

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2011

A. John Voelker
Acting 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. 2010AP2708-CR

Cir. Ct. No. 2008CF984

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMIR J. KHAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHHEL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Amir Khan appeals a judgment convicting him of first-degree sexual assault of a child under twelve years old. He also appeals an order denying his postconviction motion without a hearing. He argues: (1) the court erred when it answered questions the jury posed during its deliberations;

(2) his trial attorney was ineffective for agreeing to the court's answer to the first jury question and for not requesting an additional response to the second question; and (3) the court erred by deciding the postconviction motion without a hearing. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Khan was charged with sexually assaulting his stepsister. The victim testified that Khan forced her to perform oral sex on him and he ejaculated in her mouth. He then forced her to have vaginal intercourse. The victim washed after the incident. She reported the incident the next day and was taken to the hospital where she was examined by a SANE (sexual assault nurse examiner) nurse, Erin Stein.

¶3 Stein collected various items of potential evidence from the victim for delivery to the state crime lab. She took the victim's underwear and bra, a maxipad, a pubic hair combing, a vaginal swab/smear, an oral swab/smear, a pubic hair standard, dried secretions and fingernail evidence. A urine test concluded "no sperm seen." The items Stein collected were placed in separate envelopes in the "SANE kit" which was marked exhibit 3. Stein's report was marked exhibit 9. The report indicated that the victim had washed her vaginal area, rinsed her mouth, brushed her teeth and urinated between the time of the assault and the examination. The report described the victim's behaviors during the exam as cooperative, controlled, tense and soft-spoken. Stein found a slight abraded area on the victim's labia majora.

¶4 The crime lab analyst, Denise Jones, performed DNA tests on the items contained in the SANE kit. She indicated that one sperm cell was recovered from the victim's vaginal sphere, but there was insufficient DNA for a

comparison. She also found partial male profiles from the dried secretion swab and fingernails. The dried secretion swab came from the victim's posterior fourchette. Jones' reports, exhibits 6 and 7, indicated that the DNA recovered from Khan's buccal swab was consistent with the DNA recovered from the victim, meaning that Khan could not be excluded as the source of the DNA. However, the sperm cell could have been transferred from a towel and any paternal male relative could have left that strand.

¶5 During deliberations, the jury sent a note to the judge asking three questions:

Can the dried secretion be transferred by towel or does physical contact need to be made?

And was the dried secretion sperm or DNA?

Where was the sperm found??

After consulting with both attorneys, and with the agreement of the defense attorney, the court responded:

The record is closed. You will need to rely on your collective memories and your collective notes to find information regarding all of these questions.

The jury then sent another note:

Can we get the SANE Kit.

Can [we get the] Reports of the results of the kits??

Over defense objection, the court responded:

I am providing you with both Crime Lab results regarding the SANE kit. There is only one kit (not kits).

The jury foreperson informed the bailiff that the lab reports satisfied the jury's request.

DISCUSSION

¶6 Khan contends that the court failed to answer the questions the jury posed in its first note and should have had the testimony read to the jury. That issue was not properly preserved for appeal because Khan's counsel stated:

I think probably the best answer is the parties presented all the evidence they intended to present. You should collectively discuss the evidence that was presented regarding these questions and rely on your collective memory and the notes in that regard.

The court then observed that the testimony indicated where the sperm cell was found, in the vaginal swab. The testimony did not clarify whether the dried secretion was sperm or DNA. The testimony indicated that a sperm cell could be transferred from a towel, but did not specifically answer whether the dried secretion could have. Khan's attorney then responded:

I don't think we want to get into a situation where we're answering specific questions. I know at least one of the three were answered during the trial, or at least partially, but I think the Court is right. We have to tell them to rely on what they have.

¶7 When defense counsel does not object to a claimed circuit court error, the issue is addressed in the framework of ineffective assistance of counsel. *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. To establish ineffective assistance of counsel, Khan must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). He established neither because the answers he now suggests would have been inappropriate.

¶8 The jury asked the court factual questions, in effect either asking to have the evidence reopened or to have the court perform the jury's sifting and winnowing function. See *State v. Toy*, 125 Wis. 2d 218, 222, 371 N.W.2d 386 (Ct. App. 1985). Had the court responded to the jury's first note by reading back witnesses' testimony, it would have suggested that the court wanted the jury to accept the witnesses' testimony. Because the court's response was correct, Khan's trial attorney was not ineffective for failing to object to it.

¶9 Khan's counsel did object to the court's response to the second jury note. Counsel noted that the jury wanted to find out where the sperm was located and had questions about DNA transfer that would not be found in exhibits 6 and 7, the crime lab reports. On appeal, Khan argues that his counsel should have asked the court to send the jury exhibit 9, the SANE nurse report, which indicated that no sperm was seen in the victim's urine. He also argues that exhibits 6 and 7 were too technical for the jury and the court should have had Jones' testimony, particularly the cross-examination, read to the jury.

¶10 The court appropriately denied the jury's request for the SANE kit itself, as there is no legitimate use the jury could make of envelopes containing DNA samples. The alleged significance of exhibit 9 is that it stated "no sperm seen" in the victim's urine. However, as the court noted in its order denying the postconviction motion, nothing in the record suggested that sperm entered the victim's urinary tract or would have been present in her urine. The fact that only

one sperm was recovered and it was found in the victim's vaginal area was contained in exhibits 6 and 7. Whether the lab reports were so technical that they needed to be supplemented with rereading the analyst's testimony is a matter the jury could decide for itself. Because the jury did not request to have testimony read back, it would have been inappropriate for the court to select testimony that it determined would answer the jury's questions. The foreperson confirmed that the jury was satisfied upon receiving exhibits 6 and 7, and the jury never indicated any desire to see exhibit 9, the SANE nurse's report.

¶11 The court properly denied the postconviction motion without a hearing because the record conclusively demonstrates that Khan is not entitled to relief on the grounds asserted in Khan's motion. *State v. Allen*, 2004 WI 106 ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. Because the court correctly responded to the jury's questions and Khan's counsel did not perform deficiently, regardless of whether there was any strategy behind counsel's decisions, a hearing on the postconviction motion was not necessary.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

