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DISTRICT III

October 18, 2022

To:

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Electronic Notice

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

2019AP1746-CRNM State of Wisconsin v. Ronald Richard Johnson
(L. C. No. 2015CF1793)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Ronald Johnson filed a no-merit report concluding that no grounds exist to challenge Johnson's conviction for repeated sexual assault of a child, contrary to WIS. STAT. § 948.025(1)(e) (2019-20).[1] Johnson filed a response challenging the effectiveness of his trial counsel, and counsel filed a supplemental no-merit report addressing Johnson's claims. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967),

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Johnson with repeated sexual assault of a child, alleging that Johnson committed at least three acts of first- or second-degree sexual assault against Chloe[2] over a period of more than three years, when Chloe was between eleven and fourteen years old. An initial jury trial ended in a mistrial, at Johnson's request, based on his hospitalization after the second day of trial.

Before a second trial began, the circuit court denied Johnson's request to admit evidence that Chloe had been sexually assaulted by a different person when she was four years old, concluding it did not meet any of the exceptions under the rape shield law. At trial, Chloe testified that Johnson touched her breasts and/or vagina during visits to his apartment on approximately ten occasions during the time period between her father's July 2, 2011 death and her September 15, 2014 interview with police. Chloe testified that on one occasion, in the summer of 2013, she spent time with Johnson at Bay Beach. After returning to Johnson's apartment, Johnson pushed Chloe to the floor and touched her vagina with his hands before telling her: "Don't tell nobody." Chloe also testified that after returning to Johnson's apartment from a 2014 "road trip," Johnson blocked the two exits from his apartment with dressers. According to Chloe, Johnson then pushed her onto the living room couch and touched her breasts and her vagina with his hands.

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

Chloe further testified that between September 11 and September 13, 2014, she received a series of text messages from Johnson in which he referred to Chloe as a "slutty rapist." When one of Chloe's sisters identified herself to Johnson and told him to "stop talking," Johnson responded:

> Don't tell me what to do. I know what that s***** rapist thing is and what she does. You need to know about it too. Everywhere she goes she sexually rubs herself on everyone and anyone. You can't let that girl out of your eyesight. She's a rapist. She turns adults into child molesters.

Chloe then confided to the same sister that Johnson had been touching her vagina and breasts.

Johnson's sister testified in his defense that during a telephone conversation with Chloe, she asked Chloe "what really happened" with Johnson and Chloe responded "that nothing happened, that she just made it up because her friends influenced her after talking with them, that she decided that that was the truth."

After an on-the-record colloquy in which the circuit court informed Johnson of both his right to testify and his right to not testify, and confirmed that Johnson had discussed his rights with counsel, Johnson opted to testify. Johnson denied taking Chloe to Bay Beach or touching her inappropriately. He likewise denied her claims about the dressers and about inappropriate touching following a road trip. Johnson testified there were "never … incidents of any touchings at my place." Johnson stated that he "started being inappropriate with the text messages to let everybody know exactly what these kids were like."

A jury found Johnson guilty of the crime charged. Out of a maximum possible forty-year sentence, the circuit court imposed a twenty-five-year term consisting of fifteen years' initial confinement followed by ten years' extended supervision.

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdict and whether the circuit court properly exercised its sentencing discretion. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that neither of these issues has arguable merit. The no-merit report sets forth an adequate discussion of these potential issues to support the no-merit conclusion, and we need not address them further.

Although the no-merit report does not address it, we conclude there is no arguable merit to any claim that the circuit court erred by excluding evidence that Chloe was sexually assaulted when she was four years old. The admissibility of evidence lies within the circuit court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). We will uphold an evidentiary ruling if we conclude the circuit court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778.

Wisconsin's rape shield law, WIS. STAT. § 972.11, excludes any evidence of a complaining witness's prior sexual conduct, regardless of the proffered purpose, unless the evidence falls within one of three enumerated statutory exceptions or one judicially created exception. *See* ***State v. Dunlap*** 2002 WI 19, ¶¶16-19, 250 Wis. 2d 466, 640 N.W.2d 112. Prior sexual assault of a child falls within the definition of "sexual conduct" contained in the rape shield statute. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 643, 456 N.W.2d 325 (1990). In order to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge, a defendant must make an offer of proof showing:

> (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. If the defendant makes that showing, the circuit court must then determine whether the State's interests in excluding the evidence are so compelling that they nonetheless overcome the defendant's right to present it.

State v. Carter, 2010 WI 40, ¶42, 324 Wis. 2d 640, 782 N.W.2d 695.

Johnson argued that because Chloe was the victim of an earlier sexual assault, "she does have some information in her mind which she can use to falsely accuse [him]." Noting that the prior act was "a long, long time ago," the circuit court determined that any evidentiary value of the past conduct had dissipated. Ultimately, there is no factual basis in the record to support a nonfrivolous claim that the court erred by excluding this evidence.

In his response to the no-merit report, Johnson raises several challenges to the effectiveness of his trial counsel. To substantiate a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. A defendant proves prejudice by demonstrating there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. "It is not enough for the defendant to show that the

errors had some conceivable effect on the outcome of the proceeding." ***Id.*** at 693. However, "a defendant need not prove the outcome would 'more likely than not' be different in order to establish prejudice in ineffective assistance cases." ***State v. Sholar***, 2018 WI 53, ¶44, 381 Wis. 2d 560, 912 N.W.2d 89 (citing ***Strickland***, 466 U.S. at 693). Thus, "a defendant need not prove the jury *would have* acquitted him [or her], but he [or she] must prove there is a *reasonable probability* it would have, absent the error." ***Id.***, ¶46.

Johnson claims that his trial counsel was ineffective by failing to reasonably communicate with Johnson or otherwise prepare him for trial. Johnson, however, confirmed at trial that he had sufficient time to consult with his attorney about his decision to testify. Counsel likewise confirmed that he had discussions with Johnson on "several different occasions" about the case and Johnson's decision to testify. Nothing in our review of the record establishes that additional consultation with counsel would have affected Johnson's testimony or the outcome of the trial. To the extent Johnson claims he was unaware of the elements that the State had to prove, thereby inhibiting his ability to establish a defense, nothing in the record supports this claim. Moreover, Johnson and his trial counsel had the opportunity to witness the State's case in his first trial before preparing a defense for the second trial.

Suggesting that evidence supporting his bindover was fabricated, Johnson contends his trial counsel was ineffective by failing to review the preliminary hearing transcript. Even assuming that trial counsel never reviewed the preliminary hearing transcript, nothing in the record or Johnson's response supports a nonfrivolous claim that Johnson was prejudiced by this claimed deficiency. Moreover, a "conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing." *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Johnson additionally intimates that his trial counsel was ineffective by

failing to make any objections at trial. However, the failure to object, alone, does not establish ineffectiveness of counsel, and nothing in the record supports a claim that Johnson was prejudiced by this claimed deficiency.

Johnson also argues that his trial counsel was ineffective by failing to call alibi witnesses. However, Johnson does not specify how any purported alibi witness would have undermined the State's case.

Johnson further asserts that his trial counsel was unfamiliar with the layout of Johnson's apartment, thus hindering counsel's ability to cross-examine Chloe regarding her allegations. Defense counsel, however, used photographs of Johnson's apartment to challenge Chloe's testimony. To the extent Johnson contends that his trial counsel did not try to impeach Chloe, the record belies his claim. Defense counsel cross-examined Chloe about her claim that the dressers prevented her from leaving Johnson's apartment. Specifically, defense counsel questioned how Johnson was able to move two dressers so quickly that Chloe did not have time to exit the apartment during that time. Defense counsel also asked Chloe to explain why she continued to go to Johnson's apartment after the alleged assaults began. Additionally, defense counsel called Johnson's sister to testify that Chloe told her she fabricated the allegations. Johnson's challenge to defense counsel's performance in this regard lacks arguable merit.

Next, Johnson asserts that his trial counsel was ineffective by failing to challenge the admission of text messages sent by him and extracted from Chloe's iPod. However, nothing in our review of the record or Johnson's response provides grounds for pursuing a nonfrivolous challenge to the admission of the text messages.

To the extent Johnson argues that his trial counsel's closing argument had no value, the record again belies his claim. Defense counsel's argument emphasized inconsistencies in Chloe's testimony, suggested a possible motive for her allegations, and provided alternative reasons for Johnson's text messages.

Likewise, the record does not support a nonfrivolous challenge to defense counsel's performance at sentencing. Defense counsel recounted Johnson's employment history and noted that Johnson had been a caretaker and caregiver for his family members throughout his life. Defense counsel acknowledged that Johnson had a prior criminal record, but he emphasized that Johnson's last crime was more than fifteen years earlier.

Our review of the record, the no-merit reports, and Johnson's response discloses no other basis for challenging trial counsel's performance and no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Ralph J. Sczygelski is relieved of his obligation to further represent Ronald Johnson 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