OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

January 14, 2020

To:

Hon. Paul J. Lenz
Circuit Court Judge
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire, WI 54703-5496

Hon. Shaughnessy P. Murphy
Circuit Court Judge
721 Oxford Ave.
Eau Claire, WI 54703

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Avenue, Ste. 2220
Eau Claire, WI 54703-5496

Gary King
District Attorney
721 Oxford Ave.
Eau Claire, WI 54703

Melissa M. Petersen
Petersen Law Firm, LLC
P.O. Box 480
Ellsworth, WI 54011

Scott E. Rosenow
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2018AP1512-CR State of Wisconsin v. Kody L.K. Grimm (L. C. No. 2015CF1271)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kody Grimm appeals a judgment of conviction for sexually assaulting an eighteen-year-old woman while she was asleep at her friends' apartment. Grimm also appeals an

order denying him postconviction relief.[1] Grimm argues he is entitled to a new trial because his attorney was ineffective by not calling the victim's two friends who were present in the apartment at the time of the sexual assault to testify at his trial. He also claims he is entitled to a new trial in the interests of justice. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we affirm. *See* WIS. STAT. RULE 809.21 (2017-18).[2]

After swimming with her friends Sierra Thompson and Tyler Olson, the victim in this case was shown a photo of Grimm on Facebook and asked if she wanted to meet him. Olson is Grimm's stepbrother; he is also Thompson's boyfriend. When the victim replied yes, arrangements were made to pick up Grimm at a gas station and take him to Olson and Thompson's apartment in Eau Claire. Upon picking up Grimm, he bragged about being drunk and high. At the apartment, the group watched a movie. Grimm and the victim were on a blanket and mattress on the floor; Olson and Thompson were in a bed about five feet away. The victim fell asleep, but she awoke at about 2:30 a.m. and realized her shirt was pulled up and her shorts and swimsuit were pulled down to her knees.

Thompson brought the victim to Mayo Hospital. While there, Thompson told police that she heard the victim crying in the bathroom. When asked by Thompson what was wrong, the victim stated that she felt like she had "cum" inside her. Thompson also told police that Olson asked Grimm if he had sex with the victim, and Grimm told Olson that he did. Olson then

[1] The Honorable Paul J. Lenz presided over the jury trial and entered the judgment of conviction. The Honorable Shaughnessy P. Murphy entered the order denying the Grimm's postconviction motion.

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

shouted at Grimm to leave the apartment, and Grimm did. The victim underwent a sexual assault examination with a sexual assault nurse, and vaginal and cervical swabs were collected. Grimm voluntarily spoke to a police detective and denied having sex with the victim. After signing a consent form, Grimm also voluntarily allowed police to swab his mouth to collect his DNA. The Wisconsin State Crime Laboratory report indicated Grimm was the source of the male DNA detected from the sperm on the victim's cervical swab.

Grimm was subsequently charged with one count of second-degree sexual assault and one count of third-degree sexual assault. Following a jury trial, Grimm was found guilty of both counts. The circuit court imposed concurrent sentences consisting of six years' initial confinement and seven years' extended supervision on count one, and two years' initial confinement and three years' extended supervision on count two.

Grimm sought postconviction relief, arguing his trial counsel was ineffective by not investigating and calling Olson and Thompson to testify at trial. The circuit court denied the motion, and Grimm moved for reconsideration. Grimm also filed a supplemental postconviction motion, arguing for a new trial in the interests of justice due to the absence of Thompson and Olson at trial. The court held an evidentiary hearing, at which Grimm's trial attorney testified that he normally had an investigator speak to witnesses, but he did not know whether an investigator spoke with Thompson and Olson. Counsel thought that he had tried to do so because this was a felony trial case.

Olson also testified at the postconviction hearing, stating that Grimm and the victim had been cuddling and kissing on the night in question. Thompson testified at the postconviction hearing that Grimm and the victim were sitting together during the movie but were not really

flirting. Thompson also testified that the victim was "laughing, smiling, and making jokes" during the "rape kit" at the hospital, but she acknowledged this testimony conflicted with the sexual assault nurse's recorded observations of the victim's behavior. Thompson also admitted her postconviction hearing testimony conflicted with what she had told police. She testified at the postconviction hearing that she had lied to police to "get [the victim] justice." The court denied the postconviction motion, and Grimm now appeals.

A defendant who asserts ineffective assistance must show that: (1) counsel performed deficiently; and (2) the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Court] expect[s] will often be so, that course should be followed." ***Id.*** at 697. When reviewing ineffective assistance of counsel claims, we uphold the circuit court's factual findings unless they are clearly erroneous, but we independently determine whether counsel was ineffective. ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695.

Here, Grimm's trial counsel did not prejudice the defense by failing to interview and call Thompson and Olson to testify at trial. Grimm's theory of defense was that he never had sex with the victim. However, the DNA evidence showing that sperm present in the swabs taken from the victim was consistent with Grimm's DNA standard, which itself proved that Grimm did have sex with the victim that evening. Olson's and Thompson's respective testimony would not have undermined the DNA evidence.

DNA testing has an unparalleled ability both to exonerate the innocent and to identify the guilty. ***District Attorney's Office for Third Judicial Dist. v. Osborne***, 557 U.S. 52, 55 (2009).

Wisconsin courts have relied upon strong DNA evidence when finding attorneys' errors nonprejudicial under ***Strickland***. *See, e.g.*, ***State v. McDowell***, 2004 WI 70, ¶65, 272 Wis. 2d 488, 681 N.W.2d 500. The State Crime Laboratory analyst told the jury that "the sperm fraction of the vaginal and cervical swabs" were "single source male profiles and they match[ed] Kody Grimm's standard." The analyst explained that "single source" meant: "the profile is less common than one in seven trillion, so that's 1,000 times the population of the Earth. So that is that person."

Grimm fails to develop an argument regarding how or why testimony from Thompson or Olson would have exonerated him despite his one-in-seven-trillion DNA match with the semen found in the victim's vagina. In fact, Grimm does not even mention the DNA evidence in the argument section of his principal appellate brief. Grimm merely asserts that Thompson and Olson could have testified that Grimm and the victim were fully clothed when Thompson and Olson woke up. There are, however, a number of reasons why a jury could likely have reconciled this testimony with the DNA testimony. Namely, the victim may have pulled up her shorts before Thompson and Olson noticed, or the victim may even have been wrong about whether her shorts were pulled down when she woke up. Regardless, any discrepancy in this regard would not have affected the outcome given the DNA evidence confirming the sexual assault.

Grimm also argues that Olson could have told the jury that Grimm and the victim cuddled and kissed each other on the night in question. Grimm does not explain how this evidence would have supported his defense that he never had sex with the victim. Regardless, that testimony would have conflicted with the victim's trial testimony, Grimm's trial testimony, and Grimm's statement to police. Grimm testified at trial that the victim never flirted with him,

kissed him, or hugged him. A detective also testified that Grimm denied kissing the victim or even touching her except to shake her hand when they met. Again, given the DNA evidence, this purported discrepancy would not have affected the outcome of the trial.

Grimm further argues that Olson could have testified at trial that he did not hear any movement or struggle during the time frame of the sexual assault. Again, the DNA evidence proved the assault happened, even if Olson did not awaken. Furthermore, the DNA evidence would not have been undercut by Grimm's contention that Olson and Thompson could have told the jury that the victim did not cry or appear upset after accusing Grimm of raping her. Quite simply, cross-examination of Olson and Thompson would have underscored their prior inconsistent statements to police and the sexual assault nurse that Grimm confessed to having sex with the victim. Grimm also argues the victim changed her story to state that the rape occurred when Thompson and Olson were outside looking for cigarettes in their vehicle, but any alleged discrepancy regarding Olson's and Thompson's location also would not have changed the DNA evidence affirming Grimm's guilt.

For the first time in his reply brief, Grimm suggests that he and the victim had consensual sex. He further contends that had his trial counsel "investigated and found the inconsistencies by the witnesses, he would have been able to present evidence to show that there was not a sexual assault that took place despite the fact there was DNA evidence." We will not address arguments raised for the first time in a reply brief. ***Northwest Wholesale Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Accordingly, we will not further address the issue of consensual sex.

Grimm's ineffective assistance claim thus fails because he has not shown prejudice. Quite simply, the verdict rested largely on the testimony of impartial professionals whose DNA analysis determined there was a less than one-in-seven-trillion probability that the victim had intercourse with someone other than Grimm. When asked by police if there was any reason why his DNA would be in the victim's vagina, Grimm was dumbfounded and said there was no reason. Olson's and Thompson's trial testimony concerning collateral details would not have changed that fact. Indeed, their testimony would have been harmful to the defense, as they told investigators that Grimm had confessed to having sex with the victim, contrary to Grimm's testimony denying that the sex occurred. Because Grimm has failed to prove prejudice, we need not consider whether his trial counsel performed deficiently.

Finally, Grimm is not entitled to a new trial in the interests of justice. The absence of Thompson and Olson at trial did not prevent the real controversy—whether Grimm had sex with the victim—from being fully tried. Given the overwhelming DNA evidence of guilt, justice has not miscarried. *See* WIS. STAT. § 752.35.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals