OFFICE OF THE CLERK

WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

January 3, 2020

To:

Hon. Rebecca F. Dallet
Circuit Court Judge, Br. 40
821 W. State St.
Milwaukee, WI 53233

Hon. Michael J. Hanrahan
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Kiley Zellner
Crivello Carlson S.C.
710 N. Plankinton Ave., Ste. 500
Milwaukee, WI 53203

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

David Bernard Moore 184126
Milwaukee County Jail
949 N. 9th St.
Milwaukee, WI 53233

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

2018AP1865-CRNM State of Wisconsin v. David Bernard Moore (L.C. # 2013CF5477)

Before Kessler, Dugan and Donald, 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).

David Bernard Moore appeals from a judgment of conviction entered after a jury found him guilty of one count of felony intimidation of a witness in furtherance of a conspiracy,

contrary to WIS. STAT. § 940.43(4) (2013-14),[1] and from the denial of his postconviction motion to vacate the court-imposed DNA surcharge. Moore's appellate counsel, Kiley B. Zellner, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32.[2] Moore has filed a response. We have independently reviewed the record, the no-merit report, and Moore's response, as mandated by ***Anders***. We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgment and the order.[3]

Moore's adult son was charged with committing numerous domestic violence-related crimes against a woman named A.B. The criminal complaint that was filed against Moore alleged that he tried to dissuade A.B. from attending a court proceeding, in furtherance of a conspiracy with his son and his son's mother. The charge was supported by transcripts of recorded phone calls that Moore's son made to his father, mother, and A.B. from the jail.

The case proceeded to trial, where the State played recordings of the phone calls. It also presented the testimony of an investigator who spoke with A.B. about conversations she had with Moore. In addition, A.B. testified. Moore's defense was that his actions—including driving

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

[2] This is the second time Zellner has filed a no-merit report concerning Moore's conviction. We rejected the prior no-merit report after identifying a potentially meritorious appellate issue concerning the court-imposed DNA surcharge. *See* ***State v. Moore***, No. 2015AP1021-CRNM, unpublished op. and order at 2 (WI App Aug. 16, 2017).

[3] 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 Moore'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.

A.B. to court on multiple occasions—demonstrated that he was not intimidating A.B. or trying to dissuade her from attending the trial or testifying.

The jury found Moore guilty. The trial court sentenced him to three years of initial confinement and three years of extended supervision. It also ordered Moore to pay a mandatory $250 DNA surcharge.

The no-merit report addresses three issues: (1) whether there was sufficient evidence to support the jury's verdict; (2) whether the trial court considered appropriate sentencing factors and properly exercised its sentencing discretion; and (3) whether the $250 mandatory DNA surcharge was properly imposed. Appellate counsel concludes that there would be no arguable merit to pursuing any of those issues on appeal. This court is satisfied that the no-merit report properly analyzes the issues it raises. The no-merit report sets forth the applicable standards of review and details the evidence satisfying the elements of the crime. It also discusses the trial court's compliance with ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197, at the sentencing hearing. Finally, the no-merit report explains why there would be no arguable merit to pursuing the DNA surcharge issue. We agree that these issues do not have arguable merit. This court will not discuss these issues further, except to the extent we are responding to the issues Moore has raised in his response.

We turn to Moore's response. First, Moore expresses concern that the prosecutor personally knew A.B., and he asserts that the trial court ignored this issue when it was raised. The record contains a letter written by a different prosecutor about this issue. The letter indicates that in February 2014, A.B. notified the parties and the trial court that she believed that the assigned prosecutor had a conflict of interest. The State's letter explained that shortly after the

prosecutor was assigned, the prosecutor "discovered that she knew [A.B.'s] mother and older sister" because the prosecutor served as an athletic coach for A.B.'s older sister and the prosecutor's mother served as an athletic coach for A.B. The State said that it had "thoroughly reviewed this matter" and had concluded that the prosecutor did not have a conflict under the Rules of Professional Conduct. The State's letter offered to address any concerns of the trial court or other parties. There is no indication that there was further discussion about the letter. We conclude that Moore has not raised an issue of arguable merit, as the facts outlined in the letter do not constitute a conflict under the Rules of Professional Conduct.

Next, Moore complains that the no-merit report fails to indicate that A.B. testified on Moore's behalf. This is not an issue of arguable merit. We have reviewed the entire record, including all of the transcripts. The State called A.B. as a witness, and trial counsel cross-examined her. We acknowledge that A.B. offered some testimony that was favorable to Moore, but that does not change our conclusion that there would be no arguable merit to assert that the evidence was insufficient to support the conviction.

Moore also asserts that the no-merit report erroneously stated that Moore referred to the concept of "no face[,] no case" on the recorded jail calls. Moore is incorrect. The no-merit report indicated that Moore's son had used that phrase when he called Moore from the jail. The no-merit report further noted that A.B. had testified "that Moore discussed with her that if she didn't come to court to testify the case would be dismissed" and that "Moore discussed 'no face, no case' with her as well." The no-merit report's statements are consistent with the trial testimony.

Moore asks this court to consider the fact that his son's mother was not charged with any crimes even though she also said things on the telephone calls that her son placed from the jail. This is not a basis to challenge Moore's conviction. Prosecutors have "great discretion in determining whether to commence a prosecution," and they are not required to file charges in any given case. *See* ***State v. Karpinski***, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979).

The next issue Moore raises is related to his communication and interaction with A.B. Moore acknowledges that he spoke with A.B. about the charges against his son, but he maintains that he spoke with A.B. "as any parents do to their kids when they get in situations like this." He argues that he did not "attempt[] to persuade [A.B.] from going to court" and actually "helped her and made sure she showed up for court." The no-merit report adequately addresses this issue. The evidence presented—including the phone call recordings and testimony from the investigator and A.B.—was sufficient for the jury to find that Moore knew A.B. was a witness, attempted to dissuade her "from attending or giving testimony at a proceeding authorized by law," and "acted with the purpose to prevent" A.B. from attending or testifying. *See* WIS JI—CRIMINAL 1292.

Moore also disputes appellate counsel's conclusion that there would be no arguable merit to challenge the imposition of a DNA surcharge where Moore already provided a sample. Again, we are satisfied with the no-merit report's discussion of this issue. We rejected the first no-merit report so that appellate counsel could pursue a challenge to the DNA surcharge, but our supreme court's subsequent decision in ***State v. Williams***, 2018 WI 59, ¶43, 381 Wis. 2d 661, 912 N.W.2d 373, rejected the same challenge to the DNA surcharge. There would be no arguable merit to an appeal of the order denying Moore's motion to vacate the DNA surcharge.

Finally, Moore expresses general displeasure with the no-merit process and with his appellate counsel. For instance, he criticizes appellate counsel for the style of the no-merit report and for moving to withdraw from representation. However, the no-merit report and request to withdraw are consistent with the required format. *See* WIS. STAT. RULE 809.32.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kiley B. Zellner is relieved from further representing David Bernard Moore 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