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February 21, 2014

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

2013AP697-CRNM State of Wisconsin v. Donelle L. Johnson (L.C. #2010CF521)

Before Curley, P.J. Kessler and Brennan, JJ.

Following a bench trial in January 2011, the circuit court found Donelle L. Johnson guilty of one count of first-degree sexual assault of a child. The circuit court imposed a sixteen-year term of imprisonment bifurcated as ten years of initial confinement and six years of extended supervision. Johnson appeals.

Johnson's appointed postconviction and appellate counsel, Attorney Christopher Donovan, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and

WIS. STAT. RULE 809.32 (2011-12).[1] Johnson submitted a lengthy response, and Attorney Donovan filed two supplemental no-merit reports. This court has considered the no-merit reports and Johnson's response, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State charged Johnson in February 2010 with one count of first-degree sexual assault of a child, M.J., born on October 4, 1999. *See* WIS. STAT. § 948.02(1)(b) (2009-10) (barring sexual intercourse with a child who has not reached the age of twelve years). The State further alleged that Johnson was M.J.'s biological father and charged him with one count of incest. *See* WIS. STAT. § 948.06(1) (2009-10). According to the complaint, Johnson had sexual intercourse with M.J. "on or about January 22, 23 or 24th, 2010." The complaint went on to allege that Johnson had been sexually assaulting M.J. during her weekend visits to his home since she was seven years old.

After the case had been pending for several months, the State moved to dismiss the incest charge, conceding that, although Johnson is the biological father of M.J.'s half-siblings, he is not related to M.J. by blood, and he is not her stepfather. The circuit court granted the State's motion and dismissed the incest allegation. The State subsequently filed an amended information charging Johnson with one offense, sexual contact with a child who had not attained the age of thirteen years. *See* WIS. STAT. § 948.02(1)(e) (2009-10). Johnson denied the allegation and demanded a trial.

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

We first consider whether Johnson could mount an arguably meritorious claim that the circuit court erroneously granted the State's pretrial motion to admit evidence of other acts pursuant to WIS. STAT. § 904.04(2). Whether to admit other acts evidence is governed by the three-step analysis set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The circuit court must first determine whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. Second, the circuit court must determine whether the evidence is relevant. ***Id.*** Third, the circuit court must determine whether "the probative value of the other acts evidence is 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 preparation of cumulative evidence." ***Id.*** at 772-73. We review the circuit court's decision to admit other acts evidence for an erroneous exercise of discretion. ***Id.*** at 780.

Here, the State moved to admit evidence that Johnson began sexually assaulting M.J. in 2006 and continued to assault her through late January 2010. The State advised that M.J. first made a documented complaint about Johnson in 2006 and that, on May 2, 2006, when she was interviewed by a police officer, she disclosed that Johnson touched her vaginal area. The State further advised that, in January 2010, she alleged that "every time she's asleep, [Johnson] is drunk and touches her everywhere, in places he shouldn't be touching her." The State explained that it wanted to present evidence of Johnson's prior acts of sexually assaulting M.J. because they: (1) provided a context for the charge; (2) supported the State's theory that Johnson's

actions were part of a plan to perpetrate ongoing assaults on her; and (3) explained why M.J. had difficulty in describing a "precise memory of the specific event" charged.[2]

Other crimes, wrongs, or acts are admissible to support a contention that the crime charged is part of a larger plan. *See* WIS. STAT. § 904.04(2). Context, credibility, and background are also permissible purposes for other acts evidence. *See* ***State v. Marinez***, 2011 WI 12, ¶27, 331 Wis. 2d 568, 797 N.W.2d 399. In this case, the circuit court concluded that the State offered the other acts evidence for valid reasons, the evidence involved the same victim and was relevant to the issues, and the probative value of the evidence was not substantially outweighed by the danger of undue prejudice.

The record shows that the circuit court considered the proper factors, applied the appropriate standard of law, and reached a conclusion that a reasonable judge could reach. Accordingly, the circuit court properly exercised its discretion. *See* ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. A challenge to the circuit court's decision would be frivolous within the meaning of ***Anders***.

In the response to the no-merit report, Johnson asserts that his trial counsel was ineffective for failing to object to the other acts evidence because, he says, it was "evidence of criminal activity with which [he] was not charged" and therefore irrelevant. We assess claims of

[2] The State's motion to admit other acts evidence revealed that M.J.'s half-sister, A.J., born in September of 2001, also reported in 2006 that she was sexually assaulted by Johnson, but that neither child provided details sufficient to support criminal charges at that time. The State added that it would not solicit information at trial that Johnson allegedly sexually assaulted A.J.

ineffective assistance of counsel under the familiar two-prong test described in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, the defendant must show that his or her attorney's performance was deficient and that the deficiency prejudiced the defense. ***Id.*** Whether the lawyer's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

Johnson cannot pursue an arguably meritorious claim that his trial counsel performed deficiently for failing to object to other acts evidence because his trial counsel did oppose the State's motion to admit such evidence. To the extent that Johnson implies that his counsel was ineffective because the circuit court decided to admit the disputed evidence, he misunderstands his trial counsel's role. A trial lawyer is not ineffective merely because his or her arguments do not prevail. *Cf.* ***State v. Robinson***, 177 Wis. 2d 46, 58, 501 N.W.2d 831 (Ct. App. 1993) ("Effective representation is not to be equated with a not guilty verdict.").

We next consider an issue that neither appellate counsel nor Johnson discusses, namely, whether Johnson could mount an arguably meritorious challenge to his waiver of a jury trial. To obtain a valid jury trial waiver, the circuit court must conduct a colloquy sufficient to ensure that the defendant: (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) understood that a jury trial consists of a panel of twelve people, and that all twelve people must agree that the State has proved the elements of the crime charged before the defendant may be found guilty; (3) understood that at a court trial, the judge alone decides whether the defendant is guilty or not guilty of the crime charged; and (4) had enough time to

discuss this decision with counsel. *See* ***State v. Anderson***, 2002 WI 7, ¶24, 249 Wis. 2d 586, 638 N.W.2d 301.

Here, the circuit court conducted a colloquy with Johnson that satisfied ***Anderson***. Additionally, Johnson's trial counsel explained that he had advised against a bench trial, and Johnson confirmed that he had decided to disregard his lawyer's advice. The circuit court found that Johnson knowingly, intelligently, and voluntarily waived his right to a jury trial. That finding is amply supported by the record. Johnson cannot pursue an arguably meritorious challenge to his jury waiver.

We next consider whether the evidence presented at trial was sufficient to sustain the conviction. The test for sufficiency of the evidence is the same whether a jury or the circuit court acts as the fact finder. ***State v. Curiel***, 227 Wis. 2d 389, 418, 597 N.W.2d 697 (1999). We apply a highly deferential standard. ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, 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, 501, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence are determinations that rest with the factfinder. ***Id.*** at 504.

Before the circuit court could find Johnson guilty, the State was required to prove beyond a reasonable doubt that he had sexual contact with M.J. and that she had not reached the age of thirteen years at the time of the sexual contact. *See* WIS JI—CRIMINAL 2102E; WIS. STAT. § 948.02(1)(e) (2009-10). M.J. was the first witness. She testified that her birthday was October 5, 1999, and that she was eleven years old. She said that when she was ten years old,

Johnson got drunk and then approached her while she was sleeping, removed her pants, took off his clothes, and "put his stuff in [her] lower part." She further explained that Johnson's "stuff" is the part of his body between his legs. M.J. was unable to state precisely when the sexual assault occurred, but she explained that it was cold outside. M.J. also testified that Johnson had similarly assaulted her approximately ten times, and that the assaults began when she was seven years old.

A nurse testified that she first interviewed M.J. on January 28, 2010, as part of the response to a report that M.J.'s mother was physically abusing the child. During the examination, M.J. disclosed ongoing sexual abuse by Johnson.

An expert in the dynamics of child sexual assault testified for the State. She explained, among other matters, the reasons that children delay disclosing sexual assault and why they may be inconsistent when describing events.

The evidence also included audiovisual recordings of statements that M.J. gave to police officers. In a recorded statement that she gave to a policewoman on January 28, 2010, M.J. said that, on the previous Saturday night, during a weekend visit with Johnson at his home, he took off her clothes and "put his stuff in [hers]." After M.J. disclosed Johnson's sexual abuse, she described physical abuse by her mother. M.J. then explained that she wanted to live with Johnson because her mother's home was "a terrible place," and Johnson had promised not "to do that stuff anymore." Additionally, the circuit court considered a recorded statement M.J. gave to a policewoman in May 2006. In the 2006 statement, M.J. said "Donelle" had touched her "puddin'," which she explained is the part of her body she uses to go to the bathroom.

Johnson elected not to testify on his own behalf, but he presented the testimony of his girlfriend, LaBrittany B. She testified that, on the weekend of January 22, 2010, she was at home with Johnson while his children and M.J. were visiting. LaBrittany B. testified that Johnson drank no alcoholic beverages and that at no time during the night did Johnson get out of the bed that she shared with him.

After considering the evidence and the arguments of counsel, the circuit court found that Johnson had sexual contact with M.J. in January 2010. The circuit court rejected the testimony of LaBrittany B., finding that she lied for Johnson because he is the father of her son. By contrast, the circuit court found M.J. credible, that she had no motive to lie, and that she had made her most recent disclosure at a time when she hoped to be taken from her physically abusive mother and placed with Johnson. The circuit court recognized that "the details are all over the map," but found that M.J. was "consistent in one thing; and that is that the person that she calls her daddy, Donelle Johnson, puts his stuff in her private area." The circuit court concluded that it had "no doubt" about its verdict that Johnson sexually assaulted M.J.

The record contains ample evidence of guilt. An appellate challenge to the sufficiency of the evidence would be frivolous.

We next consider whether Johnson could mount an arguably meritorious challenge to his waiver of the right to testify. A valid waiver must be knowing, intelligent, and voluntary. *See* ***State v. Weed***, 2003 WI 85, ¶42, 263 Wis. 2d 434, 666 N.W.2d 485. Here, Johnson told the circuit court that he had decided not to testify and that he had not used illegal drugs, alcohol, or prescription medication before making the decision. He said that he had not been threatened or promised anything in exchange for giving up his right to testify, and he confirmed his

understanding that his lawyer could advise him about the decision but that the decision was his alone. Additionally, his trial counsel told the circuit court that, in counsel's view, Johnson was knowingly, voluntarily, and intelligently giving up his right to testify. In light of the colloquy conducted in this case, further proceedings to challenge the validity of Johnson's waiver of the right to testify would lack arguable merit.

We next consider Johnson's contention that his trial counsel was ineffective for failing to object to the admission at trial of M.J.'s videotaped statements. Audiovisual recordings of pretrial statements made by children who are available to testify are admissible under the circumstances set forth in WIS. STAT. § 908.08. Pursuant to § 908.08(3):

> The court or hearing examiner shall admit the recording upon finding all of the following:
>
> (a) That the trial or hearing in which the recording is offered will commence:
>
> 1. Before the child's 12th birthday....
>
> (b) That the recording is accurate and free from excision, alteration and visual or audio distortion.
>
> (c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.
>
> (d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.
>
> (e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

Here, the circuit court found that the videotaped statements satisfied WIS. STAT. § 908.08(3). M.J. was younger then twelve at the time of trial; the recordings are accurate; the child demonstrated an understanding of the importance of telling the truth; the time, content and

circumstances of the police interviews provided indicia of trustworthiness; and Johnson and his trial counsel reviewed the recordings well in advance of trial. The circuit court must admit a videotaped statement that satisfies § 908.08(3). *See* ***State v. James***, 2005 WI App 188, ¶¶20-21, 285 Wis. 2d 783, 703 N.W.2d 727. Trial counsel therefore did not perform deficiently by conceding the admissibility of the videotapes.

Johnson disagrees and directs our attention to the analysis for admission of a child's videotaped statement set forth in ***State v. Snider***, 2003 WI App 172, ¶17, 266 Wis. 2d 830, 668 N.W.2d 784. That analysis is not relevant here. The discussion in ***Snider*** is applicable when a videotaped statement is not admissible under WIS. STAT. § 908.08(3), and the circuit court nevertheless considers whether to admit the statement as an exception to the hearsay rule under WIS. STAT. § 908.08(7). *See* ***Snider***, 266 Wis. 2d 830, ¶16. Accordingly, ***Snider*** does not provide Johnson a meritorious ground for further postconviction proceedings.[3]

Johnson next contends that his trial counsel was ineffective for failing to challenge M.J.'s recorded statement that Johnson was "taken" from the family in the past because he had committed sexual assault. Johnson emphasizes the prosecutor's acknowledgment at sentencing that "there is nothing in the police report that indicates [the police] ever directly asked [Johnson] about sexual assault by [Johnson]" before January 2010. The record reflects, however, that Johnson was not prejudiced by his trial counsel's failure to challenge any alleged inaccuracies in M.J.'s recollections about the aftermath of her 2006 disclosure. Johnson's trial counsel

[3] Johnson also points to ***State v. Greene***, No. 2007AP1506, unpublished slip op. (WI App Feb. 26, 2008). That case is an unpublished per curium decision released before July 1, 2009. Accordingly, it cannot be cited as precedent or persuasive authority in this case and provides no basis for further appellate proceedings here. *See* WIS. STAT. RULE 809.23(3)(a)-(b).

thoroughly impeached M.J. The circuit court well understood that her memory was faulty and recognized that her testimony was inconsistent, explicitly finding that "the details are all over the map."[4] The circuit court nonetheless found her credible when she alleged that Johnson sexually assaulted her.

Next, Johnson asserts that his trial counsel should have sought to suppress the portion of M.J.'s 2010 recorded statement in which she told the police that Johnson "touched A.J. [Johnson's biological daughter] in places ... a long time ago." In assessing this contention, we have taken into account that the State's motion to admit other acts evidence sought admission of sexual assault allegations involving only M.J. This court is nonetheless satisfied that Johnson cannot pursue an arguably meritorious claim based on the reference to A.J. On appeal, any alleged error in admitting other acts evidence would be subject to a harmless error analysis. *See* ***State v. Lock***, 2012 WI App 99, ¶42, 344 Wis. 2d 166, 823 N.W.2d 378. M.J.'s fleeting reference to a "long ago" event involving A.J. was at worst a harmless error in this bench trial. "'In a case tried by the court the admission of improper evidence is to be regarded on appeal as having been harmless, unless it clearly appears that but therefor the finding would probably have been different.'" ***State v. Harling***, 44 Wis. 2d 266, 278, 170 N.W.2d 720 (1969) (citations and one set of quotation marks omitted). Here, as already noted, the State advised the circuit court during pretrial proceedings that A.J. alleged in 2006 that Johnson had sexually assaulted her.

[4] We add, however, that Johnson submitted with his response to the no-merit report an excerpt from a Form JC-1610, "Petition for Protection or Services (Chapter 48)," relating to M.J. The Petition includes a narrative of events immediately after M.J. made allegations of sexual abuse in 2006 and shows that her mother told authorities she "would not allow contact with the father." Thus, the information Johnson offers supports M.J.'s recollection that the family's contact with Johnson was interrupted after M.J. disclosed sexual abuse, regardless of whether police confronted him.

Thus, Johnson was not prejudiced when the allegation was briefly mentioned during the bench trial.

Relatedly, we reject the suggestion that trial counsel was ineffective for failing to offer proof that A.J. told police in 2010 that Johnson never assaulted her. Evidence that Johnson did not sexually assault A.J. is irrelevant to the determination of whether Johnson sexually assaulted M.J. *See* ***State v. Tabor***, 191 Wis. 2d 482, 496-97, 529 N.W.2d 915 (Ct. App. 1995). Accordingly, this issue does not present an arguably meritorious basis for further appellate proceedings.

Next, Johnson contends that his trial counsel was ineffective for failing to object to alleged prosecutorial misconduct. In this regard, Johnson first claims that the prosecutor engaged in misconduct by cross-examining LaBrittany B. about: (1) Johnson's alcohol consumption; (2) whether Johnson ever got out of bed during the night; and (3) whether she was with Johnson at all times. We agree with appellate counsel that these inquiries were directly related to the testimony and allegations in the case, and thus were appropriate areas of inquiry. *See* WIS. STAT. § 906.11(2) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.") Accordingly, trial counsel had no obligation to allege prosecutorial misconduct in connection with the cross-examination of LaBrittany B. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (lawyer is not required to pursue meritless claims).

Johnson next contends that his trial counsel failed to challenge alleged prosecutorial misconduct during closing argument. The prosecutor, he complains, improperly speculated about why Johnson allowed M.J. to continue visiting him after she accused him of sexual assault

in 2006, implying that he was aware of the accusation at that time. At sentencing, he again reminds us, the State took the position that Johnson "might well be being truthful" when he denied knowing about the allegations in 2006. Johnson also complains because the prosecutor argued that M.J. told an examining physician in 2006 about Johnson's assaults; the physician's notes from 2006 show that, in fact, the doctor received information about Johnson's assaults from a third party.

"When a defendant alleges that a prosecutor's statements and arguments constituted misconduct, the test applied is whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (citation and one set of quotation marks omitted). Here, the prosecutor's closing arguments did not undermine the fairness of the bench trial. The rule is long established that arguments of counsel are not evidence. ***Merco Distrib. Corp. v. O & R Engines, Inc.***, 71 Wis. 2d 792, 795-96, 239 N.W.2d 97 (1976). We presume that the circuit court knew and applied this well-settled principle. *See* ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶10, 273 Wis. 2d 471, 681 N.W.2d 302 (every person presumed to know the law). Accordingly, Johnson was not prejudiced by the prosecutor's speculation and imprecise closing remarks during this bench trial, and his trial counsel was thus not ineffective for failing to object. ***State v. Ziebart***, 2003 WI App 258, ¶29, 268 Wis. 2d 468, 673 N.W.2d 369 (no attorney is ineffective for failing to challenge a harmless error).

Next, Johnson claims that his trial counsel was ineffective for failing to hire an expert witness to conduct an evaluation pursuant to ***State v. Richard A.P.***, 223 Wis. 2d 777, 795, 589 N.W.2d 674 (Ct. App. 1998) (permitting defendant to offer expert testimony that he or she does not exhibit character traits consistent with a sexual disorder such as pedophilia). According to

Johnson, his postconviction and appellate counsel—Attorney Donovan—located an expert who could have testified in Johnson's favor, thus demonstrating that trial counsel was ineffective for failing to retain such a witness. Attorney Donovan's response shows that he explored this issue with trial counsel. *See* WIS. STAT. RULE 809.32(1)(f). Trial counsel explained that he did hire an expert, but the expert's testimony would not have been helpful to Johnson. "[C]ounsel's strategic choices, made after thorough investigation of the law and facts, are virtually unchallengeable." ***State v. Chu***, 2002 WI App 98, ¶52, 253 Wis. 2d 666, 643 N.W.2d 878. Even more significantly here, Attorney Donovan submitted a report from the expert he retained for postconviction and appellate proceedings. The report shows that Johnson misunderstands the expert's conclusions. The expert determined that "the Abel Screen, a well-respected measure of sexual interest, places Johnson in the highest risk category of having committed a sexual offense." The expert further opined that an evaluation pursuant to ***Richard A.P.*** "would not be helpful in [Johnson's] appeal [and] [i]t is highly unlikely that the results of a similar evaluation, if conducted at the time of his trial, would have been any different." Further appellate proceedings regarding this issue would lack arguable merit.

Johnson also complains that his trial counsel failed to call character witnesses, specifically, his mother and stepfather, to testify on Johnson's behalf. Attorney Donovan responds that he investigated this contention with trial counsel, who explained that Johnson's family was not cooperative. Trial counsel therefore concluded that Johnson's family members "would not make good witnesses." Johnson could not pursue an arguably meritorious challenge to this conclusion. *See* ***Chu***, 253 Wis. 2d 666, ¶52.

Next, Johnson alleges that his trial counsel afforded him ineffective assistance by failing to present testimony that, "during an interrogation conducted on 1/28/10 and 1/29/10 [Johnson]

stated that he would be willing to undergo DNA testing." Evidence that a defendant offered to undergo DNA testing may reflect consciousness of innocence, and a defendant may present such evidence for that purpose under some circumstances. *See* ***State v. Santana-Lopez***, 2000 WI App 122, ¶5, 237 Wis. 2d 332, 613 N.W.2d 918. The record in this case, however, does not support Johnson's claim that he offered to submit to DNA testing. Rather, the record includes a police report summarizing the custodial interview of January 28, 2010, and stating, in pertinent part: "Johnson refused to give consent to have his buccal swabs collected."[5] Nonetheless, we asked appellate counsel for a supplemental no-merit report discussing whether anything outside the record supports further postconviction or appellate proceedings to address this issue. In the supplemental no-merit report and affidavit, appellate counsel describes his unsuccessful efforts to substantiate Johnson's claim. With the supplemental report, appellate counsel submitted recordings of Johnson's custodial statements to police on January 28, 2010, and January 29, 2010. *See* WIS. STAT. RULE 809.32(1)(f). The recordings reflect Johnson's unwavering refusal to undergo DNA testing, despite the interrogating officers' requests for such testing and suggestions that such testing might exonerate him. In sum, nothing presented to this court supports an arguably meritorious claim that trial counsel was ineffective for failing to present evidence regarding DNA testing. Johnson's conclusory allegations alone cannot support postconviction proceedings. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433.

[5] A buccal, or cheek, swab, is used to develop a DNA profile. *See* ***State v. Deadwiller***, 2013 WI 75, ¶¶5, 12, 350 Wis. 2d 138, 834 N.W.2d 362.

Johnson next asserts that his trial counsel was ineffective for failing "to suppress [a] hearsay statement." He refers us to a portion of the sentencing transcript in which the prosecutor described a statement made by M.J.'s mother in 2006 when she reported M.J.'s allegation of sexual abuse. The rules of evidence, however, are inapplicable to sentencing proceedings. *See* WIS. STAT. § 911.01(4)(c). Moreover, as we have already explained, evidentiary errors in a bench trial are harmless unless they probably changed the outcome of the trial. *See* ***Harling***, 44 Wis. 2d at 278. The record is clear here that the circuit court's finding of guilt did not turn on statements that M.J.'s mother made in 2006. Rather, the circuit court convicted Johnson because it found M.J. credible, and it believed her.

Johnson last contends that the State's case was so weak that the cumulative effect of his trial counsel's alleged errors undermines the integrity of the guilty verdict. We disagree. The State's case featured testimony from the victim, M.J. She accused Johnson, a person she knows well, of sexually assaulting her. The circuit court found M.J. credible, noting particularly that she made an accusation against Johnson at the same time that she asked to live with him so that she could escape from her physically abusive mother. The State's case was a compelling one.

We turn to whether Johnson could raise an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the

factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Further, in exercising sentencing discretion, the circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***Stenzel***, 276 Wis. 2d 224, ¶7.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court concluded that the crime was "very serious" and that M.J. would suffer the effects of the crime for the rest of her life. The circuit court discussed Johnson's character as a largely mitigating factor, acknowledging his family's belief in his good qualities and accepting that, but for sexually offending, he is "in every other respect a good person." The circuit court also "acknowledge[]d [Johnson's] employment [and] the fact that [he] ha[s] tried to make it despite not having a GED." The circuit court, however, viewed the need to protect the public as the most significant sentencing factor. Stating that Johnson was a "danger to the community," the circuit court selected punishment and deterrence as the primary sentencing goals. The circuit court told Johnson that it had selected a sentence to ensure "that [Johnson] will never [sexually assault a child] again."

The circuit court explained the factors that it considered when imposing sentence. The factors were proper and relevant. Moreover, the sentence imposed was not unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment

of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Upon conviction, Johnson faced a statutory maximum sentence of sixty years of imprisonment. *See* WIS. STAT. §§ 948.02(1)(e) (2009-10), 939.50(3)(b) (2009-10). "In our society, sexual abuse of a child ranks among the most heinous crimes a person can commit." ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶80, 283 Wis. 2d 384, 700 N.W.2d 27 (Prosser, J., concurring). Given the nature of Johnson's crime, we cannot say that the circuit court's sentencing decision shocks the public sentiment or violates the judgment of reasonable people concerning what is right and proper.

Last, we note that, throughout the sentencing proceedings, the circuit court described M.J. as nine years old at the time of the offense. In fact, M.J. was ten years old in January 2010. A person has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Johnson's trial counsel did not object, however, when the circuit court referred to M.J. as a nine-year-old victim, so we consider any possible postconviction challenge in an ineffective-assistance-of-counsel context. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (in the absence of an objection, we address issues under the ineffective-assistance-of-counsel rubric). Johnson could not, as a matter of law, show any prejudice stemming from the circuit court's error in describing M.J. as nine years old when Johnson sexually assaulted her. First, the error was *de minimis* in light of her actual age. Second, the law draws no distinction between having sexual contact with a nine-year-old child and having sexual contact with a ten-year-old child. *See* WIS. STAT. § 948.02(1)(e) (defining the crime of sexually assaulting a person who has not attained the age of thirteen years). Therefore, we are satisfied that a postconviction challenge based on the circuit

court's description of M.J. as nine years old at the time of the offense would be frivolous within the meaning of ***Anders***.

No other issues warrant discussion. To the extent that Johnson's response raises additional issues, we have considered his assertions and concluded that the allegations he makes do not suggest arguably meritorious grounds for further postconviction or appellate proceedings. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 184 (court of appeals not required to explicitly identify and reject the nearly infinite meritless issues present in any trial transcript). Based on our independent review of the record, we conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Christopher Donovan relieved of any further representation of Donelle L. Johnson on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals