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**DISTRICT II**

March 29, 2017

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

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2015AP1882-CRNM State of Wisconsin v. Austrin S. Espinoza (L.C. #2012CF278)

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

Austrin S. Espinoza appeals from a judgment of conviction entered after a jury found him guilty of one count of repeated acts of sexual assault involving the same child. Espinoza's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16), [1] and ***Anders v. California***, 386 U.S. 738 (1967). Espinoza received a copy of the report and has elected not to respond. Upon consideration of the report and an independent review of the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The evidence at trial was that on and between May 9, and May 28, 2012, Espinoza engaged in at least five acts of intercourse with the fourteen-year-old victim. The victim testified that she would go over to Espinoza's apartment without her parents' knowledge and she and Espinoza would have penis to vagina intercourse. The victim's mother learned from an older daughter that the victim had secretly spent the night with Espinoza. After the victim verified she had intercourse with an adult male, the family called the police. The jury found Espinoza guilty of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(e), and at sentencing, the circuit court ordered an eight-year bifurcated sentence with five years of initial confinement and three years of extended supervision. Appointed counsel filed a no-merit notice of appeal and no-merit report.

The no-merit report discusses whether there is arguable merit to a challenge to the sufficiency of the evidence supporting the guilty verdict. We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Here, the victim's trial testimony was sufficient to establish all the offense elements; a reasonable juror could have found beyond a reasonable doubt that Espinoza engaged in at least three acts of intercourse with a person under the age of sixteen during the time period alleged.

The no-merit report also addresses the circuit court's ruling that two audiotaped recordings of two conversations between Espinoza and his sister were admissible. We agree with the analysis in the no-merit report and its conclusion that no arguably meritorious issue arises from these rulings. First, the circuit court's well-explained rulings constitute a proper exercise of discretion. *See* ***State v. Roberson***, 157 Wis. 2d 447, 452, 459 N.W.2d 611 (Ct. App. 1990). Second, in the end, the statements complained of were not admitted at trial.

The final issue discussed in appellate counsel's no-merit report is whether the sentence was the result of an erroneous exercise of discretion. The no-merit report states the correct standard of review and points to those parts of the sentencing court's remarks which demonstrate that the court adequately discussed the appropriate facts and factors relevant to sentencing, and explained why its sentence was the minimum amount of confinement "consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted); ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The eight-year sentence is well within the forty-year maximum and cannot be considered unduly harsh or excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the sentencing court explicitly stated it was not using the COMPAS risk assessment to determine whether Espinoza should be incarcerated or the severity of his sentence, and the record supports this assertion. This comports with ***State v. Loomis***, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749.

We consider the no-merit report incomplete. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., jury selection, evidentiary objections during trial, confirmation that the defendant's waiver of the right to testify is valid,

use of proper jury instructions, and propriety of opening and closing statements. The no-merit report fails to give any indication that appointed counsel considered whether these parts of the process give rise to potential appellate issues.[2] As part of our independent review, we have considered each of these areas and determine that none gives rise to an arguably meritorious challenge. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (difficult to know the nature and extent of the court of appeals' examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion).

During jury selection, several jurors were struck or excused for cause. Espinoza objected to one of these for-cause strikes. We conclude that no arguably meritorious issue arises from the circuit court's discretionary decision to dismiss a prospective juror who repeatedly stated he did not think he could be fair. *See* ***State v. Ferron***, 219 Wis. 2d 481, 491-92, 579 N.W.2d 654 (1998) (whether a prospective juror is biased and should be dismissed for cause is a matter for the circuit court's discretion). *See also* ***State v. Tody***, 2009 WI 31, ¶32, 316 Wis. 2d 689, 764 N.W.2d 737 ("[A] circuit court judge should err on the side of dismissing a challenged juror when the challenged juror's presence may create bias or an appearance of bias."). In terms of evidentiary objections, the circuit court sustained a number of Espinoza's objections and overruled various objections levied by the State. Having reviewed the circuit court's rulings on

[2] Counsel has a duty to review the entire record for potential appellate issues. A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See* ***McCoy v. Court of Appeals of Wis.***, 486 U.S. 429, 438 (1988). It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. *See* ***State v. Allen***, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). Counsel should at least briefly address all aspects of a jury trial in future no-merit reports.

evidentiary objections made during trial, including those unfavorable to Espinoza, we conclude that none gives rise to an issue of arguable merit. Additionally, the circuit court conducted a proper colloquy with Espinoza about his waiver of the right to testify. Further, the jury instructions properly stated the law.[3] Finally, the State did not make improper arguments to the jury during opening or closing arguments.

Our review of the record discloses no other potential issues for appeal.[4] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Espinoza in this 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 Angela C. Kachelski is relieved from further representing Austrin S. Espinoza in this matter. *See* WIS. STAT. RULE 809.32(3).

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

[3] Over the State's objection, the circuit court declined to instruct the jury on circumstantial evidence, *see* WIS JI—CRIMINAL 170, or "Circumstantial Evidence: Flight, Escape, Concealment,"*see* WIS JI—CRIMINAL 172. Neither party requested that the jury be instructed on a lesser included offense.

[4] We observe that restitution proceedings were conducted after sentencing. The restitution amount was drastically reduced as reflected in the post-sentencing restitution order and amended judgment. Our independent record review does not reveal the existence of any arguably meritorious challenge to the restitution order.