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DISTRICT II

October 14, 2020

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

2019AP1306-CRNM State of Wisconsin v. David J. Baker (L.C. #2016CF310)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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 J. Baker appeals from a judgment convicting him of first-degree sexual assault of a child and exposing genitals to a child. *See* WIS. STAT. §§ 948.02(1)(e) and 948.10(1)(a) (2017-

18).[1] His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Baker did not file a response. After reviewing the record and counsel's report, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Baker was accused of having sexual contact with a ten-year-old child living in the same home. A jury found him guilty of the aforementioned felonies. At sentencing, the parties jointly recommended a global sentence of five years of initial confinement and ten years of extended supervision, and the circuit court imposed concurrent sentences consistent with that joint recommendation. This no-merit appeal follows.

The no-merit report first addresses whether the evidence at Baker's jury trial was sufficient to support the jury's verdicts. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state 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." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial persuades us that the State produced ample evidence to convict Baker of his crimes. That evidence included testimony from the victim and the videotaped forensic interview of the victim that was conducted two days after the assault. While the defense expert provided testimony that could have led the jury to find that repeated questioning of the victim affected her memory, the jury was free to accept the victim's

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

testimony and find Baker guilty. We agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In fashioning its sentence, the court considered the seriousness of the offenses, Baker's character, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It adopted the parties' joint sentencing recommendation, which included a term of initial confinement shorter than the seven to nine years recommended in the presentence investigation report. Under the circumstances of the case, the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Baker's sentence would lack arguable merit.

We will briefly address three other issues that we identified during our independent review of the record. First, the jury instructions given in this case included WIS JI—CRIMINAL 140, which another defendant challenged in litigation before the Wisconsin Supreme Court. In that case, the court held "that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Consequently, there would be no arguable merit to pursue postconviction proceedings based on the use of jury instruction WIS JI—CRIMINAL 140 at Baker's trial.

Second, the circuit court empaneled fourteen jurors so that two could serve as alternates who would be excused prior to deliberations. The parties later stipulated to having two specific jurors selected as the alternates. The first of those jurors was made an alternate because he indicated that he was scheduled to attend an event in the evening of the second day of the trial that could conflict with jury deliberations if they extended into the evening. The second juror, a woman, was made an alternate because the parties, the bailiff, and the clerk observed her sleeping during the State's closing argument when it was replaying the video of the victim's forensic interview. Given the parties' stipulation to select those two jurors as the alternates and the fact those jurors did not participate in deliberations, there would be no arguable merit to seek a new trial based on the participation of either juror.

Third, when the parties brought to the circuit court's attention the fact that the female juror had fallen asleep during the State's closing argument, trial counsel indicated that she believed a male juror may have also fallen asleep during the same video. However, the State said that the juror did not appear to be sleeping. Trial counsel then stated that she was "more concerned" about the female juror who was observed sleeping by multiple people.[2] When trial counsel recommended that the female juror be made an alternate, she said that the other alternate should be the man with the time conflict. She added: "But if somebody else falls asleep, I think [the man with the time conflict] may have to come back in."[3] At that point, the circuit court gave

[2] The circuit court said that it "was not watching the jury" because it "watched the video the whole time."

[3] The discussion about juror attentiveness during the State's closing argument took place prior to trial counsel's closing argument, when the jurors were on a break. The record does not indicate there were any issues with juror attentiveness during trial counsel's closing argument and the State's rebuttal argument.

trial counsel an opportunity to consult with Baker, and he told the circuit court that he agreed with trial counsel's decisions about the alternates.

We conclude that there would be no arguable merit to seeking postconviction relief based on trial counsel's decision not to further explore whether a male juror may have fallen asleep during the State's closing argument. When the State indicated that it did not observe the man sleeping, trial counsel chose not to pursue the issue. Instead, trial counsel said she supported the selection of two other alternates and further indicated that she would consider keeping the man with a time conflict on the jury only if someone else were to fall asleep during the remaining proceedings. We have not identified an arguable basis to challenge trial counsel's strategic decision. *See* ***State v. Breitzman***, 2017 WI 100, ¶38, 378 Wis. 2d 431, 904 N.W.2d 93 ("[T]here is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance" and "[c]ounsel's decisions in choosing a trial strategy are to be given great deference.") (citations omitted).

Our independent review of the record—including jury selection, jury instructions, Baker's waiver of his right to testify, opening statements/closing arguments, and questions by the jury during the trial and deliberations—does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Carl W. Chesshir of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of further representation of David J. Baker in this matter.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals