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DISTRICT IV

March 9, 2016

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

2014AP731-CRNM State of Wisconsin v. Duane J. Stevens (L.C. # 2010CF64)

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

Duane Stevens appeals a judgment convicting him, following a jury trial, of second degree sexual assault of a child. Attorney Faun Moses has filed a no-merit report seeking to withdraw as appellate counsel.[1] *See* WIS. STAT. RULE 809.32 (2013-14);[2] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90,

[1] Attorney Catherine Malchow has subsequently been substituted for Moses, and has not withdrawn the no-merit report.

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

403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence, several circuit court rulings, and the sentence. Stevens was sent a copy of the report, and 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

We begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places many of the other potential issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal, rather than a retrial.

The general test for sufficiency of the evidence is whether the evidence 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 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). With respect to the charge in this case, the elements the State needed to prove were that: (1) Stevens had sexual intercourse with B.D.S.—which by statutory definition would include any intrusion, however slight, by an object into the genital opening of another at the defendant's instruction; and (2) that B.D.S. was under the age of sixteen at the time. WIS. STAT. §§ 948.01(6) and 948.02(2); WIS JI—CRIMINAL 2104 and 2101B.

B.D.S. testified that Stevens lived in the same house with her and her mother for several years. When B.D.S. was fifteen, Stevens started to pay a lot of attention to her and began saying and doing inappropriate things, such as asking her whether she was a virgin, having her describe her past sexual experiences in explicit detail, and hugging and kissing her. After several months

of that type of conduct, on one afternoon Stevens told B.D.S. that he wanted to help her become a better lover. Stevens got a vibrator and directed B.D.S. to take off her pants and underwear and use the vibrator in front of him. After B.D.S. repeatedly told Stevens no, and that she was not comfortable with that, Stevens then directed her to get under the covers so he could talk her through various techniques. B.D.S. then complied, and Stevens began breathing heavily as he told B.D.S. to pull the vibrator in and out of her vagina and to contract her pelvic muscles.

The credibility of B.D.S.'s testimony was for the jury to decide, and if accepted as true, was plainly sufficient for a jury to find each of the required elements of the offense beyond a reasonable doubt.

Other Acts Evidence

Prior to trial, the court granted a motion by the State to admit other acts evidence relating to a prior sexual assault conviction against Stevens. In the other case, Stevens was living in the same residence with a family that had a thirteen-year-old girl. Stevens began spending a lot of time with the teenager, staying up late watching movies with her, and ultimately had her perform oral sex on him.

Under WIS. STAT. § 904.04(2), evidence of other crimes or acts may be admissible when offered for the purpose of establishing a plan or motive that reduces the possibility that the charged conduct was innocent. However, the evidence still must be relevant under WIS. STAT. §§ 904.01 and 904.02, in that it relates to a fact or proposition of consequence to the determination of the action, and its probative value must not be substantially outweighed by the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 785-89, 576 N.W.2d 303 (1998). Wisconsin courts apply a "greater latitude

rule" that permits other acts evidence to be admitted more liberally in sexual assault cases—particularly those involving children. ***State v. Marinez***, 2011 WI 12, ¶20, 331 Wis. 2d 568, 797 N.W.2d 399.

The circuit court ruled that the other acts evidence was offered for the permissible purpose of showing that Stevens had a method or plan of grooming teenagers with attention as a preface to sexual activity. It further concluded that the evidence was relevant to determining whether Stevens had engaged in the conduct alleged in the current case, and that its probative value outweighed its prejudicial effect. In sum, the record shows that the circuit court reasonably exercised its discretion in admitting the other acts evidence. In addition, the court provided the jury with a cautionary instruction to consider the evidence only with regard to motive, intent, preparation or plan, and not to conclude that Stevens was a bad person or acted in conformity with a certain character trait. We agree with counsel that there is no arguable basis to challenge the court's ruling.

Voir Dire

The circuit court refused to strike a potential juror who worked at Columbia Correctional Institution. However, the record plainly shows that the circuit court reasonably exercised its discretion after questioning the juror about his ability to set aside his own experiences and opinions, listen to the evidence and judge's instructions, and consider the case impartially.

Sentence

A challenge to Stevens' sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and

it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Stevens was afforded an opportunity to comment on the PSI and to address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court characterized Stevens' obsessive behavior with the victim as "absolutely sick." With respect to Stevens' character, the court noted that Stevens was highly manipulative and refused to accept responsibility for his behavior. The court saw very little hope for rehabilitation, given Stevens' failure to recognize or acknowledge that he did anything wrong. The court concluded that a prison term was necessary for punishment.

The court then sentenced Stevens to seven years of initial confinement and five years of extended supervision, to be served consecutive to another sentence Stevens was already serving. The components of the bifurcated sentence were within the applicable penalty ranges and the total confinement period constituted only thirty percent of the maximum exposure Stevens faced. *See* WIS. STAT. §§ 948.02(2) (classifying second degree sexual assault of a child as a Class C felony) and 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence imposed here was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v.***

Grindemann, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals