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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

June 11, 2015

To:

Hon. David L. Borowski
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

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

Dustin C. Haskell
Assistant State Public Defender
735 N. Water St., Rm. 912
Milwaukee, WI 53203

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

Anthony O. Bass 617973
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2015AP235-CRNM State of Wisconsin v. Anthony O. Bass (L.C. #2013CF4603)

Before Curley, P.J., Kessler and Brennan, JJ.

Anthony O. Bass appeals from a judgment of conviction, entered upon his guilty plea, on one count of second-degree sexual assault of a child who has not yet attained the age of sixteen. Appellate counsel, Dustin C. Haskell, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Bass was advised of his right to file a response, and he has responded. Upon this court's independent review of the

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

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

A criminal complaint alleged that victim M.T.P. told police that on October 1, 2013, she awoke to find her mother's boyfriend, Bass, on top of her. She further told police that Bass pulled down her underwear and had penis-to-vagina intercourse with her. M.T.P. was thirteen years old at the time of the alleged offense. The complaint also alleged that victim S.A.P. reported that some time between May and August 2011, Bass, who was wearing only boxer shorts at the time, reached his hand under her clothes and rubbed her buttocks back and forth. S.A.P. was eleven or twelve years old at the time of the alleged offense. An amended information later changed the time period for S.A.P.'s allegations to May 2012 through July 8, 2012, when S.A.P. was almost thirteen. Bass was charged with two counts of second-degree sexual assault of a child who has not yet attained the age of sixteen.

Bass agreed to resolve this case through a plea agreement. In exchange for his guilty plea to the count regarding M.T.P., the State would amend the charge to allege sexual contact rather than sexual intercourse, dismiss and read in the other count, and recommend prison but without specifying a number of years. The circuit court accepted Bass's plea and sentenced him to eight years' initial confinement and five years' extended supervision.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Bass's guilty 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 Bass's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Bass 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 offenses. The jury instructions for second-degree sexual assault of a child by sexual contact were attached and initialed by Bass. The form correctly acknowledged the maximum penalties Bass 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 also 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. Counsel notes some potential deficiencies in the colloquy, though none of them ultimately give rise to an arguably meritorious appellate issue.

First, the circuit court, in discussing possible penalties with Bass, informed him only of the possibility of a fine, without specifying the possible amount. However, the plea questionnaire, which Bass acknowledged reviewing, listed the possible maximum fine of $100,000. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶31-32, 317 Wis. 2d 161, 765 N.W.2d 794 (circuit court may not rely entirely on plea questionnaire form, but form may be a tool for ensuring a knowing, intelligent, and voluntary plea).

Second, in reviewing the elements of the offenses with Bass, the circuit court initially neglected to discuss the intent element of sexual contact—that is, that the sexual contact must have been for purposes of sexual arousal or gratification. *See* WIS. STAT. § 948.01(5)(a)

(defining sexual contact). This element was discussed within the jury instructions that Bass initialed. Further, when the State pointed out the omission, the circuit court confirmed that Bass understood that component of his crime.

Third, the circuit court also neglected to provide Bass with the immigration warning required by WIS. STAT. § 971.08(1)(c). However, the record reveals that Bass was born in Milwaukee, making him a citizen of the United States. He would therefore be unable to make the allegations necessary to withdraw his plea for lack of the warning. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749.

Beyond those minor issues, which do not create any arguably meritorious issue to raise on appeal, the plea questionnaire and waiver of rights form and addendum, the jury instructions, and the court's colloquy appropriately advised Bass of the elements of his offenses and the potential penalties he faced, 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, Bass says he does not "really think that it was fair cause of what my lawyer told me before I sign this[.] I wouldn't have sign nothing for no 13 years." Bass does not identify which of his two attorneys he was talking about, nor what that lawyer told him before signing the plea forms. Presumably, Bass is referencing a representation by his second attorney about a possible sentence. However, an incorrect sentencing prediction by counsel does not provide grounds for relief. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. Indeed, Bass acknowledged during the plea colloquy that the circuit court had the final say in setting the sentence length.

Bass also says, "3 page of the plea talking about what sexual contact means and I didn't do none of that. It's talking about penile ejaculation." Bass appears to be referring to page 3 of the jury instructions. *See* WIS JI—CRIMINAL 2104. Trial counsel attached the entirety of the instruction to the plea questionnaire, and page 3 includes the optional language to be used when the sexual contact alleged is contact by intentional ejaculation. That portion of the instruction is not applicable to Bass; no one has alleged that it is. Neither of Bass's complaints related to the plea presents an arguably meritorious issue.

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 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.

The circuit court noted that Bass's plea relieved the victim of having to testify at trial, and it stated that he should get some credit for that. However, the circuit court was bothered by the fact that Bass had two federal convictions, followed by two state sexual assault charges. The circuit court noted multiple aggravating factors, like the fact that he was the stepfather or father-figure to M.T.P., that he was almost twenty years older than her, and that the assault was penis-

to-vagina. In addition, the circuit court noted that M.T.P.'s immediate concern after the assault was whether Bass might have impregnated her, a problem the circuit court explained that no thirteen-year-old should have to confront. The circuit court determined that prison was appropriate because of the gravity of the offense, the read-in offense, and Bass's record. It further stated that it was focused on punishing Bass and keeping him away from the victim for sufficient time, and on ensuring Bass received treatment in a custodial setting.

The maximum possible sentence Bass could have received was forty years' imprisonment. The sentence totaling thirteen 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 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.

Bass raises several other issues in his response, none of which have arguable merit but which we nevertheless address.[2] First, Bass had moved to sever the two charges, based on the fact that there were different victims, different types of assaults, and a separation in time of almost a year and a half between 2012 and 2013. The circuit court denied the request.

[2] Any issues Bass may have raised that we do not discuss are likewise rejected, either because they are so lacking in merit that they do not warrant individual discussion, *see* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996), or because we are unable to discern the specifics of the argument.

To determine whether the circuit court properly refused to sever charges, we use a two-step analysis. *See* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). First, we consider whether the charges were properly joined under WIS. STAT. § 971.12(1), and if the joinder was proper, then we consider whether the defendant was unfairly prejudiced by the joinder. *See* ***Locke***, 177 Wis. 2d at 596-97.

Two or more crimes can be charged in the same complaint if the crimes "are of the same or similar character." WIS. STAT. § 971.12(1). To be of the same or similar character, the crimes must be the same types of offenses, the offenses must occur over a relatively short period of time, and the evidence as to each must overlap. *See* ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). We construe the statute broadly, in favor of joinder. ***Locke***, 177 Wis. 2d at 596. Here, the crimes are certainly the same type of offense, even if the specific type of touching was different. The fourteen- to seventeen-month gap is not troubling; the more similar the offenses, the longer the permissible gap. *See* ***Hamm***, 146 Wis. 2d at 139-40. Further, as the circuit court pointed out, the main overlapping evidence in this case is Bass as the alleged perpetrator.

If joinder was proper, then the circuit court may order separate trials if it appears that the defendant is prejudiced by a joint trial, but that prejudice must be weighed against the public interest in a consolidated trial. *See* ***Locke***, 177 Wis. 2d at 597. The record does not contain much discussion of potential prejudice, but the circuit court noted that separate trials in this case would have been a waste of judicial resources. Such decision is a proper exercise of the circuit court's discretion, and the record does not demonstrate that failure to sever the counts caused "'substantial prejudice,'" necessary for this court to reverse such a discretionary decision. *See*

id. (citation omitted). There is no arguable merit to a claim the circuit court improperly refused to sever the charges.

Bass complains about the "last minute" amendment to the information to correct the dates alleged in Count 2. The legal nature of his complaint is not clear, although he may be claiming a lack of timely notice.[3] However, we know that children are often unable to remember specifics of individual assaults, *see* ***State v. Nommensen***, 2007 WI App 224, ¶15, 305 Wis. 2d 695, 741 N.W.2d 481, so a more liberal approach is taken with respect to notice requirements in child sexual assault cases, *see* ***State v. Fawcett***, 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App. 1988). The amendment to the information was made at least three months before Bass entered his plea; this is hardly last-minute.

Bass also appears to be claiming that the State may have coerced S.A.P.'s mother to give the State the dates it wanted.[4] Aside from the fact that the record does not support such an allegation, Bass waived the right to challenge the factual basis for the charge or the witness credibility regarding dates when he entered his plea agreement. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (valid guilty plea waives all nonjurisdictional defects and defenses).

[3] It may also be that Bass is simply upset by the date change because he had a valid alibi for the 2011 dates: he was incarcerated in federal prison at the time.

[4] M.T.P. had told her mother about Bass's alleged assault, but her mother did not call police. Rather, it was teachers who noticed a behavior change and notified authorities. M.T.P.'s mother was charged for failing to act to protect her daughter, but evidently resolved the matter with the State through her own plea agreement, the details of which are not in this record.

It is for the same reason that Bass's complaints about insufficient or planted evidence must be rejected. Bass gave up the opportunity to challenge the State's evidence when he entered a plea, though we note two particular complaints. First, Bass complains, "Look at my final pre-trial when the DA said she don't have the victim standard buccal swab was never taken so she had that taking. So, they didn't have no (DNA) so the[y] planted it there?" The missing buccal swab would have been the known sample from M.T.P. for the crime lab analysts to use in developing her DNA profile. That profile could then be compared against the profiles developed from the collected evidentiary samples from M.T.P.'s body and clothes. The presence or absence of M.T.P.'s known DNA profile for comparison has no bearing on whether the lab was also able to detect Bass's DNA in the same samples.[5]

Bass also complains, "The State say they had fresh abrasion that was healing to [M.T.P.'s] hymen. Now, she had fresh healing to her hymen in [April] 4, 2014 this is what it say in this Report in Court 6 months after this was suppost to happen it's still fresh 6 months after[.] All lie's." At a hearing on April 4, 2014, the State informed the court that it had received the medical reports describing the victim's hymen injury. We have no reason to believe the examination was anything other than contemporaneous with the reporting of the assault. In other words, April 4 was the date on which the State described the report to the court, not the date on which M.T.P. was examined.

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

[5] The results of the DNA testing evidently showed Bass's DNA present in the crotch of M.T.P.'s underwear, though not in the waistband.

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 Dustin C. Haskell is relieved of further representation of Bass in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals