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June 27, 2018

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

2017AP2291-CRNM State of Wisconsin v. Benedict J. Jacobs (L.C. #2015CF6)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Benedict J. Jacobs appeals from a judgment of conviction for repeated sexual assault of the same child. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),¹ and *Anders v. California*, 386 U.S. 738 (1967). Upon consideration of

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

counsel's report and Jacobs' response, and after conducting an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

A jury found Jacobs guilty of repeated sexual assault of the same child. The assaults occurred in 1998 when Jacobs, then age sixteen, was babysitting his niece, then age six. The victim first reported the assaults to law enforcement in 2014. Before trial, Jacobs moved to exclude the prosecution's expert witness from testifying about delayed reporting of child sexual assault and false reporting of sexual assault. The trial court denied the defense motion. The victim testified at trial that on one occasion when Jacobs was babysitting her, he inserted his fingers in her vagina, anally penetrated her, and licked her vagina. Jacobs testified that none of it happened. Jacobs was sentenced to twenty years in prison.² Jacobs' postconviction motion for four days of sentence credit was granted.

The no-merit report addresses the potential issues of whether the trial court properly allowed the expert witness to testify about common reporting behaviors of child victims of sexual assault,³ whether there was sufficient evidence to support the jury's guilty verdict, and whether the sentence was a proper exercise of discretion or unduly harsh. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

² The crime was committed before the enactment of Truth-In-Sentencing.

³ In his response, Jacobs asserts that the expert should not have been allowed to testify. The no-merit report explains why he is wrong.

A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. The no-merit report fails to give any indication that appointed counsel considered whether those parts of the process give rise to potential appellate issues. Our review of the trial record discloses no issues of arguable merit from the jury trial. The jury voir dire was more than adequate and no jurors were challenged or struck for cause. There were no evidentiary objections by the defense that were overruled. The trial court conducted a proper colloquy with Jacobs about his decision to testify. The jury instructions properly stated the law. No improper arguments were made to the jury during opening or closing arguments. The jury was polled and confirmed that the verdict was unanimous.

In his response, Jacobs first complains that his first attorney did very little and never informed him that the charging period had been amended to the entire year of 1998.⁴ Whether a defendant has sufficient notice of the charge is a question of constitutional fact that is reviewed de novo. *State v. Kempainen*, 2015 WI 32, ¶16, 361 Wis. 2d 450, 862 N.W.2d 587. In child sexual assault cases, flexible application of notice requirements is made and the date of the commission of the crime need not be precisely alleged. *Id.*, ¶22. Here, the record does not suggest that broadness of the time period deprived Jacobs of sufficient notice and left him unable to prepare an adequate defense. Because of the passage of time between the assaults and the first

⁴ The criminal complaint and information charged that the crime occurred “on or about June 1, 1998.” Although the record does not include an amended information, the court instructed the jury that the information charged that the crime occurred “during the calendar year 1998.”

reporting to law enforcement, it made little difference whether the crime was alleged to have occurred on June 1, 1998, or in the calendar year of 1998.⁵ The victim's young age when the assaults occurred, that she visited her father every other weekend in 1998, and that Jacobs did not regularly babysit her are part of the totality of circumstances of why it was reasonable to not charge a precise date for the crime. Even if defense counsel had objected to a change in the charging period, the objection would have been overruled, and correctly so. The expansion of the charging period does not give rise to an issue of arguable merit.

Jacobs also complains that his second attorney failed to call character witnesses at trial. WISCONSIN STAT. § 904.04(1)(a) permits character evidence for the purposes of showing truthfulness or a pertinent trait involved in the crime on trial, i.e., honesty in theft cases, peaceableness in murder cases. Even when such evidence is admissible, it may be excluded in the sound discretion of the trial court if it is insufficient to establish a character trait. *Hart v. State*, 75 Wis. 2d 371, 384-94, 249 N.W.2d 810 (1977). When character evidence is presented by an accused, the prosecution may present evidence to rebut it and do so by inquiry into relevant specific instances of conduct. *See* WIS. STAT. §§ 904.04(1); 904.05(1).

Here, the record does not suggest anyone other than Jacobs' parents as available character witnesses, and it is not known if they could give testimony as to Jacobs' reputation for truthfulness. Since the crime occurred some eighteen years before trial, in 1998, when Jacobs was sixteen, it would have been unlikely for a lay witness to suggest Jacobs possessed some character trait at age sixteen that related to the crime. *See State v. Walters*, 2004 WI 18, ¶37, 269

⁵ Defense counsel acknowledged at a status conference that given the age of the allegations, the investigation of potential alibi witnesses was limited and that people only remembered where Jacobs was living but no specific day or time.

Wis. 2d 142, 675 N.W.2d 778 (a six-year gap between the alleged assault and a psychologist's evaluation minimized the probative value of the expert testimony). Moreover, on this record there was good reason to not present character evidence. Such evidence would have opened the door for the prosecution to present rebuttal evidence. The record establishes that there were accusations that Jacobs had assaulted at least one other niece.⁶ There is no arguable merit to a potential claim that Jacobs' second attorney did not call available witnesses.⁷

Finally, Jacobs asserts his belief that the victim lied during the trial. He claims the lack of physical evidence or medical reports means the prosecution did not meet its burden of proof. This is nothing more than a challenge to the sufficiency of the evidence which we have already rejected as lacking arguable merit. Physical evidence is not required for a conviction.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Jacobs further in this appeal.

Upon the foregoing reasons,

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

⁶ The presentence investigation report repeats accusations against Jacobs by the victim's half sister.

⁷ Jacobs faults his second attorney for not calling "my other niece" in response to the victim's claim that he assaulted his "other niece." He claims that the niece would have testified the accusation was false. There was no testimony at the trial regarding any alleged assault by Jacobs on any other niece. There was no need for the defense to call a witness to contradict evidence that was not presented.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Benedict J. Jacobs in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals