OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

January 14, 2014

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Kevin Michael Gaertner
6714 W. Fairview Ave.
Milwaukee, WI 53213

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Ricky N. Alexander 570855
Dodge Corr. Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

2011AP2992-CRNM State of Wisconsin v. Ricky N. Alexander (L.C. #2009CF5916)

Before Fine, Kessler and Brennan, JJ.

Ricky N. Alexander appeals a judgment convicting him of one count of first-degree sexual assault of a child, sexual intercourse with a child under the age of twelve, and one count of first-degree sexual assault of a child, sexual contact with a child under the age of thirteen. He also appeals an order denying his motion for postconviction relief. Appointed appellate counsel, Kevin M. Gaertner, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS.

STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Alexander filed a response. After considering the no-merit report and the response, and after conducting an independent review of the record, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction and order denying the motion for postconviction relief. *See* WIS. STAT. RULE 809.21.

Alexander was charged with first-degree sexual assault of a child under the age of twelve-sexual intercourse and first-degree sexual assault of a child under the age of thirteen-sexual contact. The jury was unable to reach a verdict, so a mistrial was declared and Alexander was retried. At the second trial, the jury convicted Alexander of both charges. Alexander filed a postconviction motion alleging ineffective assistance of trial counsel. The circuit court denied the motion without a hearing.

The no-merit report next addresses whether Alexander's retrial violated his right to be free from double jeopardy. When a jury is unable to reach a verdict, "[a] defendant's retrial [is] not barred by the double jeopardy clause of either the federal or the state constitutions." *See* ***Wheeler v. State***, 87 Wis. 2d 626, 633, 275 N.W.2d 651 (1979). Alexander moved for a mistrial based on a hung jury during the first trial. Because Alexander's motion for mistrial was based on the fact that the jury was unable to reach a verdict, he cannot argue that the second trial was barred by double jeopardy. There would be no arguable merit to this claim.

The no-merit report and Alexander's response address whether there would be arguable merit to a challenge to the jury selection. A defendant has a right under both the federal and state

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

constitutions to trial by an impartial jury. ***State v. Chosa***, 108 Wis. 2d 392, 400, 321 N.W.2d 280 (1982). The decision to strike a juror for cause is committed to the circuit court's discretion. ***Id.*** The circuit court struck Juror 8, Juror 10, Juror 13, and Juror 17 for cause. Juror 8 expressed her concern that she might not be able to be impartial based on her personal experiences and/or the experiences of people she knows. Juror 10 was required to take a family member to a medical procedure on the last expected day of trial. Juror 13 told the circuit court, outside the presence of the other jurors, that Alexander's demeanor made her feel like she could not treat him fairly; he was smiling in a manner the juror thought was inappropriate. Juror 17 worked for the Milwaukee Police Department, knew the prosecutor and knew all of the witnesses named who worked for the Milwaukee Police Department. Based on the *voir dire* transcript, the circuit court properly exercised its discretion in striking these jurors for cause.

In his response, Alexander contends that his lawyer should have asked Juror 6 more questions about his job duties as a supervisor in the child welfare department. The *voir dire* transcripts shows that the circuit court did, in fact, ask Juror 6 detailed questions about his employment and asked whether he thought he could be fair and impartial in this case given his work with children. Juror 6 told the circuit court that he could be fair and impartial in deciding the case. There was no reason to strike Juror 6 for cause.

Alexander also contends in his response that the entire jury pool was tainted because one of the jurors was a friend of the prosecutor. Alexander also made this assertion at sentencing, arguing that he had not received a fair trial as a result. Alexander's argument has no legal merit because the juror in question, Juror 17, was struck for cause and did not serve on Alexander's jury. To the extent that Alexander is arguing that *all* of the potential jurors had to be eliminated because one person in the jury was friends with the prosecutor, this argument has no legal basis.

Moreover, there is nothing in the transcript that even remotely suggests that Juror 17's straightforward answers to the circuit court's questions and the questions by counsel showed bias or would have negatively influenced the jury in any way. There would be no arguable merit to an appellate challenge to the jury selection.

The no-merit report addresses whether there would be arguable merit to a challenge to the prosecutor's opening argument or to any of the circuit court's evidentiary rulings. We have reviewed the transcript of the entire trial, including the opening argument, and see no basis for an appellate challenge to the prosecutor's opening argument or to the circuit court's evidentiary rulings. There would be no arguable merit to this claim.

The no-merit report addresses whether Alexander knowingly and voluntarily waived his right to testify at trial. A criminal defendant has the right to testify on his or her own behalf at trial. *See* ***State v. Weed***, 2003 WI 85, ¶40, 263 Wis. 2d 434, 666 N.W.2d 485. When a defendant elects not to testify, the circuit court should conduct a colloquy with the defendant on the record to ensure that the defendant is knowingly and voluntarily waiving the right to testify on his or her own behalf. ***Id.*** The record shows that the circuit court conducted a colloquy with Alexander to determine whether he was knowingly and voluntarily waiving his right to testify on his own behalf. There would be no arguable merit to a claim that Alexander did not knowingly and voluntarily waive his right to testify at trial.

The no-merit report addresses whether the circuit court properly exercised its discretion in denying Alexander's motions to dismiss at the close of the State's evidence and again at the close of all evidence, which occurred at the same time because Alexander did not put on any witnesses on his behalf. The circuit court properly denied the motions because it concluded that

issues of fact had been raised by the testimony presented at trial that needed to be decided by the jury. Therefore, there would be no arguable merit to this claim.

The no-merit report next addresses whether the circuit court misused its sentencing discretion. The circuit court sentenced Alexander to thirty-three years in prison for first-degree sexual assault of a child, sexual intercourse with a child under the age of twelve. The circuit court imposed twenty-five years of initial confinement and eight years of extended supervision as to this conviction.[2] The circuit court also sentenced Alexander to ten years of imprisonment for first-degree sexual assault of a child, sexual contact with a child under the age of thirteen. The circuit court imposed five years of initial confinement and five years of extended supervision, to be served consecutively, as to this conviction. The circuit court considered Alexander's offenses to be extremely serious, noting that the legislature mandated a twenty-five year *minimum* term of initial incarceration. The circuit court considered Alexander's character, including the mitigating circumstance that he had no prior record. The circuit court also considered the need to protect the public and concluded that Alexander was extremely dangerous to the community. The circuit court admonished Alexander for disparaging the system by claiming that his prosecution was "somehow [a] witch hunt that everyone participated in and the entire courtroom was a joke." The circuit court explained its application of the various sentencing considerations in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. There would be no arguable merit to a challenge to the sentence on appeal.

[2] There is a mandatory minimum sentence of twenty-five years of confinement under WIS. STAT. § 939.616(1r).

The no-merit report and Alexander's response address whether the circuit court erred in denying Alexander's postconviction motion alleging ineffective assistance of counsel. Alexander argued that his trial lawyer ineffectively represented him because he did not hire an independent expert to review the DNA analysis done by the State Crime Lab and he should have called Gloria Bentley, who lived at the apartment complex where the victim was assaulted, as a defense witness on his behalf at trial. The circuit court denied the motion without a hearing on the grounds that the motion did not allege sufficient facts to entitle Alexander to a hearing.

"To sustain an ineffective assistance of counsel claim, a defendant must show that his trial counsel's performance was deficient and that this performance prejudiced his defense." ***State v. Snider***, 2003 WI App 172, ¶20, 266 Wis. 2d 830, 668 N.W.2d 784. To show deficient performance, a defendant "must identify acts or omissions of his trial counsel that were not the result of reasonable professional judgment." ***Id.***, ¶21. The defendant "must overcome the strong presumption that his trial counsel employed reasonable professional judgment in making all significant decisions." ***Id.***

The circuit court properly denied the motion without a hearing. Alexander did not allege facts showing how he was prejudiced by his lawyer's decision not to call a defense expert. He did not explain what an outside DNA expert would have testified to that would be of significance to his case. Similarly, Alexander did not allege sufficient facts to show that he was prejudiced by Bentley's failure to testify. He has not attached an affidavit from Bentley to show what her testimony would have been. According to the postconviction motion, Bentley would have testified that the victim came to her door with Alexander shortly after the assault to ask for change for a $50 bill and, at that time, it did not appear to Bentley that there was anything wrong with the victim. Even if Bentley testified as Alexander claims she would, we agree with the

circuit court that the purported testimony would not have been "sufficient to damage the credibility of the victim or alter the outcome of the case." There would be no arguable merit to a claim that the circuit court erred in denying the postconviction motion without a hearing.

Alexander argues in his response that his trial lawyer, Paul Strouse, ineffectively represented him. He contends that Strouse failed to investigate motives that the victims might have had to provide false testimony. He states that the mothers of both victims might have been jealous of one another because he had dated both of them, and they could have caused their daughters to lie about the assaults due to their jealous feelings. There is nothing whatsoever in the record before us that supports these bald assertions. Moreover, if Alexander thought that the victims might have a motive to lie, he should have informed his lawyer of that fact, rather than fault his lawyer on appeal for failing to investigate on appeal. There would be no arguable merit to this claim.

Alexander next argues that Strouse should have read the transcripts from the first trial and used them to impeach the victims' testimony. Assuming for the sake of argument that Strouse did not read the transcripts of the first trial to prepare for this trial, which is extremely unlikely, Alexander cannot show prejudice. Strouse *did* point out alleged inconsistencies in the testimony where it was appropriate to do so throughout the trial. There would be no arguable merit to this claim.

Alexander contends in his response that Strouse should have objected to the prosecutor's statement during closing argument: "What do they find? They find male DNA on her labia swabs. Is that male DNA consistent with Mr. Alexander? Absolutely." He contends that this statement was misleading and prejudicial because Debra Kaurala, the DNA expert from the State

Crime Lab, testified that she could not say with any reasonable degree of scientific certainty that Alexander was the source of the DNA.

Alexander misunderstands the meaning of the term "consistent" as it was used by the prosecutor. The prosecutor's comments about the labia swabs, when read in context, make clear that the prosecutor was accurately informing the jury that Kaurala testified that the DNA on the swabs could have come from Alexander, although the evidence did not conclusively show that Alexander was the source. The prosecutor stated:

> And then you have the DNA. Can the DNA prove that there was a crime? No. But what the DNA proves is it is consistent with what this girl says. Why was the left side of her neck swabbed by Miss Hildebrand and then sent to the crime lab? Because she said he was kissing her on her neck and on her ear.
>
> What do they find on the left side? They find the amylase. They can type it for DNA. And with respect to the swab on the neck, they are able to say, Ms. Kaurala, that that DNA came from Mr. Alexander.
>
> Does it prove he sexually assaulted her? No. But is it consistent with what she says? Yes.
>
> And then what do they find on the labia swabs? They find a Y-STR profile. You know, the likelihood of randomly selecting a person is fairly low, one in 37 people in the population. If this was an ID case, in order words, if this girl … couldn't tell you who did it, that would be reasonable doubt with[] no problem. This is not an ID case. This is a credibility case.
>
> So she says Mr. Alexander has penis to vagina intercourse. What do they find? They find male DNA on her labia swabs. Is that male DNA consistent with Mr. Alexander? Absolutely.
>
> And then the other piece of evidence is the four-by-four gauze pad. As the nurse described, the girl takes this gauze pad and wipes her vaginal area before she urinates. What do they find there? They find male DNA. Is it consistent with Mr. Alexander? Yes. What is the likelihood of randomly selecting an unrelated person? It is greater than one in 1,500 in the African American population.

> Again, if this was an ID case, these girls were blindfolded, if they didn't know, that would be reasonable doubt. But it is not an ID case. It is a question of credibility.
>
> Those findings are consistent with what she said. Those are factors you consider.

Because the prosecutor did not argue that the DNA collected from the labia swabs conclusively proved that Alexander was the perpetrator, as Alexander seems to suggest, there would be no arguable merit to a claim that the prosecutor's closing argument was misleading.

Alexander argues in his response that Strouse did not have adequate knowledge about recent DNA science to adequately represent him because Strouse prefaced a question on cross-examination to Kaurala by saying, "I want to make sure I understand because I don't know a lot about this." Lawyers often review information carefully and slowly with witnesses in order to help the jury understand the information and ask questions so that a lay person without specialized knowledge can comprehend what is being explained. Strouse's statement to Kaurala in no way indicates that he was not up to the task of cross-examining her. This contention is meritless. Alexander also contends that Strouse should have retained a separate defense expert who would have challenged the reliability of Kaurala's testimony. Again, this claim would be unavailing. Kaurala is an educated DNA expert with extensive experience. Much of the data she analyzed was inconclusive, and she freely told the jury that in response to questions asked of her. There is nothing about her testimony that suggests that she was biased against Alexander. After reviewing the testimony, we do not find anything to suggest that a second DNA expert would have helped Alexander's case. There would be no arguable merit to this claim.

Alexander argues in his response that Strouse should have impeached the testimony of the Sexual Assault Nurse Examiner, Christina Hildebrand, because Hildebrand stated at the first

trial that she did not use a speculum during the examination because the victim was not sexually active, but then testified at the second trial that the transection of the victim's hymen was consistent with penetrating blunt force trauma. This testimony was not inconsistent. Hildebrand testified that she did not use a speculum during the examination because the victim had not been sexually active *before she was assaulted*. The fact that the victim's hymen was transected during the assault is not inconsistent with the fact that the victim was a child who was not sexually active. There would be no arguable merit to this claim.

Alexander next argues in his response that his appellate counsel, Kevin Gaertner, who submitted this no-merit report, ineffectively represented him because he should have filed a merits appeal raising ineffective assistance of trial counsel and other claims. Alexander's argument that his appellate counsel has provided constitutionally ineffective representation is premature because this appeal is still pending. Moreover, Gaertner *did* raise the issue of ineffective assistance of trial counsel by postconviction motion, but the circuit court rejected the argument. Moreover, we have concluded that there would be no arguable merit to an appellate challenge to that decision. Gaertner's representation on appeal has been exemplary. He submitted a very thorough no-merit report that does an excellent job of addressing the potential issues for appeal. There would be no arguable merit to a claim in the context of this appeal that Gaertner provided ineffective assistance of appellate counsel.

We have considered all of the many issues Alexander raised in his response, even if we have not explicitly addressed each and every one of them separately, but we have found no grounds for an appellate challenge to the conviction. Therefore, we affirm the judgment of conviction and the order denying postconviction relief. We also relieve Attorney Kevin M. Gaertner of further representation of Alexander in this matter.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kevin M. Gaertner is relieved of any further representation of Alexander. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals