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June 6, 2018

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

2017AP1751-CRNM State of Wisconsin v. Kalvin Ed Vaughn (L.C. # 2014CF4584)

Before Neubauer, C.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).

Kalvin Ed Vaughn appeals from a judgment convicting him after a jury trial of two counts of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(b) and (d) (2015-16).[1] Appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE

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

809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Vaughn responded at length. Counsel filed a supplemental report. Upon consideration of the no-merit reports, Vaughn's response, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there are no issues with arguable merit for appeal and thus summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

The no-merit report considers whether the evidence was sufficient to convict Vaughn and whether the trial court erroneously exercised its discretion in sentencing Vaughn to a total of forty years' confinement and twenty-five years' extended supervision. The report also gave careful attention to whether any other issues arose before or at trial that would warrant reversal. As our review of the record satisfies us that the no-merit report properly and thoroughly analyzes these issues as without merit, we address them no further.

Vaughn raises a host of issues, several alleging the ineffectiveness of defense counsel's trial preparation and performance. He complains that counsel failed to: properly investigate the case and obtain critical evidence, reports, and text messages from the victim; consult with and retain experts to rebut the testimonies of the State's expert witness on patterns in sexual assault disclosures by children and of the Sexual Assault Nurse Examiner; object to repeated instances of hearsay; object to the prosecutor's suggestion that two absent witnesses (Vaughn's son and Vaughn's girlfriend) would have testified favorably to the State and that he caused them to skip trial; and move for a mistrial when the prosecutor "questioned [him] about the exercise of his right to remain silent."

We first note that Vaughn told the trial court more than once that he was satisfied with his counsel's performance, except when counsel said he was not optimistic about the trial

outcome and encouraged Vaughn to consider the State's plea offer. Further, Vaughn's spin on the evidence is not borne out by the record when read in context. For example, some of the records he complains were not provided—certain photographs, allegedly exculpatory text messages from the victim—do not exist. Most importantly, we cannot address any aspect of trial counsel's performance because it did not occur before us. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996) (claims of ineffective trial counsel cannot be reviewed on appeal if not preserved in trial court). Finally, if Vaughn's criticisms of trial counsel are a backdoor claim that appellate counsel was ineffective for not raising trial counsel's performance as an issue on appeal, he still cannot prevail. Appellate counsel's failure to argue a forfeited issue on appeal is not ineffective assistance. ***Id.***

Appellate counsel's supplemental report addresses each of Vaughn's nearly twenty issues. Although counsel more than adequately considered it, we, too, address Vaughn's emphatic complaint that the trial court twice allowed amendments to the charging period to conform to the evidence. Significantly, the young victim reported that the sexual assaults began when she was only ten and continued until she was twelve and occurred at two different addresses, neither of which was her residence. The court first allowed an amendment to match her testimony as to her recollection of the time frame and location of the assaults and another to match Vaughn's slightly different testimony about when he moved to the second address.

The purpose of the charging document is to inform the accused of the acts he or she allegedly committed and to provide an understanding of the offense charged so he or she can prepare a defense. ***State v. Wickstrom***, 118 Wis. 2d 339, 348, 348 N.W.2d 183 (Ct. App. 1984). The charging document may be amended if the defendant is not prejudiced—and there is no prejudice when the amendment does not change the crime charged and the alleged offense is the

same and results from the same transaction. ***Id.*** The time frame amendments here did not present Vaughn with any new elements to defend against. The trial court's amendment of the charges was not an erroneous exercise of discretion. *See* ***State v. Flakes***, 140 Wis. 2d 411, 416, 410 N.W.2d 614 (Ct. App. 1987).

As this case was being prepared for release, Vaughn filed a thirty-three-page response to counsel's supplemental report. His response continues to reargue fully litigated facts and to assign unfounded blame to the prosecution and trial and appellate counsel. It changes nothing.

This court commends appellate counsel's thoroughness. Our review of the record confirms counsel's conclusion that there are no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Vaughn further in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved from further representing Vaughn in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals