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January 27, 2015

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

2013AP1404-CRNM State v. Abel D. M. Jump (L. C. No. 2012CF143)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Abel Jump has filed a no-merit report concluding no grounds exist to challenge Jump's convictions for child enticement with intent to expose a sex organ and felony bail jumping. Jump 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]

The State charged Jump with child enticement and felony bail jumping, and he was ultimately convicted upon a jury's verdict of the crimes charged. Out of a maximum possible twenty-five-year sentence for the child enticement conviction, the court imposed a ten-year sentence consisting of five years' initial confinement and five years' extended supervision. With respect to the bail jumping conviction, the court imposed and stayed the maximum six-year sentence, consisting of three years' initial confinement and three years' extended supervision, and placed Jump on three years' probation, consecutive to the other sentence.

Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). The crime of child enticement by exposing a sex organ requires proof that: (1) the defendant caused or attempted to cause a child to go into a vehicle, building, room, or secluded place; (2) the defendant did so with the intent to expose a sex organ to the child or cause the child to expose a sex organ in violation of WIS. STAT. § 948.10; and (3) the victim had not attained the age of eighteen. WIS. STAT. § 948.07(3). In turn, the elements of felony bail jumping are that the defendant was charged with a felony, that he or she was released from custody on bond, and that he or she intentionally failed to comply with the conditions of his or her bond. *See* WIS. STAT. § 946.49(1)(b).

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

At trial, the victim testified she was acquainted with Jump because he was her father's friend. The victim further testified that when she was sixteen years old, she engaged in a conversation via Facebook messaging with Jump, who was in Minnesota for two weeks of National Guard training. During the course of their exchange, Jump told the victim he wanted to have sex with her and he wanted her to bring a friend along to a motel where the three of them could have sex together.

The victim's mother testified that after learning about the Facebook messages from someone other than the victim, she reviewed and generated printouts of the exchange. She contacted police when she read Jump's proposed motel encounter. A detective with the Oneida County Sheriff's Department testified regarding her investigation, and screen shots of the Facebook messages from both the victim's computer and Jump's telephone were published to the jury. The jury also heard testimony that Jump was on bond at the time of this alleged offense, and a condition of that bond forbade Jump from committing another crime.

Jump testified on his own behalf, and acknowledged initiating a Facebook message to the victim simply to determine how things were "back home." Jump stated, however, that he did not engage in any of the sexually-charged messaging that followed but, rather, posited that somebody else had used his phone while Jump was on kitchen duty. Another guardsman on kitchen duty that day testified that Jump spent the majority of his time in the kitchen texting on a cellphone and Jump was "told multiple times to put his cellphone away and return to his duties." To the extent there was conflicting testimony, it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to their testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. This evidence is sufficient to support the convictions.

The no-merit report addresses whether any challenge to the trial court's evidentiary rulings would lack arguable merit. The admissibility of evidence lies within the trial court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). We will uphold an evidentiary ruling if we conclude the trial court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Walters***, 2004 WI 18, ¶14, 269 Wis. 2d 142, 675 N.W.2d 778.

Jump sought to introduce evidence that when the victim was ten years old, she falsely accused two cousins of sexually assaulting her in an attempt to gain attention. The rape shield law, WIS. STAT. § 972.11, generally prohibits evidence of a complainant's prior sexual conduct. ***State v. Ringer***, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. One exception to this general prohibition allows for the admission of "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness." WIS. STAT. § 972.11(2)(b)3. Before admitting evidence of prior untruthful allegations, the circuit court must determine: "(1) whether the proffered evidence fits within [§] 972.11(2)(b)3[.]; (2) whether the evidence is material to a fact at issue in the case; and (3) whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature." ***State v. DeSantis***, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990).

Jump argued that evidence of a prior untruthful allegation was material to the victim's credibility. The trial court excluded the evidence, concluding it was "not the slightest bit probative" in this case. The present matter was not a case of "he said, she said." Rather, there was direct evidence of the existence of the messages between the Facebook accounts of the victim and Jump. Moreover, Jump did not dispute the existence of the messages and conceded

that he initiated a conversation with the victim via Facebook message on the day in question. To the extent Jump testified that somebody else must have engaged in the sexually-charged messaging that followed, it was his credibility, not the victim's credibility, that the jury was ultimately left to weigh. Because the probative value of this evidence did not outweigh its inflammatory and prejudicial nature, any challenge to its exclusion would lack arguable merit.

Jump also sought to exclude testimony about the Facebook messages unless there was inspection of the forensic image from the hard drive of the victim's computer, as nobody actually saw Jump send the messages attributed to him. The trial court properly determined that any challenge to the authenticity of the messages went to the weight of the evidence, not its admissibility.

Citing ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), Jump alternatively sought to exclude the testimony of a detective sergeant with the Oneida County Sheriff's Department, asserting the detective was not qualified as an expert to explain Facebook messaging to the jury. The detective testified that she received the printout of the Facebook messages made by the victim's mother. During her interview with the victim, the detective asked the victim to log on to her Facebook account so she could verify that the printed messages matched those on the victim's Facebook page. Because the times of the messages—the majority of which took place between 2:26 p.m. and 5:54 p.m.—were not visible on the printout of the messages, the detective wrote in the times, as shown within the victim's Facebook account. The detective also took screen shots of matching messages on Jump's cellphone, though the detective was able to see only the portion of the conversation beginning at 4:28 p.m.

A trial court's gate-keeping function under the ***Daubert*** standard is to ensure that an *expert's* testimony is based on a reliable foundation and is relevant to the material issues. ***State v. Giese***, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. The circuit court determined that ***Daubert*** was not implicated because the investigator was not testifying as an expert. Her testimony was not predicated upon scientific, technical or other specialized knowledge. *See* WIS. STAT. § 907.01(3). Rather, the investigator was testifying about readily observable messages and commonly known aspects of Facebook messaging familiar to nearly a billion users. Any challenge to the circuit court's admission of this evidence would lack arguable merit.

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 offenses; Jump's character; the need to protect the public; and the mitigating factors Jump 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 Jump'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 Leonard D. Kachinsky is relieved of further representing Jump in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals