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January 4, 2022

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

2020AP1349-CRNM State of Wisconsin v. Nathaniel Lee Robinson-Trey
(L.C. # 2016CF3449)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Nathanial Lee Robinson-Trey appeals a judgment entered after a jury found him guilty of second-degree sexual assault and incest. Appellate counsel, Attorney Hans P. Koesser, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Robinson-Trey did not file a response. This court has considered the no-merit report, and we have independently reviewed the record as mandated by ***Anders***. We

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Robinson-Trey had sexual intercourse with A.R. on July 30, 2016, knowing that she was unconscious and that she was his half-sister. The State charged Robinson-Trey with second-degree sexual assault and incest. Robinson-Trey pled not guilty and requested a speedy jury trial.

On the first day of trial, Robinson-Trey moved to exclude DNA test results that the State had provided a few days earlier. In support, Robinson-Trey asserted that the State had failed to submit the results within the discovery deadline established by the circuit court. The State conceded that the results—which reflected that Robinson-Trey's semen was found in A.R.'s vaginal area—could not be used in the prosecution's case-in-chief but argued that the results should be admissible as rebuttal evidence if Robinson-Trey testified and denied having sexual intercourse with A.R. The circuit court agreed with and adopted the State's position.

The matter proceeded to trial. The State presented testimony from A.R., her cousin M.L., and an investigating officer. Robinson-Trey did not present any evidence. He argued that the State's evidence was thin and lacked third-party witnesses, injuries to the victim, medical testimony, and test results. The jury found him guilty as charged.

At sentencing, Robinson-Trey faced maximum penalties of a $100,000 fine and a forty-year term of imprisonment for second-degree sexual assault, and he faced a $25,000 fine and twelve years and six months of imprisonment for incest. *See* WIS. STAT. §§ 940.225(2)(d), 944.06, 939.50(3)(c), (f) (2015-16). The circuit court imposed a twelve-year term of imprisonment for second-degree sexual assault, bifurcated as seven years of initial confinement

and five years of extended supervision. The circuit court imposed a concurrent, evenly bifurcated ten-year term of imprisonment for incest. The circuit court awarded Robinson-Trey the 118 days of sentence credit that he requested, found him ineligible for both the Wisconsin substance abuse program and the challenge incarceration program, and did not order any restitution.

We first consider whether Robinson-Trey could pursue an arguably meritorious claim that the State failed to present sufficient evidence to support the guilty verdicts. We conclude that he could not do so.

Before the jury could find Robinson-Trey guilty of second-degree sexual assault, the State was required to prove beyond a reasonable doubt that: (1) Robinson-Trey had sexual intercourse with A.R; (2) A.R. was unconscious at the time of the sexual intercourse; and (3) Robinson-Trey knew that A.R. was unconscious at the time of the sexual intercourse. *See* WIS. STAT. § 940.225(2)(d) (2015-16); WIS JI—CRIMINAL 1213. Before the jury could find Robinson-Trey guilty of incest, the State was required to prove beyond a reasonable doubt that: (1) Robinson-Trey had sexual intercourse with A.R.; (2) he knew that A.R. was related to him by blood; and (3) A.R. was related to Robinson-Trey in a degree of kinship closer than second cousin. *See* WIS. STAT. § 944.06 (2015-16); WIS JI—CRIMINAL 1532.

A.R. testified that she was eighteen years old, Robinson-Trey was nineteen years old, and that she had known him for most of her life because they had the same father. She said that on or about July 30, 2016, she was at their grandmother's home. Robinson-Trey came over to visit at approximately 10:00 p.m., and her fourteen-year-old cousin, M.L., was also in the home. A.R. said that she fell asleep on the couch while Robinson-Trey and M.L. were talking in the kitchen.

A.R. testified that she awoke because she felt someone touching her, and she realized that Robinson-Trey was having penis-to-vagina intercourse with her. She got away from him, ran up the stairs, and told M.L. what had happened. A.R. said that she asked M.L. to call her parents—A.R.'s aunt and uncle—who came and took A.R. to the hospital.

M.L. testified that on the night of the incident, she was fourteen years old and visiting her grandmother. She said that she and her cousins, Robinson-Trey and A.R., chatted for a time, but A.R. fell asleep on the couch, and M.L. went upstairs to bed. She said that early the next morning, she was awakened by A.R., who looked "scared" and was "shaking." According to M.L., A.R. "said that Nate had raped her," and "she started crying." M.L. went on to describe calling her parents and going to the hospital with A.R.

