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DISTRICT III

November 24, 2020

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

2019AP1318-CRNM State of Wisconsin v. Michael L. Petersen, Jr.
(L. C. No. 2015CF182)

Before Stark, P.J., Hruz and Seidl, 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 Angela Kachelski, appointed counsel for Michael Petersen, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be

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

arguable merit to any issues based on proceedings before or during trial; the sufficiency of the evidence to support the jury verdicts; Petersen's posttrial claim of jury bias; or the sentence imposed by the circuit court. Petersen was provided a copy of the report, but he has not filed a response. In response to a prior order of this court, counsel has filed a supplemental no-merit report. Upon independently reviewing the entire record, as well as the no-merit report and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Petersen was convicted following a jury trial of repeated sexual assault of the same child and incest with child. The circuit court sentenced Petersen to a total of ten years' initial confinement and five years' extended supervision.

The no-merit report concludes that there would be no arguable merit to any issues based on the initial appearance, Petersen's waiver of his right to a preliminary hearing, or arraignment. We agree with counsel's assessments.

The no-merit report also addresses whether there would be arguable merit in challenging the circuit court's decision admitting expert testimony offered by the State following a ***Daubert***[2] hearing. The State offered expert testimony from two witnesses. One witness testified that, based on her training and experience, most child sexual assault victims do not have vaginal injuries and that the results of most child sexual assault victims' examinations are "normal" or have "nonspecific findings." The other witness testified that, based on her training and experience, the majority of sexual assault victims delay reporting the assaults. We agree with counsel's

[2] *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 596 (1993).

assessment that it would be wholly frivolous to argue that the court erred by admitting the experts' testimony. *See* WIS. STAT. § 907.02 (setting forth criteria for testimony by experts); ***State v. Pico***, 2018 WI 66, ¶15, 382 Wis. 2d 273, 914 N.W.2d 95 ("Whether to admit proffered expert testimony rests in the circuit court's discretion.").

The no-merit report also addresses whether there would be arguable merit in challenging the circuit court's decision denying Petersen's motion to dismiss based on law enforcement's destruction of the victim's recorded interview. At a hearing, the State offered police testimony that the recording's destruction was unintentional. The State also offered police testimony that the substance of the interview had been documented in a police report, which was offered into evidence, and that the content of the interview had been consistent with other recorded interviews that had been preserved. The court found that the police did not intentionally destroy the recording and that dismissal was not warranted, but the court would nonetheless give a jury instruction that evidence that would normally be discoverable by the defense had been destroyed.

We agree with counsel's assessment that this issue lacks arguable merit. Nothing before us would support a nonfrivolous argument that the circuit court erred by denying the motion to dismiss based on destruction of the recording. *See* ***State v. Luedtke***, 2015 WI 42, ¶46, 362 Wis. 2d 1, 863 N.W.2d 592 (holding that the destruction of evidence violates a defendant's due process rights if the police: (1) failed to preserve evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence that is potentially exculpatory).

The no-merit report addresses whether there would be arguable merit to any issues based on jury voir dire. It notes that during voir dire, one potential juror stated he had worked as a guardian ad litem for sixteen years and that he would be "looking more for reasons to convict

rather than acquit." The potential juror was excused. However, Petersen also moved to strike the entire jury panel. Petersen argued that the potential juror's statement was equivalent to an expert stating that Petersen "was more likely guilty than not guilty." The circuit court determined that despite the potential juror's experience as an attorney, his statement about "looking" for reasons to convict would not prevent the jury panel from being fair and impartial, and the court denied the motion on that basis. We conclude that it would be wholly frivolous to challenge the court's decision denying the motion to strike the jury panel.

The no-merit report also addresses whether there would be arguable merit to any issues based on any of the following: the circuit court allowing, over Petersen's objection, the victim's mother to remain in the courtroom during the victim's testimony; the court's determination of the number of prior convictions for Petersen or any testifying witness; the opening statements; the court's rulings on objections during witness testimony; defense counsel's position that there was no basis to challenge the admissibility of Petersen's statement to law enforcement; Petersen's decision to testify in his own defense; the court's denial of Petersen's motion to dismiss at the close of the State's case; the court's ruling on Petersen's motion to exclude the victim from the courtroom after her reaction to Petersen's testimony; jury instructions; closing arguments; the court's answer to a jury question; and the court's ruling accepting the jury verdicts and finding Petersen guilty of the charges. We agree with counsel's analyses of those issues and we conclude that there would be no arguable merit to further proceedings based on any of them.

The no-merit report also addresses whether the evidence was sufficient to support the convictions. A claim of insufficient evidence requires a showing that "the evidence, viewed most favorably to the [S]tate 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 regarding the sufficiency of the evidence. The evidence at trial, including testimony by the victim, if deemed credible by the jury, was sufficient to support the verdicts.

The no-merit report also addresses whether there would be arguable merit challenging the circuit court's denial of Petersen's posttrial motion to set aside the verdicts based on the alternate juror's report that some of the jurors had discussed their opinions about the evidence and Petersen's guilt or innocence prior to deliberations. Petersen argued that the jurors were objectively and subjectively biased, denying him his right to a fair trial. *See* ***State v. Lepsch***, 2017 WI 27, ¶¶21-22, 374 Wis. 2d 98, 892 N.W.2d 682 ("The United States Constitution and Wisconsin's Constitution guarantee an accused an impartial jury."). The alternate juror testified at a hearing that during the course of the trial and prior to deliberations, some of the jurors discussed the witnesses, the evidence, and their opinions as to Petersen's guilt. The circuit court found that Petersen had not established a basis for a new trial, and it denied the motion. No-merit counsel states that she was unable to obtain any evidence to support a claim of juror bias in a postconviction motion. We agree that under these circumstances further proceedings on this issue would lack arguable merit.[3]

Finally, the no-merit report addresses whether a challenge to Petersen's sentences would have arguable merit. Our review of a sentence determination begins "with the presumption that

[3] By a prior order, this court directed no-merit counsel to obtain the transcript of the hearing on the motion to set aside the verdicts, which was missing from the record, and to inform this court whether counsel's review of the transcript affected her opinion of whether there are any issues of arguable merit in this case. After the record was supplemented with the missing transcript, counsel filed a supplemental no-merit report concluding that nothing in the transcript altered her opinion that further proceedings would lack arguable merit. We agree with counsel's assessment.

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 Petersen was afforded the opportunity to address the circuit court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Petersen's character and criminal history, the seriousness of the offenses, 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 sentences were within the maximum Petersen faced and, given the facts of this case, there would be no arguable merit to a claim that the sentences were unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (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") (citation omitted). The court awarded Petersen sentence credit of 115 days, a calculation that was undisputed by counsel. We discern no erroneous exercise of the court's sentencing discretion.

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

Therefore,

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

IT IS FURTHER ORDERED that attorney Angela Kachelski is relieved of any further representation of Michael Petersen in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals