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

2013AP868-CRNM State of Wisconsin v. Richard Allen Lungren (L.C. # 2011CF55)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Richard Allen Lungren appeals from a judgment of conviction entered after a jury found him guilty of seven counts of capturing an image of nudity without the subject's consent. Lungren's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Lungren received a copy of the report and filed a response. Counsel then filed a supplemental no-merit report. Upon consideration of the no-merit and supplemental no-merit reports, Lungren's response, and an

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Shortly after midnight on December 31, 2010, Lungren called 911 to report that a woman was deceased in his bed. Lungren was employed at a Milwaukee hotel and lived in one of the units. Police responded and found a woman, A.C.S., deceased on Lungren's bed. Lungren told police that he met A.C.S. about two weeks prior and that on December 29, 2010, she called to tell him she was at the hotel. With his permission, she obtained a key to and entered his room. Lungren arrived back at the hotel at around 9:30 p.m. A few hours later, A.C.S. left the hotel in a cab and returned in the early morning hours of December 30, 2010. Lungren stated that she appeared to be under the influence of something. A.C.S. eventually passed out on the bed wearing a bra and panties. With Lungren's consent, police searched his cell phone and discovered seven photographic images of a nude female on a bed. The photos were date-stamped between 7:12 a.m. and 2:45 p.m. on December 30, 2010. In a statement to police, Lungren admitted that he had taken the pictures of A.C.S. while she was unconscious. He stated that in one photo, he had posed her by placing her right hand near her vagina. Lungren stated that while sleeping, A.C.S. made some loud snorting noises but continued to sleep and did not wake up. Lungren fell asleep on the bed, and when he woke up at sometime around 12:30 a.m. on December 31, 2010, he discovered that A.C.S. was deceased. Lungren dressed A.C.S. before calling the police. After providing a statement, Lungren was arrested and charged with seven counts of photographing A.C.S. while she was nude, without her consent. He was later charged in a separate case with one count of first-degree reckless homicide in connection with A.C.S.'s death. The charges were joined for trial.

Lungren filed motions to suppress evidence seized from his cell phone and statements he made to police. The trial court denied Lungren's motions after an evidentiary hearing. Following a jury trial, Lungren was acquitted of the homicide, but convicted of seven counts of capturing a nude image without the subject's consent. At sentencing, the court imposed a bifurcated sentence of one year of initial confinement and two years of extended supervision on each of the seven counts, to run consecutive to one another. The no-merit and supplemental no-merit reports address whether there was sufficient credible evidence to support the guilty verdicts, whether the trial court properly denied Lungren's motions to suppress physical evidence and statements, and whether the trial court properly exercised its discretion at sentencing.

Suppression Rulings

Lungren filed motions to suppress the photographs seized from his cell phone and the statements he made to Detectives Gust Petropoulos and Daniel Thompson in an interview room at the police administration building. The trial court denied both motions. With regard to the photographs seized from Lungren's cell phone, the trial court concluded that the phone was searched pursuant to Lungren's consent. *See* ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998) (one exception to the Fourth Amendment's warrant requirement is a search conducted pursuant to consent where that consent is freely and voluntarily given). In reviewing a motion to suppress, we apply a two-step standard of review. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will uphold a trial court's factual findings unless they are clearly erroneous, but decide independently whether those facts violate constitutional principles. ***Id.***

We agree with appointed counsel that there is no arguably meritorious challenge to the trial court's ruling that Lungren consented to the search of his cell phone. To determine if the consent exception is satisfied, this court first reviews whether consent was given in fact by words, gestures, or conduct, and second, whether the consent was voluntary. ***Phillips***, 218 Wis. 2d at 196-97. Detective James Hensley testified that Lungren provided oral and written consent for officers to search the contents of his cell phone and that Lungren provided him with the number for the cell phone. The State introduced Hensley's notebook, which contained Lungren's signed consent for officers to search both his residence and phone. Though Lungren testified that he was not sure what he was signing, the court credited Hensley's testimony that he explained the consent form to Lungren prior to obtaining his signature. The trial court found that Lungren in fact consented to the search of his cell phone. "This finding of historical fact is not contrary to the great weight and clear preponderance of the evidence." ***Id.*** at 197. The trial court further examined the totality of the circumstances and determined that Lungren's consent was voluntarily given. In making its determination, the trial court considered and found credible Hensley's testimony that at the time he provided consent, Lungren was not threatened, handcuffed, or otherwise in custody.[2] The trial court applied the proper legal standard and its findings of fact are not clearly erroneous. We agree with appointed counsel that based on the

[2] Hensley testified that when he arrived, he saw the victim deceased on the bed in Lungren's hotel room, and that because it was Lungren's residence, he needed to discern whether Lungren would consent to police searching the room or if officers needed to obtain a warrant. Hensley testified that though Lungren was in his squad when he gave consent to search, he was not handcuffed, the squad doors were open or unlocked, and Hensley had explained to Lungren that he was not in custody. Hensley testified that he informed Lungren that "he wasn't a suspect, he is not in custody, and I was asking permission" for consent to search his room "because without that, we can't just go into his room."

trial court's findings of fact, any argument that Lungren did not consent or that his consent was not voluntary would be without arguable merit.

We further agree with appellate counsel's conclusion that the trial court did not err in denying Lungren's motion to suppress statements. Because it was undisputed that Lungren's statements were made prior to any ***Miranda***[3] warnings and in response to police questioning, the central inquiry for the trial court was whether Lungren was in custody. ***State v. Torkelson***, 2007 WI App 272, ¶11, 306 Wis. 2d 673, 743 N.W.2d 511 (under ***Miranda***, police may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights). A person is in custody if, under the totality of the circumstances, "a reasonable person would not feel free to terminate the interview and leave the scene." ***State v. Martin***, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270. In making this determination, relevant factors include "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

> When considering the degree of restraint, we consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved.

Id. In reviewing a trial court's decision on a motion to suppress, we will uphold the trial court's factual findings unless clearly erroneous. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). "However, whether a person is in custody for ***Miranda*** purposes is a question of law, which we review de novo." ***Id.***

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

The trial court determined that at the time of Lungren's interview with Petropoulos and Thompson, he was not in custody. The trial court credited Hensley's testimony that after being informed that he was not in custody, Lungren agreed to be transported downtown for a voluntary interview. The trial court found that Lungren was never handcuffed and was transported to the police administration building's lobby to wait for the interviewing detectives. The trial court believed and considered Thompson's testimony that he and Petropoulos interviewed Lungren in an unlocked interview room and that prior to the interview, Lungren confirmed that he understood he was not in custody and told police "he wanted to get to the bottom of our investigation, and we told him that we appreciate it." The trial court found that the interview lasted about one hour. Based on the audio recording and the testimony of both Thompson and Lungren, the trial court found that the interview was calm and cordial, with Lungren being cooperative and detectives offering him food, coffee, and cigarettes. Lungren was not restrained and he never asked if he could leave. The trial court found that at the time police asked about the photographs on Lungren's phone, they were unaware a crime had been committed. The court found that once officers learned that the victim was unconscious and had not consented to the photography, they realized that Lungren's actions were probably criminal, and so they terminated the interview and arrested Lungren. Based on the trial court's findings of fact, we agree with appointed counsel that no arguably meritorious challenge exists to the admissibility of Lungren's taped statement to the detectives.[4]

[4] We also conclude that there is no arguably meritorious challenge to the voluntariness of Lungren's statement. The question of voluntariness involves the application of constitutional principles to historical facts. ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice. ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). In determining whether a (continued)

Jury Trial

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts. On review, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so [insufficient] in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (citation omitted). The report sets forth the applicable standard of review and, as to each of the seven counts, discusses the evidence in relation to the elements of the crime of capturing an image of nudity without the subject's consent. We have reviewed the trial transcripts and agree with counsel's analysis and conclusion that based on the testimony of the officers and Lungren's recorded statement, there was sufficient evidence to support each conviction.

Though not addressed in appellate counsel's no-merit report, based on our independent review of the record, we conclude that no arguably meritorious issues arise from the jury

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statement is voluntary, we consider the totality of the circumstances and balance the personal characteristics of the defendant against the pressures imposed by law enforcement in inducing the statement. ***Hoppe***, 261 Wis. 2d 294, ¶38. Lungren had just turned fifty-four years old and had prior experience with law enforcement. Nothing in the record suggests that he was in poor mental or physical health. The trial court found that the interview was cordial, relatively short, and Lungren was offered food and cigarettes. Detective Thompson testified that at the time of Lungren's interview, it was believed that the victim had died a sudden, accidental death due to a drug overdose, and Lungren was not suspected of a crime. Though ***Miranda*** warnings were not administered, neither did police make any threats or promises. There is no evidence that the detectives engaged in coercive conduct or deception, or otherwise brought to bear undue pressure sufficient to overcome Lungren's will or ability to resist.

selection, admission of evidence, colloquy concerning Lungren's decision not to testify at trial, closing arguments of counsel, or the jury instructions, including the lesser-included offenses.[5]

Sentencing

The no-merit report addresses whether the trial court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing is committed to the trial court's discretion, and our review is limited to determining whether the court erroneously exercised that discretion). Here, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In terms of protecting the public, the sentencing court considered Lungren's prior record and that he was on probation out of California when these offenses were committed. In assessing the offense gravity, the sentencing court explicitly stated on more than one occasion that it was not holding Lungren responsible in any way for causing the victim's death. However, the court considered it significant that the victim trusted Lungren and that he took advantage of her vulnerability by taking nude pictures while she was unconscious, an abuse of trust that "was really despicable." The sentencing court determined that the crime was aggravated by the fact that Lungren posed the victim to make the pictures more sexually explicit. The court also found that the

[5] It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. *See* ***State v. Allen***, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124. In future no-merit reports where there has been a jury trial, appointed counsel should consider addressing these areas. In this case, for example, there was some concern that a member of the jury appeared at times to be sleeping. With trial counsel's consent, the court agreed to remove this juror prior to deliberations as one of the two available alternates. Additionally, the jury was presented with several stipulations. Though we have concluded that none gives rise to an issue of arguable merit, absent a brief discussion or acknowledgement in the no-merit report, we cannot be certain that appointed counsel has considered all potential issues.

circumstances surrounding the taking of the pictures reflected poorly on Lungren's character in that rather than helping the victim "at some point prior to the point when she died," he took advantage of her drugged state for his own selfish purposes:

> I mean, she's clearly passed out. And you took full advantage of her being passed out, unconscious to the point where you can move her arms and move her and manipulate her to take pictures of her. So the fact that you did this, it's disrespectful. The fact you—she trusted you and that the response from you was to do this to her.

In his response to the no-merit report, Lungren asserts that the trial court based its sentence on an improper factor, namely, its characterization of him as being in "a position of trust" with the victim. Lungren also suggests that the sentencing court improperly blamed him for not taking action to prevent the victim's death. Discretion is erroneously exercised when a sentencing court imposes its sentence based on clearly irrelevant or improper factors. ***Gallion***, 270 Wis. 2d 535, ¶17. A court's sentencing decision is afforded a strong presumption of reasonability consistent with the strong public policy against interference with the trial court's discretion. ***Id.***, ¶18. Accordingly, the defendant bears the heavy burden of showing that the sentencing court erroneously exercised its discretion. ***Id.***, ¶72.

We agree with appointed counsel's analysis and conclusion that any challenge to the sentencing court's exercise of discretion is without arguable merit. Though Lungren was acquitted of recklessly causing the victim's death, the trial court was free to consider the facts related to that offense in sentencing him. ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436 (in discerning a defendant's character, a sentencing court may consider "uncharged and unproven offenses" as well as "facts related to offenses for which the defendant has been acquitted"). It was within the sentencing court's discretion to find aggravating the fact that

Lungren did not take action to assess the victim's well-being during her many hours of unconsciousness, and instead took advantage of the situation for his own gratification. Though the trial court never provided a definition for Lungren's "position of trust," the record makes clear that the court was referring to the victim placing herself in Lungren's hotel room while under the influence of a very powerful drug that rendered her unconscious. These facts are not irrelevant or improper considerations. The weight to be given any factor is within the sentencing court's discretion, *see* ***Ziegler***, 289 Wis. 2d 594, ¶23, and here, the trial court was in the best position to evaluate the relevant sentencing factors and Lungren's demeanor, *see* ***State v. Klubertanz***, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116. Further, the bifurcated sentence totaling twenty-one years 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 as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other potential issues for appeal.[6] Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to further represent Lungren in this appeal.

Upon the foregoing reasons,

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

[6] Based on the record, we agree with the trial court's determination that Lungren was entitled to 461 days of sentence credit pursuant to WIS. STAT. § 973.155.

IT IS FURTHER ORDERED that Attorney Christopher M. Glinski is relieved from further representing Richard Allen Lungren in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals