

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 29, 1995

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, 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. 95-0684-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARTH E. COATES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Counsel for Garth E. Coates has filed a no merit report pursuant to RULE 809.32, STATS. Coates filed a response challenging his counsel's analysis of some issues and raising additional issues. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

A jury convicted Coates of thirteen counts of sexual contact with young girls, incest, exposure of his genitals and attempting to intimidate three of the victims from reporting the crimes. The counts involve incidents with two of his daughters and three of their friends, occurring at five different times. Coates was sentenced to a total of 199 years in prison for these offenses.

The no merit report addresses the sufficiency of the evidence, whether trial counsel was ineffective and whether the court properly exercised its sentencing discretion. In his response, Coates argues that the State did not present sufficient credible evidence, that his trial counsel was ineffective and that the police, social workers and prosecutors engaged in misconduct in his case.

The State presented sufficient evidence to convict Coates on each of the counts. Each of the victims testified that Coates touched her in her vaginal area. Two of the victims were Coates' children. One victim testified that Coates "flashed her" on one occasion. Several victims testified that Coates threatened them with physical harm and mutilation if they reported the crimes. This testimony, if believed by the jury, is sufficient to support the verdicts. Noting inconsistencies in the victims' testimony and their prior statements to investigators and at the preliminary hearing, Coates argues that the evidence was not credible. It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *See State v. Toy*, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985).

One of the victims recanted her allegations before trial, but at trial again testified that Coates had sexual contact with her. This evidence was placed before the jury and it chose to believe her trial testimony. Viewing her testimony and the other evidence in the light most favorable to the verdict, we conclude that the jury could reasonably have found guilt beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). Coates argues that this witness' testimony is a total fabrication because she stated that she recanted after visiting her father in jail. The defense introduced evidence of jail records establishing that the recantation occurred the day before she visited her father in jail. The child also testified, however, that Coates' girlfriend told her, prior to the visit with her father, that if she recanted, she could live with her father and his girlfriend in the country and they could raise horses. This information was presented to the jury, and the jury chose to

believe the child's trial testimony. It is the jury's task, not this court's, to sift and winnow the credibility of witnesses. *Toy*, 125 Wis.2d at 222, 371 N.W.2d at 389.

Coates challenges the sufficiency of the evidence as to count thirteen, a sexual assault that occurred in a house that was being remodeled. Coates contends that contrary to the child's testimony, the house was fully furnished with five individuals present at the time the sexual assault allegedly occurred. Evidence establishing that the victim was incorrect on incidental details of the crime does not establish any basis for this court to overturn the jury's verdict. *See, e.g., id* at 221-22, 371 N.W.2d at 388-89.

Coates also argues that the evidence that the child's hymen was intact contradicts the child's testimony. Sexual contact does not require penetration. *See* § 948.01(5), STATS. To the extent that the child's previous statements to the police indicated that penetration had occurred, the jury could have reasonably concluded that the child misperceived what occurred while Coates was fondling her genital area. The jury could reasonably reconcile the contradictions in the evidence and find beyond a reasonable doubt that Coates had sexual contact with the victim. The victim's testimony on the essential elements of the crime charged was not incredible as a matter of law. *See State v. Daniels*, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415-16 (Ct. App. 1983).

Coates' trial counsel was effective in his representation. Coates contends that his counsel had only thirty days to prepare for trial and did not interview or call several important witnesses. To establish ineffective assistance of counsel, Coates must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Our review of the record establishes that Coates' trial counsel adequately cross-examined the witnesses and presented Coates' case. Counsel brought out numerous prior inconsistent statements by the witnesses. Coates was not prejudiced by the short amount of time that counsel had to prepare for trial.

Trial counsel sent a paralegal to interview one of the witnesses. The paralegal prepared a written report summarizing the witness' failure to remember the day in question and concluding that the witness would be of no assistance to the defense. Trial counsel is not ineffective for relying on his

investigator's report that the witness did not remember the day or events in question.

Coates presents an affidavit from his son, Chad, who worked in the garage on the day of the sexual assault alleged in count thirteen. Had he been called, Chad would have testified that he did not see the child go into the house through the garage. Coates has not established that he was prejudiced by his counsel's decision not to call Chad to testify. Chad's proffered testimony would not have established that the child did not go through the garage, but only that Chad did not see her. Chad's testimony, along with that of the other potential defense witnesses, would not have established that the victim's testimony was incorrect on any matter of significance.

Coates argues that his trial counsel was ineffective because he failed to call "vital witnesses" to establish illegal drug use by one of the victims and conspiracy by the victims and their mother to frame him due to the mother's sexual misconduct with a neighbor boy and her purchase of drugs from him. Coates has not established that the details of the mother's alleged sexual misconduct or drug use are relevant to the present charges. His trial counsel explored the possible motives of the victims and their mother for presenting false testimony. Counsel cannot be faulted for failing to call additional witnesses to pursue irrelevant collateral matters.

Coates faults his trial counsel for using a learned treatise for the purpose of showing the suggestibility of a child witness rather than calling a witness to the stand. The use of a learned treatise rather than a live witness is a strategic choice that is virtually unchallengeable on appeal. *See id.* at 690-91 (counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable).

Coates also argues that the State engaged in prosecutorial misconduct, concealing evidence and conspiracy when it pressured the victim who recanted into testifying, failed to present medical evidence establishing that one of the children's hymens was intact, and used false statements and perjured testimony. Each of these arguments is based on factual assertions that represent Coates' biased view of the evidence presented at trial. Our

independent review of the record discloses no misconduct by the State in securing Coates' conviction.

Finally, the trial court reasonably exercised its sentencing discretion. The court specifically considered the gravity of the offenses, Coates' character and the need to protect the public. See *McCleary v. State*, 49 Wis.2d 263, 275-76, 182 N.W.2d 512, 519 (1971). The court specifically considered Coates' long history of sexual assaults and violence, and the danger he posed to the community. The 199-year sentence constitutes a reasonable exercise of the trial court's discretion.

We conclude that there is no arguable merit to any issue raised in the no merit report or the response. Our independent review of the record discloses no other potential issues for appeal. Therefore, we affirm the judgment of conviction and relieve Attorney Brian L. Mares of further representing Coates in this matter. See RULE 809.32(3), STATS.

By the Court. – Judgment affirmed.