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October 25, 2017

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

2016AP143-CRNM State of Wisconsin v. Jason S. Linsmeyer (L.C. # 2011CF5312)

Before Lundsten, P.J., Blanchard and Kloppenburg, 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).

Attorney Thomas Erickson, appointed counsel for Jason Linsmeyer, 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 whether there

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

would be arguable merit to further proceedings based on any of the following: (1) the sufficiency of the evidence to support the jury verdict; (2) the circuit court's decision to allow testimony by the State's expert witness; (3) the circuit court's decision to allow evidence of prior bad acts; (4) the State's expert's prior participation with the prosecutor in a seminar; (5) the court denying the defense motion for a mistrial; (6) defense counsel's failure to object to the State's questioning of Linsmeyer as to his sexual morality; (7) the sentence imposed by the circuit court; (8) the surcharge imposed by the circuit court; or (9) a claim of jury impropriety. Linsmeyer has responded to the no-merit report, arguing that his counsel was ineffective by failing to object to the State's questions as to Linsmeyer's sexual morality; that the court erred by denying the defense motion for a mistrial; that the prosecutor committed prosecutorial misconduct by failing to disclose that the State's expert had participated in a seminar with the prosecutor; that there was jury impropriety; that the evidence was insufficient; and that his counsel was ineffective by failing to call character witnesses at trial and failing to object to statements by the prosecutor at sentencing. Counsel has filed a supplemental no-merit report. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Linsmeyer was convicted of repeated sexual assault of a child, following a jury trial. The circuit court sentenced Linsmeyer to thirteen years of initial confinement and seven years of extended supervision.

The no-merit report and response both address whether there would be arguable merit to a challenge to the sufficiency of the evidence to support the jury verdict. 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 testimony of the victim, if deemed credible by the jury, was sufficient to support the conviction for repeated sexual assault of a child.

Linsmeyer argues that the evidence was insufficient because, in his view, the victim lacked credibility. Linsmeyer points out that the victim's forensic interview, which was played for the jury, contained internal inconsistencies, and that the victim's trial testimony was at times inconsistent with her forensic interview. Linsmeyer also argues that the victim lacked credibility because several witnesses, including the victim's family members, testified that the victim was not a truthful person. Linsmeyer also points to testimony as to Linsmeyer's reputation for truthfulness. However, Linsmeyer does not identify any inconsistencies that would render the victim's testimony inherently incredible. It was the role of the jury to weigh the witnesses' credibility. The jury was entitled to believe the victim's testimony despite any inconsistencies in her testimony, the testimony that the victim was not a truthful person, and the testimony that Linsmeyer was a truthful person.

Next, the no-merit report addresses whether there would be arguable merit to a claim that the circuit court erred by denying the defense motion to exclude the proposed testimony of the State's expert under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993). Linsmeyer argued that the expert's testimony as to delayed and piecemeal disclosure common to child victims of sexual assaults was not sufficiently reliable, was not relevant as to the sexual assaults in this case, and was unfairly prejudicial because the expert had also interviewed the

victim and thus her testimony would imply that the expert believed the victim was truthful. *See* WIS. STAT. § 907.02(1); WIS. STAT. § 904.01. The court held a ***Daubert*** hearing, and the State's expert testified as to her education and experience in interviewing child victims and as to disclosure issues common to child victims of sexual assault. The court determined that the witness was qualified to testify as an expert, that the testimony would assist the jury, and that the testimony was appropriate under the facts and circumstances of this case. We agree with counsel's assessment that a challenge to the circuit court's exercise of discretion in admitting the expert testimony would lack arguable merit. *See* ***State v. Smith***, 2016 WI App 8, ¶¶4-10, 366 Wis. 2d 613, 874 N.W.2d 610 (2015) (rejecting a ***Daubert*** challenge to the circuit court's exercise of discretion in allowing expert testimony as to common reactions by child sexual assault victims, including delayed disclosure, and explaining that this court will not disturb a circuit court's decision to allow expert testimony "if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record" (quoted source omitted)).

Next, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's exercise of discretion by denying the defense motion to exclude evidence of Linsmeyer's prior bad acts, specifically, evidence that Linsmeyer's sexual assaults of the victim began years earlier in a different county. Linsmeyer argued that the evidence was not relevant and that the danger of unfair prejudice outweighed its probative value, and that the evidence amounted to impermissible propensity evidence. *See* WIS. STAT. §§ 904.01 to 904.04. The circuit court denied the motion, explaining that there is greater latitude for admission of other acts in child sexual assault cases, *see* WIS. STAT. § 904.04(2)(b), and that the prior acts involving the same victim were admissible for the proper purpose of showing context and a continuing

course of conduct. We agree with no-merit counsel that a challenge to the circuit court's exercise of discretion would lack arguable merit. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236-37, 341 N.W.2d 716 (Ct. App. 1983) (other acts evidence is admissible to show background relationship between the parties and the context of the case, and the circuit court must exercise its discretion to determine whether to admit the evidence).

The no-merit report also addresses whether there would be arguable merit to any issues arising from the State's expert previously participating in a seminar with the prosecutor. During the expert's direct testimony, the expert stated that she had recently participated in a seminar that was not yet added to her resume. The next day, the defense objected that the State had not previously disclosed the expert's participation in the seminar with the prosecutor, which defense counsel discovered by doing an internet search after the expert's testimony on direct. The defense argued that the State had an obligation to disclose any materials related to the seminar as impeachment evidence under ***Brady***,[2] and that material from the seminar was necessary for the defense to effectively cross-examine the expert. The State responded that the information as to the seminar was readily available via the internet, and the State had now provided the defense with an outline used by the presenters at the seminar. The State also informed the court that its expert witness did not have any material that she prepared for her presentation at the seminar. The circuit court examined the witness under oath outside the presence of the jury, and the witness testified that she had no materials in connection with the seminar, but that she helped prepare materials that were retained by her co-presenter. The State indicated it would attempt to obtain that material. The court agreed with the State that the facts as to the seminar were a

[2] ***Brady v. Maryland***, 373 U.S. 83 (1963).

matter of public record and not the sort of material the State was required to disclose to the defense. It determined that the defense could effectively cross-examine the witness with the material it had, and that the court would examine any materials obtained by the State in-camera, turn over any relevant material, and allow the defense to recall the witness if necessary. The defense then cross-examined the witness as to her participation at the seminar with the prosecutor.

Linsmeyer contends that the State's failure to disclose information as to the State's expert's recent seminar participation denied the defense the ability to effectively respond to the expert. Linsmeyer argues that, had the information been disclosed earlier, the defense could have obtained an expert opinion as to whether a close working relationship with the State would create bias on the part of the interviewer. Linsmeyer asserts that the failure to provide the most up-to-date resume for the State's expert was an intentional failure to disclose requested information and amounted to prosecutorial misconduct.

We discern no arguable merit to this issue. Linsmeyer asserts that the defense could have obtained expert testimony as to the effect of the relationship between the expert and the State on the interview process, but provides no support for that assertion. That is, Linsmeyer does not assert that an expert actually could have provided any testimony on that topic or what that testimony would have been. Moreover, Linsmeyer does not explain why he did not request time to obtain that expert testimony, if it was available and would have been helpful to the defense. Additionally, the circuit court addressed the issue, and determined that the defense would be able to effectively cross-examine on the issue of the expert's participation at the seminar, and defense counsel did so. Nothing before us would support a non-frivolous argument that Linsmeyer was prejudiced by any failure to disclose. *See* ***State v. Harris***, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680

N.W.2d 737 (to show a ***Brady*** violation, "prejudice must have ensued" from the non-disclosure of evidence (quoted source omitted)).

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court's decision to deny Linsmeyer's motion for a mistrial after the State asked Linsmeyer whether he had a physical altercation with his wife at a friend's house, leading the friend to tell Linsmeyer that he was no longer welcome in her house. Linsmeyer argued that his character for peacefulness had not been placed in issue, that the evidence was not relevant, and that the State had failed to provide the defense with notice of the State's intent to introduce the evidence of Linsmeyer's prior act of violence. Linsmeyer moved for a mistrial, arguing that the jury had already heard the improper evidence by way of the State's question. The court denied the motion. It explained that the question had only been asked at that point. The court then determined that Linsmeyer had opened the door by testifying that he had never had any physical confrontation with his wife besides one accidental incident that resulted in her having a black eye.

Linsmeyer contends that the State improperly introduced other acts evidence that Linsmeyer had engaged in acts of domestic violence by questioning Linsmeyer as to the incident at the friend's house. Linsmeyer asserts that it was improper for the State to attempt to introduce that evidence because the State did not provide Linsmeyer with notice of its intent to do so, and because the evidence of domestic violence may have influenced the jury's verdict. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (other acts evidence is only admissible if offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by the danger of unfair prejudice).

We discern no arguable merit to this issue. The State did not introduce any evidence that Linsmeyer had engaged in an act of physical violence against his wife at the friend's house. The State asked Linsmeyer whether the physical altercation had occurred and whether Linsmeyer had been told he was no longer welcome at the friend's house, and Linsmeyer answered no. A challenge to the circuit court's exercise of discretion to deny Linsmeyer's motion for a mistrial on that basis would be wholly frivolous. *See* ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61 (explaining that a motion for a mistrial requires a circuit court to exercise its discretion to "decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial" despite the claimed error).

Next, the no-merit report addresses whether there would be arguable merit to a claim that defense counsel was ineffective by failing to object to the State's cross-examination of Linsmeyer regarding his character for sexual morality. The State questioned Linsmeyer regarding his sexual relationship with the woman he later married while she was still married to another man. Defense counsel informed the circuit court that he thought there was a basis to object to the line of questioning because Linsmeyer's character for sexual morality had not been placed into issue. The court responded that evidence that Linsmeyer had engaged in an extramarital affair for a year with a married woman went to Linsmeyer's character and his character for truthfulness. Defense counsel then stated that he had decided not to object because he thought the questioning helped the defense. The no-merit report concludes that counsel's performance was not deficient by making a strategic decision not to object, and that the defense was not prejudiced because the central issue was whether the victim's testimony of the assaults was credible. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective

assistance of counsel must establish that counsel's performance was deficient and that the deficiency prejudiced the defense).

Linsmeyer contends that his trial counsel was ineffective by failing to object to any questioning as to Linsmeyer's involvement in an extramarital affair. He contends that the evidence was not relevant as to Linsmeyer's character or character for truthfulness because the extramarital affair had occurred thirteen years prior, during Linsmeyer's young adulthood. In support, Linsmeyer cites ***Vanderperren v. Board of Bar Examiners***, 2003 WI 37, ¶¶3, 55, 261 Wis. 2d 150, 661 N.W.2d 27 (applicant for the state bar had demonstrated the requisite character and fitness where evidence to the contrary occurred when she was a young adult, and she had not had any incidents within the past five years). Linsmeyer contends that the evidence prejudiced the defense because the State asked multiple questions of multiple witnesses as to the affair. He contends that counsel had no reasonable strategy for failing to object, and also points out that, even had counsel objected, the objection would have been overruled based on the circuit court's determination that the evidence was relevant as to Linsmeyer's character and character for truthfulness. Linsmeyer argues that, if the defense had known that the State would introduce evidence as to the extramarital affair, the defense would have explored the issue with the potential jurors during voir dire. He contends that the defense limited its trial strategy to avoid the issue of the divorce so that the extramarital affair would not have to be revealed. He argues that the evidence was improper other acts evidence because there was no link between the extramarital affair and the child sexual assaults alleged in this case.

We discern no arguable merit to this issue. At the outset, as Linsmeyer acknowledges, the circuit court determined that the evidence was relevant as to Linsmeyer's character, and thus any objection by the defense would have failed. Counsel is not ineffective by failing to raise a

fruitless objection. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). Moreover, a challenge to the circuit court's exercise of discretion to allow the evidence as to Linsmeyer's character would be wholly frivolous. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (circuit court's decision to admit or exclude evidence is discretionary); ***State v. Olson***, 179 Wis. 2d 715, 722, 508 N.W.2d 616 (Ct. App. 1993) ("The degree and manner of cross-examination in criminal cases is largely a matter within the discretion of the [circuit] court."); ***State v. Boehm***, 127 Wis. 2d 351, 358, 379 N.W.2d 874 (Ct. App. 1985) (holding that a criminal defendant puts his or her credibility at issue by testifying at trial, and that "[f]or purposes of attacking credibility, specific instances of conduct probative of truthfulness or untruthfulness and not remote in time, may be inquired into on cross-examination" (citing WIS. STAT. § 906.08(2))). As to Linsmeyer's contention that the defense would have asked additional questions on voir dire had the defense known that the extramarital affair would be discussed, nothing before us indicates that any of the jurors would have indicated bias on that topic. *See* ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990) (holding that prospective jurors are presumed impartial, and that a party challenging juror impartiality has the burden of proving bias). Finally, as to Linsmeyer's claim that the defense limited its questioning of witnesses to avoid discussion of the extramarital affair, Linsmeyer has not explained why, if that was the case, the defense did not explore those topics fully once the affair was revealed.

The no-merit report also addresses whether a challenge to Linsmeyer's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] 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). Here, the circuit court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the gravity of the offense, Linsmeyer'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 sentence was well within the maximum Linsmeyer 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" (quoted source omitted)). We discern no erroneous exercise of the court's sentencing discretion.

Next, the no-merit report addresses whether the DNA surcharge was properly imposed. Because Linsmeyer was convicted of repeated sexual assault of a child, the DNA surcharge was mandatory at the time of his offense. *See* WIS. STAT. § 973.046(1r) (2005-06).

Finally, the no-merit report addresses whether there would be arguable merit to a claim of jury impropriety. No-merit counsel states that he discussed with trial counsel the issue of whether the jurors may have somehow learned that Linsmeyer had previously been charged with child sexual assault. No-merit counsel states that a defense investigator contacted jurors and that no evidence was obtained that would support an argument that any of the jurors learned of Linsmeyer's prior child sexual assault case or of any other jury impropriety.

Linsmeyer asserts in his no-merit response that the information obtained from the jurors supports a claim of jury impropriety. He asserts that one juror, P.P., indicated that appearance

mattered to her, that she saw a photograph of Linsmeyer from before he went to trial, and that the difference in his appearance between the photograph and his appearance at trial led her to believe that Linsmeyer was not credible. Linsmeyer asserts that P.P. must have been referring to the booking photograph that the State attempted to introduce into evidence and which the circuit court held could not be admitted. Linsmeyer also asserts that another juror, M.A., was suffering from dementia by the time the defense investigator attempted to contact her, and that it was unclear whether M.A. was suffering from any symptoms of dementia at the time of trial. Finally, Linsmeyer asserts that the prosecutor had a file and cover letter from Linsmeyer's prior sexual assault case on the prosecution table while Linsmeyer testified, and that at least some of the jurors would have been able to see it.

No-merit counsel concludes again in a supplemental no-merit report that there would be no arguable merit to a claim of jury impropriety. Counsel asserts that Linsmeyer misstates what P.P. told the investigator, and that what P.P. actually said was that the jury saw photos of the defendant and that P.P. deemed the victim credible because of her detailed description of the events. Counsel states that there was no indication M.A. was suffering from dementia at the time of trial. Counsel asserts that nothing in the investigation revealed any evidence that the jurors had knowledge of Linsmeyer's prior case.

We discern no arguable merit to this issue. According to the material submitted with the supplemental no-merit report, P.P. told the investigator that "she rendered the verdict that she did because of victim's testimony," that "the victim seemed credible and she simply had too many details of the assaults and [P.P.] found her testimony to be pretty convincing," and that "the jury saw older photos of the defendant and she was bothered by his appearance. She stated that his appearance mattered to her." P.P. also told the investigator that "she absolutely did not look

[Linsmeyer] up and that she knows for a fact that no other jurors mentioned looking him up." As Linsmeyer asserts, it appears that the photograph P.P. states that the jury saw was the photograph that the State attempted to introduce into evidence while questioning the victim, and which the circuit court excluded from evidence. Ultimately, though, P.P. indicated that she reached the verdict based on her assessment of the victim's credibility. While P.P. stated that Linsmeyer's appearance bothered her and that his appearance mattered to her, nothing in her statement indicates that her viewing the photograph that was then excluded from evidence on the defense's objection affected her verdict. We note that the victim testified that Linsmeyer looked different at trial than when she last saw him in that, at trial, he had shorter hair and was clean-shaven. Thus, Linsmeyer's difference in appearance was already revealed to the jury. The material also does not indicate any basis to support a claim that M.A. was suffering from dementia at the time of trial, or that any of the jurors learned of Linsmeyer's prior sexual assault case before rendering their verdict.

Linsmeyer also asserts in his no-merit report that his trial counsel was ineffective by failing to call additional witnesses to testify as to Linsmeyer's character for truthfulness and as to the open-door policy at Linsmeyer's household. *See* ***State v. Honig***, 2016 WI App 10, ¶27, 366 Wis. 2d 681, 874 N.W.2d 589 (2015) ("An attorney's failure to call a witness whose testimony would have been central to the theory of defense can constitute deficient performance."). Linsmeyer asserts that three additional witnesses would have testified to Linsmeyer's character for truthfulness, to the victim's character for untruthfulness, and that Linsmeyer allowed a neighbor to enter his home at any time. Linsmeyer also asserts that his trial counsel should have called as a witness the boy that the victim was dating, and that the boy and the victim had a discussion about pedophiles on Facebook several days before the victim made the accusations

against Linsmeyer in this case. However, defense counsel already called several witnesses to testify that Linsmeyer had a character for truthfulness, and that the victim had a character for untruthfulness. Also, Linsmeyer asserts that the reason that his counsel chose not to pursue the additional witnesses was because they would not have testified to the truthfulness of Linsmeyer's wife, who was a key defense witness. We discern no arguable merit to a claim that trial counsel was ineffective by failing to call those additional character witnesses. Nor do we discern any arguable merit to a claim that trial counsel was ineffective by failing to call witnesses to testify that Linsmeyer allowed a neighbor to enter his home at any time, when the victim testified the sexual assaults generally occurred in closed rooms or in vehicles when she was alone with Linsmeyer, or to call the boy the victim was dating simply because the two had a conversation about pedophiles.

Finally, Linsmeyer asserts that his trial counsel was ineffective by failing to object to a statement by the prosecutor at sentencing. The prosecutor stated that she had spoken to the victim's father, and that he told her that the victim and her family had chosen not to attend sentencing because the victim was doing much better after the trial was over and the father did not want the victim to have to suffer from seeing Linsmeyer again. Linsmeyer asserts that one of the defense witnesses told him after sentencing that the witness had heard from the victim that the victim's father was upset that the prosecutor had not contacted him since the trial. We conclude that Linsmeyer has not set forth sufficient facts to support a non-frivolous assertion that the prosecutor was not telling the truth about her contact with the victim's father or that defense counsel should have had any reason to question the prosecutor's statement. Linsmeyer does not assert that the victim's father would provide testimony to support Linsmeyer's assertion that the prosecutor had not contacted the father, or that the father would have spoken on Linsmeyer's

behalf at sentencing. There is nothing before us that would support a non-frivolous argument as to this issue.

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 judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas Erickson is relieved of any further representation of Jason Linsmeyer in this matter. *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