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October 30, 2019

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

2018AP1495-CRNM State of Wisconsin v. Timothy R. Treadway (L.C.# 2017CF1668)

Before Fitzpatrick, P.J., Blanchard, and Nashold, 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).

Attorney Mitchell Barrock, appointed counsel for Timothy R. Treadway, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967). Treadway was sent a copy of the

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

report and has filed a response. Counsel then filed a supplemental report, and Treadway filed a response to the supplemental report. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Upon consideration of the report, the supplemental report, Treadway's responses, and an independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Treadway was initially charged with first-degree sexual assault of a child, D.T. On the scheduled trial date, D.T.'s mother and D.T. did not appear. The State charged Treadway with felony intimidation of a witness for D.T.'s non-appearance. It alleged that Treadway contacted D.T.'s mother prior to the scheduled trial and offered her money to prevent D.T. from testifying. At a rescheduled trial on both charges, a jury found Treadway not guilty of the sexual assault charge but guilty of the intimidation of a witness charge. The circuit court sentenced Treadway to an eighty-month term of imprisonment consisting of thirty-two months of initial confinement and forty-eight months of extended supervision.

The no-merit report first addresses whether the evidence was sufficient to convict Treadway on the intimidation of a witness charge. When addressing sufficiency of the evidence,

an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). “[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.” *Id.* at 506-07.

Based on these standards, we agree with counsel that there is no arguable merit to challenging the sufficiency of the evidence. Without attempting to recite all the trial evidence in detail here, we are satisfied that it was sufficient. In short, the State provided evidence that Treadway called D.T.'s mother from jail the day before the originally scheduled trial and offered her \$400 so that she and D.T. would not appear.² The jury heard a recording of the call. Treadway and D.T.'s mother each testified and denied that they were the individuals on the call, but there was significant evidence to the contrary. Although much of that evidence was circumstantial, “[i]t is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.” *See id.* at 501.

Treadway argues that D.T.'s mother's testimony was exculpatory and “exonerated” him. Much of D.T.'s mother's testimony, *if believed*, was exculpatory. However, the jury plainly disbelieved that testimony, and “the credibility of the various witnesses is within the exclusive province of the trier of fact.” *See Johnson v. State*, 55 Wis. 2d 144, 148, 197 N.W.2d 760 (1972). Thus, D.T.'s mother's testimony does not provide an arguable basis to challenge the sufficiency of the evidence.

Having concluded that there is no arguable merit to challenging the sufficiency of the evidence, we turn to other potential issues.

² Because D.T. was a minor, it was not necessary for the State to show that Treadway had direct communication with D.T. Rather, communication with D.T.'s mother was sufficient. *See State v. Moore*, 2006 WI App 61, ¶¶9-13, 292 Wis. 2d 101, 713 N.W.2d 131 (evidence of direct contact with a child witness is not necessary because the parent has authority to influence whether the child cooperates with court proceedings).

The first potential issue relates to other acts evidence and Treadway's trial counsel's motion for a mistrial based on that evidence. During trial counsel's cross-examination of Treadway's ex-girlfriend, she was repeatedly asked if she was angry and if she dislikes Treadway. In response, the ex-girlfriend said that of course she dislikes him, because her daughter told her that she (the daughter) had been sexually assaulted by Treadway. Trial counsel moved for a mistrial, arguing that this testimony was prejudicial and violated a previous court ruling on other acts evidence. The circuit court denied the motion.

The supplemental no-merit report addresses whether there is arguable merit to challenging the circuit court's decision to deny the motion for a mistrial. "A motion for mistrial is committed to the sound discretion of the circuit court." *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. "Generally, in determining whether to grant a mistrial in cases where there is no structural error, the circuit court must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial." *Id.*, ¶29. The circuit court "examines whether the claimed error is sufficiently prejudicial to warrant a mistrial." *Id.* The "trial judge is in the best position to determine whether circumstances warrant the granting of a mistrial." *State v. Seefeldt*, 2003 WI 47, ¶29, 261 Wis. 2d 383, 661 N.W.2d 822. When, as here, the defendant sought a mistrial "on grounds not related to the State's alleged laxness or overreaching, we give the trial court's ruling 'great deference.'" *State v. Bunch*, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995) (quoted source omitted).

Given these deferential standards and the record before us, we agree with no-merit counsel that there is no arguable merit to challenging the circuit court's exercise of its discretion to deny the motion for a mistrial. As noted, that court was in the best position to determine the likely effect of the prior sexual assault allegation on the jury under all the circumstances. The

court acknowledged that allegation was serious, but noted that it came in response to defense counsel's questions. The court concluded that the disclosure of the allegation did not rise to the level of prejudice required for a mistrial. The court correctly noted that the disclosure of the allegation was not elicited by the prosecution. Finally, as part of its closing instructions to the jury, the court provided a limiting instruction directing the jury not to consider the allegation as evidence that Treadway was a bad person or committed the crimes charged. We "presume that juries comply with properly given limiting and cautionary instructions, and thus consider this an effective means to reduce the risk of unfair prejudice to the party opposing admission of other acts evidence." *State v. Marinez*, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399.

Treadway next claims that he was not properly convicted because the jury was instructed on only three of the four elements for the intimidation of a witness charge. More specifically, Treadway asserts that the jury was not instructed on the fourth element, which required that he acted in connection with a trial in a felony case in which he was charged. *See* WIS. STAT. § 940.43(7) (2015-16). We see no arguable merit to this issue. Although the circuit court did not expressly refer to this element as an "element" of the crime, the court accurately instructed the jury that it could not find guilt unless it found that Treadway acted in connection with a trial in a felony case in which he was charged.

Treadway next argues that there should be further proceedings directed at obtaining the court reporter's notes or audio recording of the trial in order to challenge an amendment the court reporter made to the trial transcript. We conclude that such proceedings would be wholly frivolous. The original transcript showed the circuit court instructing the jury that evidence of Treadway's twenty-three prior convictions "is *now* proof of guilt of the offense now charged." (Emphasis added.) However, after this wording was brought to the court reporter's attention by

a postconviction motion, the court reporter checked her notes, acknowledged that the transcript contained a typographical error, and amended the transcript so that it showed the circuit court instructing the jury that evidence of Treadway's prior convictions "is *not* proof of guilt of the offense now charged." (Emphasis added.) Treadway appears to claim that the amended transcript is inherently unreliable because the court reporter certified the accuracy of both the original and the amended transcript. We disagree that the court reporter's certification of the original transcript, by itself, provides an arguable basis to challenge the veracity of the amended transcript. Treadway provides no other basis to question its veracity and, therefore, we see no arguable merit to pursuing further proceedings relating to the amended transcript.

Our review of the record discloses no other issues of arguable merit with respect to events before or at trial. We see no basis to challenge the court's pretrial rulings, jury selection, the circuit court's evidentiary rulings, or the jury instructions in addition to the instructions already discussed. No improper arguments were made to the jury. During the course of the jury's deliberations, the circuit court reasonably denied the jury's request for portions of the trial transcript, and the court reasonably granted the jury's request to replay the recording of the phone call constituting the basis of the intimidation of a witness charge. The call was replayed in open court.

Similarly, we see no issues of arguable merit with respect to sentencing. Treadway's sentence was within the maximum allowed. Although the circuit court's sentencing remarks were brief, the court referenced the required sentencing factors along with other relevant factors, and the court did not consider any inappropriate factors. See *State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197.

Finally, the no-merit report addresses whether trial counsel was ineffective. We agree with no-merit counsel that the record reveals no arguable basis to pursue a claim that trial counsel was ineffective. In particular, while defense counsel's questioning produced the allegation of a prior alleged child sexual assault allegation, as discussed above, the witness's answer appears to have been a surprise to counsel and could not reasonably have been anticipated.

Our review of the record discloses no other potential issues for appeal.

IT IS ORDERED that the judgement of conviction and the order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mitchell Barrock is relieved of any further representation of Timothy R. Treadway in this matter. *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