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DISTRICT II

September 3, 2014

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

2014AP184-CRNM State of Wisconsin v. Miguel A. Dejesus (L.C. #2011CF136)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Miguel A. Dejesus appeals from a judgment convicting him of first-degree sexual assault/sexual contact of a child under thirteen in violation of WIS. STAT. § 948.02(1)(e) (2011-12).[1] Dejesus's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Dejesus exercised his right to file a response, counsel filed a supplemental no-merit report, and Dejesus filed a second response. Upon consideration of the no-merit report, the responses, the supplemental report, and our independent

review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there are no issues which would have arguable merit for appeal. We summarily affirm the judgment, *see* WIS. STAT. RULE 809.21, accept the no-merit report, and relieve Attorney Roberta A. Heckes of further representing Dejesus in this matter.

Dejesus's eight-year-old step-granddaughter, L.M.R., accused him of having sexual contact with her. Dejesus insisted he was innocent. He claimed L.M.R. was coached by her mother, Laisa, who fabricated the charge when she learned he was going to report her and her boyfriend for verbally and physically abusing L.M.R. A jury found Dejesus guilty. The court sentenced Dejesus to five years' initial confinement plus ten years' extended supervision. This no-merit appeal followed.

We first address whether there is arguable merit to a claim that the evidence was insufficient to support the verdict. The conviction will be sustained unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The jury decides credibility issues, weighs the evidence, and resolves conflicts in the testimony. ***State v. Gomez***, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993).

The State had to prove that Dejesus had sexual contact with L.M.R., that she was under thirteen years old, that the contact was intentional, and that it was done with the intent that he become sexually aroused or gratified. *See* WIS JI—CRIMINAL 2102E and 2101A (2008). Laisa

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

testified that, because she is legally blind, Dejesus drove her on errands and watched her girls, then ages eight and four, while she shopped; that she told L.M.R. and her sister to stay in the back seat of his car while they waited because L.M.R. had told her that Dejesus would "bother" her; that on this occasion he drove them to Aldi's and when she came out of the store, the girls were outside the car and L.M.R. looked "scared"; and that L.M.R. later told her that Dejesus had touched her "between her legs."

L.M.R. was ten years old at the time of trial. According to L.M.R.'s videotaped interview with a social worker and courtroom testimony, Dejesus told her to get in the front seat, that she was his girlfriend, and that he loved her; kissed her legs, feet, and ears, rubbed her vagina underneath her clothes with his fingers, smelled them, and said, "Ah, that smells good;" and tried to make her put her hand on his "d-i-c-k" over his clothes. She described the encounter as "nasty" and "disgusting" and got out of the car. L.M.R. told the social worker the assault happened in a Goodwill store parking lot but testified at trial that it was at Aldi's.

Dejesus denied ever touching L.M.R. inappropriately. He asserts that the evidence cannot have been sufficient to convict him. A paraplegic, Dejesus testified that he has a urinary catheter and has "never had any sexual arousal of any kind" since becoming paralyzed in 1981 and thus could not have acted with the intent of becoming sexually aroused or gratified.

The jury was instructed that "[i]nten[t] must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent." Like other forms of intent, intent to become sexually aroused or gratified may be inferred from the defendant's conduct. ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987). If the jury believed L.M.R.'s testimony about Dejesus's actions, it reasonably

may have inferred that sexual arousal or gratification is not limited to a physical response. If more than one reasonable inference can be drawn from the credible evidence, we must accept the reasonable inference the trier of fact drew. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

The no-merit report also considers whether an arguable issue exists in regard to the exercise of sentencing discretion and whether the sentence is excessive. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court fully addressed the sentencing objectives of the protection of the public, punishment and rehabilitation of the defendant, and deterrence, ***id.***, ¶40, and the primary sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). It gave the greatest weight to Dejesus's prior criminal record, because he committed felonies even though confined to a wheelchair but did not pursue employment, and the underlying circumstances of the assault against a child who trusted him. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). The court provided a "rational and explainable basis" for the sentence it imposed, satisfying this court that discretion in fact was exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76 (citation omitted). Dejesus's fifteen-year sentence for that crime, with two-thirds of it on extended supervision and when measured against his sixty-year exposure, cannot be said to be so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The sentence represents a proper exercise of discretion.

Dejesus disagrees. He asserts that he improperly was given a harsher sentence because he maintained his innocence. *See* ***Scales v. State***, 64 Wis. 2d 485, 496-97, 219 N.W.2d 286

(1974) (lack of remorse cannot be sole sentencing consideration). The court did comment that rehabilitation did not look promising due to Dejesus's "refus[al] to accept the fact that [he] really ha[s] been convicted of this." But it also examined a panoply of factors and comprehensively explained its rationale. Our review of the sentencing transcript satisfies us that there is no arguable merit to a claim that the court penalized him solely for standing firm.

We also conclude that no meritorious issue could come from a challenge to the denial of Dejesus's pro se postconviction motion to vacate the DNA surcharge on the basis that he provided a sample in 2003 while incarcerated and "satisfied all of the requirements of the DNA surcharge." If a court imposes a sentence for a violation of WIS. STAT. § 948.02(1), it "shall impose" a $250 DNA surcharge. WIS. STAT. § 973.046(1r). The statute makes no exception for persons who already have provided a sample or paid a surcharge.

The report next addresses whether there would be arguable merit to a claim that the verdict was tainted. We agree there would not be. A juror contacted the court postverdict to express her concerns about the verdict. With both counsel present, the court interviewed her. A post-trial viewing of the Aldi and Goodwill parking lots made her doubt some of L.M.R.'s testimony because they did not match the girl's descriptions. She said she believed L.M.R. had been sexually assaulted but was unsure that Dejesus was the perpetrator; that she felt uncomfortable voicing her opinion during deliberations, as she had served the prior week with several of the same jurors and one in particular still was "quite angry" with her; that she voted to convict Dejesus because she felt "kind of badgered" into it by looks from and the body language of other jurors; and that another juror also was unconvinced of Dejesus's guilt but voted to convict him because the juror did not like his demeanor. The woman expressly denied being

threatened and said even "badgered" was too harsh a word. She said she did not think she could mention her qualms when polled.

Nothing could come of this juror's post hoc remorse and the peek into the jury's deliberations. Jurors may not testify regarding their mental processes in deliberations. WIS. STAT. § 906.06(2). They "are required to deliberate in secret, and are not permitted to impeach their own verdict by disclosing the methods employed in reaching it." ***Suhaysik v. Milwaukee Cheese Co.***, 132 Wis. 2d 289, 301, 392 N.W.2d 98 (Ct. App. 1986). "The purpose of jury polling is to test the uncoerced unanimity of the verdict by requiring jurors to take individual responsibility and state publicly that they agree with the announced result." ***State v. Raye***, 2005 WI 68, ¶18, 281 Wis. 2d 339, 697 N.W.2d 407. "[T]he validity of a unanimous verdict is not dependent on what jurors agree to in the jury room, but rather upon what is unanimously reported in open court." ***Id.***, ¶19 (citation omitted). Dejesus's claim that trial counsel was ineffective for failing to seek dismissal of the case on grounds of a tainted verdict thus would fail. Not pursuing a meritless motion or argument does not constitute deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. For the same reason, postconviction counsel was not ineffective for failing to allege below the ineffectiveness of trial counsel on these points.[2]

Dejesus's claim that trial counsel was ineffective for failing to object to Laisa's testimony as opinion evidence and hearsay also would fail. Laisa's testimony as to what L.M.R. told her

[2] Ineffective assistance of trial or postconviction counsel claims first must be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); ***State v. Starks***, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146.

Dejesus did, why she told L.M.R. to sit in the back seat, and that L.M.R. was outside the car and looked "scared" was not, as Dejesus, contends, impermissible opinion evidence on L.M.R.'s truthfulness. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). They were factual statements that corroborated L.M.R.'s testimony. As to hearsay, trial counsel did object. At least once, the State explained that it elicited what L.M.R. said to explain why Laisa called the police, not for the truth of the matter. That is not hearsay. *See* WIS. STAT. § 908.01(3).

Dejesus next contends the trial court also should have instructed the jury on second-degree sexual assault of a child. First-degree, a Class B felony with a maximum penalty of sixty years' imprisonment, requires proof that the child is less than thirteen years old. WIS. STAT. §§ 948.02(1)(e), 939.50(3)(b). Second-degree, a Class C felony with a maximum penalty of forty years' imprisonment and/or a $100,000 fine, requires proof that the child is less than sixteen years old. Secs. 948.02(2), 939.50(3)(c). As is relevant here, both require proof that the contact was for the purpose of sexual arousal or gratification. WIS. STAT. § 948.01(5)(a); WIS JI—CRIMINAL 2102E, 2105, 2101A. The statutes are the same, except for the penalty and the child's age. No reasonable view of the evidence casts reasonable doubt on the first-degree charge and supports a guilty verdict only on second-degree sexual assault. *See* ***State v. Muentner***, 138 Wis. 2d 374, 385, 406 N.W.2d 415 (1987). Dejesus's fifteen-year sentence is well below even that for second-class sexual assault. His argument has no arguable merit.

Dejesus challenges jurisdiction. The assault was alleged to have occurred at an Aldi's in the part of Appleton that lies in Calumet county. Dejesus contends that a more thorough investigation by trial counsel and police would have shown that L.M.R.'s description of the

parking lot did not match that Aldi's parking lot, so he should not have been tried in Calumet county.[3] The complaint alleged that the assault occurred in Calumet county. The evidence showed that L.M.R. had complained about Dejesus touching her in the past and that Dejesus also drove Laisa to shop at a Wal-Mart and Goodwill near Aldi's, also in Calumet county. L.M.R. told the social worker the assault happened at Goodwill. Laisa did not report the Aldi assault for a few weeks. Given the passage of time and being in the car with Dejesus at different stores, L.M.R. could have confused the parking lots or have been thinking of an earlier incident. There is no arguable issue regarding subject matter jurisdiction.

Finally, Dejesus requests that we order new counsel appointed because current counsel is prejudiced against him as shown by her refusal to file a merit appeal. We decline. We have examined Dejesus's issues and carefully reviewed the entire record. We agree with counsel that there exist no issues of arguable merit. Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Roberta A. Heckes is relieved from further representing Dejesus in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Dejesus's real issue seems to be with the limited pool of eligible jurors in small Calumet county. Several of the jurors on his panel recently had served together on another case which, apparently, led to tension between the remorseful juror and another. At voir dire, however, all jurors said they could be fair and impartial. The makeup of the jury did not deny him due process or a fair trial.