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

2013AP379-CRNM State of Wisconsin v. Napoleon Lamar Swims
(L.C. # 2011CF3031)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Napoleon Swims appeals a judgment convicting him, following a jury trial, of one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2011-12).[1] Attorney Michael Zell has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S.

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

429 (1988). Swims was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Swims was charged with two counts of sexual abuse of A.C.D., a child under the age of sixteen, contrary to WIS. STAT. § 948.02(2). The criminal complaint states that a Milwaukee police officer was dispatched to St. Joseph's hospital regarding a sexual assault claim. At the hospital, A.C.D. told the officer that the baby girl she had given birth to the previous day was fathered by her mother's live-in boyfriend, Napoleon Swims. A.C.D. recounted two different instances of sexual assault by Swims to the officer. DNA samples were taken from A.C.D., Swims, and the baby. An analysis of the samples by the State Crime Laboratory were consistent with a conclusion that Swims was the father, with a paternity index of 102 million, meaning that it was "102 million times more likely" that Swims was the father of the baby, versus another man in the general population. After a jury trial, Swims was found guilty of the first count of sexual assault and not guilty of the second count.

The no-merit report addresses: (1) whether Swims' counsel was ineffective for failing to provide Swims with plea options and for failing to retain a DNA expert, (2) whether Swims' right to a speedy trial was violated, (3) whether his right to an impartial judge was violated, (4) whether the circuit court erred when it did not dismiss the case or release Swims when the victim did not appear at the first scheduled trial date, (5) whether the circuit court erred in sentencing Swims, (6) whether the evidence was sufficient to support the conviction, and (7) whether Swims' due process rights were violated when a material witness warrant was issued for the victim's mother.

Ineffective Assistance of Counsel

The no-merit report informs us that Swims believes his counsel was ineffective for failing to provide him with plea options and for failing to retain a defense DNA expert for trial. A claim of ineffective assistance of counsel has two parts: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

The no-merit report states that Swims complains that his trial counsel did not convey to him the plea offer that was made by the district attorney. This argument is without merit because the record reflects that a plea offer was made to Swims and it was rejected. Specifically, at the final pretrial hearing, defense counsel informed the court that Swims wanted to proceed to trial, and the assistant district attorney stated that the plea offer was being withdrawn.

There also would be no merit to an argument that trial counsel was ineffective for failing to obtain a defense DNA expert. Even if we assume that counsel's performance was deficient with regard to the DNA evidence, the claim of ineffective assistance would fail on the prejudice prong. Swims' trial counsel extensively cross-examined the forensic scientist who performed the DNA analysis in this case. In addition, the DNA match was not the only evidence linking Swims to the crime. Indeed, A.C.D. testified at trial that Swims put his penis in her vagina. We are satisfied that confidence in the outcome is not undermined because of the absence of a defense DNA expert.

Speedy Trial

WISCONSIN STAT. § 971.10(2)(a) requires that a felony trial commence within 90 days of when a speedy trial demand is made. In this case, a demand was made on October 26, 2011, and the trial occurred on January 11, 2012. Thus, the statutory time limit was complied with. Even if Swims were to argue that his counsel should have made the speedy trial demand sooner, that argument would also fail. Wisconsin courts assess whether a criminal defendant suffered a violation of the right to a speedy trial by conducting the four-factor balancing test set forth in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). The four-factor ***Barker*** test requires a court to balance: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion or failure to assert the right to a speedy trial; and (4) the prejudice to the defendant arising from the delay. ***Id.*** In this case, the length of the delay from when the criminal complaint was filed to when the trial was held was just over six months. A delay approaching one year is presumptively prejudicial. ***State v. Borhegyi***, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998). The delay in this case was well under a year and, thus, we are not persuaded that Swims would be able to show that he was prejudiced by the delay under the ***Barker*** test.

Impartiality of Judge

In the no-merit report, counsel asserts that there would be no arguable merit to a claim that Swims' right to an impartial judge was violated. Swims filed a recusal motion requesting that Judge Borowski recuse himself because he was biased against Swims. The motion was never ruled upon because the case was administratively transferred to Judge Kuhnmuench due to congestion of Judge Borowski's calendar. Swims then requested substitution of the judge, and the case was transferred to a third judge, Judge Dugan, who ultimately presided over the pretrial

motions, trial, and sentencing. Because Judge Borowski did not preside over the pretrial motions, trial, and sentencing, we agree with counsel that there would be no merit to an argument that Borowski should have recused himself.

Victim's Failure to appear at First Scheduled Trial Date

The no-merit report states that Swims believes he should have been released from custody when the victim, A.C.D., failed to appear at the first scheduled jury trial date. The State informed the court that it was unable to proceed to trial on that date. The State also requested a material witness warrant for A.C.D.'s mother. The State expressed suspicion that, because Swims and A.C.D.'s mother have a child together, the two were colluding to avoid Swims' conviction. The State requested that Swims be released while the State attempted to procure its witnesses. Swims' trial counsel then moved for dismissal of the case without prejudice. The circuit court denied the motion to dismiss and instead rescheduled the trial for January 11, 2012, expressing concern about the possibility that Swims was tampering with witnesses.

WISCONSIN STAT. § 971.10(4) states that a defendant not tried in accordance with the statutory requirements for a speedy trial "shall be discharged from custody." However, as previously discussed, we are satisfied that Swims' right to a speedy trial was not violated and, thus, the circuit court was not required to release him under § 971.10(4). As to the court's decision to reschedule the trial, a decision whether to grant or deny an adjournment request is left to the trial court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion. *See* ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. In this case, the circuit court based its decision upon a reasonable concern about witness tampering

and, thus, we are satisfied that any argument that the circuit court erroneously exercised its discretion in denying the motion to dismiss would be without merit.

Sentencing

We have also considered whether there would be arguable merit to challenging Swims' sentence. Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court must specify the objectives of the sentence on the record, which "include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence [of] others." ***Id.***, ¶40.

The record reflects that the circuit court adequately discussed factors relevant to sentencing Swims, and properly exercised its discretion. The no-merit report states that Swims believes that the circuit court improperly considered count two, which was dismissed, in imposing the sentence. We agree with counsel that there would be no arguable merit to pursuing this issue on appeal. A court may consider uncharged and unproven offenses, as well as facts related to offenses for which a defendant has been acquitted. ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436. Additionally, the sentence the court imposed was well-within the forty-year maximum for a class C felony. *See* WIS. STAT. §§ 948.02(2) (classifying sexual assault of a child under the age of 16 as a Class C felony), 973.01(2)(b)3 and (d)2 (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). *See also* ***State v. Grindemann***, 2002 WI App 106,

¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (there is a presumption that a sentence well within the limits of the maximum sentence is not unduly harsh).

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762.

Upon our independent review of the record, we agree with counsel's assessment that a sufficiency of the evidence challenge would be without merit. The elements of second-degree sexual assault of a child are: (1) that the accused had sexual contact or intercourse with the victim, and (2) that the victim was under the age of sixteen. WIS. STAT. § 948.02(2). There is no dispute that A.C.D. was under the age of sixteen at the time of the alleged sexual assault. The only potential issue on appeal, then, is whether the evidence was sufficient to prove that Swims had sexual contact or intercourse with A.C.D.

DNA evidence linked A.C.D.'s baby to Swims. A.C.D. testified at trial that, when she was thirteen, Swims woke her up when she was sleeping and put his penis in her vagina. There were minor discrepancies in A.C.D.'s testimony. At first, she testified that the sexual assault incident happened "[a]bout probably three years ago." The assistant district attorney, recognizing the dating discrepancy, followed up with additional questions, including how old A.C.D.'s daughter was. A.C.D. answered that her daughter was nine months old. She then testified that the sexual assault incidents she had disclosed to police had occurred the previous

summer, which was consistent with the allegations charged in the information. The jury heard all of the evidence and came back with a guilty verdict as to one count of sexual assault. We are satisfied that the minor discrepancies in A.C.D.'s testimony did not render the evidence so lacking in probative value that it undermined the jury's guilty verdict.

Material Witness Warrant

Finally, the no-merit report states that Swims believes that his due process rights were violated when, at the final pretrial hearing, the circuit court authorized a material witness warrant pertaining to A.C.D.'s mother. When the State later decided not to call A.C.D.'s mother as a witness at trial, Swims' counsel argued that she was not a material witness and that the warrant should not have been issued. We are not persuaded that A.C.D.'s mother was not a material witness merely because she was not called to testify at trial.

WISCONSIN STAT. § 969.01(3) states, in relevant part, "If it appears by affidavit that the testimony of a person is material in any felony criminal proceeding and that it may become impracticable to secure the person's presence by subpoena, the judge may require such person to give bail for the person's appearance as a witness." At the final pretrial hearing, the State informed the court that the police had made efforts to find A.C.D. and her mother, and filed an affidavit stating as much. A.C.D's mother had testified at the preliminary hearing that she, Swims, and A.C.D. were living together during the relevant time frame of when A.C.D.'s baby was conceived. We are satisfied that, based on the facts, that the circuit court properly exercised its discretion in authorizing a warrant for A.C.D.'s mother pursuant to § 969.01(3), such that there would be no merit to challenging that decision on appeal.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Michael Zell is relieved of any further representation of Napoleon Swims in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals