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January 25, 2017

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

2015AP2592-CRNM State of Wisconsin v. Jeffrey F. Evers (L.C. # 2014CF738)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Jeffrey F. Evers appeals from a judgment convicting him of kidnapping and first-degree sexual assault with use or threat of use of a dangerous weapon. Evers' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Evers filed multiple responses. After reviewing the record, counsel's report,

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

and Evers' responses, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Evers was convicted following a jury trial of kidnapping and first-degree sexual assault with use or threat of use of a dangerous weapon. The charges stemmed from allegations that he forced a woman to drive around in his car with him by threatening her with a gun and ultimately sexually assaulted her.² For his actions, the circuit court imposed an aggregate sentence of twenty years of initial confinement followed by ten years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether the evidence at Evers' 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 Evers of his crimes. That evidence included testimony from the victim and a codefendant, who was present during the crimes. It also included a stipulation that sperm found in the victim's vagina matched Evers' DNA profile. 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

² Evers was acquitted of two counts of armed robbery stemming from the same incident. Evers was accused of forcing the victim to make multiple withdrawals from ATM machines.

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, Evers’ 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 Evers’ lengthy criminal record, 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.³

Finally, the no-merit report addresses several other issues, including (1) whether Evers waived his right to challenge the court commissioner’s decision to bind him over for trial, (2) whether Evers’ speedy trial rights were violated, (3) whether the jury was selected in a lawful manner, and (4) whether the jury instructions were appropriate. We are satisfied that the no-merit report properly analyzes these issues as without merit, and we will not discuss them further.⁴

As noted, Evers filed multiple responses to counsel’s no-merit report. In them, he complains primarily about his trial counsel’s effectiveness. Specifically, he faults counsel for

³ The circuit court imposed two DNA surcharges in the case. The surcharge on the kidnapping count was discretionary, as the crime occurred in 2013. Given the use of DNA in this case, we are satisfied that the record supports this discretionary imposition.

⁴ One point about the jury instructions deserves mention. During deliberations, the jury asked the circuit court to clarify the word “transport,” which is found in the instruction for kidnapping. *See* WIS JI-CRIMINAL 1280. It also asked “if at any point in [the] night consent to be transported was revoked[,] even at point of sexual assault[,] does this confirm kidnapping?” With the assent of counsel, the court informed the jury that (1) transport requires movement and (2) consent can be revoked but then all four elements of kidnapping must be proven after the revocation. We are not persuaded that the court’s responses to the jury’s questions present an issue of arguable merit.

(1) failing to investigate the credibility of the victim, (2) failing to impeach the victim with a recording of her 911 call, (3) failing to move for a mistrial due to the victim's unwillingness to answer certain questions on cross-examination, (4) failing to investigate the credibility of the codefendant who testified for the State,⁵ (5) failing to impeach the testimony of Officer Karla Lehmann about the victim's statement to another officer that no one forced her into Evers' car,⁶ (6) failing to explain the concept of lesser-included offenses to him, and (7) failing to obtain bank records of the victim revealing her ATM transactions on the night in question.

While we normally decline to address claims of ineffective assistance of trial counsel for the first time on appeal, *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), appellate counsel's no-merit report seeks counsel's discharge from the duty of representation. Therefore, we must independently determine whether Evers' claims have sufficient merit to require appellate counsel to file a postconviction motion and request a *Machner* hearing.

With respect to Evers' claims of ineffective assistance relating to the victim, we are satisfied that no issue of arguable merit could arise from them. Evers fails to explain what information additional investigation would have yielded about the victim's credibility. In any event, trial counsel did attack the victim's credibility at trial. On cross-examination, he questioned her about an inconsistent statement she made in her 911 call⁷ and got her to admit

⁵ At one point in his responses, Evers suggests that the codefendant testified for the defense. The record does not support this assertion.

⁶ Lehmann conducted multiple interviews of the victim. In one of the interviews, the victim indicated that Evers forced her into his car. The victim reasserted that position at trial.

⁷ Although trial counsel did not use the recording of the 911 call in his examination of the victim, the jury later heard the recording after it was entered into evidence.

that she was looking to go to a party on the night in question and, at least initially, felt comfortable when Evers approached her about taking her to one. When the victim became uncooperative and turned away from counsel, he did not move for a mistrial, which would have been denied as without merit. Instead, he used that in closing argument, noting, “She would not even face me when asked questions.... In telling the truth, if you’re telling the truth you face the person. You don’t turn around.”

We are also satisfied that no issue of arguable merit could arise from Evers’ other claims of ineffective assistance. Again, Evers fails to explain what information additional investigation would have yielded about the codefendant’s credibility.⁸ Moreover, the record shows that trial counsel elicited from Lehmann the victim’s statement to another officer that no one forced her into Evers’ car. The record also confirms that counsel discussed with Evers the concept of lesser-included offenses before electing not to ask for any. That strategy paid off with the acquittal of two felony counts. As for the victim’s bank records, a detective testified that he subpoenaed the victim’s bank and was told that such records no longer existed. Counsel cannot be faulted for failing to obtain evidence that does not exist.

In addition to the foregoing issues, we considered other potential issues that arise in cases tried to a jury, e.g., objections during trial, confirmation that the defendant’s waiver of the right

⁸ At the time of trial, the codefendant was being held at the Winnebago Mental Health Institute and taking medications for mental illness. Although she had been found not competent to stand trial for the charges against her, she was allowed to testify in Evers’ case under WIS. STAT. § 906.01’s general rule of competency for witnesses. The jury was aware of her pending case and mental health issues. Likewise, it was aware that she had received immunity for her testimony and believed that the State would “give [her] a break down the line” in exchange for testifying. Finally, it was aware that some of the details of her account did not match the victim’s recollection. Thus, the jury had the information it needed to assess the codefendant’s credibility.

to testify is valid, propriety of opening statements and closing arguments, and the circuit court's communication to the jury during its deliberations. Here, objections during trial were properly ruled on. When Evers elected not to testify, the circuit court conducted a proper colloquy to ensure that his waiver was valid. No improper arguments were made to the jury during opening statements or closing arguments. Finally, the court's answers to the jury's questions and requests for exhibits were appropriate. Accordingly, we conclude that such issues would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.⁹ 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 Christopher W. Rose 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 Christopher W. Rose is relieved of further representation of Evers in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

⁹ Two other matters deserve brief mention. First, at one point in his responses, Evers accuses the prosecutor of misconduct for "leaving a photo of a gun in front of the jury throughout the trial proceedings." The record does not support this assertion. Second, before trial, Evers requested and received a new attorney. The circuit court warned Evers that he would not get another attorney appointed from the court. We are not persuaded that the court's warning presents an issue of arguable merit.