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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 I

May 29, 2024

To:

Hon. Joseph R. Wall
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Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Steven Zaleski
Electronic Notice

Sean Quincy Lewis 555129
Green Bay Correctional Institution
P.O. Box 19033
Green Bay, WI 54307-9033

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

2021AP2163-CRNM State of Wisconsin v. Sean Quincy Lewis (L.C. # 2017CF5680)

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

Sean Quincy Lewis appeals from a judgment, entered on a jury's verdicts, convicting him of two counts of first-degree child sexual assault by sexual contact with a person under age thirteen. Appellate counsel, Steven Zaleski, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Lewis has submitted a response. Upon this court's independent review of the record as mandated by ***Anders***,

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

counsel's report, and Lewis's response, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

On November 24, 2017, D.A. ("Danielle")[2] left four of her children at home while she went to work; the oldest, twelve-year-old Cory, was in charge. A man came to the house, claiming he was having car trouble. Cory allowed the man to use his cellphone to call for a ride. Cory then called Danielle, who asked to speak to the man. The man told Danielle that he was a friend of her boyfriend, Duntaye Bowen, and reminded her that they had met once when she gave him and Bowen a ride. When Danielle was done speaking with the man, Cory went inside the house while the man waited outside. The man then knocked on the door, asked for water, and entered the house.

When Danielle returned home, the children told her that the man had entered the home and touched five-year-old Ryan's and eight-year-old Logan's genitals and buttocks over their clothing. Cory, Ryan, and Logan were given forensic interviews, which were recorded. Lewis was initially identified as a suspect when police interviewed Bowen, who stated that Danielle had given him and Lewis a ride a few months prior. Bowen confirmed Lewis's identity through a photo array; the array was also shown to Cory, who identified Lewis as the man at the house.

Lewis was charged with two counts of first-degree sexual assault of a child under the age of thirteen, contrary to WIS. STAT. § 948.02(1)(e). A jury convicted Lewis of both counts, and

[2] For ease of reading and pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the family's initials.

the trial court imposed thirteen years of imprisonment and thirteen years of extended supervision on each count, to be served concurrently. Additional facts will be discussed herein as necessary.

DISCUSSION

Appellate counsel discusses approximately ten issues in the no-merit report. Lewis's three-page response contains a list of seventeen concerns. Issues that are not specifically discussed in this opinion are deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

I. Videotaped Statements

The first issue appellate counsel discusses in the no-merit report is whether "the circuit court erroneously exercised its discretion in admitting the video recorded statements of the three children." In a criminal trial, the court "may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify[,]" notwithstanding the fact that the statement is otherwise hearsay. WIS. STAT. § 908.08(1); ***State v. Mercado***, 2021 WI 2, ¶¶40-41, 395 Wis. 2d 296, 953 N.W.2d 337. Prior to determining a statement's admissibility, "the court shall view the statement." § 908.08(2)(b). The trial court "shall admit the recording" if the recording satisfies the criteria set forth in § 908.08(3). The purpose of § 908.08, however, is "to make it easier, not harder, to employ videotaped statements of children in criminal trials and related hearings." ***State v. Snider***, 2003 WI App 172, ¶13, 266 Wis. 2d 830, 668 N.W.2d 784.

The State had given notice in the criminal complaint that it intended to introduce the videotaped forensic interviews of the children at trial. Lewis filed a pretrial motion objecting to

admission of the recordings. Specifically, Lewis objected to the admission of Cory's and Ryan's interviews because, he argued, each failed to meet at least one of the statutory criteria for admission. Lewis acknowledged that Logan's interview probably met the criteria for admission, but he asked that the trial court nevertheless review that recording and make a determination as to its admissibility.

Whether to admit or exclude evidence is a matter of trial court discretion. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. To properly exercise discretion, the trial court must examine the relevant facts, apply a proper standard of law, and use a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***State v. Dorsey***, 2018 WI 10, ¶37, 379 Wis. 2d 386, 906 N.W.2d 158. We do not disturb a circuit court's exercise of discretion unless that discretion has been erroneously exercised. ***James***, 285 Wis. 2d 783, ¶8.

In the no-merit report, counsel observes that "the record fails to demonstrate that the circuit court fully viewed all of the statements made by the children on all of the recordings" as required by WIS. STAT. § 908.08(2)(b) and that "the record fails to reflect that the circuit court made the findings" required under § 908.08(3). Counsel nevertheless concludes that there is no arguable merit to challenging the admission of the recordings because § 908.08(7) permits admission of the videos without requiring compliance with §§ 908.08(2) and (3), provided the statement satisfies some other hearsay exception. *See* ***Mercado***, 395 Wis. 2d 296, ¶¶54-55; ***Snider***, 266 Wis. 2d 830, ¶16.

Mercado and ***Snider*** both addressed admission of children's videotaped statements under the residual hearsay exception, WIS. STAT. § 908.03(24), which permits admission of "[a]

statement not specifically covered by any of the [other listed] exceptions but having comparable circumstantial guarantees of trustworthiness." There are five factors that courts should look to in considering whether a child's statement meets circumstantial guarantees of trustworthiness: the attributes of the child making the statement; the person to whom the statement was made; the circumstances under which the statement was made; the content of the statement itself; and other corroborating evidence. ***Mercado***, 395 Wis. 2d 296, ¶56; ***Snider***, 266 Wis. 2d 830, ¶17 (both citing ***State v. Sorenson***, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988)). The no-merit report properly identifies the ***Sorenson*** factors, analyzes the children's statements using those factors, and concludes that there is no arguable merit to challenging admission of the recorded forensic interviews because the statements were admissible under the hearsay exception. *See* ***Mercado***, 395 Wis. 2d 296, ¶¶58-62. We agree with the analysis set forth in the no-merit report; there is no arguable merit to challenging the admission of the children's videotaped interviews.

II. ***Pulizzano*** Evidence

Before trial, Lewis sought to introduce, under ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), "evidence of [a] November 21, 2017 sexual assault" of Cory, which reportedly occurred three days before Lewis's assaults of Ryan and Logan. Lewis's defense theory was that the boys' allegations were actually based on the November 21 event, not on any interaction with Lewis. Thus, the second issue discussed in the no-merit report is whether the circuit court erred when it denied Lewis's motion to admit this evidence.

Under Wisconsin's rape shield law, if the defendant is accused of a crime under WIS. STAT. § 948.02, "any evidence concerning the complaining witness's prior sexual conduct … shall not be admitted into evidence" unless that evidence meets one of three enumerated

exceptions. ***State v. Burns***, 2011 WI 22, ¶¶31-33, 332 Wis. 2d 730, 798 N.W.2d 166. In this case, the November 21 incident does not qualify for admission under any of the statutory exceptions. ***Pulizzano***, however, provides a fourth exception; specifically, there are instances in which evidence that is otherwise inadmissible under the rape shield law "may be admitted to protect a defendant's right to mount a meaningful defense." ***Burns***, 332 Wis. 2d 730, ¶35. To establish a right to present evidence under ***Pulizzano***, the defendant must make an offer of proof showing that: (1) the prior acts clearly occurred; (2) the acts closely resembled those of the present case; (3) the prior act is clearly relevant to a material issue; (4) the evidence is necessary to the defendant's case; and (5) the probative value of the evidence outweighs its prejudicial effect. ***Id.***, 155 Wis. 2d at 656-57.

We again agree with counsel's analysis in the no-merit report. It is not clear that a November 21 sexual assault occurred or even which children were involved. The motion suggests that Cory was the victim but the attached call log suggests the incident actually involved Ryan. The incident also does not closely resemble the facts of the present case. Accordingly, our review of the record and the no-merit report satisfies us that there is no arguable merit to a claim that the circuit court erroneously exercised its discretion in denying Lewis's ***Pulizzano*** motion.

In his response, Lewis argues that the trial court "errored to instruct the Distric[t] Attorney to release evidence of prior sexual abuse of children 3 days earlier" and that "a ***Brady*** violation [occurred] on the grounds that my [defense] should have let the jury hear of prior sexual abuse of these children to establish prior knowledge of inappropriate touching." As explained, the trial court properly denied the ***Pulizzano*** motion. Further, Lewis is not describing a ***Brady*** violation. A violation of ***Brady v. Maryland***, 373 U.S. 83 (1963), occurs when the

prosecution either willfully or inadvertently withholds evidence favorable to the accused, causing prejudice. ***State v. Harris***, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737. The record does not support an arguably meritorious ***Brady*** claim.

III. Sufficiency of the Evidence

The no-merit report discusses whether sufficient evidence supports the jury's guilty verdicts. 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). "[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).

There are two elements of first-degree sexual assault of a child contrary to WIS. STAT. § 948.02(1)(e): the defendant had sexual contact with the victim and the victim was under the age of thirteen at the time of the alleged sexual contact. *See* WIS JI—CRIMINAL 2102E. Sexual contact is an intentional touching of the victim's intimate part or parts[3] by the defendant, either directly or through clothing. *See* WIS JI—CRIMINAL 2101A. Sexual contact also requires that the defendant acted with intent to become sexually aroused or gratified. ***Id.***

[3] "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." WIS. STAT. § 939.22(19).

It is well established and undisputed that Ryan and Logan were under age thirteen at the time of the alleged sexual contact. That means the only potential question is whether sufficient evidence supports a jury's conclusion that Lewis had sexual contact with the boys. Upon reviewing the record and the no-merit report, we agree with counsel's description, analysis, and conclusion that the evidence was sufficient to support the verdict.

Relatedly, Lewis in his response complains that the circuit court erred when it denied his motion to dismiss at the close of evidence. "At the close of the [S]tate's case and at the conclusion of the entire case, the defendant may move on the record for a dismissal." WIS. STAT. § 972.10(4). The test for the sufficiency of the evidence on the motion to dismiss is the same as the test on appeal. ***State v. Scott***, 2000 WI App 51, ¶12, 234 Wis. 2d 129, 608 N.W.2d 753. That is, we will not reverse the denial of a motion to dismiss as long as the jury reasonably could have found the defendant guilty. ***Id.***

When Lewis moved to dismiss, the trial court applied the correct legal standard and, as explained above, there was sufficient evidence to support the verdict. Thus, there is no arguable merit to challenging the denial of the motion to dismiss.

IV. Sentencing Discretion

The no-merit report also discusses whether the circuit court properly exercised its sentencing discretion. ***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, ***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 other factors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The concurrent sentence structure of twenty-six years' imprisonment is well within the 120-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and 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). There would be no arguable merit to a challenge to the court's sentencing discretion.

V. Lewis's Response

A. Trial Court Bias

Lewis claims that the trial court was biased because when Duntaye Bowen was preparing to testify as a State's witness, the trial court "was giving him answers." Specifically, the trial court instructed Bowen to answer, if asked, that he had three prior convictions. The trial court also instructed Bowen that he could testify that he met Lewis in 2015, but he should not testify that he met Lewis in jail.

Neither instruction is an indication of bias. The State is required to disclose the criminal records of its witnesses to the defendant. WIS. STAT. § 971.23(1)(f). "In Wisconsin, however, the jury does not know what the crimes were—just how many, unless … the witness does not follow the script and give[s] the number approved by the trial court[.]" ***State v. Lobermeier***, 2012 WI App 77, ¶16, 343 Wis. 2d 456, 821 N.W.2d 400. Here, the trial court was simply informing Bowen of the number of convictions to which the parties stipulated. In addition, the

limiting instruction given regarding Bowen's introduction to Lewis was for Lewis's benefit, to prevent the jury from hearing that Lewis had been previously incarcerated. There is no arguable merit to a claim of trial court bias.

B. Bowen's Testimony

Lewis next asserts that Bowen lied under oath and argues that trial counsel was ineffective for failing to point out Bowen's lies to the jury, "which would have ruined [Bowen's] credibility." Specifically, Lewis says Bowen lied when he testified that no one ever called him "Taye" for short and when he testified that the last time he recalled being at Danielle's home was September 4, 2018.

The two prongs of an ineffective-assistance claim, deficient performance and prejudice, are well-established, so we do not discuss them in greater detail. ***State v. Williams***, 2000 WI App 123, ¶¶22-23, 237 Wis. 2d 591, 614 N.W.2d 11. Assuming without deciding that Lewis is correct that Bowen lied in both instances and that trial counsel was deficient for not highlighting such testimony, the record does not support any conclusion of prejudice. Bowen's testimony went to identifying Lewis and establishing a connection to Danielle's home. However, Cory also identified Lewis, Lewis did not dispute that he had been to Danielle's home, and Bowen gave no testimony regarding the actual assaults, so even if counsel called attention to Bowen's inconsistencies, the verdicts would have been the same. There is no arguable merit to a claim of ineffective assistance for failing to highlight supposed lies in Bowen's testimony.

Lewis also complains that the State was leading Bowen "throughout his testimony," and trial counsel was ineffective because he never objected. "A leading question is one which unmistakably suggests the desired answer." ***State v. Sarinske***, 91 Wis. 2d 14, 45, 280 N.W.2d

725 (1979) (citation omitted), *overruled on other grounds by* ***State v. Wayerski***, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468. Questions that call for a simple "yes" or a "no" answer are generally not leading questions. Leading questions should generally be avoided, *see* WIS. STAT. § 906.11(3), but they are not prohibited, *see* ***State v. Barnes***, 203 Wis. 2d 132, 138, 552 N.W.2d 857 (Ct. App. 1996). Lewis does not identify any particular questions he believes were leading, and our review of the record reveals no improper leading questions by the State. Any "leading" objection would have been overruled, and counsel is not effective for failing to raise a meritless objection. *See* ***State v. Counihan***, 2020 WI 12, ¶51 n.15, 390 Wis. 2d 172, 938 N.W.2d 530.

C. The Photo Array

Lewis complains that "the children identified 'someone else' in the photo array." Of the three children, only Cory was shown the array, which consisted of six different photos, each in its own manila folder. Cory selected the suspect in the third folder. Lewis likely believes he was misidentified because the reference sheet, which contains all six photos together, has Lewis's photo in the second position, not the third. However, the officer who conducted the array testified regarding the process, explaining that the order of the individual photos in folders is intended to differ from the order of the photos on the reference sheet. This is done, in part, so that the officer does not know the order of the photos in the folders as the witness is viewing them. The record reflects that the third folder shown to Cory contained Lewis's photo. There is no arguable meritorious claim of misidentification.

D. Other Witness Testimony

Lewis next contends that the testimony of a gas station attendant was irrelevant and trial counsel should have objected. When Lewis's description was broadcast by officers responding

to Danielle's home, someone noticed that it was similar to the description of a suspect in a disturbance call made from a nearby gas station at around the same time. Police went to the gas station and obtained surveillance video, which was then used to help identify Lewis. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. The attendant's testimony was necessary to authenticate the video, *see* WIS. STAT. §§ 909.01; 909.015(1), and also indirectly went to the identity of the perpetrator. There is no basis for a relevancy objection.

Lewis additionally asserts that the testimony of the DNA analyst was irrelevant and prejudicial. As noted, Lewis had asked for some water, which the children gave him. The cup Lewis used was swabbed for possible DNA. The analyst testified that the DNA profile obtained from the cup swabs was a mix of at least four individuals, at least three of whom were male. She further testified that the mixture was "too complex" for her to either include or exclude any one person as a contributor. This evidence goes to the identity of the perpetrator, so there is no basis for a relevancy objection.

E. The DNA Evidence

Lewis claims that trial counsel was ineffective for failing to "point out to the jury" that his DNA "was 'NOT' found on that cup." Such an argument would not have been proper. The analyst did not testify that Lewis's DNA was not found; she testified that she could neither include nor exclude any individuals as contributors of the DNA on the cup with the data she had. Trial counsel is not ineffective for failing to make a misleading argument to the jury.

F. Jury Question

Lewis complains that a question from the deliberating jury was answered without his knowledge. A court's communication with a deliberating jury outside the presence of the defendant and his counsel violates the defendant's right to be present. *See* ***State v. Burton***, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983); *see also* ***State v. Koller***, 2001 WI App 253, ¶62, 248 Wis. 2d 259, 635 N.W.2d 838. The jury sent out a single question, and the transcript reflects that, upon receipt of the question, the trial court began to address the matter with both attorneys. Lewis was not personally present. However, the transcript further reflects that the jury signaled it had reached a verdict before any answer to its question was returned. Thus, there was no actual communication with the jury, and no violation of Lewis's right to be present.

G. Jury Instructions for Lesser-Included Offenses

Finally, Lewis "feel[s] the jury should have had a lesser included [offense]." Second-degree sexual assault is a lesser-included offense of first-degree sexual assault. ***State v. Moua***, 215 Wis. 2d 511, 519-20, 573 N.W.2d 202 (Ct. App. 1997). However, a lesser-included offense instruction is required only if there are reasonable grounds in the evidence for both acquittal on the greater charge and conviction on the lesser. ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995). Here, a jury could not simultaneously acquit Lewis of the greater offense but also convict on the lesser. The only way to acquit on the greater offense and convict on the lesser included charge of second-degree sexual assault was if the jury was uncertain whether the children were under thirteen years of age—which would prohibit convictions on first-degree sexual assault—but certain that the children were under sixteen years of age, which would allow convictions for second-degree sexual assault. The record is uncontroverted that Ryan and Logan

were well under age thirteen. *Cf.* ***Moua***, 215 Wis. 2d at 513-17 (explaining reasons for the uncertainty of whether victim was thirteen, fourteen, or sixteen years old). There is no arguable merit to a claim that the jury should have received a lesser-included instruction.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Steven Zaleski is relieved of further representation of Lewis in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals