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

2013AP105-CRNM State of Wisconsin v. Jermaine W. Shuttlesworth (L.C. #2011CF78)
2013AP106-CRNM State of Wisconsin v. Jermaine W. Shuttlesworth (L.C. #2012CF1)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

In these consolidated no-merit appeals, Jermaine W. Shuttlesworth appeals from judgments of conviction for: (1) second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2011-12)[1] and (2) attempted second-degree sexual assault of a child, contrary to § 948.02(2) and WIS. STAT. § 939.32(1), (1g), and (1m). Shuttlesworth's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S.

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

738 (1967). Shuttlesworth received a copy of the report and filed two separate responses. To address Shuttlesworth's responses, appointed counsel filed two supplemental no-merit reports. Upon consideration of the no-merit report, responses, and supplemental no-merit reports, as well as our independent review of the record, we conclude that the judgments may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint in circuit court case No. 2011CF78,[2] HCN, a fourteen-year-old girl, reported that in November 2011 she and Shuttlesworth had been "drinking" with her mother and sister at their house. After the mother and sister went to bed, Shuttlesworth began asking questions about her sexual history. Shuttlesworth grabbed her face and kissed her, pushed her onto a couch, and pulled off her pants and underwear. He then inserted his penis into HCN's vagina as she tried to kick at him. HCN told Shuttlesworth that she wanted to go to bed, and he allowed her to get up, but warned her not to tell anyone about what had just happened. Shuttlesworth was charged with one count of second-degree sexual assault of a child under sixteen in connection with this incident.

The other charged incident happened in September 2011. Shuttlesworth was hanging out with several girls, including JH and AN, at the home of AN's mother, who was also Shuttlesworth's girlfriend. JH, who was thirteen years old, reported that Shuttlesworth was drinking at the kitchen table and began looking at her body. Throughout the evening, Shuttlesworth made sexual comments and grabbed at JH's body. At one point, he sat on top of

[2] This trial court case underlies appeal No. 2013AP105-CRNM. The consolidated appeal, No. 2013AP106-CRNM, is taken from the judgment entered in circuit court case No. 2012CF1.

her, held her down with his legs, and grabbed her buttocks. He then tried unsuccessfully to pull her pants down. After the girls went to bed, JH came out to get a glass of water. Shuttlesworth called her over, grabbed her wrist, pulled out his penis, and asked her to kiss it. JH began to yell and AN came out to see what was going on. The girls went back into the bedroom. JH then saw Shuttlesworth standing at the door to the bedroom. He motioned JH to come out and pointed to the bathroom. At that point, JH was scared and told AN about Shuttlesworth's earlier sexual actions. AN went into Shuttlesworth's room and yelled at him. The next day, JH told her mother about what had happened, and Shuttlesworth was charged with: (1) exposing his genitals to a child, (2) attempted second-degree sexual assault of a child under sixteen, and (3) second-degree sexual assault of a child under sixteen.

Pursuant to a plea agreement encompassing both cases, Shuttlesworth pled guilty to the single count of second-degree sexual assault in 2011CF78, and to attempted second-degree sexual assault, count two in 2012CF1. The remaining counts were dismissed and read in. At sentencing, the court initially imposed concurrent identical twenty-five-year sentences on each count, with ten years of initial confinement followed by fifteen years of extended supervision. After entry of the judgments, the department of corrections sent a letter to the court in connection with 2012CF1, pointing out that under WIS. STAT. § 939.32(1m)(b), "[t]he maximum term of extended supervision for an attempt to commit a classified felony is one-half of the maximum term of extended supervision for the completed crime under [WIS. STAT. §] 973.01(2)(d)." Therefore, assuming the applicability of § 939.32(1m)(b), the maximum term of extended supervision was seven and one-half years. After soliciting input from the parties, the trial court amended the judgment in 2012CF1 to reflect an extended supervision term of seven and one-half

years, for a total sentence length of seventeen and one-half years, concurrent with the twenty-five-year sentence in 2011CF78.

The no-merit report addresses whether there is any basis for a challenge to the validity of Shuttlesworth's guilty pleas and whether the trial court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There are two general methods by which we review a postsentencing plea withdrawal claim. *See* ***State v. Negrete***, 2012 WI 92, ¶16, 343 Wis. 2d 1, 819 N.W.2d 749; ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. Under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and its progeny, we review the record for defects in the plea colloquy. In the present case, the record demonstrates that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***Bangert***, 131 Wis. 2d at 266-72, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court specifically ascertained Shuttlesworth's understanding of the plea agreement, the maximum penalties, and that the court was not bound by the parties' agreement or recommendations. The trial court drew Shuttlesworth's attention to the completed plea questionnaire on file and ascertained that he had reviewed and signed the document and understood its contents. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent, and voluntary plea). Attached to the plea form were the jury instructions relevant to both offenses. Shuttlesworth personally acknowledged that he had reviewed and understood each offense element. The trial court ascertained the existence of a factual basis for each offense and explained the significance of read-in charges to Shuttlesworth. Using the ***Bangert*** analysis, we conclude that no issue of merit exists from the plea taking.

The second method of review is applicable where a defendant requests plea withdrawal based on factors extrinsic to the plea colloquy. ***Hoppe***, 317 Wis. 2d 161, ¶3. In these cases, plea withdrawal may be warranted where the defendant demonstrates the existence of a manifest injustice by clear and convincing evidence. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The ***Bentley*** line of cases is implicated in Shuttlesworth's responses to the no-merit report, in which he raises claims relating to two documents: (1) a Wisconsin State Crime Laboratory Report and (2) a report based on an examination of HCN performed by a sexual assault nurse examiner (SANE report). As to the crime lab report, Shuttlesworth alleges that based on its findings, he has a defense to the charge of "sexual intercourse" and that his plea was therefore unknowing and involuntary due to the ineffective assistance of trial counsel. Shuttlesworth attaches a copy of the crime lab report to his no-merit response and asserts that it "proves there [was] no intercourse" with HCN. Shuttlesworth alleges that trial counsel failed to provide him with this report and that had counsel reviewed the report with Shuttlesworth, he "would never have pleaded guilty."

Pursuant to WIS. STAT. RULE 809.32(1)(f), after receiving Shuttlesworth's response, appellate counsel filed a supplemental no-merit report with several attachments, including an affidavit from trial counsel which avers that:

> I had several lengthy discussions with Mr. Shuttlesworth about the merits of the case. On more than one occasion, I had to remind him that the State was charging him with sexual intercourse ***or sexual contact***. And, further, to convict him it would only have been necessary for the State to prove he engaged in sexual contact with the victim. Thus, we discussed how proving intercourse itself was not a necessity.[3]

[3] Though Shuttlesworth filed another response to the supplemental report, he does not dispute trial counsel's affidavit assertions and we accept them as true.

The supplemental no-merit report points out that the attached jury instructions contain the following elements of second-degree sexual assault: (1) "the defendant had sexual [contact] [intercourse] with" HCN and (2) HCN "was under the age of 16 years at the time of the alleged sexual [contact][intercourse]." *See* WIS JI—CRIMINAL 2104. Also attached were the jury instructions defining sexual contact, sexual intercourse, and attempted second-degree sexual assault of a child. *See* WIS JI—CRIMINAL 2101A, 2101B, and 2105A. The supplemental no-merit report argues that Shuttlesworth therefore understood at the time of his plea that the State could, but would not have to, prove intercourse. Appellate counsel also asserts that the contents of the crime lab report do not tend to disprove sexual intercourse or otherwise support Shuttlesworth's plea withdrawal claim.

We agree with appellate counsel that there is no arguably meritorious challenge to Shuttlesworth's plea based on the crime lab report. Where a plea is alleged to be the result of the ineffective assistance of trial counsel, the defendant must prove both that counsel's conduct was deficient or outside the wide range of professionally competent assistance and that counsel's errors were prejudicial. ***Bentley***, 201 Wis. 2d at 311-12. Even if we assume that trial counsel failed to share the crime lab report with Shuttlesworth and that this failure was deficient,[4] there is no prejudice. The record conclusively demonstrates that at the time of his plea, Shuttlesworth understood that he was guilty of second-degree sexual assault if he had "sexual contact" with

[4] Included in the supplemental no-merit report is trial counsel's affidavit stating: "It is my office's practice to provide a complete discovery file to defendants immediately upon receipt. While I have no specific recollection of doing so in the present case, I do not know why I would have operated outside of my general course of conduct." Because we are not a fact-finding court, for purposes of this no-merit appeal we will assume the truth of Shuttlesworth's statement that he did not review a copy of the crime lab report prior to entering his pleas.

HCN, that the State would not have to prove intercourse to obtain a conviction, and that there was a factual basis for "sexual contact" in the complaint. As a matter of law, there is no reasonable probability that had Shuttlesworth reviewed the crime lab report, he would not have pled guilty and would have insisted on going to trial.[5] ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Turning to Shuttlesworth's claim involving the SANE report, as this court previously informed him by order entered March 4, 2013, there is no such report in the court record. Nonetheless, Shuttlesworth maintains that both trial and appellate counsel "have intentionally refused to give the appellant a copy of the SANE report for the sole purpose to prevent the appellate [sic] from proving that he did not have sexual intercourse with the alleged victim." After appellate counsel filed her first supplemental no-merit report, Shuttlesworth filed a response asking this court to take judicial notice of the fact that "appellate counsel has intentionally lied to this court." In support, Shuttlesworth attaches letters he received from trial counsel and from appellate counsel, which he claims are contradictory.[6] Appellate counsel filed a second supplemental no-merit report in which she included another letter previously sent to Shuttlesworth. In that letter, appellate counsel informed Shuttlesworth in no uncertain terms that

[5] Though not necessary to our determination that there was no prejudice, we also note that the crime lab report does not "prove[] that there was no intercourse" with HCN. In analyzing swabs taken from HCN's neck, a "match" was discovered between the DNA on the swab and Shuttlesworth. Though no semen was detected, vaginal and rectal swabs also revealed the presence of male DNA. As to the vaginal and rectal swabs, the report does not state that Shuttlesworth was ruled out as the male DNA contributor.

[6] The attached letter from trial counsel indicates that he previously turned over all documents in his possession to appellate counsel, while appellate counsel's letter to Shuttlesworth indicates that she does not have a copy of a SANE report. We fail to see the inconsistency. The SANE report, if it exists, was not in the record and it appears that neither trial nor appellate counsel possessed a SANE report.

she had reviewed trial counsel's entire file, including computer discs, and that there was no SANE report contained therein.

We conclude that no arguably meritorious issue arises from Shuttlesworth's SANE report claim. First, Shuttlesworth has failed to demonstrate that such a report even exists. The report is not in the court record nor in the materials forwarded by trial counsel to appellate counsel.[7] An attorney does not have a duty to turn over an item not in his or her possession. Additionally, as discussed above, Shuttlesworth pled to sexual assault with an understanding that the offense could be proven by either sexual contact or intercourse. The criminal complaint contains facts supporting a basis for the commission of sexual assault by means of sexual contact as well as intercourse. In sum, there is no arguably meritorious challenge to the knowing and voluntary nature of Shuttlesworth's pleas.

In fashioning its sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court considered probation but concluded that it would unduly depreciate the severity of the offenses and would not adequately further "the objectives of punishment, deterrence, and rehabilitation." In assessing Shuttlesworth's character, the trial court considered his "fairly lengthy criminal record" but noted it did not involve prior

[7] According to Shuttlesworth, he believes there is a SANE report in the record because "the trial court record contains a police report written and submitted by [a sheriff's deputy] that affirms that alleged sexual assault victim [HCN] was taken to [the hospital] for a 'SANE' examination." There is no such police report in the record. Assuming the police report was instead part of discovery, it does not appear to indicate that the nurse drafted an official SANE report.

sexual assaults. The court also took into account Shuttlesworth's redeeming qualities, including his employment history and supportive family. As to offense severity and the need to protect the public, the court considered the offenses to be "very serious" based on their nature and impact on the victims:

> I think the Court has to take into account the length of the sentence in terms of protecting the victim from further contact by Mr. Shuttlesworth. I think that's important in making Mr. Shuttlesworth accountable and having any other potential victims protected from Mr. Shuttlesworth until he can get appropriate treatment and care regarding any sexual needs as well as any substance abuse needs.

The court then determined that five years of initial confinement on each count along with the maximum permissible term of extended supervision was "the minimum amount needed to meet the objectives of sentencing." The court imposed concurrent ten-year terms of initial confinement to make the sentencing structure "as simple as possible."

We conclude that the trial court properly exercised its discretion at sentencing.[8] Further, the twenty-five-year bifurcated sentence was well below the sixty-year maximum authorized by statute, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive or unusual as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179,

[8] We have also considered whether the trial court's imposition of an excessive term of extended supervision on one count implicates other aspects of the sentence. It is clear from the charging documents and the record of the plea hearing that the parties and the trial court understood the maximum penalty in No. 2012CF1 to be twenty years, and the same judge presided at sentencing. The record of the sentencing hearing conclusively demonstrates that to the extent the trial court misunderstood the proper application of the attempt modifier, Shuttlesworth was not prejudiced. The trial court determined that ten years of initial confinement was appropriate based on the facts of the cases, Shuttlesworth's needs and characteristics, and its overall objectives. In determining sentence, the trial court did not misstate or refer to the maximum term of initial confinement available on each count.

185, 233 N.W.2d 457 (1975). There is no meritorious challenge to the trial court's sentencing decision.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit and supplemental no-merit reports, affirms the judgments, and discharges appellate counsel of the obligation to represent Shuttlesworth further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Roberta A. Heckes is relieved from further representing Jermaine W. Shuttlesworth in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals