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

2016AP752-CRNM State of Wisconsin v. Melvin Williams (L.C. # 2013CF5749)

Before Fitzpatrick, P.J., 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).

Melvin Williams appeals from a judgment entered upon a jury's verdicts convicting him of two counts of first-degree sexual assault of a child by sexual intercourse with a person under age twelve. Appellate counsel, Kathleen A. Lindgren, has filed a no-merit report, pursuant to

Anders v. California, 386 U.S. 738 (1967); *see also* WIS. STAT. RULE 809.32 (2017-18).[1] Williams filed a response to the report, and appellate counsel submitted a supplemental no-merit report. Upon this court's independent review of counsel's reports, Williams' response, and of the record as mandated by ***Anders,*** we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

In December 2013, ten-year-old T.I.D.'s father called police after T.I.D. disclosed to a stepmother figure and a cousin that Williams had "raped" her.[2] Milwaukee Police Detective Karla Lehmann conducted a forensic interview of T.I.D. T.I.D. told Lehmann that Williams raped her during the time period when she was nine years old and lived with her mother and Williams, who was then her mother's boyfriend, in an apartment on Vliet Street. T.I.D. said that on more than one occasion, Williams would ask her for a favor, telling her to suck "on his private" and he would give her candy. T.I.D. also said Williams had put his "private in her private," which Lehmann understood as a description of penis-to-vagina sexual intercourse. Williams was thus charged in a criminal complaint with two counts of first-degree sexual assault of a child—one for penis-to-vagina intercourse and one for penis-to-mouth intercourse. The complaint alleged that the assaults occurred between June 6, 2012, and June 5, 2013, the time period during which T.I.D. was nine years old.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted. Williams was convicted under the statutes in effect at the time of his offense, the 2011-12 statutes. However, since the relevant statutes have not changed, we will refer to and cite from the current version.

[2] The word "raped" is in quotation marks because it is the word that T.I.D. reportedly used.

Following a trial at which T.I.D., Williams, and others testified, the jury convicted Williams as charged. The circuit court later sentenced Williams to twenty-five years of initial confinement, the mandatory minimum, and twenty years of extended supervision on each count, to be served concurrently. Additional facts will be discussed herein.

DISCUSSION

In the no-merit report, appellate counsel discusses two issues. Williams raises four main issues in his response, only one of which overlaps with counsel's discussion. We address each issue in turn.

I. Sufficiency of the Evidence to Support the Jury's Verdicts

The first issue appellate counsel discusses in the no-merit report is whether sufficient credible evidence supports the jury's verdicts. In his response, Williams contends that there was insufficient evidence to support the verdicts because T.I.D.'s testimony was inconsistent and because there was no medical evidence to substantiate her allegations.

We review the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 504, 451 N.W.2d 752 (1990). The standard of review is the same whether the conviction relies on direct or circumstantial evidence. *See* ***id.*** at 503. "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

There are two elements to the crime of first-degree sexual assault of a child by sexual intercourse with a person who has not attained the age of twelve years: (1) the defendant had sexual intercourse with the victim and (2) the victim was under the age of twelve years at the time of the alleged sexual intercourse.[3] *See* WIS. STAT. § 948.02(1)(b); WIS JI—CRIMINAL 2102B. The record and the no-merit documents reflect no arguably meritorious challenge to the sufficiency of the evidence supporting the second element, the victim's age; the substantive sufficiency issue discussed by both appellate counsel and Williams relates to the evidence supporting the first element, whether Williams had sexual intercourse with T.I.D.

T.I.D., who was then eleven years old, told the jury about Williams asking her to suck on his "private part" and about how he put "his private in her private." She described Williams withdrawing his penis to ejaculate and wiping away the semen with a tissue. She testified that the assaults occurred when she was nine and in the fourth grade, living with her mother and Williams on Vliet Street. She also said that the assaults took place while her mother, who was attending college at the time, was at school.

The testimony of other adults, including T.I.D.'s mother, established that T.I.D. lived with Williams on Vliet Street before she turned nine. T.I.D. was also inconsistent on some details of the assaults, like how many times she was assaulted, what room the assaults occurred in, and how she was positioned when Williams had penis-to-vagina intercourse with her.

[3] "'Sexual intercourse' means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another." WIS JI—CRIMINAL 2101B. "Sexual intercourse" also includes fellatio, which means "oral contact with the penis." ***Id.*** There is no arguable merit to any claim that the acts alleged by T.I.D. fail to fulfill the definition of sexual intercourse.

The State presented testimony from Amanda Didier, a forensic interviewer at Children's Hospital of Wisconsin. She explained, among other things, that the concept of time develops over a child's life but that children can still identify and describe events even if they cannot identify a time. Didier also discussed the difference between core details, which are "the main event that the child remembers or the main part that was the most impactful to them," and peripheral details, which are "all those contextual details around the event," and testified that core details are easier for children to remember.

Williams testified in his own defense and denied that he had ever had T.I.D. "suck on [his] private part," denied that he had penis-to-vagina sexual intercourse with her, and denied that he had any other sexual contact with her. In his no-merit response, Williams asserts that "the evidence adduced at trial failed to meet the level of proof required to legally justify a finding of guilt" because T.I.D.'s testimony was inconsistent "in every important aspect" and there was no "medical evidence to substantiate the allegations of sexual intercourse."

Inconsistencies in the victim's testimony do not render that testimony inherently incredible. *See* ***Syvock v. State***, 61 Wis. 2d 411, 414-416, 213 N.W.2d 11 (1973). As the arbiter of credibility, a jury "has the power to accept one portion of a witness'[s] testimony, reject another portion and assign historical facts based upon both portions." ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). "In short, a jury can find that a witness is partially truthful, partially untruthful and have both of these determinations mean something quite independent of one another." ***Id.*** Thus, the jury could choose to believe the portions of T.I.D.'s testimony in which she described Williams performing sexual acts with her—the core details—while finding her inconsistencies on the timing and peripheral details to be a non-issue.

Medical substantiation of intercourse is not an element of first-degree sexual assault, nor is it a prerequisite to a conviction. *Cf.*, ***State v. Holt***, 128 Wis. 2d 110, 120, 382 N.W.2d 679 (Ct. App. 1985) (superseded by statute on other grounds) (While the presence or absence of serological typing of semen "is a matter for the jury to consider, it is not necessary for conviction."). In addition, a jury "may convict on the basis of uncorroborated testimony[.]" ***Kohlhoff v. State***, 85 Wis. 2d 148, 153-54, 270 N.W.2d 63 (1978).

However, the State also presented testimony from Dr. Kelly Hodges, who examined T.I.D. when her father brought her in after calling the police. Hodges testified that T.I.D.'s exam "was normal. Meaning that her hymen and the rest of her female genitalia looked exactly as would be expected for a girl her age." Hodges further explained that a normal exam was "not at all surprising…. The literature well supports this, that most victims of child sexual abuse, whether it's degree of the spectrum, have normal physical exams." Hodges noted that the "normal" results of T.I.D.'s exam could be explained by a number of factors, including that: (1) reporting is often well-removed from the time of the incident, giving any injuries plenty of time to heal; (2) T.I.D. was in the fourth of five clinical stages of puberty, and "the more estrogen you have, the more complete those tissues feel," and (3) "a lot of times this type of contact doesn't actually cause any injuries. Even when girls report pain, there's often no visible evidence[.]"

While Williams states in his response that he "categorically rejects" Hodges' "outlandish" testimony, the jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. Although our review of the record satisfies us that there is additional evidence to support the jury's verdict, including corroborating testimony from witnesses to whom T.I.D. disclosed the assaults, T.I.D.'s

testimony alone is sufficient evidence to support the verdict. There is no arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdicts.

II. Ineffective Assistance of Trial Counsel

In his no-merit response, Williams contends that he received ineffective assistance from trial counsel. "There are two elements that underlie every claim of ineffective assistance of counsel: first, the person making the claim must demonstrate that his or her counsel's performance was deficient; and second, he or she must demonstrate that this deficient performance was prejudicial." ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. "We give 'great deference to counsel's performance, and, therefore, a defendant must overcome a strong presumption that counsel acted reasonably within the professional norms.'" ***Id.*** (quoting ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801). It is not necessary for us to address both elements if the defendant cannot make a sufficient showing on one or the other. *See* ***State v. Tomlinson***, 2001 WI App 212, ¶40, 247 Wis. 2d 682, 635 N.W.2d 201. Williams identifies four primary ways in which he contends his attorney was ineffective.

A. Failure to Request a Speedy Trial

On April 23, 2014, a status conference was held ahead of the May 5, 2014 trial date. Williams had filed a motion in limine in which he sought to limit the scope of T.I.D.'s testimony, and the State had filed a summary of the proposed expert testimony regarding delays in reporting child sexual assaults that was ultimately introduced through Didier.

At the conference, for which Williams did not appear in person, Williams' trial counsel objected to the State's proposed expert testimony and requested a hearing on its admissibility.

See WIS. STAT. § 907.02(1); ***Daubert v. Merrell Dow Pharms. Inc.***, 509 U.S. 579 (1993). Trial counsel also requested an adjournment to find his own expert if the State's expert was allowed. The State did not object to an adjournment, so the circuit court adjourned the May 5, 2014 trial date and set the case for a ***Daubert*** motion hearing on July 24, 2014.

The parties returned to court on April 30, 2014; Williams appeared in person. Trial counsel reported that although he did what he thought was in Williams' best interest in requesting an adjournment the week before, "it turned out that I proceeded contrary to his wishes." Williams "did not care about the expert witness, [and] and at almost all costs he wanted to proceed to trial" as originally scheduled. Trial counsel thus sought to withdraw the motion to adjourn and to reinstate the trial date. The State objected for various reasons, including that Williams had not demanded a speedy trial. This prompted Williams to interject in protest, saying, "Yes, I did. Yes, I did, Your Honor."

Trial counsel told the circuit court that Williams "believes he told me to make a speedy trial demand" but if he had, counsel had not made a note of the request. The court denied the motion to reinstate the May 5 trial. It explained that although Williams said he had asked counsel to make a speedy trial demand earlier, the request was not communicated to the court and the State's witnesses had already been called off. The court did, however, enter a speedy trial demand for Williams as of the April 30 hearing, and Williams' trial was then scheduled to and did commence within ninety days.

There are two types of speedy trial rights: statutory and constitutional. *See* WIS. STAT. § 971.10(2)(a); U.S. CONST. amend. VI.; WIS. CONST. art. I § 11. The statutory speedy trial right requires the trial of a felony defendant to "commence within 90 days from the date trial is

demanded by any party in writing or on the record." Sec. 971.10(2)(a). A speedy trial request that is not clearly conveyed to the circuit court in writing or on the record is insufficient to start the statutory clock. *Cf.*, ***State v. Leighton***, 2000 WI App 156, ¶¶20-21, 237 Wis. 2d 709, 616 N.W.2d 126 (defendant's letters to circuit court seeking assistance with discovery did not "evince an assertion" of the statutory speedy trial right). The record shows that once Williams' speedy trial demand was clearly conveyed to the court and entered, his trial began within the required ninety-day period.

Further, the exclusive remedy for a statutory speedy trial violation is the defendant's pretrial release on bond, not dismissal of the charges. WIS. STAT. § 971.10(4). Thus, because Williams' pretrial period has passed, any claim of a statutory speedy trial violation is now moot and, though Williams did not have an opportunity for pretrial release, he instead received sentence credit for the time spent in pretrial custody. Thus, the record does not support an arguably meritorious claim of a statutory speedy trial violation.

The constitutional speedy trial right is also guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 7 of the Wisconsin Constitution. When a defendant claims he was denied his constitutional right to a speedy trial, we employ a four-part balancing test. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). We consider: "(1) the length of [the] delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." ***Id.*** Though this speedy trial analysis considers the totality of the circumstances, the first factor, delay, functions as a "triggering mechanism." ***Id.*** at 509-10. Until there is a presumptively prejudicial delay, the other factors need not be examined. ***Id.*** As a delay approaches, and certainly when it exceeds, one year, it

generally becomes presumptively prejudicial. ***Id.*** Constitutional "speedy trial concerns attach when the complaint and warrant are issued." ***Id.*** at 510-11 (citation omitted).

Assuming without deciding that Williams did, in fact, ask counsel to make a speedy trial demand "from the very beginning," the delay in this case, from the January 6, 2014 preliminary hearing—when trial counsel first appeared with Williams—to the July 28, 2014 start of trial, is slightly less than seven months. And, even running the speedy trial clock from the date of Williams' arrest in late December 2013, the delay totals only slightly more than seven months. A seven-month delay is not presumptively prejudicial; thus, there is no arguably meritorious claim of a constitutional speedy trial violation.

Even if trial counsel performed deficiently by failing to enter Williams' speedy trial demand when first requested, Williams cannot establish prejudice from this deficiency because the record does not support a valid claim for either a statutory or constitutional speedy trial violation. Accordingly, there is no arguable merit to a claim of ineffective assistance of trial counsel for the delay in making the speedy trial demand.

B. Failure to Challenge the State's Witnesses

1. Amanda Didier

Didier testified generally about how a child's level of development may affect his or her ability to communicate, including that children use different language from adults, may understand and process questions differently, may lack appropriate vocabulary for reporting sexual abuse, and may experience difficulty with conceptualizing time. As noted, trial counsel had requested an adjournment of Williams' trial to find an expert witness to counter the State's

expert, and Williams contends that trial counsel was deficient because counsel "subsequently failed to attain any expert at all." Williams also contends that he was prejudiced by "[losing] the very important ability to have an expert testify for the defense to potentially offer alternate conclusions/opinions and or challenge the State's expert['s] … conclusions/opinions."

"It is within an attorney's discretion to call or not call a particular witness, if the circumstances of the case reasonably support such a decision." ***State v. Wood***, 2010 WI 17, ¶73, 323 Wis. 2d 321, 780 N.W.2d 63. If the defendant claims that trial counsel was deficient for failing to call a particular witness, the defendant must allege with specificity what the witness would have said if called to testify. ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647 (2003).

Williams does not indicate which specific "conclusions/opinions" of Didier's testimony should be challenged, nor does he identify a witness who would have testified on his behalf or what that expert would say—he complains only that trial counsel failed to call someone with the *potential* to offer alternate opinions. Accordingly, he fails to show any demonstrable prejudice from the failure to call an expert for the defense. While trial counsel had noted to the court pretrial that he had an expert whom he had called in other cases, there is nothing in the record to suggest that the witness had agreed to testify in this case. There is also no indication in the record that the witness would have been available for trial, even with ninety days' notice. Moreover the record shows that trial counsel reported to the court in Williams' presence that Williams did not care about the State's expert and objected to further delay in his trial. Accordingly, the record does not support an arguably meritorious claim of ineffective assistance of trial counsel for failure to call an expert to counter Didier.

2. Dr. Kelly Hodges

Williams also contends that trial counsel was ineffective for failing to object to the testimony of Dr. Hodges, which Williams says should have been done "on the basis that this particular witness was not on the State's witness list prior to trial." Williams asserts that he was prejudiced by Hodges' testimony because she "essentially 'ensured' [sic] the jury among other things that … an 8-year-old girl could have had 'full-blown' intercourse … with an adult male without causing any injury or disruption to the hymen."

The record reflects that trial counsel did not object to Hodges' testimony "for the limited purpose of introducing the records from the hospital and perhaps interpreting entries on there" as the parties had briefly discussed on a prior date, but "if it goes beyond what it is in the medical records, then I would object on the grounds that she's testifying as an expert when the State has not complied with the obligation to send us a summary of her opinions and so forth." Accordingly, there is no arguable merit to a claim that trial counsel was deficient for failing to object to Hodges' testimony for her lack of disclosure on the State's witness list because trial counsel did precisely that.

C. Failure to Give an Opening Statement

At the start of trial, trial counsel opted to reserve the opening statement until the close of the State's case. When the defense case started, however, counsel did not give an opening statement. Williams claims it was prejudicial for counsel to not inform the jury, through an opening statement, "of his intention to prove 'Beyond any Reasonable Doubt' … that [the] crime could not have occurred when the government alleged in the information[.]" He contends that

giving the jury advance notice of the inconsistencies in the timeline "would have developed well needed credibility with the jury early on, [and] thus would have likely resulted in acquittal."

An opening statement is limited in purpose and scope. ***United States v. Dinitz***, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring). "It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." ***Id.***; *see also* ***Beavers v. State***, 63 Wis. 2d 597, 606, 217 N.W.2d 307 (1974) (The "purpose of an opening statement is to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard.")

Because, as the jury was instructed, "[d]efendants are not required to prove their innocence," and "[t]he burden of establishing every fact necessary to constitute guilt is upon the State," *see* WIS JI—CRIMINAL 140, it was not prejudicial for trial counsel to not have asserted in an opening statement that he was going to prove beyond a reasonable doubt that the crime could not have occurred. Thus, there is no arguable merit to a claim that counsel was deficient for failing to make the specific argument Williams proposes.

To the extent that Williams is asserting more generally that trial counsel should have used the opening statement to tell the jury that the defense case would show "that [the] crime could not have occurred when the government alleged in the information," thereby developing "well needed" credibility with the jury, we discern no prejudice from trial counsel's failure to give that statement. As will be discussed herein, the circuit court allowed the State to amend the information to better conform to the evidence, changing the alleged time frame when the assaults occurred to a period between October 2011 and June 15, 2012. Had trial counsel made a

promise to the jury at the start of the trial to disprove the timeline of the original information, such promise and any credibility developed therefrom would have been undermined once the court allowed the State to amend the information.[4] Thus, there is no arguable merit to a claim that trial counsel was ineffective for failing to offer an opening statement.

D. Failure to have T.I.D. Psychologically Examined

Finally, Williams asserts that T.I.D. "may have … been suffering from mental complications at the time these extremely serious allegations of sexual assault were made" against him. Williams argues that trial counsel was deficient "by neglecting to move to have [the] alleged victim clinically evaluated by a psychologist to determine if psychological issues may have been the key factor in causing the alleged victim to manufacture a false tale of this magnitude[.]"

In the supplemental report, appellate counsel analyzes this issue under the ***Shiffra*/*Green*** standard for disclosure of confidential psychiatric records. *See* ***State v. Shiffra***, 175 Wis. 2d 600, 608-10, 499 N.W.2d 719 (Ct. App. 1993); ***State v. Green***, 2002 WI 68, ¶¶24-25, 253 Wis. 2d 356, 646 N.W.2d 298. While we agree with appellate counsel that there is no arguable ***Shiffra*/*Green*** challenge because there is no evidence that T.I.D. had any mental health records that could be disclosed, Williams does not appear to be challenging the failure of trial counsel to seek disclosure of treatment records; rather, he appears to be asserting that trial counsel should have sought to compel a psychological examination of T.I.D.

[4] Trial counsel could not have made such a representation at the start of the defense case because the amendment had already been approved.

When the State intends to offer the "testimony of one or more experts, *who have personally examined a victim* of an alleged sexual assault, and will testify that the victim's behavior is consistent with the behaviors of other victims of sexual assault, a defendant may request a psychological examination of the victim." ***State v. Maday***, 179 Wis. 2d 346, 359-60, 507 N.W.2d 365 (Ct. App. 1993) (emphasis added). Before such an examination is ordered, the court should be assured that there is a "strong and compelling" reason for it. *See* ***State v. Schaller***, 199 Wis. 2d 23, 30, 544 N.W.2d 247 (Ct. App. 1995) (citation omitted).

The State's expert, Didier, testified about the process of forensically interviewing child sexual abuse victims, but Didier's testimony was based on her general expertise, not on a personal examination of T.I.D. Further, the record does not reveal any "strong and compelling reason" for ordering a psychological evaluation of T.I.D.; requesting a psychological examination of a victim as a means of challenging his or her credibility is not a strong and compelling reason. *C.f.*, ***State v. David J.K.***, 190 Wis. 2d 726, 734, 528 N.W.2d 434 (Ct. App. 1994). Accordingly, there was no basis for trial counsel to have requested, or the circuit court to have allowed, an independent psychological examination of T.I.D., and trial counsel's failure to make a meritless motion is not ineffective assistance. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

III. Circuit Court's Exercise of Discretion in Allowing the State to Amend the Information

As noted, the criminal complaint and the information originally alleged that the sexual assaults of T.I.D. occurred between June 6, 2012 and June 5, 2013, based on T.I.D.'s reports that they occurred when she was nine years old and living with Williams on Vliet Street. The

testimony from adults in this case indicated that T.I.D. and her mother actually lived with Williams on Vliet Street before that June 2012 to June 2013 time frame. Thus, during a break in testimony near the close of the State's case, the State moved to amend the time frame of the offenses in the information to be approximately October 2011 through June 15, 2012. Trial counsel objected, asserting that he had planned a defense for Williams around the dates alleged in the complaint. Specifically, trial counsel's defense plan was to argue that T.I.D. was not credible because she never lived at the location alleged, at the time alleged. The circuit court ultimately allowed the amendment sought by the State.

At trial, the circuit court "may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." WIS. STAT. § 971.29(2). Whether to allow such amendment is a matter for the circuit court's discretion. ***State v. Malcom***, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918. Here, there is no arguably meritorious challenge to a claim that there was insufficient evidence adduced at trial to justify the amendment. Rather, trial counsel argued then, and Williams argues now, that this modification deprived him of his due process right to present a defense.

In order to satisfy constitutional requirements, "the charges in the [criminal] complaint and information 'must be sufficiently stated to allow the defendant to plead and prepare a defense.'" ***State v. Kempainen***, 2015 WI 32, ¶17, 361 Wis. 2d 450, 862 N.W.2d 587 (quoted source omitted). In order to determine the sufficiency of a charge in a complaint and information, we consider two factors. *See* ***Kempainen***, 361 Wis. 2d 450, ¶17. We consider "whether the accusation is such that the defendant [can] determine whether it states an offense to which he [can] plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution of the same offense." ***Id.*** (brackets in ***Kempainen***) (quoting ***Holesome v.***

State, 40 Wis. 2d 95, 102, 161 N.W.2d 283 (1968)). There are multiple factors to assist in evaluating whether the ***Holesome*** test is satisfied, including the age and intelligence of the victim and the ability of the victim to particularize the date and time of the alleged transaction or offense. ***Fawcett***, 145 Wis. 2d at 253.

Applying the two-part ***Holesome*** test here, the first question is whether, when the amendment was granted, Williams had enough notice to prepare a defense. *See* ***Fawcett***, 145 Wis. 2d at 253. Time is not of the essence in child sexual assault cases, so it need not be precisely alleged. *See* ***id.*** at 250; *see also* ***Kempainen***, 361 Wis. 2d 450, ¶22. We have long recognized that young children often cannot comprehend or recall dates as adults can. *See, e.g.*,***Fawcett***, 145 Wis. 2d at 249. "The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance." ***Id.*** at 254.

Here, the record reflects that the circuit court considered the various factors identified in ***Fawcett*** and ultimately allowed the amendment because there were sufficient other facts alleged in the complaint to put Williams on notice of where and when the offenses allegedly occurred. Specifically, the complaint included T.I.D.'s allegations that Williams had raped her when her family lived on Vliet Street and that she was living with her mother and Williams at that time.[5] Thus, the circuit court reasoned, it was within Williams' "personal information to know" when that happened. Additionally, the court observed that if the theory of defense was that T.I.D. was not credible because she could accurately not recall the dates of the offenses, the same theory

[5] Though T.I.D. had difficulty linking her assaults to specific dates, she steadfastly maintained that they occurred while she lived with Williams on Vliet Street.

was still available, but now with the "added advantage" of the State conceding T.I.D. had been wrong about the dates. In short, our review of the record satisfies us that the court appropriately considered the various factors set forth in ***Fawcett*** for determining whether a complaint suffices to put a defendant on notice.

Applying the second prong of the ***Holesome*** test, whether the charging language violates a defendant's protection against double jeopardy, we conclude in this case that double jeopardy is not a realistic threat. *See* ***Fawcett***, 145 Wis. 2d at 255. "Courts may tailor double jeopardy protection to reflect the time period charged in an earlier prosecution.… If the [S]tate is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged." ***Id.***

Thus, based on the foregoing, there is no arguable merit to a claim that the circuit court erroneously exercised its discretion in allowing the State's oral amendment to the timeframe alleged in the information.

IV. Prosecutorial Misconduct

Finally, Williams argues that the State engaged in prosecutorial misconduct during its closing arguments. First, Williams notes that the prosecutor in her closing argument said that Williams was "[s]hoving his penis into [T.I.D.'s] vagina." He "objects to this inflammatory language" and contends that "there is no medical evidence to support such a bizarre statement." Second, Williams objects to comments in the State's rebuttal argument that he believes were misleading or inaccurate, when the State remarked, "And you heard in this case that this girl's hymen had estrogen which the doctor also said is very beneficial in healing. … [Hodges] told

you that more than one time. That she has seen children who have had full blown penetration and their hymens are just fine." Williams contends that the prosecutor "completely embel[l]ished" these statements, and asserts that "these misrepresentations undoubt[ed]ly harmed him in the eyes of the jury."

"A 'prosecutor may comment on the evidence, … argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***State v. Hurley***, 2015 WI 35, ¶95, 361 Wis. 2d 529, 861 N.W.2d 174 (quoting ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979)). The State "'is allowed considerable latitude in closing arguments,' and is permitted to draw any reasonable inference from the evidence." ***Hurley***, 361 Wis. 2d 529, ¶95 (quoted source omitted). "We review allegations of prosecutorial misconduct in light of the entire record of the case." *See* ***State v. Lettice***, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996).

While the State's comment about Williams "shoving" his penis into T.I.D. may have had significant emotional impact, it is not impermissibly inflammatory. *See* ***State v. Weiss***, 2008 WI App 72, ¶10, 312 Wis. 2d 382, 752 N.W.2d 372 (citing ***Berger v. United States***, 295 U.S. 78, 88-89 (1935) ("while [the prosecutor] may strike hard blows, he [or she] is not at liberty to strike foul ones."). It is not any more inflammatory than the nature of the alleged acts themselves.

With respect to the State's rebuttal argument, we note that the State was responding to defense counsel's argument that "[t]here is no medical evidence that an 8 year old girl had sexual intercourse with a grown man." The State's rebuttal argument is a fair, if inartful, reminder to the jury of Hodges' testimony that "the more estrogen you have, the more complete those tissues feel" and "a lot of times this type of contact doesn't actually cause any injuries…. [T]here's

often no visible evidence[.]" Accordingly, there is no arguable merit to a claim of prosecutorial misconduct in the closing arguments.

V. Sentencing Discretion

The other issue that appellate counsel discusses in the no-merit report is the circuit court's exercise of sentencing discretion. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, indicate which objective or objectives are of greatest importance, and explain how the sentence achieved the objectives. ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several additional factors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the court's discretion. ***Id.***

Although the circuit court's exercise of discretion was somewhat bound by the mandatory minimum twenty-five years of initial confinement, the court still had to exercise discretion as to whether to impose initial confinement time beyond the mandatory minimum, how much extended supervision should be imposed, the terms of extended supervision, and whether the sentences would be concurrent or consecutive. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. Because the concurrent forty-five-year sentences imposed are well within the maximum possible 120-year-range authorized by law, they are not an erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000

WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Moreover, the sentences are not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.[6]

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Kathleen A. Lindgren is relieved of further representation of Williams 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

[6] To the extent that there are any other challenges Williams attempts to raise in his no-merit response, they are deemed to have been too inadequately developed to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).