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November 14, 2019

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

2017AP1643-CRNM State of Wisconsin v. Charles H. Mundt, Jr. (L.C. # 2014CF172)

Before Blanchard, Kloppenburg, and Graham, 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 Dennis Schertz, appointed counsel for Charles H. Mundt, Jr., has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether

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

there would be arguable merit to further proceedings based on claims of: (1) insufficiency of the evidence to support the jury verdict; (2) circuit court or procedural error; (3) the denial of Mundt's post-verdict motion for a new trial; (4) ineffective assistance of trial counsel; or (5) sentencing error.[2] Mundt was sent 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. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Mundt was charged with first-degree sexual assault of a child under the age of sixteen, by use or threat of force or violence, as a repeater, based on allegations that he had anal and oral sexual intercourse with S.E. on an unknown date between June 7, 2012, and September 30, 2012, when S.E. was twelve years old. Prior to trial, Mundt filed a motion "[t]o introduce facts contained in" a 2012 misdemeanor complaint charging him with the sexual assault of C.E., who is S.E.'s mother. The alleged assault of C.E. occurred on September 13, 2012, and she reported it to law enforcement the next day. Mundt wanted to be able to point out that, in reporting her own assault, C.E. failed to tell officers about Mundt's earlier alleged assault of S.E.

The State moved to introduce other-acts evidence relating to seven prior incidents of sexual assault committed by Mundt, including the incident with C.E. The motion alleged that the other acts were admissible under the test set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), and pursuant to the "greater latitude" rule codified in WIS. STAT.

[2] Our review of this case was delayed after 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 Mundt's trial. Based on the Wisconsin Supreme Court's resolution of that appeal, (continued)

§ 904.04(2)(b). In support, the State attached seven criminal complaints with seven different victims and alleged that Mundt was previously convicted of "two counts of [second-degree] sexual assault and four counts of [fourth-degree] sexual assault with another [fourth-degree] sexual assault read-in."

At a hearing, the circuit court granted Mundt's motion to admit evidence about his alleged assault of C.E. in order to challenge the credibility of C.E. and her husband, H.E. After ascertaining that there was no objection to admitting the videotaped forensic interview of S.E., the circuit court turned its attention to the State's other-acts motion. Mundt objected to the other-acts evidence on grounds that the incidents were "with adults in a different kind of setting" and were too dissimilar to the assault of S.E. The circuit court considered each incident separately and ruled that all but two were admissible under ***Sullivan*** and the greater latitude rule.[3]

At trial, both parties introduced the videotaped forensic interview of S.E. The State presented testimony from: S.E.; C.E.; K.E. (S.E.'s brother); H.E. (S.E.'s father); investigating officer Samuel Fox; Officer Christine Giacomino, who conducted the forensic interview of S.E.;[4]

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there exists no arguably meritorious challenge to the use of WIS JI—CRIMINAL 140 in Mundt's case. *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

[3] Though the circuit court apparently deemed five prior assaults admissible, the State introduced evidence of only four prior assaults at trial.

[4] The court reporter had a medical issue at the very end of the first day of trial. As such, the transcripts do not chronologically track the proceedings, and it appears that Officer Giacomino's trial testimony from the end of day one was not recorded. There is no suggestion that any failure to record or transcribe Giacomino's brief testimony at the end of day one would give rise to a meritorious issue. On day two, the circuit court explained what had happened the day before and the State re-called Giacomino, noting that she "was testifying yesterday but I'll ask her to start again today." After greeting Giacomino, the State began its examination as follows: "We started with your testimony yesterday, and I think we (continued)

and three other-acts witnesses, S.L., F.A., and S.S., each of whom alleged a prior sexual assault by Mundt. At the request of both parties, the circuit court admitted into evidence the three criminal complaints charging Mundt with the prior bad acts of assaulting S.L., F.A., and S.S. Mundt waived his right to testify and the defense rested. With the parties' agreement, the circuit court instructed the jury on two lesser included offenses. The jury found Mundt guilty of the greater crime as charged in the information.

Before sentencing, Mundt moved for a new trial based on newly discovered evidence, specifically, his GPS records from the summer of 2012.[5] He argued that the GPS records undercut the trial testimony of both S.E. and K.E. insofar as they alleged that the assault occurred on a Friday night. Pointing to S.E.'s testimony that he went with Mundt to rent a pornographic video prior to the assault, Mundt argued that the GPS records showed he could not have been at the video store any Friday night during the charging period. After considering the GPS records in light of the record, including the trial transcripts, the circuit court denied the motion.

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only got to the point of you explaining to the jury that you have been a police officer and how long?" Any brief testimony that might have been missed on day one was repeated or reconstructed on day two.

[5] Trial counsel's original post-verdict motion sought a new trial on grounds that the State failed to provide the GPS records in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963) (government has a duty to disclose exculpatory evidence in its possession). The circuit court denied the motion, noting that Mundt had not reviewed the records and could not even allege that they were exculpatory. The court agreed "to adjourn the sentencing and give [Mundt] the opportunity to see if there is exculpatory information in there" that might form the basis for a new trial "as a result of newly discovered evidence." Later, the circuit court expanded on why Mundt's claim did not invoke ***Brady***, explaining that Mundt knew he was on the GPS monitor and "could have directed his counsel" to obtain the records, and that the information was not "in [the] possession of the Prosecutor's office" before or at trial. The pertinent finding is the second one, since evidence cannot be suppressed if it is not possessed. *See* ***State v. Wayerski***, 2019 WI 11, ¶¶56-68, 385 Wis. 2d 344, 922 N.W.2d 468.

At sentencing, the circuit court imposed a forty-year bifurcated sentence, with thirty years of initial confinement followed by ten years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the conviction. We must affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that as a matter of law no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence are for the jury. ***Id.*** at 504. We agree with appellate counsel's assessment that there would be no arguable merit to a claim challenging whether that standard was met in this case. The evidence set forth by the State, including S.E.'s in-court testimony and his forensic interview, was sufficient to support the guilty verdict.

We also agree with the no-merit report's conclusion that no issue of arguable merit arises from the admission of other-acts evidence at Mundt's trial. Prior to trial, the circuit court applied the three-factor ***Sullivan*** test to each prior sexual assault alleged in the State's other-acts motion. It explained its ruling as to each on the record. This constitutes a proper exercise of discretion. *See* ***State v. Marinez***, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399 (whether to admit or exclude other-acts evidence is left to the circuit court's sound discretion, and we will uphold its ruling if the court "'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach.'" (quoted source omitted)). At trial, the circuit court provided proper cautionary instructions to the jury about the permissible use of the other-acts evidence. *See* WIS JI—CRIMINAL 275. The jury was instructed that if it found that the prior conduct "did occur," it could be considered "only as

to the issue of motive," or, as to evidence involving C.E., "only on the issue of context or background."

The no-merit report also analyzes as without arguable merit potential issues arising from jury selection, opening and closing arguments, Mundt's waiver of the right to testify at trial, jury instructions, and verdict forms. We agree with counsel's conclusion that none of these points gives rise to a meritorious challenge. The jury was selected in a lawful manner and without objection. The circuit court engaged Mundt in a thorough and proper colloquy concerning his right to testify, and instructed the jury that Mundt's silence could not be used against him. The jury instructions accurately conveyed the applicable law and burden of proof. At the instruction conference, trial counsel objected only to the form of the verdict, which provided three separate "guilty" verdict forms representing the charged offense and the two lesser included offenses, with only one "not guilty" verdict form to encompass all three offenses. Though Mundt requested that the court submit three separate "not guilty" verdict forms, the circuit court correctly determined that the form it submitted was proper pursuant to WIS JI—CRIMINAL 482. *See also* ***State v. Hansbrough***, 2011 WI App 79, ¶9, 334 Wis. 2d 237, 799 N.W.2d 887 (rejecting the defendant's contention that there must be "a not guilty verdict form for each guilty verdict form," and approving WIS JI—CRIMINAL 482, under which a single "not guilty" verdict form may encompass the charged offense and the lesser included offenses). Finally, though not discussed in counsel's no-merit report, we conclude that the circuit court properly exercised its discretion in ruling on evidentiary objections at trial.

The no-merit report addresses the circuit court's denial of Mundt's post-verdict motion for a new trial. With proper citation to the record, the report accurately recounts and summarizes the relevant proceedings and the circuit court's ultimate decision to deny the motion. We agree

with the no-merit report's discussion and analysis of the circuit court's discretionary decision. For the reasons set forth in the no-merit report, we conclude that no issue of arguable merit arises from the court's determination that the GPS records do not constitute newly discovered evidence sufficient to warrant a new trial.

The no-merit report also concludes that there would be no arguable merit to a claim of ineffective assistance of trial counsel. We agree with appellate counsel that the record before us would not support a non-frivolous claim that Mundt was denied the effective assistance of trial counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984) (to set forth a claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that the deficiency was prejudicial).

Finally, the no-merit report addresses the sentence imposed. We agree that any challenge to the circuit court's exercise of its sentencing discretion would be without arguable merit. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing is committed to the circuit court's discretion and our review is limited to determining whether the court erroneously exercised that discretion). The crime of conviction is a class B felony requiring a bifurcated sentence with "at least 25 years" of initial confinement. *See* WIS. STAT. §§ 948.02(1)(c), 939.50(3)(b), and 939.616(1r). In imposing thirty years of initial confinement, the circuit court considered (1) the serious nature of the offense as evidenced by its maximum and mandatory minimum penalties, (2) Mundt's character, including his lengthy criminal record that continued even after he was afforded "plenty of opportunities" for probation and treatment, and (3) the need to protect the public given the escalating severity of his crimes. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court determined that "the overlying factor here is that Mr. Mundt at this point in time needs to serve a significant prison

sentence here for nothing else than the protection of the community[,] with his continued sexual deviant behavior then, [against] anywhere from … middle-aged women to children." Under the circumstances of the case, 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).

Our review of the record discloses no other potential issues for appeal. Therefore,

IT IS ORDERED that the judgment of conviction is summary affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved from further representing Charles H. Mundt, Jr., 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