OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

September 5, 2018

To:

Hon. Wayne J. Marik
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Hon. David W. Paulson
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Paul G. Bonneson
Law Offices of Paul G. Bonneson
Third Floor, Suite 407
10909 W. Bluemound Rd.
Wauwatosa, WI 53226

Patricia J. Hanson
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Troy M. Peltier 587127
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2016AP1506-CRNM State of Wisconsin v. Troy M. Peltier (L.C. # 2011CF224)

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).

Troy M. Peltier appeals (1) a judgment of conviction entered after a jury found him guilty of one count of repeated acts of sexual assault of a child, and (2) an order denying his

postconviction motion.[1] Peltier's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[2] and ***Anders v. California***, 386 U.S. 738 (1967). Peltier filed a response to the no-merit report, and appellate counsel then filed a supplemental no-merit report. Upon consideration of the original and supplemental no-merit reports, Peltier's response, 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.

Peltier was charged with repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(d), and exposing a child to harmful materials, contrary to WIS. STAT. § 948.11(2)(a). The victim in both counts was his live-in girlfriend's daughter who was ten or eleven years old during the charging period, and twelve years old at the time of trial. At trial, the victim testified that on at least three occasions, Peltier had touched, kissed and licked her "privates" and had placed her hand on his penis. A video of the victim's forensic interview conducted at the Child Advocacy Center (CAC) was played for the jury. In addition to the victim, the State presented as witnesses a forensic interviewer from the CAC, the victim's father, and Officer Jonathan Massie, the primary investigator on the case. At the close of the State's case and on Peltier's motion, the circuit court directed a "not guilty" verdict on count two, causing a child to view harmful materials, and entered a judgment of acquittal.

[1] The Honorable Wayne J. Marik presided at trial and entered the judgment of conviction. The Honorable David W. Paulson entered the order denying Peltier's postconviction motion.

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

Peltier was represented by two attorneys from the same firm. Throughout trial, the defense argued that the victim was not credible, her story was implausible, and she had motive to lie, namely, she did not like Peltier and wanted her parents to reconcile. The defense presented the victim's mother and maternal grandmother in its case in chief. Following an on-the-record colloquy, Peltier exercised his right not to testify. After deliberations began, the jury asked to watch the victim's forensic interview for a second time. Neither party objected and the jury was permitted to view the video in the courtroom. After further deliberation, the jury found Peltier guilty of count one and at sentencing, the court imposed an eighteen-year bifurcated sentence, with eight years of initial confinement followed by ten years of extended supervision.

Appointed postconviction counsel filed a motion alleging that it was error for the circuit court to replay the CAC video at the jury's request and that trial counsel was ineffective for failing to object to this replay of the victim's interview. Following an evidentiary ***Machner***[3] hearing, the circuit court denied the motion, finding that trial counsel had a strategic reason for not objecting to the video's replay and determining that nothing in the law prevented the court from playing the video in response to the jury's request. This no-merit appeal follows.

The no-merit report discusses whether there is arguable merit to a challenge to the sufficiency of the evidence supporting the guilty verdict. We may not reverse a conviction on the basis of insufficient evidence "unless 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***

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Here, the victim's trial testimony was sufficient to establish all the offense elements; a reasonable juror could have found beyond a reasonable doubt that Peltier engaged in at least three acts of sexual contact with a person under the age of thirteen during the time period alleged.

In his response to counsel's no-merit report, Peltier points to evidence presented at trial that undercut the victim's testimony, in particular, the testimony of the victim's mother. Peltier highlights aspects of the mother's testimony that directly contradicted or rendered implausible the facts testified to by the victim. He also draws our attention to evidence which arguably undercut the victim's credibility, such as a letter of questionable veracity that the victim wrote to a teacher accusing Peltier of physical abuse, and the mother's testimony about the victim's tendency to lie. Peltier misunderstands our standard of review. When we review the sufficiency of the evidence to support a jury's verdict, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether a jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. ***Id.*** at 503-04. The credibility of the witnesses and the weight of the evidence is for the jury. ***Id.*** at 504. A reviewing court "must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id***. at 506-07. Given the proper standard of review, any challenge to the sufficiency of the evidence is without arguable merit.

Next, the no-merit report discusses whether any arguably meritorious claim arises from the fact that, without objection and at the jury's request, the jury was permitted to re-watch the victim's videotaped interview in the courtroom after the start of deliberation. We agree with appellate counsel's analysis of this issue and conclude it is without arguable merit. The circuit

court permissibly allowed the video to be replayed in open court. *See* ***State v. Anderson***, 2006 WI 77, ¶¶30-32, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by* ***State v. Alexander***, 2013 WI 70, ¶¶26-29, 349 Wis. 2d 327, 833 N.W.2d 126; ***Franklin v. State***, 74 Wis. 2d 717, 724-25, 247 N.W.2d 721 (1976). Further, there is no arguable merit to a claim that trial counsel's failure to object to replaying the video constituted ineffective assistance. The postconviction court's finding that trial counsel made an intentional and strategic decision to permit the replay is not clearly erroneous, and is well-supported by the record, especially the ***Machner*** hearing testimony of both trial attorneys. Any further challenge to trial counsel's conduct as related to this claim would be wholly frivolous.

The no-merit report next discusses whether the testimony of Robin Klaila, a forensic interviewer at the CAC, gives rise to a potentially meritorious issue, and concludes it does not. Erika Lamahieu, the person who actually conducted the forensic interview of the victim, was deployed in Afghanistan at the time of Peltier's jury trial. In her place, Klaila was permitted to lay the foundation for the video's admission. Prior to trial, Peltier moved to either exclude Klaila's testimony under the expert witness statute, WIS. STAT. § 907.02, or to hold a ***Daubert***[4] hearing on its admissibility. The parties came to an agreement wherein Klaila would testify about the forensic interview process used by examiners at the CAC, but would not be permitted to offer an opinion as to whether the process was followed in this particular interview. Consistent with the agreement, Klaila described the "Stepwise" interview protocol and was cross-examined by the defense.

[4] ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993).

In his response, Peltier asserts that Klaila's testimony ran afoul of the Confrontation Clause of the United States Constitution because the State did not prove Lamahieu was unavailable.[5] We conclude that a challenge to Klaila's testimony on confrontation or other grounds lacks merit. On the condition that Klaila not opine as to whether the correct protocol was followed, Peltier agreed that she could testify. Peltier has forfeited any challenge predicated on Lamahieu's potential availability. To the extent Peltier might claim that trial counsel's agreement constituted ineffective assistance, he has not and cannot show prejudice. Klaila simply laid a foundation and provided context for the video's admission.

The final issue discussed in appellate counsel's original no-merit report is whether Peltier's sentence was the result of an erroneous exercise of discretion. The no-merit report states the correct standard of review and points to those parts of the sentencing court's remarks which demonstrate that the court adequately discussed the appropriate facts and factors relevant to sentencing, and explained why its sentence was the minimum amount of confinement "consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted); ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The eighteen-year sentence is well within the sixty-year maximum and cannot be

[5] Anticipating this argument, the no-merit report concludes that there was no confrontation clause violation pursuant to ***State v. Griep***, 2015 WI 40, ¶¶55-57, 361 Wis. 2d 657, 863 N.W.2d 567 (substitute analyst was permitted to offer expert opinion even though he did not perform the actual testing where he testified that he independently reviewed the records in the case and came to an independent opinion). Because Klaila did not offer an expert opinion, we question the necessity of counsel's analysis. To the extent it is applicable, we agree with appellate counsel's analysis and conclusion that ***Griep*** and its ilk permit Klaila's testimony.

considered unduly harsh or excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

In Peltier's response to the no-merit report, he argues that Massie "suppressed evidence favorable to Peltier" because he did not (1) collect bedsheets, blankets or underwear and test them for DNA, (2) have a sexual assault examination performed on the victim, or (3) interview certain witnesses Peltier believes should have been interviewed. Peltier argues that Massie's failure to perform these tasks violated the State's duty to turn over and to preserve potentially exculpatory evidence.[6] *See* ***State v. Harris***, 2004 WI 64, ¶¶13, 39, 272 Wis. 2d 80, 680 N.W.2d 737 (the State violates a defendant's right to due process where it withholds exculpatory, material evidence); ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) ***(Greenwold II)*** (a defendant's due process rights may be violated if the police failed to preserve evidence that is apparently exculpatory, or acted in bad faith by failing to preserve potentially exculpatory evidence). As Peltier's response acknowledges, trial counsel extensively cross-examined Massie about his investigation and argued that these alleged investigatory failings provided reasonable doubt as to Peltier's guilt. Appellate counsel's supplemental no-merit report discusses Peltier's response and explains why the cases Peltier cites in support of his due process arguments are inapt. We are satisfied that the supplemental no-merit report properly analyzes these claimed due process violations as without merit and this court will not discuss them further.

[6] Peltier lists other tasks he thinks Massie should have performed, such as "look[ing] at" a DVR system and checking items such as furniture for DNA. Our conclusion that Peltier has not shown a potentially meritorious due process violation applies to all complaints in his response concerning the scope of Massie's investigation.

Though we agree with appellate counsel's analysis of the issues addressed in the original and supplemental no-merit reports, we consider counsel's discussion incomplete. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial motions, jury selection, evidentiary objections during trial, confirmation that the defendant's waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening and closing statements. With the exception of a brief reference to the court's colloquy regarding Peltier's decision to not testify, the no-merit report fails to give any indication that appointed counsel considered whether these parts of the process give rise to potential appellate issues.[7] As part of our independent review, we have considered each of these areas and determine that none gives rise to an arguably meritorious challenge. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (difficult to know the nature and extent of the court of appeals' "examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion").

[7] Counsel has a duty to review the entire record for potential appellate issues. A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See* ***McCoy v. Court of Appeals of Wis.***, 486 U.S. 429, 438 (1988). It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. *See* ***State v. Allen***, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). Counsel should at least briefly address all aspects of a jury trial in future no-merit reports.

In terms of pretrial motions, most issues were either agreed upon by the parties or decided in Peltier's favor.[8] As to evidentiary objections, the circuit court sustained a number of Peltier's objections and overruled various objections levied by the State. Having reviewed the circuit court's rulings on pretrial motions and on evidentiary objections made during trial, we conclude that none gives rise to an issue of arguable merit. Additionally, the circuit court conducted a proper colloquy with Peltier about his waiver of the right to testify. Further, the jury instructions properly stated the law. Finally, with the exception of one comment asking the jury to send a message to the victim, the State did not make improper arguments during opening or closing arguments. As to the improper remark, the court sustained Peltier's objection and instructed the jury to disregard the State's argument.

Our review of the record discloses no other potential issues for appeal.[9] Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to further represent Peltier in this appeal. Therefore,

[8] For example, the court granted Peltier's motion to admit other acts evidence regarding the victim's untruthfulness, and the parties agreed that Peltier's statements to law enforcement were admissible, but that the recording of those statements would not be played for the jury. Though the court denied Peltier's pretrial motion to dismiss count two as wholly unrelated to the acts alleged in count one, it ultimately dismissed count two at the close of the State's case on Peltier's motion. As to the fact that the victim turned twelve before trial, *see* WIS. STAT. § 908.08(3)(a)1., the parties acknowledged the statutory significance and affirmatively agreed to the admission of her recorded interview.

[9] We observe that the record index incorrectly states that R. 68 is a "Transcript of hearing held 7-23-2013" when the hearing date is actually June 19, 2012. The transcript's cover page reflects the correct hearing date. Additionally, the offense date alleged in the original information was "on or about Fall, 2010." Without objection, the State was permitted to file an amended information alleging the charging period as "between [] September 01, 2010 and February 8, 2011." This amended charging period was presented to the jury by the circuit court and through the jury instructions. The judgment of conviction does not reflect the amendment; it contains the preamendment offense date of "09-01-2010." Following remittitur, the circuit court may wish to direct the entry of a corrected judgment reflecting the date[s] of commission contained in the amended information.

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

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved from further representing Troy M. Peltier in this matter. *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