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DISTRICT III

December 23, 2019

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

2017AP2102-CRNM State of Wisconsin v. David J. West (L. C. No. 2016CF47)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for David West has filed a no-merit report concluding there is no basis to challenge West's convictions for child enticement, false imprisonment, and attempted sexual

assault of a child under sixteen years of age.¹ West was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).²

Buffalo County Sheriff's Department responded to a report of a missing juvenile, and while en route, dispatch advised that the juvenile might be with two men in an older, red Ford Ranger, and that one of the males might be West, also known by the alias of Aaron Pyka. While searching the area, deputies received a call from West's girlfriend, advising that the victim was at her apartment. Upon their arrival at the apartment, West's girlfriend pointed the officers to the victim, who was crying. The victim told the deputies she had been abducted near her residence by two men in a black SUV.

However, the victim subsequently told the deputies that her parents were involved in an argument and, when she tried to speak up and stop it, her mother began to yell at her so she went for a walk to a park. West called her and told her he was going to pick her up, and he took her to his apartment. The victim stated that she "really did not want to go with him, but didn't want to tell him no." She also said that West took her phone away because he did not want it to "get

¹ This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review of our decision in *State v. Trammell*, No. 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). In *Trammell*, the supreme court granted review to address whether the holding in *State v. Avila*, 192 Wis. 2d 870, 535 N.W.2d 440 (1995)—that it is "not reasonably likely" that WIS JI-CRIMINAL 140 reduces the State's burden of proof—is good law, or whether *Avila* should be overruled on the ground that it stands rebutted by empirical evidence. The supreme court has issued a decision in *Trammell*, holding "that WIS JI-CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." *State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

traced by the cops.” The victim further stated that West moved a mattress into the living room area for her, and she felt West had plans to sexually assault her. The victim also told the deputies that after a period of time West left for work, and she felt that she “would not be able to leave and was scared.” The victim further advised that West’s girlfriend was getting nervous after West left for work, and she told the victim she was “going to call the cops because she knew that the police were looking for her.” West’s girlfriend allegedly told the victim that she had to “make up a story as to how she got there.” The victim said she lied to the police about being abducted by two men in a black SUV because she was “scared and told to.”

The victim also told the deputies that she had known West “for a while now,” and that they had met when West was showing animals at the county fair. They stayed in contact via Facebook, and West had made multiple comments regarding how he wanted to be with her and that he wanted to take her virginity. The victim stated that she was afraid of West, and that he gets mad at her if she does not tell him that she loves him at the end of their conversations.

An Information alleged child enticement, false imprisonment, and attempted sexual assault of a child under sixteen years of age. The State filed a pretrial motion seeking to introduce several other acts witnesses, which the circuit court granted following a hearing. At trial, the victim testified, as well as West’s girlfriend, a deputy, an investigator, and four other acts witnesses. West’s girlfriend testified that she lived with West for four days prior to the incident and she did not want the victim at the apartment after she found out the victim was a minor. She also testified that West told her to tell the police the story involving the black SUV after West had heard from his brother that the police were looking for the victim.

The first other acts witness testified that she had sexual intercourse with West when she was fourteen years old because West threatened to kill himself if she refused. The second other acts witness testified about five occasions when she was thirteen years old when West had nonconsensual sexual intercourse with her. She became pregnant as a result, and genetic testing after the birth of the child confirmed West was the father. The third other acts witness testified about an incident when she was fifteen years old in which West was sitting directly behind her on a bus, and he attempted to reach down her shirt and touch her breasts. The fourth other acts witness testified about an occasion when she was thirteen where West was at her house with another individual, but West refused to leave when the other person left, although West had been asked to leave. After that witness refused to have sex with him, West proceeded to masturbate and then placed her hand on his penis and used her hand to masturbate himself.

Following a colloquy with the circuit court, West testified in his own defense. West testified that the victim had called him and said she was running away from home because her parents were fighting, her father had a history of alcohol abuse, and nobody cared about her. West testified that he “felt bad for her” and he asked if she wanted him to come and get her. West stated that he did not threaten the victim or keep her in his apartment against her will. He also testified that he did not take her phone away from her, and that he did not instruct his girlfriend to do so. Furthermore, West claimed he did not instruct his girlfriend to lie to the police, and that the victim and his girlfriend made up the story about how she ended up at his apartment. West claimed he took the blame so his girlfriend would not get into trouble “for driving a minor and everything else.” However, West admitted that he sent pictures of his penis to the victim “one time on accident, one purposely.” He also told the victim five times on

Facebook that he loved her, he talked about sex with the victim, and he told her if he did not get sexual favors he would hurt himself.

The jury found West guilty on all counts. The circuit court imposed the following sentence: two years' initial confinement and five years' extended supervision on the child enticement charge, consecutive to any other sentence West was serving; three years' probation on the false imprisonment charge, consecutive to count one; and eight years' probation on the attempted sexual assault charge, consecutive to count one but concurrent to count two.

The no-merit report addresses potential issues regarding: (1) whether West's trial counsel was ineffective for failing to raise suppression motions; (2) whether the circuit court erred by allowing the other acts witnesses to testify; (3) whether sufficient evidence supported the verdict; (4) whether a new trial in the interest of justice was warranted; and (5) whether the court properly exercised its sentencing discretion. Upon our independent review of the record, we agree with counsel's description, analysis, and conclusion that any challenges to these issues would lack arguable merit, and we will not further address them.

Our independent review of the record discloses no other potential issues 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 Melissa M. Petersen is relieved of further representing David West in this matter. *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