COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0941-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDY O. BOHARDT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Shawano County: HOWARD W. LATTON, Reserve Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Randy Bohardt appeals a judgment convicting him of three counts: (1) Second-degree sexual assault of a child for which he was sentenced to ten years in prison; (2) second-degree sexual assault by use or threat of force, for which he was sentenced to ten years concurrent to the preceding count; and (3) child enticement for the purpose of sexual contact, to which he was sentenced to eight years consecutive to the two preceding counts. He was also ordered to pay a variety of court costs and allowed seventy-eight days of sentence credit. *See* § 973.155, STATS.

Bohardt's counsel filed a no merit report pursuant to ***Anders v. California,*** 386 U.S. 738 (1967). Bohardt received a copy and filed a response. The no merit report discusses three issues: (1) sufficiency of the evidence; (2) effectiveness of trial counsel; and (3) the trial court's discretionary decision not to release confidential documents concerning the juvenile victim. Bohardt's response contends that appellate counsel is ineffective and has committed a fraud on the court. Based upon our independent review of the record, we conclude that these issues are without arguable merit and that the record reveals no other potential appellate issues. We affirm the conviction.

At the jury trial, the victim testified that the assaults occurred at a wedding reception in June of 1993 when she was thirteen years old. She testified that Bohardt asked her to dance and while dancing he placed his hand on her butt and rubbed it. Later in the evening, he asked her to accompany him outside and she did. When outside, as they walked toward the woods, he kissed her on the mouth. When they stopped, he went down on his knees, took her wrists and forcefully pulled her down, turning her on her back. She testified that she was afraid and that he was holding on to her the whole time so that she could not go back to the building. He pulled his pants down and pulled her pantyhose down past her knees. He touched her vaginal area with his mouth and put his finger in her vagina. He also inserted his penis in her vagina. At that point, Brad Kjell, a friend of the victim's mother, approached and told him to get off of her. The child was taken to the hospital where she was examined and met with law enforcement officials.

Kjell also testified at trial. When he noticed the victim missing from the reception, he went outside looking for her. After Kjell saw people near the woods, he yelled and ran up to them, recognizing Bohardt on top of the victim having sex with her. Bohardt did not get off at first, but did so only after Kjell threatened to stab him with a screwdriver. After about seven seconds, Bohardt rolled off the victim, fastened his pants and walked off. The victim looked scared and was crying.

A forensic scientist from the State Crime Lab testified that grass stains and semen stains mixed with blood were found on the victim's panties. Semen was present on the vaginal and cervical swabs taken from the victim. Also, semen stains were identified on Bohardt's underwear and pants. An agent from the DNA Analysis Unit of the Federal Bureau of Investigation

laboratory testified that the DNA profile of the semen from the victim's vaginal swabs and panty stains matched the DNA profile of Bohardt's blood sample.

An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger,*** 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). On review of jury findings of fact, viewing the evidence most favorably to the state and the conviction, we ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. ***State v. Oimen***, 184 Wis.2d 423, 436, 516 N.W.2d 399, 405 (1994); ***State v. Alles,*** 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982). Based upon our independent review of the record, we conclude that any challenge to the sufficiency of the evidence to support the three charges is without arguable merit.

Next, to establish a violation of the fundamental right to effective assistance of counsel, a defendant must show counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Pitsch,*** 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Here, the record contains no suggestion of prejudicially deficient performance of trial counsel. Bohardt's response attacks appellate counsel's performance; however, the issue of appellate counsel's performance is not properly before us on this direct appeal. *See* ***State v. Knight,*** 168 Wis.2d 509, 512, 484 N.W.2d 540, 541 (1992) (the appropriate procedure is habeas corpus process). Consequently, the record fails to disclose an issue of arguable merit with respect to Bohardt's right to effective assistance of counsel.

Next, the record fails to disclose any issue of arguable merit with respect to the trial court's pretrial ruling denying Bohardt's motion for production for *in camera* inspection of the minor victim's juvenile records. Bohardt brought a motion to compel the State to produce for in camera inspection all records of the Shawano County Department of Health and Social Services relating to the victim. In support of the motion, he alleged that the records might contain prior false charges of sexual assault or untruthfulness of the victim or other material relative to his defense. A defendant must establish more than "the mere possibility" that confidential records may be helpful in order to justify disclosure for an *in camera* inspection. ***State v. Munoz,*** 200

Wis.2d 391, 397-98, 546 N.W.2d 570, 572-73 (1996). Here, the record offers nothing to suggest that the victim's confidential records contain any information that would compromise her credibility. To make a threshold showing, the record must contain something more than mere possibilities. ***Id.*** Because the record here makes no threshold showing, we conclude there is no arguable merit to any appeal based upon the court's pretrial ruling.

Because the record fails to demonstrate any issue of arguable merit with respect to the trial court's exercise of sentencing discretion, or any other potential appellate issue, we relieve attorney Barbara A. Cadwell of further obligation to represent Bohardt in this matter.

By the Court.—Judgment affirmed.