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August 9, 2019

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

2017AP1960-CRNM State of Wisconsin v. Jordan C. Beard (L.C. # 2016CF1158)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, JJ.

Jordan Beard appeals a judgment of conviction for one count of sexual assault of a child under sixteen years of age. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report discusses the sufficiency of the evidence to support the jury verdict, whether the sentence imposed was excessive, and whether there would be any arguable merit to a claim for

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

ineffective assistance of counsel.[2] Beard was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

The no-merit report addresses whether the evidence was sufficient to support the jury verdict. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient 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. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In order for the jury to find Beard guilty of sexual assault of a child under the age of sixteen, the State was required to prove beyond a reasonable doubt that (1) Beard had sexual intercourse with the victim, M.L.H., and (2) that M.L.H. was under the age of sixteen years at the time of the alleged intercourse. *See* WIS. STAT. § 948.02(2). *See also* WIS JI—CRIMINAL 2104. Under WIS. STAT. § 948.01(6), "sexual intercourse" includes cunnilingus and fellatio. A defendant may be convicted of the sexual assault of a minor under the age of sixteen regardless of his knowledge of the victim's age, and consent is not a defense. ***State v. Olson***, 2000 WI App 158, ¶13, 238 Wis. 2d 74, 616 N.W.2d 144.

[2] This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in ***State v. Trammell***, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). The order noted that here, at trial, jury instruction WIS JI-CRIMINAL 140 was given to the jury, and that the supreme court granted review in ***Trammell*** to address whether the holding in ***State v. Avila***, 192 Wis. 2d 870, 532 N.W.2d 423 (1995)—that it is "not reasonably likely" that WIS JI—CRIMINAL 140 reduces the State's burden of proof—is good law; or whether ***Avila*** should be overruled on the ground that it stands rebutted by empirical evidence. The supreme court has now issued a decision in ***Trammell***, holding "that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof (continued)

M.L.H. testified at trial that Beard engaged in oral sex with her at the home of her mother's friend, Todd Hetchler, when she was fifteen years old. M.L.H., Beard, and Hetchler had been drinking alcohol and watching a movie, and Hetchler fell asleep. M.L.H. testified that Beard touched his mouth and tongue to her vagina, and that she put her mouth on his penis. M.L.H. testified that when she woke up the next morning, she saw that she had received a Facebook message from Beard saying that he was ready "to go for another round." A screenshot of the Facebook message was received into evidence. The State also elicited trial testimony from M.L.H.'s mother, from Hetchler, from the police officer who investigated the incident, and from a friend of M.L.H. in whom M.L.H. confided about the incident. Having conducted an independent review of the record, we are satisfied that the evidence at trial was sufficient to support the jury verdict, such that any claim to the contrary would be without arguable merit.

The no-merit report also addresses whether there would be any arguable merit to a claim that Beard's sentence was excessive. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the circuit court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Beard's character, the seriousness of the offense, Beard's rehabilitative needs, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court imposed a nine-year bifurcated sentence, consisting of four years of

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below the reasonable doubt standard." ***State v. Trammell***, 2019 WI 59, ¶¶2, 67, 387 Wis. 2d 156, 928 N.W.2d 564.

initial confinement and five years of extended supervision, out of a maximum possible bifurcated sentence of forty years. There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). We are satisfied that, under the circumstances, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive.

Finally, the no-merit report concludes that there would be no arguable merit to any claim of ineffective assistance of trial counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense). On our own review, we agree that nothing before us would support a non-frivolous claim of ineffective assistance of counsel.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Jordan Beard 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