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DISTRICT I

September 2, 2016

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

2015AP2310-CRNM State of Wisconsin v. Duane N. Whiteside
(L.C.# 2013CF3054)

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

Duane N. Whiteside appeals from an amended judgment, entered upon a jury's verdict, convicting him of interference with child custody by a parent. *See* WIS. STAT. § 948.31(3)(a) (2013-14).[1] Whiteside's postconviction and appellate lawyer, Urszula Tempska, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Whiteside has not responded. After independently reviewing the record and the

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

no-merit report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

BACKGROUND

The charge against Whiteside stemmed from a series of events that occurred in June 2013 when Whiteside took his eighteen-month-old daughter, K.W.S., to Georgia. According to the amended complaint, K.W.S.'s mother, S.S., agreed to Whiteside taking K.W.S. on a trip to Georgia from June 8 to June 12, 2013. On June 12th, S.S. contacted Whiteside to pick up K.W.S. Whiteside, however, did not answer his phone or return S.S.'s phone calls until two days later, at which point he asked her to come to his house to discuss K.W.S. When S.S. arrived at Whiteside's residence, he told her that K.W.S. was in Georgia with Quturah Williams, the mother of another of Whiteside's children. According to S.S., Whiteside told her he wanted Williams to raise K.W.S. because she is a better mother.

S.S. traveled to Georgia and tried for five days to get K.W.S. back. S.S. ultimately returned to Wisconsin without K.W.S. and contacted the Milwaukee police. K.W.S. was eventually turned over to police in Georgia on July 10, 2013.

Following a four-day trial, the jury convicted Whiteside of interference with child custody by a parent.[2] The trial court sentenced Whiteside to two years and six months of initial confinement and three years and six months of extended supervision.

[2] A companion case against Whiteside (Milwaukee County Circuit Court Case No. 2014CF3028) was tried with the case that is the subject of this no-merit appeal. The jury acquitted Whiteside of the charges in that case and any potential appellate issues relative to those charges are not presently before us.

In her no-merit report, counsel addresses whether there would be arguable merit to an appeal on four issues: (1) whether the prosecutor's remarks during her opening and closing arguments were so unfair as to constitute a denial of due process; (2) whether the trial court properly exercised its sentencing discretion; (3) whether Whiteside received the effective assistance of trial counsel; and (4) "whether any other non-harmless legal error(s) marred" Whiteside's prosecution. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit.

We have also independently considered whether there is sufficient credible evidence to support the jury's verdict, an issue counsel does not specifically address. We will briefly discuss both this and the sentencing issue counsel has identified.

DISCUSSION

A. *Sufficiency of the Evidence*

We begin with the sufficiency of the evidence. This court views 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 Whiteside of interference with child custody by a parent, the State was required to prove: (1) K.W.S. was under the age of eighteen; (2) Whiteside was a parent of K.W.S.; (3) Whiteside concealed K.W.S. from her mother; and (4) Whiteside intentionally concealed K.W.S. *See* WIS JI—CRIMINAL 2168. The jury was instructed that "[c]onceal means to hide the child or to do something else which prevents or makes more difficult the discovery of the child by the other parent." *See* ***id.***

S.S. testified that she and Whiteside were K.W.S.'s parents. S.S. further testified that in June 2013, a court order was in effect regarding the placement and custody of K.W.S. The court order provided that S.S. and Whiteside "shall have joint legal custody, primary physical placement. Mother shall have placement at reasonable times upon reasonable notice."

S.S. explained that she allowed Whiteside to take K.W.S. to Georgia for three days in June 2013. When K.W.S. was not returned to her, S.S. called Whiteside and left messages. Days later, when Whiteside eventually answered the phone, he told S.S. that K.W.S. was in Georgia with Williams and that Williams was going to keep her for the summer. When S.S. asked for the address where K.W.S. was staying, Whiteside refused to give it to her. According to S.S., Whiteside eventually told her that if she wanted K.W.S. back she would have to fly to Georgia and get her.

S.S. flew to Georgia. Upon her arrival, she contacted Whiteside who instructed her to sit by a doorway in the airport and told her that someone was going to bring K.W.S. to her. After waiting eight hours with no sign of K.W.S., S.S. contacted the Atlanta police. S.S. spent five days in Georgia trying to get K.W.S. back to no avail. She ultimately returned to Wisconsin,

without K.W.S., and contacted the Milwaukee police who helped her to locate K.W.S. in Georgia in July 2013.

S.S. said that during the time when K.W.S. was missing, she spoke or left messages for Whiteside on more than twenty occasions stating that she wanted to see K.W.S., inquiring as to her whereabouts, and asking if K.W.S. was still alive. During the times she talked to Whiteside, S.S. testified that he lied as to where K.W.S. was located.

A Milwaukee police detective testified to various attempts that he made to contact Whiteside in order to find K.W.S. Over the course of two weeks, the detective contacted him approximately thirty times. Eventually, after speaking with Williams on July 7, 2013, he learned that she had K.W.S. Williams, however, refused to give him her location. The detective explained that the police department worked with the Wisconsin Clearinghouse on Missing and Exploited Children and Adults, which generated a missing child poster of K.W.S. On July 10, 2013, the detective received an anonymous phone call from a child welfare worker in Atlanta reporting K.W.S.'s location. Shortly thereafter, Williams took K.W.S. to a nearby police station.

Whiteside testified on his own behalf. He said that he told S.S. he was taking K.W.S. to Georgia "[f]or the duration of the summer" and that she "didn't have any objections." Whiteside denied telling S.S. that the trip to Georgia would only be for three days. After returning to Milwaukee without K.W.S., Whiteside checked in with S.S. via text message. At that point, S.S. told him she missed K.W.S. and wanted Whiteside to get her back. Whiteside testified that he told S.S. he did not have the money for a return trip and that if she wanted K.W.S. back, S.S. would have to go to Georgia herself. He said that S.S. knew K.W.S. was with Williams and

explained that he did not give S.S. Williams's phone number because "[s]he already had it." Whiteside further testified that S.S. knew Williams's address.

However, Whiteside admitted that Williams contacted him at the end of June and said that she no longer wanted to have K.W.S. At that point, he instructed Williams to turn K.W.S. over to a female friend of his whose name he did not initially disclose to police.

Whiteside also acknowledged that when officers asked him for Williams's address on numerous occasions, he refused to give it. He said he explained to the police that he had joint custody of K.W.S. and that K.W.S. was in Georgia with Williams with both parents' knowledge and was, therefore, not missing.

The jury, which is the sole judge of credibility, was entitled to accept the evidence presented by the State over Whiteside's testimony. *See* ***State v. Burgess***, 2002 WI App 264, ¶23, 258 Wis. 2d 548, 654 N.W.2d 81 ("[T]he jury is sole judge of credibility; it weighs the evidence and resolves any conflicts."). We conclude that an appellate challenge to the sufficiency of the evidence would lack arguable merit.

B. ***Sentencing Discretion***

Counsel addresses 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.

In fashioning its sentence, the trial court reflected on that fact that the offense was a felony, a child was involved, and the ordeal lasted for a month, "[w]hich when your child is missing and gone, every hour is going to seem like a lifetime." The trial court emphasized: "It's absolutely incredible, meaning not believable[,] to think that you and Ms. Quturah Williams did not know during the five-day period in June that [S.S.] was there [in Atlanta] and wanted her child." While taking into account Whiteside's contributions to the community and his positive attributes, the trial court nevertheless concluded that a message had to be sent to the community that what happened in this case is unacceptable.

The trial court imposed a six-year sentence, which was less than half of the maximum time available. *See* WIS. STAT. § 948.31(3)(a), 939.50(3)(f). 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 amended judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Urszula Tempska is relieved of further representation of Duane N. Whiteside in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen

Clerk of Court of Appeals