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DISTRICT III

November 29, 2022

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

2020AP779-CRNM State of Wisconsin v. Ronald L. Kupsky
(L. C. No. 2018CF686)

Before Stark, P.J., Hruz and Gill, 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 Ronald Kupsky has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge Kupsky's conviction for first-degree sexual assault of a child (contact with a child under age thirteen). Kupsky filed a response to the no-merit report raising multiple challenges to his conviction and sentence, and

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

counsel filed a supplemental no-merit report. Counsel later filed a second supplemental no-merit report, after this court questioned whether there would be arguable merit to a claim that Kupsky's constitutional right to a speedy trial was violated. Having reviewed the initial and supplemental no-merit reports, and upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we now conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

Kupsky was charged with a single count of first-degree sexual assault of a child (contact with a child under age thirteen). Kupsky waived his right to an attorney and elected to represent himself. Acting pro se, Kupsky entered a plea of not guilty by reason of mental disease or defect (NGI). Psychologist Brooke Lundbohm was appointed to examine Kupsky for purposes of his NGI plea. Following the examination, Lundbohm filed a report in which she opined that there was no support "for a conclusion that, as a result of a mental disease or defect, Mr. Kupsky lacked substantial capacity to appreciate the wrongfulness of his conduct or the capacity to conform his conduct to the requirements of the law."

The case proceeded to a bifurcated jury trial. During the guilt phase of the trial, eighteen-year-old "Megan"[2] testified that Kupsky had dated her aunt for about a year, when Megan was ten or eleven years old. Megan testified that when she was ten, she and Kupsky were playing volleyball in the yard of her home in Black Creek, Wisconsin.[3] The volleyball rolled

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

[3] A law enforcement officer testified that the Black Creek home is located in Outagamie County.

into some tall grass, and Megan went to retrieve it. Kupsky followed her, and somehow Megan ended up on the ground. Kupsky got down next to her on the ground, slid his hand up her leg, and touched her vaginal area. Megan testified that Kupsky moved his fingers in a circular motion outside of her underwear but underneath her pants. While doing so, Kupsky said to Megan, "[D]oes it tickle because I know that feels good." Megan testified that she did not tell anyone about this incident at the time because she did not think that anyone would believe her and she did not want to ruin her aunt's relationship with Kupsky.

Megan's testimony about the volleyball incident formed the basis for the single charge against Kupsky. However, the circuit court also permitted the State to introduce other-acts evidence at trial regarding additional incidents that were alleged to have occurred at Megan's aunt's home in Waupaca County. Megan testified that on one occasion, she and her aunt were watching a movie at her aunt's house, and Kupsky was doing something on his laptop. When Megan's aunt left the room, Kupsky told Megan to come over and look at what he was doing on the computer. After Megan sat next to Kupsky, he put a blanket over her lap and put his hands down her pants. Kupsky then touched Megan's vaginal area beneath her underwear, using the same motions as in the volleyball incident.

Megan also testified regarding another incident in Waupaca County. On that occasion, Megan had worn a belt and had cinched it as tight as she could to try to stop Kupsky from putting his hands down her pants. Kupsky was able to remove the belt, however, and again put his hands down Megan's pants and touched her vaginal area. Megan "believe[d]" that the touching was inside her underwear. Megan testified that during both of the incidents in Waupaca County, Kupsky whispered in her ear, "Does it tickle?"

On cross-examination, Megan also testified regarding an additional incident, during which Megan was lying in the bedroom of her aunt's house and Kupsky came into the room and asked Megan whether she was asleep. Megan ignored Kupsky, and he then said that if she woke up he could "make [her] feel so good, that [she] would have never felt that before." Megan conceded on cross-examination that Kupsky had never asked her for any "sexual favors." Kupsky then asked Megan, "Then how do you know this was done for sexual gratification?" Megan responded, "I guess I don't. I don't know."

The State presented testimony from one other witness during the guilt phase of Kupsky's trial—a law enforcement officer who testified regarding Megan's prior consistent statements to police regarding the assaults. After the State rested, Kupsky moved to dismiss the charge based on insufficient evidence, and the circuit court denied his motion. Kupsky did not present any witnesses and chose not to testify in his own defense. The court conducted a colloquy with Kupsky to ensure that his waiver of the right to testify was knowing, intelligent, and voluntary. After the court instructed the jury and the parties made their closing arguments, the jury found Kupsky guilty of first-degree sexual assault of a child (contact with a child under age thirteen).

The second phase of Kupsky's bifurcated trial—the responsibility phase—took place the following day. Lundbohm was the only witness to testify during the responsibility phase. She testified that she had diagnosed Kupsky with other specified personality disorder with antisocial and schizoid features, which typically does not constitute a mental disease or defect for purposes of an NGI defense. Lundbohm also explained that her "research" and "evaluation" did not support a conclusion that Kupsky suffered from a mental disease or defect. Lundbohm further testified that, in her opinion, Kupsky was able to conform his behavior to the requirements of the law. Following jury instructions and the parties' closing arguments, the jury rejected Kupsky's

NGI defense, finding that Kupsky did not have a mental disease or defect at the time he sexually assaulted Megan in relation to the offense charged.

With the parties' agreement, the circuit court proceeded directly to sentencing. Megan addressed the court, and the State and Kupsky then made their sentencing arguments. During its sentencing remarks, the court emphasized Kupsky's poor character, the gravity of the offense, and the danger that Kupsky posed to the community. Based on those factors, the court concluded that a "long prison sentence" was necessary to punish Kupsky, to deter him from committing similar crimes in the future, and to protect the public. The court then sentenced Kupsky to twenty years of initial confinement followed by twenty years of extended supervision, consecutive to any other sentence.

The no-merit report addresses whether there are any issues of arguable merit regarding: (1) Kupsky's waiver of his right to counsel; (2) the circuit court's decision to allow the State to introduce other-acts evidence; (3) jury selection; (4) the parties' opening statements and closing arguments; (5) the court's decision to allow the State to introduce Megan's prior consistent statements during the guilt phase of Kupsky's trial; (6) the jury instructions; (7) Kupsky's waiver of his right to testify during both phases of his bifurcated trial; (8) the sufficiency of the evidence to support the jury's verdicts during both phases of Kupsky's trial; and (9) the court's exercise of sentencing discretion. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit. Having independently reviewed the record, we also conclude that there are no issues of arguable merit regarding the court's rulings on Kupsky's motions in limine and the court's other evidentiary rulings during trial.

Kupsky raises four issues in his response to the no-merit report. First, he contends that the evidence was insufficient to support the jury's verdict during the guilt phase of his trial because the State failed to present evidence "that the assault was done for the purpose of sexual gratification." To prove that Kupsky was guilty of first-degree sexual assault of a child (contact with a child under age thirteen), the State needed to prove that Kupsky had "sexual contact" with Megan. *See* WIS. STAT. § 948.02(1)(e). To prove that Kupsky had sexual contact with Megan, the State needed to prove that he intentionally touched Megan's intimate parts either for the purpose of sexually degrading or sexually humiliating Megan or for the purpose of sexually arousing or gratifying himself. *See* WIS. STAT. § 948.01(5)(a)1.

Kupsky contends that the State failed to prove he acted for the purpose of sexually gratifying himself because when he asked Megan at trial how she knew that "this was done for sexual gratification," she responded, "I guess I don't. I don't know." Despite Megan's response to that question, other evidence at trial was sufficient to support a finding that Kupsky acted for the purpose of sexually gratifying himself. *See* ***State v. Carter***, 229 Wis. 2d 200, 206, 598 N.W.2d 619 (Ct. App. 1999) (When reviewing the sufficiency of the evidence, "[t]his court searches for credible evidence to sustain the verdict, not for evidence to sustain a verdict the jury did not reach."). Specifically, Megan testified that during the charged incident, Kupsky slid his hand up her leg, touched her vaginal area, and moved his fingers in a circular motion outside of her underwear. While doing so, Kupsky said, "[D]oes it tickle because I know that feels good." Megan also testified regarding other incidents in which Kupsky put his hands down her pants and touched her vaginal area, which suggests that Kupsky's conduct during the charged incident was not merely mistaken or accidental. In addition, Megan testified that on a different occasion,

Kupsky told her that if she woke up he could "make [her] feel so good, that [she] would have never felt that before."

Based on Megan's testimony, the jury could reasonably infer that Kupsky acted for the purpose of sexually gratifying himself when he touched Megan's vaginal area during the charged incident. Conversely, the jury could also have inferred that Kupsky engaged in that act solely to tickle Megan or provide her with pleasure. However, "when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). Applying this standard in the instant case, we must accept the jury's reasonable inference that Kupsky acted for the purpose of sexually gratifying himself when he touched Megan's vaginal area, as the evidence upon which that inference was based is not incredible as a matter of law. Thus, there would be no arguable merit to a claim that the evidence was insufficient to support the jury's verdict during the guilt phase of Kupsky's trial.

Second, Kupsky argues that the charge against him should have been dismissed because the circuit court violated his constitutional right to a speedy trial. For the reasons explained in the second supplemental no-merit report, we agree with appellate counsel that this issue lacks arguable merit. When a defendant asserts that his or her constitutional right to a speedy trial has been violated, a court must consider "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his [or her] right; and (4) prejudice to the defendant." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. "The right to a speedy trial is not subject to bright-line determinations and must be considered based on the totality of circumstances that exist in the specific case." ***Id.*** "Essentially, the test weighs the conduct of the

prosecution and the defense and balances the right to bring the defendant to justice against the defendant's right to have that done speedily." ***Id.*** "The only remedy for a violation of the [constitutional] right to a speedy trial is dismissal of the charges."[4] ***Id.***

Regarding the first factor in the constitutional speedy trial analysis, the record shows that Kupsky was charged on August 9, 2018, and his trial began on May 22, 2019. Thus, the delay in bringing Kupsky to trial was 286 days, or approximately nine and one-half months.

The second factor in the speedy trial analysis requires us to consider the reason for the delay in bringing the defendant to trial. Based on our review of the record, we agree with appellate counsel that after Kupsky was charged, "the case progressed in a reasonable and timely manner." A delay occurred when Kupsky refused to accept Lundbohm's report regarding his NGI plea and requested a hearing on that issue. That hearing took place on February 7, 2019, approximately one month after Kupsky requested it. As such, that one-month delay is attributable to Kupsky. At the end of the February 7 hearing, the parties scheduled Kupsky's trial for May 22 and 23, 2019. The parties were unable to schedule the trial during March or April of 2019 because of conflicts in the circuit court's and the prosecutor's calendars. That delay is attributable to the State, but it is not weighed heavily against the State because there is no evidence that the State made a deliberate effort to delay Kupsky's trial in order to hamper his defense. *See* ***id.***, ¶26.

[4] As noted in the supplemental no-merit report, the remedy for a violation of the statutory right to a speedy trial is the defendant's release from custody pending trial. *See* WIS. STAT. § 971.10(4). Here, Kupsky clearly invoked his constitutional right to a speedy trial, rather than his statutory right to a speedy trial. In any event, to the extent that Kupsky's statutory right to a speedy trial was violated when he was not tried within ninety days after he filed his speedy trial demand, *see* § 971.10(2)(a), we agree with appellate counsel that the violation did not prejudice Kupsky because Kupsky was in custody serving a twenty-year sentence in a different case while he was awaiting trial in the instant case.

Turning to the third factor in the speedy trial analysis, the record shows that Kupsky filed a constitutional speedy trial demand on December 3, 2018. As such, Kupsky clearly asserted his right to a speedy trial.

With respect to the fourth factor, the record does not support a conclusion that Kupsky suffered any prejudice as a result of the delay in bringing him to trial. As appellate counsel correctly notes, while a delay "approaching one year" is presumptively prejudicial, *see* ***id.***, ¶12, the delay in this case was only about nine and one-half months. Moreover, when determining whether a delay was prejudicial, we must consider "the three interests that the right to a speedy trial protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." ***Id.***, ¶34. We agree with appellate counsel that Kupsky's pretrial incarceration in this case was not "oppressive," or prejudicial, as the trial occurred only nine and one-half months after the charge against him was filed and less than six months after Kupsky filed his speedy trial demand. Kupsky was also serving a sentence in another case while he awaited trial in this case, meaning that he would have remained in custody regardless of any delay that occurred in bringing him to trial in this case. In addition, appellate counsel correctly notes that Kupsky agreed to his trial being scheduled on May 22 and 23, 2019, and he did not express any anxiety or concern regarding those dates. Furthermore, there is no support in the record for a claim that the delay in bringing Kupsky to trial impaired his defense.

In summary, the record shows that the delay in bringing Kupsky to trial was not particularly long; the case proceeded in a reasonable and timely manner; a relatively small portion of the delay was attributable to the State; and there is no evidence that Kupsky was prejudiced by any delay in bringing him to trial. Although Kupsky did assert his right to a

speedy trial, we agree with appellate counsel that based on the totality of the circumstances, there would be no arguable merit to a claim that Kupsky's constitutional right to a speedy trial was violated.

Kupsky next asserts that his "trial counsel was ineffective in his claim of mental defect" and "should have argued that the defendant suffers from pedophilia—a qualified mental defect." This claim lacks arguable merit because Kupsky validly waived his right to counsel and chose to represent himself at trial. A defendant who exercises the right to represent him- or herself "cannot thereafter complain that the quality of his [or her] own defense amounted to a denial of 'effective assistance of counsel.'" ***McKaskle v. Wiggins***, 465 U.S. 168, 177 n.8 (1984) (citation omitted).

Finally, Kupsky argues that the circuit court imposed an excessive sentence. In support of this claim, Kupsky asserts that the court failed to consider the relevant sentencing factors and ignored mitigating factors, such as Kupsky's military service and his status as a "father with strong ties to the community." Kupsky also suggests that the court erred by failing to impose probation. In addition, Kupsky appears to believe that a lesser sentence was warranted because "there was no criminal intent in this case," there was "no penetration or use of force," and "[t]his was nothing more th[an] a 'touch' crime."

Kupsky's excessive sentence claim lacks arguable merit. A sentence is deemed to be unduly harsh or unconscionable if it is "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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A sentence well within the limits of the maximum sentence is

presumptively not unduly harsh or unconscionable. ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507. Here, Kupsky's forty-year sentence is well within the sixty-year maximum sentence for first-degree sexual assault of a child (sexual contact with a child under age thirteen). *See* WIS. STAT. §§ 939.50(3)(b), 948.02(1)(e). Thus, the sentence is presumptively not unduly harsh or unconscionable.

Furthermore, Kupsky's criticisms of the circuit court's sentencing rationale are misplaced. Contrary to Kupsky's assertion, the record shows that the court considered the primary sentencing factors when imposing his sentence—namely, the gravity of the offense, the character of the offender, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court also identified its main sentencing objectives as punishment, deterrence, and protection of the public. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. Although Kupsky apparently believes that the court should have given more weight to different sentencing factors and objectives, "[a]s long as there is evidence in the record that the [circuit] court considered appropriate factors, this court will not second-guess a [circuit] court's sentencing decision." *See* ***State v. Gardner***, 230 Wis. 2d 32, 48, 601 N.W.2d 670 (Ct. App. 1999). Here, the record shows that the court considered appropriate factors, and under the circumstances of this case—which involved the repeated touching of a ten-year-old child's genitalia—Kupsky's forty-year sentence is not so excessive, unusual, or disproportionate to the offense as to shock public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185. While Kupsky asserts that there was no "criminal intent" in this case, the jury determined otherwise, and the evidence was sufficient to support the jury's verdict.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski is relieved of her obligation to further represent Ronald Kupsky 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