Officer Miguel Cornejo testified that he interviewed Robinson-Trey on August 3, 2016, following his arrest. The jury watched a portion of the recorded interview. Robinson-Trey admitted that A.R. was his half-sister, and he admitted having sexual intercourse with her on July 30, 2016. He denied, however, that A.R. was unconscious, and he maintained that the sexual intercourse was consensual.

When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force 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). The trier of fact, not this court, considers the

weight of the evidence and the credibility of the witnesses and resolves any conflicts in the testimony. *See* ***id.*** at 503-04.

The evidence summarized above amply satisfies the standard set forth in ***Poellinger***. In reaching this conclusion, we have considered appellate counsel's discussion of the evidence offered to prove that A.R. and Robinson-Trey were half-siblings, and we agree with appellate counsel's conclusion that Robinson-Trey could not mount an arguably meritorious challenge to the sufficiency of that evidence. Pursuant to WIS. STAT. § 908.03(19), members of a person's family may testify "concerning a person's ... relationship by blood ... or other similar fact of this personal or family history." A.R.'s testimony was sufficient to establish her familial relationship with Robinson-Trey. *See* ***Poellinger***, 153 Wis. 2d at 507. Robinson-Trey also admitted in his custodial statement that A.R. was his half-sister. Further pursuit of a challenge to the sufficiency of the evidence in this case would be frivolous within the meaning of ***Anders***.

We next consider whether Robinson-Trey could pursue an arguably meritorious claim that he did not validly waive his right to testify at trial. The record shows that the circuit court conducted a colloquy with Robinson-Trey and established that he was aware of his right to testify, had discussed it with his counsel, and had decided not to exercise that right. The colloquy fully satisfied the obligations imposed by ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. Further pursuit of this issue would also lack arguable merit.

We next consider whether Robinson-Trey could pursue an arguably meritorious challenge to the ruling permitting the State to present DNA test results as rebuttal evidence. We conclude that he could not do so.

> [W]hen a [circuit] court rules that certain evidence is admissible, the admission cannot be deemed prejudicial error unless the evidence actually is admitted against the party objecting to it.... "Error cannot be assigned to a [circuit] court ruling denying a motion *in limine* to exclude evidence because the ruling is advisory and tentative[.]"

State v. Frank, 2002 WI App 31, ¶9, 250 Wis. 2d 95, 640 N.W.2d 198 (citation omitted; italics added). Robinson-Trey chose not to testify or present evidence. The State therefore never presented any rebuttal evidence, and the jury never heard about the inculpatory DNA test results. Accordingly, Robinson-Trey cannot pursue an arguably meritorious challenge to the circuit court's conditional ruling allowing the State to present the DNA evidence in rebuttal. *See* ***id.***

In the no-merit report, appellate counsel examines whether Robinson-Trey could pursue an arguably meritorious claim that his trial counsel was ineffective for failing to object on hearsay grounds to testimony from M.L. describing A.R.'s statements accusing Robinson-Trey of rape. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

Robinson-Trey could not pursue an arguably meritorious claim that his trial counsel performed deficiently by forgoing an objection to M.L.'s testimony. The evidence showed that A.R. fled from Robinson-Trey when she awoke to find him penetrating her vagina, and she

sought out M.L. immediately. M.L. described A.R. as crying, scared, and shaking while she disclosed that Robinson-Trey had raped her only moments earlier. A.R.'s statements describing that rape and naming her assailant were therefore admissible as present sense impressions and excited utterances. *See* WIS. STAT. § 908.03(1)-(2); *see also* ***State v. Boshcka***, 178 Wis. 2d 628, 639-41, 496 N.W.2d 627 (Ct. App. 1992) (holding that statements of an adult victim describing a sexual assault within a few hours after the occurrence are admissible as excited utterances when made under the stress of the event). Further pursuit of this issue would lack arguable merit.

We next consider whether Robinson-Trey could pursue an arguably meritorious claim that his trial counsel was ineffective for not seeking to suppress his custodial statements pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). At a ***Miranda-Goodchild*** hearing, the State is required to show by a preponderance of the evidence that the defendant received and understood the warnings required by ***Miranda*** and that the defendant's custodial admissions were voluntary. *See* ***State v. Jiles***, 2003 WI 66, ¶¶25-26, 262 Wis. 2d 457, 663 N.W.2d 798. Trial counsel told the circuit court that Robinson-Trey had no grounds to pursue such a hearing. The record includes the video-recording of Robinson-Trey's custodial statement and the warnings that preceded it. The warnings complied with the requirements of ***Miranda***.[2] "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of ***Miranda*** are rare." ***State v. Ward***, 2009

[2] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

WI 60, ¶61, 318 Wis. 2d 301, 767 N.W.2d 236 (citations omitted). Nothing in the video-recording or elsewhere in the record provides a basis to challenge the voluntary nature of Robinson-Trey's admissions. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We next consider whether Robinson-Trey could pursue an arguably meritorious claim for relief based on the State's rebuttal argument. A defendant forfeits any challenge to an allegedly improper prosecutorial closing argument unless the defendant first moves for a mistrial upon that ground. *See* ***State v. Bell***, 2018 WI 28, ¶11 & n.13, 380 Wis. 2d 616, 909 N.W.2d 750. Trial counsel did not move for a mistrial here, so the arguable merit of any challenge must be assessed within the rubric of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

The prosecutor argued, first, that the defense was "in a tough predicament to try to come up with something to argue about as to why their client is innocent." Trial counsel objected that the prosecutor was improperly shifting the burden of proof to the defense. *Cf.* ***State v. Schulz***, 102 Wis. 2d 423, 427, 307 N.W.2d 151 (1981) (observing that the State bears the burden of proving all elements of a crime beyond a reasonable doubt). The State responded that it did not intend to shift the burden but merely intended to argue the facts. The circuit court indicated that the State should move on. Robinson-Trey did not pursue the issue further.

Second, the State argued at the conclusion of its rebuttal that Robinson-Trey was presumed innocent when the trial began, but "after the evidence was completed, that presumption was gone. That presumption of innocence was out the door because at that point, once you heard the evidence, once all the evidence was told to you or played for you, that

presumption was gone because then the defendant was guilty." Robinson-Trey did not object or move for a mistrial in response to this argument, although the presumption of innocence attends the defendant "up to and including the time the jury begins deliberations." *See* ***State v. Holt***, 128 Wis. 2d 110, 136-37, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*.

We conclude that, regardless of whether trial counsel performed deficiently in response to the State's rebuttal arguments, Robinson-Trey could not pursue an arguably meritorious claim that he suffered prejudice as a result. "To demonstrate prejudice, the defendant must show that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" ***State v. Pinno***, 2014 WI 74, ¶82, 356 Wis. 2d 106, 850 N.W.2d 207 (citation omitted). Robinson-Trey was not deprived of a fair and reliable trial in this case. The circuit court barred the prosecutor from presenting inculpatory DNA test results in the State's case-in-chief because Robinson-Trey did not have sufficient time to assess and respond to those results. The evidence presented was nonetheless overwhelming and included a video-recording of Robinson-Trey confessing to sexual intercourse with his half-sister, A.R. The circuit court instructed the jurors on the burden of proof and the presumption of innocence, specifically explaining that the State bore the burden of proving every element beyond a reasonable doubt and that the presumption of innocence required a finding of not guilty "unless in your deliberations you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty." The circuit court also instructed the jurors that remarks of counsel and closing arguments are not evidence and that the jury must base its verdict solely on the evidence presented at trial and the law as given in the instructions of the court. Jurors are presumed to follow jury instructions, *see* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85,

750 N.W.2d 780, and no basis exists to reject that presumption here. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We next conclude that Robinson-Trey could not mount an arguably meritorious challenge to his sentences. The circuit court identified punishment and Robinson-Trey's rehabilitation as the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***State v. Gallion***, 2004 WI 42, ¶¶41-43, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court's discussion included consideration of the mandatory sentencing factors, namely, "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentences imposed were within the maximums allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We last conclude that Robinson-Trey could not pursue an arguably meritorious challenge to the circuit court's finding that he was ineligible to participate in the challenge incarceration program, *see* WIS. STAT. § 302.045, and the Wisconsin substance abuse program, *see* WIS. STAT. § 302.05.[3] A person serving a sentence for a crime specified in WIS. STAT. ch. 940 is statutorily disqualified from participating in either program. *See* §§ 302.045(2)(c); 302.05(3)(a)1.

[3] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05, 973.01(3g).

Robinson-Trey's sentence for second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(d) (2015-16), disqualifies him from participation.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or 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 Hans P. Koesser is relieved of any further representation of Nathaniel Lee Robinson-Trey. *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