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

2013AP2146-CRNM State of Wisconsin v. Sammy S. Cooper (L.C. # 2011CF105)

Before Higginbotham, Sherman, and Kloppenburg, JJ.

Sammy Cooper appeals a judgment convicting him, following a jury trial, of two counts of repeated sexual assault of a child, contrary to WIS. STAT. § 948.025(1)(b) (2013-14).[1] Attorney Steven Phillips has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; s*ee also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex***

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

rel. McCoy v. Wisconsin Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses several aspects of the trial as well as the validity of the sentence imposed. Cooper was sent a copy of the report, and has filed a response. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the evidence

The no-merit report asserts that there would be no arguable merit to challenging the sufficiency of the evidence on appeal. Upon reviewing the no-merit report, the response, and the record, we agree with counsel's assessment. When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state 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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

With respect to each of the counts, the State was required to prove that Cooper had engaged in at least three acts of sexual intercourse with each of the alleged victims, who were Cooper's stepdaughters, and that the victims were under the age of twelve at the time. *See* Wis. JI-Criminal 2107 (2009); WIS. STAT. § 948.02(1)(b). "Sexual intercourse" is defined as "vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction." WIS. STAT. § 948.01(6).

The State presented evidence that, on June 20, 2011, Cooper's wife, Marcy, approached their friend, Christopher Moen, who was a member of the same motorcycle club that Cooper belonged to. Marcy told Moen that she had learned that something sexual occurred between Cooper and her daughters, C.L.B. and A.M.B, on Father's Day in the family camper. Moen told Marcy to call the police, and she did. Officer Richard Lueneburg told Marcy to take the children to Hess Memorial Hospital. The doctor there advised Marcy to take the children to a hospital in Madison to be examined. Cooper was at work during this time. When he returned home from work around 2:30 a.m., his wife and stepdaughters were not home. Cooper then called Moen to ask if he knew of their whereabouts. Moen told Cooper to come to the clubhouse because they needed to talk.

When Cooper arrived at the clubhouse, Moen and two club "enforcers" were waiting for him. Once Cooper was inside, Moen asked what had happened in the camper on Father's Day. Cooper initially said that he didn't remember and that he had been having blackouts. He said that, on Father's Day, he blacked out and woke up with his pants around his ankles and C.L.B. and A.M.B weren't there. After several minutes, Cooper then said, "I did it. All right. I don't know. I don't remember. But if they say I did it, then I must have done it because they don't lie." Moen and the two enforcers began punching and kicking Cooper. After they stopped, one of the enforcers called 911. Moen testified at trial that Cooper was not bleeding or swollen.

Police arrived and transported Cooper to the police station. At the station, Cooper made a confession to Officer Lueneburg during interrogation, stating, "[I]f they said I did it, then I did it.… They never lie." When asked if the girls had ever touched his penis, Cooper admitted that he had asked them to do so once, over a year earlier. He believed there was one such incident with each girl. Cooper also admitted that he remembered four times when he had A.M.B.

perform oral sex on him. He further admitted that there had been about the same number of such acts with C.L.B. Cooper also acknowledged putting his penis "down by their butt" and believed that he had had anal intercourse with C.L.B once. Cooper admitted that the assaults of A.M.B began when she became inquisitive about sexual matters, around age nine or ten, and the assaults of C.L.B. began when she was seven or eight.

At trial, the State played video recordings of interviews of C.L.B. and A.M.B. done by the Safe Harbor Child Advocacy Center. Both girls told the interviewer that Cooper had forced them to perform oral sex on multiple occasions. C.L.B. estimated that Cooper made her perform oral sex at least ten times a month. C.L.B. stated that every time she was made to give Cooper oral sex, he also touched his penis to her vagina. Both A.M.B. and C.L.B. also stated that Cooper showed them pornography on his laptop and that Cooper assaulted them anally on multiple occasions.

Regarding the incident on Father's Day, 2011, A.M.B. stated that Cooper had asked the girls to help him clean the camper, and that he gave them the choice of cleaning or performing oral sex. A.M.B. and C.L.B. both stated in their Safe Harbor interviews that A.M.B. was forced to perform oral sex on Cooper and that A.M.B. stood on watch for their mother as Cooper had anal intercourse with C.L.B.

A.M.B. and C.L.B. both testified at trial. A.M.B., who was thirteen at the time of trial, again described the assaults of her and her sister on Father's Day. She also testified that Cooper had attempted to put his penis in her vagina on two separate occasions, that he had put his penis in her anus "[a]bout five times," that he had rubbed her vagina with his hands ten to twenty times, and that he had placed his penis in her mouth "[a]bout sixty times a year." C.L.B., who

was ten years old at the time of trial, testified that Cooper had "sexually abused" her. She confirmed that the statements she made during her Safe Harbor interview were true. She described the events that occurred on Father's Day in a manner that was consistent with what she had said in her Safe Harbor interview.

Cooper testified at trial on his own behalf. He testified that, since confessing to Officer Lueneburg, he has never admitted to assaulting his stepdaughters and has always maintained that his confession was false. On cross-examination, Cooper stated that, contrary to his earlier confessions in which he stated that his stepdaughters do not lie, the girls actually *had* lied about numerous things, particularly when they thought they would be in trouble. He also suggested that Moen and the other motorcycle club members could have lied to get him out of the club, and suggested that Moen was motivated by a desire to have contact with Marcy.

At trial, the State also presented the testimony of crime lab analyst Denise Jones, who tested an art shirt, or art smock, that was retrieved by police from a trailer parked on the property of the girls' grandparents' house. According to C.L.B., Cooper had forced her to perform oral sex on him in the trailer in January 2011. When Cooper ejaculated, C.L.B. spit the semen onto the shirt. Jones tested stains found on the shirt for DNA. Jones testified at trial that some of the stains contained semen and saliva. For two of the stains tested, Jones concluded that Cooper was the source of sperm found in the stains. Jones also concluded that C.L.B. was a likely major contributor to the stains from the shirt, as her DNA profile matched DNA obtained from the shirt.

Cooper admitted that his DNA was on the shirt, but stated that he and Marcy used to have sex in the trailer when they lived there and that they would grab whatever old shirt was nearby

and wipe off with it. Cooper also stated that Marcy would spit out semen onto the shirt after oral sex. He conceded on cross-examination that he did not know how C.L.B. would know that semen would be found on the shirt.

Defense expert Alan Freidman, who holds a Ph.D. in molecular genetics, testified that whether the DNA obtained from the shirt stains belonged to Marcy could not be determined because Marcy's DNA was never submitted for analysis. Friedman agreed with Jones's conclusion that Cooper was the source of the semen on the shirt.

Dr. Richard Tovar, a board certified emergency physician with experience in conducting SANE exams, testified at trial on behalf of the defense. He stated that he had reviewed the police reports, transcripts of A.M.B.'s and C.L.B.'s Safe Harbor interviews, the SANE exam records, and certain medical reports pertaining to A.M.B. He testified that if a child were forced to perform fellatio, one might find bruising or tearing in the child's "oral areas," but that the SANE nurse did not document any examination of either child's oral areas. Tovar also stated that the SANE nurse did not find any evidence of trauma or abnormalities consistent with sexual assault after examining the rectal and genital areas of C.L.B. and A.M.B. Tovar further stated that the SANE nurse did not note any physical evidence that would corroborate the accusations of years of abuse.

Tovar testified that A.M.B.'s records indicated that she had been treated every six months since the age of six for a condition known as hemangioma, a collection of blood vessels underneath the skin. In A.M.B.'s case, this condition appeared in her genital area. Tovar opined that the type of abuse alleged by A.M.B. would have likely caused the hemangioma to bleed for a prolonged period of time. He stated that A.M.B. also underwent surgery in February 2011 for

genital warts. Tovar opined that, due to these medical conditions, it was likely that medical professionals would have looked at A.M.B.'s genital area on a regular basis, and that they would likely have reported any suspected sexual abuse if they had seen any physical evidence of it. Tovar also reviewed Cooper's medical records, the most recent of which was from February 2008, and found no indication that Cooper had any sexually transmitted disease.

Dr. Katherine Hilsinger, the gynecologist who performed the surgery on A.M.B.'s genital warts, testified on behalf of the State. Hilsinger stated that the HPV virus, which causes genital warts, is harder to detect in males than in females. Hilsinger recalled that, before performing surgery on A.M.B., she conferred with both Cooper and Marcy. At Cooper's request, Hilsinger spoke privately with him, and he asked her how long it would take for genital warts to be visible after exposure. The question caused Hilsinger to have "significant concerns" that A.M.B. had been sexually abused, as did the statistic that eighty percent of children with genital warts have been sexually abused. Cooper admitted to having the conversation with Hilsinger, and testified that he was merely concerned about whether the condition was contagious and how it was transmitted. Hilsinger testified that, during A.M.B.'s surgery, she noted that A.M.B.'s hymen was intact, but "stretched" more than it should have been for a girl her age, a condition which could have been caused by a man attempting to insert a penis into her vagina. Hilsinger stated that she did not report her concerns because she mistakenly believed that the police had already investigated A.M.B.'s possible abuse and found the suspicions to be unfounded.

The jury heard all of the evidence and came back with a guilty verdict as to two counts of repeated sexual assault of a child. We are satisfied, based on the record as well as the no-merit report and response, that the evidence was sufficient to support the jury's verdict.

Evidentiary issues

Prior to trial, Cooper moved to suppress his confession made to Officer Lueneburg because he claimed it was made in a state of terror. Cooper argued that his mental state was severely compromised by the earlier incident with Moen and the club enforcers, when he was beaten. Cooper argued that the police knew or should have known about what had occurred at the motorcycle club, making any waiver of ***Miranda***[2] rights "virtually meaningless" and rendering his confession involuntary.

The circuit court held a hearing on the motion, at which Lueneburg and Cooper both testified. The court reviewed a DVD and transcript of the interrogation prior to the hearing. Cooper testified that he was scared and tired when he waived his rights and that everything was a "blur." Lueneburg testified that he gave Cooper ***Miranda*** warnings and that Cooper waived his rights and agreed to speak with him. Lueneburg denied that Cooper had told him about the club members beating him or threatening him or that Cooper expressed fear that the club members would harm him if he left the police station. Lueneburg denied making any threats or promises to Cooper to induce him to confess.

At the conclusion of the hearing, the court denied the suppression motion. The court based its decision on a finding that certain aspects of Cooper's testimony were "not very credible." When we review a suppression motion, we will defer to the circuit court's credibility determinations and will uphold its findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). There is

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

nothing in the record, the no-merit report, or the response to suggest that the circuit court erred here and, thus, we agree with counsel's assessment that there would be no merit to challenging the suppression ruling on appeal.

Another evidentiary issue addressed in the no-merit report and response is whether the circuit court properly excluded evidence of the charges and conviction of Marcy's friend, David Funk, for sexual assault of a child. Cooper filed a motion in limine, asserting that this evidence was relevant because C.L.B. referred to "Dave" Funk in her videotaped Safe Harbor interview. C.L.B. stated that Dave used to be Marcy's friend, but that they were no longer friends because Dave sent a text message to Marcy saying he wanted to have sex with her.

The court ruled that the defense could inquire about the source of the victims' knowledge of sexual matters and could inquire about their knowledge of the text message. However, the court ruled that whatever probative value the evidence of Funk's charges and conviction had was substantially outweighed by its prejudicial effect, since the similarity of the behavior might improperly suggest to the jury that Funk had actually assaulted the girls, when there was no evidence and no claim that that was the case.

We agree with counsel's assessment in the no-merit report that the court's ruling was a proper exercise of discretion. The hearing transcript confirms that the court properly applied the appropriate legal standards to the relevant facts in determining that the evidence was not relevant and that its probative value was outweighed by the danger of unfair prejudice. *See* WIS. STAT. §§ 904.01, 904.03. Thus, we are satisfied that a challenge to the ruling on the motion in limine would be without arguable merit on appeal.

Amendment of the information at trial

At the outset of the trial, before the jury was selected, the prosecutor asked the court's permission to amend Count 1 of the information to allege that the assaults of C.L.B. began in August of 2008, rather than August of 2009. The prosecutor originally had understood C.L.B. to have been alleging that Cooper began assaulting her when she was seven years old (in 2009), but when he reviewed the recording of her Safe Harbor interview, he discovered that C.L.B. corrected herself, and had indicated that the assaults began when she was six years old (in 2008). The prosecutor stated that the requested amendment did not reflect any new information and that the revision was necessary to correct the prosecutor's own error in drafting the charging documents. The prosecutor noted that the change in dates would also conform to Cooper's confession to Lueneburg, in which he admitted that he began assaulting both children at about the same time, which would have been the spring or summer of 2008.

Cooper objected to the amendment, arguing that it was prejudicial to him because he intended to rely on C.L.B.'s inconsistent statements about her age in attacking her credibility. The court initially withheld ruling on the amendment, "pending the evidence and how that plays itself out."

After the victims had testified and their Safe Harbor interviews had been played for the jury, the prosecutor renewed the motion. Cooper's counsel suggested that the prosecutor's motion would be more appropriately addressed after the evidence was closed. The court agreed to defer its ruling until the close of evidence. On the last day of trial, Cooper's counsel again objected to the proposed amendment, arguing that it would be prejudicial to the defense due to the "inconsistencies in statements, unreliability of what these girls are saying." Counsel

conceded, however, that she had been provided with the girls' Safe Harbor interviews early in the case.

The circuit court permitted the amendment, ruling that Cooper was not prejudiced by it. The court reasoned that the State had provided the defense with a copy of C.L.B.'s interview approximately seventeen months before trial, and that Cooper therefore could not have been surprised by the allegation that the assaults began in 2008 rather than 2009. The court further stated that the amendment did not change the crime that was alleged.

We will not reverse a circuit court's decision to amend an information unless there was a clear or manifest misuse of discretion. ***State v. Neudorff***, 170 Wis. 2d 608, 615, 489 N.W.2d 689 (Ct. App. 1992). That is not the case here. The circuit court applied the appropriate legal standard, assessing whether the amendment prejudiced the defendant. *See* ***Wagner v. State***, 60 Wis. 2d 722, 726, 211 N.W.2d 449 (1973) (circuit court may allow amendment of information at any time in the absence of prejudice to defendant). Our supreme court has held that "when the defendant has adequate notice of the amended count—in that the amendment does not change the crime charged and the alleged offense remains the same and results from the same transaction—a defendant is not prejudiced." ***State v. Derango***, 2000 WI 89, ¶50, 236 Wis. 2d 721, 613 N.W.2d 833. We agree with counsel's conclusion that there would be no arguable merit on appeal to challenging the court's decision on amending the information.

Motion for mistrial

Cooper argues in his no-merit response that the circuit court should have granted his motion for a mistrial. The motion was based upon an observation made by Detective Tim Andres, one of the witnesses, that one juror told another juror something to the effect of "this is a

waste" or "what a waste." The second juror reacted to the comment and they both laughed. The issue was brought to the court's attention on the fifth day of trial. Andres told the prosecutor that he believed that the comment occurred during the cross-examination of Denise Jones, the state's DNA expert. Andres described the juror who he believed made the remark and the juror who reacted to it, and the descriptions appeared to line up with two jurors, Brown and Strack. Andres testified under oath about what he heard and saw.

The court then conducted individual voir dire of Brown and Strack, who denied having made or heard the remark. They confirmed that they had kept an open mind about the case and could be fair to both sides. The prosecutor's paralegal then told the prosecutor, and eventually stated under oath, that she believed it was another juror, Jackson, who had laughed at the remark. The court then conducted voir dire of all the remaining jurors, who all denied hearing the remark and insisted they had listened to the evidence presented by both sides and could be fair to both parties.

Defense counsel moved for a mistrial. The court denied the motion, reasoning that even if the remark were made, it was unclear what the juror considered to be a "waste" and whether the remark was even related to the case. The court stated that it had no objective basis for concluding that the jurors were lying when they gave the court assurances that they listened to the evidence presented by both parties and promised to be fair to both parties.

"A motion for mistrial is committed to the sound discretion of the circuit court." ***State v. Ford***, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. Here, we agree with counsel that the court considered the relevant facts and used a rational reasoning process to reach the conclusion

that a mistrial was not warranted, basing that conclusion in part on credibility determinations regarding the jurors, which we will not disturb on appeal.

Sentence

A challenge to Cooper's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Cooper was afforded an opportunity to comment on the PSI and address the court. The court considered the standard sentencing factors and explained their application to this case at length. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197 (describing standard sentencing factors). The court then sentenced Cooper to 25 years of initial confinement and 15 years of extended supervision on each count, to be served consecutively. It also awarded 618 days of sentence credit; ordered restitution in the amount of $1,215.60; imposed standard costs and conditions of supervision; directed Cooper to provide a DNA sample; and determined that Cooper was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 948.025(1)(b) (classifying repeated sexual assault of a child as a Class B felony), 973.01(2)(b)1. and (d)1. (providing maximum terms of forty years of initial confinement and twenty years of extended supervision for a Class B felony). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'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, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Steven Phillips is relieved of any further representation of Sammy Cooper in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals