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December 26, 2017

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

2016AP711-CRNM State of Wisconsin v. Rodolfo Andaverde (L.C. # 2013CF2297)

Before Lundsten, P.J., Blanchard, and Fitzpatrick, 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 809.23(3).

Rodolfo Andaverde appeals judgments convicting him, following a jury trial, of one count of first-degree sexual assault of a child under the age of thirteen and one count of bail jumping.[1] Attorney Michael D. Rosenberg has filed a no-merit report seeking to withdraw as

[1] Although the notice of appeal refers to a "judgment" in the singular, we note that separate judgments were issued for each count.

appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[2] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State 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 to support the verdicts, the admission of out-of-court statements made by the victim; the circuit court's decision to read certain portions of the testimony back to the jury; and the circuit court's exercise of its sentencing discretion. Andaverde was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

We begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places other potential issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal, rather than a retrial.

The general test for sufficiency of the evidence is whether the evidence is "'so lacking in probative value and force'" that 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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). With respect to the charges in this case, the elements the State needed to prove for first-degree sexual assault of a child under the age of thirteen were that: (1) Andaverde had sexual contact with SRZ (meaning that he intentionally touched the breast or

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

vagina of SRZ with the intent to become sexually aroused or gratified); and (2) SRZ was under the age of thirteen at the time of the sexual contact. *See* WIS. STAT. § 948.02(1)(e) and WIS JI—CRIMINAL 2102E. The elements the State needed to prove for the bail-jumping count were that: (1) Andaverde had been charged with a felony; (2) he had been released on bond; and (3) he intentionally failed to comply with the terms of his bond. WIS. STAT. § 946.49(1) and WIS JI—CRIMINAL 1795.

As to the bail jumping, the parties stipulated to the first two elements, and further stipulated that Andaverde knew the terms of the bond. Therefore, the only issue on the bail jumping was whether Andaverde violated the terms of his bond by committing the sexual assault. That is, proving the elements of the sexual assault charge would be sufficient to prove bail jumping as well.

SRZ testified that, when she was twelve years old, Andaverde woke her up in the middle of the night by tapping on her foot. Andaverde told SRZ to come lay by him on the couch, which she did with her back to his front. Andaverde then reached around her and put his hand on her stomach, slid it up under her shirt, and began to touch her breasts underneath her bra. He then slid his hand down underneath her underwear and touched her vagina. Andaverde held SMZ's feet down by wrapping his legs around her lower legs.

Not only was SRZ's testimony sufficient, in and of itself, to support the verdicts, it was further supported by other evidence. In particular, a DNA analyst from the State Crime Lab testified that she swabbed the inside of the bra that SRZ had been wearing on the night of the incident, and was able to identify male DNA by looking only at the Y chromosome rather than the entire set of chromosomes (to eliminate SRZ's profile). The profile of the Y chromosome

was consistent with Andaverde's comparison sample. Of the 32,231 Y chromosome profiles in the database that analyst searched, only seventeen (including Andaverde's) matched the profile recovered from the bra.

Evidentiary Issues

The circuit court permitted two witnesses to testify about statements SRZ had made to them. First, the girlfriend of SRZ's father testified that, the day following the incident, SMZ told her that, in the middle of the previous night, Andaverde had put his hand up her shirt under her bra and down her pants under her underwear. We are satisfied that the court reasonably exercised its discretion when it determined that these statements were admissible as excited utterances because when SRZ had approached her father girlfriend's within twenty-four hours after the incident to make the statements, she was very upset and "crying so hard she could hardly breathe or talk." *See* ***State v. Huntington***, 216 Wis. 2d 671, 682-85, 575 N.W.2d 268 (1998) (discussing criteria for excited utterances and relaxed standard for child victims).

Second, the nurse who examined SRZ the day following the incident both produced a report admitted into evidence and testified about statements that SRZ made. Those statements were admissible under the hearsay exception for statements made for the purpose of medical treatment or diagnosis. *See* WIS. STAT. § 908.03(4).

Providing Read-Back Testimony to the Jury

During deliberations, the jury requested a copy of the SANE report. After the circuit court denied that request (on the grounds that the report contained information about SRZ's gynecological history protected by the Rape Shield Act), the jury asked to have portions of the

SANE nurse's testimony read back to them. The jury indicated that it was interested in whether SRZ had related to the nurse that she was lying on her left or right side on the couch during the incident, and whether that conflicted with SRZ's trial testimony. The trial court then provided the jury with limited portions of SRZ's and the nurse's testimony on that issue.

Andaverde objected on the grounds that reading back portions of the testimony would unduly highlight those portions. However, the circuit court reasonably exercised its discretion by limiting the read-back testimony to an issue that the jury was already focused on.

Sentences

A challenge to the defendant's sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that the defendant was afforded an opportunity to comment on the PSI and address the court both by counsel and personally. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court emphasized the tremendous impact on the victim, who had begun cutting herself, acting out, and failing at school. With respect to the defendant's character, the court expressed concern over Andaverde's prior history of domestic violence, his inability to maintain sobriety, the fact that he committed the current offense while out on bail on another sexual assault case and had previously failed on past terms of probation, and the way he minimized the offense and was less than forthcoming with the PSI writer. The court concluded that a prison

term was necessary to give Andaverde "additional time to reflect on what [he'd] done, to understand that [he needed] to comply with rules, and to simply not minimize the effect that this has had on so many people."

The court then sentenced Andaverde to two and a half years of initial confinement and five and a half years of extended supervision for the sexual assault, and to one year for the bail jumping, to be served concurrently. The judgments of conviction show that the court also awarded 435 days of sentence credit as requested by the defense; imposed standard costs and conditions of supervision and required the defendant to pay a DNA surcharge on the sexual assault charge; and determined that the defendant was not eligible for the challenge incarceration program or substance abuse program.

The components of the bifurcated sentence imposed on the sexual assault count were within the applicable penalty ranges and the total confinement period constituted about 13% of the maximum exposure Andaverde faced. *See* WIS. STAT. §§ 948.02(1)(e) (classifying first-degree sexual assault of a child under the age of thirteen as a Class B felony; 973.01(2)(b)1. and (d)1. (providing maximum terms of forty years of initial confinement and twenty years of extended supervision for a Class B felony).

The circuit court did not specify at the hearing whether the one-year term it imposed on the bail-jumping count was to be served in county jail or in the state prison system. The fact that the court did not impose a term of extended supervision suggests that the court intended to impose an indeterminate sentence to the county jail. The indication on the judgment of conviction that the sentence was to be served in prison would be consistent with WIS. STAT.

§ 973.03(2), which requires jail sentences to be served in prison when imposed in conjunction with prison sentences.

Even if the bail-jumping sentence was intended to be imposed as a prison sentence, and therefore should have included a term of extended supervision, we note that the maximum amount of extended supervision that could have been imposed on a Class H felony would have been three years. WIS. STAT. § 973.01(2)(b)8. and (d)5. Since the bail-jumping sentence was imposed concurrent to a bifurcated sentence on a Class B felony that had a term of extended supervision of five and a half years, the sexual assault sentence was controlling and we do not see how any omission on the judgment about a lesser concurrent term of supervision could have been adverse to Andaverde.

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offenses 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).

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.

Accordingly,

IT IS ORDERED that the judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to 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