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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

August 12, 2014

To:

Hon. John Zakowski
Circuit Court Judge
Brown County Courthouse
100 S. Jefferson St., P. O. Box 23600
Green Bay, WI 54305-3600

Jason B. Beck
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

Donna L. Hintze
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Xavier Freytes-Torres 541847
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2012AP2597-CRNM State of Wisconsin v. Xavier Freytes-Torres (L. C. #2011CF319)

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

Counsel for Xavier Freytes-Torres has filed a no-merit report concluding there is no basis to challenge convictions for felony intimidation of a victim and first-degree sexual assault of a child under age sixteen by use or threat of force or violence. Freytes-Torres has responded. 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.

Freytes-Torres was a friend of the victim's mother. In January 2011, while her mother and her mother's boyfriend were in a bedroom at the boyfriend's residence, Freytes-Torres and the victim were in the living room watching a movie on the sofa. Freytes-Torres allegedly touched the victim's breasts and vagina under her clothes, and then pulled down her pants and had penis to vagina intercourse while he lay on top of her holding her down. The victim testified Freytes-Torres told her if she "snitched or anything" he would do something to her, which she interpreted as meaning he would kill her. This occurred when the victim was twelve years old. She testified she did not tell her mother because she was scared.

A second assault allegedly occurred at the victim's family's apartment when she was home alone with her younger sister, who was asleep in her mother's bedroom. The victim was on the computer chatting with a friend and listening to music when Freytes-Torres came into the apartment unannounced and without permission. He started talking to the victim and then grabbed her and pulled her into another room where he touched her and then had her lie on a bed where he removed her pants and had penis to vagina intercourse with her. As he did so, he held the victim's hands above her head. When the victim tried to scream for her sister, he covered her mouth. The victim stated Freytes-Torres stopped and left immediately when the phone rang and he could see from the caller identification that it was her mother.

A third alleged incident occurred when Freytes-Torres once again entered the apartment without permission. The victim said he touched her with his hands but she could not remember the specific places. She also thought he had sexual intercourse with her on the couch.

Two to three weeks after the third incident, the victim told her mother and then a social worker at school, who contacted police. Police subsequently seized the comforter from the bed

where the victim said the intercourse occurred and obtained buccal swabs from the victim and Freytes-Torres. The comforter and buccal swabs were submitted to the crime lab and eight stains were located on each side of the comforter. Each stain was initially tested with a presumptive test for semen. All but one was negative. A cutting was taken from the stain that tested positive and DNA was consistent with both the victim and Freytes-Torres. Freytes-Torres was identified as the contributor to the single-source semen portion of the stain.

Freytes-Torres testified in his own defense. He denied having any type of sexual relations with the victim. He admitted the semen found on the comforter was his, but claimed it came from wiping his penis on the comforter after masturbating when recalling a moment when he saw the victim naked while changing clothes. He also claimed the victim had several motives for falsifying her testimony.

The jury found Freytes-Torres guilty of felony intimidation of a victim, and first-degree sexual assault of a child under age sixteen, by use or threat of force or violence, which occurred during the second incident at the family apartment. He was acquitted of the sexual assaults alleged in the first and third incidents, as well as two charges of burglary with intent to commit a sexual assault.

There is no arguable issue regarding sufficiency of the evidence. We review the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). The jury was properly instructed regarding the elements of the offenses.

The amended Information alleged the intimidation of the victim occurred in early January 2011, the same date on which the first sexual assault was alleged to have occurred. Thus, the

predicate offense was the sexual assault alleged in count one of the amended Information. In addition to the predicate offense, the intimidation charge required sufficient evidence that Freytes-Torres attempted to dissuade the victim from reporting the crime to a law enforcement agency, and that he acted knowingly and maliciously. Additionally, if the evidence was sufficient for a jury to convict on these elements, the verdict also included a question whether Freytes-Torres's act was accompanied by any express or implied threat of force, violence, injury or damage.

The first alleged sexual assault was alleged to have occurred at the victim's mother's boyfriend's residence. The victim was twelve years old at the time of the offense. She testified Freytes-Torres pulled down her pants and put his penis into her vagina as he lay on top of her holding her down. He told her if she told anyone, he would do something to her. Although Freytes-Torres contended the victim should not have been believed, 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). Sufficient evidence through the victim's testimony also supported the allegation that Freytes-Torres acted knowingly and maliciously by preventing her from reporting the assault, as well as the separate verdict question whether Freytes-Torres' actions were accompanied by any express or implied threat of force or violence.

The jury's acquittal of sexual assault as alleged in count one of the amended Information does not undermine the sufficiency of the evidence to convict Freytes-Torres of intimidation. *See* ***State v. Rice***, 2008 WI App 10, ¶¶26-27, 307 Wis. 2d 335, 743 N.W.2d 517. In that case, we relied on ***United States v. Powell***, 469 U.S. 57, 65 (1984), where a jury acquitted the defendant on drug conspiracy and possession counts, but found the defendant guilty of compound offenses involving the use of a telephone in committing and facilitating the alleged conspiracy and

possession. ***Id.*** at 59-60. The Supreme Court stated that because inconsistent verdicts may be the result of juror mistake or lenity, and because the government cannot appeal an acquittal, "the best course to take is simply to insulate jury verdicts from review on this ground." *See* ***id.*** at 69. A review for sufficiency of the evidence is performed independent of the jury's determination that evidence on another count is insufficient. ***Id.*** at 67. Therefore, as we stated in ***Rice***, "the only question is whether there was sufficient evidence on which a jury could find all the elements of the [predicate offense]." ***Rice***, 307 Wis. 2d 335, ¶27. Here, there was sufficient evidence on which a jury could find all the elements of the predicate sexual assault.

The evidence was also sufficient to support the conviction for first-degree sexual assault of a child under age sixteen by use or threat of force or violence. The victim testified Freytes-Torres had sexual intercourse with her in the family's apartment while holding her hands above her head. It is undisputed she was under the age of sixteen, and Freytes-Torres's semen was found on the comforter taken from the bed on which the victim said the assault took place. The jury was entitled to reject Freytes-Torres's masturbation story.

There is also no issue regarding whether the jury should have been instructed on a lesser included offense that did not include an element of use or threat of force or violence. Defense counsel indicated the defense did not want the instruction, as it was inconsistent with the theory that Freytes-Torres did not have sex with the victim at all. The circuit court asked Freytes-Torres directly about his understanding of this issue and he confirmed his decision was not to have the jury instructed on the lesser included offense "because I did not do it, neither with force nor without." Accordingly, Freytes-Torres forfeited this issue.

There is also no basis to challenge the court's sentencing discretion. The court considered Freytes-Torres's character, the seriousness of the offenses and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court characterized Freytes-Torres as a predator. The court considered his prior record and observed the current offense appeared to be an escalation of his previous conduct in which he hit his live-in girlfriend, the mother of his daughters, and threatened another woman he was dating with a knife. He then threatened each that if they said anything he would turn them in to the INS for deportation. The court imposed the mandatory minimum of twenty-five years' initial confinement and fifteen years' extended supervision on the sexual assault charge, and a concurrent sentence of three years' initial confinement and three years' extended supervision on the intimidation charge, which was allowable by law and neither harsh nor excessive.

Freytes-Torres insists the prosecutor improperly expressed personal beliefs in his closing argument regarding the truth or falsity of Freytes-Torres' testimony, and also improperly commented on facts not in evidence. However, the jury was properly instructed that: remarks of counsel are not evidence; if counsel's remarks suggested certain facts not in evidence, the jury must disregard the suggestion; and closing arguments are not evidence, and the prosecutor's remarks or conduct should not impact its judgment.

Freytes-Torres also argues trial counsel was ineffective for failing to have an independent expert review the crime lab's DNA results, failing to perform an independent test of the DNA found on the comforter, and failing to have a DNA expert testify at trial.

It is speculative to contend that "independent tests would have potentially provided the source of the DNA." More importantly, however, Freytes-Torres admitted at trial that his sperm

was on the comforter, as he masturbated after seeing the victim naked and when he finished, he wiped off his penis on the comforter. Freytes-Torres will not be heard to admit under oath at trial that his DNA was on the comforter, and then complain on appeal that his trial counsel did not challenge the DNA evidence.

Freytes-Torres also alleges ineffective assistance for failing to object to the jury instruction on use or threat of force. He claims in conclusory fashion that the instruction creates an impermissible mandatory presumption, which "has the effect of relieving the prosecution of the burden of proof on an element of a charged crime ...." There is no indication the trial court's jury instructions required a finding of use or threat of force or violence or that the jury construed them as such. Freytes-Torres also complains his trial counsel "failed to object to the prosecutor with respect to the exact dates that this alleged crime was committed …." Failure to prove the specific date of a sexual assault of a child is not fatal to the State's case. *See, e.g.*, ***Thomas v. State***, 92 Wis. 2d 372, 386, 284 N.W.2d 917 (1979). It was sufficient that the evidence showed beyond a reasonable doubt that the offense was committed during the time period alleged in the amended Information.

Freytes-Torres also alleges generally that trial counsel was unprepared at trial, which was "part of a larger pattern of inadequate pretrial preparation." Our independent review of the record fails to demonstrate ineffective representation. Freytes-Torres was afforded a fair trial.

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

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

IT IS FURTHER ORDERED that attorney Donna Hintze is relieved of further representing Freytes-Torres in this matter.

Diane M. Fremgen
Clerk of Court of Appeals