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DISTRICT I

December 28, 2022

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

2020AP1867-CR

State of Wisconsin v. Jose F. Montero (L.C. # 2015CF4333)

Before Brash, C.J., Donald, P.J., and White, 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).

Jose F. Montero appeals from a judgment convicting him of one count of repeated sexual assault of the same child and one count of exposing a child to harmful material. Montero also appeals from the order denying his motion for postconviction relief. Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹

In 2015, the State charged Montero with one count of repeated sexual assault of the same child and one count of exposing a child to harmful material. The charges stemmed from allegations that Montero repeatedly sexually assaulted his granddaughter N.F. and exposed her to pornography. The matter proceeded to a jury trial, where the jury viewed a thirty-eight-minute forensic video interview of N.F. The jury was provided with a transcript of the interview in order to follow along with the video. The transcripts were collected at the end of the video. Multiple witnesses also testified and the matter proceeded to deliberations.

During the deliberations, the jury sent multiple questions to the trial court, resulting in the following exchange:

[Trial Court]: All right. We have a couple of questions from the jury. They want to rereview the entire video testimony of [N.F.] as well as ... they want the transcript of [N.F.'s grandmother]. The Court's response is, "You must rely on your collective memory."

....

[Defense Counsel]: And with respect to the request to watch the video, it is an exhibit and I—if they request to watch the video, I would want them to watch it.

[Trial Court]: It's testimony, so I don't replay entire portions of testimony back to the jury unless they give me a specific portion that they're interested in, and even then we determine what is appropriate and what isn't, and I don't believe it's appropriate to play back an entire portion—almost an entirety of video testimony, so your request is denied. Thank you.

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

[Defense Counsel]: Thank you, Your Honor.

The jury ultimately found Montero guilty as charged.

Montero filed a postconviction motion for a new trial on the ground that his trial counsel was ineffective for failing to ask the trial court to instruct the jury to specify the portions of the forensic interview it wanted replayed. Alternatively, Montero argued that the trial court erroneously exercised its discretion in failing to *sua sponte* instruct the jury to specify which portions of the interview it wished to view. The postconviction court denied the motion without a hearing. This appeal follows.

On appeal, Montero only contends that the “trial court erroneously exercised its discretion when it failed to advise the jury that it might be able to view specific parts of the video.” The State raises multiple arguments in opposition, including forfeiture and abandonment. However, for purposes of completeness, we choose to address Montero’s argument on the merits.

The decision whether to provide an exhibit to the jury during deliberations is committed to the trial court’s discretion. *See State v. Anderson*, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶28, 349 Wis. 2d 327, 833 N.W.2d 126. We will uphold discretionary decisions as long as the trial 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.” *See State v. Dorsey*, 2018 WI 10, ¶37, 379 Wis. 2d 386, 906 N.W.2d 158 (citation omitted).

Here, the trial court explained that it is not its practice to allow the jury to view the entirety of a video during deliberations; rather, the jury would have to specify which portions it

wished to view and the trial court would then make a decision. That the court did not, on its own, ask the jury for specifics is not an erroneous exercise of discretion. Indeed, the trial court informed the jury at the beginning of the trial that it would be required to rely on its collective memory during deliberations. The jury was therefore aware that it would likely not receive exhibits during deliberations. Moreover, trial counsel did not ask the trial court to instruct the jury to specify which portions of the video it wished to view. In essence, the trial court did not erroneously exercise its discretion because there was no discretion to exercise. Had counsel asked the trial court to request more specificity from the jury, the trial court would have exercised its discretion in making that decision.² The trial court had one opportunity to exercise its discretion in response to the jury's request—its decision to deny the request to replay the entire video. Montero does not challenge that decision, nor does he cite to any case law to support his contention that the trial court was required to *sua sponte* instruct the jury to designate portions of the video exhibit it wanted replayed during deliberations.

For the foregoing reasons, we affirm the judgment and order.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.
See WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

² We note that Montero did not raise his ineffective assistance of counsel argument on appeal and has therefore abandoned that argument. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).