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

2016AP2048-CRNM State of Wisconsin v. Darrell L. Rogers (L.C. # 2013CF5328)

Before Brash, P.J., 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).

Darrell L. Rogers appeals from a judgment of conviction for one count of first-degree reckless homicide, contrary to WIS. STAT. § 940.02(1) (2013-14).[1] Rogers's appellate counsel, Kathleen A. Lindgren, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Rogers filed a response. Lindgren filed a supplemental

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

no-merit report, and Rogers filed a second response. We have independently reviewed the record, the no-merit reports, and Rogers's responses, 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.

Rogers was charged with first-degree reckless homicide in connection with the death of his girlfriend's five-year-old son. The criminal complaint alleged that Rogers was alone at home with the child for about three and one-half hours. The next morning, the child's mother discovered the child dead in his bed. The medical examiner concluded "that the victim suffered severe head and abdominal injuries … as a result of blunt force trauma and ruled the death a homicide."

Rogers waived his preliminary hearing and subsequently entered into a plea agreement with the State. Pursuant to the terms of the plea agreement, the State amended the charge to second-degree reckless homicide. At the plea hearing, the trial court asked the parties about the factual basis for the plea. Rogers personally told the trial court that he punched the child "in the chest area" as a form of discipline. Rogers denied strangling the child or hitting him in any other way. Rogers said the child was "all right" when the child went to sleep. The trial court concluded that Rogers's admission that he punched the child in the chest "with a closed fist" was sufficient to support the conviction.

One month after pleading guilty, prior to the sentencing hearing, Rogers moved to withdraw his guilty plea. The reason Rogers offered was that he "did not commit, and was not responsible for, all the injuries and bruising suffered by the victim." The motion asserted that the autopsy report, which concluded that the child "suffered from blunt force injuries to his head,

neck, thorax, abdomen, and extremities," as well as asphyxia, was "clearly inconsistent" with Rogers's "assertion that he only punched the victim in the chest."

While Rogers's motion to withdraw his guilty plea was pending, trial counsel moved to withdraw. The trial court granted trial counsel's motion and new counsel was appointed. Rogers appeared with new counsel and indicated that he wanted to continue to pursue his motion to withdraw his guilty plea, which the State did not oppose. The trial court granted the motion and scheduled a jury trial where Rogers would once again face the charge of first-degree reckless homicide.

Prior to the scheduled jury trial, the trial court ruled on several pretrial motions, as detailed in the no-merit report. On the first day of trial, as the trial court was waiting for potential jurors to enter the courtroom, Rogers personally addressed the trial court and asked for a bench trial. After giving Rogers time to consult with trial counsel, confirming the State's consent, and conducting a colloquy with Rogers, the trial court granted Rogers's request.

The case was tried to the court over three days. Rogers did not testify and the defense did not call any witnesses, but the parties noted on the record that if the State had not called a specific detective and the DNA analyst, the defense would have done so. At the conclusion of the trial, the trial court made detailed factual findings and found Rogers guilty. The trial court subsequently sentenced Rogers to thirty-eight years of initial confinement and fifteen years of extended supervision.

The no-merit report provides a detailed summary of the proceedings in the case and addresses two main issues: (1) whether there was sufficient evidence to support the verdict; and (2) whether the trial court properly exercised its sentencing discretion. Appellate counsel

concludes that there would be no arguable merit to raising those issues in a merit appeal. This court is satisfied that the thorough 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. With respect to sentencing, the no-merit report discusses the trial court's compliance with ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197, and it concludes that the sentence, which was less than the maximum, was not excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 183-85, 233 N.W.2d 457 (1975). We agree with appellate counsel's analysis of these issues and her conclusion 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 Rogers has raised in his responses.

We turn to Rogers's first response to the no-merit report, in which he raises four issues. First, he alleges that it was improper for the trial judge who accepted Rogers's guilty plea and granted his motion to withdraw his guilty plea to serve as the factfinder at his court trial. Second, Rogers asserts that trial counsel provided ineffective assistance by not filing a motion asking the trial judge to recuse herself because she had heard facts about Rogers's case. Third, Rogers argues that the trial court erroneously exercised its discretion when it allowed the admission of evidence of a posting concerning the discipline of children on Rogers's Facebook page. Finally, Rogers argues that his due process rights were violated because when the trial court made its factual findings at the close of the trial, it erroneously found that the victim had a "skull fracture."

Appellate counsel filed a supplemental no-merit report addressing each of the issues Rogers raised in his response. With respect to the first two issues, appellate counsel correctly notes that "[t]here was no discussion of disqualification on the record in this matter nor was it

raised by any party during circuit court proceedings." Appellate counsel further asserts that "[t]here is no existing requirement that a [j]udge must recuse [herself] after having granted a plea withdrawal." Appellate counsel is correct. WISCONSIN STAT. § 757.19(2) outlines seven situations where a trial judge is required to disqualify himself or herself. *See **id.*** The only potentially applicable situation in this case is § 757.19(2)(g), which states: "When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

Appellate counsel notes that Rogers "does not refer to examples of unfairness in the record." She concludes, having reviewed the record, that there was nothing that demonstrated unfairness or suggested that the trial judge was displaying partiality or bias. Accordingly, she concludes that there would be no arguable merit to pursue postconviction proceedings or an appeal based on the fact that the same trial judge who accepted Rogers's plea, and later allowed him to withdraw it, presided over the court trial.

We agree with appellate counsel's analysis. Clearly, Wisconsin statutes do not automatically require a trial court to be disqualified under these circumstances. In addition, the ethical rules governing judges do not require disqualification. Supreme Court Rule 60.04 states in relevant part:

> **(4)** Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:

> **(a)** The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.

The comment to SCR 60.04(4)(a) adds: "As a general matter, for recusal to be required under this provision, the personal bias or prejudice for or against a party or the personal knowledge of disputed facts *must come from an extrajudicial source*." (Emphasis added.) We conclude that there would be no arguable merit to assert that the trial judge was required to disqualify on grounds that she had acquired information about the case from properly presiding over the proceedings.

In his second response, Rogers identifies a 1984 intermediate appellate court decision from Pennsylvania and a 1979 case from the U.S. Court of Military Appeals where each court held that a trial judge should have recused himself after presiding over earlier proceedings and being asked to recuse. *See* ***Commonwealth v. Simmons***, 483 A.2d 953, 954-59 (Pa. Super. Ct. 1984); ***U.S. v. Bradley***, 7 M.J. 332, 333-34 (C.M.A. 1979). Those cases do not lead us to conclude that there would be arguable merit to assert that the trial judge was required to recuse herself. First, cases from other jurisdictions are not binding in Wisconsin. *See* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930 ("Although a Wisconsin court may consider case law from such other jurisdictions, obviously such case law is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it."). Second, other courts have reached the opposite conclusion. *See, e.g.*, ***Marlowe v. Kentucky***, 709 S.W.2d 424, 428 (Ky. Sup. Ct. 1986) (holding that recusal of trial judge "'is appropriate only when the information is derived from an extra-judicial source'" and that "'[k]nowledge obtained in the course of earlier participation in the same case does not require that a judge recuse himself'" or herself) (citation omitted).

Moreover, Wisconsin case law has long held that "judicial knowledge, properly acquired, concerning the defendant cannot be the basis of disqualification." *See* ***State v. Carter***, 33 Wis. 2d 80, 88, 146 N.W.2d 466 (1966); *see also* ***State v. Cleveland***, 50 Wis. 2d 666, 671-72, 184 N.W.2d 899 (1971) (holding that trial judges who preside over ***Miranda-Goodchild***[2] hearings can still preside over the trial because "[j]udges can dismiss from their minds, in reaching decisions, knowledge of evidence previously excluded"). In addition, our supreme court has recognized that trial judges are aware that they need to recuse themselves if they cannot act impartially, and if they continue to preside over a trial, a reviewing court can "assume that, by presiding, [the trial judge] believed that [he or] she could act in an impartial manner." *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31.

For the foregoing reasons, and for the reasons explained in the supplemental no-merit report, we conclude that there would be no arguable merit to assert that the trial judge should have *sua sponte* recused herself. We further conclude that there would be no arguable merit to assert that trial counsel provided ineffective assistance by failing to ask the trial judge to recuse herself. Automatic recusal was not required, and there is nothing in the record to suggest that the trial judge was not impartial. Thus, as appellate counsel concludes in her supplemental no-merit report, Rogers could not establish that he was prejudiced by trial counsel's failure to ask the judge to recuse herself. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (holding that to establish ineffective assistance of counsel, a defendant must show both deficient performance and prejudice).

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[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

We turn to the third issue raised in Rogers's response. The supplemental no-merit report provides a detailed description of the trial court's decision to admit evidence of a posting on Rogers's Facebook page that includes statements about the need to discipline children. Appellate counsel concludes that there would be no arguable merit to challenge the trial court's discretionary decision to admit this evidence. *See* ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998) ("The admission of evidence is a decision left to the discretion of the [trial] court" and "[w]e will not find an erroneous exercise of discretion where the [trial] court applies the facts of record to accepted legal standards."). We agree with appellate counsel's analysis of the trial court's discretionary decision. Accordingly, there would be no arguable merit to challenge the trial court's admission of the Facebook evidence.

The fourth issue raised in Rogers's response concerns the fact that in its findings of fact, the trial court referred to the child having a "skull fracture" even though the medical examiner did not testify that the child suffered a skull fracture. The trial court stated:

> [T]he doctor found that there was evidence that the child had been asphyxiated in the manner that she described. There were severe injuries to this child's lungs, his liver. There was blood in his muscles where it shouldn't be, *not to mention the skull fracture* and the large amount of blood that was found in his skull—or surrounding his brain. She also testified, and the [c]ourt finds that there were approximately two cups of blood found in this child's abdomen. Again, not where it should be.
>
> The doctor likened these injuries to those which we can expect to see in children who have either had one or two of these things happen. Either they've fallen from four, five, or six floors high to the ground or children who have been in high speed motor vehicle crashes. So these are, the [c]ourt finds, injuries that obviously took a large amount of—high degree of force to inflict on this child.

(Emphasis added.)

Appellate counsel concludes that Rogers is not entitled to a new trial or other relief based on the trial court's single reference to a "skull fracture." Appellate counsel explains:

> Based upon a review of the entirety of the evidence and testimony presented to the [c]ourt, including the description of the types and number of injuries sustained by the victim over various parts of the victim's body and the totality of the [j]udge's description of findings relied upon in her determination of guilt, appellate counsel does not find merit in the argument that the error rises to the level of a due process violation requiring that Mr. Rogers receive a new trial in the interests of justice.

We agree that the trial court's single use of the words "skull fracture" does not present an issue of arguable merit. The trial court inartfully used the words "skull fracture" to describe the child's extensive head injuries instead of using the language used by the deputy medical examiner. For instance, the deputy medical examiner testified that the child suffered a "subcutaneous hemorrhage on the occipital skull which is in the back of the head" and a swollen brain caused by an axonal injury, which she said demonstrated "that this child suffered severe head trauma." Even if a court were to conclude that the trial court's reference to "skull fracture" was clearly erroneous, there is more than sufficient evidence of varied and substantial injuries to the child to support the trial court's finding that Rogers committed first-degree reckless homicide, as detailed in appellate counsel's no-merit reports. Thus, there would be no arguable merit to challenge the sufficiency of the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (appellate court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.").

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 discharges appellate counsel of the obligation to represent Rogers further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Kathleen A. Lindgren is relieved from further representing Darrell L. Rogers 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