



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

June 28, 2019

To:

Hon. Jonathan D. Watts
Circuit Court Judge
821 W. State St.
Milwaukee, WI 53233

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

John Barrett
Clerk of Circuit Court
821 W. State Street, Room G-8
Milwaukee, WI 53233

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

Russell D. Bohach
Russell D. Bohach Attorney at Law
4284 Raymir Place
Wauwatosa, WI 53222

Jose Ruiz-Navarro
Jose Maria Arteaga 235
Reforma
Nueva Italia
61760, Mexico

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

2017AP2398-CRNM State of Wisconsin v. Jose Ruiz-Navarro (L.C. # 2013CF5061)

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

Jose Ruiz-Navarro appeals a judgment of conviction entered after a jury found him guilty of second-degree sexual assault. *See* WIS. STAT. § 940.225(2)(a) (2013-14).¹ Appellate counsel, Attorney Russell D. Bohach, filed a no-merit report pursuant to *Anders v. California*, 386 U.S.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

738 (1967), and WIS. STAT. RULE 809.32 (2017-18). Ruiz-Navarro did not file a response. Based upon our independent review of the record and the no-merit report, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm.² See WIS. STAT. RULE 809.21 (2017-18).

According to the criminal complaint, M.Y.L.-S. reported to police on November 1, 2013, that her former boyfriend, Ruiz-Navarro, approached her outside her home on October 27, 2013, forced his way into the residence, grabbed her by the hair, and lifted her up until her head hit a ceiling panel. She further reported that three days later, Ruiz-Navarro entered her home uninvited at 3:00 a.m., grabbed her by the neck, and demanded sex. When she refused, he pinned her down and forced her to have penis-to-vagina intercourse.

The State charged Ruiz-Navarro with misdemeanor battery and second-degree sexual assault. The matters proceeded to trial. The jury acquitted him of battery and convicted him of second-degree sexual assault. At sentencing, he faced maximum penalties of forty years of imprisonment and a \$100,000 fine. See WIS. STAT. §§ 940.225(2)(a), 939.50(3)(c). The circuit court imposed an evenly bifurcated eight-year term of imprisonment. The circuit court also ordered him to pay \$250 as restitution and awarded him the 157 days of sentence credit that he requested. He appeals.

² By order dated December 11, 2018, we placed this appeal on hold until resolution of a then-pending supreme court case involving challenges to WIS JI—CRIMINAL 140, which the circuit court used in the instant case to instruct the jury regarding the concept of reasonable doubt. The supreme court released its decision on May 31, 2019, and rejected the challenges to WIS JI—CRIMINAL 140. See *State v. Trammell*, 2019 WI 59, ¶¶1-2, ___ Wis. 2d ___, 928 N.W.2d 564. *Trammell* therefore does not provide Ruiz-Navarro with an arguably meritorious basis for postconviction relief. Accordingly, we lift the hold previously imposed and proceed to resolve this appeal.

In the no-merit report, appellate counsel discusses why Ruiz-Navarro could not pursue an arguably meritorious challenge to the pretrial order granting the State’s motion, filed pursuant to WIS. STAT. § 904.04(2), to admit evidence of his prior acts of violence against M.Y.L.-S. Appellate counsel also examines the sufficiency of the evidence to support the guilty verdict, setting forth the applicable standard of review and explaining why the evidence satisfies the elements of second-degree sexual assault.³ This court is satisfied that appellate counsel properly analyzed these issues, and we agree with appellate counsel that further pursuit of these issues would lack arguable merit. Additional discussion of these issues is not warranted.

Appellate counsel does not consider whether Ruiz-Navarro could pursue an arguably meritorious claim that he is entitled to a new trial because a juror was inattentive during trial. To prevail on a challenge based on an allegedly inattentive juror, a convicted person must show, *inter alia*, that a “juror was actually inattentive to the point of potentially undermining the fairness of the trial.” *See State v. Novy*, 2013 WI 23, ¶47, 346 Wis. 2d 289, 827 N.W.2d 610. On review, “we will uphold a circuit court’s factual findings regarding the conduct and attentiveness of the jurors, unless those findings are clearly erroneous.” *Id.*, ¶48.

On the first day of trial in this case, the circuit court called a short recess *sua sponte* during the testimony of the first witness, then later explained that the reason for the break was the circuit court’s observation that a juror was “nodding” with his eyes closed. The circuit court advised that it had continued watching the juror after the break and that the juror had not again

³ Before the jury could find Ruiz-Navarro guilty of second-degree sexual assault, the State was required to prove beyond a reasonable doubt that: (1) he had sexual intercourse with M.Y.L.-S.; (2) M.Y.L.-S. did not consent to the sexual intercourse; and (3) he had sexual intercourse with M.Y.L.-S. by use or threat of force or violence. *See* WIS JI—CRIMINAL 1208.

exhibited any similar behavior. Counsel for the State and the defense each indicated in response to the circuit court's inquiry that neither had observed an inattentive juror. No further discussion about the attentiveness of any juror appears in the record.

The proceedings reflect an implicit finding by the circuit court that it took the steps necessary to ensure that all of the jurors remained attentive throughout the testimony. Accordingly, the record does not support an arguably meritorious claim that a juror was insufficiently attentive. See *State v. Mark*, 2008 WI App 44, ¶24, 308 Wis. 2d 191, 747 N.W.2d 727 (we accept the circuit court's implicit findings if they are supported by the record). Further pursuit of this issue would be frivolous within the meaning of *Anders*. See *Novy*, 346 Wis. 2d 289, ¶51.

In the no-merit report, appellate counsel explains why Ruiz-Navarro could not pursue an arguably meritorious challenge to his sentence. We agree with appellate counsel's conclusion that the circuit court properly exercised its sentencing discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court identified deterrence and community protection as the primary sentencing objectives, and the circuit court discussed the sentencing factors that it viewed as relevant to achieving those objectives. See *id.*, ¶¶41-43. The sentence imposed was well within the maximum sentence allowed by law and cannot be considered unduly harsh or unconscionable. See *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Further discussion of this issue is not necessary.

Appellate counsel does not examine whether Ruiz-Navarro could pursue an arguably meritorious challenge to the order for restitution. The record shows that Ruiz-Navarro stipulated to the amount of restitution ordered. See WIS. STAT. § 973.20(13)(c). Therefore, he could not

mount an arguably meritorious challenge to the order. *See State v. Leighton*, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

Our independent review of the record does not disclose any other potential issues for appeal. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32 (2017-18).

Therefore,

IT IS ORDERED that the hold previously imposed in this matter is lifted.

IT IS FURTHER ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of any further representation of Jose Ruiz-Navarro on appeal. *See* WIS. STAT. RULE 809.32(3) (2017-18).

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

Sheila T. Reiff
Clerk of Court of Appeals