OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
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

July 21, 2017

To:

Hon. Ellen R. Brostrom
Circuit Court Judge
Br. 6
821 W State St
Milwaukee, WI 53233

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

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

Colleen Marion
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jibril Aki Wilson 573300
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2014AP2811-CRNM State of Wisconsin v. Jibril Aki Wilson (L.C. #2012CF3720)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.21 (2015.16).

Jibril Aki Wilson appeals a judgment convicting him of one count of child enticement. Attorney Colleen Marion filed a no-merit report seeking to withdraw as appellate counsel. *See*

WIS. STAT. RULE 809.32 (2015-16),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Wilson responded to the no-merit report. This no-merit appeal was then stayed pending the Wisconsin Supreme Court's decision in ***State v. Loomis***, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749, which has since been decided. After considering the no-merit report and the response, and after conducting an independent review of the record as mandated by ***Anders***, we conclude that there are no issues of arguable merit that Wilson could raise on appeal. Therefore, we affirm the judgment of conviction.

Wilson was charged with two counts of second-degree sexual assault of a child sixteen years of age or younger, one of which was as a party to a crime, one count of kidnapping, and one count of child enticement. The jury acquitted Wilson of the first three charges, but convicted him of child enticement. At the time Wilson committed the crimes, he was seventeen years old and the victim was fifteen years old. The circuit court sentenced Wilson to twenty years of imprisonment, with ten years of initial confinement and ten years of extended supervision. The circuit court also ordered Wilson to register as a sex offender.

The no-merit report first addresses whether there would be arguable merit to a claim that the circuit court improperly denied Wilson's motion to suppress recorded statements he made to police. "When the State seeks to admit statements made during custodial questioning, … it must establish that the suspect was informed of his ***Miranda***[2] rights, understood them, and knowingly

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

and intelligently waived them." ***State v. Hindsley***, 2000 WI App 130, ¶21, 237 Wis. 2d 358, 614 N.W.2d 48. It must also "establish that the statement was voluntary." ***Id.***

Wilson's pretrial suppression motion acknowledged that the police read him his ***Miranda*** rights and he told police that he understood them. However, the motion alleged that Wilson's decision to waive his ***Miranda*** rights was not voluntary because Wilson was intoxicated and sleep-deprived.

At the suppression hearing, Detective Elizabeth Stewart testified that she was present during Wilson's interrogation, which began at 5:50 a.m., about twelve hours after his arrest. Stewart testified that Wilson did not seem intoxicated and was able to respond in a meaningful way to questions, including providing narrative answers to questions. She also testified that Wilson never complained that he was under the influence of drugs or alcohol and he never indicated that he was having difficulty understanding based on having taken drugs or consumed alcohol.

In contrast, Wilson testified that he was very intoxicated when he was arrested because he consumed a substantial amount of hard liquor, was smoking marijuana, and had taken ecstasy. Wilson testified that he asked the police to take him to the hospital at about 1:00 a.m. because he felt ill due to his level of intoxication. Wilson said that hospital personnel treated him, and he was returned to jail after about four hours. Wilson also testified that he did not sleep at all between his arrest and the interrogation that took place twelve hours later at 5:50 a.m. Wilson said that he was not afraid during the interrogation and did not feel threatened, but he did not realize what he was doing because he was still intoxicated and had not gotten any sleep.

The circuit court explained in its oral ruling denying the motion to suppress that it listened to the tape of Wilson's interview, and his speech was not slurred, his answers were coherent, and he was responsive to the questions asked. The circuit court noted that Wilson "rattled off" multiple phone numbers and never said that he was drunk or high. In addition, the circuit court found Stewart's testimony that Wilson was responsive and coherent more credible than Wilson's testimony that he told the detectives that he was intoxicated before the taped portion of the interview started.

"When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Based on the circuit court's observation that Wilson was responsive and coherent, and its determination that Stewart's testimony was more credible than Wilson's testimony, we conclude that there would be no arguable merit to a challenge to the circuit court's decision denying Wilson's motion to suppress.

With respect to Wilson's interrogation, the no-merit report also addresses whether there would be arguable merit to a claim that Wilson's trial lawyer should have challenged the fact that the police would not allow Wilson to call his parents. "[F]ailure to call the parents [of a juvenile] for the purpose of depriving the juvenile of the opportunity to receive advice and counsel will be considered strong evidence that coercive tactics were used to elicit the incriminating statements." ***State v. Jerrell C.J.***, 2005 WI 105, ¶43, 283 Wis. 2d 145, 699 N.W.2d 110 (citation and quotation marks omitted). Absent other evidence of coercive tactics, failure to call a juvenile's parents is not per se coercive. Moroever, the no-merit report points out that Wilson does not allege that his statement was involuntary due to coercive police tactics,

but rather that his waiver was involuntary because he was intoxicated. Under these circumstances, we conclude that there would be no arguable merit to a claim that Wilson received ineffective assistance of trial counsel because his lawyer did not challenge the fact that Wilson's parents were not called.

The no-merit next addresses whether the evidence was sufficient to support the jury's verdict finding Wilson guilty of one count of child enticement. We will not overturn a jury's verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted). "[T]he trier of fact is the sole arbiter of the credibility of the witnesses and alone is charged with the duty of weighing the evidence." ***State v. Below***, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95.

A defendant is guilty of child enticement if the State proves: (1) the defendant caused the victim to go into a secluded place; (2) the defendant caused the victim to go into the secluded place with the intent to have sexual contact or sexual intercourse; (3) the victim was under the age of eighteen. *See* WIS. JI-CRIMINAL 2134.

Wilson testified that was driving when he saw S.P. at a bus stop. He stopped to talk to her. Wilson testified that he asked for S.P.'s phone number, but S.P. did not have a phone so he gave her his number instead. Wilson testified that S.P. then asked for a ride back to the place where she was staying, which was a group home. Wilson testified that he stopped at his house on the way, where neighbors were outside talking. Wilson testified that S.P. then said she wanted to hang out and did not want to go to the group home. Wilson testified that he took S.P.

to the home of his friend Christian, where he and his friends had been going to drink and smoke because Christian's family had recently moved out. Wilson testified that he did not intend to have sexual contact with S.P. when he took her to the house but acknowledged on cross-exam that his friends sometimes brought girls there to have sex with them. Wilson testified that he was seventeen years old when these events occurred and S.P. told him she was eighteen years old. There was no dispute that S.P. was, in fact, fifteen. Because a reasonable jury could have concluded that Wilson brought S.P. to Christian's house with the intent to have sexual contact with S.P., there would be no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report addresses: (1) whether there would be arguable merit to a claim that the circuit court improperly denied Wilson's motion to exclude S.P.'s statements to the sexual assault treatment nurse; (2) whether there would be arguable merit to a claim that the circuit court improperly denied Wilson's motion to exclude evidence that S.P. overheard Wilson say he lost his gun during a robbery attempt; (3) whether there would be arguable merit to a claim that the circuit court improperly denied Wilson's motion to exclude evidence of sexual acts taking place at the house involving other people; (4) whether there would be arguable merit to a claim that the circuit court improperly denied Wilson's pretrial motion to exclude evidence that S.P. sustained a lip injury; and (5) whether there would be arguable merit to a claim that the circuit court improperly denied Wilson's motion to exclude Donte Carpenter's testimony about his sexual contact with S.P. Wilson was acquitted of the charges to which these arguments pertain. Therefore, these arguments are not properly raised in the context of an appeal from Wilson's conviction for child enticement.

Finally, the no-merit report addresses whether there would be any arguable merit to a claim that the circuit court misused its sentencing discretion. The court sentenced Wilson to ten

years of initial confinement and ten years of extended supervision. During the sentencing hearing, the circuit court began by explaining to Wilson the various roles it played at different stages in the proceedings. The circuit court explained to Wilson that although he would not be sentenced for the crimes for which he was acquitted, the circuit court was allowed to consider the circumstances of those charges in deciding Wilson's sentence. *See* ***State v. Leitner***, 2001 WI App 172, ¶44, 247 Wis. 2d 195, 633 N.W.2d 207 (a sentencing court may consider factual circumstances related to offenses for which there has been an acquittal).

In its extensive sentencing remarks, the circuit court considered mitigating and aggravating factors in light of the primary goals of sentencing. The court said that this was a serious child enticement conviction because S.P. was repeatedly raped at the vacant home where Wilson took her. The court acknowledged that Wilson was acquitted of the kidnapping and sexual assault charges but said that he played a central role in what happened to the victim by approaching her at the bus stop and bringing her to the house.

The court noted that Wilson was only seventeen when the crime occurred, which the court considered to be a mitigating circumstance, as was the fact that Wilson faced difficulty growing up because his mother was an addict. Even so, the circuit court concluded that probation, which his lawyer requested, would unduly depreciate the seriousness of the crime. The court considered appropriate factors in deciding what length of sentence to impose and explained its application of the various sentencing guidelines in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

Although it was not addressed by the no-merit report, we have identified an additional issue that requires brief discussion. The circuit court considered a COMPAS assessment of Wilson when it imposed sentence. The Wisconsin Supreme Court recently rejected a defendant's argument that his due process rights were violated by the circuit court when it considered a COMPAS assessment in framing its sentence. *See* ***State v. Loomis***, 2016 WI 68, ¶8, 371 Wis. 2d 235, 881 N.W.2d 749. ***Loomis*** held that a sentencing court may consider a COMPAS risk assessment at sentencing as one of many factors, as long as it abides by several limitations, which include never using the risk scores to determine the severity of the sentence and never using the risk scores to determine whether an offender should be incarcerated, as opposed to released on community supervision. ***Id.***, ¶98.

At the sentencing hearing, the circuit court briefly touched on the COMPAS assessment included in the presentence investigation report, stating: "Other aspects of the PSI, I have to look at the COMPAS evaluation, which does say that there is a high risk of violent recidivism and a high risk of general recidivism, high history of violence, high probability of a criminal personality, high probability of family criminality."

The circuit court's brief comments were its only mention of the COMPAS report in its lengthy and well-reasoned sentencing decision. Because the record does not indicate the circuit court used the COMPAS report to determine the severity of Wilson's sentence or to determine whether Wilson should be incarcerated, rather than released on community supervision, we conclude that there would be no arguable merit to a claim that the circuit court's use of the COMPAS assessment was improper.

Turning to Wilson's response, he raises multiple issues that are all predicated on a single underlying claim: Wilson contends that he should not have been convicted of child enticement because he was acquitted of sexual assault. Wilson argues that having sexual contact or sexual intercourse with the victim is an element of the offense of child enticement, and the jury concluded that he did not have sexual contact or sexual intercourse with S.P. when it acquitted him of two counts of second-degree sexual assault.[3]

Wilson is mistaken. Sexual contact or intercourse is not an element of the offense of child enticement. *See* WIS. STAT. § 948.07. Rather, *the intent* to have sexual contact or sexual intercourse is an element of the crime, regardless of whether sexual intercourse or sexual contact in fact occurred. ***Id.*** Here, the jury concluded that Wilson took S.P. to a secluded location *with the intent* of having sexual intercourse or sexual contact with S.P., regardless of whether sexual intercourse or sexual contact occurred. Because the potential issues Wilson raises in his response are all predicated on his argument that he should not have been convicted of child enticement because he did not have sexual intercourse or sexual contact with S.P., there would be no arguable merit to raising these issues on appeal.

[3] More specifically, Wilson argues that: (1) the crime of child enticement was not proven beyond a reasonable doubt because the jury concluded that he did not have sexual contact or intercourse with S.P. when it acquitted him of second-degree sexual assault; (2) the jury instructions were incorrect and the evidence was insufficient because he did not have sexual contact or intercourse with S.P.; (3) he received ineffective assistance of trial counsel because his lawyer did not raise these arguments; and (4) the circuit court misused its discretion in sentencing him because he was improperly convicted of child enticement.

Our independent review of the record reveals no potential issues of arguable merit. Therefore, we affirm the judgment of conviction and relieve Attorney Collen Marion of further representation of Wilson.

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

IT IS FURTHER ORDERED that Attorney Collen Marion is relieved of further representation of Wilson in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals