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**DISTRICT I**

April 28, 2016

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

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2015AP483-CRNM      State of Wisconsin v. Douglas C. Schmidt  
(L.C. #2011CF4502)

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

Douglas C. Schmidt appeals from a corrected judgment, entered upon a jury's verdict, convicting him of two counts of second-degree sexual assault of a child under the age of sixteen. *See* WIS. STAT. § 948.02(2) (2011-12).<sup>1</sup> Schmidt's postconviction and appellate lawyer, Paul G. Bonneson, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Schmidt has not responded. After independently reviewing the record and the no-merit report, we conclude there are no issues of arguable merit that could

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

be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

### **BACKGROUND**

Schmidt was charged with two counts of second-degree sexual assault of a child under the age of sixteen stemming from events that took place in August 2011. At the time, Schmidt was twenty-two years old and his victim was thirteen.

The case proceeded to trial and, after approximately thirty minutes of deliberation, the jury convicted Schmidt of both charges. The trial court imposed two consecutive sentences of six years of initial confinement and four years of extended supervision.

In his no-merit report, counsel addresses whether there would be arguable merit to an appeal on two issues: (1) whether there is sufficient credible evidence to support the jury's verdicts; and (2) whether the trial court properly exercised its sentencing discretion. For the reasons explained below, we agree with the conclusion that there would be no arguable merit to pursuing these issues on appeal.

### **DISCUSSION**

#### ***A. Sufficiency of the Evidence***

Counsel first addresses whether the evidence is sufficient to support the jury's verdict. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the inference necessarily drawn by the jury. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury's verdict will be reversed “only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury

could have found guilt beyond a reasonable doubt.”” *State v. Alles*, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

To convict Schmidt of second-degree sexual assault of a child under the age of sixteen, the State was required to prove: (1) Schmidt had sexual contact and/or intercourse with the victim; and (2) the victim was under the age of sixteen years at the time of the alleged sexual contact and/or intercourse. *See* WIS JI—CRIMINAL 2104. The jury was instructed that consent to the sexual contact and/or intercourse was not a defense. *See id.*

The trial court further instructed the jury that sexual contact encompassed Schmidt’s intentional touching of the victim’s vagina either directly or through clothing and the victim’s touching of Schmidt’s penis if Schmidt intentionally caused or allowed the victim to do that touching. *See* WIS JI—CRIMINAL 2101A. The State had to prove Schmidt acted with the intent to become sexually aroused or gratified. *See id.*

To define sexual intercourse, the trial court explained that the term means any intrusion, however slight, by any part of a person’s body or of any object, into the genital or anal opening of another. *See* WIS JI—CRIMINAL 2101B. Emission of semen is not required, and the term includes cunnilingus and fellatio. *See id.* Finally, the act of sexual intercourse had to be either by Schmidt or upon his instruction. *See id.*

At the time of trial, the victim was fourteen. She identified Schmidt and testified that he was her older sister’s friend. She said she first met Schmidt when she was thirteen; however, she told him she was fourteen as her birthday was only days away. Schmidt told her he was sixteen. When she told him she did not believe him, Schmidt said he was eighteen. At some point, the victim found out from her sister’s boyfriend that Schmidt was twenty-two years old.

The victim described two incidents that occurred when Schmidt was at her home. During the first incident, the victim testified that the two were in the living room of her home when Schmidt put his hand down her shorts inside her underwear and “moved it around” while she was lying on the couch. Although she did not say anything to him, the victim testified that she felt uncomfortable because she “knew it wasn’t okay.” She said that Schmidt then put his fingers inside her vagina. The victim also described touching Schmidt’s penis and performing fellatio on him. She said that he ejaculated. During these events, the victim also described Schmidt performing cunnilingus on her.

The second incident took place a day or two later in the victim’s bedroom. The victim again described acts of fellatio and cunnilingus with Schmidt. She said that Schmidt ejaculated on a blanket on her bed, which she washed after he left.

In addition to the victim’s testimony, the jury heard that the victim’s father had reported concerns to the West Allis Police Department regarding the victim’s relationship with Schmidt after learning that the two had had “physical contact.” Also during the State’s case-in-chief, the jury heard testimony provided by a detective, the victim’s sister, the girlfriend of the victim’s father, and Schmidt’s roommate at the time (who, at that point, was also the boyfriend of the victim’s older sister). These witnesses provided circumstantial evidence corroborating the victim’s testimony.

Because there was no physical evidence that the sexual assaults occurred at the victim’s home, this case boiled down to a credibility contest. Schmidt did not testify nor were there any other defense witnesses. The theory of defense was that the victim had made up the allegations for attention. The jury was not convinced.

We conclude that sufficient evidence of guilt exists to support the verdicts on the two counts of sexual assault: count one related to the incident in the living room of the victim's home and count two related to the incident in the victim's bedroom. An appellate challenge to the sufficiency of the evidence would lack arguable merit.

### ***B. Sentencing Discretion***

The second issue counsel addresses is whether the trial 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 trial 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 trial 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 sub factors. *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 trial court's discretion. *See Gallion*, 270 Wis. 2d 535, ¶41.

Here, Schmidt's trial counsel requested probation. In the event the trial court did not deem probation appropriate, Schmidt's trial counsel requested that he receive concurrent sentences of five to ten years of initial confinement followed by five years of extended supervision.

In fashioning its sentence, the trial court reflected on Schmidt's extensive history of sexually inappropriate behavior. The trial court concluded that the State was correct in

describing Schmidt as having manipulated and groomed a child to gratify his own sexual needs. Additionally, the trial court noted that Schmidt was placed on probation twice before and was revoked both times. The trial court found that this was a poor reflection of Schmidt's character and demonstrated that he was a danger to the public who needed a long prison sentence.

The trial court imposed two consecutive sentences of six years of initial confinement and four years of extended supervision. In so doing, the trial court explained that this was the minimum amount of time necessary to protect the public from Schmidt and to allow him to be rehabilitated.

The trial court's sentence is 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 public sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There were no improper factors considered by the court in setting forth its sentence. There is no arguable merit to a claim the trial court erroneously exercised its sentencing discretion.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved of further representation of Douglas C. Schmidt in this matter. *See* WIS. STAT. RULE 809.32(3).

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