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 IV

January 17, 2014

To:

Hon. Daniel R. Moeser
Circuit Court Judge
215 South Hamilton, Br 11, Rm 5103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Mary Ellen Karst
Asst. District Attorney
215 South Hamilton, Rm. 3000
Madison, WI 53703

Timothy T. O'Connell
O'Connell Law Office
403 S. Jefferson St.
Green Bay, WI 54301

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

Aneudy Solis-Fuentes 577087
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2012AP1297-CRNM State of Wisconsin v. Aneudy Solis-Fuentes (L.C. #2008CF2274)

Before Lundsten, Sherman and Kloppenburg, JJ.

Attorney Timothy O'Connell, appointed counsel for Aneudy Solis-Fuentes, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Counsel also filed a supplemental no-merit report. Solis-Fuentes responded to both the initial and the supplemental no-merit reports. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

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

A jury found Solis-Fuentes guilty of one count of repeated sexual assault of a child. The court imposed a sentence of ten years of initial confinement and ten years of extended supervision.

The no-merit report addresses whether the evidence was sufficient. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. ***Id***. at 504. In this case, without attempting to repeat the evidence here, we conclude the evidence was sufficient. The testimony of the victim was sufficient. The testimony was not inherently incredible and, if believed, was sufficient to satisfy the elements of the crime. There is no arguable merit to this issue.

The no-merit report addresses whether the circuit court erred in admitting a videotaped statement by the victim at the preliminary hearing. There is no arguable merit to this issue because a conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

The no-merit report addresses whether the circuit court erred by denying Solis-Fuentes's motion to suppress a DNA sample collected from him. The motion was based on his allegation that police omitted from the search warrant affidavit a piece of information that would have undercut a showing of probable cause. To prevail on the motion, Solis-Fuentes would have to show that police made a false statement intentionally or with reckless disregard for the truth. ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978). After hearing testimony from the officer who prepared the affidavit, and watching a video of the victim's statement, the court concluded

that the officer's affidavit was supported by the victim's statement. After reviewing the video of that statement, we agree there is no arguable merit to this issue.

The no-merit report addresses whether trial counsel was ineffective by not arguing that the search warrant affidavit did not support a finding of probable cause. There is no merit to this issue because the victim's statement, together with the police seizure of the black cushion on which the victim stated some assaults occurred, provided probable cause to believe Solis-Fuentes's DNA might be on the cushion, and therefore there was probable cause to obtain a DNA sample from Solis-Fuentes.

The no-merit report addresses whether the court erred by denying Solis-Fuentes's request to question the victim about her statement that her biological father had sexually assaulted her. The State opposed that questioning on the ground that it would be in violation of WIS. STAT. § 972.11(2)(b). However, before that statute comes into play there is a more fundamental question of relevance. Although the no-merit report does not focus on that concept, the report does conclude that exclusion of the evidence was harmless because it "would not have added to the strength of the defense's case." If the evidence does not add to the strength of the case, that may be another way of saying it was not relevant. It is not apparent what the relevance in this case would be of the victim's allegation that her biological father assaulted her many years ago. For example, there was no physical evidence introduced that might be explained by reference to a prior assault. There is no arguable merit to this issue.

Solis-Fuentes asserts that his trial counsel may have been ineffective by not using an opinion of his expert at trial. As described by Solis-Fuentes, the expert said that Solis-Fuentes did not have, and could not have had, intercourse with the victim. Appellate counsel has

provided us with copies of the original nurse examination report and the written opinion of the expert hired by trial counsel. They show that the expert disagreed with certain physical findings made by the examiner. However, contrary to the assertion by Solis-Fuentes now, the expert did not conclude that Solis-Fuentes did not have, and could not have had, intercourse with the victim.

This issue lacks arguable merit for at least two reasons. The first is that the nurse who conducted the examination was not called as a witness by the State at trial, and her opinions were not otherwise introduced as evidence. Therefore, although Solis-Fuentes's expert could have disputed the examiner's findings at trial if they had been presented, there was no reason to have the expert testify, because those findings were not used against Solis-Fuentes. The second reason is that the expert did not offer any affirmative opinion that would have helped Solis-Fuentes at trial. The only potential use of the expert would have been to rebut testimony presented by the State from the nurse examination.

Solis-Fuentes asserts that his trial counsel was ineffective by not using a written statement in which the victim asserted that Solis-Fuentes did not assault her. However, trial counsel did use that letter to question the victim, as accurately described in the supplemental no-merit report. There is no arguable merit to this issue.

Solis-Fuentes also argues that a Spanish language transcript should have been made at trial of his communication through the interpreter. He cites no law requiring that such a transcript be made. Interpreters are sworn to perform accurate translation. Solis-Fuentes has not given any reason to believe that did not occur in this case. There is no arguable merit to this issue.

The no-merit report addresses whether the sentence is within the legal maximum and whether the court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors such as the severity of the offense, the impact on the victim's family, the defendant's character, and the need to protect the public and the victim's family. The court did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney O'Connell is relieved of further representation of Solis-Fuentes in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals