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**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 I**

September 5, 2014

*To*:

Hon. Ellen R. Brostrom
Circuit Court Judge
Br. 6
821 W State St
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jeffrey W. Jensen
735 W. Wisconsin Ave., 12th Fl.
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

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

Myron Isaiah Jordan 456514
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

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2013AP2866-CRNM State of Wisconsin v. Myron Isaiah Jordan (L.C. #2012CF2577)

Before Fine, Kessler and Brennan, JJ.

Myron Isaiah Jordan appeals a judgment of conviction, entered upon his ***Alford***[1] plea, on one count of second-degree sexual assault of a child under age sixteen. Appellate counsel, Jeffrey W. Jensen, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[2] Jordan was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

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

by ***Anders***, counsel's report, and Jordan's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, on or about May 19, 2012, then-ten-year-old A.M.D. was asleep on the couch in her living room and was awakened by Jordan, her mother's long-time boyfriend and A.M.D.'s *de facto* stepfather, putting his erect penis into her anus. When A.M.D. tried to call for help, Jordan put his hand over her mouth. A.M.D. asked Jordan to stop several times, but he refused, eventually stopping on his own to go use the bathroom. He came back to the living room where he fell asleep on the couch, naked and with his erect penis exposed. A.M.D. laid back down and fell asleep before waking to her mother yelling at Jordan.

A.M.D.'s mother, T.D., told police she heard Jordan come home around 3 a.m. He came into the bedroom but went back out. After about thirty minutes, T.D. went to look for Jordan. She found him asleep on the couch, naked and holding his erect penis. A.M.D. was asleep with her head near Jordan's penis. T.D. screamed, waking A.M.D. and Jordan. A.M.D. told her that Jordan put his penis in her butt, and T.D. called the police.

When the police arrived, they found Jordan not in the living room, but asleep in his bedroom wearing pants. Jordan was arrested and charged with one count of first-degree sexual assault of a child who had not yet attained the age of twelve, by sexual intercourse. Jordan was also charged with one count of possession of marijuana as a second or subsequent offense, after police found marijuana in plain view in the bedroom.

Prior to the preliminary hearing, the court commissioner dismissed the marijuana charge because the complaint was insufficient. After the preliminary hearing, the State filed an information restating the sexual assault charge and adding two new counts based on testimony

from the hearing. The new counts were possession with intent to deliver marijuana and possession with intent to deliver MDMA (ecstasy).

Ultimately, Jordan agreed to resolve this case through a plea agreement. In exchange for Jordan's ***Alford*** plea to a reduced charge of second-degree sexual assault of a child who had not yet attained the age of sixteen, by sexual contact, the drug charges would be dismissed and the State would make no specific recommendation at sentencing. Jordan would be free to argue for any sentence. In addition, the second-degree charge carried no mandatory minimum, unlike the first-degree charge's mandatory minimum of twenty-five years' imprisonment. The circuit court accepted the plea and ultimately sentenced Jordan to four years' initial confinement and eight years' extended supervision.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Jordan's plea and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Jordan's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Jordan completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offense. Attached to the form are the applicable jury instructions, including the instruction that defines "sexual contact." *See* ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18. The form correctly acknowledged the maximum penalties Jordan faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. It first heard reasons why it should accept the ***Alford*** plea, then agreed to accept the plea. *See* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (circuit court has discretion in deciding whether to accept ***Alford*** plea). The circuit court complied with all of the mandatory duties for accepting a plea. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (listing court's duties). It expressly confirmed with Jordan personally his understanding that, by entering the plea, he was giving up the right to continue with a previously filed suppression motion[3] and that he was giving up the right to raise an intoxication defense. The circuit court further confirmed Jordan's understanding that entering an ***Alford*** plea would have the same practical effect as a guilty plea. *See* ***Garcia***, 192 Wis. 2d at 858.

With respect to the factual basis for the plea, *see* WIS. STAT. § 971.08(1)(b), the circuit court first confirmed that it could rely on the facts as set forth in the criminal complaint, which incorporated A.M.D.'s statement. The State then recited its additional evidence in order to present "strong proof of guilt" to support the ***Alford*** plea. *See* ***State v. Johnson***, 105 Wis. 2d 657, 663, 314 N.W.2d 897 (Ct. App. 1981). This evidence included a nurse's report of redness or an abrasion to A.M.D.'s anus, a partial DNA profile from A.M.D. on the swab taken from Jordan's penile shaft, and a full DNA profile from A.M.D. found in a pair of Jordan's boxer shorts.

[3] The motion related to the discovery of the drug evidence only.

The plea questionnaire and waiver of rights form and addendum and the supplemental documents counsel discussed with Jordan, along with the court's colloquy and the State's summary of additional evidence, appropriately advised Jordan of the elements of his offenses and the potential penalties he faced, established "strong proof of guilt" to support the plea, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

In his response, Jordan complains that intoxication negates intent, and his crime should have been more thoroughly defended.[4] Because a valid plea waives defenses, including intoxication—which, as noted, the circuit court expressly confirmed Jordan knew he was waiving—we must discuss Jordan's complaint in the context of whether trial counsel was ineffective for not pursuing, or not recommending that Johnson pursue, an intoxication defense. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (valid guilty plea waives nonjurisdictional defects and defenses). To succeed on an ineffective-assistance claim, the defendant must show that counsel performed deficiently and that the deficiency was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

Prior to sentencing, trial counsel obtained a psychological evaluation for Jordan. According to the psychologist's summary:

> Jordan admitted that he had spent that evening engaged in a good deal of partying activity, including excessive drinking and several instances of ingesting Ecstasy pills prior to getting home in the

[4] Jordan also asserts that his offense should have been defended "with the show of flaws in the fundamental integrity of the plea." However, our review of the record reveals no such flaws.

> early morning. [Jordan recalled] that he went into the living room, laid down on the couch, and told [A.M.D.] … to go into her bedroom to sleep. After this, Mr. Jordan says that his memory is very spotty and only recalls ending up in his own bedroom asleep and then being awakened by police.[5]

The summary also noted that T.D. said she tried to talk to Jordan, "but he was pretty 'out of it.'"

Intoxication is a defense only when it "[n]egatives the existence of a state of mind essential to the crime[.]" *See* WIS. STAT. § 939.42(2). There is no intent element to second-degree sexual assault of a child generally—as written, the statute proscribing such conduct has only two elements: sexual contact or intercourse and a victim who has not yet turned sixteen. *See* WIS. STAT. § 948.02(2); WIS JI—CRIMINAL 2104. But when the assault occurs by sexual contact, the contact must have been done intentionally, for specified purposes. *See* WIS. STAT. § 939.22(34) (defining "sexual contact").

While Jordan apparently believes he was sufficiently intoxicated to raise this defense,

> [t]he "intoxicated or drugged condition" to which the statute refers is not the condition … that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete [intoxication] which makes a person incapable of forming intent to perform an act or commit a crime. To be relieved from responsibility for criminal acts it is not enough for a defendant to establish that he was under the influence of intoxicating beverages [or drugs]. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.

*See* ***State v. Guiden***, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970).

[5] After T.D. called police, she took A.M.D. to a different apartment in their building. When police arrived at the residence, they found Jordan asleep in the bedroom.

Nothing in the record suggests that Jordan was too intoxicated to form intent, despite the quantity of drugs and alcohol he purportedly consumed. Intent to become sexually aroused or gratified may be inferred from conduct. *See* ***State v. Shanks***, 2002 WI App 93, ¶26, 253 Wis. 2d 600, 644 N.W.2d 275. Jordan claims to remember nothing of the assault, so the only direct description of his conduct comes from A.M.D. Given that Jordan's "contact" with her was actually penis-to-anus intercourse, that he stopped A.M.D. from calling for another adult, and that he refused to stop until he wanted to, the record fails to support an intoxication defense.[6] Therefore, counsel was not ineffective for failing to pursue it, *see* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987), and there is no arguable merit to a claim of ineffective assistance for such failure.

Jordan also complains about the DNA evidence. Trial counsel had the State's reports reviewed by an independent expert, who took issue with certain of the State Crime Lab's methods, suggesting possible contamination of the penile swab sample and the possibility of a false positive. The expert's report was completed at least two months prior to Jordan's plea, but Jordan's plea waives any challenge to the State's evidence. Thus, we again consider whether trial counsel was ineffective for failing to do something more with the DNA expert's report, like taking the issue to trial.

The expert did not conclude that the State's samples and results *were* contaminated. Rather, he opined that the State's results showing A.M.D.'s genetic material on the swabs from Jordan's penile shaft and his shorts "are just as likely to be associated with either contamination

[6] Indeed, although the psychologist described Jordan's offense as drug-fueled, he did not suggest that Jordan would have been incapable of understanding his offense or forming intent.

or casual transfers as they are the [State's] theory of events." In other words, though the expert was critical of the State's methods, he could not exclude the possibility that the State's theory of the crime was correct. Further, defense counsel had a third expert, a clinical nurse specialist who reviewed the medical report on A.M.D. While the nurse expert questioned the methodology of the nurse who examined A.M.D., the nurse expert nevertheless concluded that the applicable criteria showed a "probable likelihood of abuse having occurred as the child gives a clear, consistent and detailed description of being molested with or without factual findings."

Neither expert exonerates Jordan, and the nurse specialist thought there was a "probable likelihood of abuse" even without corroborating physical evidence. Thus, neither witness makes acquittal reasonably probable had there been a trial. *See* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (showing prejudice requires "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'") (citation omitted). Based on the nature of the experts' conclusions, Jordan cannot make an arguably meritorious claim that trial counsel was deficient or prejudicial in encouraging his ***Alford*** plea despite the experts' reports.[7]

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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

[7] As appellate counsel points out, had there been a trial, it would have been on the first-degree charge, with a mandatory minimum sentence of twenty-five years' imprisonment upon conviction.

determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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 may consider several subfactors. *See* ***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 circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Here, the circuit court rejected probation as a sentence because it would unduly depreciate the seriousness of the offense. Further, the circuit court noted that it was evident that Jordan had drug and alcohol issues at the core of this offense, and rehabilitation would be best administered in a confined setting.[8] The circuit court considered several mitigating factors, like Jordan's good educational record and work history, and noted that his "remorse is clear." Nevertheless, the circuit court concluded that some imprisonment was necessary, not only to address the aforementioned substance abuse issues but also as a general deterrent.

The maximum possible sentence Jordan could have received was forty years' imprisonment. The sentence totaling twelve years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70

[8] In his response, Jordan contends "[t]hat matters of evidence shown/brought forth that was not produced properly on defense behalf should have been arguable to a lesser sentencing factor and a more focus on drug/alcohol abuse." To the extent that Jordan is suggesting that his drug and alcohol issues should have received greater consideration, we note that the circuit court was clearly aware of those issues, and we reiterate that the weight given to such factors is squarely within the circuit court's discretion. That Jordan may think his substance abuse issues warranted a lesser sentence is irrelevant.

Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the record reveals no other potential issues of arguable merit.[9]

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 Jeffrey W. Jensen is relieved of further representation of Jordan in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*

[9] Jordan complains that "there's no affirmative evidence through the state that [shows] my plea was possed [sic] to still maintain my innocen[c]e to the public encounter on CCAP." The electronic entries for Jordan's offense show a disposition of "Guilty Due to Alford Plea." The ***Alford*** plea "is a guilty plea in which the defendant pleads guilty while either maintaining his innocence or not admitting having committed the crime." ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). Thus, the CCAP entry accurately reflects Jordan's plea; it is not required to explain the entries in layman's terms.