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April 11, 2018

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

2017AP830-CRNM State of Wisconsin v. Douglas A. Fischer (L.C. # 2011CF160)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Douglas A. Fischer appeals from a judgment of conviction and an order denying his motion for postconviction relief. Fischer's appellate counsel filed a no-merit report pursuant to

WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Fischer filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports, and Fischer's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment and order. WIS. STAT. RULE 809.21.

Fischer was convicted following a jury trial of (1) first-degree sexual assault of a child; (2) incest with a child by a stepparent; and (3) exposing genitals to a child. The charges stemmed from an incident in which Fischer directed his then 12-year-old stepdaughter, C.S., to masturbate him while they were in a hot tub. Two additional charges were dismissed at the close of trial.² The circuit court imposed an aggregate sentence of thirteen years of initial confinement and seventeen years of extended supervision.

Fischer subsequently filed a motion for postconviction relief. In it, he raised various claims of ineffective assistance of trial counsel. He also alleged circuit court errors in relying upon inaccurate information at sentencing and failing to strike portions of C.S.'s videotaped interview with a forensic interviewer once the additional charges were dismissed. After multiple hearings on the matter, the circuit court denied Fischer's motion in an oral ruling and entered an order stating the same. This no-merit appeal follows.

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

² The charges of repeated sexual assault of a child and causing a child to view/listen to sexual activity were dismissed due to a lack of evidence presented within the charging period of the information. The State sought to amend the information to conform to the evidence, which came from a videotaped interview of C.S. by a forensic interviewer. The circuit court denied the request, noting that the videotaped interview had been in the State's possession for over eighteen months before trial.

The no-merit report addresses whether the evidence at trial was sufficient to support Fischer's convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the convictions, 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. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced enough evidence to convict Fischer of his crimes. That evidence included testimony from C.S. and a videotaped interview of her by a forensic interviewer, which occurred days after the incident in the hot tub. We agree with appellate counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offenses, Fischer's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Fischer's relationship with C.S. and the effect the crimes had on her, the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what

is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with appellate counsel that a challenge to Fischer’s sentence would lack arguable merit.³

The no-merit report further addresses several claims of ineffective assistance of trial counsel. They include complaints that counsel (1) failed to raise a motion to suppress; (2) failed to object to multiple exhibits showing sex toys and games at Fischer’s house; and (3) failed to introduce into evidence Fischer’s cellular phone records, which showed that he had a limited opportunity to commit the crimes of which he was convicted. The record discloses no basis for a suppression motion. As for the exhibits, the circuit court found, based upon trial counsel’s testimony, that there were reasonable strategic reasons for not objecting to them. Counsel wanted to show both that C.S. had an alternative source of sexual knowledge and that Fischer had an active sex life with other adults, thereby making it less likely that he would seek sexual gratification from a child. The court also noted that counsel presented testimony about phone calls/text messages at trial and argued that Fischer had a limited opportunity to commit the crimes.⁴ Accordingly, the court was not convinced that trial counsel had performed deficiently. The court’s ruling on these matters was thorough and well-reasoned. We agree with appellate counsel that a challenge to trial counsel’s performance on these grounds would lack arguable merit.

³ Although not discussed in the no-merit report, we are satisfied that the circuit court did not rely upon inaccurate information at sentencing. In his postconviction motion, Fischer complained that the court heard a statement from his sister, who accused Fischer of molesting her decades earlier. Even if that statement were inaccurate, there is no indication that the court gave it any weight at sentencing.

⁴ Even with the limited opportunity, Fischer still had ample time to commit the crimes in the hot tub, which trial counsel conceded could have taken place very quickly.

Finally, the no-merit report addresses whether a new trial should be ordered in the interest of justice. This issue is based, in part, upon the claims discussed above. It is also based upon the circuit court's failure to strike portions of C.S.'s videotaped interview with a forensic interviewer once the additional charges of repeated sexual assault of a child and causing a child to view/listen to sexual activity were dismissed. In that interview, C.S. discussed earlier assaults perpetrated by Fischer, which included the use of sex toys and pornography. Although the court declined to strike portions of the videotaped interview, it agreed to give a cautionary instruction to remedy any possible prejudice.⁵ We presume that the jury follows cautionary instructions. See *State v. Pitsch*, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985). Accordingly, we agree with appellate counsel that a request for a new trial based upon the failure to strike portions of C.S.'s videotaped interview would lack arguable merit.⁶

As noted, Fischer filed a response to counsel's no-merit report. The response focuses upon some of the same issues raised in the no-merit report, which we will not discuss again. It also asserts that (1) the State failed to disclose discovery materials to the defense; (2) the real controversy was not tried because the jury did not have certain medical information about

⁵ The instruction was based upon WIS JI-CRIMINAL 275 and read in relevant part:

[E]vidence has been presented that the defendant is alleged to have committed the crime of sexual assault on a date or dates other than [the date of the incident in the hot tub]. If you find this conduct did occur, you may consider it but not upon the issue of guilt or innocence in regard to the crimes charged. You must give this evidence the weight you determine it deserves. It is not to be used to conclude the defendant is a bad person, and for that reason, is guilty of the offenses charged.

⁶ In denying Fischer's postconviction motion, the circuit court opined that testimony concerning his earlier sexual assaults of C.S. would likely have come in anyway either as panorama evidence (they were "inextricably intertwined" with the charged crimes) or as other acts evidence under the greater latitude rule. We agree.

Fischer's penis; and (3) trial counsel was ineffective in other ways (i.e., failing to call as a witness C.S.'s friend, D.S., and failing to investigate/discover missing pages of a police report). We are not persuaded that Fischer's response presents an issue of arguable merit for several reasons.

First, as explained in the supplemental no-merit report, the State did disclose all discovery materials in its possession to the defense. Although trial counsel later indicated that she was missing several pages of a police report, appellate counsel learned that this was due to a printing error by trial counsel's assistant. Likewise, when trial counsel indicated that she did not see the sexual assault examination of C.S., appellate counsel learned that this was due to the hospital not turning the information over to the State. In the end, the missing documents contained nothing of significance and would not have helped Fischer's case.

Second, the real controversy was fully tried despite the jury not having certain medical information about Fischer's penis. Prior to trial, when C.S. first reported the sexual assaults, she described Fischer's penis as having three light moles/growths at certain locations. Police took photographs of Fischer's penis and growths, and a medical examination was performed. According to the examination, Fischer suffers from genital warts and had more than three growths on his penis.⁷ Fischer suggests that the credibility of C.S.'s allegations could not be assessed without this examination, which was never introduced into evidence. We disagree. At trial, the jury heard testimony from Fischer's wife, who acknowledged Fischer's genital warts and described how they would "move around." More importantly, the jury saw the photographs

⁷ The medical report noted seven to eight growths in all, which ranged in size from 0.5 mm to 3 mm.

of Fischer's penis and growths and could assess for themselves the accuracy of C.S.'s description. The examination would not have changed the outcome of the case.

Finally, trial counsel was not ineffective in the other ways that Fischer suggests. As noted in the supplemental no-merit report, appellate counsel had her investigator interview C.S.'s friend, D.S. D.S. had gone over to C.S.'s house shortly after the incident in the hot tub. According to the investigator, D.S. would have testified that when she arrived at the house, Fischer was in the hot tub. D.S. wanted to change into her bathing suit and get in too, but C.S. did not want to. C.S., who was wet and in her bathing suit, told her, "I just jerked off Doug and there's cum in there." Given the corroborative nature of D.S.'s account, trial counsel cannot be faulted for failing to call her as a witness. As for counsel's failure to investigate/discover the missing pages of a police report, we have already explained that they contained nothing of significance and would not have helped Fischer's case.

In addition to the foregoing issues, we considered other potential issues that arise in cases tried to a jury, e.g., jury selection, objections during trial, confirmation that the defendant's waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. Here, the jury was selected in a lawful manner. Objections during trial were properly ruled on. When Fischer elected not to testify, the circuit court conducted a proper colloquy to ensure that his waiver was valid. The jury instructions accurately conveyed the applicable law and burden of proof. No improper arguments were made by the prosecutor during opening statements or closing arguments. Accordingly, we conclude that such issues would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Melissa M. Petersen of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Melissa M. Petersen is relieved of further representation of Fischer in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals