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June 7, 2016

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

2014AP2529-CRNM State of Wisconsin v. Richard Ellery Morisett, Jr.
(L. C. No. 2013CF95)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Richard Morisett, Jr., has filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge Morisett's convictions for two counts of incest with a child as a persistent repeater, and one count each of sexual exploitation of a child and possession of child pornography. Morisett has filed a response challenging his convictions and sentence. Upon our independent review of the record as mandated by ***Anders v. California***,

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

386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal.

The State charged Morisett with the following eight crimes: two counts of sexual assault of a child under sixteen years of age, both counts as a repeater and both counts involving a then fifteen-year-old girl; intentional photographing of the girl by a sex offender without consent; possessing child pornography of the girl; three counts of incest as a persistent repeater; and one count of sexual exploitation of a child, the latter four counts involving a fifteen-year-old boy. The circuit court granted Morisett's motion to sever the counts regarding the girl from those regarding the boy, and the counts regarding the boy proceeded to trial. A jury found Morisett guilty of the crimes charged, but the State subsequently moved to dismiss one of the incest counts, conceding it had not met its burden of proof as to the date of that offense. The circuit court consequently dismissed that count.

The parties also reached a resolution of the four counts involving the girl. In exchange for Morisett's no contest plea to possession of child pornography, the State agreed to dismiss the remaining counts and join in defense counsel's recommendation for a concurrent sentence of three years' initial confinement and five years' extended supervision.[2] Morisett's convictions for incest as a persistent repeater exposed him to a life sentence on each count without the possibility of parole or extended supervision. The maximum possible sentences for sexual exploitation of a child and possession of child pornography were forty years and twenty-five years, respectively.

[2] Although Morisett pleaded no contest to count 5, possession of child pornography, the judgment of conviction indicates he entered a "not guilty" plea to that count. Because this appears to be a clerical error, upon remittitur, the circuit court shall enter an amended judgment of conviction correctly reflecting Morisett's no contest plea to possession of child pornography.

The court imposed concurrent life sentences without the possibility of parole or extended supervision for the incest convictions, with concurrent sentences totaling thirty-eight years for the sexual exploitation and child pornography convictions.

Any challenge to the jury's verdicts would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining a jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, the State established the requisite family relationship for incest. The child testified that on March 27, 2013, Morisett video recorded the child masturbating and the child performed oral sex on Morisett while Morisett continued to record the interaction. The child also testified that in "mid-fall" of the previous year, Morisett had mouth to anus sex with him, and the two performed oral sex on each other on additional occasions within the past year, though the child could not recall specific dates.

Douglas County sheriff's detective John Parenteau, who has specialized training in computer and cellular phone forensics, testified that during his examination of Morisett's cellular phone, he discovered the March 27, 2013 video recording of the child. Parenteau testified that in a subsequent police interview, Morisett stated he was "pretty messed up that night," the child had started masturbating and, "for some stupid reason," Morisett started to videotape it. Morisett also confirmed the child was performing oral sex on Morisett in the video.

To the extent Morisett challenges the child's credibility and otherwise claims there was conflicting testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found

credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Morisett's convictions.

In his response, Morisett claims his counsel would not permit him to testify at trial. The record belies this claim. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Morisett in an on-the-record colloquy, informing him of both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, and agreeing that nobody had made any threats or promises to influence his decision, Morisett confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

There is no arguable merit to a claim that the circuit court should have granted Morisett's mistrial motions. Whether to grant a mistrial is within the circuit court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The circuit court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id.*** We will uphold the circuit court's discretionary decision if the court examined the relevant facts, applied a proper legal standard, and employed a rational decision-making process. *See* ***id.*** at 506-07. Not all errors warrant a mistrial, and it is

preferable to employ less drastic alternatives to address the claimed error. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

Here, defense counsel initially moved for a mistrial based on the following exchange that occurred in front of the other potential jurors during voir dire. When asked whether any of the jurors heard or knew anything about the instant case, one juror stated: "Not necessarily this case, but I've heard of the defendant around town." When the court recounted that the juror did not answer affirmatively when earlier asked whether anyone knew the defendant, the juror stated: "Well, I don't know him personally. I've just heard rumors around town of similar cases in the past." The court then brought the juror and the attorneys into chambers for additional questioning. Outside the presence of the jury panel, the court asked what the juror was specifically referring to, and the juror responded: "Just accusations, you know, around the community in the past, not necessarily this case, but in the past about molestation." Defense counsel moved to strike the juror for cause and moved for a mistrial, arguing the panel was tainted by the juror's comments that "she was aware of [Morisett] because of rumors of molestation in the past."

The circuit court struck the juror for cause, but denied the motion to dismiss, noting it interpreted the juror's comments to be more about allegations of molesting generally, "not specifically to [Morisett]." The court also noted that any possible effect of the juror's comments could be cured by instructing the jury it could consider only the evidence presented during the trial. The jury ultimately received a curative instruction, including the directive that "[a]nything you may have heard during the jury selection process from the Court, the lawyers or other prospective jurors, is not evidence." We presume the jurors acted in accordance with the instructions, *see* ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988),

and "[p]otential prejudice is presumptively erased when admonitory instructions are properly given by a trial court." *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998).

Defense counsel filed a second mistrial motion, claiming that the testimony of police detective Michelle Lear violated a court order limiting the admission of statements Morisett made during a post-arrest telephone call to the child, in which he referenced the video on the phone and instructed the child to not say anything to the police "about last night." During that same call, Morisett also stated, "I'm going to prison." Although the court admitted statements from the call, it specifically excluded Morisett's comment about going to prison. At trial, Lear described the telephone call, recounting that Morisett said, "I'm in trouble." Although defense counsel argued this contravened the circuit court's order, the court disagreed and denied the motion, concluding it did not deem Lear's reference to "trouble" as a violation of the order prohibiting any reference to Morisett's "going to prison" statement.

At the close of the State's evidence, defense counsel renewed his motion for a mistrial, citing the potential juror's comments during voir dire, Lear's statement at trial, and the testimony of Superior police officer Thomas Champaigne, who testified that he participated in a search of Morisett's residence and "knew him from prior law enforcement contacts." Defense counsel argued that the cumulative effect of all three comments denied Morisett a fair and impartial trial. The circuit court reiterated its reasons for denying the earlier motions and noted that Champaigne's reference to prior police contacts could mean speeding tickets, and recounted that there was no discussion of "Morisett being previously arrested or convicted or the nature of any prior arrests or convictions." The circuit court determined that none of the challenged

statements, alone or cumulatively, warranted a mistrial. The record supports the circuit court's conclusion that the drastic remedy of a mistrial on these grounds was not necessary.

The record discloses no arguable basis for withdrawing Morisett's no contest plea to possession of child pornography. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Morisett completed, informed Morisett of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no contest plea. The circuit court confirmed Morisett's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Morisett committed the crime charged. Although the circuit court failed to advise Morisett of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c), the record shows Morisett is a United States citizen not subject to deportation. Any challenge to the plea on this basis would therefore lack arguable merit. The record shows the plea was knowingly, voluntarily, and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing sentences authorized by law, the court considered the seriousness of the offenses; Morisett's character, including his criminal history; the need to protect the public; and the mitigating circumstances Morisett raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Morisett's sentences are so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal.[3]

Therefore, upon the foregoing,

IT IS ORDERED that the judgment is modified and, as modified, summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of further representing Morisett in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] We observe that the presentence investigation report in this matter, which is record item 18, has not been sealed. "Except as [otherwise] provided …, after sentencing the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court." WIS. STAT. § 972.15(4). Therefore, upon remittitur, we direct the clerk of the circuit court to seal the presentence investigation report.