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**DISTRICT I**

October 31, 2019

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

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2018AP1997-CRNM      State of Wisconsin v. Marcus Pate (L.C. # 2017CF2134)

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).**

Marcus Pate appeals from a judgment of conviction entered after a jury found him guilty of one count of repeated sexual assault of the same child. *See* WIS. STAT. § 948.025(1)(d) (2015-16; 2017-18).<sup>1</sup> Pate's appellate counsel, Jeffrey W. Jensen, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Pate has not filed a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

response.<sup>2</sup> We have independently reviewed the record and the no-merit report as mandated by *Anders*.<sup>3</sup> We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.

Pate was charged with one count of repeated sexual assault of the same child. Specifically, Pate was alleged to have had repeated sexual contact with a girl under the age of thirteen. Pate gave a statement to the police, and trial counsel later told the trial court that he was not challenging Pate's statement. Ultimately, the State did not introduce any of Pate's statement at trial, and Pate did not testify.

Pate waived his right to a preliminary hearing after completing a written waiver form and having a colloquy with a court commissioner about his decision to waive that preliminary hearing. Thus, the first in-court testimony the child offered was at the jury trial. The child testified about numerous times when Pate touched her with his penis. The jury also watched a video of a forensic interview of the child in which she described the sexual contact with Pate.

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<sup>2</sup> Prior to sentencing, Pate filed a *pro se* petition for habeas corpus in this court raising concerns about his arrest and jury trial, as well as his lack of attendance at a pretrial conference. We denied the petition for several reasons, including the fact that Pate had other available remedies. *See State ex rel. Marcus Pate v. Richard R. Schmidt*, No. 2017AP2089-W, unpublished op. and order at 2 (WI App Dec. 29, 2017). Although Pate has not filed a response to the no-merit report, we will briefly address the concerns he raised in his petition for habeas corpus.

<sup>3</sup> Our review of this case was delayed because we held this appeal in abeyance pending the Wisconsin Supreme Court's consideration of an appeal concerning jury instruction WIS JI—CRIMINAL 140, which was used at Pate'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.

See WIS. STAT. § 908.08. That interview was conducted the day after the child told a school employee about the abuse.

The jury heard testimony that the results of the medical examination of the child were “normal” and did not provide evidence of sexual abuse.<sup>4</sup> Accordingly, the primary issue at trial was the credibility of the child’s testimony about sexual contact with Pate. In closing, the defense argued that the child was lying and pointed to inconsistencies in her testimony.

The jury found Pate guilty as charged. The trial court sentenced Pate to seven years of initial confinement and eight years of extended supervision.

The no-merit report addresses three issues: (1) whether there was sufficient evidence to support the jury’s verdict; (2) “[w]hether Pate validly waived his right to testify”; and (3) whether the trial court “erroneously exercised its sentencing discretion.” We agree with appellate counsel’s assessment that none of those issues presents an issue of arguable merit, and we will briefly address those issues and several others.

First, we agree with appellate counsel that the child’s testimony provided sufficient evidence to support the jury’s finding that Pate repeatedly sexually assaulted the child. “The credibility of the witnesses and the weight of the evidence is for the trier of fact.” *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990) (citations omitted). The jury was

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<sup>4</sup> The nurse practitioner who examined the child said the exam results did not surprise her “[b]ecause literature has shown and research has shown and our clinical experience has shown [that] 95 percent of the exams of victims who are known [to have been] sexually abused have normal genitalia exams” due to the body’s ability to heal itself. She also noted that she would not have expected to see an injury from the last reported contact between the child and Pate, as the child said the contact was “over clothing, not under clothing.”

entitled to accept the child's testimony, which provided evidence of more than three instances of sexual contact with Pate, as detailed in the no-merit report. *See id.*

Second, the no-merit report discusses the trial court's on-the-record colloquy with Pate concerning his decision not to testify at trial. We agree that the colloquy was adequate, as the trial court confirmed that Pate was aware of his right to testify and had discussed the issue with his trial counsel before choosing to waive that right. *See State v. Weed*, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485.

Third, there would be no arguable merit to challenging Pate's sentence, which was well within the maximum sentence of sixty 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 considered appropriate sentencing factors and explained the reasons for the sentence it imposed, consistent with *State v. Gallion*, 2004 WI 42, ¶¶17, 40-47, 270 Wis. 2d 535, 678 N.W.2d 197. For instance, the trial court mentioned the need to punish Pate and also expressed hope that Pate would be rehabilitated and "get the necessary treatment that [he needs] ... in a structured facility."

Next, we have carefully examined the trial transcript. We have not identified any basis for appeal based on the voir dire or the trial testimony. For example, the parties stipulated to excusing several jurors for cause, and the defense did not raise any concerns about the jury selection process.

We turn to several concerns that Pate raised in the *pro se* petition for habeas corpus that he filed with this court prior to sentencing. Pate expressed concern that when he was originally

arrested, the booking record indicated that he is “white” rather than African-American. Pate’s concern does not raise an issue of arguable merit for an appeal. Pate’s identity was never in question; at issue at trial was whether the sexual contact occurred as the child claimed.

Pate also expressed concern that his trial counsel did not introduce evidence that another child in the home, who told police about Pate’s abuse of the victim, later recanted. Again, Pate has not raised an issue of arguable merit. The State chose not to introduce testimony from that child witness, and the jury never heard testimony that the child observed the abuse.<sup>5</sup> Thus, there was no basis to introduce testimony about that child’s alleged recantation.

Another concern Pate expressed in his petition for habeas corpus was that trial counsel waived Pate’s appearance at the final pretrial conference. This does not present an issue of arguable merit. At that final pretrial conference, the parties simply set the trial date.<sup>6</sup> Contrary to Pate’s suggestion, the pretrial was not an evidentiary hearing. *See* WIS. STAT. § 971.04(1)(d) (indicating that a defendant has a right to be present “[a]t any evidentiary hearing”). It was not improper for trial counsel to waive his client’s appearance at the final pretrial conference.

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 Pate further in this appeal.

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<sup>5</sup> At sentencing, the State explained that a family member of the child who claimed to have witnessed the abuse “was not cooperative with the [S]tate’s office at trial and was refusing to bring that child in for trial.” The State said it chose to proceed without that additional child’s testimony.

<sup>6</sup> The transcript of the final pretrial conference is just over one page long and does not contain any presentation or discussion of evidence.

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 Jeffrey W. Jensen is relieved from further representing Marcus Pate in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*