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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/IV**

February 16, 2016

*To*:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th Street
Milwaukee, WI 53233

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

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Pamela Moorshead
Assistant State Public Defender
735 N. Water St., Ste 912
Milwaukee, WI 53202-4116

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

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2014AP2708-CR State of Wisconsin v. Toussaint Eddie Anthony
(L.C. # 2012CF1576)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Toussaint Eddie Anthony appeals a judgment, entered upon a jury's verdicts, convicting him of two counts of soliciting a child for prostitution and two counts of second-degree sexual assault of a child. Anthony also appeals the order denying his postconviction motion for resentencing or sentence modification. Anthony argues that the circuit court erroneously exercised its sentencing discretion and erred by denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We reject Anthony's arguments, and summarily affirm the judgment and order.

The State charged Anthony with two counts each of soliciting a child for prostitution and second-degree sexual assault, involving two fifteen-year-old girls, J.W. and Z.Y.[2] During pretrial negotiations, the State offered to recommend a total of six years of initial confinement followed by three years of extended supervision if Anthony entered guilty pleas to the sexual assault charges, with the remaining two charges to be dismissed and read in. Anthony declined that offer and also declined a subsequent offer by the State with the same terms except that the State would recommend a total of five years of initial confinement.

At trial, J.W. testified that she received a text message from a stranger and began exchanging messages with the individual, later identified as Anthony. The two eventually met in person after Anthony picked J.W. up from her mother's home and drove her to her grandmother's home. J.W. testified that, during the drive, Anthony talked about giving J.W. money and J.W. performed oral sex on him. J.W. and Anthony next met at Anthony's house, where J.W. performed oral sex on Anthony in exchange for $40. Anthony told J.W. that he would pay her more money if she brought a friend for him to have oral sex with. J.W. brought her cousin, Z.Y., to Anthony's home, where each performed oral sex on Anthony in exchange for money. Z.Y. testified that she accompanied J.W. to Anthony's home and performed oral sex on Anthony in exchange for money.

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

[2] Each of the girls received a citation for committing an act of prostitution.

The jury found Anthony guilty of the four crimes charged. Out of a maximum possible 130-year sentence, the court imposed concurrent sentences, consistent with the State's recommendation, resulting in a twenty-year term, comprised of fifteen years of initial confinement and five years of extended supervision.[3] Anthony's postconviction motion for resentencing or sentence modification was denied, and this appeal follows.

Sentencing lies within the circuit court's discretion. ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). As long as the circuit court considers proper factors, a sentence within the statutory limits will not be upset unless it is so excessive as to shock the public conscience. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 183-85, 233 N.W.2d 457 (1975). It is the defendant's burden to demonstrate that a sentence is improper. ***Id.*** at 183-84.

Anthony argues that the sentencing court impermissibly punished him for exercising his constitutional right to a jury trial. Our supreme court has held that a "defendant cannot receive a harsher sentence solely because he has availed himself of the important constitutional right of trial by jury." ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975). Anthony claims that the sentencing court "unduly considered" his insistence on going to trial when the court made the following comments at the sentencing hearing:

> The presentence report certainly describes the offense. We have all heard the testimony. What those young ladies who took the stand had to go through in order to testify and be victimized a number of times; not only in your presence, sir, but then because of the ramifications it has to what they have to live with and those emotional scars that will be there for their entire life-time.

[3] To the extent Anthony suggests that the State's sentencing recommendation was vindictive because it was higher than what the State had offered to recommend during plea negotiations, the State's earlier offer contemplated dismissing two of the charges.

We are not persuaded that the single reference about J.W. and Z.Y. having to testify, contained within the more far-ranging comments above, establishes that Anthony was punished for exercising his constitutional right to a jury trial.

First, Anthony's own comments during allocution place the court's reference about the victims in context. After apologizing to the victims and their parents, Anthony stated: "I have made poor choices. *I made a poor judgment when I went to trial and put these kids on the stand*, which I shouldn't have done. I wasn't thinking rationally and I made a very, very big mistake." (Emphasis added.) It appears that the court's reference to the victims testifying was a response to Anthony's expression of remorse for having made the victims testify at a trial.

Second, the challenged reference was not a stand-alone comment. Rather, it was a small part of a larger observation regarding how Anthony had victimized the girls—one of whom had multiple sexual contacts with Anthony—and how they would have to live with emotional scars. Although courts may not consider improper factors at sentencing, "[i]t does not automatically follow … that an off-hand reference to [an improper] consideration indicates the trial court must have utilized [the improper consideration] in [its] sentencing deliberations." ***Buckner v. State***, 56 Wis. 2d 539, 551, 202 N.W.2d 406 (1972). Here, the court considered proper sentencing factors, including the seriousness of the offenses, Anthony's character, and the need to protect the community. Before making the challenged reference to the victims having to testify, the court explained the facts of the crime, noting that Anthony had solicited for sexual activity two children "who … can't make adult decisions." The court followed the challenged reference by stating that Anthony's crime "rates up there as one of the most serious type of offenses in this system." Thus, it appears that the court's reference to the victims having to testify at trial was merely part of the court's assessment of the crime's severity. Ultimately, given all of the factors

considered by the court when fashioning the sentence imposed, we are confident that Anthony was not punished for exercising his right to a jury trial.

Moreover, even were we to assume that the challenged reference showed that the court improperly considered Anthony's decision to exercise his right to a jury trial, Anthony invited the error by expressing remorse over going to trial. This court will not review error invited by an appealing party. *See* ***State v. Thexton***, 2007 WI App 11, ¶6, 298 Wis. 2d 263, 727 N.W.2d 560 (WI App 2006). Anthony effectively asked the court to consider the exercise of his constitutional right by saying he wished he had not gone to trial and made the victims testify. The court, therefore, did not err by mentioning the topic.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*