COURT OF APPEALS
DECISION
DATED AND RELEASED

February 20, 1996

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(1), STATS.

NOTICE

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No. 95-2657-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER MCSWAIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Following a four-day jury trial, Christopher McSwain was found guilty of one count of abduction of another's child while armed and one count of first-degree sexual assault of a child while armed. He was sentenced to forty-three years in prison on the first count with 164 days credit, and forty-three years on the second count, to run consecutively.

McSwain's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). The no merit report addresses nine issues: (1) the sufficiency of the evidence; (2) the admissibility of McSwain's statements; (3) the court's rejection of psychiatric testimony on the issue of character traits of persons who give false confessions; (4) the admissibility of other "bad acts" evidence; (5) McSwain's waiver of his right to testify; (6) whether the trial court's omitting to read the entire verdict form as to count two to the jury was harmless error; (7) whether the trial court properly exercised its sentencing discretion; (8) whether the trial court properly refrained from setting a parole eligibility date based upon the parties' stipulation; and (9) whether there was any basis to request a sentencing modification. The no merit report concluded that the issues were without arguable merit.

McSwain received a copy of the no merit report and filed several letters that we construe to be a response. McSwain contends that he is convicted of a crime that he did not commit; that the victim is a liar and set him up; that there is no evidence of sexual assault; that the white judge and white jury were prejudiced; that his defense attorney and the district attorney were also white; and that his defense counsel told him that it would be best if he didn't take the stand.

We have independently reviewed the record. Based upon our independent review of the record, we conclude that the no merit report correctly describes and analyzes the issues it identifies. We agree that the issues it identifies are without arguable merit. Because McSwain's response and the record disclose no other potential issues of arguable merit, we affirm the judgment.

We conclude that sufficient evidence supports the verdict. 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). On review of jury findings of fact, viewing the evidence most favorably to the state and the conviction, we ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a

reasonable doubt. ***State v. Oimen***, 184 Wis.2d 423, 436-37, 516 N.W.2d 399, 405 (1994). Based upon our independent review of the record, we conclude that any challenge to the sufficiency of the evidence is without arguable merit.

The record reveals that on the date of the assault, two carpenters were sitting in their truck when they saw a young boy come toward them, looking upset and as if he had been crying. He said that a man had attempted to rape him. The carpenters pursued a man, but were unable to catch him. The police were called and took the boy's statement. The boy, age eleven, explained that he had been at the public library and a man had followed him out. The man took something from him at knife point and told the boy to remove his pants, but the boy said he escaped.

The officers went to the library and spoke to library personnel. The librarian said she remembered the individual the officers described and that he frequently visited the library. She remembered him visiting that day seeking books on Jeffrey Dahmer. She gave the officers a name and the officers eventually located his residence where they were let in by household members. McSwain resided in the home's basement, where a knife that fit the victim's description was recovered.

McSwain was given his ***Miranda*** rights before being questioned. He told the officers he had a history of mental problems and substance abuse but was not being presently medicated for his condition. The officers observed that McSwain appeared normal and not out of touch with reality. McSwain waived his ***Miranda*** rights and proceeded to give a statement in which he admitted sexually assaulting the boy but denied robbing him. McSwain gave a detailed description of how he first observed the boy at the library, thought of raping him and followed him, eventually leading him between two garages, where he pulled out a knife and instructed the boy to pull down his pants. The boy complied. McSwain said he looked at the boy's rectum and wanted to rape him. McSwain exposed his penis and told the boy to lay down on the ground. McSwain told the boy to turn over, and McSwain laid on top of the boy, rubbed his penis against the boy's thigh until he ejaculated. The boy was then allowed to leave. The officer testified that he was surprised by this statement, because he had primarily been investigating an armed robbery. The boy had never told the officers that McSwain had placed his penis on him and had ejaculated.

The victim was interviewed again. At the second interview, the boy gave a more detailed description of the assault. He stated that he had complied when McSwain instructed him to pull down his pants at knife point and that McSwain had rubbed his penis against the boy's thigh until his thigh was wet. He explained that McSwain wiped off his thigh with a discarded milk carton. The victim's trial testimony was consistent with this statement.

McSwain contends that the testimony supports inferences consistent with his innocence, claiming that he was set up and that the victim is a liar. However, the assessment of weight and credibility is a jury function. ***Poellinger,*** 153 Wis.2d at 503, 451 N.W.2d at 756. "Thus, when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07, 451 N.W.2d at 757. We conclude that the jury was entitled to believe the testimony of the victim and the investigating officers. Based upon their testimony, as well as the testimony of others including the carpenters and library personnel, we conclude that any challenge to the sufficiency of the evidence would be without arguable merit.

Next, we conclude that any challenge to the admissibility of McSwain's confession is without arguable merit. Following a hearing, the trial court concluded that McSwain's confession was voluntary. *See* ***State ex rel. Goodchild v. Burke,*** 27 Wis.2d 244, 264–65, 133 N.W.2d 753, 763–64 (1965). The record supports the court's conclusion. The interviewing detective testified that he advised McSwain of his constitutional rights and that McSwain indicated he understood each right. He did not request a lawyer. He did, however, request six sandwiches, which were provided him, along with a can of soda. The detective observed that McSwain appeared to be oriented and not under the influence of any alcohol or drug. McSwain spoke in a logical, coherent fashion. His demeanor was cooperative. He denied participating in any armed robbery. The officer used no coercive methods, made no threats or promises. The interview took less than two hours and took place in the early evening. Any challenge to the admissibility of the confession is without arguable merit.

We further conclude that there is no arguable merit to the trial court's rejection of psychiatric testimony offered to show that McSwain had characteristics consistent with individuals who give false confessions. The

decision to admit expert testimony is within the discretion of the trial court. ***Valiga v. National Food Co.,*** 58 Wis.2d 232, 251-52, 206 N.W.2d 377, 388 (1973). Here, the trial court explained its reasons for rejecting the testimony, including the reason that the necessary connection between the proffered testimony and the defense's theory of false confession was absent. Because of marginal relevancy, the court excluded the testimony. Any challenge to the court's exercise of discretion in this regard would be without arguable merit.

We further conclude that the record reveals no issue of arguable merit with respect to the trial court's decision to allow "prior bad acts" evidence. This issue is also discretionary with the trial court. Because the evidence of the 1988 sexual assault on a thirteen-year-old boy was similar in nature to the crime charged, and was admitted to show motive and intent for sexual gratification, it was permitted under § 904.04(2), STATS. *See* ***State v. Plymesser,*** 172 Wis.2d 583, 591-93, 493 N.W.2d 367, 371-72 (1992); ***State v. Friedrich,*** 135 Wis.2d 1, 24, 398 N.W.2d 763, 773 (1987).

The record further reveals no issue of arguable merit concerning McSwain's waiver of his right to testify in his own behalf. When the trial court questioned McSwain about his decision, McSwain testified to the effect that he had discussed the matter with his lawyer and had made the decision by himself. McSwain also testified to the effect that his attorney made no threats or promises to get him to make the decision. The record reveals a knowing and voluntary waiver.

We further conclude that the record reveals no issue of arguable merit with respect to the court's failure to read the entire verdict form as to count two. The court had previously read the guilty and not guilty forms for count one in their entirety, and the forms were essentially the same. The jury was provided with written copies of the form and, upon return, each was read out loud. The jurors were individually polled. Because no prejudice results, this error would form no basis for any issue of arguable merit. *See* ***State v. Patino,*** 177 Wis.2d 348, 378-79, 502 N.W.2d 601, 613 (1993).

The record reveals no issue of arguable merit with respect to sentencing, an issue addressed to trial court discretion. *See* ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The record discloses that

the trial court carefully considered the issue of character of the defendant, protection of the public and gravity of the offense. The sentence fell within the allowable maximums. The court noted McSwain's prior record, and the extreme emotional injury to the child. Because the record shows consideration of the appropriate factors, any challenge based upon sentencing would be without arguable merit.

We further conclude that the trial court may, in its discretion, accept the parties' agreement to allow the parole board to determine the parole eligibility dates. *See* §§ 973.0135 and 304.06(1), STATS. We also conclude that the record fails to reveal, and McSwain does not allege, any new factor to justify sentence modification.

We conclude that McSwain's response does not raise any issues of arguable merit. He primarily challenges the sufficiency of the evidence and the credibility of the witnesses. As previously discussed, these issues are without arguable merit. The record does not support his contention that the convictions are the result of racial prejudice. The record reveals an informed and voluntary waiver of his right to testify in his own defense.

The record reveals no other potential issue of arguable merit. Therefore, we affirm the conviction and relieve attorney Michael A. Yamat of further representation of McSwain in this matter.

By the Court.—Judgment affirmed.