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DISTRICT III

April 1, 2014

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

2012AP2805-CRNM State of Wisconsin v. Shane T. Robbins (L. C. #2010CF93)

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

Counsel for Shane Robbins has filed a no-merit report concluding there is no basis to challenge Robbins' convictions arising from the sexual assault of his girlfriend's five-year-old daughter. Robbins has responded and counsel has filed a supplemental no-merit report. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

Robbins' case was tried to a jury after the circuit court granted a motion to sever charges related to the alleged sexual assault of another child. The jury returned guilty verdicts against

Robbins on one count of first-degree sexual assault—sexual intercourse with a child under age twelve; one count of sexual assault—sexual contact with a child under age thirteen; one count of physical abuse of a child—intentionally causing bodily harm; and two counts of exposing genitals to a child. The jury acquitted Robbins of exposing a child to harmful material and operating a motor vehicle without the owner's consent.

The court imposed sentences consisting of twenty-five years' initial confinement and fifteen years' extended supervision on the sexual intercourse count; twenty years' initial confinement and ten years' extended supervision on the sexual contact count, consecutively; three years' initial confinement and three years' extended supervision on the child abuse count, concurrently; and nine months' jail for each of the exposing genitals counts, concurrently.

There is no issue of arguable merit regarding the sufficiency of the evidence. Robbins maintains there was no "definitive DNA" or other physical evidence to support the jury's findings. We review the sufficiency of the evidence in the light most favorable to the jury's findings. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). We may overturn on the basis of insufficiency of the evidence only if the jury could not possibly have drawn the appropriate inferences from the evidence adduced at trial. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Denise Jones from the Wisconsin state crime lab testified that a "[p]artial Y-STR profile was detected from the dried secretion swabs reportedly from the labia minora [of the victim]." Robbins' DNA was identified as a possible source. A sexual assault nurse examiner ("SANE") also testified:

> [S]he had generalized redness, redness in her vaginal area. She had a three-quarter centimeter abrasion, like a linear abrasion, which is like scraping of the top skin off and that was right in-between her labia minora, and her labia majora. She had general redness around the whole vaginal opening. She had, also had approximately one-and-a-half centimeter by a half centimeter abrasion in the midline of the posterior fourchette ….

The SANE nurse further testified the child victim "explicitly" told the nurse what happened:

> [She] had stated that she was, on the afternoon of the 6th, she was in the bedroom with Shane Robbins. [She] disclosed that she was lying on her back on the bed and Shane straddled her and was rubbing his penis against her. [She] was able to show this S.A.N.E. nurse exactly how she was lying, how Shane straddled her and where he rubbed his penis on her.

The SANE nurse also testified the victim reported that Robbins had assaulted her on a prior occasion when the child "[w]as home sick recently."

The victim's mother testified that on April 6, 2010, she went shopping. Her children stayed with Robbins at the residence they shared. The mother returned home and subsequently began drawing a bath for the victim, who was "crying on the toilette shaking." When her mother asked what was wrong, the child responded, "My pee'er hurts." Her mother examined her and observed the vaginal area was "very red." The victim subsequently indicated, "Shane did it, Shane did it." When the victim's mother confronted Robbins, he initially stated, "I didn't do anything, I didn't do anything." Eventually, Robbins admitted, "She was lying next to me and her butt was up against me and I got aroused. What do you want me to say?" Robbins also stated, "It's not like I penetrated her. I just rubbed her a little bit." The mother testified Robbins then asked her to forgive him and give him another chance.

Deputy Sheriff Ron Ripley testified he was on general patrol duty that night and received a call from dispatch regarding a request to locate Robbins regarding an alleged sexual assault. Robbins was located at his father's residence. Ripley testified that Robbins stated, "I'm not running from the law I was gonna wait it out till morning and check myself into detox."

Robbins' father testified that when Robbins arrived at his home, Robbins "said he did something bad." His father also testified:

> [H]e said some girl came up on the couch and he was drunk and she starting rubbing on his crotch area with her butt or whatever it was, and supposedly he ejaculated or something and he felt bad and ran away.

The victim testified she was in the second grade at the time of the assaults. She testified Robbins "put his weiner in my private." She testified her mother was at the store during the sexual assault on the couch. She testified to another assault when she was in her mother's bed. She also stated her "private was hurting while he was touching [her] with his private" after the second time.

The response to the no-merit report emphasizes inconsistencies in the trial testimony by the child victim and other witnesses. However, the jury was entitled to accept the evidence indicating guilt. The weight to be given evidence and witness credibility is within the sole province of the jury. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). There is no arguable challenge to the sufficiency of the evidence supporting the jury verdicts.

Counsel represents in the no-merit report that Robbins also claims he was not able to adequately view the victim during her trial testimony. However Robbins' contention is belied by the record. Robbins failed to inform the court or his trial attorney that he was not able to

adequately view the victim witness.[1] Therefore, this argument was forfeited and will not be further addressed.

The response to the no-merit report also addresses alleged juror bias. Robbins suggests one potential juror should have been stricken for cause because she “has been or knows someone that’s been assaulted.” However, the potential juror stated her experience would not “cause [her] any difficulty listening to this kind of a case and being fair to both sides.”

Robbins insists another potential juror “tells [the] judge he doesn’t think he can be fair.” This is a mischaracterization of the record. Although this potential juror initially equivocated on whether he could be unbiased in his opinion, the juror stated “yes” when asked if he would be able to listen to the evidence. When then asked if he could be fair, he replied, “I can sure try.” The circuit court is in a much better position than this court to determine if a potential juror’s response is sincere. The court determined the juror could be fair and that finding is not clearly erroneous. *See* ***State v. Oswald***, 2000 WI App 2, ¶21, 232 Wis. 2d 62, 606 N.W.2d 207.

There is also no issue of arguable merit regarding the court’s sentencing discretion. The court considered the proper statutory factors, including Robbins’ character, the seriousness of the offenses and the need to protect the public. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The court emphasized the loathsome nature of the crime and Robbins’ prior criminal history. The court imposed a sentence authorized by law and therefore presumptively

[1] The no-merit report represents that Robbins did not inform the court or trial counsel that he could not view the child witness testify. Robbins responded to the no-merit report but failed to refute this representation, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

We also agree with counsel's analysis regarding assistance of counsel. Trial counsel's strategic decisions were reasonable, and our independent review of the record discloses no arguable merit to any issue regarding ineffective assistance of counsel.

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Andrew Morgan is relieved of further representing Robbins in this matter.

Diane M. Fremgen
Clerk of Court of Appeals