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**DISTRICT IV**

September 6, 2016

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

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2016AP167-CRNM State of Wisconsin v. Jorge Eduardo Lara Saldivar
(L.C. # 2013CF64)

Before Lundsten, Sherman and Blanchard, JJ.

Jorge Lara Saldivar appeals a judgment convicting him, following a jury trial, of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2) (2011-12).[1] Attorney Timothy O'Connell has filed a no-merit report and seeks to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14); *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State***

[1] All further references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

***ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence at trial and the sentencing. Lara Saldivar was provided a copy of the report and has filed a response. Upon reviewing the entire record, as well as the no-merit report and Lara Saldivar's response, we conclude that there are no arguably meritorious appellate issues.

Lara Saldivar went to trial on the charge of first-degree sexual assault of a child under the age of 16 by use or threat of force or violence. WIS. STAT. § 948.02(1)(c). Following the close of evidence, the circuit court deemed it appropriate to instruct the jury regarding the lesser-included offense of second-degree sexual assault of a child, WIS. STAT. § 948.02(2), in addition to first-degree sexual assault. The jury convicted Lara Saldivar of second-degree sexual assault of a child.

At trial, the victim, R.H., testified that she was fifteen years old when Lara Saldivar grabbed her by the wrist as she was seated near a fire pit at her father's home and pulled her behind a recreational vehicle parked in the yard. R.H. testified that she resisted the pulling, but was unsuccessful. R.H. testified that she did not scream because she was scared of what Lara Saldivar would do to her if she fought back too hard. R.H. testified that Lara Saldivar pushed her to the ground, held her down, pulled her shorts down, and forced his penis into her vagina. R.H. explained that she told Lara Saldivar to stop, but that Lara Saldivar continued to assault her. R.H. was eventually able to convince Lara Saldivar to let her get up to use the bathroom, and R.H. headed toward the house. When she was about halfway there, she started running away. R.H., who testified she was "in panic mode," ran through the streets of Montello, eventually ending up at a bar owned by someone R.H. knew. While at the bar, R.H. encountered Lara Saldivar, who, R.H. testified, screamed at her and told her to shut up. R.H. revealed to one of the

bartenders and the owner that Lara Saldivar had raped her. The bartender, who described R.H. as disheveled and hysterical when she entered the bar, called the police. On cross-examination, R.H. acknowledged that Lara Saldivar and his wife indicated concern that R.H. was in ongoing communication with a man in his mid-thirties.

Wisconsin State Crime Laboratory DNA analyst Brittany Paulson testified that male Y-STR DNA profiles obtained from swabs of R.H.'s underwear and vagina were consistent with the Y-STR profile of Lara Saldivar. Paulson also testified that R.H. was the source of the major STR profile obtained from swabs obtained from Lara Saldivar's boxer shorts.

Lara Saldivar testified that he did not have sexual intercourse or sexual contact with R.H. at any time in his life. Lara Saldivar also testified that R.H. was angry with him because Lara Saldivar had told his wife, a relative of R.H., that he was aware R.H. was in communication with an older man and that Lara Saldivar had conveyed to R.H. that his wife was going to be having a discussion with R.H. regarding their concerns about the communication. Lara Saldivar also testified that R.H. threatened him that she would cause problems in his life if he caused problems in hers. Finally, Lara Saldivar testified that R.H. kissed him on the cheek that evening.

We agree with appellate counsel that there is no meritorious argument on appeal regarding the sufficiency of the evidence underlying the conviction. We review the sufficiency of the evidence in the light most favorable to sustaining the conviction, ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390, and will sustain the conviction unless "it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt," ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more

than one inference can be drawn from the evidence, we adopt the inference that supports the conviction. ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557.

The circuit court advised the jury that the State had to prove the following elements for the offense of second-degree sexual assault of a person who has not attained the age of 16: (1) that Lara Saldivar had sexual intercourse with R.H., and (2) that R.H. was under the age of 16 at the time of the alleged sexual assault. R.H.'s testimony is sufficient to satisfy both of these elements.[2]

We also agree that any challenge to the circuit court's sentence would lack arguable merit. Our review of the circuit court's sentence begins with the "presumption that the trial court acted reasonably," leaving the defendant with the burden to demonstrate "some unreasonable or unjustifiable basis in the record" in order for us to overturn it. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Lara Saldivar's potential maximum imprisonment was 40 years, with 25 years of initial confinement and 15 years of extended supervision. *See* WIS. STAT. §§ 948.02(2) (classifying second-degree sexual assault of a child as a Class C felony); 939.50(3)(c); 973.01(2)(b)3.; and 973.01(2)(d)2. The circuit court imposed a total of 18 years of imprisonment, with 10 years of initial confinement and 8 years of extended supervision, less than half the potential maximum.[3]

Our review of the record indicates that the circuit court complied with the requisite sentencing considerations set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535,

[2] Numerous other witnesses testified on behalf of the State and the defense.

[3] The circuit court deemed Lara Saldivar ineligible for the challenge incarceration or substance abuse programs.

678 N.W.2d 197. The circuit court indicated that it had considered the presentence report, and agreed with both counsel that the nature of the case was "extremely emotional" and presented "extremely difficult consideration[s]." Noting the seriousness of the offense, the court excluded probation as a sentencing option. Turning to ***Gallion***, the court considered Lara Saldivar's prior history and character, noting that Lara Saldivar's wife indicated in her statement at sentencing that Lara Saldivar was hard working and a good father. The court noted its observation that Lara Saldivar was very intelligent and had a lot of potential in terms of rehabilitation. The court also noted that Lara Saldivar did not have a history of violent offenses, but that his offense of conviction was violent. The court also indicated that it believed that Lara Saldivar engaged in "grooming type" conduct related to R.H.[4] While noting that Lara Saldivar seemingly possessed positive qualities, such as being hard working and a good father, the circuit court indicated its serious concern for Lara Saldivar's ability to control his sexual impulses, as well as his tendency to be manipulative. The court, acknowledging the possibility that Lara Saldivar may be deported, determined that Lara Saldivar presented a strong concern as it relates to protection of the public, whether the public was located in the United States or another country. And, while the court indicated its belief that Lara Saldivar's risk of violent recidivism was on the low end of the scale, the court determined that Lara Saldivar showed no remorse and was in denial, thus

[4] The circuit court received information from the Dane County district attorney's office relating to details of a sexual assault case that the district attorney's office had filed against Lara Saldivar with R.H. as a victim, and which the district attorney's office dismissed following Lara Saldivar's conviction in this matter in Marquette County. The court indicated at sentencing that it recognized Lara Saldivar had not been convicted in Dane County and that the court intended to consider the Dane County material only to help the court determine whether Lara Saldivar fit the profile of "being able to reckon with the circumstances that led him to this particular charge." The court indicated that it considered the Dane County materials in determining that Lara Saldivar engaged in grooming conduct and also considered the materials in terms of evaluating Lara Saldivar's character. *See* ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436 (to discern defendant's character, the sentencing court may consider uncharged and unproven conduct, as well as conduct for which defendant has been acquitted).

placing the public at higher risk. The court also emphasized that second-degree sexual assault of a child "is a very, very serious charge," concluding: "I can't think of a circumstance that is more troublesome to this Court than people that manipulate the most vulnerable people." Finally, the court concluded that Lara Saldivar exhibited no consciousness that what he did was wrong.[5]

In crafting its sentence, the circuit court considered the recommendations made by both counsel, and concluded that the recommendation made by the Department of Corrections in the presentence report, coupled with the ***Gallion*** factors, was the most appropriate sentence. We are satisfied that the court fulfilled its sentencing responsibilities.

A sentence well within the applicable statutory maximums is presumed not to be unduly harsh. Reviewing the record independently, as well as according the circuit court's analysis and decision due deference, we conclude that the sentence the court 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

[5] Though not raised by appellate counsel, we are satisfied that the circuit court's remarks relating to Lara Saldivar's lack of remorse, lack of consciousness of wrongdoing, and denial do not raise a concern that the court imposed a harsher sentence than it otherwise would have or comprised the court's sole considerations in sentencing Lara Saldivar, and, therefore, do not run afoul of ***Scales v. State***, 64 Wis. 2d 485, 495-97, 219 N.W.2d 286 (1974). As in ***State v. Baldwin***, 101 Wis. 2d 441, 457-59, 304 N.W.2d 742 (1981), the court considered lack of remorse and denial in tandem with numerous other considerations, and did not give undue weight to these considerations when fashioning its sentence.

Lara Saldivar raises numerous issues in response to the no-merit report[6] which fall into two basic categories: (1) ineffective assistance of counsel related to counsel's pretrial investigation and preparation for trial, cross-examination of witnesses, and presentation of evidence; and (2) questions related to the validity of the DNA testing and attendant trial testimony, as well as a suggestion that other testing should have been done. We conclude that neither category includes an arguably meritorious issue for appeal.

With regard to the ineffective assistance of counsel allegation, we have reviewed the trial transcript and find no indication that counsel failed to vigorously defend Lara Saldivar. Trial counsel ably questioned witnesses and, in particular, challenged the DNA analyst in her conclusions related to the potential sources of DNA evidence. And, counsel presented witnesses who supported Lara Saldivar's view of the evidence.

Lara Saldivar lists a variety of questions that he believes counsel should have asked witnesses and argues that trial counsel failed to appropriately investigate and prepare the case prior to trial. When challenging the effective assistance of counsel on the basis that counsel failed to adequately question witnesses or investigate a case, a defendant must allege with specificity what the questions or investigation would have revealed, and how an omission or omissions affected the outcome of the case. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Lara Saldivar fails in this respect. Lara Saldivar makes no attempt to show prejudice with regard to his allegations of deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (to prove ineffective assistance of counsel

[6] Appellate counsel did not file a supplemental no-merit report as permitted pursuant to WIS. STAT. RULE 809.32(1)(f) (2013-14).

defendant must show both deficient performance and that he was prejudiced by the deficient performance); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305 (same).

Lara Saldivar also questions the integrity of the DNA testing and analysis, suggesting that samples were contaminated or lost, and that the analyst erred in failing to consider that the DNA evidence attributed to R.H. that was obtained from his underwear could, in fact, have belonged to Lara Saldivar's wife, a relative of R.H., and may have been transferred when his wife folded his laundry. Lara Saldivar's allegations amount to nothing more than baseless supposition. Lara Saldivar presents us with no newly discovered evidence that causes us to question the integrity of the verdict.

Finally, in the course of our independent review, we consider whether there is an arguably meritorious argument to be made regarding the circuit court's decision to submit the lesser-included offense of second-degree sexual assault of a child over Lara Saldivar's objection. Following the close of testimony, the court held its instructions conference at which the district attorney requested that the court instruct the jury on second-degree sexual assault of a child in addition to the first-degree sexual assault charge with which Lara Saldivar was charged. Defense counsel objected to the inclusion of the second-degree sexual assault option. Second-degree sexual assault of a child is a lesser-included offense of first-degree sexual assault of a child.

Submission of the lesser-included offense is proper when there are reasonable grounds in the evidence to support an acquittal on the greater offense and a conviction on the lesser offense. ***Hawthorne v. State***, 99 Wis. 2d 673, 682, 299 N.W.2d 866 (1981). Whether the evidence supports the submission of the lesser-included offense instruction is a question of law which we review de novo. ***State v. Moua***, 215 Wis. 2d 511, 517, 573 N.W.2d 202 (Ct. App. 1997).

Our review of the trial testimony convinces us that the circuit court appropriately submitted the lesser-included second-degree sexual assault of a child instruction and verdict for the jury's consideration. We conclude that a reasonable view of the evidence supports a guilty verdict for second-degree sexual assault beyond a reasonable doubt and casts reasonable doubt as to the element of force required for conviction of first-degree sexual assault of a child. *See* ***id.*** at 518.

In ***State v. Fleming***, 181 Wis. 2d 546, 510 N.W.2d 837 (Ct. App. 1993), we considered whether a circuit court properly submitted a lesser-included offense to the jury over the defendant's objection. *See* ***id.*** at 551, 560-62. In concluding that the circuit court properly submitted the lesser-included offense in the context of intentionally causing bodily harm to a child, we noted that the greater offense, with which Fleming was originally charged, required proof, in addition to the lesser-included charge elements, of a high probability of great bodily harm to the child. *See* ***id.*** at 560-62. While there was medical evidence in the ***Fleming*** record supporting the great bodily harm element, the jury was not required to accept the testimony, even if the evidence stood uncontradicted. *See* ***id.*** at 561. We also noted that the jury was not instructed with regard to the definition of "great bodily harm," which could hamper the jury's ability to find beyond a reasonable doubt that Fleming intended to cause great bodily harm. ***Id.*** at 562. Here, the court followed the pattern instruction when instructing the jury on the elements of first-degree sexual assault. Neither the pattern instruction nor the governing statute, WIS. STAT. § 948.02(1)(c), defines "use or threat of force or violence." The jury was, however, also instructed pursuant to the pattern instruction that any consideration of R.H.'s conduct must be confined to the determination of whether Lara Saldivar had sexual intercourse with R.H. by the use or threat of force or violence.

In this case, the difference between first- and second-degree sexual assault of a child under the age of 16 turns on the element of "force." And while "use of force" evidence exists in the record, the jury was not required to accept it, even if the evidence stood uncontradicted. *See* ***Fleming***, 181 Wis. 2d at 561. Further, as in ***Fleming***, the jury was not instructed with regard to the definition of the critical differentiating element of "use of force" that was necessary to a conviction for first-degree sexual assault of a child. *See* ***id.*** at 562. The jury was, however, instructed to use its common sense and everyday life experiences in evaluating the evidence.

We conclude that a reasonable view of the evidence in this case permits acquittal on the greater charge and conviction on the lesser charge; thus, submission of the lesser-included offense is appropriate as a matter of law. *See* ***Hawthorne***, 99 Wis. 2d at 682.[7]

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32 (2013-14).

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2013-14).

[7] *See also* ***State v. Sarabia***, 118 Wis. 2d 655, 663, 348 N.W.2d 527 (1984) ("We hold that the defendant or the state may request and receive lesser included offense instructions, even when the defendant has given exculpatory testimony, if under a reasonable but different view of the record, the evidence and any testimony other than that part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge.").

IT IS FURTHER ORDERED that Attorney Timothy O'Connell is relieved of any further representation of Jorge Lara Saldivar in this matter pursuant to WIS. STAT. RULE 809.32(3) (2013-14).

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