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October 10, 2018

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

2018AP675-CRNM State of Wisconsin v. Jason P. Robinson (L.C. # 2015CF162)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Jason P. Robinson appeals from a judgment of conviction for repeated sexual assault of a child. 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). Robinson received a copy of the report and was advised of his right to file a response. He has elected not to do so. Upon

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

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.

A ten-year-old girl who lived in Robinson's residence reported that he had been sexually assaulting her since she was eight and that he played a pornographic video during some of the assaults. Robinson was charged with repeated sexual assault of a child and causing a child to view sexual activity. Robinson pled no contest to the sexual assault charge under a plea agreement which dismissed as read-ins the other charge and a child sexual assault charge from another case. The plea agreement also dismissed an additional charge in the other case. The agreement required a joint sentencing recommendation of twelve and one-half years of initial confinement and fifteen years of extended supervision. Robinson was sentenced to twenty years of initial confinement and fifteen years of extended supervision.

The no-merit report addresses the potential issue of whether Robinson's plea was knowingly, voluntarily, and intelligently entered. After summarizing the circuit court's duties under WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, the report asserts that the "plea colloquy in this case was quite extensive." We do not agree. The plea colloquy relied heavily on the plea questionnaire Robinson had signed and, as a result, the colloquy was short. ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794, explains that the circuit court may not rely entirely on a plea questionnaire as a substitute for a substantive in-court plea colloquy. "The plea colloquy cannot … be reduced to determining whether the defendant has read and filled out the Form," and "the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant." ***Id.***,

¶32. With one exception, the circuit court's use of questionnaire, interspersed with the colloquy, demonstrates Robinson's understanding of the information he was entitled to and that his plea was knowingly, voluntarily, and intelligently entered.

The exception to what otherwise would have been an unassailable plea colloquy is the absence of an on-the-record discussion of the elements of the offense. *See* ***Bangert***, 131 Wis. 2d at 269 (establishing a mandatory obligation on the circuit court to first inform the defendant of the charge's nature or to ascertain that the defendant possess such information and to do so in a manner that is more than just a perfunctory procedure). A circuit court shall determine that the plea is made with an understanding of the nature of the charge by summarizing the elements of the crime by reading from the appropriate jury instructions or statute; asking defendant's counsel whether he explained the nature of the charge to the defendant and requesting him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing; or expressly referring to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea. ***Id.*** at 267-68. Here, the circuit court merely asked Robinson if he had reviewed with his attorney "the elements or different parts that make up the offense of repeated sexual assault of a child." The court did not refer to any place in the record, not even the plea questionnaire, where the elements were listed.

The plea questionnaire simply listed the elements as "Defendant did commit at least 3 acts of sexual assault against the same child." That was an inadequate listing of the elements. WISCONSIN JI—CRIMINAL 2107 teaches that the crime of repeated sexual assault of a child includes the elements of the type of sexual assault that was committed. Here, the plea questionnaire listed the underlying sexual assault as a violation of WIS. STAT. § 948.02(1)(d), that is, sexual contact with a person who is not sixteen. An element of sexual contact is that the

defendant 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). 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 may be that because no record was made of Robinson's understanding of the elements of sexual assault, including the purpose element of the sexual contact, his plea was taken without compliance with the procedure mandated in ***Bangert***, 131 Wis. 2d at 266-72.

Despite the potential defect in the plea colloquy, we conclude that a postconviction motion for plea withdrawal lacks arguable merit. A motion to withdraw a plea is only meritorious if the defendant can allege that he did not know or understand that aspect of his plea that is related to a deficiency in the plea colloquy. ***State v. Brown***, 2006 WI 100, ¶62, 293 Wis. 2d 594, 716 N.W.2d 906 In reference to Robinson's acknowledgement during the plea colloquy that he reviewed the elements of the offense with counsel, the no-merit report notes that: "In speaking to Robinson, it is counsel's understanding that it could not be argued in good faith that [Robinson] did not understand such." Robinson has not disputed counsel's representation. Thus, Robinson cannot make the required allegation that he did not understand the nature of the charge, and there is no arguable merit to a claim that his plea was not knowingly entered. No issue of merit exists from the plea taking.

The no-merit report also addresses whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the potential sentencing issue as without merit, and this court will not discuss it further. Further, we cannot conclude that the thirty-five year sentence when measured against the maximum sixty

year sentence is so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other potential issues for appeal.[2] Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Robinson 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 Timothy T. O'Connell is relieved from further representing Jason P. Robinson in this appeal. *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

[2] Any other possible appellate issues from the proceedings before entry of the plea are waived because Robinson's no contest plea waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.