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DISTRICT III

January 10, 2017

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

2015AP1679-CRNM State of Wisconsin v. Sylvester Prescott (L. C. No. 2014CM1349)

Before Stark, P.J.[1]

Counsel for Sylvester Prescott has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding no grounds exist to challenge Prescott's conviction for sexual intercourse with a child age sixteen or older, contrary to WIS. STAT. § 948.09. Prescott was informed of his right to file a response to the no-merit report and has not responded. Upon an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), this

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14).

court concludes there is no arguable merit to any issue that could be raised on appeal. Therefore, the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

While investigating an unrelated matter involving seventeen-year-old T.H., police learned T.H. had sexual intercourse with twenty-seven-year-old Prescott. The State charged Prescott with one count of sexual intercourse with a child age sixteen or older. Prescott was convicted upon a jury's verdict of the crime charged. Out of a maximum possible nine-month sentence, the court imposed eight months in jail, consecutive to any sentence Prescott was then serving.

Although the no-merit report does not address it, we conclude any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). WISCONSIN STAT. § 948.09 provides: "Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor." At trial, T.H. testified she knew Prescott because he is the uncle of her high school classmate. T.H. contacted that classmate for a ride to school, and both the classmate and Prescott picked T.H. up at her home and brought her back to Prescott's apartment. The classmate then left for school on the bus and T.H. remained to "hang out" with Prescott. T.H. testified she had penis to vagina sexual intercourse in Prescott's apartment and Prescott then drove her to school. T.H. further testified she is not married to Prescott and she told Prescott she was seventeen years old. A police detective also testified that both T.H. and Prescott told him they had sexual intercourse with each other.

To the extent there was any conflicting testimony, it was the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Prescott's conviction.

Any challenge to Prescott's waiver of his right to testify would lack arguable merit. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Prescott in an on-the-record colloquy, informing him of both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, Prescott confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

The record discloses no arguable basis for challenging the effectiveness of Prescott's trial counsel. To establish ineffective assistance of counsel, Prescott must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance affected the outcome of the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The no-merit report addresses whether trial counsel was ineffective by failing to pursue a pretrial motion to suppress Prescott's statements to police. A

police detective testified at trial that while piecing together details regarding an unrelated investigation, he discovered information implicating Prescott in the present offense. Prescott agreed to speak to the detective outside Prescott's apartment building and made inculpatory statements during their conversation. Nothing about this encounter would support a nonfrivolous argument that trial counsel was ineffective by failing to move to suppress those statements. *See* ***State v. Brockdorf***, 2006 WI 76, ¶39, 291 Wis. 2d 635, 717 N.W.2d 657 (holding that police are not required to give ***Miranda***[2] warnings if the suspect is not in custody).

The no-merit report also questions whether trial counsel was ineffective by failing to request that the jury be polled. First, we note that the circuit court instructed the jury that its verdict must be unanimous, and the jurors are presumed to have followed that instruction. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Further, where a defendant was represented by counsel at trial, "the decision to assert or waive certain rights, including whether to poll the jury, was delegated to that counsel." ***State v. Jackson***, 188 Wis. 2d 537, 543, 525 N.W.2d 165 (Ct. App. 1994). This court has also held that "[i]n the absence of any indication that the jury's verdict was not unanimous, … the decision not to request an individual polling was a reasonable one in the circumstances … and was not deficient performance." ***State v. Yang***, 201 Wis. 2d 725, 746, 549 N.W.2d 769 (Ct. App. 1996). Because we presume the jury followed its instructions and there is no indication in the record that the verdict was not unanimous, any challenge to counsel's performance based on the failure to request a jury poll would lack arguable merit. Our review of the record and the no-merit report discloses no basis

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[3] hearing.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Prescott's character, including his criminal history; the need to protect the public; and the mitigating circumstances Prescott raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Prescott's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

An independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Jeffrey A. Mann is relieved of further representing Prescott in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).