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June 28, 2017

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

2016AP1418-CR State of Wisconsin v. Sean Tywan Tatum (L.C. # 2014CF3098)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Sean Tywan Tatum appeals from a judgment of conviction entered after a jury found him guilty of first-degree sexual assault, as a party to the crime, and an order denying his motion for postconviction relief based on the ineffective assistance of counsel. Tatum contends that the reports of the State's expert, a DNA analyst, contained inadmissible hearsay and were erroneously admitted into evidence without objection from counsel. Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the judgment and order.

Tatum was charged with first-degree sexual assault, as a party to the crime, after having engaged in the gang rape of A.J. Tatum was tried jointly with codefendant Xavier Wilkes.

According to the trial testimony, on August 18, 2013, A.J. and her friend C.J. met in Milwaukee and then went to purchase heroin. After doing so, they drove to 26th Street and Greenfield Avenue and parked C.J.'s car. A.J. left in order to earn money by prostitution so that she could purchase more heroin. While C.J. was alone in the car, four men entered her car while another stood outside it. C.J. identified the man who entered the front passenger seat as Wilkes. Wilkes reached for C.J.'s wallet and phone, and when she resisted, Wilkes lifted his shirt to show the handle of what appeared to be a gun.[2] A.J. had left condoms in the backseat of the car. Wilkes took a condom from the backseat, placed it over his penis and told C.J, "you need to do this," but she refused. Although Wilkes and the other men attempted to force C.J. to engage in a sex act, they relented once C.J. said she was a lesbian. After the men forced C.J. to drive to a nearby convenience store where they stole some items, they returned to the same location where C.J. had earlier parked the car at 26th Street and Greenfield Avenue.

Once A.J. returned to the car, Wilkes exited from the front passenger side and asked her if she had made any money. When A.J. replied that she had—she had made forty dollars—Wilkes took it from her. After a brief conversation, Wilkes took A.J. by the arm and walked her

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] It turned out that it was not a real gun, but a BB-type gun.

through an alley to a backyard with a wooden fence. Three of the men followed behind them, with another male staying behind with C.J. Once in the backyard, A.J. was forced to remove her clothing and then have sexual contact and intercourse with several of the men at the same time.

At some point, C.J. was taken to the backyard, and she saw the men sexually assaulting A.J. Once C.J. was returned to the car, she was able to secretly dial 911 from a phone that was left inside her car. A police sergeant responded, and C.J. waved him down, telling him that six men were raping A.J. The men saw the police and started running. As the sergeant went into the alleyway, A.J. came running out, naked from the waist down and trying to pull up her underwear. She was hysterical, saying she had been raped and pointing in the direction where the men had fled.

Officers found three men, one of whom was Wilkes, just a block away from the crime scene, on the porch of a home where none of them lived. Tatum was not found that night. At trial, A.J. said that Tatum looked familiar, that she was "pretty sure," "almost positive" that Tatum was there that night, but she was "not a hundred percent sure." A.J. was also unable to identify Tatum from a photo array. When Wilkes was apprehended, and later searched during booking, the police found a condom on his person and forty dollars.

Back at the crime scene, police found nine condoms and a number of condom wrappers. A police detective swabbed each of the nine condoms inside and out. The condom that was found on Wilkes was the same as those found at the scene. The condoms all had "the same lot number, same package, same brand, same model." A detective contacted the distributor and was told that this lot number was marked "not for sale," meaning that they were given out at a hospital, school, or clinic, and they were distributed on the east coast, possibly New York City or

Washington, D.C. A.J. testified she obtained the condoms found in the car from a needle exchange program.

From one of the condoms that contained sperm, a DNA profile was able to be generated that, when uploaded to the Combined DNA Index System (CODIS), matched that of Tatum. Subsequently, two buccal swabs were taken from Tatum, and his DNA profile again matched the DNA that was contained in sperm that was in one of the condoms.

The report from the DNA analyst who testified that Tatum's DNA was matched to a condom at the scene was entered into evidence without objection.

During deliberations, the jury asked if they could consider all of the information contained in the DNA analyst's report, not just what was contained in her testimony. The parties agreed that the jury could do so.

The jury found Tatum guilty of first-degree sexual assault.[3]

Postconviction, Tatum moved for a new trial, arguing that counsel was ineffective in failing to object to the entry of the report of the DNA analyst, which contained inadmissible hearsay.

[3] The Honorable Timothy G. Dugan presided over the trial and sentenced Tatum.

After a ***Machner***[4] hearing, the circuit court denied Tatum's motion, concluding that the report was properly admitted into evidence and, in any event, any deficiency did not prejudice Tatum.[5]

Under both the Wisconsin and United States Constitutions, in order for a court to find that counsel rendered ineffective assistance, a defendant must show that counsel's performance was deficient and that, as a result of that deficient performance, the defendant was prejudiced. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

Counsel's deficient performance is constitutionally prejudicial if "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." ***Thiel***, 264 Wis. 2d 571, ¶20 (citation omitted). In other words, the prejudice component asks "whether it is 'reasonably likely' the result would have been different." ***Harrington v. Richter***, 562 U.S. 86, 111 (2011) (citation omitted). "The likelihood of a different result must be substantial, not just conceivable." ***Id.*** at 112.

If a defendant fails to meet one prong of the ***Strickland*** test, we need not address the other prong. ***Strickland***, 466 U.S. at 697.

A claim of ineffective assistance of counsel is a mixed question of law and fact. The circuit court's findings of fact will be upheld unless they are clearly erroneous. ***Thiel***, 264

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[5] The Honorable Ellen R. Brostrom denied Tatum's motion for postconviction relief.

Wis. 2d 571, ¶21; ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" ***Thiel***, 264 Wis. 2d 571, ¶21 (citation omitted). The determination of counsel's effectiveness, in contrast, is a question of law, which is reviewed de novo. ***Kimbrough***, 246 Wis. 2d 648, ¶27.

We need not address whether the report of the DNA analyst constituted inadmissible hearsay such that trial counsel was constitutionally deficient in not objecting to its entry into evidence, because Tatum was not so prejudiced by the admission of the report that our confidence in the outcome is undermined. The evidence of Tatum's guilt was overwhelming. It is undisputed that Tatum's DNA was found inside a condom that contained semen. This condom came from the same lot number—one that was not for retail sale—as other condoms also found at the crime scene and the one on Wilkes' person.

Tatum's defense at trial was that either this incident was consensual or, his attorney argued, the condom containing Tatum's DNA was left there prior to the gang rape of A.J. But, those arguments had little force. It is undisputed that the condoms were from the same lot, one of them contained Tatum's DNA, and an unused condom was found on Wilkes' person. A police detective testified that the yard where the condoms were found was not strewn with litter but was otherwise clean—all undisputed evidence refuting Tatum's argument that a used condom with Tatum's DNA may have gotten on the scene at some other time or may have been garbage that traveled.

Further, both A.J. and C.J. testified that Wilkes displayed what appeared to be a gun, and a BB-type gun was found near the rape scene. Both A.J. and C.J. had their money stolen, and

forty dollars was found on Wilkes' person, the same amount A.J. had earned. Before raping A.J., the men had threatened to sexually assault C.J.; they only relented when she said she was a lesbian. C.J. made a frantic call to 911 that was played for the jury. A police sergeant who responded to the scene described A.J. as hysterical, and she immediately told him she had been raped. All of this overwhelmingly showed that the sexual contact that occurred was not consensual, and that the condom containing Tatum's DNA was not the result of some prior sex act involving either A.J. or some other unknown person.

Although there may have been some prejudicial material in the report of the DNA analyst,[6] as Tatum argues, in light of the overwhelming proof that Tatum participated in the rape of A.J. and the weak defense that was available to him, this does not undermine our confidence in the jury's verdict. *See* ***State v. McDowell***, 2004 WI 70, ¶¶64-65, 272 Wis. 2d 488, 681 N.W.2d 500; *see also* ***State v. Jones***, 2010 WI App 133, ¶26, 329 Wis. 2d 498, 791 N.W.2d 390. Even if the report of the DNA analyst had not been entered into evidence, the jury's verdict would have been the same. *See* ***Jones***, 329 Wis. 2d 498, ¶26.

[6] Tatum complains that the expert's report identified more than one sample in which Tatum was a possible source of DNA and that the condoms also contained A.J.'s DNA, whereas the expert's testimony only addressed one sample in which Tatum was the source. This is largely cumulative given that it is undisputed that Tatum's DNA was identified in sperm in one condom. There was no evidence from which to infer that Tatum had sexual contact with someone at some earlier point and left the condom, which ended up surrounded by eight others from the same lot. Any claim that Tatum had sexual contact in the immediate area at some earlier point would be pure speculation. Tatum also claims he was unduly prejudiced because the report revealed he had previously been convicted and had used aliases. But a police detective and the expert testified that Tatum's profile matched one of the condom profiles when the condom profile was uploaded into CODIS. Thus, the jury was presumably aware Tatum had a prior conviction, as DNA collection is associated with criminal convictions. That the jury potentially learned that Tatum used aliases does not undermine our confidence in the verdict given the overwhelming evidence of guilt.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals