



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 IV

February 25, 2013

To:

Hon. Patrick J. Fiedler
Circuit Court Judge
215 South Hamilton, Br 8, Rm 8103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Martha K. Askins
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Robert J. Kaiser Jr.
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Roger A. Altieri 558786
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2011AP1636-CRNM State of Wisconsin v. Roger A. Altieri (L.C. # 2009CF330)

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

Roger Altieri appeals related judgments convicting him of one count of repeated sexual assault of the same child, one count of first-degree sexual assault of a child, five counts of possession of child pornography, two counts of child abuse, and one count of strangulation and suffocation. Attorney Martha Askins has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12)¹; *see also Anders v. California*, 386 U.S. 738, 744 (1967), and *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses pretrial motions to consolidate the pornography charges, to sever other counts, and to admit other acts evidence; the validity of Altieri's entry of pleas on the pornography charges and his waiver of his rights to a jury and to testify on the remaining counts; the circuit court's refusal to allow Altieri to personally question witnesses while represented by counsel; the sufficiency of the evidence to support the charges tried to the court; the denial of mistrial motions; and the validity of the sentences. Altieri 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.

Pretrial Motions

Altieri moved to consolidate the five counts of possession of child pornography on the grounds that they were multiplicitous. Multiplicity arises when a single criminal episode or course of conduct is charged as multiple counts rather than merged. *State v. Hirsch*, 140 Wis. 2d 468, 471, 410 N.W.2d 638 (Ct. App. 1987). The test to determine whether multiple counts are permissible is, first, whether the charges are identical in law and fact and, second, whether the legislature intended to allow more than one unit of prosecution. *See State v. Bergeron*, 162 Wis. 2d 521, 534, 470 N.W.2d 322 (Ct. App. 1991). Charges are different in fact if they are separated in time or place, require separate acts of volition within a course of conduct, or are otherwise significantly different in nature. *State v. Anderson*, 219 Wis. 2d 739, 748-51, 580 N.W.2d 329 (1998). Here, the State charged that Altieri had separately downloaded each of the five pornographic images in question, and had saved each to a different location. We are satisfied that the circuit court properly found that each count involved a separate volitional act. *See State v. Multaler*, 2001 WI App 149, ¶¶35-36, 246 N.W.2d 752, 632 N.W.2d 89.

The State moved to admit other acts evidence—that Altieri had possessed child pornography—at the trial on the remaining charges. The circuit court granted the motion on the grounds that the evidence was relevant to both motive and intent, and that its probative value was not outweighed by the danger of unfair prejudice. We agree with counsel’s assessment that the circuit court properly applied the relevant law to the facts before it. *See generally State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998) (setting out test for admissibility of other acts evidence); *see also State v. Marinez*, 2011 WI 12, ¶20, 331 Wis. 2d 568, 797 N.W.2d 399 (Wisconsin courts apply a “greater latitude rule” that permits other acts evidence to be admitted more liberally in sexual assault cases—particularly those involving children).

After the circuit court’s ruling on other acts evidence, Altieri also moved to sever the sexual assault counts, to which that evidence would be relevant, from the child abuse and strangulation counts.² The court first noted that joinder was proper under WIS. STAT. § 971.12(1) because the charged offenses were near in time, involved the same people, related to an overall story, and would include overlapping evidence. The court acknowledged that there was some danger of prejudice from the other acts evidence, but concluded that a limiting instruction would suffice. We see no reasonable basis to challenge the circuit court’s exercise of discretion.

Pleas On The Pornography Charges

After the circuit court denied Altieri’s motion to consolidate the pornography charges, Altieri chose to enter pleas on those five counts. In order to withdraw a plea after sentencing, a

² There were other counts involved in the motion, but since Altieri was acquitted on those charges, we do not address them.

defendant must either show an unknowing plea, or demonstrate some other manifest injustice, such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. *See State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); *State v. Krieger*, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The circuit court conducted a plea colloquy exploring Altieri's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; *Bangert*, 131 Wis. 2d at 266-72; *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The court made sure that Altieri understood that the court would not be bound by any sentencing recommendations, and could impose consecutive, maximum sentences. The court also inquired into Altieri's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire. Altieri indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint provided a sufficient factual basis for the pleas. Altieri indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Altieri has not alleged any other facts that would give rise to a manifest injustice. Therefore, Altieri's pleas were valid and operated to waive all nonjurisdictional defects and defenses with respect to those convictions. *See State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

Waiver Of Right To Trial By Jury

The circuit court conducted a colloquy to determine whether Altieri was knowingly, voluntarily, and intelligently waiving his right to a jury before it granted his request for a bench trial on the remaining charges. Having reviewed the transcript, we agree with counsel's assessment that the colloquy satisfied the constitutional requirements set forth in *State v. Anderson*, 2002 WI 7, ¶¶11, 23-24, 249 Wis. 2d 586, 638 N.W.2d 301.

Hybrid Representation

Altieri requested permission to ask some questions pertaining to computer evidence. The circuit court denied the request on the grounds that there would be no hybrid representation. The court's ruling was in line with established case law. *See State v. Debra A.E.*, 188 Wis. 2d 111, 138, 523 N.W.2d 727 (1994) (there is no constitutional right to hybrid representation); *see also State v. Cummings*, 199 Wis. 2d 721, 754, 546 N.W.2d 406 (1996) (noting that courts have discretion whether to allow someone to represent himself with the assistance of standby counsel).

Sufficiency Of The Evidence

The circuit court found Altieri guilty of four of the seven charges on which he proceeded to trial, found him guilty of a lesser-included offense on a fifth charge, and acquitted him of two charges. 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)).

To prove Altieri guilty of repeated first-degree sexual assault of the same child, the State needed to provide evidence showing beyond a reasonable doubt that Altieri had sexual contact with a child—meaning that he intentionally touched the breast, buttock, groin, vagina, or pubic mound of a person under the age of thirteen, or caused that person to touch his penis, for the purpose of sexual arousal or gratification—on three or more occasions. WIS. STAT. § 948.025(1)(d) and WIS JI—CRIMINAL 2107. To prove Altieri guilty of the lesser-included offense of first-degree sexual assault of a child, the State needed to provide evidence showing beyond a reasonable doubt that Altieri had such sexual contact with a child on at least one occasion. WIS. STAT. § 948.02(1)(e).

To prove Altieri guilty of each count of physical abuse of a child, the State needed to provide evidence showing beyond a reasonable doubt that Altieri intentionally caused bodily harm—meaning physical pain or injury, illness, or any impairment of physical condition—to a person who had not attained the age of eighteen. WIS. STAT. § 948.03(2)(b) and WIS JI—CRIMINAL 2109. The State further needed to show beyond a reasonable doubt that Altieri was not reasonably acting in the discipline of the child when causing the bodily harm. WIS JI—CRIMINAL 950.

And finally, to prove Altieri guilty of strangulation or suffocation, the State needed to provide evidence showing beyond a reasonable doubt that Altieri intentionally impeded the normal breathing or circulation of blood of a person by applying pressure on the throat or neck or blocking the nose or mouth. WIS. STAT. § 940.235(1) and WIS JI—CRIMINAL 1255.

Two sisters, aged 13 and 10, testified about a number of incidents in which Altieri had touched each girl's breasts, inserted his finger into the older sister's vagina on at least two

occasions, kicked both girls in anger, and lifted the younger girl off the ground by the hood of her sweatshirt, choking her. A Sexual Assault Nurse Examiner testified that she observed a possible healed tear in the vaginal tissue of the older sister that could be consistent with digital insertion, although that was not the only potential cause of the injury.

The girls' mother testified that she observed the kicking and choking incidents. A responding police officer testified that she observed a red mark on the neck of one of the girls, and that, after she arrested Altieri for child abuse, he made a statement that one of the girls was autistic and could say anything, including that he raped her.

A social worker assigned to investigate possible physical abuse to the girls conducted interviews in which the younger girl disclosed incidents of sexual contact. The police then executed search warrants at two locations related to Altieri, which led to the discovery of VHS tapes, DVDs, and computer hard drives containing child pornography.

Psychologist Anna Salter provided an expert opinion that developmentally delayed children have a higher risk of being sexually abused, that pornography can be used to groom young victims, and that physical abuse may impact a child's reporting of sexual abuse.

