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November 10, 2015

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

2014AP720-CRNM State v. Davius Zartay Conrod (L. C. No. 2012CF6104)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Davius Conrod has filed a no-merit report concluding there is no basis to challenge Conrod's conviction for second-degree sexual assault of a child. Conrod 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 on appeal and summarily affirm.

This matter arises out of the alleged sexual assault by Conrod of his girlfriend's two daughters. Conrod allegedly touched J.J.W.'s breasts and vagina on numerous occasions when

she was eleven and twelve years old. Conrod was also alleged to have touched her younger sister B.J.B.'s chest under her clothing on one occasion. A jury found Conrod guilty of sexually assaulting J.J.W., and not guilty with regard to B.J.B. The circuit court imposed a sentence of ten years' initial confinement and five years' extended supervision.

Any challenge to the sufficiency of the evidence would lack arguable merit. We must view the evidence in the light most favorable to the verdict and must sustain the verdict unless no reasonable juror could have found guilt beyond a reasonable doubt, particularly when the verdict has the approval of the trial court. ***State v. Poellinger***, 153 Wis. 2d 493, 507-08, 451 N.W.2d 752 (1990).

J.J.W. testified Conrod came into her room at night, and she awoke to Conrod touching her leg with his hand. Several weeks later, she woke up to Conrod touching "my chest and my private." J.J.W. testified, "[F]irst it was over and then it was under [my clothes]." The prosecutor asked if Conrod said anything to her when he touched her. There was a long pause and the prosecutor asked, "Would it be easier for you to write the words down?" J.J.W. then wrote down, "You got that good pussy."

J.J.W. also testified to an incident in the living room when Conrod "came in and like sat on the couch and like got closer to me … and I like kept scooting over so like he kept trying to reach for my chest and I kept pushing away." J.J.W. testified to another occasion when she was in the shower:

> [H]e came like trying to creep in and like come in and I was like washing myself up and like, Why is you in the bathroom with me? Because I really don't know why he is in there. So, he was like, shhh, don't tell nobody. Don't tell your mom about this and he started washing me up … he started from the back like washing my

> back and going down. He told me to turn around and he washed my front part.

J.J.W. testified that as Conrod washed, he touched her with his hand: "My butt and my back, my upper back and my lower back." Conrod then told her to turn around and he touched her chest and stomach with a towel, then "the towel dropped so he used his hand with the soap."

On another occasion, J.J.W. testified that she was putting clothes away in her mother's room. Conrod walked in the room and told her to "take it off." J.J.W. took off a dress she was trying on and Conrod told her to take off her bra. J.J.W. took off her bra and Conrod "started acting like he was taking pictures … with his hands." J.J.W. then ran into the bathroom.

On another occasion J.J.W. was asleep when Conrod came in the bedroom and touched her chest and her "private" under her clothes. On yet another occasion, Conrod got into J.J.W.'s bed and "pulled his penis out of his boxers and he pulled it out and like he pulled my pants down and my underwear and like tapped his thing on me." "The area where I pee."

J.J.W. also testified Conrod told her he would "buy you anything you want if you don't tell." Conrod tried to touch her arm and said, "Pinky promise you won't tell anybody."

Conrod testified in his own defense and disputed J.J.W.'s testimony. In his response to the no-merit report, Conrod insists that J.J.W. provided false testimony laden with inconsistencies, and the jury ignored J.J.W.'s motive to lie. Conrod asserts J.J.W. disliked him and "made these allegations because she didn't want me to live or be with her mother. She stated she hated me an[d] didn't want me there because me and her mother were arguing."

However, when there is a conflict between the victim's and the alleged perpetrator's testimony, it is the jury's job to determine their credibility and resolve conflicts in their

testimony. This court will not overturn the jury's credibility assessments unless they are inherently incredible or in conflict with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975). Inconsistent statements do not render testimony incredible or patently misleading. *See* ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 415 (Ct. App. 1983). This case turned on credibility. The jury had the right to believe J.J.W.'s testimony, and reject Conrod's denials. There was more than sufficient evidence to support the jury's guilty verdict.

In his response to the no-merit report, Conrod also argues his trial counsel was ineffective for failing to call "alibi witnesses." He also claims counsel should have called his sister to testify. Conrod has not identified the alleged alibi witnesses, or how the alleged alibi witnesses would testify if called. Similarly, he fails to identify how his sister would testify if called. Complaints of uncalled witnesses are not favored because such allegations are largely speculative.[1] *See* ***State v. Street***, 202 Wis. 2d 533, 549, 551 N.W.2d 830 (Ct. App. 1996).

Conrod also argues his trial attorney was ineffective for failing to attempt to postpone the trial when it was determined on the first day of trial that the detective who took J.J.W.'s statements "wasn't going to testify because she was on vacation." Conrod claims his attorney therefore could not cross-examine the detective about J.J.W.'s inconsistencies. According to

[1] We note Conrod contends his sister "was there the night the allegations were made." However, she was not present when the sexual assaults occurred. Conrod testified that he was outside after unsuccessfully attempting to get his vehicle started when his sister arrived. His sister and the victim's mother went back into the house. Conrod's sister was only present at the victim's residence after the allegations were made and the victim's mother called the police and told Conrod "to pack [his] things and get out."

Conrod, the detective was "the main witness" and the detective's testimony "would [have] showed J.J.W. credibility wasn't credible."

However, the record discloses that Conrod's trial counsel explored at great length the inconsistencies between J.J.W.'s trial testimony and her statements to police, as well as her possible motives to fabricate the charges. In addition, we are not persuaded the detective who took J.J.W.'s statement could have been the "main witness" at the trial, or that the outcome of the trial might have been different had the detective testified. Trial counsel's performance was not deficient in not attempting to postpone the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Conrod also argues that his confrontation rights were violated at trial by allowing J.J.W. to write down that Conrod said to her, "You got that good pussy." During the trial testimony, the following exchange occurred:

> Q: Did he say anything to you when he would touch you in January of 2011?
>
> A: Yes.
>
> Q: What did he say to you? It's okay to say bad words if you are quoting someone else and in your room like this. Would it be easier for you to write the words down?
>
> A: Yes.

Defense counsel asked to be heard and the jury was excused. After hearing counsel's argument, the court stated the following:

> THE COURT: The district attorney in no way is indicating what the answer should be that the witness should write down. Record can reflect that the witness did have a very long pause and appears to be very uncomfortable and when given the opportunity to write down the word, to write down what was said without being given

> the answer of what was said, the witness indicated she would be able to write down the answer. So, I think she can certainly write it down, rather than stating it verbally and she has not been told what the answer is by the question.

"Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial." ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. Admissibility, presentation, and order of evidence fall within that realm. ***Id.***, ¶19. The court properly exercised its discretion by accommodating the child's reluctance to verbalize in a public courtroom Conrod's profane statement. Here, the victim was present at trial and subject to full and meaningful cross-examination, including with respect to her answer written down. By allowing the child to write down the statement, the court appropriately minimized the mental and emotional strain that child witnesses in criminal proceedings experience as a result of having to testify. *See* ***id.***, ¶¶17-19. Conrod's right to confront witnesses was not violated.

The record also discloses no arguable basis for challenging the court's sentencing discretion. The court considered the proper factors, including Conrod'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 emphasized, "Society needs to protect children particularly in an instance like this where the child's most personal and intimate self is being violated by another person." The court noted the offenses were "further aggravated here because Mr. Conrod violated his position of trust …." The sentence imposed was far less than the maximum forty years' sentence the court could have imposed, and the sentence is therefore presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

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 (2013-14).

IT IS FURTHER ORDERED that attorney Michael Holzman is relieved of further representing Conrod in this matter.

Diane M. Fremgen
Clerk of Court of Appeals