COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2980-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

IRAN SHUTTLESWORTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Iran Shuttlesworth appeals from a judgment of conviction entered following a jury trial for two counts of kidnapping, contrary to WIS. STAT. § 940.31(1)(b), and four counts of first-degree sexual assault, contrary

to WIS. STAT. § 940.225(1)(b).[1] Shuttlesworth also appeals from the trial court's order denying his postconviction motion without a hearing. On appeal, Shuttlesworth argues that the trial court erred in admitting expert testimony regarding DNA evidence because: "the State failed to comply with the discovery provisions of [WIS. STAT. § 972.11]"; "[§ 972.11], governing case law, and [WIS. STAT. RULE 901.04], bar DNA 'match' evidence without supporting probability statistics"; and "even if [§ 972.11] was not violated, admission of the evidence violated due process." Shuttlesworth also argues that his trial counsel was ineffective for: (1) failing to object to multiplicitous sexual assault charges in counts two and three, as well as counts five and six; (2) allowing counts five and six to be presented to the jury in violation of his right to jury unanimity and verdict specificity; and (3) "failing to present expert testimony and other material showing that the evidence should not be admitted."[2] We reject Shuttlesworth's arguments and affirm.

I. BACKGROUND.

¶2 Shuttlesworth was charged with committing crimes against two young women — B.F. and T.F. Specifically, the criminal complaint alleged that on two different dates Shuttlesworth committed kidnapping, and first-degree sexual assault "by use or threat of use of a dangerous weapon" against B.F. and T.F., respectively. Shuttlesworth pled not guilty. Following substantial delays as the parties awaited the results of DNA analysis, the case proceeded to a jury trial.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

[2] We note that Shuttlesworth confines his challenges to the admission of DNA evidence discovered on the clothes and/or person of T.F. Shuttlesworth does not challenge the admission of similar testimony regarding B.F.

¶3 At trial, B.F. testified that on the night she was assaulted, she was walking home from her boyfriend's house during a blizzard. She stated that because it was snowing heavily, she stopped at a store to call her parents to ask for a ride home. After waiting at the store for her parents for two hours, a man, whom B.F. later identified as Shuttlesworth, driving a black Chevrolet Blazer, stopped and offered her a ride. B.F. testified that after she got into the car, Shuttlesworth parked in an alley, put a gun to her head and pulled a knitted cap over her eyes. He then ordered her to remove her clothes, climb into the back of the car and lie down. B.F. asserted that after she complied with his order, Shuttlesworth climbed into the back of the car and sexually assaulted her. Finally, Shuttlesworth ordered her to turn over and he again sexually assaulted her.

¶4 T.F. testified that on the night she was assaulted, she was waiting for a bus after visiting a friend, when a man driving a black Chevrolet Blazer pulled up and asked her if she wanted a ride. When T.F. declined the offer, the man, whom she later identified as Shuttlesworth, got out of the car, put a gun to her head and told her to get in the car. T.F. got in the car and Shuttlesworth drove to an alley and parked. Holding the gun to her head, Shuttlesworth ordered T.F. to take off her clothes and get in the back of the car. He then covered her face with her shirt and the hood of her coat. T.F. testified that Shuttlesworth ordered her to sexually arouse him and, because he still had the gun pointed at her head, she rubbed his penis with her hand. Finally, she related that once Shuttlesworth became aroused, he sexually assaulted her.

¶5 The State then offered evidence of DNA samples taken from the girls' clothing, and expert testimony that the DNA specimens matched Shuttlesworth's DNA sample. The expert testified that, based on the samples,

Shuttlesworth was the source of the DNA "to a reasonable degree of scientific certainty." A second expert corroborated this testimony.

¶6 Shuttlesworth argued that he had been misidentified. He presented testimony from four alibi witnesses, as well as testimony from a forensic scientist at the Wisconsin State Crime Laboratory that pubic hairs found on T.F. following the assault did not belong to him. Shuttlesworth also offered both B.F.'s and T.F.'s description of the vehicle in which they had been assaulted, arguing that the descriptions did not match his vehicle. Nevertheless, Shuttlesworth was convicted on all counts.

¶7 Shuttlesworth then filed a postconviction motion, arguing that the trial court erred in allowing testimony regarding the DNA evidence found on T.F.'s clothing. In support of his postconviction motion, Shuttlesworth submitted reports from an expert in statistics. The expert claimed that, contrary to the FBI's conclusion, the available evidence did not necessarily uniquely identify a DNA donor. Shuttlesworth also argued that trial counsel was ineffective. The reviewing court, in denying Shuttlesworth's postconviction motion without a hearing, found that: (1) the trial court had not erred in admitting the DNA evidence, but that if an error occurred, it was harmless; and (2) Shuttlesworth's trial counsel was not ineffective.

II. ANALYSIS.

A. DNA evidence.

¶8 It is undisputed that, pursuant to WIS. STAT. § 972.11(5) (1995-96), the State disclosed all DNA evidence to Shuttlesworth on September 12, 1996, over a year before the trial began. The 1996 FBI crime lab report concluded that

Shuttlesworth's DNA matched the DNA specimens taken from the clothing and/or person of both B.F. and T.F. The reports also included probability statistics setting forth the odds of randomly selecting an unrelated individual whose DNA profile matched the DNA from the questioned specimen.

¶9 In June 1997, Shuttlesworth made a second request for discovery of any DNA evidence pursuant to WIS. STAT. § 972.11. Four days prior to trial, on October 9, 1997, the State faxed a supplementary report from the FBI crime lab. The State also notified Shuttlesworth that it would not present probability statistics to support its conclusion that he was the source of the DNA in the T.F. case. Instead, the State relied on the supplementary report's conclusion that, "[Shuttlesworth] is the source of DNA obtained from [the] specimen ... to a reasonable degree of scientific certainty."

¶10 Shuttlesworth filed a motion in limine seeking to exclude the FBI's conclusion and to limit the State to presenting statistical probability evidence. He argued that WIS. STAT. § 972.11 precluded the admission of the DNA evidence contained in the supplementary report because he had been notified of the evidence only four days prior to trial. Furthermore, he asserted that there was no authority for this evidence and the statutory scheme of § 972.11 did not permit its admission. The trial court denied Shuttlesworth's motion and, during trial, the State presented expert testimony that Shuttlesworth was the source of the DNA found in the T.F. investigation "to a reasonable degree of scientific certainty."

¶11 First, in order to determine whether the State complied with the provisions of WIS. STAT. § 972.11, we must engage in statutory construction. Construction of a statute involves a question of law, which we consider *de novo*. ***State v. Dean***, 163 Wis. 2d 503, 510, 471 N.W.2d 310 (Ct. App. 1991). "The

primary source for the construction of a statute is the language of the statute itself." ***Id.*** When the statutory language is clear and unambiguous, we arrive at the intention of the legislature by giving the language its ordinary and accepted meaning. ***Id.***

¶12 WISCONSIN STAT. § 972.11(5) in pertinent part provides:

> (b) In any criminal action or proceeding, the evidence of a deoxyribonucleic acid profile is admissible to prove or disprove the identity of any person if the party seeking to introduce evidence of the profile complies with all of the following:
>
> 1. Notifies the other party in writing by mail at least 45 days before the date set for trial, or at any time if a date has not been set for trial, of the intent to introduce the evidence.
>
> 2. If the other party so requests at least 30 days before the date set for trial, or at any time if a date has not been set for trial, provides the other party within 15 days after receiving the request with all of the following:
>
> a. Duplicates of actual autoradiographs generated.
>
> b. The laboratory protocols and procedures followed.
>
> c. The identification of each probe used.
>
> d. A statement describing the methodology of measuring fragment size and match criteria
>
> e. A statement setting forth the allele frequency and genotype date for the appropriate data base used.

Shuttlesworth contends that the State violated the 15-day notice requirement contained in § 972.11(5)(b)2 because it "had not at the time of trial, and in fact never has, disclosed the protocol and procedures that allowed its expert" to arrive at the conclusion contained in the supplementary report — that he was the source of the DNA sample "to a reasonable degree of scientific certainty." We disagree.

¶13 We are satisfied that the State complied with the discovery requirements contained in WIS. STAT. § 972.11(5). The record indicates that in

1996, over a year prior to trial, the State provided the defense with all the relevant information required by § 972.11(5). In fact, on two separate occasions Shuttlesworth's attorney acknowledged that the State disclosed the information required by the statute.[3] Further, at a pretrial hearing the following exchange occurred:

> THE COURT: It's my understanding that pretrial issues relative to the scientific evidence in this case have all been resolved so we will not have to address any of those issues at the time of trial.
>
> [PROSECUTOR]: Your Honor, the technology used was RFLP and that has been covered by our Statute as being admissible evidence and all of the discovery requirements in that Statute have been complied with.
>
> THE COURT: So we have no issues as to the admissibility of the scientific evidence?
>
> [SHUTTLESWORTH'S ATTORNEY]: We do not.

Although Shuttlesworth argued, unsuccessfully, that the evidence should have been excluded on the grounds of confusion and waste of time, he never alleged that the State failed to disclose the requisite protocol and procedure information within the required time period. Nevertheless, Shuttlesworth argues that the State violated the notice provisions when it faxed the supplementary report to him four days prior to trial. We reject this argument.

¶14 Shuttlesworth has provided no evidence that the information contained in the supplementary report was subject to the requirements of WIS. STAT. § 972.11. As the State correctly asserts:

[3] First, during a pretrial on September 12, 1996, Shuttlesworth's attorney acknowledged that the DNA evidence was available, and that the State had provided everything required under WIS. STAT. § 972.11. Then, at a status conference on October 18, 1996, Shuttlesworth's attorney discussed the DNA testing conducted by the State and indicated that the defense wished to conduct additional testing.

> If, after preparing the initial reports, the FBI had conducted further tests on the DNA evidence, there may have been additional protocols to be disclosed to the defense. Here, however, there is no evidence additional testing was done. Rather, the FBI expert merely broadened his conclusions about the data that had already been gathered.

There is no indication that the FBI relied on any protocols or procedures other than those set forth in the initial reports. Instead, the supplementary report merely reflects a change in FBI policy allowing examiners to assert that an individual is the source of a DNA sample collected and examined as evidence during a criminal investigation. Nothing in § 972.11 required the State to disclose the expert opinions or conclusions contained in the supplementary report. We are satisfied that the supplementary report did not contain any new information subject to the notice requirements of § 972.11 and, therefore, the State did not violate the statute by providing the report to Shuttlesworth four days before trial.

¶15 Next, Shuttlesworth argues that the trial court erred in admitting DNA match evidence without supporting probability statistics. He maintains that WIS. STAT. § 972.11, WIS. STAT. RULE 901.04, and governing case law require the State to submit probability statistics in support of the DNA match evidence. Shuttlesworth concludes that because the State failed to offer the necessary statistical predicate, the DNA match evidence was inadmissible. We disagree.

¶16 There is nothing in either the statutes or the supporting case law that required the State to present statistical probability evidence as a prerequisite to the DNA match evidence. The clear and unambiguous language of WIS. STAT. § 972.11(5) provides that DNA evidence is admissible to establish identity if the party seeking to introduce the DNA evidence complies with the notice and disclosure requirements set forth in § 972.11(5)(b). The statute clearly and

unambiguously sets forth what the proponent of DNA evidence must do for the evidence to be admissible. The statute does not state that a party seeking to introduce DNA evidence must also introduce probability statistics, and we will not construe the statute to require such evidence.

¶17 Shuttlesworth maintains, however, that the instant case is governed by ***State v. Peters***, 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995). Shuttlesworth cites ***Peters*** for the proposition that, in order to assist the jury, DNA evidence requires the presentation of statistical probability evidence. In particular, Shuttlesworth relies on a specific passage from ***Peters*** in which this court asserted:

> [T]he probability evidence was necessary to assist the jury in determining the significance of the match between [defendant's] DNA and the DNA found on the victim. As we previously recognized, the mere fact that a defendant's DNA matches a sample taken from the victim does not establish that the defendant perpetrated the crime. Statistical probability evidence is necessary to determine the likelihood of a coincidental match between the defendant's DNA and the sample taken from the victim's person and clothing.

Id. at 691. Based on this quoted language, Shuttlesworth concludes that, "[u]nder ***Peters***, the evidence ought not to have been admitted absent the necessary statistical predicate." However, Shuttlesworth has misconstrued our analysis and holding in ***Peters***.

¶18 In ***Peters***, this court determined the admissibility of expert testimony regarding probability statistics under Wisconsin law prior to the passage of WIS. STAT. § 972.11(5). In that case, the State presented expert testimony that Peters' DNA matched a sample taken from the victim, and that the likelihood that the sample DNA would match that of a randomly selected individual was 1 in 7.6

million. Peters averred that the trial court erred in admitting the statistical probability evidence because, he claimed, the evidence was unreliable.

¶19 The trial court applied the three-part relevancy test to determine whether the scientific evidence was admissible. ***Id.*** at 687 (citing ***Watson v. State***, 64 Wis. 2d 264, 273, 219 N.W.2d 398 (1974)). Under the three-part test, scientific evidence is admissible if: (1) the evidence is relevant; (2) the witness is qualified as an expert; and (3) the evidence will assist the trier of fact in determining an issue of fact. ***Id.*** at 687-88 (citing ***State v. Walstad***, 119 Wis. 2d 483, 516, 351 N.W.2d 469 (1984)). In discussing part three, this court asserted that "the probability evidence was necessary to assist the jury in determining the significance of the match between Peters' DNA and the DNA found on the victim." ***Id.*** at 691. Because the statistical probability evidence met the three prongs of the relevancy test, this court concluded that the trial court did not erroneously exercise its discretion in admitting the evidence. ***Id.*** at 692.

¶20 Contrary to Shuttlesworth's assertions, this court did not "specifically hold[] that probability evidence is necessary to assist the jury in determining the significance of any match." This court was never asked to consider whether admission of probability statistics is a prerequisite to the admission of evidence that a defendant's DNA matched the sample taken from a victim. Rather, this court was asked whether the trial court erroneously exercised its discretion in admitting the probability statistics in that case. Therefore, we reject Shuttlesworth's argument that, under ***Peters***, the trial court erroneously

admitted evidence that his DNA matched the sample found on the victim without corresponding probability statistics.[4]

B. Ineffective assistance.

¶21 Shuttlesworth argues that trial counsel was ineffective for: (1) failing to object to multiplicitous sexual assault charges; (2) allowing multiplicitous counts to be presented to the jury in violation of his right to jury unanimity and verdict specificity; and (3) "failing to present expert testimony and other material showing that the [DNA match] evidence should not be admitted." We disagree.

¶22 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the ***Strickland*** analysis applies equally to ineffectiveness claims under the state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel, which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, "[t]he 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 we conclude that Shuttlesworth has not proven one

[4] Shuttlesworth also argues that by admitting the DNA evidence, the trial court violated his due process rights. Because we have already determined that the trial court properly admitted the DNA evidence we reject this argument. ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) ("[W]e should decide cases on the narrowest possible grounds and should not reach the constitutional issues if we can dispose of the appeal on other grounds."); *see also* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if this court's decision on one point disposes of the appeal, we need not decide other issues raised).

prong, we need not address the other prong. ***Id.*** at 697. Proof of either the deficiency or the prejudice prong presents a question of law which this court reviews *de novo*. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶23 If a motion alleging ineffective assistance of counsel alleges facts which would entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary ***Machner***[5] hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether a motion alleges facts which, if true, would entitle a defendant to relief, is a question of law which this court reviews *de novo*. ***Id.*** However, it is within the discretion of the trial court to deny a postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts to raise a question of fact, if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.*** at 309-11. Our review of a trial court's decision not to hold a ***Machner*** hearing is limited to determining whether the trial court erroneously exercised its discretion. ***Id.*** at 318.

¶24 First, Shuttlesworth argues that trial counsel was ineffective for failing to object to multiplicitous sexual assault charges. Specifically, Shuttlesworth contends that counts two and three, and counts five and six are multiplicitous. However, his trial counsel failed to object to the charges and, therefore, Shuttlesworth concludes trial counsel was ineffective.

¶25 Charges contained in a criminal complaint are multiplicitous when the defendant is charged with more than one count for a single completed offense. ***State v. Rabe***, 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980). Multiplicitous charges

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

violate the double jeopardy provisions of the State and Federal Constitutions and, therefore, are prohibited. ***Id.*** However, double jeopardy does not prohibit the breaking down of a single course of conduct into component parts, each constituting a separate chargeable offense. ***State v. Kanarowski***, 170 Wis. 2d 504, 510, 489 N.W.2d 660 (Ct. App. 1992).

¶26 In order to determine whether charges are multiplicitous, this court applies a two-part test. ***State v. Grayson***, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992). Under the first part, we must ascertain whether the charged offenses are identical in law and fact. ***Id.*** In this case, "where a course of conduct is alleged to have constituted multiple violations of the same statutory provision, the determinative inquiry is whether each offense requires proof of an additional fact that the other offenses do not." ***State v. Sauceda***, 168 Wis. 2d 486, 493 n.8, 485 N.W.2d 1 (1992). If the offenses are "different" under the first part of the test, we must presume "that the legislature intended to permit cumulative punishments for both offenses." ***Id.*** at 495. Then, under the second prong, we must determine whether legislative intent permits separate prosecutions. ***Grayson***, 172 Wis. 2d at 159. Here, we conclude that the charges were not multiplicitous.

¶27 Although counts two and three and counts five and six are identical in law, they are not identical in fact. The amended information provides, in pertinent part:

> COUNT 02: FIRST DEGREE SEXUAL ASSAULT
>
> On November 27, 1995 . . . [the defendant] did have sexual intercourse (penis to vagina from the front) with B.F. and by use or threat of use of a dangerous weapon, contrary to Wisconsin Statutes section 940.225 (1)(b).
>
> COUNT 03: FIRST DEGREE SEXUAL ASSAULT
>
> On November 27, 1995 . . . [the defendant] by force or threat of imminent force, did have sexual intercourse (penis

> to vagina from behind) with B.F. and by use or threat of use of a dangerous weapon, contrary to Wisconsin Statutes section 940.225 (1)(b).
>
> COUNT 05: FIRST DEGREE SEXUAL ASSAULT
>
> On January 6, 1996 . . . [the defendant] did have sexual contact (contact with the defendant's penis) with T.F. without her consent and by use or threat of use of a dangerous weapon contrary to Wisconsin Statutes section 940.225 (1)(b).
>
> COUNT 06: FIRST DEGREE SEXUAL ASSAULT
>
> On January 6, 1996 . . . [the defendant] did have sexual intercourse (penis to vagina) with T.F. without her consent and by use or threat of use of a dangerous weapon contrary to Wisconsin Statutes section 940.225 (1)(b).

(Underlining in original.) Counts two and three and counts five and six are identical in law because they alleged violations of the same statutory provisions — § 940.225 (1)(b). ***State v. Bergeron***, 162 Wis. 2d 521, 534, 470 N.W.2d 322 (Ct. App. 1991). However, counts two and three and counts five and six are not identical in fact.

¶28 Although counts two and three are legally identical, they are "sufficiently different in fact to demonstrate that a separate crime has been committed." ***State v. Eisch***, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980). To find Shuttlesworth guilty of count two, the jury had to find that he had face-to-face sexual intercourse with B.F. To find Shuttlesworth guilty of count three, the jury had to find that he had sexual intercourse with B.F. from behind. At trial, B.F. testified that after Shuttlesworth abducted her at gunpoint, and ordered her to remove her clothing and get into the back of his Chevrolet Blazer, he inserted his penis into her vagina. She then testified that he told her to roll over and get on her knees. B.F. stated that after she complied with Shuttlesworth's orders, he once again inserted his penis into her vagina, this time from behind. Contrary to

Shuttlesworth's assertions, the record clearly demonstrates that these acts were not part of the same general transaction or episode; they were separated in time and were factually different. ***State v. Hirsch***, 140 Wis. 2d 468, 473, 410 N.W.2d 638 (Ct. App. 1987); *see also* ***State v. Kruzycki***, 192 Wis. 2d 509, 523, 531 N.W.2d 429 (Ct. App. 1995) (defendant had sufficient time to reflect between assaults and again commit himself to his course of action). We conclude that counts two and three are not identical in fact and, therefore, are not multiplicitous.

¶29 Counts five and six are also not identical in fact. To convict Shuttlesworth on count five, the jury had to find that he engaged in unlawful sexual contact with T.F. T.F. testified that after Shuttlesworth abducted her at gunpoint, and told her to remove her clothes and get in the back of his black Blazer, he instructed her to "get him hard." T.F stated that she rubbed Shuttlesworth's penis with her hand. Then she testified that after she rubbed his penis with her hand, he got on top of her and penetrated her vagina with his penis. Thus, proof of count five is established by T.F.'s uncontroverted testimony that she rubbed Shuttlesworth's penis after he ordered her to get him aroused. Proof of count six is established by T.F.'s testimony that after Shuttlesworth became aroused, he inserted his penis into her vagina. We reject Shuttlesworth's argument that "proof of both counts 05 and 06 is accomplished by establishing penis to vagina intercourse" because count six requires proof of an additional fact – penetration – that is not required to prove count five. Therefore, we conclude that counts five and six were not multiplicitous.

¶30 Thus, we are satisfied that counts two and three and counts five and six were not multiplicitous. Therefore, we conclude that the record conclusively demonstrates that Shuttlesworth's trial counsel was not ineffective for failing to raise this challenge before the trial court.

¶31 Next, Shuttlesworth contends that counts five and six violated his rights to jury unanimity and verdict specificity and, therefore, his trial counsel was ineffective for allowing those counts to be presented to the jury. Shuttlesworth avers that nothing in either the information, verdict forms, or jury instructions informed the jury that count five contained different allegations and required proof of different facts than count six. However, we have already determined that the information and T.F.'s trial testimony adequately demonstrated the factual differences between count five and count six. Moreover, as we shall explain, the prosecutor's opening and closing statements, and the trial court's jury instructions considered in conjunction with the information and T.F.'s testimony, ensured jury unanimity and verdict specificity.

¶32 In his opening remarks, the prosecutor asserted that "[T.F.] was forced to hold [Shuttlesworth's] penis ... and there was an act of penis to vagina sexual intercourse." Then in his closing remarks, the prosecutor stated that the sexual contact charge involved "forcing the touch" of Shuttlesworth's penis, while the sexual assault involved "penetration of the vagina." Following the trial, the trial court instructed the jury:

> The term sexual contact which is the type of sexual assault alleged in count five in this case means intentional touching by the victim of an intimate body part of the defendant. In this case it is alleged to be the defendant's penis. If the defendant intentionally caused the victim to do that touching, the touching may be of the intimate body part directly or it may be through the clothing.
>
> The term sexual contact also requires that the defendant caused the victim to touch his intimate body part with the intent that he become sexually aroused or gratified.

The trial court also gave the jury the standard unanimity instruction[6] as well as the directive:

> [D]etermine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the information. Each count charges a separate crime and you must consider each one separately.
>
> Your verdict for the crime charged in one count must not affect your verdict in any other count.

Jurors are presumed to follow instructions. ***State v. Sarinske***, 91 Wis. 2d 14, 29-30, 280 N.W.2d 725 (1979). Thus, we are satisfied that the information, T.F.'s testimony, and the prosecutor's remarks distinguished the charges factually and the jury instructions informed the jury to consider the charges separately. Therefore, this court, like the trial court, is satisfied that "the nature of the offenses charged were different and thoroughly explained to the jurors" and Shuttlesworth's assertions to the contrary constitute conclusory allegations.

¶33 Consequently, we conclude that Shuttlesworth's rights to jury unanimity and verdict specificity were not violated and, therefore, his trial counsel was not ineffective for failing to object to counts five and six on these grounds.

¶34 Finally, Shuttlesworth argues that his trial counsel was ineffective for "failing to present expert testimony and other material showing that the [DNA match] evidence should not be admitted." Because we have already determined that the trial court properly admitted the DNA match evidence, we conclude that trial counsel's failure to present the type of evidence that Shuttlesworth advocates

[6] Specifically, the trial court instructed the jury that "before the jury may return a verdict which may be legally received, such verdict must be reached unanimously. In a criminal case all 12 jurors must agree in order to arrive at a verdict."

was not prejudicial and, therefore, Shuttlesworth's trial counsel was not ineffective.

¶35 For all these reasons, we reject Shuttlesworth's arguments and we affirm his judgment of conviction as well as the order denying his postconviction motion.

By the Court.—Judgment and order affirmed.

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