We agree with counsel's analysis as to how the evidence described above was sufficient to satisfy each of the required elements of the charges of which Altieri was convicted following his bench trial.

Motions For Mistrial

Altieri moved for two mistrials during the course of the trial in response to alleged discovery violations. First, the State admittedly failed to advise the defense prior to trial about

an additional incident in which the older sister alleged that Altieri had touched her while he was holding a cat. The prosecutor explained that the girl had disclosed the incident for the first time during trial preparation, and argued that he was not required by WIS. STAT. § 971.23 to turn the information over because it was not exculpatory and not in written or recorded form. The circuit court denied the first motion for mistrial because it agreed with the prosecutor that there was no technical violation, but the court noted that it still had concerns about fairness and inquired whether defense counsel wanted additional time or other remedies in order to adequately respond to the new allegation. The circuit court directed the court reporter to prepare a transcript of the girl's testimony, and defense counsel was granted the opportunity to re-cross-examine the girl and the detective who was present when she made the statement on the cat incident.

The second mistrial motion was based upon the State's failure to turn over a transcript of jail telephone recordings in which Altieri had made the statement, "I mean, I didn't hurt the girls. The girls deserved what they got." The circuit court determined that the State should have turned over the transcribed recordings, but concluded that a mistrial was not warranted. Instead, the court barred the State from introducing anything from the jail recordings. We agree with counsel's assessment that the circuit court acted consistent with the law and within its discretion in its handling of both mistrial motions.

Waiver Of The Right To Testify

After the State rested, the circuit court conducted a colloquy with Altieri about his right to testify. Altieri first indicated that he wished to testify, but, after a break, informed the court that he had changed his mind. The court then conducted a second colloquy, after which it concluded that Altieri had knowingly and voluntarily waived his right to testify. Having

reviewed the transcript, we are satisfied that the colloquies conducted by the court satisfied the constitutional requirements set forth in *State v. Weed*, 2003 WI 85, ¶¶37-43, 263 Wis. 2d 434, 666 N.W.2d 485.

Sentences

A challenge to Altieri's sentences would also lack arguable merit. 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). The record here shows that Altieri was afforded the opportunity to comment on the PSI and to address the court prior to sentencing. The transcript shows that the circuit court considered the standard sentencing factors and explained their application to this case in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court then sentenced Altieri to ten years of initial confinement and five years of extended supervision on the count of repeated sexual assault of a child; a consecutive term of ten years of initial confinement and five years of extended supervision on the sexual assault count relating to the second victim; three years of initial confinement and one year of extended supervision on each of the five child pornography counts, to run concurrent with each other but consecutive to the sexual assault counts, with the associated mandatory fine of \$500 per count; one year in jail on the child abuse count relating to the first victim, to be served concurrently with the sexual assault sentence relating to that victim; and one year each on the child abuse and strangulation counts related to the second victim, to be served concurrently with the sentence on the second count related to her.

The sentences imposed were well within the applicable penalty ranges, and were not so excessive or unduly harsh as to shock the conscience. *See* WIS. STAT. §§ 948.025(1)(d) (classifying repeated sexual assault of the same child as a Class B felony); 948.02(1)(e) (classifying first-degree sexual assault of a child under 13 as a Class B felony); 939.50(3)(b) (providing maximum imprisonment term of 60 years for Class B felonies); 948.12(1m) and (3) (classifying possession of child pornography as a Class D felony); 939.50(3)(d) (providing maximum imprisonment term of 25 years for Class D felonies); 948.03(2) (classifying child abuse, intentionally causing harm, as a Class H felony); 940.235(1) (classifying strangulation and suffocation as a Class H felony); 939.50(3)(h) (providing maximum imprisonment term of 6 years for Class H felonies); and 973.01 (explaining bifurcated sentence structure) (all 2007-08 statutes). There is a presumption that a sentence “well within the limits of the maximum sentence” is not unduly harsh, and the sentences imposed here were 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*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

Conclusion

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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.

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

IT IS FURTHER ORDERED that Attorney Martha Askins is relieved of any further representation of Roger Altieri in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals