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October 25, 2016

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You are hereby notified that the Court has entered the following opinion and order:

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2015AP2340-CR State of Wisconsin v. Romesh Kadlec (L.C. # 2013CF1274)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

Romesh Kadlec appeals a judgment convicting him of second-degree sexual assault of an unconscious victim[1] following a jury trial, and an order denying his motion for postconviction relief. Kadlec argues that trial counsel rendered ineffective assistance of counsel. After reviewing the record and briefs, we conclude at conference that this case is appropriate for

[1] WISCONSIN STAT. § 940.225(2)(d) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

summary disposition. WIS. STAT. RULE 809.21. For the reasons discussed below, we summarily affirm.

At trial, the victim, C.C., testified that she knew Kadlec from work and accompanied him to a motel with the expectation that they would watch a movie and have a drink and dinner. C.C. testified that she had one drink which Kadlec prepared for her and which tasted "horrible." After finishing the drink, C.C. sat on the bed and began watching a movie. C.C. testified that she began to feel dizzy and could not speak. C.C.'s next memory is of waking up face down in disarray on the bed and moaning or crying. C.C. testified that her pants were "low." C.C. got up and went to the bathroom, and testified she could not remember anything after that until she later opened her eyes and heard an angry Kadlec instructing her that they were leaving. C.C. described herself upon awakening on the bathroom floor as "[h]orrible, completely unaware, not exactly aware of what was going on or why I was there." C.C. testified that she did not remember the ride home.

When C.C. awoke at home the next morning, she sent a text message to Kadlec, asking him what had happened the previous evening. Kadlec responded, "'You passed out for about two hours in the bathroom. Did not get anywhere.'" In a subsequent text message, Kadlec responded, "'We only foreplay.'" When C.C. asked Kadlec for the definition of "foreplay," he responded, "'Look it up.'" Kadlec later reiterated in another text message that they "'foreplayed for a bit. Then you went to the bathroom and passed out. We did not do anything.'"

C.C. indicated that upon awakening at home, she was in "horrible pain" throughout her vaginal and anal areas. C.C. testified that the pain continued and that she presented herself for

medical treatment three days later. Medical personnel sent C.C. to the sexual assault treatment center where she underwent a full examination by a sexual assault nurse examiner.

The sexual assault nurse examiner testified at trial that C.C. presented with bruising on her chest and thigh, and an abrasion on her breast. The nurse also noted "healing" abrasions in C.C.'s vaginal area, which the nurse noted were consistent with penetration. The nurse also noted two tears in C.C.'s anal area. Finally, the nurse testified she took swabs of areas that may have been affected by the assault.

A forensic scientist from the Wisconsin State Crime Laboratory testified that the only male DNA she identified from the swabs and materials she received for testing was obtained from the pair of C.C.'s underwear that was forwarded as evidence. There was no male DNA on the vaginal or anal swabs submitted for analysis. The forensic scientist described the male DNA detected in the underwear as "touch DNA," as opposed to DNA from bodily fluids, and that it was a "trace amount." The scientist concluded that the DNA profile she developed from the underwear "is consistent with the profile [she] developed" from Kadlec. On cross-examination, the forensic scientist testified that the male DNA she identified from the underwear could have come from contact with any part of the body, be it a penis or a hand.

Kadlec's theory of the defense, buttressed by the text messages he sent to C.C., was that while he and C.C. engaged in "foreplay," there was no proof of intercourse. With regard to the trace amount of male DNA that was consistent with Kadlec's DNA profile, Kadlec argued to the jury: "[The forensic scientist] acknowledged that this evidence could have very well been left by contact between Mr. Kadlec's hand and [C.C.'s] underwear[.] [T]hat is consistent with foreplay,

not intercourse. The DNA evidence proves exactly what Mr. Kadlec freely acknowledged happened."

Kadlec sought postconviction relief, arguing that trial counsel rendered ineffective assistance in failing to retain a DNA expert to challenge the methods and analysis performed by the State's forensic scientist,[2] and Kadlec requested a hearing. The circuit court denied Kadlec's motion without a hearing.

Whether Kadlec's postconviction motion on its face alleges sufficient facts to entitle him to a hearing is a question of law that we review de novo. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The circuit court is permitted to deny a hearing if key factual allegations are conclusory or if the record conclusively demonstrates that Kadlec is not entitled to relief. ***Id.***, ¶12. Because we conclude that the record conclusively demonstrates that Kadlec is not entitled to relief, we affirm the circuit court's denial of an evidentiary hearing.

Kadlec's ineffective assistance of counsel allegation requires him to demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel's conduct fell "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant's argument falls short with respect to

[2] Kadlec also raised another basis for his challenge that is not before us on appeal.

either deficient performance or prejudice, we need not address the other prong. *See* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of [the ineffective assistance of counsel] inquiry if the defendant does not make a sufficient showing on one.").

Kadlec's ineffective assistance of counsel claim turns on the postconviction expert report of Theodore Kessis, Ph.D., which alleges that the Wisconsin State Crime Laboratory forensic scientist who testified at trial failed to follow "scientifically acceptable practice" when processing Kadlec's DNA reference sample in the "same time and space" as she processed the underwear swab. Kessis opined: "Given the extreme sensitivity of the ... testing procedure, the processing of samples of unknown origins together with samples of know[n] origins can easily lead to a contamination event and false positive result." Kessis concluded that the forensic scientist's conclusion that the DNA she obtained from the underwear was consistent with that of Kadlec was "problematic," and determined that the forensic scientist's detection of the trace amount of male DNA from the underwear sample "is at least as likely to have occurred via a contamination event connected to the manner in which the samples were processed as it is via ... an act of direct contact." Kadlec argues that trial counsel was deficient in having failed to retain

an expert who could have provided Kessis's analysis and conclusions to the jury,[3] and that the absence of this testimony prejudiced Kadlec.

We are confident that the outcome of the trial would not have been different had Kessis or another DNA expert testified that contamination and a false positive may have resulted from the forensic scientist's alleged substandard processing of the DNA samples. The forensic scientist freely acknowledged at trial that the trace DNA she located on the underwear could have resulted from contact with a hand rather than a penis, and offered no testimony whatsoever suggesting that the presence of the DNA in the underwear was indicative of intercourse or penetration. Rather, the forensic scientist's testimony fit neatly with Kadlec's theory of the defense that he engaged in foreplay with C.C., but not intercourse. Kadlec's "foreplay" theory sprang not from the forensic scientist's discovery of male DNA consistent with Kadlec's DNA on C.C.'s underwear, but from Kadlec's own text messages that he sent to C.C. after the assault. Further, Kadlec's argument that the forensic scientist's "unchallenged testimony amounted to scientific proof that Kadlec's body was in direct contact with CC's vagina and/or anus because [the forensic scientist] testified that her findings were consistent with some part of Kadlec's body being in direct contact with the inside material of the crotch-area of CC's underwear" is simply not borne out by the testimony that the scientist offered at trial. In sum, Kadlec fails to show that

[3] Kadlec also suggests that trial counsel was deficient in having failed to challenge the admissibility of the State's DNA evidence on the basis of the forensic scientist's alleged substandard processing methods. It does not appear that Kadlec raised this claim before the circuit court. We decline to consider it for the first time on appeal. ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). Similarly, Kadlec argues for the first time in his reply brief that trial counsel was "unreasonable" in having "acquiesc[ed]" to the statement that Kadlec touched C.C.'s crotch area, and that this acquiescence prejudiced Kadlec. We decline to address this argument. *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (an argument raised for the first time in a reply brief is generally not considered).

he was prejudiced by not having his DNA expert challenge the State's DNA evidence, where that evidence was consistent with his own defense.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and order denying the motion for postconviction relief are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*