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

2016AP1186-CRNM State of Wisconsin v. Cesar R. Romero-Zavala (L.C. # 2014CF2308)

Before Brennan, P.J., Kessler and Brash, JJ.

Cesar R. Romero-Zavala appeals from a judgment of conviction, entered upon a jury's verdict, on one count of repeated sexual assault of a child. Appellate counsel, Marcella De Peters, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and

WIS. STAT. RULE 809.32 (2015-16).[1] Romero-Zavala was advised of his right to file response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Romero-Zavala's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

According to the criminal complaint, eleven-year-old J.Z. reported to a forensic interviewer that her stepfather,[2] Romero-Zavala, had put his "front part"—which J.Z. identified on a diagram as the penis—"in her butt," often while she was sleeping. The first time he did this, Romero-Zavala told J.Z. not to tell her mother. The most recent incident had occurred a few weeks before the interview, when J.Z.'s mother found Romero-Zavala in bed with J.Z., under the covers. J.Z. reported that this contact occurred more than three times, beginning when she was ten. She also reported that Romero-Zavala would touch her vagina with his hand and sometimes made her touch his penis with her hand.

Romero-Zavala was charged with one count of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(e) (2013-14).[3] The matter was tried to a jury, which convicted Romero-Zavala. The trial court sentenced Romero-Zavala to twelve years' initial

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

[2] Although J.Z. referred to Romero-Zavala as her dad, and then clarified he was her stepfather, it appears that he was not actually married to her mother.

[3] WISCONSIN STAT. § 948.025(1)(e) (2013-14) states, "Whoever commits 3 or more violations under s. 948.02 (1) or (2) within a specified period of time involving the same child is guilty of … [a] Class C felony if at least 3 of the violations were violations of s. 948.02 (1) or (2)."

confinement and six years' extended supervision. Additional facts will be discussed herein as necessary.

DISCUSSION

I. Sufficiency of the evidence

The first issue counsel discusses in the no-merit report is whether sufficient evidence supports the jury verdict. We view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). "'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

To find Romero-Zavala guilty of repeated sexual assault of a child, the State had to prove that he committed at least three sexual assaults of J.Z. during a specified time period. *See* WIS JI—CRIMINAL 2107. The jury was instructed that to prove at least three sexual assaults, the State had to show that:

> [Romero-Zavala] had three or more acts of sexual contact with [J.Z] between April 24, 2013, and 5-21, 2014.

> Consent to sexual contact is not a defense. That [J.Z.] was under the age of 16 when the sexual contact occurred. Knowledge of [J.Z.'s] age is not required. And mistake regarding the age of [J.Z.] is not a defense.
>
> Sexual contact is an intentional touching of the breast and vagina, pubic area, anus, or buttocks of the child by the defendant.
>
> The touching may be of the breast, vagina, pubic area, anus or buttocks directly, or it may be through the clothing.
>
> The touching may be done by any body part or by any object, but it must be an intentional touching.
>
> Sexual contact is also the intentional touching of the defendant's penis by the child at the defendant's instruction or the intentional touching of the defendant's penis to any body part of a child.
>
> The contact may be directly or it may be through the clothing, but it must be an intentional touching.
>
> All forms of sexual contact requires the defendant acted with intent to become sexually aroused or gratified or to sexually degrade or humiliate the child.[4]

Our review of the record satisfies us that there was sufficient evidence upon which the jury could convict Romero-Zavala. The parties agreed that J.Z. was younger than sixteen. Intent may be inferred from a defendant's conduct. *See* ***State v. Stewart***, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988). J.Z. testified about Romero-Zavala touching her vagina with his hand multiple times, and of at least two instances where Romero-Zavala put his "front part" in her

[4] Based on the charging statute specified in the complaint and these jury instructions, it appears the State was proceeding on the theory that Romero-Zavala's predicate sexual assaults were all violations of WIS. STAT. § 948.02(2), which states, "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony."

butt.[5] The State also had J.Z. identify the relevant body parts on diagrams in court, and the diagrams were shown to the jury. The State presented testimony from Heather Jensen, who initially interviewed J.Z. Jensen testified that J.Z. described two specific instances where Romero-Zavala put his penis "in her butt," and that he touched her vagina over her clothes. Jensen also testified that J.Z. described Romero-Zavala making her touch his penis under his clothes. Romero-Zavala did not testify.

This evidence suffices for a guilty verdict on repeated sexual assault of a child. There is no arguable merit to a challenge to the sufficiency of the evidence.

II. Sentencing

The only other issue counsel raises in her no-merit report is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006

[5] Regardless of what J.Z. meant by "in her butt," such contact meets the definition of "sexual contact" for purposes of conviction under WIS. STAT. § 948.025(1)(e).

WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Although the trial court's sentencing comments in this case were brief, they nevertheless reflect a proper exercise of discretion. The trial court identified appropriate sentencing objectives. It explained that it believed that probation ("[s]upervision in the community") was not an option because it would unduly depreciate the seriousness of the offense. While the trial court acknowledged that Romero-Zavala had no criminal history, it noted that his conviction here was based on "repeated acts" conducted "over a long period of time" that traumatized the victim, making the offense a "very serious" one.

The maximum possible sentence Romero-Zavala could have received was forty years' imprisonment. The sentence totaling eighteen years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

III. Preservation of Issues

Romero-Zavala's first argument in his no-merit response is that appellate counsel did not file a postconviction motion, so the issues raised in the no-merit report have not been properly preserved for appeal. Romero-Zavala is incorrect. "An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence[.]" WIS. STAT. § 974.02(2). Also, while it is true that a postconviction motion is generally a necessary prerequisite to appellate review of a sentence, *see* ***State v. Barksdale***, 160

Wis. 2d 284, 291, 466 N.W.2d 198 (Ct. App. 1991), counsel could not and should not have pursued a meritless postconviction motion, and the no-merit report provides an alternate context for this court to review any sentencing issues, *see* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶27, 314 Wis. 2d 112, 758 N.W.2d 806.

IV. Ineffective Assistance of Trial Counsel

Romero-Zavala's remaining issues in his no-merit response are claims of ineffective assistance of trial counsel. To prevail on an ineffective-assistance claim, the defendant must show both that counsel performed deficiently and that the deficiency was prejudicial. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To show deficient performance, the defendant must identify specific acts or omissions that fall outside the range of professionally competent assistance. *See* ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis. 2d 642, 679 N.W.2d 893. The test for prejudice is "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Balliette***, 2011 WI 79, ¶24, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted).

A. Failure to File a Motion to Dismiss

J.Z. had a physical examination in May 2014 after reporting Romero-Zavala's assaults. Romero-Zavala believes that trial counsel should have filed a motion to dismiss the criminal complaint on the grounds that "medical physical findings directly refute allegations/complaint." He believes the examination report refutes J.Z.'s allegations because it indicates, according to Romero-Zavala, an "'intact Hymen without disruption and normal anal exam.'" Romero-Zavala

believes that if he were in fact having "'anal / vaginal' intercourse, surely there would be some physical evidence found by the medical examination."

A police report filed by Officer Victor Centeno on May 28, 2014, stated that there was a report of "several counts of penis to vagina and penis to anus sexual intercourse," and Centeno testified at the preliminary hearing that he was investigating complaints of intercourse. However, the criminal complaint does not allege penis-to-vagina intercourse, nor does it specifically allege penis-to-anus intercourse, and the medical report notes that J.Z. only "disclosed penis to anus and hand to vagina contact." Further, while it is true that the medical report indicates an "[e]strogenized redundant hymen without disruption [and n]ormal anal exam," the report also indicates that the examination "*neither confirms nor refutes a diagnosis of sexual abuse*. Most child victims of sexual abuse have normal genital exams." (Emphasis added.) It is also worth noting that the examination occurred approximately a month after the most recent assault.

The medical report does not directly refute J.Z.'s allegations or the allegations contained in the complaint; thus, a motion to dismiss the complaint, either at bindover or before trial, because of the information in the report would have failed. Trial counsel was not ineffective for failing to pursue a meritless motion. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

B. Failure to Move for Admission of the Medical Report

Romero-Zavala complains that the medical report contains "conclusive physical evidence that [neither his] 'front part' nor his 'penis' ever penetrated JZ (anally or vaginally) as alleged," so the report "would have been strong probative evidence for defense to not only rebut complaint

as filed but also [police] report … and would also directly challenge JZ's credibility." He contends trial counsel's failure to utilize the report to "clearly disprove any allegation or testimony of 'intercourse'" caused the real controversy to not be fully tried and was prejudicial because of the reasonable probability of a different result had it been introduced.

As explained, the medical report on its face states that it neither confirms nor refutes any sexual abuse; it is not "conclusive physical evidence" nor does it "clearly disprove" any assault. While it appears that Romero-Zavala wants this court to infer that the identification of a "hymen without disruption" proves there was no penis-to-vagina intercourse, such intercourse was neither alleged in the complaint nor attempted to be shown at trial, and Centeno's police report was never presented at trial. It is not reasonably probable that a facially neutral medical report would yield a different result. We do not perceive any deficient performance by trial counsel for failing to seek the introduction of neutral evidence.[6] *See* ***id.***

C. Failure to Move to Suppress Testimony Describing "Intercourse"

Romero-Zavala, believing the medical report conclusively demonstrates no intercourse or penetration, claims that trial counsel should have moved to suppress or objected to any testimony from forensic examiner Jensen or police officer Centeno that could be interpreted as describing

[6] Romero-Zavala also complains that the prison "is using incorrect information from the Pre-Sentence Investigation Report … that there was in fact penis penetrating anus and vagina." He directs us to a copy of his inmate classification report, and he believes that the medical report would counter this problem. The inmate classification report contains background information stating that Romero-Zavala had performed "penis to anus contact/intercourse." The medical report would not correct this. Further, Romero-Zavala should have a mechanism through the prison system for correcting its information about him. *See* ***State ex rel. LeFebre v. Israel***, 109 Wis. 2d 337, 347, 325 N.W.2d 899 (1982) (per curiam).

intercourse. Centeno offered no such testimony at trial, and his police report was not entered into evidence.

Romero-Zavala identifies three specific instances of Jensen's testimony that he believes are objectionable. These segments of testimony are as follows.

> [JENSEN]. I asked [J.Z.] to tell me about the last time that it happened. … *She said that he put his thing, is what she called it, in her butt and that he was moving it around*.
>
> ….
>
> Q. Did she disclose other instances of any other contact?
>
> A. She disclosed other instances. … She said that it had happened more than one time. I asked her did it happen one time or more than one time *that he put his thing in her butt*, and she said it happened more than one time. …
>
> ….
>
> Q. And so that was the information that you had going into this interview with [J.Z.]?
>
> A. Yes.
>
> Q. So [J.Z.'s] description about *her dad's front part being in her butt*, you had no idea about that --
>
> A. Correct.
>
> Q. -- until she disclosed?

(Emphasis added.)

There is no basis for claiming trial counsel was ineffective for failing to object to these statements. Again, the medical report does not conclusively demonstrate whether there was intercourse or penetration but, in any event, the jury was not instructed regarding intercourse. Further, under the definition of sexual contact and the jury instructions, the phrase "in her butt" does not necessarily describe intercourse. Finally, Jensen was testifying using J.Z.'s description

of what occurred. Any objections to Jensen's testimony would have been overruled. Trial counsel is not ineffective for failing to raise a meritless objection. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

D. Failure to Investigate Maternal Grandmother

Romero-Zavala told trial counsel that J.Z.'s maternal grandmother did not like him because she believed Romero-Zavala was responsible for her son being imprisoned for murder and may have "motivated JZ into making allegations." According to Romero-Zavala, the grandmother believes that Romero-Zavala should have helped her son flee to Mexico to avoid the murder conviction. Romero-Zavala believes this "speaks very well" of his "personal character," sufficient to create reasonable doubt under ***Edgington v. United States***, 164 U.S. 361, 366 (1896).

The rule articulated in ***Edgington***, that evidence of good character may create reasonable doubt, has since been superseded by a rule of evidence which provides that a generally good character as a person is not relevant for disproving criminal intent. *See* ***United States v. Lutz***, 18 M.J. 763, 769 (C.G.C.M.R. 1984); *see also* Fed. R. Evid. 404(a)(1) (2017) and WIS. STAT. § 904.04(1).

Romero-Zavala also contends that a post-trial interview of J.Z.'s mother shows that she "clearly believes" the grandmother "planted these allegations in JZ." The only remotely related sentence in the post-trial investigation report is that the grandmother "was the first person to plant seeds of doubt" about Romero-Zavala in J.Z.'s mother's mind. There is no context as to whether this doubt relates to the current offense or to Romero-Zavala more generally.

Additionally, defense counsel did attempt to ask J.Z.'s mother about J.Z.'s grandmother, but the trial court prohibited him from continuing the questioning.

However, nothing in the record suggests that J.Z. fabricated her allegations at her grandmother's insistence such that we can say counsel should have pursued the matter further. In short, the record does not support a claim of deficient performance by trial counsel in this regard.

E. Failure to Explain the Difference Between Guilty and No-Contest Pleas

The State's first plea offer called for Romero-Zavala to enter a guilty or a no-contest plea to the repeated sexual assault charge, for which Romero-Zavala's exposure was forty years. Prior to voir dire, the State made a record of an offer that had been tendered over the prior weekend: Romero-Zavala could plead to two counts of third-degree sexual assault and one count of fourth-degree sexual assault, reducing his exposure to twenty years and nine months. A third offer, apparently made just before voir dire began, called for Romero-Zavala to plead to one count of third-degree sexual assault and one count of fourth-degree sexual assault, which would have reduced his total exposure to ten years and nine months.

Romero-Zavala asserts in his no-merit response that he thought he had to plead guilty to the charges to accept any of the offers, but trial counsel failed to adequately explain the difference between guilty and no-contest pleas. He asserts that if counsel had "explained that entering a plea of 'No-Contest' in no-way represents that he is pleading guilty, there is a high degree of probability [he] would have [accepted] the State's" last offer with a no-contest plea.

Romero-Zavala does not explain what he now believes the difference between the pleas to be, nor why he was willing to enter a no-contest plea but not a guilty plea. Presumably, it has to do with his denial of guilt. But while a no-contest plea is not an admission of guilt, it is treated as such for the purposes of a judgment of conviction. Further, a trial court accepting a guilty or no contest plea must satisfy itself that "the defendant in fact committed the crime charged." *See* WIS. STAT. § 971.08(1)(b). Typically, to satisfy this requirement, the trial court seeks the defendant's acknowledgment of the accuracy of the facts as alleged in the criminal complaint, or an admission of some other facts sufficient to fulfill the elements of the crime or crimes to which the defendant is pleading. Given that Romero-Zavala continued to deny any inappropriate contact with J.Z. after his conviction, it is not reasonably probable that counsel could have persuaded him to enter a no-contest plea with a better explanation of the nuanced distinctions between guilty and no-contest pleas.

F. Summary

There is no arguable merit to any of Romero-Zavala's underlying complaints. Accordingly, trial counsel was not ineffective for failing to pursue them, nor was postconviction counsel ineffective for failing to pursue a postconviction motion alleging trial counsel was ineffective.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of further representation of Romero-Zavala 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 except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals