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110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

September 27, 2016

To:

Hon. Timothy G. Dugan
Circuit Court Judge
Milwaukee County Courthouse
821 W. State St., BR. 10
Milwaukee, WI 53233-1427

John T. Wasielewski
Wasielewski & Erickson
Suite 211
1429 N. Prospect Ave.
Milwaukee, WI 53202

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Darrion C. Washington 625057
Racine Youthful Offender Corr. Facility
P.O. Box 2500
Racine, WI 53404-2500

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

2016AP86-CRNM State v. Darrion C. Washington (L.C. # 2014CF2470)

Before Kessler, Brennan and Brash, JJ.

Darrion C. Washington appeals from a judgment of conviction, entered upon a trial court's verdict, on one count of first-degree sexual assault of a child who has not yet attained the age of thirteen. Appellate counsel, John T. Wasielewski, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Washington was advised of his right to file a response, and he has responded. Upon this court's

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

independent review of the record as mandated by ***Anders***, counsel's report, and Washington's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

In 2014, H.W. reported to her mother that in 2010 and 2011, Washington had sexual contact with H.W. on multiple occasions. The criminal complaint primarily alleged multiple instances of "penis to buttocks" intercourse, which evidently involved him rubbing his penis in between H.W.'s buttocks, although the last interaction alleged in the complaint was an act of penis-to-anus intercourse. Washington opted for a bench trial rather than a jury trial. Following testimony, including testimony from both H.W. and Washington, the trial court convicted Washington. He was sentenced to twenty-five years' imprisonment, consisting of fifteen years' initial confinement and ten years' extended supervision.

The first issue counsel addresses on appeal is whether Washington's jury waiver was appropriate.[2] We agree that it was. The waiver was made in writing and on the record by Washington personally, and the trial court conducted a colloquy to ensure that Washington was making a voluntary and understanding waiver. *See* ***State v. Livingston***, 159 Wis. 2d 561, 569-

[2] We first considered whether there was any arguable merit to a challenge to the trial court's jurisdiction, as Washington was fourteen or fifteen years old at the time of the events underlying his charge, and first-degree sexual assault is not an offense for which the criminal court has original jurisdiction over a juvenile. *See* WIS. STAT. §§ 948.02(1)(e) (2009-10) & 938.138(1).

However, it is the date of the commencement of the action, not the date of the alleged offense, that governs which court has jurisdiction. *See* ***State v. Montgomery***, 148 Wis. 2d 593, 601, 436 N.W.2d 303 (1989). Further, the record clearly indicates that the delay between the offense dates and the charging date is the result of delayed reporting, not "manipulative intent" by the State. *See* ***State v. Velez***, 224 Wis. 2d 1, 16, 589 N.W.2d 9 (1999); ***State v. Becker***, 74 Wis. 2d 675, 677-79, 247 N.W.2d 495 (1976). Accordingly, we are satisfied that there would be no arguable merit to a challenge to the trial court's jurisdiction.

70, 464 N.W.2d 839 (1991); *see also* WIS. STAT. § 972.01(1). Washington acknowledged that a jury would have to be unanimous to convict him. *See* ***State v. Resio***, 148 Wis. 2d 687, 696-97, 436 N.W.2d 603 (1989). Trial counsel explained his reasons for recommending a bench trial, and Washington acknowledged counsel's explanation. There is no arguable merit to a challenge to the jury waiver.

The second issue counsel discusses is whether sufficient evidence supports the conviction. 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 one drawn by the fact-finder. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). We will overturn the verdict "'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 [fact-finder] 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). Moreover, the fact-finder is the sole arbiter of the credibility of the witnesses. *See* ***Poellinger***, 153 Wis. 2d at 506. "This court will only substitute its judgment for that of the trier of fact when the fact[-]finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

The State must prove two elements to secure a conviction on first-degree sexual assault of a child: that the defendant had sexual contact or sexual intercourse with the victim, and that the victim was under the age of thirteen at the time of the contact or intercourse. *See* WIS. STAT. § 948.02(1)(e) (2009-10); WIS JI—CRIMINAL 2102E. Washington was alleged to have assaulted H.W. by sexual contact. "Sexual contact" is an intentional touching of the victim's intimate part

or parts by the defendant, done for the purpose of sexually degrading or sexually humiliating the victim or sexually arousing or gratifying the defendant. *See* WIS. STAT. § 948.01(5)(a)1. (2009-10); WIS JI—CRIMINAL 2101A. Buttocks are an intimate part. *See* WIS. STAT. § 939.22(19) (2009-10).

H.W. testified about various instances of Washington's sexual contact with her, which also included instances of penis-to-vagina intercourse and fellatio. She testified about why she came forward when she did, which was after she had gotten in trouble with her mother for walking home from school with boys. She denied fabricating the assaults.

Washington testified and denied committing any of the assaults. He asserted he could not have committed any of the alleged contact because of a sexually transmitted disease—specifically, gonorrhea—which he said caused him to have near-perpetual discharge from his penis. He claimed to have contracted the infection when he was eleven and was sexually assaulted by a sixteen-year-old girl. Washington indicated that the infection had remained untreated for approximately seven years, although he claimed his symptoms, including painful urination, disappeared after a while.

The State called a sexual assault nurse examiner to testify in rebuttal. She explained that gonorrhea, untreated for seven years, would likely be very painful, and she noted that once a patient became symptomatic, symptoms would not disappear on their own.

When pronouncing its verdict, the trial court explained that it found H.W. credible and Washington not credible. It summarized the testimony upon which it relied. Given the trial court's credibility determinations, there was sufficient evidence to show that Washington committed first-degree sexual assault of a child. H.W. provided her date of birth, which

established that she was under age thirteen at the time of the assaults. She described multiple instances of sexual contact, including the originally alleged penis-to-buttocks contact, that Washington had with her.[3] Washington's intent is inferable from his actions and the circumstances of the case. *See* ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987). There is no arguable merit to a challenge to the sufficiency of the evidence to support the trial court's verdicts.

The last issue counsel discusses 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 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 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 subfactors. *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* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The trial court reiterated that, having listened to all of the testimony, it believed H.W. and did not believe Washington. It noted the seriousness of the offense, which began when H.W.

[3] We observe that "sexual contact" also includes "intentional penile ejaculation of ejaculate" onto any body part, clothed or unclothed, of the victim, done for the purpose of sexually degrading or sexually humiliating the victim, or sexually arousing or gratifying the defendant. *See* WIS. STAT. § 948.01(5)(b) (2009-10). H.W.'s testimony also established this type of contact.

was nine and went on for an extended period of time. While the trial court noted several mitigating factors, such as Washington's lack of a criminal record and his apparent victimization when he was ten or eleven himself, the trial court also noted that Washington still had not taken responsibility for anything that had happened. The trial court determined that probation would unduly depreciate the seriousness of the offense, that the nature of the offense warranted punishment, and that Washington needed "intensive treatment" free from outside distractions.

The maximum possible sentence Washington could have received was sixty years' imprisonment. The sentence totaling twenty-five years' imprisonment is well 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 so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the trial court's sentencing discretion.[4]

[4] In his response, Washington included a copy of a letter to Attorney Wasielewski, in which Washington wrote that he disagrees "with the unlawfully legal element acts displayed by [the trial court]. The statement made by him relating to my character as a person. And not even having the decency [to] fairly and justly review the case file evidence at the court hearing and sentencing."

We discern no meritorious issues from this complaint. One of the primary factors a court may consider at sentencing is the defendant's character, *see* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984), and that consideration will be informed by the defendant's demeanor at trial and other proceedings. At trial, the court will consider only that evidence presented by the parties, and it is not clear what evidence from sentencing Washington believes the trial court should have considered that it did not.

Our independent review of the record reveals no other potential issues of arguable merit.[5]

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney John T. Wasielewski is relieved of further representation of Washington in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] In his letter to counsel, Washington also asserts multiple instances of ineffective trial counsel. First, he complains that trial counsel allowed the State to "amend vital address victim statements in the criminal complaint. I believe if had been challenged, this could have possibly dismissed." The complaint misstated the address of the alleged assaults as being on 18th Street instead of 28th Street. The address, however, is not an element of the offense. *See* ***State v. Badzinski***, 2014 WI 6, ¶32, 352 Wis. 2d 329, 843 N.W.2d 29. Washington was further not deprived of any notice despite the error because the address was described as his grandfather's house. And, even if the error had been challenged and the charge dismissed as a result, the State would have been free to issue a revised complaint.

Second, Washington complains trial counsel did not provide copies of "suicide papers"—*i.e.*, a letter supposedly written by H.W.—or a copy of a CD containing the State's in-custody interview of Washington. It is not at all clear what issues Washington believes may stem from counsel's failure to provide copies of these items to Washington, if in fact that occurred.

Finally, Washington alludes to new evidence about why H.W.'s mother "would file a false criminal complaint report against" him and why a detective "purged his testimony" on the witness stand. Attorney Wasielewski asked Washington to elaborate, but as best we can tell, Washington provided no additional information to counsel. We further observe that the detective, who Washington may be alleging perjured himself on the stand, gave only the briefest testimony to establish the chain of custody for H.W.'s letter, which he obtained from her mother before logging it into inventory. On the record before us, we can discern no issues of arguable merit from Washington's vague and conclusory assertions to counsel.