

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2808-CR

Cir. Ct. No. 2009CF50

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. PETRIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Price County: ANN KNOX-BAUER, Judge. *Judgment reversed in part and cause remanded; order affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Christopher Petrie appeals a judgment of conviction for two counts of repeated sexual assault of a child, and an order denying his postconviction motion. Petrie argues there was insufficient evidence

to convict him of count one. He also argues he received ineffective assistance of counsel. The State concedes, and we agree, that there was insufficient evidence to convict as to victim Shandar P. That conviction is therefore reversed and we remand for the court to enter a judgment of acquittal. However, we reject Petrie's ineffective assistance of counsel argument and affirm his conviction as to victim Shawna P.

BACKGROUND

¶2 In August 2009, Petrie was charged with repeatedly sexually assaulting his twin sisters Shandar and Shawna between January 1, 2001 and August 31, 2001. During the first ten days of this period, the girls were eight years old; they were nine during the rest of the period.¹ The State filed an Information in April 2010 containing charges identical to those listed in the complaint.

¶3 At trial, the State presented four witnesses: Shandar, Shawna, brother Eric, and detective Tad Wetterau. There were no defense witnesses. The jury convicted Petrie on both counts, and he moved for postconviction relief. Petrie argued he received ineffective assistance of trial counsel for several reasons. The circuit court denied the motion, and Petrie now appeals.

¹ Petrie is approximately nine and one-half years older than Shandar and Shawna.

DISCUSSION

Sufficiency of the Evidence

¶4 Petrie argues the State presented insufficient evidence that he sexually assaulted Shandar on three separate occasions during the time period identified in the Information. To prevail on this claim, Petrie must show that “the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force 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 (1989).

¶5 At the conclusion of the evidence, the judge instructed the jury that the State “has to show beyond a reasonable doubt that at least three sexual assaults took place within a specified period of time. The specified period of time is from January 1, 2001, through August 31, 2001.” The State concedes it failed to prove this element and that the conviction on count one, pertaining to Shandar, should be reversed.

¶6 The State’s brief sets forth the following evidence relative to the time element. Shandar testified that Petrie started to have sexual contact with her when she and her sister “were ... eight or nine.” The incidents took place at both the family home in Prentice, Wisconsin, and at Petrie’s trailer home. Shandar testified that in 2001 ten or eleven incidents of sexual contact took place between herself and Petrie. She specifically described three of these incidents. Additionally, Shawna testified that she saw Petrie having sexual intercourse with Shandar in a bedroom of the family home in May 2001.

¶7 We agree with Petrie and the State that the foregoing facts are insufficient to prove at least three assaults of Shandar took place between January 1 and August 31, 2001, specifically. We therefore reverse and remand for the court to enter an order of acquittal on count one. *See State v. Ivy*, 119 Wis. 2d 591, 608, 350 N.W.2d 622 (1984) (If the evidence is insufficient, we must order a judgment of acquittal.) (citing *Burks v. United States*, 437 U.S. 1, 18 (1978)).

Ineffective Assistance of Counsel

¶8 Petrie asserts his trial counsel was ineffective for failing to question Shandar's and Shawna's brother Eric about his ten criminal convictions and Shawna about an interview from 2001.² Thus, he requests we reverse his conviction for repeated sexual assault of Shawna.

¶9 Petrie briefly outlines the four trial witnesses' testimony as follows. Eric testified that Petrie sexually assaulted him similar to how Eric saw Petrie sexually assault Shawna and Shandar. Shandar's testimony included no evidence of assaults against Shawna. Wetterau stated Shawna's trial testimony was consistent with what she told him in an interview in 2007. Further, Wetterau testified that Eric told him Shawna and Shandar said Petrie sexually assaulted them. Petrie asserts Shawna's testimony was the most helpful to the State's case, indicating:

She stated she is now 18, and that in 2001 she did not remember all of the details but that she did remember that she told the interviewers the defendant sexually assaulted her[;] in two interviews in 2007 she was never specifically

² Petrie also asserted counsel was ineffective for failing to request that Shandar be sequestered. In light of the State's response, however, Petrie withdrew this argument in his reply brief.

asked about the defendant so she never told them about the defendant at that time[;] and in a third interview in 2007 she did not remember if she said Petrie had sexually assaulted her. Further, she saw Petrie assault Shandar too.

¶10 Aside from setting forth the standard of review, an inadequate recitation of the trial evidence, and a few references to the postconviction hearing, Petrie's ineffective assistance of counsel argument is this:

Considering the circumstances, however, the defendant had ineffective assistance of counsel. Had counsel argued for sequestration, had counsel provided the witnesses with the police reports to refresh their memory, had defense counsel questioned the witnesses differently, the facts presented would have been dramatically different and the outcome of the case would have been different.

¶11 Petrie offers no argument as to why his trial attorney's failure to ask Eric about his prior convictions constituted deficient performance, much less why such failure was prejudicial. We therefore reject the argument as undeveloped. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we may disregard issues that are inadequately briefed).

¶12 Moreover, we agree with the State that, even assuming counsel performed deficiently and that Eric's credibility would have been seriously undermined, there was no prejudice. As explained in the State's brief, Shawna's testimony was convincing, detailed, and internally consistent. She specifically recounted three incidents and further testified that Petrie assaulted her approximately fifty times, with at least thirty occurring between January and August 2001. Additionally, Wetterau stated her testimony was consistent with her statements to him in 2007. Thus, while Eric's testimony was helpful to the State's case, it was not critical. There is no reason to believe the jury would not have found Shawna credible in the absence of Eric's testimony.

¶13 Petrie next suggests that counsel should have questioned Shawna about a 2001 interview report. Petrie asserts: “The 2001 report indicates she told the interviewers she did not hear or see Petrie touch her since she was sleeping, she just believed he did since she awoke to her underwear being at her knees.”³ Petrie explains that, when trial counsel was asked why he did not furnish the witness with the 2001 police report to refresh her memory, counsel responded: “I don’t know what my rationale at that time was. I wouldn’t know what her answer would be. It could be a dangerous thing to ask, but I don’t know why I didn’t ask the question.”

¶14 Petrie fails to provide any argument whatsoever as to why his attorney’s failure to ask about Shawna’s 2001 statement was either deficient or prejudicial. We reject the argument as undeveloped. *See Flynn*, 190 Wis. 2d at 39 n.2. Indeed, Petrie’s ineffective assistance of counsel argument is “so lacking in organization and substance that for us to decide his issues, we would first have to develop them. We cannot serve as both advocate and judge.” *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶15 Petrie does provide argument in his reply brief, citing further facts and asserting the statement in the 2001 report would have critically undermined Shawna’s credibility because the statement referred to every single instance of abuse. Petrie’s argument is too little too late. Raising or developing an argument for the first time in a reply brief impermissibly deprives the respondent of an

³ This assertion of fact is not supported by an accurate citation to the record. Petrie directs us to a trial transcript page containing jury voir dire.

opportunity to respond. Thus, we disregard Petrie's reply argument. *See Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

By the Court.—Judgment reversed in part and cause remanded; order affirmed.

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

