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June 19, 2019

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

2018AP66-CRNM State of Wisconsin v. Jesse L. Horrighs (L.C. # 2014CF1741)

Before Lundsten, P.J., Kloppenburg 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 Suzanne Edwards, appointed counsel for Jesse Horrighs, 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 identifies the following

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

potential issues: (1) ineffective assistance of counsel; (2) evidentiary rulings and jury selection; (3) sufficiency of the evidence to support the jury verdict; and (4) the sentence imposed by the circuit court.² Horrighs was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel’s assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Horrighs was convicted, after a jury trial, of second-degree sexual assault of a child. The court sentenced Horrighs to eight years of initial confinement and eight years of extended supervision. Horrighs filed a postconviction motion seeking the disclosure of photographs taken during the child victim’s examination by a sexual assault nurse examiner (SANE). The postconviction motion argued that review of the photographs was necessary to determine whether Horrighs’s trial counsel was ineffective by failing to retain an expert to provide an alternate explanation for the injuries to the victim’s vaginal area that were noted during the SANE exam. The circuit court denied the motion, explaining that Horrighs had not shown that the evidence would have led to a different outcome at trial.

The no-merit report addresses whether there would be arguable merit to a claim of ineffective assistance of counsel. It concludes that there would be no arguable merit to any claim

² This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in *State v. Trammell*, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). The order noted that here, at trial, jury instruction WIS JI—CRIMINAL 140 was given to the jury, and that the supreme court granted review in *Trammell* to address whether the holding in *State v. Avila*, 192 Wis. 2d 870, 535 N.W.2d 440 (1995)—that it is “not reasonably likely” that WIS JI—CRIMINAL 140 reduces the State’s burden of proof—is good law; or should *Avila* be overruled on the ground that it stands rebutted by empirical evidence. The supreme court has now issued a decision in *Trammell*, holding “that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State’s burden of proof below the reasonable doubt standard.” *State v. Trammell*, 2019 WI 59, ¶67, _Wis. 2d _, _N.W.2d _.

that trial counsel was ineffective at trial or sentencing. *See Strickland v. Washington*, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense). On our own review, we agree that nothing before us would support a nonfrivolous claim of ineffective assistance of counsel.

Additionally, the no-merit report notes that Horrighs sought postconviction disclosure of the photographs taken during the SANE exam. It states that Horrighs sought the photographs to determine whether the injuries observed during the exam could have been attributed to a medical condition or were inconsistent with the described sexual assault. The no-merit report asserts that there would be no arguable merit to a challenge to the order denying the postconviction motion because it is unlikely that an expert opinion that the injuries were the result of another medical condition or event would have altered the jury verdict. Although no-merit counsel does not explain her reasoning, we agree that further proceedings on this issue would lack arguable merit.

A defendant seeking postconviction discovery must establish that the evidence sought is consequential to an issue in the case and that there is a reasonable probability that there would have been a different outcome with the evidence. *State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999). Here, the postconviction motion argued that review of the photographs was necessary to determine whether trial counsel was ineffective by failing to retain an expert to provide an alternate explanation for the injuries to the victim's vaginal area noted during the SANE exam. *See Strickland*, 466 U.S. at 687-694. However, at trial, the examining nurse testified only that the injuries to the child victim's vaginal area were "consistent" with the reported sexual assault. Defense counsel elicited that "consistent" meant that it was *possible* that the injuries were caused by the sexual assault, not that the injuries were *conclusive* of an assault.

Defense counsel also elicited that the nurse had not explored with the victim or the victim's mother other possible sources of the injury. The nurse further stated that the noted injuries could have been caused by a fall, although she was unaware of that history. Thus, the jury heard that, ultimately, the evidence as to the source of the injuries to the victim's vaginal area was inconclusive. Moreover, the other evidence at trial included the child victim's recorded statement of the assault during a forensic examination and the victim's mother's testimony that she witnessed part of the assault. We conclude that it would be wholly frivolous to argue that the circuit court erred by denying Horrighs's postconviction motion seeking the SANE photographs for review by an expert to determine if there was another explanation for the injuries. *See O'Brien*, 223 Wis. 2d at 323 (holding that "a party who seeks post-conviction discovery must first show that the evidence is consequential to an issue in the case and had the evidence been discovered, the result of the proceeding would have been different").

The no-merit report identifies the potential issue of "whether Horrighs'[s] trial was fair." On this issue, the no-merit report states that the circuit court "made several ruling[s] pretrial which addressed admissibility of other acts evidence, witness testimony, along with other evidentiary issues." However, the no-merit report does not explain what those rulings were, state the legal standard, or explain why she has concluded that a challenge to those rulings would lack arguable merit. Nonetheless, this court has conducted an independent review of the record, and has concluded that a challenge to the court's evidentiary rulings would lack arguable merit.

Horrighs filed a pretrial motion seeking to exclude the victim's statements during her forensic interview that Horrighs had sexually assaulted her on prior occasions. Horrighs argued that the references to prior sexual assaults were impermissible other acts evidence. The circuit court denied the motion to exclude the evidence, explaining that there is greater latitude for

admission of other acts evidence in child sexual assault cases, *see* WIS. STAT. § 904.04(2)(b), and that the prior acts involving the same victim were admissible for the proper purpose of showing motive, intent, credibility, and context. We conclude that a challenge to the circuit court's exercise of discretion would lack arguable merit. *See* §§ 904.04(2)(b) (providing that, in a child sexual assault case, "evidence of any similar acts by the accused is admissible"); 904.04(2)(a) (other acts evidence admissible to show motive or intent).

Horrighs also filed a pretrial motion to exclude the State's proposed expert testimony by the child victim's special education teacher. He acknowledged that the State had provided notice that it would call one of the victim's teachers at trial, but argued that the State had failed to provide him with records or statements concerning the witness's testimony or any information as to the witness's qualifications to render an opinion as to the victim's developmental delay and ability to communicate. The court denied the motion to exclude the expert testimony. It determined that, because the teacher's proposed testimony would be based on the teacher's interactions with the child victim rather than on records, the State was not required to produce school records. We conclude that a challenge to the circuit court's exercise of discretion to admit the testimony would lack arguable merit. *See State v. Williams*, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919 (admission of testimony generally a matter for circuit court's discretion).

The no-merit report also concludes that there would be no arguable merit to further proceedings based on jury selection, evidentiary rulings at trial, or the circuit court's answers to questions submitted by the jury during deliberations. We agree that none of these issues would have arguable merit.

The no-merit report addresses whether the evidence was sufficient to support the conviction. Although counsel does not fully explain her conclusion that the evidence was sufficient, we agree that there would be no arguable merit to a claim of insufficiency of the evidence. 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). The evidence at trial, including testimony by the investigating officers, the SANE nurse, and the victim and her mother, was sufficient to support the jury verdict.

Finally, the no-merit report addresses whether a challenge to Horrichs’s sentence would have arguable merit. The no-merit report states in conclusory fashion that the circuit court properly addressed the sentencing factors and that the sentence was within the maximum allowed by statute. While the no-merit report does not fully address this issue, we conclude that a challenge to the court’s sentence would lack 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). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Horrichs’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 Horrichs to eight years of initial confinement and eight years of extended supervision. The sentence was within the maximum Horrichs faced and, given the facts of this case, there would be no arguable

merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive “only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances” (quoted source omitted)). We discern no arguable merit to a challenge to the sentence imposed by the court.

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.

As noted in this opinion, the no-merit report failed to adequately address the identified potential issues. Inadequate no-merit reports unduly burden this court with first developing the potential issues identified by counsel. While this court has conducted an independent review of the record and concluded that further proceedings would lack arguable merit, counsel is cautioned that her future no-merit reports must explain the reasons that counsel has concluded that each identified issue lacks arguable merit, including explanation of the legal standard and application of that standard to the specific facts of the case.

IT IS ORDERED that the judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Suzanne Edwards is relieved of any further representation of Jesse Horrighs 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