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September 14, 2016

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

2015AP1434-CRNM State of Wisconsin v. Lauren Scott Olejniczak (L.C. # 2013CF391)

Before Higginbotham, Sherman and Blanchard, JJ.

Lauren Olejniczak appeals a judgment convicting him, following a jury trial, of two counts of second-degree sexual assault of a child. Attorney Steven Phillips has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Olejniczak was

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

sent a copy of the report and has filed a response in which he raises issues of witness credibility and testimonial inconsistencies, which are addressed below in the section discussing the sufficiency of the evidence to support the convictions. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

Multiplicity

Olejniczak was charged with four counts of second-degree sexual assault, contrary to WIS. STAT. § 948.02(2) (1999-2000), with respect to a child who was then fourteen years old. The State alleged that Olejniczak sucked the victim's breasts, inserted his fingers into her vagina, licked her vagina, and made her touch his penis. Olejniczak moved to dismiss the latter three counts as multiplicitous, and the circuit court denied the motion. We agree with counsel's assessment that there would be no arguable merit to challenging the circuit court's ruling on the motion to dismiss.

We use a two-prong test to evaluate claims of multiplicity: (1) whether the charged offenses are identical in law and fact; and (2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count. ***State v. Anderson,*** 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Here, the four offenses are identical in law because they were all charged under WIS. STAT. § 948.02(2) (1999-2000). However, the offenses are not identical in fact. "Charged offenses are not multiplicitous if the facts are either separated in time or of a significantly different nature." ***Id.*** at 749. That is the case here. Although the four charged acts all occurred within one night, each count involved an act of sexual assault different from the others. *See*, *e.g.,* ***State v. Eisch***, 96 Wis. 2d 25, 291 N.W.2d

800 (1980) (defendant was properly charged with four counts of sexual assault for penile/vaginal intercourse, anal intercourse, inserting an object into the victim's vagina, and forcing the victim to perform oral sex). Accordingly, any challenge to the court's ruling on the motion to dismiss on multiplicity grounds would be without arguable merit.

Denial of defendant's motion for in camera inspection of victim's records

Olejniczak filed a pretrial motion seeking an in camera inspection of the victim's medical, psychological, and psychiatric records. The circuit court denied the motion. We agree with counsel's assessment that a challenge to the court's ruling would be without arguable merit. To make a preliminary showing for an in camera review, the defendant must "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence" and that the records are not merely cumulative. ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298. Olejniczak argued that the victim could have changed her story over the course of counselling. However, these arguments are based upon speculation, as opposed to the specific factual basis required under ***Green***. The record reflects that the victim did not, in fact, seek any counseling. She acknowledged consulting her primary care physician regarding some mental health issues, for which she was prescribed medication. However, the victim testified at trial that she did not go to a therapist, deciding instead to just "deal with it" on her own. In light of all of the above, we conclude that a challenge to the court's ruling on the motion for in camera review would be without arguable merit.

Sufficiency of the evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether 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). To prove that Olejniczak was guilty of second-degree sexual assault of a child, the State needed to prove that he had sexual contact with the child and that the child was under the age of 16 years at the time of the alleged sexual contact. *See* WIS. STAT. § 948.02(2) and WIS JI—CRIMINAL 2104. Here, the sexual contact alleged in counts one through four was contact with breasts, digital penetration, oral sex, and contact with penis, respectively. The jury found Olejniczak guilty on counts one and two and not guilty on counts three and four.

Several witnesses testified at trial. Among them was the victim, who testified that she was fourteen at the time of the alleged assaults. She testified that she visited the home of Olejniczak and his girlfriend on a Friday in September 2001 and stayed overnight. Olejniczak drove her the next day about three and a half hours to her grandparents' house in Holcombe, Wisconsin. After they arrived at her grandparents' house, they all had some alcoholic drinks. The victim further testified that, after her grandparents went to bed that night, Olejniczak pulled the victim onto his bed in the room she was sharing with him, told her to be quiet, removed her clothes, touched her breasts with his hands and mouth, and used his fingers and mouth to touch her vaginal area. The victim also stated that Olejniczak made her touch and suck his penis. The victim testified that her grandmother came down the stairs and into the bedroom, pulled the covers back from the victim, and asked why she wasn't wearing any clothes. According to the victim, the grandmother then told her to get dressed and said this would be their "little secret."

The victim admitted at trial that she had been “pretty intoxicated” and that she could not recall all of the details. She stated that she did not initially report the incident to anyone because she was “scared.”

Olejniczak also testified on his own behalf. He admitted that the victim had visited him on the weekend in question and testified that he had given her a back rub on that Friday night after she arrived. However, he denied that he went with the victim to visit her grandparents in September 2001. He testified that he attended a neighborhood candlelight vigil in honor of 9/11 on that Saturday night with the victim. Olejniczak testified that the trip he made with the victim to her grandparents’ house was not in September 2001, but rather in March 2002.

The victim’s grandmother also testified at trial. She testified that Olejniczak and the victim came to visit her in Holcombe, but could not recall the date. She denied that there had been any drinking going on and testified that, after arriving, Olejniczak went to take a shower. The grandmother stated that, while Olejniczak was still in the shower, she went to check on things and found the victim lying naked on a bed. The grandmother further stated that she told the victim to get dressed and that she was asking for trouble.

Cheryl Kellner, who was Olejniczak’s fiancée at the time of trial, also testified. She testified that the victim came to visit her and Olejniczak in September 2001. Kellner recalled Olejniczak giving the victim a back rub on Friday. Kellner stated that she, Kellner, went to visit her sister on Saturday. She testified that the victim stayed at her and Olejniczak’s home the whole weekend. On cross-examination, Kellner admitted that she had previously told law enforcement officers that Olejniczak and the victim had gone alone to Holcombe that weekend.

Investigator Gordon Foiles, who interviewed the victim after she reported the assaults, testified at trial that the victim's testimony was consistent with what she had previously reported to him. Regarding his interview with Olejniczak, Foiles testified that Olejniczak did not remember most of "the issues of that weekend" and did not provide any details about what occurred. Foiles further testified that the testimony of Olejniczak, Kellner, and the victim's grandmother was not consistent with their previous interviews with him.

In his no-merit response, Olejniczak asserts that the results of a polygraph test he took would show that the trip he made with the victim occurred in March 2002 and not September 2001. However, the polygraph test results would not have been admissible and, therefore, any argument that the results could have bolstered Olejniczak's testimony or changed the result of the trial is without merit. *See* ***State v. Dean,*** 103 Wis. 2d 228, 279, 307 N.W.2d 628 (1981) (polygraph test results are generally inadmissible in criminal proceedings). Olejniczak further asserts in his no-merit response that the victim and Foiles did not provide credible accounts of what happened.

We acknowledge that Olejniczak's account of what happened differed from the testimony of other witnesses. However, when there is conflicting testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Here, the jury heard Olejniczak's testimony about what happened, including his testimony that the victim was lying. The jury did not find Olejniczak's testimony to be credible. This court may not overturn the jury's credibility assessments unless they are

inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). That is not the case here. Accordingly, we are satisfied that evidence at trial was sufficient to support the convictions, such that there would be no arguable merit to challenging the convictions on appeal.

We also agree with counsel's conclusion that there would be no arguable merit to challenging the circuit court's denial of Olejniczak's motion for judgment notwithstanding the verdicts. Olejniczak argued that there was no way the jury, acting reasonably, could have found him guilty of counts one and two, but not guilty of counts three and four, since the counts all arose from a single criminal act. This argument is without arguable merit for the same reason any multiplicity argument would be without arguable merit—the four charged acts occurred, each involved an act of sexual assault different from the others. Therefore, a jury could reasonably find that the State had met its burden as to certain acts of assault but not as to others.

Sentence

Finally, we agree with counsel's assessment that there would be no arguable merit to a claim that circuit court improperly exercised its sentencing discretion. In imposing sentence, the court considered Olejniczak's character, criminal history, the serious nature of the offense, the need to protect the public, and Olejniczak's need for rehabilitation. The court imposed a sentence of three years of initial confinement and three years of extended supervision on each count, to run concurrently. The sentence was well within the maximum penalty range. *See* WIS. STAT. § 948.02(2) (1999-2000) (classifying second-degree sexual assault of a child as a Class BC felony), § 939.50(3)(bc) (1999-2000) (providing a maximum imprisonment term of 30 years for

a Class BC felony). Under these circumstances, it cannot reasonably be argued that Olejniczak's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We note that this case previously was placed on hold pending the supreme court's decision in ***State v. Loomis***, 2016 WI 68, __Wis. 2d__, 881 N.W.2d 749. In our order placing the appeal on hold, we noted that the circuit court may have relied on COMPAS assessments at sentencing,[2] and that the supreme court accepted certification in ***Loomis*** to address whether due process prohibits reliance on such assessments at sentencing. The supreme court now has issued a decision in ***Loomis***. The court held that, if used properly with an awareness of the limitations and cautions, a circuit court's consideration of a COMPAS assessment at sentencing does not violate a defendant's right to due process. ***Loomis***, __Wis. 2d at __, ¶8, 881 N.W.2d at 753. Specifically, the court held that a sentencing court may consider a COMPAS risk assessment at sentencing if the presentence investigation report (PSI) "instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence." ***Id.***, ¶98. The court additionally held that "risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community." ***Id.***

Here, the record satisfies us that the circuit court's use of the COMPAS assessment, if any, was consistent with the requirements of ***Loomis***. In this case, the PSI to which the COMPAS assessment is attached contains limiting language informing the court that risk scores

[2] The circuit court made reference at sentencing to the presentence investigation report, which had attached to it a copy of the COMPAS risk assessment tool.

should not be the sole and deciding factor in determining the severity of the sentence or whether the offender is incarcerated. In addition, although the circuit court made reference to the PSI at sentencing, it did not specifically reference the COMPAS assessment, nor does anything in the record, the no-merit report, or Olejniczak's submissions suggest that the court relied on the COMPAS risk scores as the determinative factor in imposing sentence. Accordingly, we are satisfied that the ***Loomis*** decision does not present any issue of arguable merit in this case.

Our review of the trial record discloses no other issues of arguable merit. The rulings made on the motions in limine were proper. There is no basis to challenge jury selection. Evidentiary objections throughout the trial were properly ruled upon. The jury instructions accurately conveyed the applicable law and burden of proof, and no improper arguments were made to the jury. Accordingly, we conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Steven Phillips is relieved of any further representation of Lauren Olejniczak in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals