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DISTRICT IV

April 16, 2020

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

2018AP1230-CRNM State of Wisconsin v. Christopher M. Cleaves (L.C. # 2015CF616)

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 Philip Brehm, appointed counsel for Christopher Cleaves, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Counsel provided Cleaves with a copy of the report, and Cleaves submitted three responses. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT.

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

RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

After a trial to the court, Cleaves was convicted of three counts of second-degree sexual assault of a child. The court imposed concurrent sentences of twelve years of initial confinement and eight years of extended supervision.

We first address whether the evidence at trial was sufficient to support the convictions. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. ***Id.*** at 504.

Without attempting to review the evidence in detail here, the convictions were supported by the testimony of the victim. She testified to three acts of sexual intercourse. Her testimony was not inherently incredible and, if believed by the factfinder, was sufficient to support the convictions. Although Cleaves casts doubt on the victim's credibility by pointing to potential inconsistencies in her accounts of the events, those inconsistencies are not so significant as to make her testimony incredible.

We next consider whether there is an arguable issue related to discovery materials. The victim's medical records, as originally provided to the defense, included a page that was marked "9 of 9," but the first eight pages of that document were not provided. Eventually, by the day of trial, the State provided an additional eight pages. According to the State, the material was "discharge notes" that the patient would have been given to take with her.

Cleaves claimed then, and does so again in his responses to the no-merit report, that the material provided by the State is not the real eight pages. His claim appears to be based on the fact that the additional eight pages that were provided had a different date on them. However, that date, in the month before the trial, is consistent with the idea, as discussed on the record, that the State was going to ask the hospital to recreate the original eight pages so they could be provided to the defense. Cleaves has not given any plausible reason to believe that the recreated eight pages were not, as stated, discharge notes given to the patient to take away. Nor is there any reason to believe those notes would be exculpatory. There is no arguable merit to this issue.

Cleaves asserts that the complaint improperly referred to his race. It appears that the use of race in the complaint was mainly related to identification of the person who committed the alleged conduct. Furthermore, even if the use of race in the complaint was unnecessary or improper in some way, it is not apparent how this could have affected the ultimate outcome of his case. Cleaves asserts that it caused the court to have bias towards him, but there is no basis to reach that conclusion. There is no arguable merit to this issue.

Cleaves argues that his counsel was ineffective by not seeking interlocutory review after the preliminary examination. He argues that the State failed to show sufficient support for a total of three counts. This argument lacks arguable merit because the State is required to establish only that the defendant probably committed a felony. WIS. STAT. § 970.03(1). There is no requirement for the State to make that showing for each count.

Cleaves argues that the convictions for three acts of sexual intercourse were a violation of the protection against double jeopardy because they were not sufficiently separated in time to be

considered separate volitional acts. The victim's testimony about the acts of intercourse was sufficient to establish that they were separate volitional acts.

Cleaves asserts that DNA from other males who had intercourse with the victim around the same time should have been tested, and that if it had been, the result of the trial would have been different. There is no basis to believe the result of the trial would have been different, because the laboratory analyst testified that, based on testing, "it is at least 180 million times more likely to observe the DNA profile that was detected from [the victim's child] if Christopher Cleaves is the biological father than if a random unrelated male was the biological father."

The no-merit report addresses whether the court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Brehm is relieved of further representation of Cleaves 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