COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3397-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY H. BOSTEDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: PETER NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

PER CURIAM. Jeffrey Bostedt appeals a judgment entered upon a jury verdict finding him guilty of second-degree sexual assault of a child. Bostedt received four years probation with conditions that included an eight-month jail term. Bostedt raises five arguments on appeal: (1) The evidence was insufficient; (2) the trial court made erroneous evidentiary rulings; (3) the prosecutor made an

improper closing argument; (4) Bostedt received ineffective assistance of counsel; and (5) the trial court imposed an unreasonable sentence. We reject his arguments and affirm the judgment.[1]

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). The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment. ***Bennett v. Larsen Co***., 118 Wis.2d 681, 706, 348 N.W.2d 540, 554 (1984). Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

Tanya D. testified that Bostedt was a friend of her mother's boyfriend who would sometimes sleep on the living room couch when he visited. In April 1996, when she was fourteen years old, she was watching television while sitting on the sectional sofa in her living room. The sofa was described as L- or J-shaped. Bostedt came into the room and laid down on one section, while Tanya laid on the other section on her stomach. She turned and faced the back of the couch. His head was near hers, and he reached over and rubbed her back and left

[1] Bostedt also argues that the trial court erroneously denied his motion for release pending appeal. Bostedt previously petitioned for leave to appeal the trial court's order denying bail or staying the jail term condition. We granted leave, and in an order dated August 19, 1998, concluded that the trial court's decision reflected a reasonable exercise of discretion. Because we previously ruled on this issue, we do not address it again.

breast. Tanya testified that she heard his zipper unzip and that she felt his hand reach down the front of her shorts near her pubic area. She further testified that Bostedt was lying on his side, and he took her hand and briefly placed it on his penis. Tanya heard her mother's bedroom door open, and Bostedt quickly pulled away, covering himself with a blanket.

Section 948.02(2), STATS., provides: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class BC felony." The definition of sexual contact includes:

> Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

Section 948.01(5)(a), STATS.

Bostedt argues that Tanya was the least credible witness to testify at trial, that her story varied each time she told it, that it was physically impossible for the contact to take place the way she described it and that the prosecution had to remind and prompt her. The trier of fact, not the appellate court, assesses weight and credibility. *See* ***Bennett***, 118 Wis.2d at 706, 348 N.W.2d at 554. We are unpersuaded that Tanya's testimony is incredible as a matter of law. Based upon Tanya's testimony, the jury could find beyond a reasonable doubt that Bostedt had sexual contact with Tanya.

Next, Bostedt argues that he was denied the right to present a defense because the trial court did not permit him to present evidence relating to Tanya's truthfulness. He argues that the trial court excluded evidence that in

1996, Tanya was suspended from school because she made a false bomb threat. The trial court limited questioning to whether Tanya made "a false report" to her high school. Bostedt concedes that he did not raise this issue in a postconviction motion, but argues that because it relates to the sufficiency of the evidence, there is no requirement that he do so. *See* § 974.02(2), STATS. We disagree.

In order for alleged trial court errors to be considered as a matter of right on appeal, they must first be presented to the trial court. *See* ***State v. Monje***, 109 Wis.2d 138, 151, 325 N.W.2d 695, 702 (1982). Bostedt's argument challenges an evidentiary ruling, not the sufficiency of the evidence. There is no indication Bostedt raised this alleged claim of error before the trial court. Accordingly, we do not consider it for the first time on appeal.

Next, in a three-sentence argument, Bostedt contends that the trial court's *in camera* review of Tanya's treatment records precluded him from discovering exculpatory evidence. Bostedt does not identify the allegedly exculpatory evidence and cites no legal authority for his position. This court declines to abandon its neutrality in an attempt to develop Bostedt's argument for him. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).

Next, Bostedt argues that the trial court erroneously permitted the State to make repeated references to his alcohol consumption on the night of the offense and other occasions when he visited Tanya's house. With just one exception, no objection was made to these references. Bostedt's claim of error is not preserved with respect to the unobjected-to references. *See* § 901.03(a), STATS.; *see also* ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989). Because the trial court sustained the one objection that was made to

the phrase "drinking and carousing," the court's ruling does not serve as a basis for Bostedt's claim of error.

Bostedt also argues that the trial court erred when it limited questioning of his mother, "his best character witness." The record fails to support his claim. The trial transcript discloses that the trial court permitted the witness to step down after Bostedt's attorney stated that he had no further questions. Because the record fails to support Bostedt's claim of error, we reject his argument.

Next, Bostedt contends that the prosecutor's improper argument was so fundamentally erroneous and prejudicial that we should review it in the absence of any objection. He contends that the prosecutor referred to him as a drunken student and that the prosecutor lied when he told the jury that a detective had written down an incriminating statement of Bostedt's. Also, Bostedt claims that the prosecutor referred to Tanya's friend as a fourteen-year-old girl who would not talk about sexual matters, but that the friend was actually fifteen and knowledgeable about sexual matters.

The plain error rule is reserved for those cases where it is likely that the error denied the defendant a basic constitutional right. ***State v. Street***, 202 Wis.2d 533, 552, 551 N.W.2d 830, 839 (Ct. App. 1996). Prosecutors are permitted wide latitude in closing arguments. "The constitutional test is whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Neuser***, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995) (quoted source omitted). The prosecutor is permitted to draw any reasonable inference from the evidence in closing argument. "The line between permissible and impermissible argument is drawn

where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." ***Id***. The prosecutor's remarks must be examined in the context of the entire trial. ***Id***. Viewing the prosecutor's remarks in context, we conclude that he asked the jury to make inferences from the evidence. We are satisfied that the remarks did not deny Bostedt a basic constitutional right.

Next, Bostedt claims that his Sixth Amendment rights to effective assistance of trial counsel were violated. He contends that counsel was inexperienced and failed to pursue alternative defensive theories, emphasize weaknesses in the case, challenge the sufficiency of the evidence and preserve objections. The record fails to demonstrate that postconviction proceedings were brought to preserve counsel's testimony. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). "It is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel" at a post-conviction hearing. ***Id.*** It is inappropriate for this court to determine the competency of trial counsel on unsupported allegations. ***State v. Simmons***, 57 Wis.2d 285, 297, 203 N.W.2d 887, 894-95 (1973).

Bostedt argues that no evidentiary hearing is required because counsel's mistakes were not trial strategies, relying on ***State v. Smith***, 207 Wis.2d 258, 558 N.W.2d 379 (1997). ***Smith*** provides that when the facts are undisputed, the court may determine issues of law. *See* ***id***. Here, in contrast, Bostedt's assertions involve factual issues. Because there is no evidentiary record on this issue, we cannot review Bostedt's claims of ineffective assistance of counsel.

Finally, Bostedt argues that the trial court erroneously exercised its sentencing discretion because he was sentenced based upon erroneous

information. He contends that the presentence report inaccurately stated that his girlfriend of ten years broke up with him because of the allegations in this case. The record discloses that at the sentencing hearing, defense counsel informed the court that the presentence author never interviewed Bostedt's girlfriend. Counsel denied the assertion that the breakup resulted from the charges. The record also discloses that in sentencing Bostedt, the trial court considered the nature of the offense, Bostedt's character, lack of prior criminal record, good employment history, and lack of rehabilitative needs except for alcohol consumption. The court also considered punishment and deterrence. These are appropriate factors. *See* ***State v. Sarabia,*** 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). The record does not indicate that the trial court based any part of the sentence on Bostedt's relationship with his girlfriend and, as a result, Bostedt's argument fails.

By the Court.—Judgment affirmed.

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