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September 25, 2018

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

2018AP204-CRNM State of Wisconsin v. Justin L. King (L. C. No. 2015CF189)

Before Stark, P.J., Hruz and Seidl, 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).

Justin L. King appeals from a judgment of conviction for two counts of being a party to the crime of second-degree sexual assault of a child. 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). King filed a response to the no-merit report, and counsel then filed a supplemental no-merit report. *See* RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

As co-actors, King and Laura McClure were charged with sexually assaulting a fifteen-year-old girl at King's apartment by having sexual intercourse and sexual contact with her. At a jury trial, the girl testified that she became very intoxicated at King's apartment. She admitted she also smoked marijuana while alone in the bedroom with King and McClure. She testified that later in the evening, King had intercourse with her and touched her breasts. She also said McClure touched her vagina inside with her fingers and outside with her tongue. Although McClure had given the police a statement that sexual activity occurred between herself, King, and the girl, at trial she denied any such activity and said she had lied to the police. McClure testified that there was no sexual contact between King and the victim. The defense presented no evidence. The jury found King guilty of two counts of being a party to the crime of second-degree sexual assault of a child. King was sentenced to concurrent terms of three years' initial confinement and four years' extended supervision.

The no-merit report addresses the potential issues of whether King's trial counsel was ineffective for not moving to suppress evidence, whether the evidence was sufficient to support the guilty verdicts, whether King should be granted a new trial in the interests of justice, and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied

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

that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

The no-merit report fails to discuss other components of a jury trial that must be examined for the existence of potential appellate issues (e.g., pretrial rulings, 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 statements and closing arguments). The no-merit report fails to indicate that appointed counsel considered whether those parts of the jury trial give rise to potential appellate issues. Our independent review of the trial record discloses no issues of arguable merit. Jury voir dire was more than adequate. There was no objection to potential jurors struck for cause, and the circuit court had a sufficient reason for striking those potential jurors. The circuit court properly exercised its discretion in overruling the evidentiary objections by the defense during the trial. The trial court conducted a proper colloquy with King about his waiver of the right to testify. The jury instructions properly stated the law. No improper arguments were made to the jury during opening or closing arguments. The jury was polled and confirmed that the verdict was unanimous.

The main premise of King's response is that the victim lied on the stand. He also claims his trial counsel was ineffective by not cross-examining the victim on inconsistencies between her statements to police and her trial testimony. Trial counsel's cross-examination of the victim showed contradictions between her testimony and some things she told police. During cross-examination, counsel also elicited the victim's admission that she had sent text messages saying nothing happened. Thus, trial counsel did a reasonable job drawing the victim's credibility into

question, and there is no arguable merit to a claim he was ineffective during the victim's cross-examination. The jury determines the credibility of witnesses and the weight of their testimony.² See *State v. Wachsmuth*, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). While the record can be read to show minor discrepancies in the victim's testimony, inconsistencies and contradictions in a witness's testimony are for the jury to consider in judging credibility. See *Kohlhoff v. State*, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). There is no arguable merit to a claim that the jury was required to reject the victim's testimony as incredible.

King claims that because there was no DNA evidence, the jury's verdict is wrong. There is no requirement that the prosecution meet its burden of proof by DNA or other physical evidence.³ The victim's testimony alone was sufficient to support the jury's verdict.

King also asserts in his response that his trial counsel was ineffective by failing to call King's nephew as a witness,⁴ advising King not to testify, failing to present evidence of Facebook messages suggesting that nothing happened, and not obtaining a second presentence investigation report. King also asserts, as he did at sentencing, that as he was walking out of the courthouse after being convicted, he heard the alternate juror say she had looked King up on the

² Because it is the jury that decides credibility, we reject King's assertion that he was denied a fair trial because police pressured McClure to say things that were not true. The jury heard McClure's explanation of why she lied to police, that she made up parts of her statement because she has "a very active imagination," and that she was having a "severe episode" of mental health issues when interviewed by police. The jury was free to accept or reject McClure's explanation as to why she told the police that there was sexual activity between herself, King, and the victim.

³ The jury heard why DNA testing was not done on any of the items retrieved from King's apartment.

⁴ King's nephew was at the apartment earlier in the evening, but McClure threw him out of the apartment at some point. The nephew was angry and made a noise complaint about King's apartment to the police.

computer the night before. The supplemental no-merit report addresses these claims raised in King's response. The discussion in the supplemental report satisfactorily describes why none of the claims has arguable merit, and we will not discuss them further.

Our review of the record discloses 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 King 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 attorney Melissa Petersen is relieved from further representing Justin L. King 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