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April 17, 2017

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

2016AP274-CRNM State of Wisconsin v. Chad T. Neitzel (L.C. # 2014CF428)

Before Lundsten, Higginbotham and Sherman, JJ.

Attorney Jennifer Lohr, appointed counsel for Chad Neitzel, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the circuit court's decision to allow expert testimony by a State witness on the issue of strangulation, over Neitzel's objection; (2) the State's assertion in closing argument that the victim's testimony was truthful;

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

(3) the sufficiency of the evidence to support the jury verdicts; and (4) the sentence imposed by the circuit court. Neitzel has responded to the no-merit report, arguing that his trial counsel was ineffective and that the prosecutor improperly vouched for the victim's credibility. Attorney Lohr has filed a supplemental no-merit report addressing Neitzel's claim of ineffective assistance of counsel. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Neitzel was convicted of strangulation, battery, and bail jumping, following a jury trial. The court sentenced Neitzel to two and one-half years of initial confinement and one and one-half years of extended supervision, followed by an imposed and stayed sentence of five years of initial confinement and three years of extended supervision, with three years of probation.

The no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision to allow the State to introduce expert testimony on strangulation over Neitzel's objection. Neitzel objected to the State's expert witness on grounds that the testimony about strangulation was not relevant because it was not based on any specific facts from this case, and that the witness was not qualified as a medical expert based on her experience as a nurse. The court determined that the expert's testimony on strangulation was relevant to assist the jury in understanding the evidence. The circuit court qualified the State's witness as an expert on the physiological aspects of strangulation and victim behavior based on the witness's experience with strangulation victims as an emergency room nurse and the witness's research, training, and publication in the area of strangulation. We agree with counsel's assessment that there would be no arguable merit to a claim that the circuit court erroneously exercised its discretion by allowing the expert testimony. *See* WIS. STAT. § 907.02; *see also* ***State v.***

Chitwood, 2016 WI App 36, ¶30, 369 Wis. 2d 132, 879 N.W.2d 786 ("[W]hether to admit or exclude expert testimony is reviewed under an erroneous exercise of discretion standard.").

Next, both the no-merit report and response address whether the State improperly vouched for the credibility of the victim. The no-merit report notes that the defense objected to a comment by the State during closing arguments. The defense had argued in closing that the victim's statements to police and on the stand were inconsistent, that the victim's allegations of abuse were not true, and that the evidence established a bad breakup rather than a case of domestic violence. In rebuttal, the State asserted that, while the victim was upset with Neitzel for other reasons, the victim did not conjure her allegations of abuse, but rather "said those things because they are true." The defense objected.[2] The no-merit report concludes that there would be no arguable merit to a claim that the State's argument was improper, asserting that the State properly commented on the evidence in the record during its rebuttal. *See* ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998) (explaining that "[c]losing argument is the lawyer's opportunity to tell the trier of fact how the lawyer views the evidence and is usually spoken extemporaneously and with some emotion," and that "[a] prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors," but may not "suggest that the jury arrive at its verdict by considering factors other than the evidence"). We agree with counsel's assessment that further proceedings based on the State's comment during rebuttal would lack arguable merit.

[2] The court did not rule on the objection, and the defense did not pursue the issue further.

Neitzel asserts in his response that the State improperly vouched for the credibility of the victim in opening and closing statements. Neitzel does not cite to any specific statement by the State in opening or closing that Neitzel believes was improper. Our review of opening and closing statements does not reveal any statement by the State that would support a non-frivolous argument that the State improperly vouched for the victim's credibility.

Neitzel also asserts that he was denied the effective assistance of counsel. Neitzel asserts that his trial counsel was ineffective by failing to present testimony by three witnesses Neitzel wished to have testify in his defense. Neitzel contends that testimony by the three witnesses he identified was necessary to explain Neitzel's side of the story to the jury, discredit the victim, and establish the victim's motive to fabricate the allegations. Specifically, Neitzel contends that: (1) T.N. would have testified that the victim never returned a ring that Neitzel had given to the victim, contrary to the victim's trial testimony that she returned the ring to Neitzel; (2) S.N. would have testified that Neitzel and S.N. were having an affair while Neitzel was in a relationship with the victim and that neither S.N. nor Neitzel had the sexually transmitted disease that the victim testified she contracted from Neitzel; and (3) E.H. would have testified as to conversations, texts, and emails between E.H. and the victim and E.H.'s interactions with Neitzel and the victim later in the day on which the victim testified that Neitzel had strangled her. Neitzel states that his trial counsel interviewed each potential witness, and determined that T.N. would not provide relevant information; that S.N.'s testimony would complicate the defense; and that E.H. lacked credibility and would not benefit the defense.

Neitzel also asserts that the victim wrote a letter to the prosecutor prior to trial asking to drop the strangulation charge and restraining order against Neitzel. Neitzel asserts that he

requested that his trial counsel obtain the letter as well as emails exchanged between the victim and the prosecutor during the same time period.

No-merit counsel asserts in a supplemental no-merit report that a claim of ineffective assistance of trial counsel would be wholly frivolous. Counsel points out that, according to Neitzel's no-merit response, trial counsel investigated the potential witnesses and determined that the witnesses would not be helpful to the defense. Counsel also states that her own investigation did not establish any basis to support a non-frivolous claim that trial counsel was ineffective by failing to present testimony by the three witnesses identified by Neitzel.

We agree with no-merit counsel that a claim of ineffective assistance of counsel would lack arguable merit. A claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The claim must also show that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. According to Neitzel's supplemental no-merit response, counsel interviewed the three potential witnesses and determined that their testimony would not benefit the defense. Those facts would not support a non-frivolous claim of ineffective assistance of counsel. *See* ***id.*** at 690 (counsel's strategic decisions are virtually unassailable).

Regardless, nothing in the no-merit response indicates that the three potential witnesses identified by Neitzel would have provided testimony that would have been helpful to the defense. The defense theory at trial was that the victim fabricated the allegations because she

was angry at Neitzel after he gave her a sexually transmitted disease and engaged in activity on Facebook that the victim found disrespectful to their relationship. T.N.'s testimony that the victim kept a ring that Neitzel gave her would not have supported that defense or otherwise established the victim's motive to fabricate the allegations. Moreover, Neitzel does not explain how T.N. would have known whether the victim returned the ring, and thus it does not appear that T.N.'s testimony would have impacted the victim's credibility. S.N.'s testimony as to an affair between Neitzel and S.N. was not necessary to support the defense theory that the victim fabricated the allegations based on the victim being angry with Neitzel, particularly because Neitzel does not contend S.N. would have testified that the victim knew about the affair. As to the testimony regarding the sexually transmitted disease, Neitzel does not explain how evidence that Neitzel and S.N. did not have the disease would have helped the defense. Finally, Neitzel does not explain any specifics about E.H.'s testimony that would have contributed to the defense's case.

As to the letter identified by Neitzel and attached to the no-merit response, nothing in the letter indicates that the victim recanted her allegations. Rather, the letter indicates that the victim maintained that the abuse occurred, but that the victim did not wish for Neitzel to be charged with a felony and that the victim wished to have contact with Neitzel. Nothing about the letter indicates that the letter, or similar emails, would have assisted the defense.

The no-merit report also addresses whether there would be arguable merit to a claim that the evidence was insufficient to support the jury verdicts. A claim of insufficiency of the evidence requires a showing that "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). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including the victim's testimony and Neitzel's stipulation as to his bond at the time of the battery, was sufficient to support the jury verdicts.

The no-merit report also addresses whether a challenge to Neitzel's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Neitzel was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offenses, Neitzel's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Neitzel to two and one-half years of initial confinement and one and one-half years of extended supervision, followed by an imposed and stayed sentence of five years of initial confinement and three years of extended supervision, with three years of probation. The sentence was within the maximum Neitzel faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is 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" (quoting another source)). We discern no erroneous exercise of the court's sentencing discretion.

Finally, the no-merit report concludes that there would be no arguable merit to a challenge to the circuit court's decision denying Neitzel's postconviction motion for sentence modification based on the new factor of Neitzel's ineligibility for the Challenge Incarceration and Substance Abuse Programs as to his convictions for strangulation and battery. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (a new factor for sentence modification is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties" (quoting another source)). The court explained that sentence modification was not warranted as to the strangulation sentence because that sentence was primarily for punishment and not rehabilitation. It also explained that sentence modification was not warranted as to the battery sentence because, while the court considered Neitzel's rehabilitative needs and its belief that Neitzel would be eligible for programming in imposing sentence, the court determined that it would not make sense to reduce Neitzel's incarceration time in the absence of the programming. The court explained that it wanted Neitzel to commit to rehabilitation, but the absence of the benefit of the programming for Neitzel did not change the court's determination as to the amount of incarceration time. We agree with counsel that a challenge to the circuit court's decision would lack arguable merit. *See* ***id.***, ¶¶33, 37, 40 (a fact not highly relevant to sentencing is not a new factor; even if a fact constitutes a new factor, it is within the circuit court's discretion to deny sentence modification if it determines that the factor does not justify sentence modification).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction and order are affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jennifer Lohr is relieved of any further representation of Chad Neitzel in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals