COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0643-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD DAKOTA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Richard Dakota, pro se, appeals an order denying postconviction relief from a judgment convicting him of two counts of sexual contact with a child under the age of thirteen. He argues that he is entitled to a new trial for a variety of reasons. We interpret his arguments as challenges to the

sufficiency of the evidence and effectiveness of trial counsel. We reject his arguments and affirm the order.

After his conviction, Dakota's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS. Dakota requested that his counsel be allowed to withdraw, that the no merit report be withdrawn and that he be allowed to proceed pro se on a postconviction motion challenging the effectiveness of trial counsel. We granted the motion and dismissed the appeal. Dakota proceeded on a postconviction motion and appealed the order denying relief.

At the outset, we agree with the State that large portions of Dakota's brief are incomprehensible. For example, in challenging defense counsel's effectiveness, Dakota argues, without citation to the record or authority: "This is shown by the trial court's finding regarding the paint - sealed window evidence is evaluating counsels window evidence in evaluating counsels performance." Our review of the record fails to reveal any evidence with respect to a paint-sealed window.

While we will grant pro se incarcerated litigants leeway with strict compliance regarding rules of briefing, this court cannot expend its resources guessing the nature of issues and developing an appellant's arguments. *See* ***Cascade Mtn., Inc. v. Capitol Indem. Corp***., 212 Wis.2d 265, 270 n.3, 569 N.W.2d 45, 47 n.3 (Ct. App. 1997). Further, from a review of Dakota's brief, it is unclear whether the issues he attempts to raise were addressed at the trial court level. We do not address issues raised for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992); *see also* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Therefore, we confine our review to those matters Dakota raises in his appellate

brief that were also raised at the postconviction hearing: sufficiency of evidence and effectiveness of trial counsel.

Dakota was convicted of violating § 948.02(1), STATS., which prohibits sexual contact with a child under the age of thirteen. Sexual contact is defined as intentional touching, either directly or through clothing, of intimate parts of the defendant or the victim for the purpose of sexual gratification. Section 948.01(5)(a), STATS. The definition of intimate parts includes: breast, buttock, groin, vagina or pubic mound. Section 939.22(19), STATS.

An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value 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, 755 (1990). On review of jury findings of fact, viewing the evidence most favorably to the State and the conviction, we ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. ***State v. Oiman***, 184 Wis.2d 423, 436, 516 N.W.2d 399, 405 (1994).

The record discloses no merit to Dakota's challenge based upon the sufficiency of the evidence. At trial, B.D., who was nine at the time of the assault, testified that she was at a party at Dakota's house in the summer of 1995. When she went into the house, Dakota squeezed her right breast and put his hand inside her pants, over the top of her underwear and squeezed her vaginal area a couple of times. She testified that she told her mother of the assault on November 20, 1995. A.D., who was eight at the time of the offense, testified that she was at the same party and that when she went to say goodbye, Dakota touched her between her

legs on the outside of her clothing. She did not immediately tell her mother but eventually told the school counselor.

Dakota argues that there were no eyewitnesses to the offenses other than the victims. This argument is directed to the weight and credibility of the testimony, a fact-finding function of the jury, not this court. ***Poellinger***, 153 Wis.2d at 506, 451 N.W.2d at 757. Dakota further argues that there was no medical evidence showing penetration of the vagina. Vaginal penetration is not an element of the crime of sexual contact of a child. Section 948.01(5), STATS. The evidence is sufficient for a jury to find beyond a reasonable doubt that the elements of the offenses charged were satisfied.

Next, we address Dakota's ineffective assistance of counsel claims. To demonstrate ineffective assistance of counsel, a defendant must show counsel's deficient performance and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, it must be shown that "counsel's representation fell below an objective standard of reasonableness." ***Id***. at 688. With respect to prejudice, the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id***. at 687. "The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694. A defendant's failure to establish either the deficiency component or the prejudice component is dispositive. ***Id***. at 697.

At the ***Machner*** hearing, Dakota sought to prove that his counsel was ineffective for failure to call an expert witness to testify whether there was

penetration. We agree with the trial court's conclusion that the evidence would have been irrelevant because penetration is not a requisite element to prove the offense of sexual contact. *See* § 948.01(5), STATS. Also, to the extent a medical exam would show abrasions or irritation, defense counsel explained that the time elapsed between the assault and its reporting was too long to permit a medical exam to have been probative. Defense counsel's explanation was reasonable. Also, medical evidence of lack of a penetration is not inconsistent with and does not contradict victims' testimony. Therefore, the trial court correctly determined that expert testimony was not necessary and that Dakota failed to show deficient performance by defense counsel.

Dakota further argues that defense counsel was ineffective for failure to show inconsistencies in the victims' testimony to impeach credibility. We agree with the trial court's conclusion that the record proves otherwise. Defense counsel cross-examined the child victims and demonstrated a number of inconsistent statements. Most significantly, defense counsel showed that statements made to investigating officers were inconsistent with certain aspects of trial testimony. For example, at trial, B.D. testified that she was touched over her underwear but under her clothes. In earlier statements, she alleged that she was touched over her clothing. Similarly, when defense counsel cross-examined A.D., he established that in her statement to officers, she stated that Dakota touched her seven times, and under her clothing; yet at trial, she testified that he touched her one time over her clothing. Because the record supports the trial court's determination, we do not overturn it on appeal.

Dakota also contends that trial counsel was ineffective because he failed to call witnesses to testify that one uncle Rollie was never at the party, despite the victims' contention that he was. The trial court correctly observed that

the purpose of this evidence was to call into question the weight and credibility of the victims' testimony. We agree with the trial court that because their testimony was attacked in many other ways, no prejudice resulted from counsel's failure to call witnesses on this single isolated item of impeachment.

In his brief, Dakota makes additional ineffective assistance of counsel claims, but these instances of alleged deficient performance were not raised at the postconviction hearing. For example, Dakota argues that trial counsel was ineffective for failing to object on hearsay grounds to testimony of Denise Servais, a police liaison with the Green Bay Police Department, who testified to the contents of an interview with the victims. The record shows no objection at trial. However, this issue was not raised at the ***Machner*** hearing. *See* ***id***. at 797, 804, 285 N.W.2d at 908.

Also, he argues that defense counsel was ineffective for allowing detective Glen Deviley to testify to hearsay. We note that it was defense counsel, not the prosecutor, who called Deviley to the stand. The prosecutor actually objected on hearsay grounds to portions of Deviley's testimony. In any event, Dakota did not raise this issue at the ***Machner*** hearing, so we do not review it on appeal.

Dakota further complains that defense counsel elicited testimony that one of the victims told Kim Fenendael from Human Services one version of the assault. The district attorney objected on the basis of hearsay; the trial court overruled the objection because the child's statement was a prior inconsistent

statement. The double hearsay issue was not raised at trial. In any event, the issue was not raised at the ***Machner*** hearing, and therefore is not addressed on appeal.[1]

Because the record discloses evidence sufficient to support the judgments of conviction and because it fails to support Dakota's claims of ineffective assistance of counsel, the order is affirmed on appeal.

By the Court.— Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

[1] The record indicates that Dakota chose to represent himself at the ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).