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June 26, 2019

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

2018AP829-CRNM State of Wisconsin v. Joshua L. Hilgendorf (L.C. #2017CF248)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

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).

Joshua L. Hilgendorf appeals from a judgment of conviction entered after a jury found him guilty of second-degree sexual assault of a child and possession of drug paraphernalia. Hilgendorf's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Hilgendorf has filed a lengthy response.[2] Upon consideration of the no-merit report, the response, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The no-merit report examines whether: the complaint recited probable cause for Hilgendorf's detention; the initial appearance, preliminary examination, and arraignment met statutory requirements/were properly waived; the trial court properly exercised its discretion in allowing the admission of other-acts evidence; jurors were fairly selected or stricken and were properly instructed; opening statements and closing arguments comported with established law; the court's evidentiary rulings reflect a proper exercise of discretion; the jury's verdicts were supported by sufficient evidence; Hilgendorf's sentence reflects an appropriate exercise of discretion; and the determination of sentence credit and Hilgendorf's eligibility for the early-release programs, and the judgment were accurate.[3]

As our review of the record satisfies us that the no-merit report properly analyzes these issues and concludes that they are without merit, we address them no further, except for sufficiency of the evidence, as it is raised in Hilgendorf's response. We also are satisfied that

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Were it not for the fact that this case was placed on hold pending the supreme court's decision in ***State v. Trammell***, 2019 WI 59, ___ Wis. 2d ___, ___ N.W.2d ___. Hilgendorf's response would have been deemed untimely. ***Trammell*** has been decided and was filed on May 31, 2019. ***Id.***

[3] The no-merit report also indicates that the jury "sent several questions for submission," but our review of the record revealed no questions asked during deliberations.

Hilgendorf made a knowing, intelligent, voluntary, and informed decision to exercise his constitutional right to testify at trial.

Hilgendorf's response addresses numerous issues. Although none have arguable merit, we address them so that he better understands what can be brought to an appeal. The common thread running through his response is his belief that this no-merit appeal deprived him of a direct appeal.[4] It did not. A no-merit appeal is a direct appeal in which appellate counsel has determined there are no issues of arguable merit. ***State v. Tillman***, 2005 WI App 71, ¶¶16-17, 281 Wis. 2d 157, 696 N.W.2d 574. In some regards, a no-merit appeal "affords a defendant greater scrutiny of a trial court record and greater opportunity to respond than in a conventional appeal." ***Id.***, ¶18.

Hilgendorf contends he was convicted on insufficient evidence and that the State did not meet its burden of proof. The burden of proof at trial differs from the standard of review on appeal. "When the defendant challenges the sufficiency of the evidence, the test is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt." ***State v. Koller***, 87 Wis. 2d 253, 266, 274 N.W.2d 651 (1979). The question is not whether this court is convinced of the defendant's guilt but whether we are satisfied that the jury, acting reasonably, could be so convinced. ***Id.*** "If more than one inference can be drawn from the evidence, the inference which supports the jury finding

[4] Hilgendorf claims he did not fully comprehend the no-merit process as explained by appellate counsel and was told he had no choice in the matter. Counsel has certified that she advised him of his options under WIS. STAT. RULE 809.32(1)(c). Hilgendorf also asserts that he did not understand he had just thirty days within which to file his response. That is neither here nor there, as we accepted it although he filed it nearly eight months after it was due.

must be followed unless the testimony was incredible as a matter of law." ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

Contrary to Hilgendorf's assertion that appellate counsel did not address the issue, it is discussed under the heading "Verdicts."[5] The jury heard testimony that would satisfy the two elements of second-degree sexual assault of a child and the one element of possession of drug paraphernalia. Hilgendorf asserts that there were many inconsistencies in the testimony. That is irrelevant on appeal. It is for the jury "to decide which evidence is credible and which is not, and how conflicts in the evidence are to be resolved." ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). The jury thus was entitled to accept the State's witnesses' testimony as true or most credible.

Hilgendorf next contends that trial counsel performed ineffectively and that he "intends to file for a ***Machner***[6] hearing." An evidentiary hearing will be denied if the defendant presents only conclusory allegations. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. To permit a reviewing court to meaningfully assess the claim, the defendant must include details regarding who, what, when, where, and how the facts alleged entitle him or her to the relief sought. ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. All of Hilgendorf's claims lack such specificity.

[5] Defendants often challenge the sufficiency of the evidence after a jury trial. We recommend that all appellate counsel use a more specific heading to signal that discussion in the no-merit report.

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

He asserts that he was prejudiced by counsel's failures to call character witnesses who would have "show[n] there was no intent as to sexual contact" and to file pretrial motions other than fairly standard motions in limine. The only witness Hilgendorf suggests is his fiancée, but he does not describe what she would have said or how she could know his intent with the victim. He also does not hint at what motions he believes counsel should have made.

Hilgendorf contends it is "quite questionable" whether trial counsel had adequate time to prepare for the other-acts motion hearing, as counsel received the State's motion only the day before. The result, he says, is that the jury was allowed to hear the number of his prior convictions. He does not challenge the court's exercise of discretion in granting the motion.

First, as they are fairly common and the law is well-settled, other-acts motions should not require substantial research. Our review of the record shows that counsel argued fully and appropriately, and voiced no concern about having received the motion just the day before. Second, the State's other-acts motion dealt solely with a prior sexual assault of a different minor by Hilgendorf. While the motion was granted, the incident was not used at trial. Third, the number of Hilgendorf's prior convictions was not a result of the motion hearing; prior records are used in virtually every case. Hilgendorf's claim that defense counsel was ineffective for not questioning the victim at trial about her juvenile record has no merit because the prosecutor already had asked her, just as he asked the victim's boyfriend and mother about the number of prior offenses on their records.

Another failure, Hilgendorf claims, is that counsel did not inform him of counsel's duty to interview, or to arrange for an investigator to interview, various people[7] or that the SPD could hire an investigator, so as to "more fully explore[] new avenues for his defense." The victim, her boyfriend, her mother, and the two investigating police officers testified. Hilgendorf does not suggest what other relevant witnesses should have been investigated, what their testimony would have been, or what "new avenues" he thought would come to light. "[A] defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

Hilgendorf faults his counsel for not objecting when, during the victim's mother's testimony, she stated that her daughter was the "product of a kidnapping and a rape." He complains that the jury "accepted [the comment] as a fact," generating unfair sympathy. He also complains that counsel's examination of the boyfriend was "more helpful to the State, that counsel did not cross-examine the police officer who was involved in the drug paraphernalia count, and that during counsel's cross-examination of the officer who investigated the sexual-assault charge, counsel "stopped questioning [her] abruptly," instead of "pursu[ing] further specifics" that "may have given the jury a new perspective." These allegations, too, are wholly speculative, conclusory, and devoid of necessary facts.

[7] Ostensibly quoting SCR 20:4.2, he claims counsel was obliged to "interview, or arrange for an investigator to interview, witnesses and others—police, complainant, victim, other witnesses, co-defendants, client's family, etc." Supreme Court Rule 20:4.2 addresses communication with a person represented by counsel. We cannot discern to what source Hilgendorf refers.

Hilgendorf's last ineffectiveness claim is that counsel's failure to object to WIS JI—CRIMINAL 140 at the jury instruction conference constituted a waiver of his right to object to the instruction. That is true. ***State v. Trammell***, 2019 WI 59, ¶2, ___ Wis. 2d ___, ___ N.W.2d ___. The supreme court ruled, however, that the jury instruction does not mislead, confuse, or misdirect a jury. ***Id.***, ¶37. There is no arguable merit to a claim that he was prejudiced by the waiver.

Finally, Hilgendorf alleges "judicial coercion," saying the trial court rushed the jury to reach a verdict. By mentioning several times that it likely would be a one-day trial, he claims the court "creat[ed] an expectation in jurors' minds that a decision must be made by the end of that day." The jury began deliberations at 5:16 p.m. and returned a guilty verdict at 5:47 p.m. Hilgendorf contends it is "apparent that many members of the jury were more concerned with getting the trial over with" than examining the facts and weighing them honestly.

The trial court made no reference in its final instructions to the jury that it was under any time constraint. Aware that jurors have outside obligations, the court kept them abreast of the anticipated pacing, and advised them that, while it thought the trial would wind up in one day, it might go past 5:00 p.m. The jury's short deliberation time does not necessarily mean a lack of full consideration of the evidence. Further, the jury was polled immediately after and all twelve jurors indicated that the guilty verdict was theirs. Hilgendorf's assertion that the jury felt compelled by the court to reach a verdict by day's end is speculative and conclusory.

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 Hilgendorf 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 Erica L. Bauer is relieved from further representing Hilgendorf in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that Hilgendorf's response to the no-merit report is accepted.

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

Sheila T. Reiff
Clerk of Court of Appeals