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**DISTRICT II**

October 26, 2022

To:

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Stephen Smith, #680520  
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You are hereby notified that the Court has entered the following opinion and order:

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2021AP1073-CRNM      State of Wisconsin v. Stephen Smith (L.C. #2018CF999)

Before Neubauer, Grogan and Lazar, 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).**

Stephen Smith appeals from a judgment of conviction for child enticement and for four counts of second-degree sexual assault, all as a persistent repeater under WIS. STAT. § 939.62(2m)(b) (2017-18).<sup>1</sup> Smith's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Smith has filed a response, and counsel has filed a supplemental no-merit report addressing his claims.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Upon consideration of the no-merit report, Smith's response, and the supplemental no-merit report and following an independent review of the appellate record as mandated by *Anders* and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

Smith was charged with child enticement (Count 1), four counts of second-degree sexual assault (Counts 4, 6, 8 and 9), two counts of physical abuse of a child (Counts 2 and 5), two counts of false imprisonment (Counts 3 and 7), one count of exposing his genitals to a child (Count 11), and one count of causing a child to expose her genitals (Count 10). All charges arose from his conduct on July 19, 2018, when he was alleged to have taken sixteen-year-old Natasha<sup>2</sup> to the motel where he was residing and had multiple instances of forced sexual contact with her, including intercourse. As to Counts 1, 4, 6, 8 and 9, the State alleged that Smith's prior convictions for sexual contact with minors in Illinois in 1991 and 2003 rendered Smith a persistent repeater subject to lifetime imprisonment under WIS. STAT. § 939.62(2m)(b)1, (b)2 and (c) (2017-18). The State also sought lifetime sex offender supervision pursuant to WIS. STAT. § 939.615(2) (2017-18).

After Natasha reported the crimes in August 2018, Smith, who was on federal GPS monitoring at the time, cut off his ankle bracelet and absconded. He was subsequently apprehended and waived his preliminary hearing. Before trial, the State filed an amended Information dismissing all counts except for child enticement and the four counts of second-degree sexual assault. He proceeded to trial on those charges, was convicted, and was sentenced

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<sup>2</sup> Consistent with the policy underlying WIS. STAT. RULE 809.86, we refer to the victim using a pseudonym.

to lifetime imprisonment in accordance with the persistent-repeater penalty enhancer. Smith was also ordered to register as a sex offender for life and to pay restitution for the victim's counseling needs.

The no-merit report concludes that there are no issues of arguable merit for appeal. The no-merit report analyzes, among other things, the sufficiency of the evidence to convict Smith; Smith's rejection of the State's plea offer; issues regarding jury selection; a mistrial motion based on a juror's observation of a Department of Corrections form with Smith's name; pretrial motions in limine filed by the defense; evidentiary decisions by the circuit court during the trial; the adequacy of the jury instructions; and the resolution of jury questions during deliberations. The no-merit report also concludes the circuit court properly sentenced Smith to mandatory lifetime imprisonment as a persistent repeater. Our review of the appellate record satisfies us that the no-merit report sufficiently analyzes these issues and properly concludes that any challenge based upon them would lack arguable merit.

The no-merit report does not address a few references at trial to the victim's virginity at the time of the offense. Natasha testified that during the drive to the motel, Smith asked her several times whether she had "done anything with boys before," which she interpreted as asking if she had had sex. She told Smith she had not. Natasha's stepfather also stated during a lengthy narrative answer that after he learned of the assaults, he had talked to Smith and told him Natasha was a virgin. This virginity testimony potentially violated the rape shield law. *See State v. Burns*, 2011 WI 22, ¶37 n.20, 332 Wis. 2d 730, 798 N.W.2d 166; *see also* WIS. STAT. § 972.11(2)(b) (2017-18).

However, because there was no objection to the virginity testimony, any challenge to Smith's conviction on that basis would be reviewed for ineffective assistance of trial counsel. Smith would have to demonstrate prejudice, which requires showing a reasonable probability that the outcome of the proceedings would have been different without the challenged testimony. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). The references to Natasha's virginity were scant, and as Smith's appointed appellate counsel recognizes elsewhere in the no-merit report, the persuasive force of the State's case was Natasha's detailed and extensive testimony regarding how the assaults occurred. Considering the totality of the evidence, we are confident the trial produced a reliable outcome so as to render any ineffective-assistance-of-counsel claim on this ground lacking in any arguable merit.

Smith's response raises the prospect of an ineffective-assistance-of-counsel claim based on his trial counsel's failure to procure GPS records from the federal Electronic Monitoring Program that Smith was participating in at the time of the offenses. He argues the records would disprove Natasha's testimony that he picked her up on the corner near her house in Zion, Illinois, between 2 and 3 p.m. on July 19, 2018. According to the GPS records submitted with Smith's motion, he left his home at 1:53 p.m. on July 19, reentered at 2:48 p.m., left again at 3:18 p.m., and returned at 4:18 p.m. Smith contends the period between 1:53 and 2:48 p.m. was an insufficient amount of time to have traveled to Zion to pick up Natasha and then to have returned to his residence.

Appellate counsel's supplemental no-merit report acknowledges that Smith's trial attorney was arguably deficient for failing to obtain the GPS records before the trial.<sup>3</sup> However, appellate counsel concludes that any ineffective-assistance-of-counsel challenge on this ground would fail because Smith cannot demonstrate prejudice. Counsel's supplemental submissions include an affidavit by an SPD investigator who reviewed Smith's GPS data from July 19, 2018 with an officer from the United States Probation and Parole office. The GPS records showed that between 1:53 p.m. and 2:48 p.m., Smith's monitoring device traveled from Smith's residence in Kenosha to Zion, briefly stopped at the intersection where Natasha told police Smith had picked her up, then traveled back to Smith's residence. Between 3:18 and 4:18 p.m., Smith again drove from his residence to Zion and back, stopping briefly at an intersection there. The stops in Zion occurred at 2:17 p.m. and 3:46 p.m., respectively.

The record contains nothing to substantiate Smith's claim that the travel indicated by his GPS data was physically impossible. And while appellate counsel acknowledges that the thirty-minute period between 2:48 and 3:18 p.m. is "a short timeframe" for Smith to have committed the acts alleged, we agree with counsel's assessment that the logs of Smith's movements would not have materially aided Smith's trial defense. The GPS records do not undermine our confidence in the outcome of the trial proceedings. Based upon the supplemental no-merit report and the attachments thereto, we conclude there is no issue of arguable merit regarding trial counsel's failure to obtain Smith's GPS data for July 18, 2019.

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<sup>3</sup> Trial counsel did apparently obtain the GPS records after Smith was convicted at trial.

Our review of the appellate record discloses no other potentially meritorious issues for appeal.

Based upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Frances Philomene Colbert is relieved from further representing Stephen Smith in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*