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

2019AP1733-CRNM State of Wisconsin v. Jose Guadalupe Diaz (L.C. # 2017CF1853)

Before Dugan, Donald and White, 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).

Jose Guadalupe Diaz appeals from a judgment of conviction for first-degree sexual assault by sexual contact with a child under thirteen. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),¹ and *Anders v. California*, 386 U.S. 738 (1967).

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

Diaz received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, as mandated by *Anders*, the judgment is summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In December 2016, Diaz’s daughter reported that Diaz sexually assaulted her one night in the summer of 2016 while she was staying at Diaz’s apartment in Milwaukee. Diaz was charged with two counts of first-degree sexual assault of a child, one involving sexual intercourse-penis to mouth, and the other involving hand to vagina contact. After a four-day jury trial, Diaz was found guilty of the charge involving hand to vagina contact and not guilty of the charge involving sexual intercourse. Diaz was sentenced to fifteen years of initial confinement and fifteen years of extended supervision.

The no-merit report addresses the potential issues regarding the sufficiency of evidence, the decision to admit the daughter’s audiovisual recorded interview, whether any trial errors occurred, including the denial of the defense’s request to strike two jurors for cause, the removal of a sleeping juror, the propriety of the jury instructions, whether trial counsel was ineffective for not objecting to the grandmother’s testimony that she believed her granddaughter, and whether the sentence was the result of an erroneous exercise of discretion or unduly harsh. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

The no-merit report fails to discuss whether any issue of arguable merit arises from the order in which the witnesses were presented. WISCONSIN STAT. § 908.08 permits the admission of audiovisual recordings of statements by children but requires certain procedures be followed.

Where, as here, the recorded statement is admitted on the prosecution's motion, the prosecutor may call the child to testify "immediately after the statement is shown," or if the prosecutor does not call the child, the court shall, on request of the defendant, order that the child "be produced immediately following the showing of the statement to the trier of fact for cross-examination." Sec. 908.08(5)(a). The order of the presentation of the evidence under § 908.08(5)(a) was recently considered in *State v. Mercado*, 2020 WI App 14, ___ Wis. 2d ___, ___ N.W.2d ___. In *Mercado*, this court held that the trial court's decision to allow a child to testify prior to the showing of the child's video interview did not comply with the law and was, therefore, erroneous. *Id.*, ¶57. Here the child's recorded interview was played during the testimony of the interviewer on the first day that evidence was taken. The interviewer's testimony was then followed by that of the child's grandmother. Then the interviewer was recalled at the end of the day for a few additional questions. The next morning, the child testified.

Arguably the child was not called to testify immediately after the audiovisual recorded statement was shown to the jury because the testimony of two other witnesses intervened. However, no objection was made at trial to the order in which the witnesses were presented. Thus, Diaz could only raise a potential claim of error by a claim of ineffective assistance of trial counsel. See *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

A claim of ineffective assistance of counsel has two parts: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficient performance inquiry is "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. The prejudice test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. The prejudice determination considers “the totality of the evidence before the judge or jury.” *Id.* at 695.

Even if Diaz could establish deficient performance by trial counsel’s failure to object to the order of the witnesses and less than exacting compliance with WIS. STAT. § 908.08, he would not be able to establish prejudice from the failure to object. Had a timely objection been launched, the child’s testimony would still have been presented, but just immediately after the conclusion of the interviewer’s testimony with no other witness’s testimony intervening. A timely objection would not have resulted in the exclusion of the evidence. Diaz could not establish that the court’s confidence in the outcome would be undermined simply because the child’s testimony was not presented at the end of the day and immediately after the recorded statement was shown to the jury. A claim of ineffective assistance of trial counsel lacks merit.

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 Diaz 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 Dustin C. Haskell is relieved from further representing Jose Guadalupe Diaz 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