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August 6, 2014

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

2013AP919-CRNM State of Wisconsin v. Dontae Rogers
(L.C. #2010CF3106)

Before Fine, Kessler and Brennan, JJ.

Dontae Rogers appeals from a judgment of conviction for sexual exploitation of a child. *See* WIS. STAT. § 948.05(1m) (2009-10).¹ Appellate counsel, Donna Odrzywolski, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Rogers did not respond. After independently reviewing the record and the no-merit

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

report, this court concludes there are no arguably meritorious issues and, therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

BACKGROUND

According to the complaint, Rogers texted and posted on Facebook a picture of his then sixteen-year-old girlfriend performing oral sex on him. As a result, he was charged with one count of sexual exploitation of a child.

Prior to trial, the State made the following offer to resolve Rogers's case: Rogers would plead guilty to three misdemeanor charges and the State would recommend nine-month consecutive sentences on each count, stayed. The State would then recommend probation.

The trial court conducted a *Ludwig* hearing as requested by the State. *See State v. Ludwig*, 124 Wis. 2d 600, 610-11, 369 N.W.2d 722 (1985) (addressing the defendant's right to be informed of the State's plea offer and to personally accept or reject it). Rogers rejected the offer, and the case proceeded to a jury trial where he was found guilty of one count of sexual exploitation of a child. He was sentenced to three years of initial confinement and three years of extended supervision.

The no-merit report addresses a number of issues, including: (1) Rogers's competency to proceed at trial; (2) the sufficiency of the evidence; and (3) the trial court's exercise of sentencing discretion.

DISCUSSION

A. Legal Competency

At the outset, we briefly address legal competency. On three separate occasions while this case was pending, the trial court ordered competency evaluations of Rogers. The evaluations were requested by two separate trial attorneys who were appointed to represent Rogers. The attorneys expressed concerns due to difficulties they had communicating and working with Rogers.² Additionally, the court observed odd behaviors by Rogers that caused it to question his competency. The record indicates that Rogers had a history of outpatient treatment where he was reportedly diagnosed as being bipolar and suffering from schizophrenia. Following each competency examination, however, Rogers was deemed competent to proceed. *See State v. Byrge*, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (“Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.”) (citation omitted).

The record reveals that the trial court and the parties went to great lengths to ensure that Rogers was competent to stand trial. Consequently, there would be no arguable merit to an appeal on this basis.

B. Sufficiency of the Evidence

We next address whether the evidence is sufficient to support the jury’s verdict. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference

² Rogers had three separate trial attorneys represent him at various times in the proceedings. Two of these attorneys were allowed to withdraw.

can be drawn from the evidence, we must accept the inference necessarily drawn by the jury. See *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury's verdict will be reversed "only if, viewing the evidence most favorably to the [S]tate 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).

Rogers's victim testified during his trial. She told the jury she met Rogers at the start of her junior year of high school when she was sixteen years old. The victim thought Rogers was twenty years old when she first met him.³ Their relationship became sexual and continued during the victim's junior year of high school. At one point, the victim performed oral sex on Rogers and noticed that he was holding his cell phone. The victim thought that Rogers had taken a picture of her and when she confronted him, he said that he had been text messaging.

In June 2010, around the time of the victim's seventeenth birthday, she broke up with Rogers. Shortly thereafter, the victim was contacted by a friend who said that Rogers had posted a picture of the victim on Facebook and had sent the picture via text and email. The picture was of the victim performing oral sex on Rogers. When the victim checked her mother's cell phone, she found the picture had been sent from a number that belonged to Rogers. The victim testified that the picture had been taken by Rogers the day he was holding his cell phone while she performed oral sex on him.

³ In actuality, based on his date of birth, Rogers was twenty-one when he first met the victim and turned twenty-two around the time when he and the victim began dating.

Upon seeing the text and the Facebook page containing the picture, the victim testified that she panicked and contacted the police.

The victim's friend who told her about the picture also testified at trial. The victim's friend said that after she saw the picture, during a phone call, she asked Rogers why he had sent the picture. He said it was because the victim was sleeping with other men. The victim's friend relayed that Rogers never denied having sent the picture. The victim's friend said that Rogers had previously made comments to her that the victim was cheating on him.

Officer Deborah Kranz testified that she interviewed the victim in June 2010, four days after the victim and Rogers had broken up. Officer Kranz prepared a report detailing the interview. The victim told Officer Kranz about her relationship with Rogers, including that they had sex at Rogers's house. The victim specifically told Officer Kranz about the incident where she thought Rogers had taken a picture of her while she was performing oral sex on him. At that time, the victim relayed to Officer Kranz that when she asked Rogers what he was doing with his phone, he said he was texting someone. After the victim told Rogers to "quit playing," he said that the image was blurry and that he had deleted it. When the victim checked Rogers's phone, she did not find any pictures so she assumed Rogers had deleted the photo. According to Officer Kranz, the victim reported that throughout her relationship with Rogers, he accused her of cheating on him. The victim explained to Officer Kranz that she learned from a friend that a picture of her performing oral sex had been texted and posted on Facebook. The victim further stated to Officer Kranz that Rogers started calling repeatedly saying that the victim had given another man a sexually transmitted disease and said that the victim would have sex with anybody.

Detective Gregory Jackson assisted Officer Kranz with her investigation. He testified that he pulled up the picture of the victim on Facebook and printed a true and correct copy of the image. Detective Jackson also testified that the victim positively identified Rogers from a booking photograph.

Rogers did not testify and no witnesses were called on his behalf.

The evidence presented at trial supports the elements of sexual exploitation of a child. *See* WIS JI—CRIMINAL 2122. The jury, which is the sole judge of credibility, was entitled to accept this evidence—and it did, finding Rogers guilty in less than two hours. *See State v. Burgess*, 2002 WI App 264, ¶23, 258 Wis. 2d 548, 654 N.W.2d 81, *aff'd*, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124 (“[T]he jury is sole judge of credibility; it weighs the evidence and resolves any conflicts.”). There would be no arguable merit to challenging the sufficiency of the evidence on appeal.

C. Sentencing Discretion

We also conclude that there would be no arguable basis to assert that 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, or that the sentence was excessive, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The trial court must consider the principal 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 it must determine which objective or objectives are of greatest importance, *Gallion*, 270 Wis. 2d 535,

¶41. In seeking to fulfill the sentencing objectives, the trial 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 it may consider several subfactors. *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 Gallion*, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. The trial court noted Rogers's minimal prior record, his mental health issues, and the ongoing problems Rogers suffered from a prior physical assault. Despite these mitigating considerations, the trial court found that Rogers's refusal to accept responsibility for the crime was an aggravating factor, particularly in light of Rogers's contention to the PSI report writer that this was a case of mistaken identity. The trial court accounted for the fact that at the time of sentencing, Rogers had been sitting in custody for just under two years.

On the charge of sexual exploitation of a child, Rogers was sentenced to three years of initial confinement and three years of extended supervision with credit for the time he had already served. The trial court explained that it was sentencing Rogers to less than the presumptive five-year minimum based on the State's suggestion and on the presentence report that was commissioned by the defense.⁴ The court found that the deviation was in the best

⁴ WISCONSIN STAT. § 939.617 was renumbered and amended in 2012. *See* 2011 Wis. Act 272 (eff. Apr. 24, 2012). Under the revised statute, Rogers would have faced at least five years in prison. However, the version of § 939.617 in effect at the time of his sentencing in March 2012 allowed the court to impose a lesser sentence or place Rogers on probation "if the court [found] that the best interests of the community [would] be served and the public [would] not be harmed and if the court place[d] its reasons on the record." *See* § 939.617 (2009-10).

interest of the community and that the public would not be harmed. Additionally, the trial court ordered Rogers to pay the \$500 child pornography surcharge. *See* WIS. STAT. § 973.042(2).

Counsel does not address it, but we note that the trial court also required Rogers to provide a DNA sample and pay the related DNA surcharge. The trial court stated that the DNA surcharge was “required, but it is also punishment and deterrence.” WISCONSIN STAT. § 973.046 does not *require* that the DNA surcharge be imposed for violations of WIS. STAT. § 948.05; consequently, this was a misstatement by the court. However, the trial court was entitled to exercise its discretion and order the surcharge under § 973.046(1g). The trial court’s stated reasons of punishment and deterrence were sufficient to support its exercise of discretion in this regard. We conclude there would be no arguable merit to challenging the circuit court’s exercise of its sentencing discretion on this or any other basis.

Our independent review of the record reveals no other potential issues of arguable merit. To the extent we have not addressed a specific issue raised by counsel, we agree with her analysis.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved of further representation of Rogers in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals