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DISTRICT II

September 6, 2023

To:

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Clerk of Circuit Court
Ozaukee County Justice Center
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Dennis F. Blaine, #683280
Kettle Moraine Correctional Inst.
P.O. Box 282
Plymouth, WI 53073-0282

You are hereby notified that the Court has entered the following opinion and order:

2021AP75-CRNM State of Wisconsin v. Dennis F. Blaine (L.C. #2018CF371)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Attorney Mark S. Rosen, as appointed counsel for Dennis F. Blaine, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Blaine filed a response, and counsel filed a supplemental no-merit report. After reviewing the record, counsel's reports, and Blaine's response, we conclude there are no issues

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

with arguable merit for appeal. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Blaine was charged with one count of second-degree sexual assault by use or threat of force or violence. He was accused of forcibly assaulting the victim at a Holiday Inn. Blaine's first trial ended in a mistrial due to jury deadlock. Blaine was convicted following a second jury trial. For his actions, the circuit court imposed a sentence of twelve years of initial confinement and thirteen years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether the evidence at Blaine's trial was sufficient to support his convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "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, 507, 451 N.W.2d 752 (1990).

In order to prove that Blaine committed second-degree sexual assault under WIS. STAT. § 940.225(2)(a), the State needed to prove that Blaine had sexual intercourse with the victim, M.F., that M.F. did not consent to the sexual intercourse, and that Blaine had sexual intercourse with M.F. by use or threat of force or violence. *See* WIS JI—CRIMINAL 1208. Under WIS. STAT. § 940.225(5)(c), "sexual intercourse" includes cunnilingus, fellatio, or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The definition of sexual intercourse does not require emission of semen. WIS. STAT. § 939.22(36).

Our review of the trial transcripts persuades us that the State produced sufficient evidence to convict Blaine of the crime of second degree sexual assault. That evidence included testimony from the victim, M.F., that Blaine pinned her down on a hotel room bed, lifted up her dress, and pulled down her leggings and underwear, despite M.F. resisting and telling Blaine multiple times to stop. M.F. further testified that, without her consent, Blaine pushed her down with his body weight and licked her vagina, put his fingers into her vagina and anus, and attempted to put his penis inside of her anus, but was too drunk to do so. M.F. called 911, and one of the police officers who responded to the 911 call testified at Blaine's trial. The officer testified that when he arrived at the hotel, M.F. was sitting in the hallway, looking very distraught and crying. The officer observed Blaine sitting nude on the bed inside a hotel room, speaking with another police officer.

Blaine also testified at trial on his own behalf. Blaine's version of the events was that he and M.F. tried having sex, but that he could not keep an erection up due to drinking, and that M.F. became irritated. Resolving conflicts and inconsistencies in the evidence and judging the credibility of the evidence is the responsibility of the jury. ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). In this case, the jury heard testimony from both M.F. and Blaine, and found M.F.'s testimony to be more credible. "It is generally not the province of the reviewing court to determine issues of credibility." ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). Only when the evidence is inherently or patently incredible will we substitute our judgment for the jury's. ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (1995). We see no basis for doing so here. Having reviewed the trial record, we agree with counsel that the evidence was sufficient to support the jury's verdict, such that any claim to the contrary would be without arguable merit on appeal.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "'rational and explainable basis.'" ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In fashioning its sentence, the court considered the seriousness of the offense, Blaine's character and rehabilitative potential, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. We are satisfied that the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no indication that the court relied on inaccurate information at sentencing. Accordingly, any challenge to the sentence imposed would lack arguable merit.

As noted, Blaine filed a response to the no-merit report. All of the issues that Blaine identifies are discussed thoroughly in counsel's no-merit report and supplemental report. We agree with counsel's conclusion that the issues lack arguable merit, and will not discuss them further.

Our review of the record—including jury selection, jury instructions, the court's rulings on pretrial motions, Blaine's waiver of his right not to testify, and opening statements/closing arguments—discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Blaine further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark S. Rosen is relieved from further representing Dennis F. Blaine in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals