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October 30, 2018

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

2017AP288-CRNM State of Wisconsin v. Kenneth Raymond Hall (L.C. #2015CF2220)

Before Sherman, Blanchard and Fitzpatrick, 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 George M. Tauschcheck, appointed counsel for Kenneth Raymond Hall, 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:

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

(1) the sufficiency of the evidence to support the jury verdict; and (2) whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. Hall has responded to the no-merit report, arguing that his trial counsel was ineffective by: (1) failing to object to admission of the videotape of the forensic interview of the child victim; (2) failing to obtain the victim's medical records or consult a medical expert; (3) failing to introduce evidence that Hall was willing to take a polygraph test; (4) failing to object on grounds that the prosecutor was asking leading questions and testifying for the State, and by failing to call witnesses to impeach a State witness; (5) failing to object to hearsay evidence; and (6) failing to request an instruction on a lesser-included offense. Counsel has filed two supplemental no-merit reports. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit reports, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Hall was convicted of first-degree sexual assault of a child by intercourse with a child under twelve, following a jury trial. The court sentenced Hall to the mandatory minimum of twenty-five years of initial confinement, plus seven years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the conviction. 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 evidence at trial, including the videotape of the forensic interview of the victim and the testimony of the victim, the victim's mother, the

investigating officer, and an inmate housed with Hall who claimed Hall made inculpatory statements to him regarding this case, was sufficient to support the verdict.

Hall argues in his no-merit response that his trial counsel was ineffective for several reasons. A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984). We conclude that a claim of ineffective assistance of counsel would lack arguable merit.

Hall contends first that his counsel should have objected to the State's introduction of the videotaped forensic interview of the child victim. We conclude that a claim that trial counsel was ineffective by failing to object to the videotape would be wholly frivolous because counsel stated repeatedly on the record that he chose not to object to the videotape for strategic reasons. *See* ***State v. Breitzman***, 2017 WI 100, ¶65, 378 Wis. 2d 431, 904 N.W.2d 93 ("Trial strategy is afforded the presumption of constitutional adequacy."); ***State v. Elm***, 201 Wis. 2d 452, 464–65, 549 N.W.2d 471 (Ct. App. 1996) (counsel's reasonable strategic decision will not support a claim of ineffective assistance of counsel).

At a pretrial hearing, the State put on the record that it intended to use the forensic interview of the child victim. Defense counsel stated that he had viewed the recorded interview, and that he had no objection to its admission. On the first day of trial, defense counsel affirmed that he had no objection to admission of the recording, and stated that he had viewed the video with Hall. Defense counsel explained further: "As a trial strategy, there's a portion of the forensic interview, I believe it helps the defense case by playing it." Hall confirmed that he understood. Later that day, defense counsel reiterated that the defense was not challenging

admission of the videotape, and stated that "we believe that there's things on the disc that can help the defense's case also." Hall confirmed that he had viewed the videotape with counsel. After the videotape was played for the jury, defense counsel stated again that the defense had chosen not to object to the videotape for tactical reasons, noting that the victim acted at times in a playful manner during the interview.[2] Because counsel explained a reasonable strategy in choosing not to object to the videotape, and Hall agreed to that strategy, a claim of ineffective assistance of counsel on this basis would lack arguable merit.[3] *See* ***State v. Kimbrough***, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752 ("[O]ur function upon appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms."). *See also* ***State v. McDonald***, 50 Wis. 2d 534, 538–39, 184 N.W.2d 886 (1971) (defendant who acquiesces to trial counsel's strategic choice is bound by that decision); ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985) (explaining that the "'reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions'" (quoted source omitted)).

Next, Hall contends that his trial counsel was ineffective by failing to obtain medical reports as to testing of the victim following the alleged assault and failing to consult a medical expert. Hall also cites ***Thomas v. State***, 92 Wis. 2d 372, 384, 284 N.W.2d 917 (1979), for the

[2] Defense counsel also stated that he had not been able to play the videotape on his laptop computer at the defense table while it was played on the larger screen for the jury, but that the defense was able to hear the videotape and had watched it previously. Hall confirmed that was correct. To the extent that Hall argues counsel was ineffective based on being unable to view the video at the defense table, and failing to raise any objection on that basis, we discern no arguable merit to that contention.

[3] Hall contends that his trial counsel's failure to object to the videotape was unreasonable because the videotape contained the only evidence of penetration to support the first-degree sexual assault of a child charge. However, the State's witness, Marquise Green, testified that Green had been jailed with Hall and that Hall admitted to Green that Hall placed his finger inside the victim's vagina.

proposition that "to sustain a conviction there should be corroboration by other evidence as to the principal facts relied on to constitute the crime," and argues that there was no physical corroboration of the victim's claims in this case. The ***Thomas*** court, however, also recognized that "as a general rule the conviction of a sex crime frequently rests upon the uncorroborated testimony of a complaining witness." ***Id.*** The court explained that the requirement for corroboration is limited to instances "'[w]here the testimony of the prosecuting witness bears upon its face evidence of its unreliability,'" such as when the testimony was "'intrinsically improbable and almost incredible.'" ***Id.*** (quoted sources omitted). Such was not the case here. Moreover, Hall has not explained how medical reports or a medical expert would have supported his defense against the allegations in this case. Because nothing in the record, the no-merit reports, or the no-merit response would support a non-frivolous argument that the defense was prejudiced by the lack of medical reports or a medical expert, a claim of ineffective assistance of counsel on this basis would be wholly frivolous.

Hall also contends that his trial counsel was ineffective by failing to introduce evidence that Hall was willing to take a polygraph test. Hall asserts that law enforcement asked him if he would be willing to take a polygraph test, and that he stated that he would. In ***State v. Hoffman***, 106 Wis. 2d 185, 217, 316 N.W.2d 143 (Ct. App. 1982), we held that "an offer to take a polygraph examination is relevant to an assessment of the offeror's credibility and may be admissible for that purpose." However, we subsequently clarified that "an agreement to submit to a polygraph test at the suggestion or request of another is not an offer within the meaning of ***Hoffman***." ***State v. Pfaff***, 2004 WI App 31, ¶28, 269 Wis. 2d 786, 676 N.W.2d 562. Because Hall asserts that he agreed to submit to a polygraph test at the request of law enforcement, not

that Hall offered to submit to the test, the evidence was not admissible under ***Hoffman***. We therefore discern no arguable merit to a claim of ineffective assistance of counsel on this basis.

Hall also contends that his trial counsel was ineffective by failing to object to the prosecutor improperly using leading questions to elicit testimony of the sexual assault from the child victim. However, we have recognized that "leading questions have been allowed … when the witness is immature, timid or frightened," and "an exception to the undesirability of leading questions on direct examination has been historically recognized" when "applied to a child witness." ***State v. Barnes***, 203 Wis. 2d 132, 138-40, 552 N.W.2d 857 (1996). We discern no arguable merit to a claim that trial counsel was ineffective by failing to object to the prosecutor asking leading questions of the four-year-old victim in this case.

Hall then contends that his counsel should have called witnesses to impeach the State's witness, Marquise Green, who testified that Hall confessed to him while they were jailed together. Hall asserts that other inmates would have testified that Green admitted he lied about Hall confessing. We ordered no-merit counsel to investigate this issue further, and counsel filed a second supplemental no-merit report stating that he consulted with Hall, and Hall stated that he was unable to identify any witnesses who would testify that Green admitted his testimony was false. We therefore discern no arguable merit to a claim of ineffective assistance of counsel on this basis. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126 (claim of ineffective assistance of counsel for failure to investigate must specifically allege what the investigation would have revealed and how it would have altered the outcome of the trial). Hall also contends that the prosecutor testified for the State when the prosecutor asked Green to confirm that the prosecutor did not sign an agreement that Green proposed for Green to receive specific consideration for his testimony against Hall. However, the prosecutor asked the

questions of Green, rather than testifying to those facts himself. We therefore discern no arguable merit to a claim of ineffective assistance of counsel for failing to object to the prosecutor testifying.

Next, Hall contends that his trial counsel was ineffective by failing to object to hearsay. Hall contends that his trial counsel should have objected to testimony by the victim's mother. Hall argues that the mother's testimony as to what the victim told her did not fall within a hearsay exception for an excited utterance. *See* ***State v. Huntington***, 216 Wis. 2d 671, 681-82, 575 N.W.2d 268 (1998) ("'The excited utterance exception … is based upon spontaneity and stress ….'" (quoted source omitted)). Hall asserts that the victim's report of the abuse was not contemporaneous or spontaneous because the victim did not make the statement to her mother until the day after the sexual assault occurred and the victim's mother elicited the report by asking the victim whether anyone had touched her and whether Hall had put his hands into her underwear. He also points out that there was no evidence that the victim was in a heightened emotional state when she reported the abuse. However, in ***Huntington***, the supreme court recognized "'a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are sole witnesses to the crime.'" ***Id.*** at 682 (quoted source omitted). The court noted that the excited utterance exception has been "liberally construed" in cases "where a child has made an allegation of sexual abuse that does not immediately follow the incident … to hold such statements sufficiently contemporaneous and spontaneous to fall within the exception." ***Id.*** The court also recognized three common factors supporting application of the excited utterance exception, all of which apply here: "(1) the child is under ten years old; (2) the child reports the sexual abuse within one week of the last abusive incident; and (3) the child first reports the abuse

to his or her mother." ***Id.*** at 683. Accordingly, we conclude that a claim of ineffective assistance of counsel for failing to object to the mother's testimony of the victim's report of the sexual assault would be wholly frivolous.

Hall argues similarly that nothing about the forensic interview supports admission of the victim's statements as excited utterances. However, determinations of admissibility of forensic interviews are made pursuant to WIS. STAT. § 908.08. Moreover, as set forth above, counsel explained his strategic decision not to object to the forensic interview. A claim of ineffective assistance of counsel on this basis would lack arguable merit.

Finally, as to Hall's claim of ineffective assistance of counsel, Hall contends that his trial counsel was ineffective by failing to request a jury instruction on the lesser included offense of second-degree sexual assault. He asserts that the evidence supported a conviction for sexual contact without penetration, and that his counsel therefore should have requested the instruction. However, a lesser included instruction would have been inconsistent with Hall's defense that he did not sexually assault the victim at all and that the victim fabricated the story so that she could stay home with her mother instead of going to Hall's home. We have held that trial counsel is not ineffective for failing to request a lesser included offense instruction when, as here, "the record shows that a reasonable attorney could have chosen an all-or-nothing approach as an objectively reasonable defense strategy." *See* ***Kimbrough***, 246 Wis. 2d 648, ¶¶1, 32. Accordingly, a claim of ineffective assistance of counsel on this basis would lack arguable merit.

Finally, the no-merit report addresses whether a challenge to Hall'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). The record establishes that Hall was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Hall's character and criminal history, the seriousness of the offense, 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 court sentenced Hall to the mandatory minimum of twenty-five years of initial confinement plus seven years of extended supervision. We discern no erroneous exercise of the court's sentencing discretion.

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 George M. Tauscheck is relieved of any further representation of Kenneth Raymond Hall 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