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DISTRICT IV

November 18, 2021

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

2020AP67-CRNM State of Wisconsin v. Kelly Lee Baxter (L.C. # 2017CF345)

Before Blanchard, P.J., 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 Mark Schoenfeldt, appointed counsel for Kelly Lee Baxter, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to the sufficiency of the evidence to support the jury verdict; the sentence imposed by the circuit court; or the effectiveness of trial counsel's

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

representation. Baxter was provided a copy of the report, and has filed a response asserting potential issues based on his competency to proceed to trial, DNA evidence, and counsel's failure to assert a double jeopardy violation after Baxter's first trial ended in a mistrial. No-merit counsel has filed a supplemental no-merit report concluding that the issues Baxter has raised would lack arguable merit. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

In February 2017, Baxter was charged with second-degree sexual assault based on a home invasion and sexual assault of a seventy-eight-year-old woman that occurred in April 2000. The criminal complaint asserted that the State had obtained a positive match between DNA recovered from the victim's bedsheet and Baxter's DNA in the Combined DNA Index System. Baxter's first trial ended in a hung jury. Following the first trial, the State conducted additional testing of the victim's bedsheet, which indicated that Baxter's DNA was present on multiple spots on the bedsheet. Baxter was convicted following a second jury trial. The court sentenced Baxter to twenty years of initial confinement and ten years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the jury verdict. 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 this standard has been met here. The evidence at trial, including testimony by the investigating

officers, the doctor and nurse who examined the victim after the sexual assault, and the State DNA analyst was sufficient to support the verdict.

Baxter argues in his no-merit response that the circuit court erred by not ordering a competency evaluation prior to trial. Baxter cites his counsel's statement at a December 19, 2017 hearing that Baxter had mental health issues that affected his ability to make progress in sex offender treatment. He argues that, once his trial counsel stated that he had mental health issues, the circuit court was required to hold a competency hearing under WIS. STAT. § 971.14. Baxter also argues that, at his second trial, the circuit court should have seen that Baxter was only following what his counsel told him to say and should have stopped the proceeding and ordered a competency evaluation.

No-merit counsel concludes in the supplemental no-merit report that the circuit court did not err in not holding a competency hearing. Counsel concludes that Baxter's inability to complete sex offender treatment based on mental health issues, and his cooperation with his counsel at trial, did not show that he lacked substantial mental capacity to proceed. Counsel concludes that the record does not indicate that Baxter lacked mental capacity, and also points out that Baxter does not now assert that he was, in fact, incompetent to proceed.

We conclude that this issue lacks arguable merit. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1). A person is competent to proceed if the person possesses both "sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and ... a rational as well as factual understanding of a proceeding against him or

her." ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). However, "a history of psychiatric illness … does not necessarily render the defendant incompetent to stand trial." ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477. Rather, "[b]efore competency proceedings are required, evidence giving rise to a reason to doubt competency must be presented to the trial court." ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). We agree with no-merit counsel's assessment that the record does not indicate a reason to doubt Baxter's competency. Moreover, as counsel points out, Baxter does not now assert that he ever lacked substantial capacity to proceed. *See* § 971.13(1). Accordingly, any issue on this basis would be wholly frivolous.

The no-merit report also addresses whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. We conclude that this issue lacks arguable merit. This court's 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). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the gravity of the offense, Baxter's rehabilitative needs, 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 court imposed twenty years of initial confinement and ten years of extended supervision. Given the facts of this case, there would be no arguable merit to a claim that the sentence, which was the maximum allowed by law, 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 circuit court granted Baxter 379 days of sentence credit, on counsel's stipulation. We discern no arguable merit to a challenge to the circuit court's sentencing decision.

The no-merit report concludes that there would be no arguable merit to a claim of ineffective assistance of counsel based on counsel's representation of Baxter at trial or sentencing. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and also that the deficient performance prejudiced the defense).

Baxter argues in his no-merit response that his rights to due process and the effective assistance of counsel were violated in connection with DNA evidence. He argues that there was DNA evidence recovered from the victim's house that did not match Baxter but that was not tested or presented to the jury, preventing the case from being fully tried. He asserts that DNA testing of that material would have matched a man who worked at a gas station and lived near the victim's house and who was of Hispanic descent, consistent with the victim's report that her assailant had a Spanish accent. He asserts that testing of the fingernail scrapings taken from the victim and cigarette butts recovered outside the victim's house tested positive for DNA from a Hispanic male. He argues further that that evidence was presented at Baxter's first trial, which he argues prevented his conviction at that trial, but that the DNA evidence favorable to Baxter was then excluded from his second trial. Baxter asserts that the State requested that the DNA evidence favorable to Baxter be removed from the second trial so that the State would not have to keep returning for new trials; that the circuit court granted that request; and that the court then

ordered the court reporter to delete those statements from the transcript. He argues that his trial counsel was ineffective by failing to object.

Baxter also argues that the State used color-enhancing images of the victim's bedsheet to make it appear that the blood on the victim's bedsheet was redder, as if the assault "just happened." He argues that the State purposely made the blood on the bedsheet appear redder than it actually was to refute Baxter's explanation for how his blood got on the victim's bedsheet. (At trial, Baxter claimed that his blood was on the bedsheet because, at some earlier point in time, prior to the sexual assault, Baxter had cut his head and then walked through the bedsheet as it was hanging from a clothesline in the victim's basement.) Baxter also contends that, at the first trial, the court allowed a witness to handle the bedsheet with ungloved hands. He argues that the DNA evidence from the bedsheet was therefore contaminated for use at the second trial.

No-merit counsel responds in the supplemental no-merit report that there would be no arguable merit to a claim that the DNA evidence from the victim's bedsheet was contaminated by handling by a witness at the first trial. Counsel concludes that, even if the witness had improperly handled the bedsheet, the result would have been that the witness's DNA would have been recovered from the bedsheet in subsequent testing, not that Baxter's DNA was deposited on the bedsheet in that process.[2]

[2] The supplemental no-merit report does not address any of Baxter's other assertions related to DNA evidence.

We conclude that none of Baxter's assertions of due process violations or ineffective assistance of counsel related to DNA evidence would have arguable merit. The State's DNA analyst testified that Baxter was the source of the DNA from the blood on the victim's bedsheet. The analyst also testified that testing of material collected from the victim's hospital visit after the assault and a cigarette butt collected outside the victim's home did not indicate the presence of Baxter's DNA. The analyst explained that the material collected from the victim's hospital visit either did not have any DNA or had too little DNA to analyze, while the cigarette butt had DNA from an unknown male source. However, while Baxter contends that the DNA from the cigarette butt and the victim's fingernail scrapings were from a Hispanic male, nothing in the record or Baxter's no-merit response establishes a non-frivolous basis to pursue that argument.[3]

We also conclude that there would be no arguable merit to further proceedings based on Baxter's claim that DNA evidence from the first trial that was favorable to Baxter was excluded from the second trial. Contrary to Baxter's assertion, the analyst did not provide any DNA testimony favorable to Baxter at the first trial that was then excluded from the second trial. There is no support in the record for an argument that the transcript was altered in any way. Moreover, an argument that the circuit court deleted statements that evidence from the first trial would be excluded lacks arguable merit because no evidence from the first trial was, in fact, excluded from the second trial.

[3] At trial, Baxter's counsel argued that the victim had provided a description of her assailant as Hispanic, and counsel then asserted that Baxter is not Hispanic and did not "look Hispanic." Counsel was also able to elicit from the DNA analyst that it was possible that a Hispanic male had been the assailant but left no DNA on the bed. However, nothing before us would support a non-frivolous claim that any of the DNA evidence was from a Hispanic male.

We also discern no arguable merit to further proceedings based on Baxter's contention that the State used color-enhanced images to make the blood on the victim's bedsheet appear more red, and therefore more recent, to the jury. We find no support for that contention in the record. The responding officers testified that, at the victim's home immediately following the reported sexual assault, the blood on the bedsheet appeared to be the typical red color of fresh blood, as represented in the pictures taken of the bedsheet at that time. Moreover, the DNA analyst testified that it can take days or weeks for blood to darken from red to brown, and Baxter's defense was that, on some unknown date prior to the sexual assault, he cut his head and walked through the bedsheet in the victim's basement. Based on the record before us, we discern no arguable merit to any issue based on Baxter's claim that the State used color-enhancing on the photographs of the bedsheet to make the blood appear redder to the jury.

We also agree with no-merit counsel that there would be no arguable merit to further proceedings based on Baxter's claim that a witness handled the bedsheet without gloves at the first trial. Our review of the record does not support Baxter's contention that a witness handled the bedsheet without gloves at the first trial. Additionally, as counsel points out, even if the witness had handled the bedsheet without gloves, that would not explain why subsequent testing of additional sections of the bedsheet revealed *Baxter*'s DNA. We discern no arguable merit to further proceedings based on this issue.

Finally, Baxter argues in his no-merit response that his trial counsel was ineffective by failing to move to dismiss this case on double jeopardy grounds after Baxter's first trial ended in a hung jury. No-merit counsel asserts in a supplemental no-merit report that there was no basis for trial counsel to move to dismiss based on double jeopardy because the mistrial was not caused by intentional conduct by the prosecutor. *See* ***State v. Copening***, 100 Wis. 2d 700, 714-

15, 303 N.W.2d 821 (1981). We agree with no-merit counsel that this issue lacks arguable merit. The Double Jeopardy Clause does not bar a second trial when a first trial ends in a hung jury. *See* ***Richardson v. United States***, 468 U.S. 317, 324 (1984); ***State v. DuFrame***, 107 Wis. 2d 300, 305-06, 320 N.W.2d 210 (Ct. App. 1982). Additionally, as no-merit counsel points out, the record contains no evidence of any bad faith by the prosecutor that would have barred retrial. *See* ***State v. Jenich***, 94 Wis. 2d 74, 92, 288 N.W.2d 114 (1980). We discern no basis for a non-frivolous argument that trial counsel was ineffective by failing to move to dismiss on double jeopardy grounds.

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.

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

IT IS FURTHER ORDERED that Attorney Mark Schoenfeldt is relieved of any further representation of Kelly Lee Baxter 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