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DISTRICT IV

October 29, 2020

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

2019AP975-CRNM State of Wisconsin v. Michael J. Schafer (L.C. # 2018CF48)

Before Blanchard, Graham, and Nashold, 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).

Attorney Bradley J. Lochowicz, appointed counsel for Michael Schafer, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to further proceedings based on Schafer's postconviction claim of ineffective assistance of counsel; other claims of ineffective assistance of counsel; an officer's testimony at trial that the victim was telling the truth; the sufficiency of the evidence to support the jury verdict; or the sentence imposed by the circuit court. Schafer was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Schafer was convicted, following a jury trial, of repeated sexual assault of a child. The court sentenced Schafer to the mandatory minimum of 25 years of initial confinement, plus 20 years of extended supervision. Schafer filed a postconviction motion arguing that his trial counsel was ineffective by failing to object to the court reading WIS JI—CRIMINAL 140 to the jury. The court denied the motion without a hearing.

The no-merit report concludes that, based on the supreme court's decision in ***State v. Trammell***, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564, upholding the validity of WIS JI—CRIMINAL 140, Schafer's postconviction claim of ineffective assistance of counsel now lacks arguable merit. We agree with counsel's assessment that, based on ***Trammell***, it would be wholly frivolous to challenge the circuit court's decision denying Schafer's postconviction

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

motion. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense).

The no-merit report also concludes that there would be no arguable merit to a claim of ineffective assistance of counsel based on counsel failing to: (1) object to the State filing an amended information that changed the dates of the assaults to conform to the testimony expected at trial; or (2) pursue a motion to suppress Schafer's statements to police. We agree with counsel's assessment that nothing before us would support a non-frivolous claim of ineffective assistance of counsel on either basis.

The no-merit report addresses whether there would be arguable merit to further proceedings based on an officer testifying at trial that the victim was telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (no witness may testify that another witness is telling the truth). We agree with counsel's assessment that further proceedings on this issue would lack arguable merit. Defense counsel objected to the officer's testimony that the victim was truthful during the officer's interview with him, and the court sustained the objection. The court also gave a curative instruction to the jury, instructing the jury to disregard that testimony. The jury is presumed to have followed the curative instruction. *See* ***State v. Lukensmeyer***, 140 Wis. 2d 92, 110, 409 N.W.2d 395 (Ct. App. 1987).

The no-merit report also addresses whether the evidence was sufficient to support the conviction. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have

found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including testimony by the victim's mother and great-grandmother, the investigating officers, and the recorded statement of the child victim, if deemed credible by the jury, was sufficient to support the verdict.

Finally, the no-merit report addresses whether a challenge to Schafer's sentence would have arguable merit. We agree with counsel's assessment that a challenge to the sentence imposed by the circuit court would be wholly frivolous. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Schafer was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Schafer's character, the seriousness of the offense, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum Schafer faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances'" (quoted source omitted)). The court awarded Schafer 42 days of sentence credit, on counsel's stipulation. We discern no erroneous exercise of the circuit court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction or the order denying postconviction relief. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction and the order denying postconviction relief are affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Bradley Lochowicz is relieved of any further representation of Michael Schafer 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