OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 21, 2014

To:

Hon. Mary Kay Wagner
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Michael S. Holzman
Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Robert D. Zapf
District Attorney
Molinaro Bldg
912 56th Street
Kenosha, WI 53140-3747

Jacob M. Johnson 598337
Dodge Corr. Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

2013AP2330-CRNM State of Wisconsin v. Jacob M. Johnson (L.C. #2011CF1102)

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

Jacob Johnson appeals from a judgment convicting him of strangulation and suffocation contrary to WIS. STAT. § 940.235(1) (2011-12)[1] and attempted second-degree sexual assault with use of force contrary to WIS. STAT. §§ 940.225(2)(a) and 939.32. Johnson's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Johnson received a copy of the report and was advised of his right to file a response.

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Johnson's guilty pleas were knowingly, voluntarily and intelligently entered and had a factual basis; and (2) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty pleas, Johnson answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied in all substantial respects with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Johnson's guilty pleas were knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis in the complaint, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Johnson signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Johnson's guilty pleas.

In concluding that a challenge to Johnson's guilty pleas would lack arguable merit for appeal, we have considered an insubstantial defect in the plea colloquy which did not render Johnson's plea to attempted second-degree sexual assault unknowing, unintelligent or involuntary. ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482. The criminal complaint, which formed the factual basis for Johnson's guilty plea to attempted second-degree sexual assault, describes an attempted act of penis-vagina intercourse (the victim alleged that during the violent attack, Johnson started unbuttoning his pants, and Johnson admitted to police that he intended to have intercourse with the victim before she escaped). The information also describes the attempted second-degree sexual assault as an attempted act of penis-vagina intercourse.

The jury instructions for second-degree sexual assault attached to Johnson's plea questionnaire do not define "intercourse."[2] The circuit court did not define "intercourse" during the plea colloquy. We assume without deciding that the circuit court had to ascertain whether Johnson understood the definition of intercourse as part of discharging its duty to confirm his understanding of the nature of the crime. *Cf.* ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18 (definition of sexual contact is an element of the offense of sexual assault and defendant must be aware of this element at the time a plea is entered); ***Hoppe***, 317 Wis. 2d 161, ¶18. As we reason below, the absence of this definition does not undermine the validity of Johnson's guilty plea.

[2] "Intercourse" as defined in WIS. STAT. § 940.225(5)(c) includes all manners of intrusions into a victim's body, including vulvar penetration, WIS. STAT. § 939.22(36).

Johnson pled guilty to attempted second-degree sexual assault via intercourse. The complaint alleges Johnson's intent to place his penis in the victim's vagina and that he started unbuttoning his pants. These allegations provide a factual basis for attempted intercourse. WIS JI—CRIMINAL 580. There can be no question that had Johnson succeeded, his activity would have constituted "intercourse" under any understanding of the term. Johnson cannot allege that he did not understand the meaning of "intercourse" under the facts of this case. Therefore, we conclude that the circuit court's failure to define "intercourse" during the plea colloquy is an insubstantial defect which did not render Johnson's plea to attempted second-degree sexual assault unknowing, unintelligent or involuntary. *See* ***Taylor***, 347 Wis. 2d 30, ¶39.

With regard to the sentences, the record reveals that the sentencing court's discretionary 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). The court adequately discussed the facts and factors relevant to sentencing Johnson to eighteen and one-half years for attempted second-degree sexual assault and a consecutive six years for strangulation and suffocation. In fashioning the sentences, the court considered the seriousness of the offenses, Johnson's character and history of other offenses, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Johnson was not eligible for the Challenge Incarceration Program or the Substance Abuse Program. WIS. STAT. § 973.01(3g) and (3m). The felony sentences complied with § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The circuit court properly required Johnson register as a sex offender. WIS. STAT. § 973.048(2m). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

Our independent review of the record did not disclose any potentially meritorious issue for appeal, including any issue arising from Johnson's competency evaluations and the withdrawal of his plea of not guilty by reason of mental disease or defect. WIS. STAT. § 971.06(1)(d).

We conclude that there would be no arguable merit to any issue that could be raised on appeal. Therefore, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Michael Holzman of further representation of Johnson in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Michael Holzman is relieved of further representation of Jacob Johnson in this matter.

Diane M. Fremgen
Clerk of Court of Appeals