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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

November 30, 2023

To:

Hon. Nicholas McNamara
Circuit Court Judge
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
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Erin Hanson
Electronic Notice

Patricia Sommer
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Alfredo Martinez-Sotelo 683144
Jackson Correctional Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2021AP561-CRNM State of Wisconsin v. Alfredo Martinez-Sotelo
(L.C. #2018CF2450)

Before Blanchard, Graham, 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).

Alfredo Martinez-Sotelo appeals a judgment of conviction for one count of repeated sexual assault of a child. Attorney Patricia Sommer, his appointed counsel, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Martinez-Sotelo was sent a copy of the report and filed a response, and counsel filed a supplemental no-merit report. Upon consideration of the report, response, supplemental report,

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

and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the complaint allegations, Martinez-Sotelo sexually assaulted his nine-year-old step-daughter, A.B.,² on multiple occasions over a period of eight to nine months. A.B. reported that Martinez-Sotelo touched her vagina, and she said that she believed it happened about twenty times.

The case proceeded to a jury trial. The evidence included A.B.'s testimony and recorded statements from a forensic interview, testimony from the forensic interviewer, testimony from school employees to whom A.B. reported her allegations, testimony from A.B.'s mother, and statements that Martinez-Sotelo made to a police detective who interviewed him.

The jury found Martinez-Sotelo guilty. The circuit court sentenced him to a bifurcated term of imprisonment consisting of fifteen years of initial confinement and ten years of extended supervision.

The no-merit report first addresses whether there are issues of arguable merit relating to motions in limine, jury selection, opening statements, the admissibility of expert testimony the court allowed, and closing arguments. Based on our independent review of the record, we agree with counsel that there are no issues of arguable merit in these areas. Our review of the record also reveals no other issue of arguable merit relating to the events before or during trial,

² To protect her privacy, we refer to the victim using initials that do not correspond with her own. *See* WIS. STAT. RULE 809.86(4).

including with respect to Martinez-Sotelo's decision not to testify and the instructions the jury was given.

The no-merit report next addresses sufficiency of the evidence. We agree that there is no arguable merit to this issue. An appellate court will not overturn a conviction based on insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting all of the evidence here, we conclude based on our review of the record that it was sufficient to support the jury's verdict.

In his response to the no-merit report, Martinez-Sotelo raises four claims for ineffective assistance of trial counsel. For the reasons we now explain, we conclude that these claims lack arguable merit.

When claiming ineffective assistance of counsel, a defendant has the burden to establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of a trial, prejudice requires the defendant to show that there is a reasonable probability that, but for counsel's alleged errors, the result of his trial could have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Martinez-Sotelo's first claim for ineffective assistance of trial counsel relates to his recorded interview with police in which the police used a Spanish-language interpreter to communicate with him. The interview was not played for the jury. Rather, Martinez-Sotelo's statements from the interview were admitted at trial through the testimony of a police detective who participated in the interview. A number of the statements were incriminating. Martinez-Sotelo stated that he would touch A.B.'s vagina under her underwear, although he claimed that he did so to check if she had wet her pants. When asked if he ever did this in front of A.B.'s mother, he stated that he never did.

Martinez-Sotelo argues that trial counsel was ineffective by failing to obtain a complete transcript of his interview with police. He alleges that the transcript of the interview that the State provided in discovery did not include a complete translation. He further alleges that a complete transcript would show that, due to interpretation issues, he did not fully understand the rights he was waiving by agreeing to speak with the police. Additionally, he argues that a complete transcript is important to determine whether the interpreter properly translated the police questions and his answers relating to the underlying assault allegations.

In the supplemental no-merit report, appellate counsel states that she engaged an interpreter certified by the supreme court to review the interpretation of the police interview, and that the certified interpreter concluded that the original interpretation was accurate. Based on counsel's representations, we conclude that there is no arguable merit to Martinez-Sotelo's claim that trial counsel was ineffective by failing to obtain a complete transcript of the police interview. Because a certified interpreter has verified that the original interpretation was accurate, Martinez-Sotelo cannot show that trial counsel's failure to obtain a complete transcript resulted in any prejudice.

Martinez-Sotelo's second claim for ineffective assistance of trial counsel relates to A.B.'s mother's work schedule and to the credibility of A.B. and her mother. As relevant to this claim, the jury heard testimony and recorded statements from A.B. suggesting that the assaults often occurred on Saturdays when A.B.'s mother was working. Additionally, A.B. and her mother both testified that the mother sometimes worked on Saturdays and sometimes did not.

Martinez-Sotelo claims that trial counsel was ineffective by failing to obtain A.B.'s mother's work schedule. He alleges that A.B.'s mother did not work on Saturdays and that her work schedule would have shown whether she had been at work on the days in question.

We conclude for two main reasons that Martinez-Sotelo cannot reasonably argue that he was prejudiced by trial counsel's alleged failure to obtain the work schedule. First, Martinez-Sotelo has not provided the schedule or alleged any basis to believe that the schedule is still available. The work schedule would be necessary for a court to now determine whether the schedule supports Martinez-Sotelo's allegation that A.B.'s mother did not work on Saturdays.

Second, even if the work schedule could be obtained, and even if it showed that A.B.'s mother was not *scheduled* to work on Saturdays, we conclude that it would have been highly unlikely to have undermined A.B.'s credibility or bolstered Martinez-Sotelo's defense. The schedule would not necessarily prove that her mother never actually worked on Saturdays. Additionally, A.B. did not testify that the assaults occurred exclusively on Saturdays. Moreover, A.B. was a young child and may have been mistaken as to the day of the week when some of the assaults occurred. Last but not least, Martinez-Sotelo's statements to police in which he admitted to touching A.B.'s vagina when her mother was not present left him with no viable

argument that A.B.'s allegations of vaginal touching were false. Rather, his theory of defense was that the touching was innocent and not for purposes of sexual arousal or gratification.

Martinez-Sotelo's third claim for ineffective assistance of trial counsel similarly relates to credibility and more specifically to whether A.B.'s allegations were fabricated. He claims that counsel was ineffective by failing to obtain text messages and logs that would have shown that he and A.B.'s mother had been fighting and that A.B.'s mother was trying to get him out of the house. He alleges that A.B.'s mother's desire to get him out of the house could have been a "possible reason" for A.B.'s mother to convince A.B. to fabricate allegations against him.

We conclude that Martinez-Sotelo cannot reasonably argue that he was prejudiced by trial counsel's alleged failure to obtain the text messages and logs. Even if the messages and logs showed that he and A.B.'s mother were fighting and that A.B.'s mother wanted him out of the house, he would have been in no better position to explain his admissions to police, and his fabrication theory would have been highly speculative. *See State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("A showing of prejudice requires more than speculation.").

Martinez-Sotelo's fourth and final claim for ineffective assistance of trial counsel relates to testimony by one of the State's expert witnesses and an allegation by A.B. that Martinez-Sotelo inserted his fingers into her vagina during at least one of the assaults. The expert testified that digital penetration of a young girl's vagina would not necessarily cause injury to the hymen or genitals, and that any injury may heal quickly and without scarring. The State used this testimony to downplay the fact that A.B. had not undergone a medical examination. Martinez-Sotelo claims that trial counsel was ineffective by failing to request that A.B. be compelled to submit to a medical examination and by failing to retain an expert to counter the State's expert.

He asserts that experts in similar cases have testified that digital penetration would likely cause an “enlarged introital opening, distorted hymen, and sickling or thinning of the hymenal ring.”³

To be clear, the State was not required to prove that Martinez-Sotelo digitally penetrated A.B.’s vagina to satisfy the elements of the crime. *See* WIS. STAT. §§ 948.02(1), 948.025(1)(d). However, evidence contradicting her allegation of digital penetration could have had bearing on her credibility or on Martinez-Sotelo’s defense that he did not touch her vagina for purposes of sexual arousal or gratification. Regardless, we conclude that Martinez-Sotelo’s fourth claim for ineffective assistance of counsel lacks arguable merit.

We see multiple impediments to this fourth claim, but we focus on one such impediment. “Trial counsel’s failure to bring a meritless motion does not constitute deficient performance,” *State v. Swinson*, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12, and counsel here could have reasonably concluded that a request to compel a medical examination of A.B. was meritless and would be denied. To the extent there is authority in Wisconsin that might have arguably supported a request to compel a medical examination of A.B., the relevant factors on balance would have strongly weighed in favor of denying the request. *Cf. State v. Maday*, 179 Wis. 2d 346, 359-60, 507 N.W.2d 365 (Ct. App. 1993) (discussing factors courts consider in deciding whether a defendant has shown a compelling need or reason for a psychological

³ Martinez-Sotelo uses quotation marks for this phrase in his response, but he does not provide a source for the quotation.

examination of the victim).⁴ And, without a medical examination, the expert testimony that Martinez-Sotelo believes counsel should have offered would have had little significance.

We turn to the circuit court's exercise of its sentencing discretion. The no-merit report does not address sentencing. However, based on our independent review of the record, we conclude that there is no arguable basis for Martinez-Sotelo to challenge his sentence. The circuit court considered the required sentencing factors along with other relevant factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not consider any improper factors. The sentence was well within the maximum allowed and could not be challenged as unduly harsh or so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other basis upon which Martinez-Sotelo might challenge his sentence.

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

Therefore,

IT IS ORDERED that the circuit court's judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

⁴ In *State v. Maday*, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993), the court set forth the following factors to be considered in addressing whether to compel a psychological examination of a victim: "(1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use." *Id.* at 360.

IT IS FURTHER ORDERED that Attorney Patricia Sommer is relieved of any further representation of Alfredo Martinez-Sotelo in this matter.

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

Samuel A. Christensen
Clerk of Court of Appeals