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

2014AP1984-CRNM State of Wisconsin v. John Chanthasit (L.C. #2012CF1475)

Before Curley, P.J., Brennan and Bradley, JJ.

John Chanthasit appeals from a judgment of conviction, entered upon a jury's verdict, on one count of second-degree sexual assault of a child who had not yet attained the age of sixteen. Chanthasit also appeals from an order denying his postconviction motion for a new trial. Appellate counsel, Leonard D. Kachinsky, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Chanthasit was

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Chanthasit's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

BACKGROUND

Complainant C.V. called police after her daughter told her that then-thirteen-year-old J.V.L. confided that he had been inappropriately touched by Chanthasit. C.V. told police that it had been reported to her that Chanthasit put his hand down J.V.L.'s pants while J.V.L. was sleeping. C.V., J.V.L., and Chanthasit are relatives. C.V. lives near Green Bay, while J.V.L., Chanthasit, and other relatives had come to Green Bay to attend a funeral for C.V.'s father. Many of these guests were staying with C.V. or her sister, C.B., who lived nearby in Bellevue. Green Bay police responded to a liquor store parking lot around 3 a.m. on December 2, 2012, to meet with C.V. and J.V.L. Officer Sean Hamill took a written statement from J.V.L., then transported him to a hospital for a sexual assault nurse exam.

While at the hospital, C.V. told Hamill that she had received a phone call indicating that Chanthasit had learned of the investigation and was trying to leave the home at which he was staying. Hamill notified the Brown County Sheriff's Department and asked them to attempt to take Chanthasit into custody. Deputy Kevin Stahl was dispatched around 4 a.m. to C.B.'s home, where Chanthasit was found hiding in a closet.

Chanthasit was charged with one count of second-degree sexual assault of a child who had not yet attained the age of sixteen, by sexual conduct. The jury convicted him. The circuit

court imposed a sentence of seven years' initial confinement and nine years' extended supervision. Chanthasit moved for a new trial, claiming trial counsel had not properly advised him about the State's ability to use prior convictions against him, leading him to waive his right to testify even though he actually wanted to take the stand. After a hearing at which both counsel and Chanthasit testified, the circuit court denied the postconviction motion. Chanthasit now appeals.

DISCUSSION

Appellate counsel identifies four possible issues, each of which he concludes lacks arguable merit. Chanthasit raises multiple issues that can be grouped into five main issues, some of which overlap with counsel's issues.

A. Sufficiency of the Evidence

The first issue, addressed by both appellate counsel and Chanthasit, 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 the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506.

As the ultimate arbiter of credibility, the jury has the power to accept one portion of a witness's testimony and reject another portion; a jury can find that a witness is partially truthful and partially untruthful. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). We defer to the jury's function of weighing and sifting conflicting testimony in

part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

"'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state 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 omitted). "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

Second-degree sexual assault of a child is committed by one who has sexual contact with a person who has not attained the age of sixteen years. *See* WIS. STAT. § 948.02(2); WIS JI—CRIMINAL 2104. Sexual contact is an intentional touching of an intimate part of the victim by the defendant, directly or through clothing, done with the intent of the defendant to become sexually aroused or gratified. *See* WIS JI—CRIMINAL 2101A.

J.V.L. testified that he was thirteen years old at the time, and that Chanthasit touched his penis, under his clothes, for several seconds. Though there was no direct testimony regarding Chanthasit's intent to become aroused or gratified, intent may be inferred. *See* ***State v. Hurley***, 2015 WI 35, ¶39, 361 Wis. 2d 529, 861 N.W.2d 174. There was testimony that J.V.L., one of his brothers, and three similarly aged female cousins were originally all asleep on a large air mattress in one bedroom on December 1, 2012. The girls were awakened and sent to the bedroom of the one who lived in the house. It is not clear who woke them, but Chanthasit, who

is about ten years older than J.V.L., took the girls' place on the mattress. J.V.L. further testified that while sleeping on his left side, he felt Chanthasit's hand under his shorts, moving slowly from behind him. The shorts, which were compression shorts, fit tightly. The hand rubbed his penis for several seconds. When J.V.L. rolled onto his stomach, the hand began rubbing his buttocks.

Based on the clothes J.V.L. was wearing, the jury could conclude that the touching under the shorts was intentional. Because the touching continued when J.V.L. changed positions to take his penis out of Chanthasit's reach, the jury could infer a purpose of sexual arousal or gratification.

Chanthasit complains that J.V.L.'s testimony had multiple inconsistencies, among them: the length of time of the touching, who woke the girls, and whether J.V.L. had his cell phone with him.[2] However, none of these inconsistencies goes to the elements of the crime, and the jury is free to give whatever weight it chooses, including no weight, to inconsistent portions of testimony. Those inconsistencies may or may not persuade the jury that a witness is incredible on major points. However, inconsistencies in minor details do not render J.V.L.'s other testimony patently incredible, and J.V.L. consistently maintained that it was Chanthasit who touched him inappropriately.

Chanthasit complains about the lack of physical or forensic evidence in this case, asserting his DNA should have been found in the waistband of J.V.L.'s shorts if, in fact, he had

[2] Chanthasit further complains that because of the inconsistencies, J.V.L. was a hostile witness under WIS. STAT. § 972.09. However, that statute merely allows a witness, who testifies inconsistently with a prior statement, to be treated as an adverse witness by the party who called that witness.

assaulted J.V.L. However, it is incorrect to say there was no DNA evidence. There was no semen or saliva involved in this case so, at best, any DNA would have been obtained from skin cells, or touch DNA, and the State called a DNA analyst to testify about the evidence that was collected.

From the shorts J.V.L. was wearing, a swab of the waistband revealed a mix of at least two people's DNA. The analyst explained that there was one major and one "very, very low" sample, the latter being insufficient for comparison to any other sample. A swab from the crotch of the shorts and a swab from J.V.L.'s penis both had the same, single profile matching the major contributor from the waistband swab. The State would later surmise that the single profile was probably J.V.L.'s, although evidently no standard had been collected from him for comparison. In other words, there was DNA evidence, just a "very, very low" amount, insufficient for making a comparison that either included or excluded Chanthasit as the contributor of the DNA.[3] However, neither DNA nor other physical evidence is required for a conviction; testimony will suffice. There is, therefore, no arguable merit to a challenge to the sufficiency of the evidence to support the jury verdict.

B. Grant of a Continuance

The next issue counsel addresses is whether the circuit court erred in granting a continuance to the State because the DNA evidence had not been processed in time. Chanthasit objected because he had made a speedy trial demand, but the circuit court granted the

[3] It was noted that the assault had not been reported for at least a day because of the funeral, and that the children, including J.V.L., had special roles in the Buddhist ceremony that involved multiple clothing changes.

continuance anyway. *See* WIS. STAT. § 971.10(3)(a) ("A court may grant a continuance … if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial."). We agree that there is no issue of arguable merit related to this issue.

Although it did not use the exact phrase "ends of justice," the circuit court noted that the DNA results might prove exculpatory, making a continuance "as much to the defendant's benefit as it is to the State's benefit." Later, because the statutory speedy trial time requirement was not met, the circuit court granted a signature bond to Chanthasit. *See* WIS. STAT. § 971.10(4). The seventy-day delay is not presumptively prejudicial and, as the DNA evidence did not expressly incriminate Chanthasit and could be used to support his defense that the assault never happened, the defense was not prejudiced by the continuance. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998) (listing factors to consider when a constitutional, rather than statutory, speedy-trial violation is alleged).

C. Other Constitutional Issues

Chanthasit claims several violations of his constitutional rights during trial; none of these, however, is an issue of arguable merit. First, he complains that the district attorney asked leading questions of J.V.L. Specifically, after J.V.L. testified that Chanthasit had touched his private part, the State asked, "When you say your private part, do you mean your penis?" However, while leading questions are typically discouraged on direct examination, using leading

questions with a child witness is an exception where such questions will be permitted.[4] *See* ***State v. Barnes***, 203 Wis. 2d 132, 137, 552 N.W.2d 857 (Ct. App. 1996).

Second, Chanthasit complains that the State presented a presumption to the jury during its closing arguments about the source of the major DNA profile, even though the State "isn't supposed to state nothing but the facts." He argues presumptions are constitutionally impermissible under ***State v. Genova***, 91 Wis. 2d 595, 283 N.W.2d 483 (Ct. App. 1979). What the State told the jury was:

> The DNA samples that she took from the waistband of the compression shorts is a mixture of two people's DNA. The major male contributor matches the male contributor for all of the other findings and then the minor contributor it's not enough to develop a profile. Could it be John Chanthasit? Yes. Could it be his mother or any of a thousand other people? Yes.
>
> ….
>
> What were the results? Well, of course, you developed a single male profile from the penile swabs. That's not surprising because we know a single male handled that gauze with his hands and then rubbed the gauze on his penis. So the only reasonable inference is is that that single male profile is, in fact, [J.V.L.'s] DNA.
>
> The same major contributor is on the waistband. Again, no surprise. He was wearing the compression shorts for at least a full 24 hours.
>
> Same male contributor of DNA on the crotch of the shorts. It's the same male. Again, not a surprise that [J.V.L.'s] DNA would be on the crotch of the short.

[4] If, as Chanthasit suggests, J.V.L. was a hostile witness, then the State would have been able to treat the examination as a cross-examination, another instance where leading questions are permissible. *See* WIS. STAT. § 906.11(3).

> What we're really looking for and what the analyst indicated is mixtures. What they're looking for is mixtures of two or more people where they can discern out profiles for the different individuals, but that didn't happen here.
>
> So the DNA findings do not point to another male perpetrator. The male whose profile was developed in all three samples the only reasonable inference is is that it's [J.V.L.'s] DNA.

"A 'prosecutor may comment on the evidence … argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***State v. Hurley***, 2015 WI 35, ¶95, 361 Wis. 2d 529, 861 N.W.2d 174 (quoting ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979)). The State "'is allowed considerable latitude in closing arguments,' and is permitted to draw any reasonable inference from the evidence." ***Hurley***, 361 Wis. 2d 529, ¶95 (citations omitted). The State in this case did nothing more than draw a reasonable inference—that the main DNA contributor to the samples was the person wearing the shorts and not some other unknown assailant—from the evidence and argue it to the jury.

The "presumption" in ***Genova*** was a legal presumption, given in a jury instruction, that a person intends the natural, probable, and usual consequences of his or her deliberate acts. *See* ***id.***, 91 Wis. 2d at 604-05. Aside from the fact that the ***Genova*** court affirmed the use of that jury instruction, *see* ***id.*** at 605, the State's inference about J.V.L. being the main contributor of DNA does none of the things that would make a presumption constitutionally impermissible: it does not shift the burden of persuasion, it does not relieve the State of the burden to establish every element beyond a reasonable doubt, and it does not relieve the jury of its duty to find each element beyond a reasonable doubt. *See* ***id.*** at 608.

Third, Chanthasit complains that the circuit court violated his right to remain silent when it gave WIS JI—CRIMINAL 172. That instruction related to flight, escape, or concealment and

was given because Chanthasit was found in a closet. The State is not allowed to introduce evidence of a defendant's silence, lest the jury impermissibly infer guilt therefrom. *See* ***Reichhoff v. State***, 76 Wis. 2d 375, 378, 251 N.W.2d 470 (1977). But evidence of flight, escape, or related conduct is admissible as evidence of consciousness of guilt. *See* ***Gauthier v. State***, 28 Wis. 2d 412, 420, 137 N.W.2d 101 (1965); ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710.

Fourth, Chanthasit complains the circuit court was biased against him because in denying his motion for judgment notwithstanding the verdict, the circuit court commented that there was no reason for J.V.L. to have fabricated his allegations. This comment, however, does not demonstrate bias. Once the jury reached its verdict, the presumption of innocence no longer applied, and the circuit court was not required to give Chanthasit the benefit of that presumption.[5]

There is no arguable merit to any of Chanthasit's claims of constitutional errors.

D. The Postconviction Motion

Counsel addresses whether the circuit court erred in denying the postconviction motion for a new trial. The motion alleged that trial counsel was ineffective because she had misadvised

[5] In any event, a motion for judgment notwithstanding the verdict is meant for situations where "the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment." *See* WIS. STAT. § 805.14(5)(b). It is not a method for challenging the sufficiency of the evidence. *See* ***Kolpin v. Pioneer Power & Light Co.***, 162 Wis. 2d 1, 29, 469 N.W.2d 595 (1991).

Chanthasit about the consequences of testifying on his own behalf, causing him to improperly surrender his right to testify.

Trial counsel said that she told Chanthasit that if he testified, then when he was so asked, he should answer that he had four prior convictions, which was the number that trial counsel and the State agreed could be counted. Trial counsel testified that she originally prepared Chanthasit to testify, and that she explained the importance of giving the correct answer for the number of convictions. She also testified that Chanthasit did not dispute the number with her, nor did he seem confused about the ground rules for testifying that she had given.

Chanthasit testified that he told trial counsel he had more convictions. He also said he was worried about answering "four" because he did not want the State to go into the nature of his prior convictions. But Chanthasit also conceded that trial counsel had explained that in Wisconsin, he could only be asked if he had been previously convicted and, if so, how many times. He admitted that counsel told him if he answered correctly, there would be no further inquiry about the crimes. Nevertheless, he still thought the State could explore the nature of those convictions, although he could not explain the source of that belief. Chanthasit also said he just "felt really uncomfortable" with counsel's explanation about the State's limits, after which point he "just tuned her out."

The circuit court concluded that trial counsel had advised Chanthasit properly. It commented that Chanthasit's testimony was "all over the place." It noted that it conducted a colloquy with Chanthasit during trial about his decision to not testify, and Chanthasit never mentioned any concerns to the court. Finding no ineffective assistance of counsel, the circuit court denied the postconviction motion. As the decision hinges largely on the circuit court's

determination of witness credibility, we discern no issue of arguable merit from the circuit court's denial of the postconviction motion.

E. Other Ineffective Assistance

Chanthasit raises two ineffective-assistance claims of his own.[6] First, he complains that he and counsel had decided on a strategy but that trial counsel "[t]hen randomly she kept coming back with a new plea offer but I kept refusing." The record is silent as to the genesis of the offers but we note that if the State kept making offers, trial counsel was required by law to relay them to Chanthasit. *See* ***Missouri v. Frye***, 132 S.Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

Chanthasit also complains that trial counsel did not introduce the police reports to impeach J.V.L. on his inconsistencies. Chanthasit says that trial counsel told him she did not want to keep him on the stand too long and retraumatize him. We give great deference to counsel's strategic choices. *See* ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. While the police reports might have reflected discrepancies in minor details, like the length of time of the touching, they do not provide grounds for impeachment on the facts critical to the elements of the sexual assault. Moreover, counsel *did* ask questions to impeach J.V.L., even if she did not expressly refer to the police report in so doing. There is no arguable merit to either claim of ineffective assistance of trial counsel.

[6] A third issue relating to extradition will be discussed separately.

Chanthasit also complains that postconviction counsel was ineffective for not preparing him for the postconviction motion hearing. Chanthasit claims that if he knew the postconviction hearing was going to be before the same judge as the trial, he would have requested a change of venue. That request would have been denied, because venue is in the county where the crime was committed, *see* WIS. STAT. § 971.19(1), and a motion for a change of venue must be premised on the ground that an impartial *trial* cannot be had, *see* WIS. STAT. § 971.22(1). There is no provision for a change of venue for a postconviction hearing.

To the extent that Chanthasit means he would have sought judicial substitution, such a motion would have been untimely under WIS. STAT. § 971.20(4). To the extent that Chanthasit means he would have sought judicial disqualification under WIS. STAT. § 757.19, neither Chanthasit nor the record reveals either an objective or subjective reason for the disqualification. There is, therefore, no arguable merit to a claim of ineffective assistance of postconviction counsel.

F. Sentencing

The final issue counsel raises 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* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court commented that Chanthasit's offense was "among the most abhorrent and unacceptable of crimes." It noted that Chanthasit had at least three prior offenses in Ohio, and he was on parole for one of them at the time of this offense. As Chanthasit continued to deny that he had done anything, the circuit court noted that he was "basically … totally in denial," which accentuated his danger to the community. The denial also meant that Chanthasit would not be amenable to rehabilitation and was not a candidate for probation.

The maximum possible sentence Chanthasit could have received was forty years' imprisonment. The sentence totaling sixteen years' imprisonment is well within the 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 circuit court's sentencing discretion.

G. Extradition

Finally, Chanthasit raises issues relating to extradition. When Chanthasit was arrested in Wisconsin, he was on a furlough from a halfway house in Ohio. When Chanthasit's speedy trial demand could not be met, the circuit court authorized a signature bond. Chanthasit signed the bond but was not released, even though he had waived extradition proceedings and agreed that he could be sent back to Ohio.

The district attorney sent a letter to the circuit court on May 23, 2013, explaining that the State believed it could continue to hold Chanthasit under WIS. STAT. §§ 976.03(19), (27), & (28), until this case was resolved. Chanthasit disputed this authority.

WISCONSIN STAT. § 976.03(19) provides:

> If a criminal prosecution has been instituted against [a] person under the laws of this state and is still pending, the governor at the governor's discretion either may surrender the person on the demand of the executive authority of another state, or may hold the person until the person has been tried and discharged, or convicted and punished in this state.

Based on this language, the circuit court, viewing extradition as a sovereign function assigned to the executive branch, told the district attorney that the statute says the *governor* has the discretion to hold a person, so if Chanthasit was not going to be released, the circuit court wanted documentation of the governor's exercise of that authority. The circuit court also ordered the State to contact Ohio authorities and expect to turn Chanthasit over to them unless word came from the governor before June 24, 2013.

Ultimately, the State obtained authorization from the governor, placing a hold on Chanthasit and preventing his return to Ohio. There is no arguable merit to a challenge to the failure to extradite. After the signature bond was signed, but Chanthasit was not released, he could have sought release through a writ petition, but once the governor decided to hold him, the window of opportunity for release to Ohio closed. In other words, the governor's discretion put an end to any question of whether Chanthasit could continue to be held in Wisconsin or sent to Ohio: he had to be held in Wisconsin. Chanthasit later properly received 260 days' credit for his time spent in custody from arrest to sentencing, including the time he could have been released on the signature bond but for the extradition hold.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of further representation of Chanthasit in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals