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DISTRICT IV

November 19, 2013

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

2012AP1924-CRNM State of Wisconsin v. Freddie C. Day, Jr. (L.C. # 2010CF60)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Attorney Steven Phillips, appointed counsel for Freddie Day, Jr., has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) whether the evidence was sufficient to support the conviction, following a jury trial, for first-degree sexual assault of a child; (2) whether the circuit court erred by denying the defense's challenge to the

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

prosecutor's use of a peremptory strike; (3) whether defense counsel was ineffective by failing to move for a mistrial based on a spectator's demonstrative behavior during the victim's testimony; (4) the validity of Day's no contest plea to a charge of second-degree sexual assault of a child; and (5) whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. Day was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Day was charged with one count of first-degree sexual assault, sexual contact with a child under age 13, and two counts of second-degree sexual assault, sexual intercourse with a child under age 16. The first-degree sexual assault charge was severed from the two second-degree sexual assault charges and was tried to a jury. The jury returned a guilty verdict.

Day then reached a plea agreement with the State as to the two second-degree sexual assault charges. Pursuant to the plea agreement, Day pled no contest to one count of second-degree sexual assault, and the other count was dismissed and read in for sentencing purposes. Additionally, the State agreed to recommend that the sentence for the second-degree sexual assault conviction be imposed concurrent to the sentence for the first-degree sexual assault conviction, and that the sentence for the second-degree sexual assault not result in any additional prison time. The court imposed a sentence of 18 years of initial confinement and 12 years of extended supervision on the first-degree sexual assault count, and a concurrent sentence of 10 years of initial confinement and 10 years of extended supervision on the second-degree sexual assault count.

The no-merit report addresses whether the evidence at trial was sufficient to support the conviction for first-degree sexual assault. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force 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 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here.

At trial, the victim testified that, on an evening when she was 12 years old, she met Day at a high school event. The victim testified that she went into a high school bathroom with Day, where Day told her to remove her pants. The victim testified that, when she did not do that right away, Day started to take off her pants, but then she removed her pants herself, and that Day put his fingers into her vagina and then had sexual intercourse with her. The victim's testimony, if believed by the jury, was sufficient to support the conviction for first-degree sexual assault, sexual contact with a child under 13 years of age. *See* WIS. STAT. § 948.02(1)(e) (2007-08).

Next, the no-merit report addresses the prosecutor's use of a peremptory strike to remove the only African-American male from the jury panel. Defense counsel objected to the strike under ***Batson v. Kentucky***, 476 U.S. 79, 85-86 (1986), which held that the purposeful exclusion of jury members of the defendant's race offends the Equal Protection Clause of the United States Constitution. *See* ***id.*** at 86 ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race ….") . The prosecutor explained that she exercised the peremptory strike to remove the African-American juror because that prospective juror had indicated he did not know the prosecutor, but the prosecutor remembered covering a final pretrial with that juror as a defendant and having a long

discussion with the juror at that time. Additionally, the prosecutor indicated that the juror had been dishonest during voir dire as to charges pending against him. The prosecutor further indicated that the strike was based on the juror's dishonesty rather than on his race. The circuit court found that the State had a racially neutral reason for the strike. *See* ***State v. Gregory***, 2001 WI App 107, ¶8, 244 Wis. 2d 65, 630 N.W.2d 711 (the State may rebut a prima facie showing of a discriminatory strike by "'articulat[ing] a neutral explanation related to the particular case to be tried'" (citation omitted)). We agree with counsel that this issue lacks arguable merit for appeal.

Next, the no-merit report addresses whether there would be arguable merit to a claim of ineffective assistance of counsel based on counsel's failure to move for a mistrial after noting that one of the spectators was being overly demonstrative during the victim's testimony. During a break in the victim's testimony, and out of the presence of the jury, the court addressed the Dane County victim witness coordinator specialist and asked about a woman seated next to him. The victim witness coordinator specialist explained that the woman was a school counselor, and was present as a support person for the victim. The court stated that the school counselor was being overly demonstrative in showing support by smiling too much and shaking her head, to the point that it was distracting to the court. The victim witness coordinator specialist stated that he would mention it to the counselor. Defense counsel suggested also warning the counselor not to mouth answers such as yes or no; the court responded that it had not seen that, and the victim witness coordinator specialist stated that the counselor did not know anything about the case that would allow her to prompt certain answers.

We agree with counsel that a claim of ineffective assistance of counsel would lack arguable merit. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the

deficiency prejudiced the defense). We determine that it would be frivolous to contend that counsel's conduct fell outside a reasonable range by failing to move for a mistrial on this record, or that a motion for mistrial was likely to have resulted in a different outcome.

The no-merit report also addresses the validity of Day's plea to second-degree sexual assault of a child. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Day and determine information such as Day's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Day's plea would lack arguable merit.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to Day's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome the presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the circuit court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the gravity of the offense, Day's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the applicable penalty range. *See* WIS. STAT. §§ 948.02(1)(e); 939.50(3)(b); 973.01(2)(b)1. and (d)1.; 948.02(2); 939.50(3)(c); and 973.01(2)(b)2. and (d)2. (2007-08). The sentence was well within the

maximum Day faced and, therefore, was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted 88 days of sentence credit based on Day's counsel's request. We discern no erroneous exercise of the circuit court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Phillips is relieved of any further representation of Freddie Day, Jr., in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals