



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 III/IV

February 3, 2015

To:

Hon. Lisa K. Stark
Circuit Court Judge
721 Oxford Avenue
Eau Claire, WI 54703

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Avenue, Ste. 2220
Eau Claire, WI 54703-5496

Brian C. Findley
P.O. Box 155
Darlington, WI 53530

Gary M. King
District Attorney
721 Oxford Ave
Eau Claire, WI 54703

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

Nathaniel J. Cathey
2327 4th Street
Eau Claire, WI 54703

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

2013AP1026-CRNM State of Wisconsin v. Nathaniel J. Cathey (L.C. #2011CF319)

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

Nathaniel Cathey appeals a judgment convicting him, following a jury trial, of second-degree sexual assault of a child. Attorney Brian Findley has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);¹ *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. 429 (1988). The no-merit report addresses the sufficiency of the evidence, any potential challenge to the sentence, and trial counsel's

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

performance. Cathey 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.

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 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

The elements of second-degree sexual assault of a child that the State needed to prove were that Cathey had sexual intercourse with the victim and the victim was under the age of sixteen at the time. WIS. STAT. § 948.02(2) and WIS JI—CRIMINAL 2104. Contrary to Cathey’s apparent belief (as related by counsel), it was not necessary for the State to produce DNA or other physical evidence, and the State’s failure to do so was not unusual given the victim’s delay in reporting the incident. The testimony of the victim that she was fifteen when she had intercourse with Cathey on a couch at a friend’s house, corroborated by the friend’s testimony that she and another man left the room when Cathey and the victim began having intercourse, was sufficient to satisfy both elements.

Sentence

A challenge to the defendant’s sentence would also lack arguable merit. Cathey and the State jointly recommended that the court adopt the proposal in the PSI for five years of probation

with six to nine months of conditional jail time. The court imposed five years of probation with six months of conditional jail time, and also stayed all but four months of the jail time to facilitate a transfer to Cathey's home state of Nevada. A defendant cannot challenge on appeal a valid sentence that he requested. *See State v. Scherreiks*, 153 Wis.2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Assistance of Counsel

The record shows that trial counsel was successful in excluding some prior bad acts evidence from trial, and in obtaining a term of probation for Cathey. We see nothing in the record to suggest that trial counsel's assistance was ineffective in any regard.

Conclusion

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.

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

IT IS FURTHER ORDERED that Attorney Brian Findley is relieved of any further representation of Cathey in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals