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March 12, 2025

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

2023AP180-CRNM	State of Wisconsin v. Brandon B. Smiley (L.C. #2020CF1316)
2023AP181-CRNM	State of Wisconsin v. Brandon B. Smiley (L.C. #2021CM1757)

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).

Brandon B. Smiley appeals a judgment convicting him, following a jury trial, of one count of exposing genitals to a child; one count of fourth-degree sexual assault; and one count of lewd and lascivious behavior—all as a repeater. He also appeals a judgment convicting him, following his guilty plea, of one count of disorderly conduct. Appellate counsel, Kirk D. Henley, has filed two no-merit reports in these consolidated cases pursuant to WIS. STAT. RULE 809.32

(2023-24)¹ and *Anders v. California*, 386 U.S. 738 (1967). Smiley received a copy of the reports, was advised of his right to file responses, and has not responded. Upon this court's independent review of the Record, as mandated by *Anders*, and appellate counsel's reports, we conclude that there are no issues of arguable merit that could be raised on appeal. We therefore summarily affirm the judgments.

In Waukesha County Circuit Court case No. 2020CF1316, the State charged Smiley with one count of exposing genitals to a child, one count of fourth-degree sexual assault, and one count of lewd and lascivious behavior-exposure. Each count was charged with a repeater enhancer. The complaint alleged that Smiley touched Victim A's buttocks and exposed himself to her while at a Dollar Tree store in Delafield; Victim A was a minor at the time. The complaint also alleged that Smiley exposed himself to Victim B while at the Dollar Tree. The matter proceeded to trial where multiple witnesses, including the victims and law enforcement, testified. Smiley represented himself, though the circuit court appointed stand-by counsel. The jury ultimately found Smiley guilty as charged.

While Smiley's trial was pending, the State charged Smiley with one count of lewd and lascivious behavior as a repeater in Waukesha County Circuit Court case No. 2021CM1757. The complaint alleged that while at the Waukesha County Jail, Smiley exposed himself to an employee of the jail's laundry facility. Smiley, while still proceeding *pro se*, entered a plea agreement with the State in which he would plead guilty to an amended charge of disorderly

¹ All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

conduct and the penalty enhancer would be dropped. The circuit court conducted a colloquy with Smiley and accepted his plea.

The circuit court held one sentencing hearing for both cases. In case No. 2020CF1316, the court sentenced Smiley to the following: one year and six months of initial confinement, followed by one year of extended supervision on the charge of exposing genitals to a child; one year of initial confinement and one year of extended supervision on the charge of fourth-degree sexual assault to run consecutive to the previous count; and 100 days in the local jail on the lewd and lascivious conduct charge to run concurrent to the previous two counts. In case No. 2021CM1757, the court sentenced Smiley to ninety days in the local jail on the disorderly conduct charge, to run concurrent to case No. 2020CF1316. These no-merit reports follow.

With regard to Smiley's trial, appellate counsel's no-merit report addresses the following issues: (1) whether sufficient evidence supports the convictions; (2) whether Smiley knowingly, intelligently, and freely waived his right to counsel; (3) whether the circuit court erred with certain evidentiary rulings; (4) whether the court erred in denying Smiley's request to dismiss the entire jury panel; and (5) whether the court erroneously exercised its sentencing discretion.

We first address the sufficiency of the evidence. Our standard of review is whether the evidence, viewed in the light most favorable to the State, is so insufficient in probative value and force that as a matter of law no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The standard is the same whether the evidence is direct or circumstantial. *Id.* Multiple witnesses, including the victims and law enforcement, testified at trial. Victim B identified Smiley and both GPS tracking and fingerprint evidence placed Smiley at the Dollar Tree at the time of the incidents.

We conclude that no arguable merit could arise from a challenge to the sufficiency of the evidence.

The no-merit report next addresses whether Smiley knowingly, voluntarily and intelligently waived his right to counsel. We conclude that there is no arguable merit to this issue. Consistent with the requirements of *State v. Klessig*, 211 Wis.2d 194, 206-07, 564 N.W.2d 716 (1997), the circuit court conducted a colloquy with Smiley regarding his right to counsel. The court determined that Smiley was waiving the right to counsel knowingly and voluntarily, and the Record supports this determination.

With respect to the circuit court's evidentiary rulings, appellate counsel specifically addresses whether the court erred in allowing Victim A to testify because she did not identify Smiley from a photo array and whether the court erred in admitting location evidence extracted from Smiley's GPS monitoring device. The circuit court's decision to admit or exclude evidence is a matter of discretion. *See State v. Nieves*, 2017 WI 69, ¶16, 376 Wis. 2d 300, 897 N.W.2d 363. We do not disturb a discretionary decision if discretion was properly exercised. *See State v. Hunt*, 2014 WI 102, ¶20, 360 Wis. 2d 576, 851 N.W.2d 434. A proper exercise of discretion "contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on logical rationale founded on proper legal standards." *State v. Mordica*, 168 Wis. 2d 593, 602, 484 N.W.2d 352 (Ct. App. 1992). We agree with appellate counsel's analysis as to these issues and conclude that there would be no arguable merit to a challenge to these particular evidentiary issues. We have also independently reviewed the Record and conclude that there would be no arguable merit to any of the court's other evidentiary rulings either prior to, or during trial.

Appellate counsel's no-merit report next addresses whether the circuit court erred in denying Smiley's request to dismiss the entire jury panel. Prior to the final jury selection, Smiley moved to dismiss the entirety of the jury panel on the grounds that no potential African-American jurors were on the panel. The court held off on making its decision until the final panel was selected. After the final panel was selected, the court asked Smiley whether he wished to resume his objection to the panel. Smiley responded in the affirmative. The court denied this motion and explained the procedure that Waukesha County uses for jury selection, which did not support Smiley's implied *Batson*² challenge.

To demonstrate a *Batson* violation, the defendant must first establish a prima facie case of discriminatory intent on the part of the State. *State v. Lamon*, 2003 WI 78, ¶28, 262 Wis. 2d 747, 664 N.W.2d 607. This is accomplished if the defendant (1) shows that he or she “is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant's race from the venire,” and (2) shows that the “facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race.” *Id.* The circuit court is to “consider all relevant circumstances in determining whether a defendant” has made this showing. *Id.* We agree with appellate counsel's analysis, which discussed the court's detailed explanation of how the jury pool was selected and a discussion of Waukesha County demographics. Based upon our review of the Record, we conclude that no issues of arguable merit could arise from the court's denial of Smiley's motion to dismiss the jury panel.

² See *Batson v. Kentucky*, 476 U.S. 79 (1986).

Appellate counsel's no-merit report also addresses whether the circuit court erroneously exercised its sentencing discretion. Sentencing is a matter for the court's discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It must also determine which objective or objectives are of greatest importance. *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider additional factors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the court's discretion. *Id.*

Our review of the Record confirms that the circuit court appropriately considered the relevant sentencing objectives and factors. The resulting sentence was within the potential maximum authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In addition to agreeing with appellate counsel's analysis, our independent review of the Record leads us to conclude that no reversible errors occurred at any point prior to the trial or during the trial; specifically, as they pertain to pretrial matters, opening statements, additional evidentiary rulings, voir dire, Smiley's decision not to testify, closing arguments, and jury instructions.

With regard to Smiley's guilty plea, appellate counsel's no-merit report addresses whether: (1) the circuit court erred in not dismissing the case after the initial appearance; (2) whether Smiley knowingly, intelligently, and freely waived his right to counsel; (3) whether Smiley's plea was knowing, voluntary and intelligent; and (4) whether the court erroneously exercised its sentencing discretion.

At the initial appearance, Smiley moved to dismiss the case on the ground that the criminal complaint failed to allege sufficient proof of the charge. The court commissioner denied the motion, stating, "we have a victim who indicates that you were pointing at your penis as you were stroking your penis. That is sufficient for what we would call lewd and lascivious behavior." "Whether a criminal complaint sets forth probable cause to justify a criminal charge is a legal determination this court reviews de novo." *State v. Reed*, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. "The facts and reasonable inferences drawn from facts in a complaint must allow a reasonable person to conclude that a crime was probably committed and that the defendant was probably culpable." *State v. Grimm*, 2002 WI App 242, ¶15, 258 Wis. 2d 166, 653 N.W.2d 284. Here the complaint stated sufficient facts to establish probable cause. Because there was no basis to challenge the sufficiency of the complaint, there is no arguable merit to a claim that Smiley's case should have been dismissed at the initial appearance.

Appellate counsel's no-merit report also addresses whether Smiley knowingly, intelligently, and freely waived his right to counsel. The same judge who presided over Smiley's trial also presided over his plea hearing. The circuit court reminded Smiley of their previous conversation at trial concerning the waiver of counsel and confirmed that Smiley wished to proceed *pro se* at the plea hearing as well. The court also conducted another colloquy with Smiley in which the court reminded Smiley of his right to counsel, explained the benefits of

having counsel, and ascertained Smiley's continued desire to proceed without counsel. No arguable merit exists as to this issue.

As to the plea itself, our review of the Record confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.³ These obligations exist specifically to help ensure the validity of any plea. We thus agree with appellate counsel's conclusion in the no-merit report that there is no arguable merit to seeking plea withdrawal based on a claim that Smiley's pleas were anything other than knowing, intelligent, and voluntary. The Record does not establish that any other form of a manifest justice exists. See *State v. Villegas*, 2018 WI App 9, ¶18, 380 Wis. 2d 246, 908 N.W.2d 198 (A defendant who seeks to withdraw a plea after sentencing must prove that the withdrawal is necessary to correct a manifest injustice.).

With regard to sentencing, we have already stated the factors a circuit court must consider as well as our standard of review. We again conclude that the court considered the appropriate factors, issued a legal sentence, and properly exercised its discretion. We agree with appellate counsel that there would be no arguable merit to a challenge to Smiley's sentence.

Our independent review of the Record reveals no other potential issues of arguable merit.

³ We note that the circuit court failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to obtain relief because of such an omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. *State v. Negrete*, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749. There is nothing in the Record to suggest that Smiley is not a citizen of the United States.

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

IT IS FURTHER ORDERED that Attorney Kirk D. Henley is relieved from further representing Brandon B. Smiley in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals