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March 8, 2016

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

2015AP241-CRNM State of Wisconsin v. Jesse L. Taylor (L.C. # 2011CF913)

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

Jesse Taylor appeals from a judgment of conviction for attempted second-degree sexual assault of a child under the age of sixteen. Taylor's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967). Taylor received a copy of the report, was advised of his right to file a response, and elected not to do so. Upon consideration of the report and an independent review of the record, we conclude

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

that the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* RULE 809.21.

E.E., a high school student, reported to police that Taylor, a classmate, had sexually assaulted her multiple times at a festival in May 2011. A second student, B.H., also reported being sexually assaulted by Taylor at the same festival and in a separate incident at school. The State charged Taylor with seven counts of sexual assault based on the three incidents. A jury found Taylor guilty on one count of attempted second-degree sexual assault of B.H. and acquitted on all other counts. The circuit court withheld sentence and imposed ten years' probation with six months of jail. Following a motion hearing, the circuit court held that Taylor did not qualify for an exemption from the sex offender reporting requirement under WIS. STAT. § 301.45(1m)(a). It ordered him to report as a sex offender and ordered that at the age of twenty-five he is permitted to petition the court to be exempt from reporting.

The no-merit report identifies six potential issues for appeal. As a threshold matter, the report correctly notes that any prejudice Taylor seeks to establish relative to errors by counsel or the court must relate to the sole charge on which Taylor was convicted, a count of second-degree sexual assault of B.H. *See State v. Prineas*, 2009 WI App 28, ¶35, 316 Wis.2d 414, 766 N.W.2d 206 (defendant cannot show prejudice as to a charge on which jury acquitted).

The first issue addressed by the report is whether counsel was ineffective for failing to request severance of the charges, and the report concludes that there would have been no arguable merit to a contention that joinder was not proper here under the "same or similar character" requirement of WIS. STAT. § 971.12(1), given that two of the alleged incidents involving different victims took place at the same location, on the same date, with the same

witnesses. The report also concludes that counsel was able to use the joinder for strategic advantage. Specifically, the fact that the two girls involved had met and discussed the alleged incidents with each other was used by counsel to support the defense theory that the allegations were fabricated out of jealousy over Taylor's attention to multiple girls. This strategy, the report notes, also served to tie together E.E.'s account, which could be attacked as inconsistent with the evidence, and B.H.'s account, which depended entirely on credibility, in order to taint both with doubt. We conclude that there is no arguable merit to an argument that counsel's reasonable, tactical decisions here constitute deficient performance. See *State v. Oswald*, 2000 WI App 2, ¶66, 232 Wis. 2d 62, 606 N.W.2d 207.

The second issue is whether the circuit court erred in evidentiary rulings adverse to Taylor relating to other acts evidence, cross examination of the nurse who performed E.E.'s sexual assault exam, and cross examination of E.E. The report concludes that any error as to the potential other acts evidence was harmless because the other acts evidence was never admitted at trial. The limitations on cross examination of E.E. and the nurse who examined her are likewise irrelevant because Taylor was acquitted of all charges involving E.E.

The third issue concerns the prosecutor's telling jurors, in closing argument, "[W]e submit that after you deliberate in this case, not only should you, but you must, if you are beholden to your duty as a juror, you must find Jesse Taylor guilty of each and every count." Defense counsel objected to the use of "must" rather than "should," on the grounds that it misstated the jury instruction. The circuit court overruled the objection on the grounds that the statement would have been reasonably understood by jurors as a "moral imperative" simply to do their duty as jurors. The jury was correctly instructed on this topic, and we see no arguable merit to a contention that jurors would not have followed the instructions. See *State v. Hoover*, 2003

WI App 117, ¶29, 265 Wis. 2d 607, 666 N.W.2d 74 (“an error may be rendered harmless if other correct statements of law are contained in the instructions”).

The fourth issue the report addresses is whether there was sufficient credible evidence to support the guilty verdict, and the report sets forth the applicable standard of review and the evidence satisfying the elements of the crime of conviction. To prove attempted second-degree sexual assault of a child, the State had to show that Taylor intended to commit second-degree sexual assault of a child by having sexual contact with a person under the age of sixteen, with the intent to become sexually gratified or aroused, and did acts toward the commission of that crime that demonstrated unequivocally that he formed the intent and would have committed that crime except for the intervention of another person or some extraneous factor. B.H. testified that she was fifteen when she met up with Taylor at a park during a festival, that they had walked together to a playground and talked, and that Taylor started kissing her and put his hand inside her pants and touched the outside of her vagina as she tried to stop him. She testified that he stopped touching her when her friends walked over to them. We conclude that there is no arguable merit to a contention that the evidence, viewed in the light most favorable to the verdict as it must be, is not sufficient to support the verdict. See *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

The fifth issue is whether counsel was ineffective for failing to object to ambiguous jury instructions that may have deprived Taylor of the right to a unanimous verdict or created a reasonable likelihood that the jury applied them in an unconstitutional manner. The potential ambiguity arises from the fact that two of the counts involving B.H. dealt with sexual contact with the vagina and one dealt with sexual contact with the breast. The instructions, however, define “sexual contact” as “intentional touching of the breast or vagina,” a definition that

eliminates the distinction between the two types of counts. We conclude that there is no arguable merit to a contention that any potential confusion was not dispelled by the court's correction of the definition while giving the instructions, by the correct statements of the counts on the verdict forms, and by the amended information listing the location, dates, and alleged conduct related to each count, which was provided to the jury upon its request. See *Hoover*, 265 Wis. 2d 607, ¶29 (“an error may be rendered harmless if other correct statements of law are contained in the instructions”).

The sixth issue identified by the report is whether the court erred in denying Taylor's motion to be exempt from sex offender registration. The court ordered Taylor to register and permitted him to petition the court at age twenty-five to lift the requirement. The statute permitting exemptions to sex offender registration has four requirements, and all must apply in order to qualify for an exemption. Under the statute, the circuit court makes the determination as to whether the requirements for the exemption have been satisfied. WIS. STAT. § 301.45(3)(b). Such determinations are made in the exercise of the circuit court's discretion and are upheld so long as they are “the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purposes of achieving a reasonable determination.” *State v. Cesar G.*, 2004 WI 61, ¶42, 272 Wis. 2d 22, 682 N.W.2d 1 (quoted source omitted). It is not disputed that Taylor met three of the requirements relating to conviction under a qualifying statute, defendant's age, victim's age, and a lack of intercourse by use of force or violence. WIS. STAT. § 301.45 (1m)(a)1., 1g., 2. The fourth requirement is a determination by the circuit court that “[i]t is not necessary, in the interest of public protection, to require the person to comply with the reporting requirements under this section.” WIS. STAT. § 301.45(1m)(a)(3). In addressing the fourth requirement, the circuit court considered Taylor's

prior criminal record, Taylor’s “sense of entitlement,” Taylor’s age and inclination to be a “risk taker[,]” and the reliability of tests showing Taylor was a low risk to re-offend. We conclude that there is no arguable merit to a contention that the process employed by the circuit court, which included a hearing at which a Department of Corrections psychologist testified, failed to demonstrate that the court properly exercised its discretion.

In sum, this court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit and that no procedural trial errors occurred. Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Taylor further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Cole Daniel Ruby is relieved from further representing Jesse L. Taylor in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals