have had the opportunity to convey to the jury the reasonableness of its investigation, thus potentially undermining Schill's defense. We conclude the interest of justice does not require a new trial.

*By the Court.*—Judgments and order affirmed.

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