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January 27, 2015

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

2013AP1645-CRNM State v. Daniel J. McDermott (L. C. No. 2010CF16)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Daniel McDermott has filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge McDermott's convictions for two counts of first-degree sexual assault of a child under age thirteen, contrary to WIS. STAT. § 948.02(1)(e). McDermott was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***,

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

386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

An Information charged McDermott with two counts of first-degree sexual assault, alleging McDermott had sexual contact with two children under age thirteen. After a trial, McDermott was convicted upon a jury's verdict of the crimes charged. Out of a maximum possible 120-year sentence, the court imposed and stayed consecutive ten-year sentences and placed McDermott on twenty years' probation. An initial no-merit report was rejected and that appeal was dismissed based on a potential ambiguity regarding the extended supervision portion of the imposed and stayed sentences.[2] McDermott filed a postconviction motion for sentence clarification, and the circuit court amended the judgment, reducing the imposed and stayed sentences from consecutive ten-year terms to consecutive eight-year terms, consisting of four years' initial confinement and four years' extended supervision on each count. This no-merit appeal follows.

Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). The jury heard testimony that the assaults happened while the victims, then ten and eleven years

[2] The court initially described the sentences as "four plus six and four plus six consecutive on each count," and the judgment of conviction described them as consecutive sentences of four years' initial confinement and six years' extended supervision. For the remainder of its sentencing discussion, however, the court appeared to have less extended supervision in mind, describing the sentences as being "four plus four, and then imposed and stayed." The written explanation of determinate sentence form also showed a sentence of eight years on each count, divided as four years of initial confinement and four years of extended supervision.

old, were staying at McDermott's home. McDermott was a friend of the ten-year-old's father. The girls had initially gone to McDermott's home to use his computer and ended up staying overnight. The ten-year-old testified that while lying on the couch with McDermott, he rubbed her vaginal area over her jeans. The two girls and McDermott then went to McDermott's bed, with the eleven-year-old lying in the middle. The eleven-year-old testified that McDermott rubbed her back and slowly moved his hand down to her butt area. The girls then left the bed and went to sleep on a futon in a different room. After the girls had removed their pants and settled under the covers, Dan asked if the ten-year old would stand up so he could see her underwear. She refused.

The ten-year-old's father, Michael B., testified that his daughter told him what happened the next day. When Michael asked McDermott about it, McDermott denied doing anything intentionally and said, "If I did, it was an accident." According to Michael, McDermott apologized, saying: "I'm sorry Mike. I know you are pissed right now and I would be too. What can I do to fix this?" Michael further testified that when confronted by the girls, McDermott denied touching them.

To the extent there was conflicting testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support McDermott's convictions.

The record discloses no arguable basis for challenging the effectiveness of McDermott's trial counsel. To establish ineffective assistance of counsel, McDermott must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the case. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Any claim of ineffective assistance must first be raised in the trial court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

The no-merit report addresses whether counsel was ineffective by failing to move to strike certain jurors.[3] A lawyer's failure to act to remove a biased juror who ultimately sat on the jury constitutes deficient performance resulting in prejudice to his or her client. ***State v. Carter***, 2002 WI App 55, ¶15, 250 Wis. 2d 851, 641 N.W.2d 517. There is no indication in the record, however, that the jurors were statutorily, subjectively or objectively biased. *See* ***State v. Lindell***, 2001 WI 108, ¶¶34–36, 38, 245 Wis. 2d 689, 629 N.W.2d 223.

Juror 4 indicated during voir dire that she had been sexually assaulted by an uncle when she was between the ages of eight and ten. In turn, Juror 6 indicated that a foster brother exposed himself to her when she was twelve years old and her mother had been assaulted as a child, though she did not know the details of that assault. "To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial."

[3] The no-merit discusses whether defense counsel should have moved to strike three jurors, identified as Jurors 4, 6 and 8. The no-merit report notes that Juror 8 indicated he once worked with trial witness Michael B., the ten-year-old victim's father. Defense counsel, however, used a peremptory challenge to remove Juror 8. Because that juror was not impaneled, the no-merit report's discussion of Juror 8 is superfluous.

State v. Faucher, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). Both jurors confirmed that their respective experiences would not affect their ability to fairly and impartially hear the facts of McDermott's case. Juror 4 stated she is a probation and parole agent who is able to look at all the evidence and make a decision. When asked whether she has to weigh credibility as part of her job, Juror 4 acknowledged: "Sure. Sometimes there isn't any evidence. A lot of times, especially domestics it's, you know, if you don't have the evidence, you have to let them out, keep on supervising them." Juror 4 also agreed that people at times will make false allegations. When asked whether she could decide the case solely based on the evidence heard in the courtroom, Juror 4 answered affirmatively, stating: "I never heard anything about this case before, and, again, my experience was my experience." Juror 6 similarly confirmed that she would base her decision solely on the evidence heard in this case. Although Juror 4 also indicated she went to high school with trial witness Michael B., she again confirmed there was nothing about that contact that would influence her verdict in any way. Because there is no indication in the record that these or any other jurors were biased, there is no arguable merit to a claim that counsel was constitutionally ineffective with respect to jury selection.

The no-merit report also addresses whether trial counsel was ineffective by failing to introduce expert testimony regarding false allegations of sexual abuse by children. This court has held, however, that the failure to introduce such testimony does not fall below "prevailing professional norms." *See* ***State v. Van Buren***, 2008 WI App 26, ¶19, 307 Wis. 2d 447, 746 N.W.2d 545.

The no-merit report additionally questions whether trial counsel should have introduced evidence that the girls acted toward McDermott "in a sexual way via their actions and language." Any evidence of sexual banter, however, would likely have been more harmful than helpful, as it

would be consistent with the allegations of sexualized touching. To the extent McDermott may believe that evidence of sexual banter somehow signaled the girls' consent to be touched, a child under the age of sixteen cannot consent to sexual contact. *See* ***State v. Fisher***, 211 Wis. 2d 665, 669-70, 565 N.W.2d 565 (Ct. App. 1997). The record shows that trial counsel attempted to cast doubt on the girls' testimony, mainly by emphasizing inconsistencies in their statements and testimony. The fact that a strategy fails does not make the attorney's representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; McDermott's character; the need to protect the public; and the mitigating circumstances McDermott raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that McDermott's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Steven Zaleski is relieved of further representing McDermott in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals