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**DISTRICT II**

January 18, 2017

To:

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Raymond A. Bailey Jr., #203588  
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Waupun, WI 53963-0700

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

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2016AP1062-CRNM      State of Wisconsin v. Raymond A. Bailey, Jr. (L.C. # 2014AP48)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Raymond A. Bailey, Jr., appeals from a judgment convicting him of three counts of first-degree sexual assault of a child and one count of repeated sexual assault of the same child. Bailey's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Bailey filed a response. After reviewing

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

the record, counsel's report, and Bailey's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* RULE 809.21.

Bailey was convicted following a jury trial of three counts of first-degree sexual assault of a child and one count of repeated sexual assault of the same child. The charges stemmed from allegations that he had sexual intercourse with his then six-year-old nephew in 2001 and had repeated sexual contact and sexual intercourse with his then nine/ten-year-old stepdaughter in 2000 and 2001.<sup>2</sup> For his actions, the circuit court imposed an aggregate sentence of seventy years of initial confinement followed by forty years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether the circuit court properly denied several pretrial motions. Bailey had filed motions seeking to suppress his statement to police, to sever the counts against him into separate trials, and to compel the discovery of certain evidence (i.e., his stepdaughter's journal writings and her medical records around the time of the alleged assaults). Following a hearing on the matter, the circuit court denied the motions. In doing so, the court found that Bailey was properly advised of his *Miranda*<sup>3</sup> rights before he voluntarily gave a statement to police. It further determined that joinder was proper, as the incidents would have been admissible at separate trials as other acts evidence under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Finally, the court declined to compel discovery, as the sought after

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<sup>2</sup> Bailey was acquitted of charges that he had sexual contact with his then three-year-old daughter. He was also acquitted of one charge of sexual assault involving his nephew.

<sup>3</sup> *See Miranda v. Arizona*, 384 U.S. 436 (1966).

evidence was not shown to exist.<sup>4</sup> Reviewing the court’s rulings, we agree with counsel that any challenge to them would lack arguable merit.

The no-merit report also addresses whether the evidence at Bailey’s jury trial was sufficient to support his convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the convictions, 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, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Bailey of his crimes. That evidence included testimony from both victims, who recounted their allegations against Bailey. We agree with counsel that any challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court’s sentencing decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offenses, Bailey’s character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by the age of the victims, their relationship with Bailey, and his prior history of sexual

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<sup>4</sup> Bailey’s stepdaughter indicated that she was no longer in possession of any journal writings from that period in her life. She also denied seeking medical treatment for any bleeding that occurred due to the assaults.

misconduct,<sup>5</sup> the sentence imposed does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to the circuit court’s decision at sentencing would lack arguable merit.

Finally, the no-merit report addresses two other issues stemming from Bailey’s trial: (1) whether Bailey properly waived his right to remain silent when he elected to testify; and (2) whether the jury instructions were appropriate. With respect to Bailey’s waiver of his right to remain silent, the record shows that the circuit court conducted a proper colloquy to ensure that it was knowing, voluntary, and intelligent. *See State v. Denson*, 2011 WI 70, ¶63, 335 Wis. 2d 681, 799 N.W.2d 831 (such a colloquy is recommended but not required when a defendant chooses to testify). With respect to the jury instructions, the record confirms that they accurately conveyed the applicable law and burden of proof. We agree with counsel that any challenge to these issues would lack arguable merit.

As noted, Bailey filed a response to counsel’s no-merit report. In it, he appears to question the sufficiency of the evidence to convict him. He also renews his request for his stepdaughter’s medical records around the time of the alleged assaults. We have already explained why a challenge to the sufficiency of the evidence would lack arguable merit. Likewise, we have addressed the circuit court’s denial of Bailey’s motion to compel the discovery of medical records. Again, aside from Bailey’s self-serving assertion that his stepdaughter was subject to complete medical examinations at the age of ten and under, there is

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<sup>5</sup> Bailey was previously convicted of multiple counts of sexual assault of a child.

nothing to show that such medical records exist, much less contain evidence favorable to Bailey.<sup>6</sup> For these reasons, we are not persuaded that Bailey’s response presents an issue of arguable merit.

In addition to the foregoing issues, we considered other potential issues that arise in cases tried to a jury, i.e., jury selection, objections during trial, and propriety of opening statements and closing arguments. Here, the jury was selected in a lawful manner. Objections during trial were properly ruled on. No improper arguments were made to the jury during opening statements or closing arguments.<sup>7</sup> Accordingly, we conclude that such issues would lack arguable merit.

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<sup>6</sup> As noted by counsel, even if such medical records existed and showed an absence of trauma to the victim’s vagina, that would not mean that no sexual assault occurred.

<sup>7</sup> During closing argument, the prosecutor made a statement that could be viewed as an improper “golden rule” argument. *See State v. DeLain*, 2004 WI App 79, ¶23, 272 Wis. 2d 356, 679 N.W.2d 562. The prosecutor said, “Obviously, this was very emotional, very intense, very hard for, obviously, the three young adults who had to testify yesterday to discuss with strangers, basically, you know, some very —put it—I guess I would just ask you be in their shoes, you know, coming in making statements of some very disturbing allegations of the defendant...” When read in context, this statement, which was not objected to, was not made to appeal to the jury’s sympathy for the victims. Rather, it was made to explain why they appeared so emotional and nervous when testifying. As a result, we are not convinced that the statement was improper.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.<sup>8</sup> Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Angela D. Henderson of further representation in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Angela D. Henderson is relieved of further representation of Bailey in this matter.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>8</sup> Two other matters deserve brief mention. First, at trial, defense counsel objected to a witness's statement that she came forward to law enforcement because she heard that Bailey "got out." Defense counsel requested a mistrial, believing that this vague reference to Bailey's prior incarceration unduly prejudiced the jury. The circuit court declined to grant a mistrial, but agreed to strike the testimony from the record and ordered the jury to disregard it. The court later instructed the jury to disregard all stricken testimony. We are not persuaded that the court's action presents an issue of arguable merit.

Second, during deliberations, the jury asked the question, "If we have a unanimous decision on 3 of 7 counts, will all the counts be dismissed if we are hung on the other 4 counts?" With the assent of counsel, the circuit court told the jury to reread Jury Instruction 484 and continue deliberations. Jury Instruction 484 concerns separate verdicts on multiple counts and advises the jury not to let their verdict on one count affect their verdict on any other count. *See* WIS. JI-CRIMINAL 484. The jury subsequently returned with their verdicts. Again, we are not persuaded that the court's action presents an issue of arguable merit.