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August 23, 2013

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

2012AP2080-CRNM State of Wisconsin v. Leslie L. Sumlin (L.C. #2009CF4683**)**

Before Curley, P.J., Fine and Brennan, JJ.

Leslie L. Sumlin appeals from a judgment of conviction, entered upon a jury's verdict, on one count of repeated sexual assault of a child and one count of incest with a child. Sumlin also appeals from the order denying his postconviction motion. Appellate counsel, Russell D. Bohach, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and

WIS. STAT. RULE 809.32 (2011-12).[1] Sumlin was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be pursued on appeal. Subject to correction of a scrivener's error upon remittitur, we summarily affirm the judgment and order.

Then-thirteen-year-old A.S. told her mother and, later, police, that Sumlin had made inappropriate sexual contact with her on multiple occasions, beginning shortly before her thirteenth birthday. A.S. reported the behavior after her younger sister, M.S., observed one such instance and reported it to their stepfather.[2] Based on the number and the nature of described contacts and on the relationship between Sumlin and A.S., the State charged him with one count of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(e), and one count of incest with a child, contrary to WIS. STAT. § 948.06(1).

At trial, A.S., M.S., their mother, and police officer Colleen Sturma testified. Sumlin waived the right to testify. The jury convicted Sumlin as charged. The trial court sentenced him to concurrent sentences of eighteen years' initial confinement and ten years' extended supervision on each count and imposed a $250 fine on the repeated-sexual-assault count. Sumlin filed a postconviction motion, claiming trial counsel had coerced him into waiving his right to

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The stepfather is at least the mother's live-in boyfriend; it is not clear from the record whether he was actually married to A.S. and M.S.'s mother at the time.

testify and that, if he had testified, he would have established his innocence. The circuit court denied the motion without a hearing.[3]

Counsel raises two potential issues for appeal, both of which he concludes lack arguable merit. We discuss a third potential issue *sua sponte*, though this issue also lacks arguable merit.

The first issue counsel raises is whether the State "prove[d] beyond a reasonable doubt that Leslie Sumlin was guilty of repeated sexual assault of a child and incest with a child[.]" This is a question of whether there was sufficient evidence to support the verdict. When reviewing that question, we view the evidence in the light most favorable to the verdicts. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). A jury's verdicts "'will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted). The jury is the sole arbiter of witness credibility and it alone is charged with weighing the evidence. ***Poellinger***, 153 Wis. 2d at 506.

WISCONSIN STAT. § 948.025(1)(e) provides that a person who commits three or more violations of WIS. STAT. § 948.02(1) or (2) "within a specified period of time involving the same child" is guilty of a Class C felony. This required the State to prove that Sumlin committed three or more assaults under § 948.02(1) or (2) and that those assaults happened within a specific time period. As relevant here, § 948.02(1) proscribes sexual contact with a child under thirteen years

[3] The Honorable Kevin E. Martens (the trial court) had presided over the trial and imposed sentence. When the postconviction motion was filed, it was decided by the Honorable Jeffrey A. Wagner (the circuit court), who was Judge Martens' successor.

of age, and § 948.02(2) prohibits sexual intercourse or sexual contact with a child under sixteen years of age. Sexual contact is an intentional touching of an intimate part of the victim by the defendant. WIS JI—CRIMINAL 2101A. The touching may be direct or it may be through the clothing. ***Id.*** "The touching may be done by any body part or by any object, but it must be an intentional touching." ***Id.*** Sexual contact also requires that the defendant acted with intent to become sexually aroused or gratified. ***Id.*** For purposes of this case, the jury was instructed that "sexual intercourse" meant cunnilingus.

WISCONSIN STAT. § 948.06(1) provides in relevant part that "[w]hoever … has sexual intercourse or sexual contact with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than 2nd cousin" is guilty of a Class C felony. This requires the State to prove: (1) Sumlin had sexual intercourse or contact with A.S., (2) Sumlin knew that A.S. was related to him by blood or adoption; (3) A.S. was related to the defendant in a degree of kinship closer than second cousin; and (4) A.S. was under the age of eighteen years at the time of the alleged offense. *See* WIS JI—CRIMINAL 2130.

Victim A.S. testified to no fewer than six separate instances of sexual contact or intercourse. Specifically, she claimed that Sumlin: (1) rubbed her breast with his hand over her clothes; (2) touched her "private" over her clothes; (3) started "humpin' [her] butt" with his "manhood" while both were clothed; (4) touched her breast with his hand and mouth; (5) rubbed her "private" under her nightshirt but over her underwear; and (6) licked her vagina with his tongue. A.S. testified in a way that the jury could understand her use of the word "private" to mean her vagina and "manhood" to refer to Sumlin's penis. She testified that in two instances, Sumlin was making noise while he touched her. She testified that some contact occurred before her thirteenth birthday and some after. A.S. also testified about how she was related to Sumlin,

adequately establishing the requisite degree of kinship, and it was evident from the nature of the relationship that Sumlin was aware of it.

M.S. testified that she observed an instance where Sumlin and A.S. both took off their clothes, got back into the bed, and the bed started "bumpin'." She testified that both Sumlin and A.S. were lying down, with A.S. on her back and Sumlin on his stomach on top of her. A.S. and M.S.'s mother testified, confirming the relationship between A.S. and Sumlin. Police officer Sturma testified generally about how children report sexual assaults, and why there was no physical evidence in this case. While Sumlin attempted to cast doubt on the credibility of the witnesses, especially A.S. and M.S., there was sufficient evidence to support the verdicts if the jury opted to believe the witnesses. There is, therefore, no arguable merit to a challenge to the sufficiency of the evidence to support the verdicts.

Counsel also discusses whether the circuit court properly denied Sumlin's postconviction motion. Sumlin alleged that he "was not provided effective assistance of counsel" because "trial counsel coerced [him] into agreeing not to testify[.]" Further, Sumlin "believes that his testimony would have established his innocence, and that the jury verdict in this matter would have been different."

Whether the defendant's postconviction motion alleges sufficient facts to entitle him to a hearing on the motion is subject to a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The facial sufficiency of the motion is subject to *de novo* review. ***Id.*** If the motion is not sufficient, if the motion is conclusory, or if the record conclusively demonstrates that the defendant is not entitled to relief, the decision whether to

grant a hearing on the motion is committed to the circuit court's discretion, to which we are deferential. ***Id.***

Claims of ineffective assistance of counsel are reviewed under a two-pronged test. *See* ***id.***, ¶26. The defendant must prove that his attorney's performance was both deficient and prejudicial. ***Id.*** The defendant must successfully show both prongs to secure relief. ***Id.*** To show deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

There is no arguable merit to a claim that the circuit court erroneously denied the postconviction motion. All Sumlin's motion shows is that counsel did not believe it was advisable for Sumlin to testify and advised Sumlin accordingly. In a letter to Sumlin, counsel explained that part of the strategy was to "[k]eep you off the stand and keep you away from cross examination by the [assistant district attorney]. We will attack them and not let the ADA shift the attack mode and focus towards you." When Sumlin wrote a note to counsel during the victim's testimony, counsel wrote back that he thought they could win without Sumlin's testimony. There is also a notation, "No conv. No cross – Bad things." This appears to be counsel pointing out that if Sumlin took the stand, he would be subject to cross-examination and be forced to disclose at least two prior criminal convictions, which counsel clearly thought were "bad things" that could sink the case. Nothing about counsel providing this information to

Sumlin is inherently coercive. Thus, the postconviction motion did not sufficiently allege any deficiency by counsel.

The circuit court also noted, in its order denying the postconviction motion, that:

> It is completely unknown what the defendant's testimony would have been or how it would have impacted the testimony of the witnesses who testified. [Sumlin] merely states that he would have provided other evidence. His affidavit provides nothing which would enlighten the court as to what he would have said to make the jury's verdict any different or how he would have been more credible than the witnesses who testified. In this regard, his motion is conclusory and without factual support.

We agree that the motion is insufficient, as it also fails to sufficiently allege prejudice.

Further, the circuit court found that the trial court "went through an *extensive* colloquy with the defendant about his right to testify and his right not to testify…. The record clearly establishes that the defendant freely and voluntarily waived his right to testify."

We note that, in the affidavit in support of the postconviction motion, Sumlin claimed that when the trial court engaged him in the colloquy, he "was going to inform the court about the discussions between myself and [trial counsel], and would have informed the court that I wanted to testify but felt pressured not to but the court cut me off and indicated that I was not to tell the court what discussions [were] had." Sumlin also asserted that because the trial court cut him off, "I felt that I was being told not to testify and not to argue about it and therefore I informed the court that I was in agreement with the decision not to testify."

The trial court did not "cut [Sumlin] off" so much as it did prevent him from forfeiting attorney-client privilege by disclosing the specific details discussed with counsel. More to the

point, however, we note that the trial court expressly told Sumlin that he did not have to take trial counsel's advice.

> THE COURT: Do you understand that's [counsel's] role to give you advice?
>
> THE DEFENDANT: Yes sir.
>
> THE COURT: Has he given you advice on the issue?
>
> THE DEFENDANT: Yes, he first give --
>
> THE COURT: Don't tell me what he said, all I want you to do is tell me whether or not he's given you advice.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Now it's not his decision though, it's yours.
>
> THE DEFENDANT: Yes sir.
>
> THE COURT: Do you understand that if you wanted to you could say to [counsel], well, I appreciate your advice, but I'm going to do something different anyway. You can tell him that. Do you understand?
>
> THE DEFENDANT: Yes sir.

Sumlin then confirmed that he was choosing to exercise his right to remain silent, that he was waiving the right to testify, and that no one had "threatened [him] or pressured [him] or promised [him] something to get [him] to waive [his] right to testify." Accordingly, the record conclusively establishes that Sumlin is not entitled to relief, so there is no arguable merit to a claim the circuit court improperly exercised its discretion in denying the postconviction motion.

The third issue we address is one we raise *sua sponte*: whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

At sentencing, a court must consider the principle objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***id.***

Our review of the record confirms that the trial court appropriately considered relevant sentencing objectives and factors in setting the length of Sumlin's sentence. The concurrent sentences totaling twenty-eight years' imprisonment are well within the eighty-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The $250 fine imposed on the repeated-sexual-assault conviction is a penalty authorized by law and is far less than the $200,000 total that could have been imposed for both charges. *See* WIS. STAT. § 939.50(3)(c). Although explanation of the specific amount of a fine is not necessary, the court should give some explanation of why a fine is imposed. *See* ***State v. Ramel***, 2007 WI App 271, ¶13, 306 Wis. 2d 654, 743 N.W.2d 502, *but cf.* ***State v. Kuechler***, 2003 WI App 245, ¶10, 268 Wis. 2d 192, 673 N.W.2d 335 ("There is no requirement that a court give separate reasons for imposing … prison time than it gives for imposing a fine."). A court

imposing a fine must also examine the defendant's ability to pay a fine over the course of the entire sentence. *See* ***Ramel***, 306 Wis. 2d 654, ¶15.

Here, the trial court only stated, "Given age, circumstance, length of sentence, ability to pay, rehabilitative needs, a $250 fine imposed on Count 1 only." This is not particularly illuminating as to the rational thought process that should underlie an exercise of discretion, *see* ***Mucek v. Nationwide Commc'n, Inc.***, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98, so we search the record to determine whether there is any support for imposing the fine. *See* ***Ramel***, 306 Wis. 2d 654, ¶26.

Sumlin was about forty years old at the time of his conviction; he will be approaching sixty years old upon release. He has a rather strong employment history, holding several managerial positions, so he has a background and skills that should lend themselves to post-release employment. Restitution was not imposed, so Sumlin will not have to fulfill that financial obligation. Spread out over the twenty-eight-year sentence, an annual payment on the fine is less than nine dollars per year. Even considering only the ten years of extended supervision, the annual obligation is a mere twenty-five dollars, or just over two dollars per month. Sumlin should have no difficulty fulfilling that obligation and, if he does, he is free to seek relief from it at a later date. *See* ***State v. Milashoski***, 159 Wis. 2d 99, 118-19, 464 N.W.2d 21 (Ct. App. 1990), *aff'd* 163 Wis. 2d 72, 89, 471 N.W.2d 42 (1991). The record therefore supports imposition of the fine. There is no arguable merit to a challenge to the trial court's sentencing discretion.

There is, however, a scrivener's error in the judgment of conviction. We direct the error to be corrected upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244,

618 N.W.2d 857. The judgment of conviction recites in part, "Provide DNA sample, pay surcharge *if not previously paid* or to revert to civil judgment." However, the trial court imposed no such contingency, ordering simply: "I will require that you provide a DNA sample and that you pay the DNA [surcharge], those being mandatory under the statute." Indeed, WIS. STAT. § 973.046(1r) states that the sentencing court "*shall* impose a deoxyribonucleic acid analysis surcharge" when it "imposes a sentence … for a violation of" WIS. STAT. § 948.025. (Emphasis added.) Upon remittitur, the clerk of the circuit court shall remove the contingency that was not ordered by the circuit court.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that upon remittitur, the judgment of conviction shall be modified as described herein.

IT IS FURTHER ORDERED that the judgment of conviction, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the order denying the postconviction motion is summarily affirmed. *See* ***id.***

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of further representation of Sumlin in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals