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**DISTRICT II**

January 18, 2017

To:

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

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2015AP1793-CRNM      State of Wisconsin v. Roberto Loyola (L.C. # 2012CF1305)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Roberto Loyola appeals from a judgment of conviction for second-degree sexual assault of a child under sixteen and repeated sexual assault of the same child. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Loyola received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Loyola was charged with two counts of second-degree sexual assault of a child under sixteen and repeated sexual assault of the same child. A jury trial was held. The fifteen-year-old victim testified that she came to live in the same household as Loyola in January 2011. Sometime after that, in the warmer months, Loyola would come into the basement where the girl's bed was and get into bed with her because the basement was a cooler temperature. The girl explained that after some further time, when due to health issues Loyola was no longer able to use the stairs and slept in the first floor area, he asked her to massage his legs. Loyola eventually moved the girl's hands from his legs to his penis. The girl indicated that on more than fifty occasions, Loyola required her to take off her clothes and get into bed with him. Loyola would fondle her breasts and insert his fingers into her vagina. The girl indicated that on two occasions Loyola put his mouth on her vagina and on two other occasions he ejaculated onto her hand. The assaults mostly occurred when the girl returned home from school and no one else was at home. The assaults came to light in November 2012, when the girl's aunt appeared at the home unexpectedly and saw the girl dart away from Loyola's sleeping area. Loyola's defense counsel brought to light inconsistencies between the details the girl gave to various people and her testimony, that the girl's aunt and grandmother believed she had a reputation for being untruthful, the testimony of Loyola's wife that he had erectile dysfunction (ED), and that Loyola had health issues which were risk factors for ED. The jury found Loyola not guilty of one of the second-degree assault charges. Loyola was sentenced to concurrent terms of eight years' initial confinement and twelve years' extended supervision.

The no-merit report first correctly concludes that any defect in the preliminary hearing is moot. The report then discusses jury selection, whether improper argument was made in the opening and closing arguments, whether the objections during the prosecution's rebuttal closing argument were properly overruled, whether denial of the motion to suppress evidence obtained by the SANE<sup>2</sup> nurse's examination of Loyola was proper, whether the trial court properly denied Loyola's motion to allow testimony that the victim had the herpes virus and Loyola did not, whether the court properly denied Loyola's motion to sequester the victim until after her testimony, whether improper rulings were made on evidentiary objections at trial, whether Loyola knowingly, intelligently, and voluntarily exercised his right not to testify, and whether there was sufficient credible evidence to support the guilty verdicts. The report concludes with a discussion of whether the sentence was the result of an erroneous exercise of discretion or can be considered excessive. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit and that no procedural trial errors occurred. We will not discuss any of those potential issues further.

Our additional observations of the record follow and confirm that further appellate proceedings lack merit. The jury was properly instructed. Loyola was given the opportunity of allocution at sentencing, although he did not avail himself of that right. Although the prosecutor, defense attorney, and sentencing court mentioned the COMPAS evaluation attached to the presentence investigation report, the COMPAS portion of the PSI was not used in a manner proscribed by *State v. Loomis*, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749 (holding that "a sentencing court may consider a COMPAS risk assessment at sentencing," as long as it abides

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<sup>2</sup> SANE is an acronym for Sexual Assault Nurse Examiner.

by several limitations). Indeed, the sentencing court noted that the COMPAS evaluation reflected that Loyola presented a low risk of recidivism and that it presented a mitigating factor. Loyola was assessed two \$250 DNA surcharges as required by the law at the time he committed his offenses. *See* WIS. STAT. § 973.046(1r) (2011-12) (requiring the court to impose a \$250 DNA surcharge for each conviction of sexual assault under WIS. STAT. §§ 948.02(2) and 948.025).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Loyola further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Kevin M. Gaertner is relieved from further representing Roberto Loyola in this matter. *See* WIS. STAT. RULE 809.32(3).

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