COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1560-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN P. GANZHORN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: PETER G. PAPPAS, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Vergeront, JJ.

PER CURIAM. A jury found John Ganzhorn guilty of three counts of first-degree sexual assault of a child in violation of § 948.02(1), STATS. The trial court sentenced Ganzhorn to eight years in prison to be followed by two concurrent ten-year sentences. The latter sentences were stayed, and Ganzhorn was placed on probation for twelve years. As conditions of probation, Ganzhorn

was ordered to pay restitution for the victim's counseling, to have no contact with anyone under eighteen years of age without his parole officer's approval, and to undergo sex offender assessment and treatment, if needed. Costs and assessments totaling $280 were imposed. Ganzhorn was not entitled to any credit against the sentence.

The state public defender appointed Andrew C. Kaftan to represent Ganzhorn on appeal. On Ganzhorn's behalf, Kaftan filed a postconviction motion for a new trial. After evidentiary hearings, the trial court denied the motions. Kaftan has now filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Ganzhorn received a copy of the no merit report and was advised of his right to file a response. He has filed multiple responses. After an independent review of the record, we conclude that any further proceedings in this matter would be wholly frivolous and without arguable merit. Therefore, we affirm the judgment of conviction and the order denying a new trial.

As amended, the charging documents alleged three distinct acts of sexual contact: mouth to vagina, hand to vagina, and penis to vagina. The crimes came to light during a social service worker's investigation of an abuse referral against the victim's parents. When the worker asked the victim about an incident in which she had been found underneath blankets kissing a younger boy, the victim shrugged her shoulders. When the worker asked the victim if she had been touched "in a bad way," the victim replied that Ganzhorn had done so when she was six. During a second interview, the victim made the accusations that are the basis of the present charges.

The no merit report addresses whether the time period alleged in the charging documents was sufficiently definite to allow Ganzhorn to establish a defense. The documents alleged that the crimes occurred "[b]etween May and June." Kaftan concludes that the charging documents were sufficient, and we agree. The victim was a learning-disabled ten-year-old child. She had frequent contact with Ganzhorn because he lived with her family. Other than the assaults, there was nothing extraordinary about the incident, which the victim testified occurred in her bedroom while her parents were at the grocery store. The incident was disclosed on June 23rd and the complaint against Ganzhorn was filed on July 20th. In sexual assault cases, the date of the offense does not have to be alleged precisely, and greater tolerance is allowed in cases involving child victims. *See* ***State v. Fawcett***, 145 Wis.2d 244, 250, 254, 426 N.W.2d 91, 94, 96 (Ct. App. 1988). In the present case, the age and intelligence of the victim, the nature of and circumstances surrounding the offenses, the promptness of the disclosure and the filing of the complaint, and the relatively short time period alleged lead to the conclusion that the time period was sufficiently definite. *See* ***id.*** at 253, 426 N.W.2d at 95.

The no merit report also addresses whether the trial court erroneously exercised its discretion by allowing admission of other acts evidence. Kaftan concludes that this issue lacks merit, and we agree. During a pre-trial hearing, the court ruled that the prosecution could introduce evidence of the victim's allegation that Ganzhorn sexually assaulted her when she was six and of allegations by Cassidy Y. Because no evidence was introduced at trial regarding the allegations of Cassidy Y, Ganzhorn was not adversely affected by this portion of the ruling.

Regarding the earlier act involving the victim, the court concluded that the evidence was probative of motive (sexual gratification) and that while prejudicial, it was not unfairly prejudicial. Other acts evidence is admissible to show motive, *see* § 904.04(2), STATS., with greater latitude allowed in cases involving sexual assault of minors, *see* ***State v. Fishnick***, 127 Wis.2d 247, 257, 378 N.W.2d 272, 277-78 (1985). Because the trial court properly weighed the admissibility against the potential for prejudice, there was no erroneous exercise of discretion. *See* ***id.*** at 257, 378 N.W.2d at 278.

Additionally, the no merit report addresses whether the trial court properly amended one count of the information to allege penis-to-vagina contact rather than sexual intercourse. We agree that a challenge to the judgment on this basis would be without merit. The prosecution sought the amendment because the examining physician's testimony would be that penetration, and therefore intercourse, had not occurred. The trial court allowed the amendment concluding that while it was "pretty late" to amend the information, there was no prejudice to Ganzhorn.

A trial court may allow an amendment to the information if there is no prejudice to the defendant. *See* ***State v. Wickstrom***, 118 Wis.2d 339, 348, 348 N.W.2d 183, 188 (Ct. App. 1984). Here, there was no prejudice because there was no change in the statute allegedly violated or in the victim's expected testimony, which described penis-to-vagina contact. *See* ***id.*** (no prejudice to defendant if no change to crime charged and if amended offense results from same transaction as original).

The no merit report also addresses whether the trial court erroneously exercised its discretion when it excluded evidence regarding the

reason for the abuse referral, which was an allegation of malnutrition. The court concluded that this testimony was not relevant because CHIPS proceedings were not filed and because neglect is not the same as sexual abuse. We agree with Kaftan's conclusion that this issue lacks merit. The trial court had a reasonable basis for its decision; thus, there was no erroneous exercise of discretion. *See* ***State v. Pittman***, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79-80 (1993).

From Ganzhorn's response and copies of correspondence that he sent to this court, we are aware that he believes the referral was the result of the victim's inappropriate behavior with a younger child and of her threatening other children with a knife. The jury learned of this behavior through testimony elicited by the prosecution for other purposes. Thus, the information Ganzhorn believes should have been presented was presented.

The no merit report addresses whether the trial court properly prevented Ganzhorn's expert witness from critiquing the questions asked of the victim during the investigation. Ganzhorn's defense was that the victim was susceptible to suggestion and that the investigators used extremely suggestive interviewing techniques. While the court allowed the expert to testify generally about memory, suggestibility, and questioning techniques, the court refused to allow him to evaluate the specific questions asked of the victim. The court reasoned that this would amount to giving an opinion about whether the victim's allegations were false, which is not permissible. The trial court did not erroneously exercise its discretion when it determined that the excluded testimony would not assist the jury because the testimony would, in effect, have been a comment on the credibility of a witness. *See* ***Pittman***, 174 Wis.2d at 267-68, 496 N.W.2d at 79.

Without analysis, the no merit report concludes that trial counsel's performance was not deficient and did not undermine confidence in the outcome of the trial. An ineffective assistance of counsel claim requires a showing that trial counsel's performance was deficient, and the appropriate standard for measuring counsel's performance is reasonableness, considering all of the circumstances. ***State v. Brooks,*** 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985). Reasonable strategy choices are not deficient performance. *See* ***State v. Elm***, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996). The postconviction motion alleged defective performance by failure to investigate, to seek judicial substitution, to make a record of the excluded testimony of the expert, and to challenge the lack of specificity in the charging documents. Kaftan concludes that the trial record and counsel's testimony at the hearing on the postconviction motion showed that counsel's actions were reasonable. We agree that counsel's testimony fully explained the actions challenged by Ganzhorn.

Finally, as the no merit report points out, the motion for a new trial was premised on the previously addressed potential errors. Because the alleged errors lack merit, the trial court properly denied Ganzhorn's request to overturn the verdict for a new trial.

Generally, Ganzhorn's responses merely list complaints, some of which are too vague to allow this court to ascertain his exact concerns.[1] Several of the complaints, however, involve challenges to the credibility of the victim and the sufficiency of the evidence.

[1] We have carefully reviewed Ganzhorn's responses, and we address the significant items. We have not attempted to address each and every item, however. *See* ***State v. Waste Management of Wisconsin, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal").

Specifically, Ganzhorn objects to being charged, bound over, and convicted based on the accusations and testimony of a learning-disabled child. Except for limited exceptions not applicable to this case, every person is competent to be a witness. *See* ***State v. Dwyer***, 149 Wis.2d 850, 852, 440 N.W.2d 344, 345 (1989). The believability of the child's testimony is a matter of credibility to be determined by the fact-finder. ***Id.*** at 856, 440 N.W.2d at 347. Furthermore, this case ultimately rested on whether the jury believed the victim's testimony or whether it believed that the accusations were the result of suggestive interviewing techniques, and this determination also rests on the jury's credibility assessments.

When a challenge is made to the sufficiency of the evidence, we must affirm a conviction if, considering the evidence in the light most favorable to the verdict, we can conclude that a jury, acting reasonably, could be convinced, beyond a reasonable doubt, by evidence the jurors had a right to believe and accept as true. ***State v. Barksdale,*** 160 Wis.2d 284, 289-90, 466 N.W.2d 198, 200 (Ct. App. 1991). The victim's testimony was sufficient to establish that the acts occurred. Further, the jury could infer from the nature of the acts that the purpose was sexual gratification. ***State v. Stewart***, 143 Wis.2d 28, 35, 420 N.W.2d 44, 47 (Ct. App. 1988).

Ganzhorn alleges judicial misconduct because of an incident that occurred during his expert's testimony. When the expert mentioned a third person's name, the trial court asked the witness if he was relying on the other person as an authority. The expert indicated he was, and the trial court requested a bench conference. During the bench conference, the court referred to the authority as an "unscrupulous charlatan" and advised that testimony relying on his work would be struck. Defense counsel asked no further questions on the specific topic,

and he testified at the postconviction hearing that it was not a significant part of the expert's testimony. Although a question was raised regarding whether the judge's comment was made in front of the jury and whether other comments were not reported, the trial court found that the transcript was accurate after a hearing on Ganzhorn's motion to correct the transcript. The transcript indicated that the court's "charlatan" remark occurred during a bench conference. Thus, the record does not support a claim of judicial misconduct.

Ganzhorn also raises an issue of multiplicity. The three offenses for which Ganzhorn was convicted are not multiplicitous. The offenses are not identical in fact because the sexual contact alleged in each is distinctly different in nature although they took place during a short period of time and were part of the same assaultive episode. *See* ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980).

Ganzhorn's responses present numerous complaints against Kaftan. Claims challenging representation by appellate counsel may not be raised in a response to a no merit report. Such claims must be raised by petition for writ of habeas corpus in the court of appeals or by motion filed pursuant to § 974.06, STATS., or petition for writ of habeas corpus in the circuit court depending on the nature of the actions complained of. *See* ***State ex rel. Smalley v. Morgan***, 211 Wis.2d 793, 795-96, 565 N.W.2d 805, 807 (Ct. App. 1997).

An additional potential issue not raised in the no merit report or by Ganzhorn is whether the trial court erroneously exercised its discretion when imposing sentence. Sentencing is within the trial court's discretion, ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987), and the court is presumed to have acted reasonably, ***State v. Haskins,*** 139 Wis.2d 257, 268, 407

N.W.2d 309, 314 (Ct. App. 1987). The defendant bears the burden of showing, from the record, that a sentence is unreasonable. ***Id.*** While the trial court could have articulated its reasoning process more completely, we conclude that a challenge to the sentence lacks merit. The trial court considered the offenses serious because the victim was a young child and because she had a quasi-familial relationship with Ganzhorn. The court considered Ganzhorn's character and rehabilitative needs and imposed a sentence that would make him eligible for sex offender treatment while in prison. Finally, the court considered the need to protect the public when it stated that it believed that Ganzhorn would repeat his behavior if the opportunity was presented. *See* ***id.*** at 427, 415 N.W.2d at 541 (trial court to consider gravity of offense, character and rehabilitative needs of offender, and need to protect public).

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on Ganzhorn's behalf would be without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the judgment of conviction and the order denying postconviction relief are affirmed. Kaftan is relieved of any further representation of Ganzhorn on this appeal.

By the Court.—Judgment and order affirmed.