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

2018AP420-CRNM State of Wisconsin v. Nathan T. Schloneger (L.C. # 2015CF542)

Before Brash, P.J., Kessler and Dugan, 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).

Nathan T. Schloneger appeals from a judgment of conviction for one count of repeated sexual assault of the same child, as a repeater. *See* WIS. STAT. §§ 948.025(1)(d) and 939.62(1)(c) (2013-14; 2015-16).[1] Schloneger's appellate counsel, Chris A. Gramstrup, has filed a no-merit

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

report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Schloneger filed a response to that no-merit report, and Gramstrup filed a supplemental no-merit report addressing the issues raised by Schloneger. We have now reviewed the reports and the response, and we have independently reviewed the record as mandated by ***Anders***.[2] We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm.

The no-merit report provides a detailed statement of the facts that led to Schloneger being charged with having sexual contact, over a two-year period, with a child who was younger than thirteen. The case proceeded to trial, where a jury found Schloneger guilty. The trial court imposed a sentence of twelve years of initial confinement and eight years of extended supervision. The trial court also ordered lifetime supervision "unless application is made to the court by the Department of Corrections." *See* WIS. STAT. § 939.615(2)(a) (2013-14; 2015-16).

The no-merit report addresses three issues: (1) whether there was sufficient evidence to support the jury's verdict; (2) whether the trial court erroneously exercised its sentencing discretion; and (3) whether trial counsel provided ineffective assistance. The no-merit report thoroughly addresses each of those issues, providing citations to the record and relevant authority. For example, with respect to the sufficiency of the evidence, the no-merit report

[2] Our review of this case was held in abeyance pending the Wisconsin Supreme Court's consideration of another defendant's appeal concerning jury instruction WIS JI—CRIMINAL 140, which was also used at Schloneger's trial. Based on the Wisconsin Supreme Court's resolution of that appeal, there would be no arguable merit to pursue postconviction proceedings based on the use of that jury instruction in this case. *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

describes the videotaped interview of the victim that was shown to the jury and notes that the victim also testified at trial. The victim's recorded and live testimony supports the jury's verdict.

We also agree with appellate counsel that there would be no arguable merit to challenging the sentence imposed, which was well within the maximum sentence of sixty-two years that could have been imposed. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). In addition, the trial court adequately explained the reasons it was imposing the sentence, consistent with ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

Finally, like appellate counsel, we have not identified any deficient performance by trial counsel. This court is satisfied that the no-merit report properly analyzes the issues it raises, and based on our independent review of the record, we agree with counsel's assessment that none of those issues has arguable merit.

Next, we turn to the issues that Schloneger identified in his response to the no-merit report. First, Schloneger alleges that the State engaged in prosecutorial misconduct by "blurt[ing] out confidential allegations that … [the trial court] ruled could not be entered at trial." Schloneger argues that this violated his Sixth and Fourteenth Amendment rights.

In his supplemental no-merit report, appellate counsel cites case law on prosecutorial misconduct and concludes that this issue does not have arguable merit. We agree. Prior to trial, the State filed an "other acts" motion seeking to admit evidence that about twelve years earlier,

Schloneger "engaged in sexual touching" of a different child, Jane.[3] The trial court denied the motion on grounds that it was not timely filed in accordance with the trial court's scheduling order. The parties then had this exchange:

> [The State]: If the issue arises that [trial counsel] is attempting to show that the child is making a false statement because some adult caused her to make that statement, doesn't that kick the door open to this kind of evidence?
>
> THE COURT: Rebuttal is a different question.
>
> [The State]: Okay. Then we will continue to keep [Jane] on our witness list.
>
> [Trial Counsel]: Understood, Your Honor.
>
> THE COURT: Rebuttal's a different – it's hugely different than the case in chief.
>
> [Trial Counsel]: Totally understand, Your Honor.

At trial, after the State rested, Schloneger testified in his own defense. During the State's cross-examination, the State asked Schloneger whether he was "sexually attracted to young girls." Schloneger replied, "No, I'm not." The State then asked: "Do you remember being in the care of [Jane] when she was five years old at her grandparents' house?"[4] The defense objected on relevance grounds and, outside the jury's presence, the parties presented arguments concerning the admissibility of Schloneger's alleged interactions with Jane. The trial court concluded that the potential evidence was not relevant. When the jury returned, the trial court

[3] This decision uses the pseudonym Jane when referring to that child.

[4] The prosecutor later explained, outside the jury's presence, that she "meant that [Schloneger] was responsible for [Jane's] care," not that Schloneger was in the child's care.

told them: "The objection has been sustained. The jury will disregard the question." The State did not attempt to ask any additional questions concerning Jane.

We conclude that there would be no arguable merit to asserting that Schloneger's constitutional rights were violated by this exchange. The trial court previously ruled that the other acts evidence could not be offered in the State's case-in-chief, but it acknowledged that the evidence could potentially be introduced later in the trial. When the State began to ask Schloneger about a time when Jane was at her grandparents' house, the defense objected before Schloneger could answer. The jury was instructed to disregard the State's question, and it heard nothing else about Jane during the trial. We agree with appellate counsel's analysis and conclusion: there would be no arguable merit to claiming prosecutorial misconduct.

The second issue Schloneger raised in his response concerns the jury that was selected for his trial. He argues that his Fourteenth Amendment rights were violated because the jurors "were not a variety of ages and were all the same ethnicity." We agree with appellate counsel's analysis of this issue. Schloneger was entitled to an "impartial jury," and there is nothing in the record to suggest that the jurors were not impartial. We also note that the trial court granted each of the defense's six motions to excuse a juror for cause, and the State did not independently move to exclude any other jurors for cause. Further, the defense did not raise any concerns about the jury selection process after each side exercised its peremptory strikes. Schloneger has not identified an issue of arguable merit.

The final issue Schloneger raises has to do with the evidence presented. He argues: "[T]he evidence presented in no way support[s] that great bodily harm was done." In response, appellate counsel asserts that "[g]reat bodily harm is not an element of the offense." Appellate

counsel is correct. The jury was not asked to make any findings concerning great bodily harm, as it is not an element of the offense. We note that a draft version of the jury instructions included a reference to great bodily harm, but the parties and the trial court recognized that error and revised the jury instructions before the jury was instructed. Schloneger has not identified an issue of arguable merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit reports, affirms the conviction, and discharges appellate counsel of the obligation to represent Schloneger further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Chris A. Gramstrup is relieved from further representing Nathan T. Schloneger 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