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DISTRICT IV

April 9, 2020

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

2018AP206-CRNM State of Wisconsin v. John Maxwell Reid (L.C. # 2016CF91)

Before Fitzpatrick, P.J., Kloppenburg and Nashold, 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).

John Reid appeals a judgment convicting him, following a jury trial, of second-degree sexual assault of an unconscious victim. He also appeals the order denying his motion for postconviction relief. Attorney Michael Rosenberg has filed a no-merit report seeking to

withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence to support the verdict, the availability of an intoxication defense, the jury instructions, the sentence, and whether there are grounds for sentence modification. Reid was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Here, the State needed to provide sufficient evidence to prove that Reid had sexual contact or sexual intercourse with a person who he knew was unconscious. *See* WIS. STAT. § 940.225(2)(d) (2013-14).

Erica[2] testified that she and her boyfriend stayed at a hotel while in Stevens Point for a festival. They were both asleep in the hotel bed when Erica began to awaken feeling sensations on and inside her vagina, consistent with oral sex. At first Erica thought she was having a sexual

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

[2] This matter involves the victim of a crime. Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

dream or that it was her boyfriend, until she realized that her boyfriend was snoring next to her in the bed. Then someone stuck his finger into Erica's anus, which shocked her fully awake, because that was not something her boyfriend would do with her. At that point, Erica realized there was an unknown, balding or short-haired, dark-skinned person between her legs and shouted, "Who the fuck are you?" Erica's shout woke up her boyfriend, and the unknown person got up and left the room. Erica contacted the police.

Hotel surveillance video allowed police to identify Reid as the person who had entered Erica and her boyfriend's hotel room on the night in question. The video also showed Reid exiting the room in a hurry and trotting down the hallway holding the waistband of his pants.

When questioned by police, Reid denied performing oral sex on Erica, and stated that, if he was in her room, he must have thought it was his room. However, subsequent testing found a strong statistical probability that Reid's DNA was present in rectal and vaginal swabs taken from Erica during a sexual assault examination. The laboratory also determined that Reid was the source of DNA on a beer can recovered from Erica's hotel room.

Reid testified at trial that he had attended the festival with two friends, and had been drinking all afternoon and evening. Reid testified that he thought he was entering the hotel room he was sharing with his friends when he entered Erica's room. He claimed that he did not notice that the room only had one bed instead of two, and that none of his or his friends' belongings were there. He used the bathroom, and when he came out he saw what he thought was one of his two friends sleeping on the bed, with a woman next to him "pleasuring herself." Reid then decided to "join[] in" by performing oral sex on the woman, believing her to be awake and willing. He admitted that he did not see the woman's eyes open, and did not have any

conversation with her. He said that he did not realize that the man next to Erica was not his friend and that he was in the wrong room until Erica asked him who he was, at which point he walked out.

We agree with counsel's assessment that this evidence was entirely sufficient to support the verdict, and that Reid's level of intoxication did not provide a defense because the incident occurred after Wisconsin abolished the voluntary intoxication defense. Both the DNA evidence and Reid's own testimony corroborated Erica's allegation that Reid performed oral sex on her. The only questions were whether Erica was sleeping when Reid initiated contact, and whether he knew it. The jury was entitled to find Erica's testimony more credible on these points, particularly given Reid's hurried exit from the room when Erica spoke up and his initial denials to police.

Jury Instructions

Over the objection of the defense, the circuit court instructed the jury on the lesser-included offense of third-degree sexual assault. The instruction was appropriate because, if the jury had found Reid credible, there could have been reasonable grounds to find that he was not aware that Erica was asleep. In any event, Reid was not harmed by the jury returning a compromise verdict because it convicted on the higher charge.

Sentence

A challenge to Reid's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to

overturn it. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Reid was afforded an opportunity to comment on the PSI and to address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & nn.9-12, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court emphasized the significant impact the assault had on Erica. With respect to Reid's character, the court noted that Reid had been living a close to exemplary life prior to this offense, with the possible exception of using alcohol to excess. The court concluded that a prison term was necessary so as to not depreciate the seriousness of the offense and to allow substance abuse programming in a facility setting.

The court then sentenced Reid to 50 months of initial confinement and 40 months of extended supervision. The court also ordered restitution in the amount of $12; imposed standard costs and conditions of supervision; directed Reid to provide a DNA sample and register as a sex offender; and, after initially indicating that it would find Reid eligible for the challenge incarceration program and the substance abuse program, acknowledged that he was not statutorily eligible for either program. The court's initial misapprehension regarding Reid's eligibility for programming does not provide a ground for sentence modification because the court determined during postconviction proceedings that, even if Reid's lack of eligibility were new information, it would not lead to a different sentence.

The components of the bifurcated sentence imposed were within the applicable penalty ranges, and the total confinement period constituted less than 20% of the maximum exposure Reid faced. *See* WIS. STAT. §§ 940.225(2)(d) (classifying second-degree sexual assault of an unconscious person as a Class C felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of

25 years of initial confinement and 15 years of extended supervision for a Class C felony) (2013-14). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence imposed here is 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." *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source and internal quotation marks omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction and the order denying postconviction relief are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael D. Rosenberg is relieved of any further representation of John Maxwell Reid in this matter pursuant to 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