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December 20, 2016

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

2015AP1513-CRNM State of Wisconsin v. Jason M. Joubert (L.C. # 2013CF573)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Attorney Colleen Marion, appointed counsel for Jason Joubert, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967). Counsel provided Joubert with a copy of the report, he responded to it, and counsel filed a supplemental no-merit report. After our independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

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

After a jury trial, Joubert was convicted of one count of repeated sexual assault of the same child. The court imposed a sentence of seven years of initial confinement and ten years of extended supervision.

The no-merit report addresses the sufficiency of the evidence. 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.

Without attempting to recite the evidence here, we conclude that the victim's testimony, if believed, was sufficient to establish the elements of the charge. Her testimony was not inherently incredible. We conclude that it would be frivolous to argue that the evidence was insufficient.

The no-merit report addresses whether the circuit court erred by denying a postponement of the trial that Joubert's attorney requested five days before the scheduled trial. The motion stated that counsel had learned of prior "CPS investigations," which we assume means child protective services, and that counsel needed additional time to investigate whether they would be relevant to Joubert's defense. The motion was not argued further on the record, but was apparently denied before trial, according to a discussion in court on the morning of trial. We agree that there is no arguable merit to this issue, given the short time before trial and the motion's lack of detail that would give a reason to believe relevant evidence would be found.

The no-merit report addresses whether the circuit court erred in determining the number of prior convictions that Joubert should admit to if he were to testify. Joubert conceded that the

answer three convictions was appropriate, but the court also added another four convictions for operating after revocation. The court did so because the court regarded those offenses as going to credibility by showing Joubert's violation of an order by the court and the Department of Transportation. We conclude that it would be frivolous to argue that this was an erroneous exercise of discretion.

In his response to the no-merit report, Joubert argues that his trial counsel was ineffective in several ways. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

First, Joubert argues that trial counsel should have introduced the video recording of the victim's interview with a social worker, so as to point out inconsistencies with the victim's testimony at trial. As described by Joubert, his attorney "was hesitant about playing it because it might enable the jury to hear [her] story again, reinforcing the position." We conclude that it would be frivolous to argue that this was not a reasonable strategic decision.

Joubert next argues that his trial counsel was ineffective regarding cross-examination of the victim's mother. Specifically, Joubert is concerned about the cross-examination regarding a statement he was said to have made to the mother about believing the victim may have wet the bed. Joubert appears to assert both that there was no reason for counsel to explore this incident, and that counsel failed to develop the facts sufficiently.

As to whether counsel should have explored this incident, we conclude that there is no prejudice because a detective provided essentially the same testimony later in the trial, when describing Joubert's statement to the detective. Therefore, Joubert cannot show prejudice.

As to whether counsel should have developed the facts more, the only harm Joubert identifies is that the jury asked a question about that incident during deliberations. The jury's question was whether the mother caught Joubert in the victim's room. In response, the court read back the mother's testimony, in which she recalled talking to Joubert about such an incident, but did not directly address whether she herself saw him there. Again, we conclude that there is no prejudice. If Joubert is trying to suggest now that better questioning by his counsel could have given the jury doubt about whether such an incident actually happened, we note that the detective testified that Joubert himself mentioned this incident during their interview. Even if Joubert's attorney had clarified that the mother herself did not witness this incident, that would not have changed the detective's testimony.

Joubert next asserts that his trial counsel did not properly cross-examine a detective who testified that Joubert told her he thought he was under a no-contact order against talking to the victim during the police investigation. Joubert asserts that the recording of his statement would show that he did not use the term "no-contact order," but instead said that he did not want to be charged with tampering with a witness. We conclude that, even if Joubert is correct, there is no arguably prejudicial effect from this slight difference in wording, when seen in the larger context of the entire case.

Joubert next asserts that his counsel was ineffective by failing to object to a remark made by the prosecutor during closing argument. We agree with the analysis in current counsel's supplemental no-merit report that the prosecutor's argument was not objectionable because it was not directed at the victim's reason for being present at trial, but was instead directed to the fact that she continued to tell the same story as previously told.

The no-merit report addresses whether the circuit 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, 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 Colleen Marion is relieved of further representation of Jason Joubert in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals