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DISTRICT III

January 28, 2014

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

2013AP928-CRNM State of Wisconsin v. Steven K. Robelia (L.C. # 2009CF745)

Before Hoover, P.J., Mangerson and Lundsten, JJ.

Counsel for Steven Robelia has filed a no-merit report concluding no grounds exist to challenge Robelia's conviction for repeated sexual assault of a child. Robelia was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude

there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2011-12).¹

In a one-count complaint, the State alleged that Robelia engaged in three or more episodes of sexual contact with the same boy, whose birth date is February 25, 1993. After a trial to the court, Robelia was found guilty of the crime charged. Prior to sentencing, Robelia, by new counsel, requested a determination of Robelia's competency. The court ordered a competency evaluation and, after a hearing, Robelia was found competent to proceed. Out of a maximum possible sixty-year sentence, the court imposed a ten-year sentence consisting of six years' initial confinement and four years' extended supervision.

There is no arguable merit to challenge Robelia's waiver of his right to a jury trial. "A criminal defendant's right to a trial by jury is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution." *State v. Grant*, 230 Wis. 2d 90, 95, 601 N.W.2d 8 (Ct. App. 1999). A defendant may waive the right to a jury trial in favor of a trial to the court. WIS. STAT. § 972.02(1). The circuit court must conduct a personal colloquy with the defendant on the record to ensure that a defendant's decision to waive the right to jury trial is knowing and voluntary. *See State v. Anderson*, 2002 WI 7, ¶23, 249 Wis. 2d 586, 638 N.W.2d 301.

Robelia, who is hearing impaired, was assisted at the jury waiver proceeding with a hearing device. Before engaging him in a colloquy, the court ascertained that Robelia could hear the proceedings. During the colloquy, Robelia confirmed both that he had sufficient time to

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

discuss the matter with counsel, and that he made a deliberate choice, absent threats or promises, to proceed without a jury trial. *Id.*, ¶24. Robelia also confirmed his understanding of the nature of both a jury trial and a court trial, acknowledging that a jury trial consists of a panel of twelve people that must agree on all elements of the crime charged, and at a court trial, the judge alone decides whether the defendant is guilty of the crime charged. *See id.* Any challenge to Robelia's jury trial waiver would lack arguable merit.

There is no arguable merit to challenge the sufficiency of the evidence to support the conviction. On a challenge to the sufficiency of the evidence, we may overturn the verdict only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The evidence is viewed in the light most favorable to the verdict. *Id.* at 504.

At trial, a police detective testified that Robelia admitted engaging in approximately fifty separate acts of hand-to-penis or mouth-to-penis contact with the victim in Robelia's apartment. The victim testified that Robelia was his babysitter and the incidents occurred over a span of several years, when the victim was between seven and thirteen years old. The victim's mother also testified that Robelia admitted his guilt to her in a cell phone text message. During Robelia's testimony, he admitted sexually assaulting the victim between fifty and one-hundred times. The evidence submitted at trial is sufficient to support Robelia's conviction.

There is no arguable merit to challenge the determination that Robelia was competent to proceed to sentencing. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the

commission of an offense so long as the incapacity endures.” *State v. Byrge*, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant’s present mental capacity to understand and assist at the time of the proceedings. *Id.*, ¶31. A trial court’s competency determination should be reversed only when clearly erroneous. *Id.*, ¶45.

At the competency hearing, examining psychologist Richard Hurlbut recounted that Robelia was proficient at reading lips. The evaluation, therefore, was completed with the assistance of an “oralist” who positioned herself in front of Robelia and spoke precisely to enable him to read her lips. Hurlbut ultimately opined, to a reasonable degree of professional certainty, that Robelia did not lack “the substantial mental capacity to understand the proceeding, including the sentencing process and to assist in his own defense.” According to Hurlbut, Robelia had a reasonable understanding of the sentencing proceeding, including the roles of the judge and the lawyers. The record supports the trial court’s determination that Robelia was competent to proceed to sentencing.

Defense counsel alternatively argued at the competency hearing that the absence of an oralist or sign language interpreter at trial impeded Robelia’s ability to understand and assist in his trial defense. Hurlbut, however, did not agree with defense counsel’s suggestion that at a minimum, Robelia required a good hearing aid and an oralist to understand and communicate. Hurlbut acknowledged “there were indications that when [Robelia]’s hearing aid was working properly, ... he might be able to hear adequately.” To that end, the prosecutor pointed out that at trial, Robelia indicated he could sufficiently hear and during his testimony, it was obvious Robelia understood the questions as he answered them appropriately. Because the record does

not support defense counsel's claim that Robelia could not understand what was said at trial, any challenge to the proceedings based on Robelia's hearing impairment lacks arguable merit.

Finally, the record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered: the seriousness of the offense; Robelia's character; the need to protect the public; and the mitigating factors Robelia raised. *See State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Robelia's sentence is so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney William E. Schmaal is relieved of further representing Robelia in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals