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**DISTRICT III**

October 16, 2019

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

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2018AP1368-CR

State of Wisconsin v. Richard A. Johnson (L. C. No. 2017CF1174)

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

**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).**

Richard Johnson, pro se, appeals a judgment, entered upon a jury's verdict, convicting him of sexual assault of a child under age sixteen; child enticement; and delivering not more than 200 grams of tetrahydrocannabinols ("THC"). Based upon our review of the briefs and record,

we conclude at conference that this case is appropriate for summary disposition. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup>

The State charged Johnson with sexual assault of a child under age sixteen; child enticement; delivering one gram or less of cocaine; and delivering not more than 200 grams of THC. The complaint alleged that Johnson, then sixty-four years old, had been giving thirteen-year-old Jane<sup>2</sup> money and illegal drugs in an attempt to gain sexual favors. The complaint further alleged that on or about September 30, 2017, Johnson gave Jane money in exchange for allowing him to perform oral sex on her. A jury acquitted Johnson of the cocaine delivery charge, but it found him guilty of the other charged offenses. On the sexual assault and child enticement counts, the circuit court imposed concurrent ten-year sentences, consisting of five years' initial confinement and five years' extended supervision. The court withheld sentence on the delivery of THC count and imposed a concurrent two-year probation term.

Johnson, by counsel, filed a notice of intent to seek postconviction relief and that notice was forwarded to the State Public Defender (“SPD”) for a determination of Johnson’s eligibility for appointment of counsel. Before such a determination was made, Johnson appealed pro se and filed a statement on transcript notifying this court that “[a] transcript is not necessary for prosecution of this appeal.” While the appeal was in the midst of briefing, the SPD moved to extend the time for appointing postconviction counsel and ordering transcripts. We therefore stayed briefing and directed Johnson to confirm whether he wanted to proceed without counsel in

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

<sup>2</sup> Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim’s name.

his present appeal or whether he wanted representation by appointed counsel. We added that if Johnson opted for representation by appointed counsel, we would dismiss the appeal without prejudice in order to give counsel the opportunity to review the record and any ordered transcripts.

With respect to transcripts, we recounted that Johnson's statement on transcript advised that transcripts were not necessary for prosecution of this appeal. We informed Johnson that it is the appellant's responsibility to ensure that the record before this court is complete. We also warned that we would assume any missing transcripts supported the circuit court's findings of fact and discretionary decisions. Despite our admonitions, Johnson informed this court that he had "no intention" of using SPD-appointed counsel and that he wished to proceed with his pro se appeal. In light of his response, we denied the SPD's motion to extend the time for appointing counsel and ordering transcripts, and briefing resumed.

On appeal, Johnson presents five challenges to his conviction, arguing the circuit court erred by: (1) denying his motion for a mistrial when one of the State's witnesses allegedly "ignore[d] two subpoenas"; (2) denying the jury's request to listen to both Jane's and Johnson's police interviews; (3) denying Johnson's motion for a continuance of the trial; (4) allowing the prosecutor to file "improper charges" in violation of Johnson's due process and equal protection rights; and (5) allowing the prosecutor to disregard discovery requests and withhold exculpatory evidence. As noted by the State, however, Johnson's brief is in substantial noncompliance with the rules of appellate procedure.

While a pro se brief is given substantial latitude, certain aspects of the brief must comply with the rules of appellate procedure. *See* WIS. STAT. RULE 809.19(1); *see also* **Townsend v.**

*Massey*, 2011 WI App 160, ¶27 n.5, 338 Wis. 2d 114, 808 N.W.2d 155. Johnson’s statement of facts does not include appropriate citations to the record but, rather, cites to his own appendix. See WIS. STAT. RULE 809.19(1)(d). The brief does not adequately discuss the procedural status of the case leading up to the appeal, *see id.*, and Johnson’s arguments are largely undeveloped and conclusory. See RULE 809.19(1)(e). This court need not consider undeveloped and unsupported arguments. See *State v. McMorris*, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322.

Further, the appendix is incomplete. At a minimum, the appendix should include a table of contents; the findings or opinion of the circuit court; a copy of any unpublished opinion cited under [WIS. STAT. RULE] 809.23(3)(a) or (b); and portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court’s reasoning regarding those issues. See WIS. STAT. RULE 809.19(2)(a). Here, the appendix fails to include the circuit court’s decisions on any of the issues Johnson raised before or during the trial. Johnson’s failure to comply with the appellate rules hinders this court’s ability to track and review the issues.

Moreover, Johnson failed to provide this court with the transcripts of any circuit court proceedings, thus further inhibiting our ability to properly review the circuit court rulings about which Johnson complains. As the appellant, Johnson was responsible for ensuring that all relevant transcripts are in the record. See WIS. STAT. RULE 809.11(4). When an appellant fails to ensure a complete record, our review is limited to the portions of the record available to us. See *Ryde v. Dane County Dep’t of Soc. Servs.*, 76 Wis. 2d 558, 563, 251 N.W.2d 791 (1977). As we previously warned Johnson, “we must assume that the missing material supports the [circuit] court’s ruling.” *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226

(Ct. App. 1993). Without the trial transcript, this court must assume the circuit court properly exercised its discretion when denying the motions for both a mistrial and a continuance, and when denying the jury's request for the police interviews.

As to his remaining arguments, Johnson recounts that his challenge to the prosecutor's charging decision was denied at a January 19, 2018 motion hearing. In the absence of the hearing transcript, we assume the circuit court properly denied his motion. Moreover, as the State points out, prosecutors have great charging discretion in deciding what and whom to charge. *State v. Colton M.*, 2015 WI App 94, ¶16, 366 Wis. 2d 119, 875 N.W.2d 642. That discretion is unfettered as long as it is not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* Johnson fails to adequately develop any argument that the prosecutor's charging discretion in this case was based on an unjustifiable standard, and this court declines to address undeveloped arguments. *See McMorris*, 306 Wis. 2d 79, ¶30.

Johnson likewise fails to develop his claims that the prosecutor failed to comply with discovery requests or to disclose exculpatory evidence. Johnson argues generally that the prosecutor failed to fulfill her discovery obligations; however, with the exception of the alleged failure to provide one witness's contact information, Johnson does not otherwise specify what the prosecutor failed to disclose. Johnson also fails to detail what exculpatory evidence was withheld. As noted above, this court declines to address undeveloped arguments. *See id.* Additionally, Johnson's brief references discussions about these claims at the preliminary hearing and at trial. If there was any discussion or decision on the record related to these arguments, we must again assume the missing transcripts support the circuit court's rulings.

Upon the foregoing,

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

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*