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DISTRICT I

October 3, 2023

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

2018AP1957-CRNM State of Wisconsin v. Ludwyg O. Miramontes-Rodriguez
(L.C. # 2016CF2353)

Before White, C.J., Dugan and Geenen, 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).

Ludwyg O. Miramontes-Rodriguez appeals from a judgment, entered upon a jury's verdict, convicting him of one count of repeated sexual assault of a child. Appellate counsel, Chris A. Gramstrup, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20). Miramontes-Rodriguez filed a response to that report. Counsel then filed a supplemental report, and we accepted an additional response from Miramontes-Rodriguez. Miramontes-Rodriguez later filed an amended version of that additional response, which we also accepted. Pursuant to an order of this court, counsel filed a second supplemental no-merit report, to which Miramontes-Rodriguez also responded. Upon this

court's independent review of the record as mandated by ***Anders***, counsel's reports, and Miramontes-Rodriguez's responses, we conclude there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgment.

The criminal complaint charged Miramontes-Rodriguez with one count of repeated sexual assault of a child, alleging that "on or about 2007 through 2011,"[1] Miramontes-Rodriguez had committed repeated sexual assaults of M.A.M., his stepdaughter. According to the complaint, M.A.M. told police during an interview that:

> when she was around 9 or 10, starting in 2007, that the defendant, her step-father, started touching her. MAM stated that it started with the defendant touching her breasts and vagina over her clothing and that he then began touching her breasts and vagina underneath her clothes. MAM also stated that the defendant would put his penis into her vagina, but would pull out before ejaculating, which he would do into a tissue. MAM stated that all of this touching would take place when her mother was sleeping or at work. MAM indicated that she cannot remember specific instances but indicated that it happened once or twice a week.
>
> MAM stated that the last occasion occurred in 2011 when her step-father came out of the shower in a towel and she was sitting on his bed and he came and sat next to her and had his hand on her leg when her mother walked in and started screaming at the defendant.

The information repeated the offense as it was charged in the complaint.

The case was tried to a jury, which convicted Miramontes-Rodriguez as charged. The trial court imposed the mandatory minimum term of twenty-five years of initial confinement, plus fifteen years of extended supervision. Miramontes-Rodriguez appeals.

[1] Prior to voir dire, the parties orally agreed to narrow the time frame specified in the information through March 21, 2010, the day before M.A.M. turned twelve.

I. Sufficiency of the Evidence

The first issue that appellate counsel discusses in the no-merit report is whether sufficient evidence supports the jury's verdict. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506. The standard of review is the same whether the conviction relies on direct or circumstantial evidence. *See* ***id.*** at 503. "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

In 2016, Miramontes-Rodriguez was charged with repeated sexual assault of a child, contrary to WIS. STAT. § 948.025(1)(a), as amended by 2005 Wis. Act 430 and effective June 6, 2006. Under that version of § 948.025(1)(a), "[w]hoever commits 3 or more violations under [WIS. STAT. §] 948.02(1) or (2) within a specified period of time involving the same child is guilty of … [a] class B felony if at least 3 of the violations were violations of s. 948.02 (1) (b) or (c)."[2] Under § 948.02(1)(b), as amended by 2005 Wis. Act 430 and effective June 6, 2006,

[2] The criminal complaint and information parallel this language in all relevant ways, including referencing both WIS. STAT. § 948.02(1)(b) and (c) as potential predicate offenses for a violation of WIS. STAT. § 948.025. Prior to voir dire, when condensing the time frame, the parties also agreed to remove the reference to § 948.02(1)(c) to avoid clouding the issue for the jury. That particular paragraph requires the use or threat of force or violence, and it was never alleged that Miramontes-Rodriguez used force or violence in this case.

"[w]hoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony."

M.A.M., who was by then eighteen years old, testified at trial. She told the jury her birthdate was March 22, 1998, which means that she did not attain the age of twelve until March 22, 2010. M.A.M. testified that Miramontes-Rodriguez moved in with her and her mother, E.R., when M.A.M. was nine years old. Her testimony about how Miramontes-Rodriguez's behavior evolved from him just touching her legs to sexual intercourse was consistent with the recitation in the criminal complaint. M.A.M. testified that these assaults occurred while E.R. was at work or asleep, and that they occurred both in the first house Miramontes-Rodriguez shared with her and E.R. and a second home across the street that they all moved to in December 2008. When asked how many times Miramontes-Rodriguez put his penis in her vagina, she answered, "definitely more than 10, more than 20 times." Although Miramontes-Rodriguez also testified and denied assaulting M.A.M., her testimony alone was more than adequate evidence to support the jury's verdict. Thus, there is no arguable merit to a challenge to the sufficiency of the evidence supporting the conviction.

II. Sentencing

A. General Sentencing Discretion

The second issue counsel addresses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and

determine which objective or objectives are of greatest importance. *See* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The forty-year sentence imposed is well within the sixty-year range authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. The initial confinement period is the mandatory minimum required by law, so it is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, there is no arguable merit to challenging the trial court's general exercise of sentencing discretion.

B. Application of the Mandatory Minimum

We directed counsel to file the second supplemental no-merit report after Miramontes-Rodriguez raised a concern in his amended second response, and because WIS. STAT. § 948.025 had a "bizarre" legislative history between June 6, 2006, and March 27, 2008. *See* ***State v. Thompson***, 2012 WI 90, ¶27, 342 Wis. 2d 674, 818 N.W.2d 904.

The legislature passed several bills on May 22, 2006, which took effect on June 6, 2006, and were thus in effect at the time of Miramontes-Rodriguez's first assault of M.A.M. in 2007.

Both 2005 Wis. Act 430 and 2005 Wis. Act 437 made changes to the 2003-04 version of WIS. STAT. § 948.025.[3] Act 430 also created WIS. STAT. § 939.616,[4] specifying a mandatory minimum twenty-five-year term of initial confinement for a person convicted of a violation of § 948.025(1)(a). Act 437, however, did not create any mandatory minimum sentence provisions. *See* ***Thompson***, 342 Wis. 2d 674, ¶92 (Ziegler, J., concurring). When there are seemingly inconsistent amendments to the same statute by different acts, "the last act governs." *See* WIS. STAT. *Preface* 2.C., viii (2021-22).

Ultimately, though, there is no arguable merit to challenging the application of the mandatory minimum provision. Repeated sexual assault of a child, as proscribed by all versions of WIS. STAT. § 948.025, occurs "within a specified period of time." This makes it a continuing offense—"a course of conduct that takes place over time, as opposed to a single incident, and is complete when the defendant performs the last act that, viewed alone, is a crime." *See* ***State v. Lis***, 2008 WI App 82, ¶7, 311 Wis. 2d 691, 751 N.W.2d 891. That is, Miramontes-Rodriguez's liability for his crime actually begins at the end of the continuing offense, not the start. *See* ***State v. Thums***, 2006 WI App 173, ¶11, 295 Wis. 2d 664, 721 N.W.2d 729. Because the time period for which Miramontes-Rodriguez was charged ended in 2010, we need not resolve any discrepancies between Act 430 and Act 437, because the legislature resolved those conflicts with

[3] The acts also made changes to WIS. STAT. § 948.02, subsections of which are referenced as the predicate offenses underlying a violation of WIS. STAT. § 948.025.

[4] WISCONSIN STAT. § 939.616 had its own issues. The mandatory minimum statute as created by 2005 Wis. Act 430 had been numbered WIS. STAT. § 939.617. On the same date, 2005 Wis. Act 433 created a different § 939.617 with a mandatory minimum sentence for other child sexual offenses. The revisor of statutes subsequently renumbered the Act 430 statute as § 939.616. *See* WIS. STAT. § 13.93(1)(b) (2005-06). However, the renumbering of this statute is not an issue, so we refer to § 939.616 throughout this opinion.

the enactment of 2007 Wis. Act 80, which took effect in March 2008. That act made revisions to WIS. STAT. §§ 948.025, 948.02, and 939.616, which have been in effect ever since.

Our main concern in applying the appropriate charging and penalty statutes is in avoiding an ex post facto violation. "[A]ny statute that makes the punishment for a crime more burdensome after it is committed is prohibited as an ex post facto law," ***State ex rel. Singh v. Kemper***, 2016 WI 67, ¶28, 317 Wis. 2d 127, 883 N.W.2d 86, as is a statute that "punishes as a crime an act previously committed, which was innocent when done," *see* ***id.*** (citations and internal quotation marks omitted). "The animating principle underlying the ex post facto clauses is the concept of fair warning." *See* ***id.***, ¶39. Here, the record reflects that Miramontes-Rodriguez had more than fair warning about a mandatory minimum sentence. The State referenced it in both the complaint and the information. After voir dire and before beginning the trial, the trial court engaged Miramontes-Rodriguez in a colloquy about the fact that there was a mandatory minimum sentence should he be convicted. When Miramontes-Rodriguez expressed some question about that, the trial court gave Miramontes-Rodriguez additional time to consult with trial counsel.

There are numbering differences between the Act 430 versions of WIS. STAT. §§ 948.025 and 939.616 used to charge Miramontes-Rodriguez and the 2008 version, which might lead one to question if it was appropriate to reference the Act 430 version in the sufficiency of the evidence analysis above. However, the actual elements of the offense with which Miramontes-Rodriguez was charged, as well as the penalties he faced, remained consistent between those two versions even if the numbering and organization did not.

Under the Act 430 version of WIS. STAT. § 948.025, specifically paragraph (1)(a), whoever commits three or more violations under WIS. STAT. § 948.02(1) or (2) within a specified period of time involving the same child is guilty of a Class B felony if at least three of the violations were violations of § 948.02(1)(b) or (c); relatedly, under § 948.02(1)(b), whoever has sexual intercourse with a person who has not attained the age of twelve years is guilty of a Class B felony. Under Act 430's version of WIS. STAT. § 939.616, specifically subsection (1), if a person is convicted of a violation of § 948.025(1)(a), the court shall impose a bifurcated sentence of at least twenty-five years of initial confinement.

Under the 2008 version of WIS. STAT. § 948.025, specifically paragraph (1)(b), whoever commits three or more violations under WIS. STAT. § 948.02(1) or (2) within a specified period of time involving the same child is guilty of a Class B felony if at least three of the violations were violations of § 948.02(1)(am), (b), or (c); relatedly, under § 948.02(1)(b), whoever has sexual intercourse with a person who has not attained the age of twelve years is guilty of a Class B felony. Under the 2008 version of WIS. STAT. § 939.616, specifically subsection (1r), if a person is convicted of a violation of § 948.025(1)(b), the court shall impose a bifurcated sentence of at least twenty-five years of initial confinement.

Thus, any differences in the numbering between the offense and penalty provisions named in the complaint versus the ones that should have been applied are merely technical charging violations for which there is no arguably meritorious challenge. The State could have revised the numbering at any time without changing the elements of the offense it was alleging or the potential penalties Miramontes-Rodriguez faced. Accordingly, there is no arguable merit to an ex post facto challenge or to challenging application of the mandatory minimum term of initial confinement.

III. Ineffective Assistance of Trial Counsel

The final issue discussed in the original no-merit report is whether trial counsel provided ineffective assistance. "There are two elements that underlie every claim of ineffective assistance of counsel[.]" ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. "[F]irst, the person making the claim must demonstrate that his or her counsel's performance was deficient[.]" ***Id.*** To demonstrate deficient performance, the person must show that counsel's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. Second, the person "must demonstrate that this deficient performance was prejudicial." ***Mayo***, 301 Wis. 2d 641, ¶60. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***McDougle***, 347 Wis. 2d 43, ¶13 (citation omitted). We need not address both elements if the defendant cannot make a sufficient showing as to one or the other. ***Mayo***, 301 Wis. 2d 642, ¶61.

Appellate counsel discusses two potential ineffective assistance claims. First, at the start of the sentencing hearing, trial counsel told the court that Miramontes-Rodriguez was dissatisfied because he wanted to present "external evidence" to the jury about his employment and about his "financial expenditures for the benefit of the family." Trial counsel explained to the court that Miramontes-Rodriguez had testified about those facts himself, and she told him that no one was going to disbelieve him, but also that they did not constitute a legal defense to the charges.[5] Trial

[5] Trial counsel also stated that although she "was able to get verbal verification of employment, "the banking information was problematic, despite a subpoena, because of various matters that–I think it's Mr. Miramontes' personal right–I'm not going to go any further into those."

counsel was, of course, correct that none of that information constitutes a defense. In addition, because Miramontes-Rodriguez had testified about those facts himself, external evidence would have been cumulative. Indeed, that M.A.M. essentially acknowledged Miramontes-Rodriguez's expenditures when she told the jury she was afraid to report his assaults because he was the one paying all of the bills. Accordingly, even if trial counsel performed deficiently for not securing external evidence to present at trial, there was no arguable prejudice.

Second, trial counsel told the court that Miramontes-Rodriguez's first concern after the trial was with the mandatory minimum sentence, suggesting he was claiming that "he did not fully understand that before the trial." Trial counsel noted, however, that she had "discussed that with him with my interpreter privately before trial, but more important that the Court had discussed that with him the day of trial[.]" Accordingly, there is no basis in the record for claiming a prejudicial lack of knowledge about the mandatory minimum.

In his original response, Miramontes-Rodriguez identifies two additional ineffective assistance claims. First, he complains that trial counsel was ineffective for failing to investigate approximately ten witnesses whose testimony "would support Mr. Miramontes-Rodriguez innocence that there were not inappropriate or suspicious interactions between" him and M.A.M. However, such testimony is irrelevant; the witnesses had no personal knowledge of what might have happened when Miramontes-Rodriguez was alone with M.A.M., and Miramontes-Rodriguez acknowledges in his response that there were no witnesses to the alleged assaults.

Miramontes-Rodriguez also claims these witnesses would have supported his "jealous ex-wife" theory of defense. Specifically, he believed that M.A.M.'s mother E.R. suspected him of having an affair with her cousin, R.R., and that she "sought revenge" by having M.A.M.

fabricate allegations against Miramontes-Rodriguez. Of the potential witnesses, Miramontes-Rodriguez only tells us what he believes R.R.'s testimony would have shown; among other things, she supposedly could have testified that M.A.M. and E.R. walked into her home and saw Miramontes-Rodriguez sitting at the table with her, talking. This purported testimony, however, lacks probative value. There is no suggestion that R.R. had any personal knowledge that E.R. was coaching M.A.M. or otherwise encouraging her to lie about Miramontes-Rodriguez assaulting her. Moreover, R.R.'s testimony at best goes to E.R.'s motives and credibility; it does not explain why M.A.M. would have agreed to perpetrate such a lie, particularly when M.A.M. expressed concerns about finances if Miramontes-Rodriguez were to leave. Moreover, the jury did hear about E.R.'s allegations of an affair between Miramontes-Rodriguez and R.R., from E.R., M.A.M., and Miramontes-Rodriguez himself. Accordingly, even if counsel were deficient for not further investigating or calling the witnesses, the record does not support any arguably meritorious claim for prejudice on either topic.

As his second ineffective assistance issue, Miramontes-Rodriguez asserts that trial counsel should have filed a motion under WIS. STAT. § 972.11(3) to allow evidence of M.A.M.'s prior personal and medical history, including behavioral issues and "psychological impairment." However, § 972.11(3) specifically applies to use of a patient's personal or medical history in a prosecution under WIS. STAT. § 940.22 for sexual exploitation by a therapist, which is clearly not applicable here.

Based on the foregoing, there is no arguable merit to any claim of ineffective assistance of trial counsel.

IV. Juror Bias

Finally, Miramontes-Rodriguez contends that two of the jurors were subjectively biased against him.[6] "The United States and Wisconsin Constitutions guarantee a criminal defendant the right to a trial by an impartial jury." ***State v. Nielsen***, 2001 WI App 192, ¶24, 247 Wis. 2d 466, 634 N.W.2d 325. "A juror who has expressed or formed any opinion, or is aware of any bias or prejudice in the case, should be removed from the panel." ***Id.***; *see also* WIS. STAT. § 805.08(1) (2021-22).

"Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias." ***State v. Smith***, 2006 WI 74, ¶19, 291 Wis. 2d 569, 716 N.W.2d 482 (citation omitted). There are three types of potential juror bias: statutory, subjective, and objective. *See* ***State v. Faucher***, 227 Wis. 2d 700, 716, 596 N.W.2d 770 (1999). Miramontes-Rodriguez does not contend that statutory or objective bias are an issue in this case, and we do not find any support in the record for such claims. Subjective bias "refers to the bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind." ***Smith***, 291 Wis. 2d 569, ¶20 (citation omitted). Subjective bias may be revealed by a juror who has "expressed or formed any opinion, or is aware of any or bias or prejudice in the case[.]" *See* ***id.*** (citation omitted).

[6] Relatedly, Miramontes-Rodriguez argues that trial counsel was ineffective for not moving to strike the biased jurors. *See, e.g.*, ***State v. Carter***, 2002 WI App 55, ¶14, 250 Wis. 2d 851, 641 N.W.2d 517; ***State v. Koller***, 2001 WI App 23, ¶14, 248 Wis. 2d 259, 635 N.W.2d 838; ***State v. Brunette***, 220 Wis. 2d 431, 442, 583 N.W.2d 174 (Ct. App. 1998). However, because we conclude there is no arguable merit to the claims of juror bias, however, any claim of ineffective assistance on that ground also fails. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

Miramontes-Rodriguez first contends that Juror 24 "had doubts about giving a direct answer to being fair and impartial in the case," based on the juror's answer when the trial court asked potential jurors, "Does anyone on the panel work in a law firm or in a legal capacity; spouse, close family friend or close relative that works in a legal capacity?"

> PROSPECTIVE JUROR NO. 24: I have a daughter that's an attorney. I don't know if that's going to make any difference….
>
> ….
>
> THE COURT: What type of work does she do?
>
> PROSPECTIVE JUROR NO. 24: She does liability, car liability.
>
> THE COURT: So accident cases?
>
> PROSPECTIVE JUROR NO. 24: Yes.
>
> THE COURT: All right. And have you heard stories from her about anything?
>
> PROSPECTIVE JUROR NO. 24: No, but I heard you say have an attorney, she's an attorney. I'm just following the rules.
>
> THE COURT: I understand, and I'm just asking you my questions. Can you be fair and impartial in this case?
>
> PROSPECTIVE JUROR NO. 24: I would hope I could be.
>
> THE COURT: Okay. Very good.
>
> PROSPECTIVE JUROR NO. 24: I mean, yeah, I think I can be.

Similarly, Miramontes-Rodriguez was concerned by Juror 23's answers to the court's questions after the juror told the trial court that he had a police officer cousin in Iowa who "speaks somewhat negatively about his position at times." The court asked the juror, "Do you think you could put that aside and make a decision based only on the evidence in this case?" Juror 23 answered, "I don't know if I could say, honestly, yes to that." When the court inquired

why not, the juror responded, "Just he's told stories relating to domestic violence and something similar to this."

Neither jurors' comments reflects an outright bias or a pre-existing opinion about the case. Rather, Miramontes-Rodriguez's concerns are, in essence, that the jurors expressed uncertainty about their ability to be impartial. However, "a prospective juror need not unambiguously state his or her ability to set aside bias." ***State v. Jimmie R.R.***, 2000 WI App 5, ¶28, 232 Wis. 2d 138, 606 N.W.2d 196. "'Indeed, we … fully expect a juror's honest answers at times to be less than unequivocal.'" ***State v. Tobatto***, 2016 WI App 28, ¶22, 368 Wis. 2d 300, 878 N.W.2d 701 (citation omitted; ellipses in ***Tobatto***).

A broader reading of the transcript reflects no basis for a subjective bias claim against either juror. Juror 24's statements on their face might express an uncertainty about the ability to be impartial but nevertheless reflects his willingness to be fair and impartial. The trial court explained to Juror 23 that

> the issue is not so much where we either like the charge or we don't like the charge; the issue is whether the State has met its burden of proof or not. And I guess the question is: Can you listen to the evidence fairly and make a decision as to whether the State's met its burden of proof or not?

Juror 23 answered, "I can say yes to that." Accordingly, there is no arguable merit to claiming juror bias in this matter.

Our independent review of the record reveals no other potential issues of arguable merit.[7]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2021-22).

IT IS FURTHER ORDERED that Attorney Chris A. Gramstrup is relieved of further representation of Miramontes-Rodriguez in this matter. *See* WIS. STAT. RULE 809.32(3) (2021-22).

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

Samuel A. Christensen
Clerk of Court of Appeals

[7] In his response to the second supplemental no-merit report, Miramontes-Rodriguez asks us to appoint an attorney who, although unwilling to take the case pro bono, supposedly agreed to represent Miramontes-Rodriguez if appointed by the court or the State Public Defender. However, this court ordinarily does not appoint counsel directly, and we are not persuaded it is necessary to deviate from that norm.