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August 21, 2019

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

2018AP640-CRNM State of Wisconsin v. Michael T. Wagner (L.C. #2014CF618)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Michael T. Wagner appeals from a judgment convicting him of numerous crimes. Wagner's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Wagner filed a response. After reviewing

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

the record, counsel's report, and Wagner's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Wagner was convicted following a jury trial of first-degree sexual assault of a child. The charge stemmed from allegations that, between October 2012 and August 2013, he had sexual contact with his infant daughter. Wagner also pled no contest to fifty-one additional counts of possessing child pornography.[2] The circuit court imposed an aggregate sentence of forty years of initial confinement and twenty-three years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether the evidence at Wagner's jury trial was sufficient to support his conviction. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Wagner of his crime. That evidence included (1) Wagner's own statements that he sexually assaulted his daughter;[3] (2) his collection of hardcore infant

[2] Wagner's response focuses upon his sexual assault conviction and, according to appellate counsel, Wagner does not wish to contest his pleas to possessing child pornography. At any rate, based upon our review of the record, we conclude that a challenge to the entry of Wagner's pleas would lack arguable merit.

[3] Wagner discussed sexually assaulting his daughter in text messages/emails with other child pornography collectors/traders. He also discussed assaulting her with a prison inmate who was housed in his unit.

pornography, showing his sexual interest in infants; and (3) the fact that his daughter tested positive for chlamydia, a sexually transmitted disease. We agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In fashioning its sentence, the court considered the seriousness of the offenses, Wagner's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Wagner's relationship with the victim, her vulnerability as an infant, and his lack of remorse, the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Wagner's sentence would lack arguable merit.[4]

[4] According to appellate counsel, Wagner does not wish to challenge his sentence on the child pornography counts. Even if he did, his ability to do so would be limited by the fact that his trial counsel requested it. *See* ***State v. Magnuson***, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998) (defendants may not attack their sentence on appeal when the circuit court imposes the sentence requested by them).

Finally, the no-merit report addresses several other issues, including (1) whether pretrial motions were properly ruled upon;[5] (2) whether there were any procedural errors at trial; and (3) whether trial counsel was ineffective because, as Wagner observed, she was a single mother who had a daughter with the same name as the victim. We agree with counsel that these issues do not have arguable merit for appeal, and we will not discuss them further.

As noted, Wagner filed a response to counsel's no-merit report. In it, he largely rehashes his failed defenses at trial (e.g., his incriminating statements to others were just talk, he was never alone with the victim, he had alibis for when the alleged conduct took place, the victim's positive test for chlamydia was unreliable, etc.) and speculates how they could have been made stronger. He also complains that one juror should have been dismissed from the case because the juror once met the victim and her mother at a neighborhood party.[6] We are not persuaded that Wagner's response presents an issue of arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could

[5] Wagner filed multiple motions to dismiss the case. He also moved to make the charging period for the sexual assault count more specific. Additionally, he moved to sever the child pornography counts and exclude them as other-acts evidence in the sexual assault trial. The circuit court denied all of these requests. Meanwhile, the State moved to admit the lab report identifying chlamydia in the victim's rectum under the hearsay exception for health care records. The court granted the motion after concluding that the lab report, which was diagnostic and prepared by a private company, was not testimonial for Confrontation Clause purposes. The report was introduced during the testimony of the nurse practitioner who examined and treated the victim.

be raised on appeal, we accept the no-merit report and relieve Attorney Gregory P. Seibold of further representation in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gregory P. Seibold is relieved of further representation of Michael T. Wagner 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

[6] At voir dire, the victim's mother brought this meeting to the prosecutor's attention, who in turn informed the circuit court. The court asked the juror if he had any memory of the mother. He said he did not. The court then asked whether the mother's memory of having met the juror at some time in the past would impact his ability to be fair and impartial. He said it did not. Although the juror was not asked about the victim, it seems unlikely that he would remember her if he could not remember meeting the mother at the same party. In any event, on this record, we perceive no basis to disqualify the juror from serving.