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August 30, 2017

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

2017AP616-CRNM State of Wisconsin v. Quordalis V. Sanders (L.C. #2014CF110)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Quordalis V. Sanders appeals from a judgment of conviction for exposing genitals to a child, causing a child to view sexual activity, stalking a victim under eighteen years of age, and disorderly conduct, all as a repeat offender, and from an order denying his postconviction motion. His 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). Upon consideration of the report, Sanders's two responses, and an independent review of the record, we conclude that the judgment and order 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.

E.M., a teenage employee at the Super Steak and Lemonade in Racine, reported to police on December 6, 2013, that Sanders was watching her from the restaurant's parking lot and exposing his genitals while masturbating. Sanders was arrested more than a month later on charges of exposing genitals to a child and disorderly conduct, both as a repeater. After the preliminary hearing, the information included two additional charges, causing a child to view sexual activity on December 6, 2013, and stalking a victim under eighteen years old, E.M., between January 2011 and December 6, 2013. Sanders was also charged as a repeater on the additional charges.

A jury trial was held. Before trial, the State moved to admit as other acts evidence that on December 30, 2010, Sanders had masturbated in front of E.M. while in the restaurant's bathroom. The incident that occurred on December 30, 2010, previously resulted in Sanders's conviction for disorderly conduct and lewd and lascivious behavior and his acquittal by a jury of causing a child to view sexual activity. The defense objected to the use of the December 30, 2010 incident because it was removed in time, was unduly prejudicial, and its use at trial would violate double jeopardy. The trial court ruled that the evidence would be admissible either as

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

other acts evidence or as evidence of Sanders's course of conduct to prove the elements of stalking.[2]

At trial, E.M. explained that she knew Sanders by sight and name because when she started working at the restaurant, he would do occasional deliveries for the restaurant. She testified about the December 30, 2010 exposure incident at the restaurant. She indicated that in August of 2013, when she returned to work at the restaurant after having worked some place else for a short time, Sanders was told by the restaurant's owner that he was not to be at the restaurant when she was there. E.M. frequently saw Sanders in his car parked outside the restaurant watching her. She called police on November 19, 2013, because Sanders was sitting out in his car in the restaurant parking lot staring at her. She called police again on December 1, 2013, because despite being told he was not welcome on the property, Sanders came into the restaurant to use the bathroom and when she told him he was not to be there, he called her a bitch and told her she could not tell him what to do. She testified about the December 6, 2013 incident and her 911 call that day was played. She indicated that these incidents and other times Sanders would watch her made her feel uncomfortable and scared.

The jury found Sanders guilty of all the charges. He was sentenced to time served on the disorderly conduct conviction, two years' initial confinement and three years' extended supervision on the causing a child to view sexual activity conviction, a concurrent term of two years' probation on the exposing genitals to a child conviction, and two years' initial

[2] The trial court ruled that no reference would be made to the fact that Sanders had been convicted of any crimes as a result of the December 30, 2010 incident.

confinement and three years' extended supervision on the stalking conviction, which was stayed in favor of a consecutive three-year term of probation.[3]

A postconviction motion was filed challenging the three DNA surcharges imposed on the felony convictions based on ***State v. Radaj***, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758, and claiming ineffective assistance of trial counsel based on trial counsel's failure to request a cautionary instruction regarding other acts evidence or to move to sever the stalking charge for trial.[4] The DNA surcharges were vacated. At the ***Machner***[5] hearing, Sanders's trial counsel testified that she did not seek to sever the stalking charge for trial because the 2010 exposure incident would still be admissible on the three other charges in that it involved the same victim, same defendant, and same location. Counsel also testified that she did not request the cautionary instruction—WIS JI—CRIMINAL 275—because she did not want to draw attention to the 2010 exposure incident. The trial court concluded that counsel's performance was not deficient because there was a logical strategy reason to not request the cautionary instruction and not to seek severance. The court rejected Sanders's claim that he had been denied the effective assistance of counsel.

[3] Sanders indicates in his second response to the no-merit report that his release on extended supervision was revoked on January 23, 2017. The revocation is not before this court in this appeal.

[4] A postconviction motion was filed after this court rejected an earlier no-merit report filed by Attorney Timothy L. Baldwin. ***State v. Sanders***, No. 2014AP2976-CRNM, unpublished op. and order (WI App Nov. 25, 2015). Attorney Baldwin filed a postconviction motion requesting removal of excessive DNA surcharges. The circuit court ordered removal of the $200 DNA surcharge imposed on the misdemeanor disorderly conduct conviction. Subsequently, the State Public Defender appointed new counsel for Sanders and the time for new counsel to file a postconviction motion under WIS. STAT. RULE 809.30 was extended. The second postconviction motion was timely filed.

[5] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The no-merit report discusses the sufficiency of the evidence, the trial court's ruling on the State's motion to admit the 2010 exposure incident as other acts evidence, the absence of any objections or errors regarding jury selection, evidence introduced, jury instructions, opening argument, and the colloquy about Sanders's election to not testify. The report also addresses whether the sentence was the result of an erroneous exercise of discretion and the trial court's denial of Sanders's postconviction claim of ineffective assistance of trial counsel. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further except as necessary to address Sanders's responses. With respect to the admission of the evidence of the 2010 exposure incident, we add that it was properly admitted as evidence of the course of conduct and that it did not violate Sanders' right to be free from double jeopardy because that conduct had not previously been used as part of a stalking charge. *See* ***State v. Conner***, 2011 WI 8, ¶¶4, 5 n.5, 43, 331 Wis. 2d 352, 795 N.W.2d 750.

Other observations from the record not directly discussed by the no-merit report:

- The criminal complaint was legally sufficient.[6]

- In reading count four of the information to the jury at the opening of the trial, the trial court misstated the date for stalking as being between January 2013 and December 6, 2013, rather than January 2011 to December 6, 2013. This was an inconsequential misstatement.

[6] In his response, Sanders makes a reference to the criminal complaint being "clearly defective and considered 'null and void' as a matter of law." Not so.

- During the trial, Sanders refused to sit with his legs under the tables which would have prevented the jury from seeing the shackles on his legs. It was his choice to reveal the shackles to the jury and he cannot now complain that the jury saw him shackled.

- Sanders personally complained at trial that the stalking charge was not transactionally related to the exposing charge which was the basis for the bindover after the preliminary hearing. He believed he was not properly arraigned on the stalking charge. Sanders was properly arraigned on all of the charges on February 19, 2014.

- During cross-examination, E.M. made reference to a time period that may have been "when he just out," a reference that possibly informed the jury that Sanders had been in jail. The single reference was not highlighted by any inappropriate argument and was not significant enough to suggest a mistrial remedy.

- Closing arguments did not include any improper argument.

- The jury was polled and each juror confirmed the verdict.

- At sentencing, Sanders personally complained that the police failed to preserve exculpatory evidence, specifically surveillance video from the restaurant. Sanders merely speculated that the video would have been "highly exculpatory." Yet the restaurant owner testified that the December 6, 2013 incident was caught by the camera. The initial investigating police officers testified that they did not check with the restaurant owner about surveillance cameras. Another officer followed

> up but the owner reported that the video was only kept a short time. Sanders would not be able to establish that exculpatory evidence was destroyed or that the police acted in bad faith in failing to preserve potentially exculpatory evidence. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994).

Our review of the record discloses no other potential issues for appeal.

In his responses, Sanders first expresses his disagreement with the trial court's ruling on his postconviction motion. He asserts that when other acts evidence is used, the cautionary instruction should always be given and a strategy reason can never support counsel's failure to request the instruction. The Wisconsin Supreme Court has recognized that the instruction is not required unless requested and that there may be a tactical reason by the defense to not request the instruction. *See* ***State v. Payano***, 2009 WI 86, ¶100 n.21, 320 Wis. 2d 348, 768 N.W.2d 832. Here, the trial court's finding that trial counsel advanced a logical strategic reason for not requesting the instruction is not clearly erroneous.[7]

Sanders also disputes the sufficiency of the evidence on the stalking conviction. He claims proof of the "continuous course of action" started with the 2010 exposure incident but that the continuity of action was interrupted by E.M.'s absence from the restaurant in the summer of 2012. Under WIS. STAT. § 940.32(1)(a), the "[c]ourse of conduct" means "a series of 2 or more acts carried out over time." Even without consideration of the 2010 exposure incident,

[7] Sanders suggests trial counsel was also ineffective for failing to "suppress alleged statements made by the alleged victim to police … consistent with prior inconsistencies for the same offense." It is unclear what point Sanders is making. However, there is no basis to "suppress" a victim's statements. Inconsistencies are simply tested at trial, as was done during Sanders's jury trial.

there was sufficient proof of two or more acts to support the stalking conviction.[8] Further, for reasons recognized by the trial court during trial and during the postconviction hearing, the "interruption" in time between the 2010 exposure incident and the acts that occurred in 2013 did not render the 2010 exposure incident inadmissible as other acts evidence.

Finally, Sanders contends his appellate counsel has been ineffective for not filing a timely notice of appeal after denial of the postconviction motion and instead pursuing a no-merit appeal.[9] A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). We have concluded there is no arguable merit to further postconviction or appellate proceedings. This court's decision accepting the no-merit report and discharging counsel of any further duty of representation rests on the conclusion that counsel provided competent and constitutionally required representation. Accordingly, this court accepts the no-merit report, affirms the conviction and order denying the postconviction motion, and discharges appellate counsel of the obligation to represent Sanders further in this appeal.

Upon the foregoing reasons,

[8] Sanders also theorizes that in an order revising the judgment of conviction for granting good time credit, the "trial judge modified the stalking charge, which were/is an essential element and crime of the State's case against the appellant; and when a conviction based on a theory not presented to the jury can not be affirmed, the remaining charges of the case must also be dismissed." Sanders makes several references to the trial court having modified the stalking charge. The record does not include an order revising the judgment of conviction as to good time credit or any other suggestion that the trial court "modified the stalking charge." Whatever Sanders's theory of error might be in this respect, we conclude it lacks arguable merit.

[9] Sanders has a petition for a writ of habeas corpus pending which makes similar claims. *See* ***State ex rel. Sanders v. State***, No. 2017AP1032-W.

IT IS ORDERED that the judgment of conviction and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Daniel R. Drigot is relieved from further representing Quordalis V. Sanders in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals