COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-1530-CR **Cir. Ct. No. 98-CF-27**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. M.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waushara County: WILLIAM M. McMONIGAL, Judge. *Affirmed.*

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

¶1 VERGERONT, P.J. Michael M.,[1] pro se, appeals a judgment of conviction of two counts of first-degree sexual assault of a child in violation of

[1] Use of the first name and last initial of defendant is necessary to protect the victim's identity.

WIS. STAT. § 948.02(1) (1997-98),[2] each count enhanced for sexual assault by a person responsible for the welfare of the child under § 948.02(3m), and one count of incest with a child in violation of WIS. STAT. § 948.06(1). He also appeals an order denying his motion for postconviction relief. On appeal, Michael M. contends: (1) the trial court erroneously allowed the State to present evidence obtained by an illegal search; (2) the trial court erred by not allowing him to represent himself; (3) the State failed to prove every element of the crime of sexual assault of a child; and (4) he did not knowingly and voluntarily waive his right to testify on his own behalf.[3] We decide each of these issues against Michael M. and therefore affirm.[4]

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] Michael M. also raises on appeal the issues of vindictive or selective prosecution, ineffective assistance of counsel, and failure to hold a scheduled evidentiary hearing. However, Michael M. presented arguments for these issues in the appendix supplementing his brief-in-chief. On a motion from the State for clarification of the issues before the court, we reiterated that a party may not circumvent briefing requirements by cross-referencing arguments in the appendix. ***State v. Armstead***, 220 Wis. 2d 626, 642 n.6, 583 N.W.2d 444 (Ct. App. 1998). As a result, we ordered that any issues not raised in Michael M.'s brief-in-chief would not be considered by this court. Accordingly, we review only those issues presented and argued in Michael M.'s brief-in-chief.

Because of the numerous motions Michael M. has filed with this court, by order of October 23, 2000, we directed that all his motions not then disposed of be held in abeyance pending disposition of this appeal. To the extent the issues raised in Michael M.'s motions to this court and held in abeyance by our October 23, 2000 order are raised and argued in Michael M.'s brief-in-chief, we consider them on this appeal. However, all other issues raised in motions that were held in abeyance by our October 23, 2000 order and not argued in Michael M.'s brief-in-chief are hereby denied.

[4] Michael M. also contends he did not receive a fair trial in violation of his constitutional rights, but this contention is simply a reiteration of the arguments he presents on the issues identified above. We therefore do not separately address it. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

BACKGROUND

¶2 The charges against Michael M. involved his daughter, A.M., who was between five and six years old at the time. A.M. was enrolled in a "protective behaviors" class, and on April 1, 1998, a kindergarten teacher was teaching a class on touching safety. According to the teacher, during the class and in response to a question about whom you tell if someone was inappropriately touching you, A.M. asked, "What if it was your dad?" A.M. then spoke to her teacher and a school guidance counselor about her father's behavior. Based on A.M.'s account of events, the guidance counselor made a report to social services. The following day social service agents investigated and interviewed A.M. A.M. and her brother, Z.M., were removed from the home that afternoon and placed in protective custody. Two incidents described by A.M.—one occurring on or about the last two weeks of August 1997 and the other occurring during the last three weeks of March 1998—were the basis for the criminal charges.

¶3 Michael M. was convicted after a jury trial at which he was represented by counsel. At sentencing Michael M. informed the court that he would proceed pro se in postconviction and appellate proceedings.[5] Michael M. filed postconviction motions, which were denied without a ruling on the merits under WIS. STAT. RULE 809.30(2)(i).[6]

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[5] Subsequently Michael M. was for a time represented by counsel in postconviction proceedings, but we allowed that counsel to withdraw.

[6] WISCONSIN STAT. RULE 809.30(2)(i) provides:

> (i) The trial court shall determine by an order the defendant's motion for postconviction relief within 60 days of its filing or the motion is considered to be denied and the clerk of the trial court shall immediately enter an order denying the motion.

DISCUSSION

Suppression motion

¶4 Michael M. brought a pretrial motion to suppress all statements A.M. made to social worker Colleen Rogalski of the Waushara County Department of Social Services and all other evidence Rogalski and another county social worker, Brian Fitzpatrick, obtained at Michael M.'s home. The State opposed the motion, arguing that the search was valid because it was done with the parents' consent or, in the alternative, there were exigent circumstances. The trial court heard testimony from Fitzpatrick; Rogalski; Michael M.; A.M.'s mother, Dawn W.; and A.M.'s maternal grandmother, Dolly W.

¶5 Both Rogalski and Fitzpatrick testified that late in the morning of April 2, they were assigned to investigate the report of alleged sexual abuse. They decided that they needed to interview the children that day and went to Michael M.'s home because A.M. was not in school and her brother would soon be getting home from school. Upon arriving at Michael M.'s mobile home, they were met outside by Dawn, who asked why they were there. Fitzpatrick informed Dawn that they were from the Department of Social Services and they were there because the department had received a report concerning the children, but they did not give any more details. Later Michael M. arrived, and while still outside, the social workers introduced themselves and indicated they were there because of a report the department had received. Fitzpatrick, because he could see some damage to the mobile home, indicated that the condition of the home was one of their concerns and mentioned a concern about no running water in the home. They proceeded to ask Michael M. and Dawn about how they bathed, what they drank, and how they washed dishes. Neither Fitzpatrick nor Rogaliski informed

Michael M. or Dawn of the nature of the report the department actually had received.

¶6 Both social workers also testified that when they arrived at the mobile home it had been raining lightly but began to rain harder, and at that time Dawn invited them into the home; Michael M. did not object. The parents were informed that it was common practice whenever the department received reports concerning children to look around and note any deficiencies and to interview the children in private. According to Fitzpatrick, they looked around the mobile home, determined that there was no running water but there was a sufficient water supply, and Rogalski proceeded to interview A.M. in a bedroom. Initially, neither parent asked that Dolly, the children's maternal grandmother, be present during the interviews. However, Fitzpatrick testified that after about twenty minutes, Michael M. became agitated, seemed nervous, and asked why he could not know what A.M. was saying. Michael M. proceeded to recount an incident in the past regarding a niece, whom Michael M. alleged had words put in her head by a social worker about an incident with him that did not happen. Fitzpatrick testified that he was never told to get off the premises while Rogalski was interviewing the children, and neither social worker recalled hearing either parent inform them they were unwelcome and needed to get out. During the interview A.M. informed Rogalski of incidents in which her father touched her.

¶7 Michael M. testified that Fitzpatrick asked upon arriving if they had running water and he said no but that they had plenty of water. They all went into the mobile home to show the social workers there was water. He stated that Rogalski informed him she needed to speak to the children, and right at that moment when she took A.M. to the bedroom, he asked Fitzpatrick if Dolly could see what was going on, and Fitzpatrick answered, "[N]o, I don't think so."

Michael M. proceeded to inform Fitzpatrick of a prior experience with social services involving a niece and Fitzpatrick responded, "[I]t ain't gonna happen." Michael M. testified that Fitzpatrick was acting like an officer; he (Michael M.) felt he did not have any choice in the matter, and he thought the interview was going to be limited to the issue of the lack of running water.

¶8 Dawn testified that when the social workers arrived she asked if they needed any assistance. Dawn was informed that Rogalski and Fitzpatrick were from social services and they had received a report. They proceeded to walk toward the mobile home, and Fitzpatrick asked about running water and if they could have a look inside. Dawn was nervous about the condition of the home because she realized the home "may have not been a proper home to be living in." After looking around, Fitzpatrick stated that there was plenty of water but they needed to speak with the children. Dawn did not testify that she objected to Rogalski speaking with the children.

¶9 Dolly testified that when the social workers came into the house, they made comments about the water. Rogalski said she wanted to speak to the children and when Michael M. asked why, the response was, "Didn't have to say." Michael M. asked Rogalski if Dolly could be present during the interview and Rogalski said no, but she (Dolly) could not remember the reason given. Dolly was under the impression the social workers were there because of the condition of the mobile home.

¶10 The trial court determined that the social workers entered the home with consent and that the express reason for wanting to enter the home—to check

for water—was actually confirmed after a related inspection was conducted. Therefore, the court decided the entry was for a valid purpose.[7] In addition, based on Michael M.'s testimony, the trial court determined that Michael M. had freely and voluntarily given consent to the social workers to speak to the children; if he had chosen to, the court found, Michael M. could have asked more questions about the need and nature of the interview, but he consented to an interview of the children without explanation. The trial court also concluded that exigent circumstances existed to support the warrantless search.

¶11 On appeal, Michael M. argues, as he did in his motion to suppress, that the evidence must be suppressed because the two social workers violated his constitutional rights by using a ruse to obtain a warrantless entry into his home in order to speak with his children, and because the questioning of the children exceeded the social workers' stated reason for their visit. He concedes that he did give the social workers permission to enter his home and speak with his children; however, he argues, he objected to the social workers talking to the children without another adult present, Fitzpatrick intimidated him, and he was unaware of his rights.

¶12 Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***State v. Boggess***, 115 Wis. 2d 443, 448, 340 N.W.2d 516 (1983). The social workers' entry into the mobile home was a search within the meaning of the United States and Wisconsin Constitutions. ***Id.*** at 449 n.9. Warrantless

[7] Under the Children's Code, shelter that seriously endangers the physical health of a child is an appropriate issue for a social worker to investigate. WIS. STAT. § 48.981(1)(d).

searches are per se unreasonable under the Fourth Amendment unless the search falls under one of the delineated exceptions. ***Id.*** at 449. One exception to the warrant requirement is a search conducted pursuant to consent. ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998). Consent must be "freely and voluntarily" given in order that it not violate a defendant's Fourth Amendment rights. ***Id.*** The test for voluntariness is whether consent to search was given in the absence of duress or coercion, expressed or implied. ***Id.*** at 197.

¶13 When reviewing a motion to suppress, this court applies a deferential standard to the circuit court's findings of evidentiary, historical facts. ***State v. Martwick***, 2000 WI 5, ¶18, 231 Wis. 2d 801, 604 N.W.2d 552. We uphold the trial court's findings of fact, and inferences drawn from those facts, unless clearly erroneous. ***State v. Pallone,*** 2000 WI 77, ¶27, 236 Wis. 2d 162, 613 N.W.2d 568. We review independently the application of constitutional principles to the facts as found to determine whether the standard of voluntariness of the consent has been met. ***Phillips***, 218 Wis. 2d at 195.

¶14 Michael M. appears to be challenging some of the trial court's factual findings on the ground that the trial court chose to believe the social workers. However, when the trial court acts as the finder of fact, it is the ultimate arbiter of both the credibility of the witnesses, ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977), and the weight to be given to each witness's testimony, ***Milbauer v. Transport Employes' Mut. Benefit Soc'y***, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973).

¶15 Michael M. argues that the social workers violated WIS. STAT. § 48.981(3)(c)1[8] because they were required to identify themselves and the purpose for the visit to the home, and they did not identify the true purpose. We disagree. Section 48.981(3)(c)1 does not require the agents who make a visit to identify their purpose; the statute requires only that the agents identify themselves and the agency involved, which the social workers did.

¶16 Michael M. quotes, without discussion, passages from cases to support his argument that his consent to enter his home was invalid because the social workers did not disclose the nature of the report they had received. The closest factually—***State v. Stevens***, 120 Wis. 2d 334, 339, 354 N.W.2d 762 (Ct. App. 1984), *aff'd in relevant part*, 123 Wis. 2d 303, 315, 320, 367 N.W.2d 788 (1985)—does not support his argument. In that case a garbage collector collected garbage that was turned over to the State and used to obtain a search warrant. Although the defendant had allowed the collector to enter his garage to collect the garbage, he argued that consent was not freely given because the collector, as an agent of the state, deceived him into opening his garage door. The supreme court

[8] WISCONSIN STAT. § 48.981(3)(c)1 provides in part:

> If the investigation is of a report of child abuse or neglect or threatened child abuse or neglect by a caregiver who continues to reside in the same dwelling as the child, the investigation shall also include, if possible, a visit to that dwelling. At the initial visit to the child's dwelling, the person making the investigation shall identify himself or herself and the agency involved to the child's parents, guardian or legal custodian. The agency may contact, observe or interview the child at any location without permission from the child's parent, guardian or legal custodian if necessary to determine if the child is in need of protection or services, except that the person making the investigation may enter a child's dwelling only with permission from the child's parent, guardian or legal custodian or after obtaining a court order to do so.

concluded that the garbage collector entered the garage for the very purpose contemplated by the defendant and the deception in the case was not sufficient to vitiate the defendant's otherwise voluntary consent to routine garbage disposal. ***Stevens***, 123 Wis. 2d at 315-16. ***Stevens***, in fact, supports the trial court's conclusion that Michael M.'s consent for the social workers to enter his home was freely and voluntarily given, even though the social workers did not disclose the nature of the report they had received.

¶17 Michael M. also cites passages from cases on coercion, but the trial court here implicitly found that Michael M. was not intimidated into giving the social workers consent to talk to his children, and this implicit finding is not clearly erroneous; nor is the implicit finding that Michael M. did not object to the interviews unless an adult could be present. Based on the facts as found by the trial court, which have support in the record, we conclude Michael M. freely and voluntarily consented to the social workers' entry and to the interview of his children.[9]

Right to Self-Representation

¶18 Michael M. argues the trial court violated his right to self-representation when it denied his request to proceed pro se. The State responds that Michael M.'s right to self-representation was not violated because he

[9] Michael M. also argues that exigent circumstances did not exist to support a warrantless entry into his home. Since we have already concluded that Michael M. freely and voluntarily consented to the warrantless entry, we need not address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

presented only qualified assertions that he wanted to represent himself, and he subsequently abandoned those.

¶19 The Sixth Amendment right to representation, whether by counsel or pro se, is an essential element of due process. U.S. CONST. amend. VI & XIV, § 1; WIS. CONST. art. I, § 7. While a defendant has the constitutional right to be represented by appointed counsel in cases in which the possible penalty is incarceration, a defendant also has a constitutionally protected right to proceed pro se. ***State v. Klessig***, 211 Wis. 2d 194, 202-03, 564 N.W.2d 716 (1997). The right to proceed pro se, however, is not absolute. ***State v. Oswald,*** 2000 WI App 3, ¶28, 232 Wis. 2d 103, 606 N.W.2d 238, *review denied*, 2000 WI 21, 233 Wis. 2d 84, 609 N.W.2d 473 (Feb. 22, 2000) (Nos. 97-1219-CR, 97-1899-CR). When a defendant seeks to proceed pro se, the trial court must insure that the defendant: "(1) [is] knowingly, intelligently and voluntarily waiv[ing] the right to counsel, and (2) is competent to proceed pro se." ***Klessig***, 211 Wis. 2d at 203. If these two conditions are not satisfied, the trial court must prevent the defendant from self-representation, because to do otherwise would deny the defendant the constitutional right to counsel. ***State v. Ruszkiewicz,*** 2000 WI App 125, ¶26, 237 Wis. 2d 441, 613 N.W.2d 893, *review denied*, 2000 WI 102, 237 Wis. 2d 259, 618 N.W.2d 749 (July 27, 2000) (No. 99-1198-CR). If these conditions are satisfied, the trial court must allow the defendant to represent himself or herself, because to do otherwise would deny the defendant the constitutional right to self-representation. ***Id.***

¶20 We conclude that the record demonstrates that Michael M. sought to invoke his right of self-representation. We do not agree with the State's

characterization of Michael M.'s requests as too qualified and ambiguous, nor do we agree that Michael M. abandoned his request.[10] As the State concedes, the

[10] After an unsuccessful motion by defense counsel to withdraw and two inquiries by Michael M. to the court on firing his counsel, the following took place at a pretrial hearing on a defense motion in limine:

> THE COURT: Thank you. [Defense counsel] other than the Motion in Limine which [the Prosecutor] has just referred to, does the defense have any other pending motions that remain unresolved by the Court?
>
> [DEFENSE COUNSEL]: I personally do not. My client says he has several motions to bring before this Court today.
>
> THE COURT: Okay ….
>
> ….
>
> Other than the Motion in Limine and -- [defense counsel], are you proceeding on this or are you withdrawing this Motion in Limine?
>
> [DEFENSE COUNSEL]: No. I'm proceeding. My client has informed me he doesn't wish me to bring this. I can't -- again, I can't, in good faith and good conscience and in my ethical oath to represent my client, withdraw this motion. It's in his best interests.
>
> ….
>
> And so, no, I really don't know what to say. I don't believe I can withdraw this motion. I've been informed that if I do not withdraw the motion, he wishes to fire me.
>
> THE COURT: …. This case is scheduled for trial within the month. We have been down this road in terms of your relationship with, not only [defense counsel], but prior counsel. The Court is very concerned that you have legal representation because the issues in this case are complex.
>
> The Court has no reason to believe that [defense counsel's] skills or services at any stage of these proceedings were deficient. I know that there are issues that have surfaced between you and [defense counsel] that, in the Court's opinion, is not unusual, because attorneys who are knowledgeable about the law and their obligation to represent the best interests of the

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client, oftentimes contradict with what the client believes is appropriate.

And when that happens, it's very often the difference between the client's understanding of the law and the lawyer's understanding of the law. And, oftentimes, that is why defendants have lawyers. Because the lawyers are trained to recognize and use those subtleties.

Putting [defense counsel] under the concept he would be fired as a means of attempting to have him do things that he might be ethically prohibited from doing or having him do what his sense of facts or strategy would prohibit him from doing, compromises the integrity of the whole process. And, at the present time, for you to fire [defense counsel] would place you in the position of being unrepresented.

THE DEFENDANT: That's what I want.

THE COURT: The Court will not allow that.

THE DEFENDANT: Judge, I'm fully capable of defending myself. I know the facts. I know the truth. And I, I've done it before. What he's going to do affects my children in the future. By him eliminating all these witnesses [by the Motion in Limine], it's -- all these witnesses, he's eliminating my chance, my chance to prove my innocence. It's really gone already. The only thing he can do is show that there's some doubt in the facts of everything.

Also, they, they stole my chance of proving my innocence by manipulating the psychiatrist into thinking that her evaluation was based on the criminal matter and Order through the criminal matter. And so, the lady that was supposed to do the evaluation, didn't do it.

By him eliminating all the people that, that I can show had other, other reasons for doing what they, what they've done, like -- I don't know how to express it except that --

THE COURT: [Michael M.], I think the Court understands what your concerns are. This particular motion is a motion that the Court believes represents the strategy as described by [defense counsel] a few minutes ago. And that is, whether or not these five individuals who had contact with the children and who are likely to be asked to offer their version of what the children said to them, are being prohibited from testifying. Based on [defense counsel's] strategy, recognizing that if they don't say

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> anything, it doesn't matter whether they're telling the truth or whether they're lying because they're not saying either.
>
> And [defense counsel] is taking the position that the only competent witness to give testimony regarding the circumstances of the facts themselves is your child.

Michael M. proceeded to speak about what he perceived were the problems with the way the children had been interviewed, to which the court responded that Michael M.'s concern involved trial strategy. Michael M. then became involved in a conversation with the court about the fact that he was being held in custody pending the trial. At the conclusion of this conversation, the record reflects Michael M. again asked to represent himself:

> THE COURT: [Michael M.], what you would have done or what you think or what you don't think, there is no way to get a bond modification, not at this juncture. And the more argumentative you get, the more concerned --
>
> THE DEFENDANT: I want to defend myself.
>
> THE COURT: [Michael M.], [defense counsel] is not going to be permitted to terminate his relationship with you in this case at this point. This case is set for a trial within 30 days.
>
> THE DEFENDANT: I'm not going to make it.
>
> THE COURT: Well, I don't know what you mean by that.
>
> THE DEFENDANT: Fuck that, man. My rights don't mean shit here.
>
> THE COURT: [Michael M.], this is a courtroom. You will pay more attention to the words that you are using. You are not showing the proper respect. And, just as a forewarning, if you don't participate in your own trial, sitting along with your counsel -- your conduct is going to have to conform with what is expected of people participating in a court proceeding. Outbursts or emotional expressions or anything that will alter the fairness of the trial to you and to the State could result in you being detained elsewhere and you may watch the proceedings by some other means. Is that clear?
>
> THE DEFENDANT: I don't, I don't care about contempt. My rights don't matter. Why should I care?
>
> THE COURT: [Michael M.], this Court has done and will continue to make sure your rights and interests are fully

(continued)

court did not conduct the colloquy required by ***Klessig*** to determine whether Michael M. knowingly, intelligently, and voluntarily waived his right to counsel;[11] nor did the court expressly make a determination whether Michael M. was competent to represent himself. However, we are satisfied that the record unequivocally demonstrates that Michael M. was not competent to represent

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> protected. One of the rights you have is a right to be represented by an attorney. And, in this case --
>
> THE DEFENDANT: I also have a Constitutional right to defend myself.
>
> THE COURT: You do not have a Constitutional right to defend yourself. You have a Constitutional right --
>
> THE DEFENDANT: That lawyer told me -- he's a fucking liar then. He did. I swear he did.
>
> THE COURT: I don't know any Constitutional right that says you can defend yourself.
>
> THE DEFENDANT: I'm doing that now. He told me.
>
> THE COURT: [Michael M.], the Court has an obligation to make certain that the trial is fair and that your rights and interests are fully protected. And, in this particular case, given the nature of these charges and the substantial penalty that could occur if you were convicted, reassures the Court that you have counsel. And this Court has observed [defense counsel] during many proceedings and this Court is not concerned about inadequacies of [defense counsel]. He is a competent attorney from all indications. And, if you would permit and cooperate with him, he could competently represent you and provide the defense you are entitled to. And, from that point, it becomes a jury issue.

At that point, Michael M. proceeded to raise an issue about the transcript from the prior CHIPS hearing and eventually the court had him removed from the courtroom because of his behavior. The hearing proceeded on the defense's motion in limine, which the court denied.

[11] To verify that a waiver is knowingly, intelligently, and voluntarily made, the trial court must conduct a colloquy designed to ensure the defendant: (1) made a deliberate choice to proceed pro se; (2) was aware of the difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges; and (4) was aware of the general range of penalties that could be imposed. ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997).

himself. *See* ***Klessig***, 211 Wis. 2d at 213, 214 n.9 (holding evidentiary hearing not always required when trial court fails to independently consider defendant's competency to represent self if record regarding competency to proceed pro se is clear).

¶21 Generally in determining competency to represent oneself, courts are to consider factors such as "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect [the defendant's] ability to communicate a possible defense to the jury." ***Id.*** at 212 (quoting ***Pickens v. State***, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980), *overruled in part by* ***Klessig***, 211 Wis. 2d at 206). The competency determination should not prevent persons of average ability and intelligence from representing themselves unless "a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist." ***Pickens***, 96 Wis. 2d at 569. A defendant's disruptive behavior in the courtroom is relevant in determining whether he or she should be allowed to proceed pro se, and such conduct may be the basis for not allowing a defendant to represent himself or herself. *See* ***State v. Haste***, 175 Wis. 2d 1, 29 n.5, 500 N.W.2d 678 (Ct. App. 1993).

¶22 At the motion in limine hearing[12] the court warned Michael M. about the use of inappropriate language. It noted that outbursts or emotional expressions that affected the fairness of the trial would result in Michael M. being detained elsewhere to watch the trial by another means. Michael M. continued to use inappropriate language in addressing the court, and his behavior led the court to

[12] See footnote 10.

have Michael M. removed from the courtroom.[13] Michael M. also caused an unprovoked disruption before A.M.'s video deposition, and it took four officers to control him. The record reflects that the issue of Michael M.'s inability to control himself was of such concern to the court that it ordered Michael M. to wear a stun belt under his clothes as a means of allowing Michael M. to participate in his trial.[14] The court's intent was to have the stun belt as "a last resort if the [c]ourt [was] unable to otherwise control [Michael M.]" and security was threatened. Michael M. stated that he understood the purpose of the stun belt and that if he felt that he was "going to explode," he would let the court know so he could leave the

[13] The transcript from the motion in limine hearing, in which Michael M. alleged that transcripts from the CHIPS hearing were altered, reflects the following:

> THE DEFENDANT: This is fucking bull. She didn't fucking say that. That's what he changed. He changed it.
>
> THE COURT: [Michael M.], just sit down.
>
> THE DEFENDANT: No. Fuck this, man. I'm not going to get a fair trial and, fuck, I'm not going to be there. This is fucking bullshit, Judge, I'm telling you. It's changed. I have witnesses here that could testify to that.
>
> THE COURT: Okay. [Michael M.] --
>
> THE DEFENDANT: She didn't say that. Fuck you. That's a fucking lie.
>
> THE COURT: [Michael M.], I'm going to have the deputy take you back.
>
> THE DEFENDANT: Thank you. I can't fucking handle this bullshit.
>
> (Defendant left the proceedings.)

[14] The court stated that it wanted Michael M. to be able to participate in the trial without handcuffs or foot hobbles and in street clothes to allow Michael M. to appear as natural as possible. However, the court determined the stun belt was necessary because of Michael M.'s prior outbursts.

courtroom.[15] The record reflects that Michael M. voluntarily left the courtroom when the video depositions of his children were played and when a witness for the State testified about admissions Michael M. had made about past behavior. Michael M. returned upon completion of the videos and the questioning of the witness.

¶23 This record demonstrates to our satisfaction that Michael M.'s disruptive behavior would have prevented him from presenting a meaningful defense. Accordingly, the trial court did not deny Michael M. his right to self-representation.

Sufficiency of the Evidence

¶24 Michael M. contends the State did not prove every element of the crime. According to Michael M. there is no evidence of sexual gratification and the times testified to were inconsistent.[16] Michael M.'s argument is limited to the two counts of sexual assault of a child in violation of WIS. STAT. § 948.02(1).[17]

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[15] The issue of Michael M.'s competency to stand trial was raised prior to trial. Defense counsel asked the court to review whether Michael M. was competent to stand trial because he was concerned that Michael M.'s past behavior indicated that he may be incapable of assisting in his own defense. The court determined that Michael M.'s conduct was part of a well-orchestrated course of conduct to disrupt the proceedings, and Michael M. did not lack the capacity to understand the charges or to assist fully and competently in his own defense. However, a higher standard exists for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial. ***Klessig***, 211 Wis. 2d at 212.

[16] Michael M. also asserts that the testimony relied on was hearsay and provides no further argument. A reviewing court will not consider undeveloped arguments broadly stated but never specifically argued. ***Gulrud***, 140 Wis. 2d at 730.

[17] WISCONSIN STAT. § 948.02(1) provides:

> **Sexual assault of a child. (1)** FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse

(continued)

¶25 At trial the court correctly instructed the jury that to find Michael M. guilty of violating WIS. STAT. § 948.02(1), the State must produce evidence that proves beyond a reasonable doubt that Michael M. had sexual contact with A.M., and that A.M. had not attained that age of thirteen at the time of the alleged contact.[18] WIS JI—CRIMINAL 2102. The jury also was correctly instructed that sexual contact requires an intentional touching by Michael M. of A.M.'s vagina, directly or through clothing, and that Michael M. acted with the intent to become sexually aroused or gratified. WIS JI—CRIMINAL 2102 & 2101A. Intent to become sexually aroused or gratified may be determined directly or indirectly from all the facts in evidence and statements or conduct of the defendant which indicate state of mind.[19]

¶26 In reviewing a jury verdict we may not overturn the verdict for insufficient evidence unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force 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 (1990). In reviewing the evidence we draw all reasonable inferences supporting a finding of guilt. ***Id.*** at 504. We defer to the jury's resolution of issues of credibility, weight of the evidence, and conflicts in testimony. ***Id.*** at 506. It is only when the trier of fact

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> with a person who has not attained the age of 13 years is guilty of a Class B felony.

[18] Michael M. does not contend that his daughter was not under the age of thirteen at the time of the incidents and the record supports this element.

[19] Michael M. also argues that the judge did not properly instruct the jury on separating each element of the crime. However, Michael M. did not object to the instructions at trial, and therefore has waived his right to review of this issue. ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

has relied upon inherently or patently incredible evidence that the appellate court will substitute its judgment for that of the fact finder present at trial. ***State v. Drusch***, 139 Wis. 2d 312, 325, 407 N.W.2d 328 (Ct. App. 1987). Inherently or patently incredible evidence is that evidence which is in conflict with nature or fully established or conceded facts. ***Thomas v. State***, 92 Wis. 2d 372, 382, 284 N.W.2d 917 (1979).

¶27 The testimony at trial included the following. Rogalski testified that in her interview with A.M., A.M. stated that her dad had touched her and licked her in her private parts. Rogalski used anatomical drawings to clarify the parts of A.M.'s body she believed were her private parts, and A.M. was clear that it was the vaginal area. A.M. said the first time it happened was the first day of school and her mom had walked her brother to the bus. A.M. said the last time it happened was three weeks prior to April 2; Rogalski had A.M. count off the days of the week to verify the child was aware of the days of the week and of what "three weeks ago" meant. A.M. talked about her nightgown being lifted up and her underpants being pulled down. A.M. stated that when her father was done he would want her to leave so it would not happen again, and he would be mad.

¶28 A.M.'s kindergarten teacher testified that A.M. reported her father was touching her, but told her she should not tell anyone because he would get in trouble and go to jail. A.M. also reported that at night sometimes she and her brother would have trouble sleeping and she would be sent to her parents' bedroom.

¶29 A.M.'s school guidance counselor testified that A.M. told her the following. At night A.M. would sometimes be sent to her parents' bedroom because she was talking with her brother, and her father would touch her "down

there." A.M. pointed to her vaginal area. A.M. would ask her dad to stop touching her and he would stop for a while, but start touching her again. Sometimes A.M. would be wearing a nightgown and then her dad would pull her nightgown up and he would touch her "down there" with his hands on top of her underwear. Sometimes A.M. would be wearing pajamas, and then he would touch her "down there" with his hands on top of her pajama bottoms. Sometimes when her dad was done touching her, he would get angry and tell her to get out and she would go back to her bedroom. Her dad told her not to tell anybody about it because somebody might call the police and he would have to go to jail.

¶30 Sexual Assault Crisis Center Director Bonnie Coonen testified that Michael M. told her he had on occasion masturbated in front of A.M. District Attorney Guy Dutcher also testified that Michael M. reported to him that quite frequently he and A.M. would be alone in bed together while there was some activity that was taking A.M.'s brother from the home.

¶31 A.M. testified by video deposition of one occasion in which her dad took her into the bedroom, closed the door, took off her clothes, and licked her privates. She also testified that she could not remember any other times when her dad touched her in the "wrong place." However, the State's expert witness, clinical psychologist Erica Serlin, testified as an expert in the field of child sexual abuse. Serlin testified that earlier interviews with children tend to have more validity than interviews that are distant in time from the abuse or disclosure. In addition, Serlin testified that it was significant that the details A.M. had originally reported were unique and personal—that it happened when her mother was watching television at night or when her mother was taking Z.M. to the bus stop, and that her dad would get mad afterwards. In addition, the details of secrecy

were consistent with abuse—that A.M. told others Michael M. had told her not to tell or he would get in trouble.

¶32 We have no hesitancy in concluding that a reasonable jury could find from this evidence that Michael M. committed two counts of first-degree sexual assault of a child beyond a reasonable doubt. There was sufficient evidence for the jury to find that on two occasions—one when A.M.'s mother was taking Z.M. to the bus stop in August 1997, and one at night during the last three weeks of March—Michael M. had sexual contact with A.M.'s vaginal area. In addition, there was sufficient evidence for the jury to infer that Michael M. touched A.M.'s vaginal area for purposes of sexual gratification. Michael M. points to inconsistencies in the testimony of A.M. However, the jury resolved any inconsistencies in the child's statements in a manner favoring a guilty verdict. Nothing in the child's account, either directly or as related by other witnesses, was inherently or patently incredible.

Right to Testify

¶33 Michael M. contends he did not knowingly and voluntarily relinquish his right to testify at trial. He asserts that the trial court denied him the right to testify even though he expressed a desire to do so. He also asserts that his attorney prevented him from testifying despite his expressed desire to do so, and failed to advise him that he had a constitutional right to decide himself whether he would testify.

¶34 The trial court record does not show that Michael M. asserted his right to testify to the court, but we acknowledge that this may have occurred during the side bar that occurred just before defense counsel rested. Michael M.'s affidavit accompanying his postconviction motion describes a conversation with

his attorney that apparently took place during the recess, after the side bar and before the defense rested.[20] When the defense rested, Michael M. did not make any objections.

¶35 When a trial court denies a motion under WIS. STAT. RULE 809.30(2)(i), we review the record to determine whether the defendant is entitled to any relief. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 516, 415 N.W.2d 759 (Ct. App. 1989). If a motion on its face alleges facts that would entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law, which we review de novo. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). In analyzing the motion, we bear in mind that the defendant may not rely on conclusory allegations, but must support them with objective factual assertions that allow the reviewing court to meaningfully assess the defendant's claims. ***Id.*** at 313-14.

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[20] Michael M.'s affidavit accompanying his motion avers as follows. He told his attorney he wanted to testify before and during the trial, and he had told the court he wanted to testify. His attorney did not think it was a good idea and Michael M. told his attorney he did not care what he thought. Michael M.'s attorney then asked the judge if he could speak with Michael M. in private. At this time his attorney told him, "I don't want you making a mess of things," and "I don't want you fucking things up, they don't have anything …." Michael M. was not told he had the constitutional right to make the final decision. According to Michael M.'s affidavit, when they returned to the courtroom the court asked Michael M. "if [he] said it." Michael M. "was totally dumbfounded and bewildered, [and] … said yes, still thinking [he] was going on the stand." He then realized he had said yes to something for which he did not know the question. The court asked if defense counsel had any more witnesses and defense counsel answered no.

We observe that Michael M.'s account in his affidavit appears to be internally inconsistent. He avers that in the private conversation his attorney told him that he did not want Michael M. to testify and he did not know that it was his decision to make,. But he also avers that upon their return to the courtroom, he believed he was going to testify. However, this inconsistency is not relevant to our decision.

¶36 Generally, the trial record must support a knowing and voluntary waiver of the defendant's right to testify. ***State v. Wilson***, 179 Wis. 2d 660, 672, 508 N.W.2d 44 (Ct. App. 1993). The defendant's silence in the record is presumptive evidence of a valid waiver by counsel of the defendant's right to testify. ***Id.*** at 673. In addition, the trial court is not required to undertake an on-the-record colloquy with the defendant at the close of the defense's case-in-chief concerning his or her right to testify. ***Id.*** at 672 n.3. If counsel waives the right to testify, and that decision was prejudicial to the defendant, the objection of the defendant should be based on ineffective assistance of counsel. ***State v. Albright***, 96 Wis. 2d 122, 133, 291 N.W.2d 487 (1980).

¶37 Michael M.'s postconviction motion and accompanying affidavit do not make assertions that, if true, support a finding that the trial court prevented Michael M. from testifying, and the record does not support such a finding. However, Michael M. does make some assertions that, if true, would support his position that his counsel was ineffective for not allowing him to testify and not informing him that the decision to testify was his.

¶38 The two-part ***Strickland*** test is appropriate to assess a defendant's contention that his or her right to testify was violated by defense counsel. ***State v. Flynn***, 190 Wis. 2d 31, 50, 527 N.W.2d 343 (Ct. App. 1994). In order to prevail on a claim for ineffective assistance of counsel, Michael M. must prove that trial counsel's performance was both deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under ***Strickland***, we need not analyze counsel's performance if any alleged deficiencies did not prejudice Michael M. ***Flynn***, 190 Wis. 2d at 50-51. Prejudice occurs when there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial would have been different. ***Strickland***, 466 U.S. at

694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.***

¶39 Since the trial court did not hold a postconviction hearing on whether Michael M. knowingly and voluntarily relinquished his right to testify by agreeing with his attorney, we may not decide that issue of fact. ***Flynn***, 190 Wis. 2d at 51. However, we need not remand to the trial court for a hearing on that issue if we conclude that Michael M. was not prejudiced by the alleged deficiency of counsel. ***Id.***

¶40 We conclude that Michael M. was not prejudiced even if we assume counsel prevented him from testifying and did not tell him he had a right to decide himself whether or not to do so. Michael M.'s postconviction motion and affidavit do not provide any statements of what Michael M.'s testimony would have been except for general statements that he would have denied that he "touched [his] children in a sexually arousing or gratifying manner," and that his testimony was "highly relevant," "significant," and "of prime importance." Such self-serving and conclusory statements alone are insufficient to establish prejudice. *See* ***Toro v. Fairman***, 940 F.2d 1065, 1068 (7th Cir. 1991). In addition, in view of all the evidence presented, we are convinced that, even if the jury had heard Michael M. testify that he never touched his children in a sexually arousing or gratifying manner, there is no reasonable probability the jury would have reached a different outcome.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.