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January 19, 2018

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

2016AP1482-CRNM State of Wisconsin v. Michael J. VanCaster (L.C. #2014CF938)
2016AP1483-CRNM State of Wisconsin v. Michael J. VanCaster (L.C. #2014CF1696)

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

In these consolidated cases, Michael J. VanCaster appeals a judgment convicting him of one count each of first-degree child sexual assault and felony child abuse; two counts of conspiracy to intimidate a witness; four counts of conspiracy to intimidate a victim; and six counts of intimidating a witness. His appellate counsel, Attorney Daniel Goggin II, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S.

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

738 (1967). VanCaster filed a lengthy response, to which appellate counsel filed a supplemental report and then, pursuant to this court's September 5, 2017 order, a second supplemental report, each supplement supported by an affidavit. VanCaster filed a response to the second supplemental report, various interim motions,[2] and numerous exhibits and copies of letters to Goggin. Upon consideration of the no-merit report, the supplemental reports and their affidavits, VanCaster's responses and other filings, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because we conclude there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

VanCaster was charged with first-degree child sexual assault of ATV and child abuse of SRF, his ten- and five-year-old granddaughters. The intimidation charges arose from VanCaster's efforts to dissuade the victims from making reports to law enforcement and the witnesses from attending or testifying at court proceedings.

[2] VanCaster's motions include motions for new counsel; to be provided with "unedited, accurate, and complete" transcripts, discovery materials, evidence, and courtroom audio/visual recordings; to correct the record; and to be granted "full indigency status." We deny these motions and any filed but not listed here. All have been reviewed and considered.

In addition to the copies of letters to defense counsel, he supports his motion for new counsel with the claim that this court found Attorney Goggin "deficient." That is false. We said the no-merit report and supplemental report were deficient and thus ordered a second supplemental report. Counsel did so in satisfactory fashion.

We also note that in response to VanCaster's December 17, 2016 pro se request for "reversal of the no-merit report" and for either appointment of a new attorney or time to seek representation of the Wisconsin Innocence Project, we declined to order appointment of replacement counsel and/or the Innocence Project. We then granted him sixty days within which to advise this court whether he retained replacement counsel, opted to represent himself, or wanted to continue with Goggin. We subsequently construed his December letter as a response to the no-merit report and the no-merit process proceeded with Goggin.

The parties jointly agreed to sever the sexual-assault and child-abuse charges. VanCaster waived his right to a jury trial. The sexual-assault and witness/victim-intimidation charges relating to ATV were tried jointly; the court found VanCaster guilty. It subsequently accepted his plea of no contest to child abuse of SRF, dismissed the victim-intimidation charges relating to her, and imposed a global thirty-seven-year sentence, twenty years' initial confinement plus seventeen years' extended supervision. This no-merit appeal followed.

The no-merit reports address VanCaster's speedy-trial motion; joinder of the sexual-assault and conspiracy-to-intimidate or attempt-to-intimidate-a-victim/witness charges and of the physical-abuse and intimidation charges involving the victim and witness of the physical abuse; the sufficiency of the evidence presented at the court trial; VanCaster's no-contest plea to child abuse; and ineffective assistance of counsel.[3] We are satisfied that the no-merit report and, in particular, the second supplemental report and its extensive affidavit, properly and thoroughly analyze the issues raised. We agree with counsel that they present no issue of arguable merit. We will not discuss those issues further because it would simply be to repeat the analysis provided by the no-merit reports.

VanCaster's responses raise dozens of claims of error. He generally contends the transcripts are edited and inaccurate; testimony against him was biased and/or outright false; the State's expert did not review any evidence or interview any witnesses before testifying; Special Agent Eric Beine of the Department of Justice, Division of Criminal Investigation, intentionally intimidated ATV; Beine and the prosecutor intimidated VanCaster's girlfriend and slanted her

[3] The second supplemental report also addresses the many issues VanCaster raises.

testimony; the court ignored ATV's testimony that VanCaster is innocent, ATV's mother's claim that the prosecutor slanted the mother's statements, and his girlfriend's testimony that any seemingly intimidating actions she undertook involving victims and witnesses were on her own initiative and with no intention of carrying them out; his trial counsel gave him a false sense of security regarding the trial outcome and failed to hire a private investigator, retain an expert witness, subpoena witnesses VanCaster wanted called or, in fact, to call any witnesses on his behalf, or ensure sequestration of witnesses; and appellate counsel likewise refused to hire a private investigator.

To the extent VanCaster suggests that the State denied his due process right to a fair trial by using and failing to correct several prosecution witnesses' false testimony, he confuses perjured testimony with testimony that conflicted with that beneficial to him, but was believed by the trier of fact. *See* ***State v. Whiting***, 136 Wis. 2d 400, 418, 402 N.W.2d 723 (Ct. App. 1987). "The crux of a denial of due process is deliberate deception." ***Id.***; *see also* ***United States ex rel. Burnett v. Illinois***, 619 F.2d 668, 674 (7th Cir. 1980). Even if some testimony was untrue, VanCaster neither alleges nor establishes that the State "used" it to deliberately deceive the court. *See* ***Whiting***, 136 Wis. 2d at 418. It was for the court, as the trier of fact, to evaluate the witnesses' credibility, including ATV's, and to reconcile inconsistencies in individual testimony or between a particular witness' testimony and that of others. *See* ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978).

VanCaster supports other claims with bald assertions not backed up by facts of record. For example, counsel did not seek a sequestration order because one already was in place; counsel said that he determined, and VanCaster agreed, that some of VanCaster's proposed witnesses would have been detrimental to his defense and/or opened doors to questioning

beneficial to the prosecution; and a private investigator was hired. Counsel's strategic decisions will be upheld as long as they were founded on a knowledge of the law and the facts. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Merely because a strategy was unsuccessful does not mean that counsel's performance was legally insufficient. ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987).

VanCaster also insists that virtually all of the transcripts have been edited or otherwise tampered with. As one example, he contends that the sentencing transcript in the record fails to reflect the court's alleged statement to him that "the original reasons that brought you into my courtroom have absolutely no bearing on my decision here today because there is no evidence to support it," and that the sentencing decision would be "based solely upon your character, your actions in my courtroom, your blatant disrespect for the law, oh and yes the little bit of evidence that [was] presented here." He asserts that comparing the transcripts with "unedited, complete in[-]courtroom audio/video recordings" would prove his claim.

We are skeptical that the trial court made such a statement at sentencing. As VanCaster states that he does not have copies of any audio/video recordings, we presume that he either misheard or misremembers what the court said. Further, there is no evidence in the record that any of the proceedings were both transcribed and recorded. And if VanCaster believes a defective record was entered into the trial court record, he should have moved the court in which the record is located to correct it. WIS. STAT. RULE 809.15(3). A reviewing court need not sift the record for facts to support an appellant's contentions. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). By failing to utilize the procedure of RULE 809.15(3), VanCaster in effect gave his approval to the transcripts and consented to their circulation as accurate public documents. He cannot complain here that the transcript is

defective, as this court is in no position to determine what actually occurred below. We are bound by the record as it was certified by the court reporter.

We are satisfied that the no-merit report and supplemental reports properly analyze the issues raised therein, that the issues VanCaster raises warrant no further proceedings, and that his appeal has no arguable merit. We therefore adopt the no-merit report, affirm VanCaster's convictions, and discharge Goggin of his obligation to represent VanCaster further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that all motions VanCaster has filed in this court and not yet ruled upon are denied.

IT IS FURTHER ORDERED that Attorney Daniel Goggin II is relieved from further representing VanCaster 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
Acting Clerk of Court of Appeals