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October 22, 2018

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

2015AP2596-CRNM State of Wisconsin v. Marvin Gray (L.C. # 2013CF1488)

Before Brennan, Brash and Dugan, 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).

Marvin Gray appeals a judgment, entered upon a jury's verdict, convicting him of second-degree sexual assault of a child under the age of sixteen. *See* WIS. STAT. § 948.02(2)

(2011-12).[1] Gray's postconviction and appellate lawyer, Paul G. Bonneson, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Gray has responded. After independently reviewing the record, the no-merit report, and Gray's response, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

BACKGROUND

The second-degree sexual assault charge against Gray stemmed from events that took place in July 2012. Gray, who was fifty-five years old at the time, was alleged to have had sexual intercourse with a fourteen-year-old victim.

The case proceeded to trial and a jury convicted Gray of the charge. The trial court sentenced him to twenty years of initial confinement and ten years of extended supervision.

In his no-merit report, appellate counsel addresses whether there would be arguable merit to an appeal on two issues: (1) whether there is sufficient credible evidence to support the jury's verdict; and (2) whether the trial court properly exercised its sentencing discretion. For the reasons explained below, we agree with the conclusion that there would be no arguable merit in pursuing these issues on appeal. We also address whether the State improperly vouched for the credibility of the victim and whether, as Gray asserts in his response, DNA evidence should not have been used to convict him.

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

DISCUSSION

A. *Sufficiency of the Evidence & Admissibility of DNA Evidence*

Appellate counsel first addresses whether the evidence is sufficient to support the jury's verdict. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the inference necessarily drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury's verdict will be reversed "'only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (emphasis omitted).

To convict Gray of second-degree sexual assault of a child under the age of sixteen, the State was required to prove: (1) Gray had sexual intercourse with the victim, which by statutory definition would include any intrusion, however slight, by any part of a person's body or of any object, into the genital opening of another; and (2) the victim was under the age of sixteen years at the time. *See* WIS JI—CRIMINAL 2104 & 2101B. The jury was instructed that consent to the intercourse or mistake as to age were not defenses. *See* ***id.***

At the time of trial, the victim was sixteen years old. She testified that the night before the assault, she stayed at her friend P.B.'s house. P.B. lived with her grandmother, H.B. Gray and P.B.'s grandmother were in a romantic relationship. In the morning, the victim testified that Gray came into the bedroom where she was resting with P.B. and said that the victim had to leave because she and P.B. were being too noisy. As the victim got up to leave, Gray told her that there was a room in the basement of the home where she and P.B. could go.

The victim testified that she went to the basement of the home. A makeshift bed was there, and Gray asked the victim if she could keep a secret. Gray then walked upstairs, the lights in the basement were turned off, and the victim felt him touch her thigh. The victim told the jury that Gray proceeded to have penis to vagina sexual intercourse with her and said that if she told anyone, he would kill her family. The victim identified Gray in court as the man who assaulted her.

The victim testified that she told her mother what had happened and her mother reported the assault to police. The jury heard that the victim initially told police that Gray held her down and slapped her before assaulting her, but later said that was untrue. An officer who interviewed the victim also testified that he did not recall the victim telling him that Gray threatened to kill the victim's family if she told anyone about the assault.

DNA evidence was collected and Gray was determined to be the source of semen found on vaginal swabs taken from the victim. Meanwhile, the victim's DNA was found on the penile swabs collected from Gray.

In his response, Gray challenges the use of DNA evidence at trial because it was "misplace[d] for nine months [i]n … the MPD crime lab." At trial, the State went to great lengths to establish a chain in custody as to the DNA evidence in this case.

Sexual assault nurse examiners, officers, and a State Crime Lab analyst testified to the chain of custody for the DNA samples that were tested, and the jury was aware that there was a delay in submitting Gray's buccal and penile swabs to the State Crime Lab. A forensic scientist who worked at the State Crime Lab testified that she was not the analyst who performed the actual testing, but she conducted a complete technical review of the data created by another

analyst and formed her own independent opinions. During cross-examination, trial counsel asked the forensic scientist about the delay and she responded: "Sometimes not all items of evidence come in at the same time. I can't explain that."

The law with respect to chain of custody requires proof sufficient "to render it improbable that the original item has been exchanged, contaminated or tampered with." ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). A perfect chain of custody, however, is not required. ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54. The proponent of the evidence need not negate the possibility that there was an opportunity for tampering with an exhibit, nor is the proponent required to trace the exhibit's custody by calling each custodian as a witness. ***State v. McCarty***, 47 Wis. 2d 781, 788, 177 N.W.2d 819 (1970). Any alleged gaps in a chain of custody ultimately "go to the weight of the evidence rather than its admissibility." ***McCoy***, 298 Wis. 2d 523, ¶9 (citation omitted).

The only witness who testified for the defense was H.B., Gray's girlfriend at the time of the alleged assault. H.B. testified that she told Gray that her granddaughter's friend had to leave that morning and that he walked the victim downstairs and locked the door after doing so. H.B. additionally testified that Gray left one other time that morning to take the garbage out. H.B. testified that she was not sleeping when these events transpired that morning. During its rebuttal, however, the State presented testimony from the detective that H.B. told her she went back to sleep after Gray left to take the garbage out.

Gray's trial counsel's strategy during her closing argument was to attack the reliability of the victim's testimony and to attack the reliability of the DNA evidence. As to the DNA evidence, Gray's trial counsel highlighted the fact that the State Crime Lab analyst who initially

reviewed that evidence was not at trial. Gray's trial counsel additionally highlighted for the jury what she believed were problems with the chain of custody.

After deliberating for less than one hour, the jury arrived at a guilty verdict. Our review of the record satisfies us that there was sufficient evidence upon which the jury could convict Gray. There is no arguable merit to challenging the sufficiency of the evidence or the admissibility of the DNA evidence.

B. ***Vouching for the Victim's Credibility***

Although appellate counsel did not discuss it, we have also considered whether the State improperly vouched for the credibility of the victim. During its closing argument, the State described the victim's testimony:

> You saw her yesterday. It was raw. It was emotional. Ask yourself: Do you believe she's lying? Absolutely not. She's either the greatest actress you've seen or that pain was absolutely true, and it's pain caused by him.
>
> It's a 14-year-old kid who's just sleeping over [with] her friend and she feels guilty about what happened. She didn't fight enough. And because of that guilt, she initially told the police: He held me down and slapped me. How do we know he didn't do that? She then said: I made that up because I was afraid no one would believe me. What she said, just watching her, she's not lying and that's enough to find him guilty.

Then, after describing the DNA evidence that was presented at trial, the State concluded:

> DNA isn't floating around here magically. If you put your penis in somebody, it's gonna transfer. DNA on skin cells. DNA supports what [the victim] says. She is not lying. If you go back and find she's lying, find him not guilty. But there's no reason to do so on this record from what you've heard yesterday.

During closing arguments, the State is entitled to "comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." *See* ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Further, the State "is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented." ***Id.*** at 17. That is what the State did here.

After discussing the victim's testimony, the State went through the DNA evidence and explained how it supported the victim's version of the events that took place. There would be no arguable merit to argue that the State's comments during its closing argument were improper. Additionally, the trial court instructed the jury that closing arguments, and the attorneys' conclusions and opinions described during those arguments, were not evidence. The trial court also instructed the jury to draw its own conclusions from the evidence. The trial court's instructions put the State's comments in proper perspective for the jury. *See* ***State v. Draize***, 88 Wis. 2d 445, 456, 276 N.W.2d 784 (1979).

C. ***Sentencing Discretion***

The second issue appellate counsel addresses is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the

protection of the public. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695.

During the sentencing hearing, the trial court heard that Gray had served a twenty-nine year term of initial confinement stemming from prior crimes and was released into the community approximately five months prior to committing the sexual assault in this case. In fashioning its sentence, the trial court reflected on the aggravated nature of the crime and the need to deter men in the community from having sex with underage girls. The trial court proceeded to sentence Gray to twenty years of initial confinement and ten years of extended supervision.

The trial court's sentence is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock public sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There were no improper factors considered by the court in setting forth its sentence. There is no arguable merit to a claim the trial court erroneously exercised its sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved of further representation of Marvin Gray 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