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DISTRICT IV

May 18, 2023

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Juan Cuahuey-Tlahuel
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1675-CRNM State of Wisconsin v. Juan Cuahuey-Tlahuel
(L.C. # 2018CF127)

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

Juan Cuahuey-Tlahuel appeals judgments convicting him after a jury trial of three felonies and two misdemeanors. Appointed appellate counsel, Tristan Breedlove, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Cuahuey-Tlahuel filed a response. After considering the no-merit report and

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

response, and conducting an independent review of the record as mandated by ***Anders***, we conclude that there are no issues of arguable merit that Cuahuey-Tlahuel could raise on appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State charged Cuahuey-Tlahuel with second degree sexual assault of a child, third degree sexual assault, disorderly conduct, resisting or obstructing an officer, and felony bail jumping. The complaint alleged that Cuahuey-Tlahuel sexually assaulted multiple persons while in the wave pool at a resort in Lake Delton, Wisconsin. A jury trial was held, and the jury found Cuahuey-Tlahuel guilty of all five charged offenses. The circuit court imposed a sentence of two years of initial confinement and two years of extended supervision for the second degree sexual assault of a child count, two years of initial confinement and two years of extended supervision for the third degree sexual assault count, 30 days in jail for the disorderly conduct count, four months in jail for the obstructing an officer count, and nine months in jail for the bail jumping count. The court ordered the sentences to run concurrently with each other, but consecutive to any other sentence Cuahuey-Tlahuel was serving.

Both the no-merit report and the response discuss whether Cuahuey-Tlahuel's convictions were supported by the evidence adduced at trial. When reviewing the sufficiency of the evidence, we look at whether "'the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoted source omitted).

In order for the jury to find Cuahuey-Tlahuel guilty of count one, second degree sexual assault of a child under WIS. STAT. § 948.02(2), the State needed to prove that Cuahuey-Tlahuel

had sexual contact with a child, E.H., and that E.H. was under sixteen years of age at the time of the alleged sexual contact. *See* WIS JI—CRIMINAL 2104. Sexual contact, as relevant here, is defined as "intentional touching, whether direct or through clothing" by the defendant of the complainant's intimate parts. WIS. STAT. § 948.01(5)(a)1. Under WIS. STAT. § 939.22(19), "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." Sexual contact also requires that the defendant acted with intent to become sexually aroused or gratified, or to sexually degrade or humiliate the complainant. Sec. 948.01(5)(a). E.H. testified at trial that Cuahuey-Tlahuel grabbed her butt with his "whole hand" when she was in the wave pool and that she was thirteen years old at the time it occurred. E.H. identified Cuahuey-Tlahuel in court as the person who had touched her. E.H. further testified that she thought the touching was intentional "[b]ecause it was a grab and it's not like he was drowning or anything." E.H. testified that the contact made her feel uncomfortable. We agree with counsel that there would be no arguable merit to challenging the sufficiency of the evidence to support Cuahuey-Tlahuel's conviction for second degree sexual assault of a child.

In order for the jury to find Cuahuey-Tlahuel guilty of count two, third-degree sexual assault under WIS. STAT. § 940.225(3), the State needed to prove that Cuahuey-Tlahuel had sexual intercourse with R.P., and that R.P. did not consent to the sexual intercourse. *See* WIS JI—CRIMINAL 1218A. "Sexual intercourse," as relevant here, is defined as any "intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening[.]" Sec. 940.225(5)(c). R.P. testified at trial that Cuahuey-Tlahuel inserted his finger into her anus through her swimming suit, without her consent. R.P. also identified Cuahuey-Tlahuel in court as the person who had touched her in the pool. R.P. further testified that Cuahuey-Tlahuel's actions "felt incredibly intentional." R.P. testified, "This wasn't a gentle

brush-up. This was forceful, to me." R.P. testified that she was "[d]isgusted" and also scared for her kids, who were in the same pool with her. According to R.P., Cuahuey-Tlahuel backed away from her with his hands up after the incident, and that "his reaction seemed guilty" as he swam away. R.P. spoke with a security guard and the manager on duty at the resort about the incident, and pointed out Cuahuey-Tlahuel to them.

The jury also heard testimony from Devan Dollar, who was employed as a security guard and dispatcher at the resort. Dollar testified that she was notified about the alleged assaults and given a description of Cuahuey-Tlahuel, including the swimsuit he was wearing. Dollar testified that she reviewed video footage and was able to locate a man matching Cuahuey-Tlahuel's description in the video. Dollar further testified that she backtracked the video footage and observed the man grab or touch people in three different instances. The video recording that Dollar had viewed also was admitted into evidence and played for the jury at trial. When a portion of the security video footage was played during R.P.'s testimony, R.P. testified that she was able to identify herself as well as Cuahuey-Tlahuel on the video, and specifically pointed out the moment reflected in the video when Cuahuey-Tlahuel put his hands up and swam away from her. We agree with counsel's conclusion in the no-merit report that there would be no arguable merit to challenging the sufficiency of the evidence to support Cuahuey-Tlahuel's conviction for third degree sexual assault.

In order for the jury to find Cuahuey-Tlahuel guilty of count three, disorderly conduct under WIS. STAT. § 947.01, the State needed to prove that Cuahuey-Tlahuel engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance. The phrase "otherwise disorderly conduct" is defined as "having a tendency to disrupt good order and

provoke a disturbance. It includes all acts and conduct [that] are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts." WIS JI—CRIMINAL 1900.

In addition to the evidence already discussed above, the jury heard testimony from C.O., who was friends with E.H. and had been with her in the wave pool. C.O. was thirteen years old at the time. C.O. testified that Cuahuey-Tlahuel touched her on the butt and thigh in the pool and that it made her uncomfortable. C.O. testified that, as she and E.H. got out of the pool, two girls came up to them and asked if "that guy" had touched them, pointing to Cuahuey-Tlahuel. C.O. also identified Cuahuey-Tlahuel in the courtroom.

The jury also heard testimony from A.G., who was sixteen years old on the date of the alleged incidents. A.G. testified that she had been in the wave pool with a friend that day when she was groped by a man on her upper thigh, on the inside of her leg, without her consent. A.G. viewed a portion of the security video footage and was able to identify herself in the pool, as well as her friend and Cuahuey-Tlahuel. A.G. also identified Cuahuey-Tlahuel in court as the man who had groped her. A.G. testified that, after she was groped, she spoke with security staff and with law enforcement at the resort. Given all of the testimony and video evidence at trial about Cuahuey-Tlahuel's conduct and the disturbances it allegedly caused, we are satisfied that any challenge to the sufficiency of the evidence to support Cuahuey-Tlahuel's disorderly conduct conviction would be without arguable merit.

In order for the jury to find Cuahuey-Tlahuel guilty of count four, obstructing an officer under WIS. STAT. § 946.41, the State needed to prove that Cuahuey-Tlahuel knowingly gave false information to an officer, that the officer was doing an act in an official capacity, that the

officer was acting with lawful authority, and that Cuahuey-Tlahuel intended to mislead the officer. *See* WIS JI—CRIMINAL 1766A.

Lake Delton police officer Bradley Kurkiewicz testified at trial that he was called to the resort on the date of the incidents to respond to a sexual assault complaint. At the resort, Kurkiewicz met with Cuahuey-Tlahuel, who said he did not recall touching any female subjects in the pool. Cuahuey-Tlahuel also told Kurkiewicz that he was not a good swimmer and that he may have touched a female subject at one point when he believed he was drowning.

Cuahuey-Tlahuel was arrested and transported to the Lake Delton Police Department. There, he was read his rights pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966), and was interviewed by another police officer, Kevin Adrian. The jury viewed a video recording of the interview at trial. Adrian testified at trial that Cuahuey-Tlahuel appeared to be avoiding his question when Adrian asked whether Cuahuey-Tlahuel remembered seeing anybody in the wave pool, and that Cuahuey-Tlahuel's version of events was "kind of all over the place." The jury could reasonably find, when considering Cuahuey-Tlahuel's version of events alongside the testimony of the victims, the police officers, and the security video footage, that Cuahuey-Tlahuel gave false information to law enforcement officers and intended to mislead them. We are satisfied that the evidence adduced at trial was sufficient for the jury to convict Cuahuey-Tlahuel of obstructing an officer, such that any argument to the contrary would be without arguable merit.

In order for the jury to find Cuahuey-Tlahuel guilty of count five, bail jumping under WIS. STAT. § 946.49(1), the State needed to prove that he was charged with a felony, that he was released from custody on bond, and that he intentionally failed to comply with the terms of the

bond. *See* WIS JI—CRIMINAL 1795. The parties stipulated that, as of the date of the alleged assaults, Cuahuey-Tlahuel had been charged with a felony, was released from custody on bond, and that a condition of that bond was that he shall not commit any crimes. As discussed above, the State offered sufficient evidence to prove beyond a reasonable doubt that Cuahuey-Tlahuel committed the crimes of second-degree sexual assault of a child, third-degree sexual assault, disorderly conduct, and obstructing an officer. There would be no arguable merit to challenging the sufficiency of the evidence to support the bail jumping conviction.

The no-merit report also discusses whether the circuit court erred when it granted the State's motion to admit "other acts" evidence. Specifically, the State moved to introduce video evidence of Cuahuey-Tlahuel allegedly groping an unidentified woman in the same resort pool on the same day. We review a circuit court's decision to admit other acts evidence for erroneous exercise of discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. Admissibility of other acts evidence is governed by a three-step test: the evidence must be admitted for an acceptable purpose under WIS. STAT. § 904.04(2); it must be relevant; and its probative value must not be substantially outweighed by the danger of unfair prejudice. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Greater latitude applies to all three questions when reviewing other acts evidence in sexual assault cases, especially in cases involving children. ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

Here, the circuit court reasoned that the groping evidence shed potential light on Cuahuey-Tlahuel's method of operation in committing the charged offenses and, therefore, the video containing evidence of other acts was offered for an acceptable purpose. The court further concluded that the evidence was relevant and, noting the greater latitude rule, found that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury. A circuit court properly exercises its discretion when it has examined the relevant facts, applied the proper legal standards, and engaged in a rational decision-making process. ***State v. Bentley***, 201 Wis. 2d 303, 318, 548 N.W.2d 50 (1996). The record reflects that the circuit court did so here. Any challenge to the circuit court's exercise of discretion in admitting the other acts evidence would be without arguable merit.

Finally, the no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. As explained in the no-merit report, the sentences imposed were well within the legal maximum. The standards for the circuit court and this court on discretionary 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. Any argument that the circuit court erroneously exercised its sentencing discretion is without arguable merit on appeal.

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

Upon the foregoing,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Tristan Breedlove and co-counsel Ellen Krahn are relieved of any further representation of Cuahuey-Tlahuel in these matters. *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