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DISTRICT IV

September 14, 2023

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

2021AP700-CRNM State v. Christopher B. Vine (L.C. # 2016CF42)

Before Kloppenburg, P.J., Blanchard, and Graham, 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).

Attorney Michael Covey, appointed counsel for Christopher Vine, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Vine was sent a copy of the report and filed a response, and counsel then filed a supplemental no-merit report. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Vine was charged with three offenses involving the same victim, S.T.[2]: stalking as an act of domestic abuse, delivery of a Schedule I or Schedule II narcotic substance, and second-degree sexual assault as an act of domestic abuse. S.T. reported that, over the course of several months, Vine engaged in a series of controlling behaviors directed at her while they were in a romantic relationship. His conduct eventually escalated to the point that she could not close the door while using the bathroom or interact with other men in public. Vine also stated that he would "destroy" her life if she attempted to end the relationship. During the same time period, Vine provided S.T. with narcotic drugs, and he eventually began injecting her with the drugs without allowing her to know exactly what he was injecting. On one occasion after he had injected her with drugs, S.T. woke up to find that Vine was having anal intercourse with her. When she resisted, he shoved her back down and pushed her face into a pillow.

Vine's case proceeded to a jury trial, and the jury found him guilty on all charges. The circuit court sentenced Vine as follows: on the stalking charge, seven and one-half years of initial confinement followed by five years of extended supervision; on the sexual assault charge, twenty years of initial confinement followed by eight years of extended supervision; and, on the delivery of a narcotic charge, ten years of initial confinement followed by five years of extended supervision. The court imposed all sentences concurrent with one another.

[2] To protect her privacy, we refer to the victim using initials that do not correspond to her own. *See* WIS. STAT. RULE 809.86(4).

The no-merit report addresses whether Vine could challenge the sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. An appellate court will not overturn a conviction for insufficiency of the evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting all of the evidence here, we are satisfied that it was sufficient as to each charge for which Vine was convicted.

The no-merit report also addresses whether the circuit court erred in granting the State's motion to admit other acts evidence, mainly through the testimony of Vine's ex-wife and ex-girlfriend. The other acts included his controlling and abusive behaviors directed at his ex-wife and ex-girlfriend, including forcible anal intercourse that occurred while they were sleeping and violations of one or more restraining orders. We agree with counsel that there is no arguable merit to this other acts evidence issue.

The circuit court's decision to admit other acts evidence is discretionary and will not be overturned on appeal unless the court erroneously exercised its discretion. ***State v. Gray***, 225 Wis. 2d 39, 48, 590 N.W.2d 918 (1999). We will uphold an exercise of discretion if the court "'examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** (quoted source omitted).

In the specific context of other acts evidence, circuit courts exercise discretion by applying a three-prong test under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998):

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01? ….
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. § (RULE) 904.03.

Sullivan, 216 Wis. 2d at 772-73 (footnote omitted).

Here, the State offered the other acts evidence for several purposes, including: to prove the intent and knowledge elements of stalking[3]; and to disprove Vine's claim that he mistakenly believed that S.T. was awake and consenting when he engaged in anal intercourse with her. The circuit court applied each prong of the ***Sullivan*** test in a detailed analysis. The court made no discernable error of fact or law. Further, due to the nature of Vine's offenses, the "greater latitude" rule in WIS. STAT. § 904.04(2)(b) applies to the other acts evidence in this case. Consequently, the three-prong test under ***Sullivan*** must be applied liberally in favor of

[3] To prove Vine's guilt on the stalking offense, the State was required to show that:

(1) Vine intentionally engaged in a course of conduct directed at S.T. that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of herself or a member of her family or household;

(2) Vine knew or should have known that at least one of the acts that constitute the course of conduct would cause S.T. to suffer serious emotional distress or place S.T. in reasonable fear of bodily injury to or the death of herself or a member of her family or household; and

(3) Vine's acts caused S.T. to suffer serious emotional distress or induced fear in S.T. of bodily injury to or the death of herself or a member of her family or household.

See WIS. STAT. § 940.32(2) (2013-14).

admissibility. *See* ***State v. Marinez***, 2011 WI 12, ¶20, 331 Wis. 2d 568, 797 N.W.2d 399 ("This more liberal evidentiary standard applies to each prong of the ***Sullivan*** analysis."). For these reasons, we conclude that it would be frivolous for Vine to challenge the court's decision to admit the other acts evidence.[4]

Based on our independent review of the record, we see no other issues of arguable merit relating to events before or during trial. This includes any potential issues relating to pretrial rulings, jury selection, evidentiary rulings at trial, Vine's decision not to testify, and jury instructions.

In his response to the no-merit report, Vine makes a number of factual and legal assertions relating to trial. We conclude that these assertions raise seven main issues and that each of these issues lacks arguable merit. We discuss each issue in turn.[5]

The first issue is whether the circuit court should have granted Vine's motion for a mistrial. "The decision whether to grant a mistrial lies within the sound discretion of the trial court." ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894 (2003). "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** "The denial of a motion for a mistrial will be reversed only on a clear showing of an erroneous use of discretion by the trial court." ***Id.***

[4] In admitting the other acts evidence, the circuit court concluded that the evidence was admissible even without considering the greater latitude rule in WIS. STAT. § 904.04(2)(b). Regardless, the rule's applicability here would make it especially difficult for Vine to challenge the court's decision to admit the evidence.

[5] We have considered whether there is anything in Vine's response beyond the seven main issues that we identify which raises any issue of arguable merit, and we have concluded that there is not.

Here, after a recess during jury selection, Vine's trial counsel moved for a mistrial on the ground that some members of the jury pool may have seen Vine being escorted by three sheriff's deputies. In denying the motion, the circuit court noted that the relevant case law is generally concerned with defendants in physical restraints or jail uniforms. *See, e.g.*, ***State v. Staples***, 99 Wis. 2d 364, 373, 299 N.W.2d 270 (Ct. App. 1980). Vine, in contrast, was not in shackles or handcuffs, and he was wearing civilian clothing. The court considered whether to individually question jury pool members or to provide a curative instruction but concluded that these alternative measures could draw undue attention to what appeared to the court based on all available information to be a relatively innocuous issue. In these circumstances, we conclude that Vine could not reasonably challenge the court's discretionary decision to deny his motion for a mistrial.

The second issue that Vine's response raises is whether he should receive a new trial pursuant to ***State v. Delgado***, 223 Wis. 2d 270, 588 N.W.2d 1 (1999), a case addressing juror misconduct and juror bias. We conclude that it would be frivolous to pursue this issue because Vine has no arguably meritorious claim under the standards set forth in ***Delgado***.

Delgado provides that a defendant may receive a new trial by satisfying the following two-prong test: "'(1) that [a] juror incorrectly or incompletely responded to a material question on *voir dire*'" and "'(2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased.'" ***Id.*** at 281 (quoting ***State v. Wyss***, 124 Wis. 2d 681, 726, 370 N.W.2d 745 (1985), *abrogated on other grounds by* ***Poellinger***, 153 Wis. 2d at 504-06).

Vine contends that five of the jurors who sat on his case failed to provide truthful or complete responses during jury selection, and he further contends that each of those jurors was biased. As support for these contentions, he relies on the jurors' responses or lack of responses during jury selection and on materials from outside the record. We conclude that nothing in the record or the non-record materials supports an arguably meritorious claim under ***Delgado***. We agree with counsel that Vine reads too much into both the record and non-record materials, and he engages in speculation that is not supported by either.

A good example is Vine's ***Delgado*** claim with respect to juror R.O. Vine points out that R.O. did not raise his hand when potential jurors were asked if they knew who Vine was or had prior dealings or contacts with him. He argues that R.O. knew who he was and that R.O. was biased against him. As support for this argument, Vine provides a notarized statement from Vine's own brother in which the brother asserts that the brother knew R.O. and had conversed with R.O. about Vine several times. However, Vine's brother also said in his statement that "I don't recall specifically what I had mentioned to [R.O.] about [Vine]." We conclude that even if Vine's brother's statement was arguably sufficient to satisfy the first prong of ***Delgado***—*i.e.*, that R.O. incorrectly or incompletely responded to a material question during jury selection—Vine's claim relating to R.O. would still lack arguable merit because his brother's statement provides no arguable basis to satisfy the second prong of ***Delgado***—*i.e.*, "'that it is more probable than not that under the facts and circumstances surrounding [this] particular case'" R.O. was biased against Vine. *See* ***Delgado***, 223 Wis. 2d at 281 (quoting ***Wyss***, 124 Wis. 2d at 726).

The third issue that Vine's response raises is whether the State violated ***Brady v. Maryland***, 373 U.S. 83 (1963). Vine's theory for how the State violated ***Brady*** is unclear. He appears to contend that the State violated ***Brady*** because it failed to conduct DNA testing on a

pair of S.T.'s underwear and a bedsheet collected from S.T.'s residence. There is no arguable merit to this issue because ***Brady*** is directed at the State's failure to *disclose* evidence, not a failure to test evidence. *See* ***State v. Harris***, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737.[6]

The fourth issue that Vine's response raises is whether trial counsel was ineffective by failing to pursue DNA testing of the underwear and bedsheet and by failing to investigate potential witnesses, all in an effort to show that a third party had sexual intercourse with S.T. This issue also lacks arguable merit.

To show ineffective assistance of counsel, the defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Here, Vine appears to contend that DNA testing of S.T.'s underwear and bedsheet would have revealed that she had sexual intercourse with an individual we will refer to as C.D. around the same time that Vine was alleged to have sexually assaulted her. However, Vine's supporting allegations indicate that he is only speculating that S.T. was sexually involved with C.D. at the

[6] It does not appear that Vine is claiming that the State failed to disclose the existence of the underwear and bedsheet, nor do we see any information in the record to support such a claim. The underwear and bedsheet were referenced at trial.

time. Speculation is insufficient to support a claim for ineffective assistance of counsel. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("A showing of prejudice requires more than speculation."). Moreover, even if Vine could have shown that S.T. had sexual intercourse with C.D. around the same time, it would not have established that Vine was not guilty of the sexual assault charge. Accordingly, there is no arguable merit to a claim that counsel was ineffective by failing to pursue lines of investigation into whether S.T. had sexual intercourse with C.D.[7]

The fifth issue that Vine's response raises is whether the judge who presided at trial and sentencing should have recused himself based on the appearance of bias or actual bias. For the reasons that follow, we conclude that this issue lacks arguable merit.

"There is a presumption that a judge has acted fairly, impartially, and without prejudice." ***State v. Herrmann***, 2015 WI 84, ¶24, 364 Wis. 2d 336, 867 N.W.2d 772. "The presumption is rebuttable, placing the burden on the party asserting the bias to show that bias by a preponderance of the evidence." ***Id.***

Here, Vine's claim of judicial bias is based on a somewhat convoluted set of facts that involves the acquaintance of the judge who presided at trial and sentencing in this case, the Hon. Michael J. Rosborough, with S.T.'s step-father, who was also a judge. Vine's case was tried in Richland County, and S.T.'s step-father was the circuit court judge for that county at the time. He recused himself from the case. The case was therefore tried before an out-of-county

[7] Some of Vine's allegations suggest that he may be claiming that DNA testing of S.T.'s underwear and bedsheet could have revealed that she had sexual intercourse with some other, as-yet-unidentified individual who was not C.D. and was the true "perpetrator." Any such claim is clearly frivolous.

judge, Judge Rosborough. At trial, the State argued that Vine may have targeted S.T. as revenge against S.T.'s step-father because her step-father had sentenced Vine in a previous case. S.T.'s mother testified for the State in the instant case.

Judge Rosborough stated on the record that he had considered but rejected the possibility that he should recuse himself. He explained that he was acquainted with S.T.'s step-father as a colleague and that he had met S.T.'s mother at a retirement party for a third judge, but that he was not close friends with S.T.'s step-father and that they did not "do things with one another's families or anything of that nature." Judge Rosborough stated that he believed that the only time he had met S.T.'s mother was at the retirement party, where it was just "Hi. How are you. Nice to meet you. And that was it." He also stated that he had never met S.T. Having considered those circumstances, he concluded that he could be objective.

Based on these circumstances, Vine contends that Judge Rosborough should have recused himself based on apparent or actual bias. He asserts that Judge Rosborough may have spoken with S.T.'s step-father or mother about his case at the retirement party. However, this assertion is speculative and is directly contrary to Judge Rosborough's recollection as set forth on the record. In these circumstances, we agree with counsel that Vine cannot overcome the presumption of judicial impartiality.

The sixth issue that Vine's response raises is whether trial counsel was ineffective by failing to call additional witnesses to testify at trial. He makes a variety of assertions as to what these witnesses might have known or said. However, his assertions do not provide arguable grounds to satisfy both prongs of the test for ineffective assistance of counsel. In other words, we see no arguable basis for Vine to claim both (1) that counsel was objectively unreasonable in

not calling the witnesses, and (2) that there was a reasonable likelihood that testimony from one or more of the witnesses would have produced a different outcome at trial. Accordingly, Vine could not reasonably argue that counsel was ineffective by not calling additional witnesses.

The seventh and final issue that Vine's response raises is whether trial counsel was ineffective in other respects at trial, including by failing to make objections relating to alleged hearsay, alleged perjury, and alleged Confrontation Clause violations. As with Vine's other ineffective assistance of counsel claims, his assertions in support of this claim do not provide arguable grounds to satisfy both prongs of the test for ineffective assistance of counsel.

We turn to sentencing. We agree with the conclusion in the no-merit report that there is no arguable basis upon which Vine could challenge the circuit court's exercise of its sentencing discretion. The court discussed the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not rely on any improper factors. We see no other arguable basis on which Vine might challenge his sentences.

We note that the circuit court imposed the maximum of twelve and one half years imprisonment on the stalking charge and the maximum of fifteen years of imprisonment on the delivery of a narcotic charge.[8] However, the court imposed significantly less than the maximum of forty years imprisonment on the sexual assault charge,[9] and the court made all of the sentences concurrent with one another. Vine's total overall prison term was thus significantly less than the

[8] *See* WIS. STAT. §§ 940.32(3)(a), 961.41(1)(a), and 939.50(3)(e)-(f) (2013-14).

[9] *See* WIS. STAT. §§ 940.225(2)(a) and 939.50(3)(c) (2013-14).

total overall maximum he faced. Under the circumstances, he could not reasonably argue that his sentences were unduly harsh or so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other issues with arguable merit.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael Covey is relieved of any further representation of Christopher Vine in this matter. *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