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April 28, 2020

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

2018AP1275-CRNM State of Wisconsin v. Eric W. Strong (L. C. No. 2015CF408)

Before Stark, P.J., Hruz and Seidl, 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).

Eric Strong appeals a judgment convicting him, following a jury trial, of one count of repeated sexual assault of the same child and one count of first-degree sexual assault by sexual contact with a person under the age of thirteen. Attorney Frederick Bechtold has filed a no-merit

report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses voir dire, whether Strong's counsel should have objected to the admission of testimony not provided in discovery, the sufficiency of the evidence to support the verdicts, and potential sentencing issues. Strong was sent a copy of the report, and he has filed a response alleging judicial bias; the lack of an impartial jury; challenging the jury instructions; and claiming his trial counsel usurped Strong's control of his defense and provided ineffective assistance by failing to subpoena witnesses. Counsel filed a supplemental no-merit report addressing the issues raised by Strong, to which Strong filed an additional response. Upon reviewing the entire record, as well as the no-merit report, supplement and responses, we conclude that there are no arguably meritorious appellate issues.

We first address the sufficiency of the evidence because it places the other potential issues in context. The repeated sexual assault charge related to Natalie,[2] a girl who was eleven years old at the time of trial. Natalie described several incidents that occurred in an apartment where she and Strong had once resided when she was five to six years old. The first incident happened in a closet. Strong pulled down his pants, took out his "private area," placed it in Natalie's mouth, and then rubbed it with his hand until "white stuff" came out. Natalie described Strong's private area as "wrinkly" before his hand movements, then "it folded up a little fat, and then it was like straight." A second similar incident occurred in the laundry room, and a third

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

[2] This matter involves victims of crimes. Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the names of the victims.

similar incident occurred in Strong's bedroom. Natalie testified that during one of the incidents, Strong made her swallow the white stuff. On other occasions, Strong touched Natalie's "private part" and put his fingers inside of her.

The first-degree sexual assault charge related to Kimberly, a girl who was ten years old at the time of trial. Kimberly described an incident that had occurred at the home of Strong's mother when Kimberly was about four years old. Strong and Kimberly were both naked in the shower when Strong told her to "suck on his private area." Kimberly described Strong's private area as "sticking out straight." Strong put his "private part" in Kimberly's mouth, and "a little bit of stuff came out." Kimberly tried to get out of the shower, but Strong grabbed her by the throat and warned her that she better not tell anyone.

The State plainly could have met all of the elements of the crimes charged based upon the testimony of the two girls. *See* WIS. STAT. §§ 948.025(1)(e) and 948.02(1)(e); WIS JI—CRIMINAL 2107 and 2102E. The jury was entitled to resolve any inconsistencies in the girls' accounts and to find them credible despite the delay in reporting. We agree with postconviction counsel's assessment that it would be frivolous to argue that the evidence was insufficient to support the verdicts.

Strong alleges Judge Babler was biased against him because the judge was previously Strong's guardian ad litem for over ten years. However, that allegation is not factually accurate. Rather, Judge Babler had served years earlier as the prosecutor in Child in Need of Protection and/or Services (CHIPS) and Termination of Parental Rights (TPR) cases involving Strong when he was a minor. Judge Babler never had an attorney-client relationship with Strong that would require disqualification under WIS. STAT. § 757.19(2)(c). Nor did Judge Babler's involvement in

Strong's CHIPS and TPR cases create an objective appearance of bias requiring recusal. If anything, Judge Babler's knowledge of Strong's difficult childhood would be objectively more likely to create a sense of empathy, rather than hostility, toward Strong.

As to the impartiality of the jury, Strong complains that "too many jurors had close ties with others involved in this controversy." The record does reflect that several impaneled jurors disclosed during voir dire that they knew Strong's mother or a detective who had investigated the allegations by the two girls. However, no panel member stated they knew anything about any of the charges in the present case. We agree with postconviction counsel's assessment that the relationships disclosed were too casual to be objectively disqualifying as a matter of law, particularly in a small rural county where such relationships are common. Moreover, all of the jurors indicated that they could set the relationships aside and be subjectively impartial.

Strong next contends the jury instructions were inadequate because they failed to include a definition of "sexual intercourse" before subjecting him to a mandatory minimum sentence for a crime involving sexual intercourse with a child. However, counsel correctly points out that Strong was not charged with committing a crime that carried a mandatory minimum sentence under WIS. STAT. § 939.616, and no mandatory minimum sentence was imposed against him. The jury instructions appropriately informed the jury about the definition of "sexual contact," consistent with both of the crimes alleged in the complaint and the State's theory at trial. While the conduct described by the victims may have also satisfied the definition of sexual intercourse, the State was not required to proceed on that theory. The jury was therefore correctly instructed.

Strong also alleges his trial counsel provided ineffective assistance by: failing to hire a private investigator and failing to consult with an expert or to present any witnesses or expert

opinion on Strong's behalf, as Strong had asked him to do; failing to move to suppress testimony that had not been disclosed in discovery; failing to impeach the victims' testimony with inaccuracies from their videotaped statements; and generally failing to subject the prosecution's case to meaningful adversarial testing.

However, aside from the victims' biological mother, Strong has not identified any witnesses or experts whom he believes counsel should have interviewed or called. Postconviction counsel notes that he did attempt to interview the biological mother of the victims, but that she did not want to speak with him or become involved in the case. It is speculative to conclude the victims' biological mother or anyone else would or could have provided testimony favorable to Strong, and Strong cannot demonstrate the prejudice required for an ineffective assistance claim based on his trial counsel's failure to interview or present uncalled witnesses. Similarly, Strong has not pointed to any specific inconsistencies from the victims' videotaped statements that would have been likely to alter the outcome at trial if his trial counsel had introduced them. We also note that Strong was advised of his right to testify on his own behalf, and he waived his right to do so.

Postconviction counsel acknowledges that the State did not disclose until just before trial that the victims' adoptive mother would testify that Natalie was crying when she first disclosed the abuse, and that trial counsel did not move to suppress that testimony. However, we agree with counsel's assessment that there were no grounds for a suppression motion. The late disclosure did not violate the discovery statute because the adoptive mother's statement about her proposed testimony was an oral one made during witness preparation, not a previously recorded or written statement. *See* WIS. STAT. § 971.23(1)(e). Furthermore, the proposed

testimony would not constitute hearsay because it related to the victim's demeanor and emotional state, rather than an affirmative statement made by the victim.

Finally, we agree with counsel's analysis regarding Strong's sentences. The circuit court properly exercised its discretion by considering appropriate factors before imposing concurrent terms of ten years of initial incarceration and five years of extended supervision on the repeated sexual assault of a child count, and twenty years of initial incarceration and twenty years of extended supervision on the first-degree sexual assault count. The sentences were well within the available penalty ranges and, therefore, are presumed not to be unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (discussing unduly harsh sentences). Our independent review of the record has disclosed no other arguably meritorious issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Frederick Bechtold is relieved of further representing Eric Strong 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