COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3179-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT M. H.,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Attorney Steven D. Phillips, appointed counsel for Robert H.[1] has filed a no merit report pursuant to RULE 809.32, STATS. Counsel

[1] Due to the sensitive nature of the crime, we use only the defendant's and victim's initials.

provided him with a copy of the report, and Robert has filed two responses. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal.

Robert was charged with one count of first-degree sexual assault of a child, § 948.02.(1), STATS., 1989-90, and one count of incest with a child, § 948.06(1), STATS., 1989-90. Both counts arose from an incident with his daughter, T., in 1991. A jury found Robert guilty of both counts. The court sentenced him to six years in prison on the sexual assault charge, and ten years consecutive probation on the incest charge.

The no merit report first addresses whether the evidence was sufficient to support the conviction. Robert's response asserts the evidence was insufficient. When reviewing sufficiency of the evidence, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 755 (1990). We conclude there is no arguable merit to an argument that the evidence was insufficient on the charges. T.'s testimony, if believed by the jury, was sufficient to prove every element of the crimes.

The no merit report next considers whether Robert's trial counsel was ineffective by not objecting to, and by actively eliciting, testimony about Robert's conduct toward his family, T.'s post-traumatic stress disorder, T.'s statements to counselors and law enforcement officers, and testimony that T. was

not fantasizing when she accused Robert.[2] The no merit report concludes that all of this evidence was admitted as a strategic decision to support the defense's theory of the case, as argued to the jury. The theory was that T. accused Robert in order to have him separated from the rest of the family, and that she did so because he was abusive and she was afraid of him. We agree that there is no arguable merit to these issues.

We next consider a potential ineffective assistance issue that was not addressed in the no merit brief. One element of the sexual assault charge was that T. had not attained the age of thirteen. It appears that the primary evidence to support this element was her own testimony as to her birthdate. Robert could argue that his trial counsel was ineffective by failing to make a foundation or hearsay objection as to this testimony. Obviously, T. does not have direct knowledge as to the date of her own birth, and therefore her testimony must be based on some other source. In § 908.03(19), STATS., the rules of evidence provide an exception to the hearsay rule for:

> Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption … relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history.

[2] To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Strickland***, 466 U.S. at 697. To demonstrate prejudice, 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

However, T.'s testimony was not in the form of reputation, but in the form of a statement of fact. If she had been asked to identify the source of her belief as to her birthdate, she may well have testified that this is the reputation within her family, but we do not know from this record what her testimony would have been.

Nevertheless, we conclude that this argument does not have arguable merit. To demonstrate prejudice, Robert would have to show that, if a proper objection had been made, the State would have been unable to establish that T. was under thirteen. The State might have done so either through her testimony or by independent means. Although Robert's responses to the no merit brief raise many issues, he does not claim that T. was age thirteen or older. We assume, therefore, that Robert believes she was under that age, and that the State would have been able to prove this element.

A similar foundation or hearsay objection might have been made with respect to T.'s testimony that Robert is her father. One element of the charge of incest with a child is that the defendant is related to the child by blood or adoption in a degree of kinship closer than second cousin. *See* § 948.06(1), STATS., 1989-90. Although the prosecutor said in his opening statement that Robert had been adjudicated as T.'s father, it does not appear that any evidence of that judgment was presented at trial. When asked who her father is, T. identified Robert. This is not information that she knows directly. However, as above, Robert does not claim that he is not T.'s father, and therefore we assume that the State would have been able to prove this element through a hearsay exception or other admissible evidence.

The no merit report next considers whether the trial court erroneously exercised its discretion in sentencing. We will not disturb a sentence imposed by the

trial court unless the court erroneously exercised its discretion. ***State v. Thompson***, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). When imposing sentence, a trial court must consider: the gravity of the offense, the offender's character, and the public's need for protection. ***Id.*** at 264, 493 N.W.2d at 732. The trial court here considered the appropriate factors. We conclude there would be no arguable merit to this issue.

We turn now to the issues Robert raises in his responses. Robert asserts that his trial counsel had little communication with him before, during or after trial. However, he does not claim that this alleged lack of communication affected the outcome of the case in any specific way. We see no arguable merit to this issue.

Robert asserts that "it is plain on the face of the record that counsel had no interest in proving defendant's innocence." Our review of the record does not support this claim. Robert asserts that trial counsel's strategy was incompetent. However, Robert does not propose a specific strategy that would have been better. His counsel appears to have made a reasonable effort to win a difficult case. There is no arguable merit to this issue.

Robert asserts that the trial court exhibited bias and prejudice by its comments about an alleged incident between his family and the victim's. However, our review of the record does not reveal any episode of bias. Furthermore, Robert was found guilty by the jury, not the trial court.

Robert argues that his appellate counsel was ineffective in various ways. This argument is premature. Robert cannot show prejudice from the actions of his appellate counsel until the appellate process is complete. Robert may continue the appellate process after this decision by petitioning to the supreme court. *See* RULE 809.32(4), STATS.

Robert asserts that his trial counsel was ineffective by failing to raise and argue jurisdictional issues, such as by waiving the reading of the complaint. Our review of the record shows no jurisdictional defects. Robert does not suggest how he was prejudiced by a waiver of the reading of the complaint.

Robert claims that trial counsel was ineffective by not calling a witness to testify that T. "sarcastically bragged … about how many 'Teddy Bears' she had received by saying her dad had sexually abused her." Even assuming that such a witness had testified, we are satisfied that it would not have affected the outcome of the trial.

Robert claims that trial counsel was ineffective by not having voir dire recorded. He does not identify any event during voir dire that was possibly erroneous. There is no arguable merit to this issue.

Robert asserts that the transcripts do not reflect what was said during the proceedings, and that "portions have been severely altered to prejudice Appellant on appeal." He does not identify any specific instance of alteration, and our review of the record has shown no evidence of alteration. There is no arguable merit to this issue.

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

Attorney Phillips is relieved from further representing Robert in this matter.

By the Court.—Judgments affirmed.

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