



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 III

September 18, 2018

To:

Hon. Jill N. Falstad
Circuit Court Judge
Marathon County Courthouse
500 Forest St.
Wausau, WI 54403-5554

Shirley Lang
Clerk of Circuit Court
Marathon County Courthouse
500 Forest St.
Wausau, WI 54403

Timothy T. O'Connell
O'Connell Law Office
403 S. Jefferson St.
Green Bay, WI 54301

Theresa Wetzsteon
District Attorney
500 Forest St.
Wausau, WI 54403-5554

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

Xang Xiong 658430
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2018AP691-CRNM State of Wisconsin v. Xang Xiong (L. C. No. 2016CF1269)

Before Stark, P.J., Hruz and Seidl, 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).

Xang Xiong appeals from a judgment of conviction for first-degree sexual assault of a child under thirteen and child enticement. His appellate counsel has filed a no-merit report

pursuant to WIS. STAT. RULE 809.32 (2015-16),¹ and *Anders v. California*, 386 U.S. 738 (1967). Xiong 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 review of the record, the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

After he was observed in a dark church kitchen standing behind a young child and holding one hand over the child's mouth, Xiong was charged with having sexual contact with a child under the age of thirteen and with child enticement. He entered guilty pleas to both counts. Xiong was sentenced to ten years' initial confinement and ten years' extended supervision on the sexual assault conviction. A concurrent term of four years' initial confinement and four years' extended supervision was imposed on the child enticement conviction. A postconviction motion was filed and granted to clarify on the judgment of conviction that restitution was zero dollars.²

The no-merit report addresses the potential issues of whether Xiong's plea was knowingly, voluntarily, and intelligently entered, and whether the sentence was the result of an erroneous exercise of discretion or unduly harsh. With the exception noted below, this court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

The no-merit report fails to recognize a weak spot in the plea colloquy with respect to the circuit court's duty to ascertain Xiong's understanding of the elements of the sexual assault

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

² The original judgment of conviction reflected that restitution was "TBD."

charge. See *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (the court must, under WIS. STAT. § 971.08, evaluate whether a defendant understands the charge). Here, the circuit court referenced the elements listed on the plea questionnaire. The plea questionnaire listed the elements of the sexual assault offense simply as “I had sexual contact with a person under the age of 13.” No other recitation of the elements was made during the plea colloquy.³ Thus, no apparent mention was made on the record of the necessity that Xiong acted with intent to become sexually aroused or gratified or to sexually degrade or humiliate the victim. See WIS JI—CRIMINAL 2101A (defining sexual contact), 2102E (elements of first-degree sexual assault by sexual contact). The purpose of the sexual contact is an element of the offense. See *State v. Hendricks*, 2018 WI 15, ¶¶22-23, 379 Wis. 2d 549, 906 N.W.2d 666; *State v. Bollig*, 2000 WI 6, ¶¶50-51, 232 Wis. 2d 561, 605 N.W.2d 199; *State v. Jipson*, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18. It was necessary for Xiong to be aware of this element in order to enter a knowing guilty plea to the sexual assault offense. See *Jipson*, 267 Wis. 2d 467, ¶9. It may be that, because no record was made of Xiong’s understanding of the purpose element of the offense, his plea was taken without compliance with the procedure mandated in *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). However, a motion to withdraw a plea is only meritorious if the defendant can allege that he or she did not know or understand that aspect of his or her plea that is related to a deficiency in the plea colloquy. *Brown*, 293 Wis. 2d 594, ¶62. The no-merit report states that: “In speaking to Xiong, it is counsel’s understanding that it could not be argued in good faith that [Xiong] did not understand the elements or the constitutional

³ During the plea colloquy, the circuit court simply asked Xiong if he went through with his attorney the elements of the crime for each offense listed on the plea questionnaire, if he understood the elements of the crime the State would have to prove, and if he had any questions about the elements of the crimes.

rights.” Xiong has not disputed counsel’s representation. Thus, Xiong cannot make the required allegation, and there is no arguable merit to a claim that his plea was not knowingly entered.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that attorney Timothy T. O’Connell is relieved of further representing Xang Xiong in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals