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DISTRICT I

April 18, 2023

To:

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Circuit Court Judge
Electronic Notice

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

2021AP1480-CRNM	State of Wisconsin v. Jose E. Rodriguez-Cosme (L.C. # 2018CF462)
2021AP1481-CRNM	State of Wisconsin v. Jose E. Rodriguez-Cosme (L.C. # 2018CF775)
2021AP1482-CRNM	State of Wisconsin v. Jose E. Rodriguez-Cosme (L.C. # 2018CF1571)

Before Brash, C.J., Dugan and White, 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).

In these consolidated cases, Jose Rodriguez-Cosme appeals judgments of conviction for one count of repeated sexual assault of a child, four counts of first-degree sexual assault of a child, and two counts of felony intimidation of a victim.[1] Attorney Jay Pucek, appointed counsel for Rodriguez-Cosme, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Rodriguez-Cosme was sent a copy of the report and filed a response. Counsel then filed a supplemental no-merit report, and Rodriguez-Cosme filed a supplemental response. Upon consideration of the report and supplemental report, the responses, and an independent review of the record as mandated by ***Anders***, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we summarily affirm. *See* WIS. STAT. RULE 809.21.

Rodriguez-Cosme had a bench trial, and the circuit court found him guilty of the offenses listed above. When sentencing Rodriguez-Cosme, the court imposed a combination of consecutive and concurrent sentences resulting in a total global sentence consisting of thirty years of initial confinement and thirty years of extended supervision.

The no-merit report first addresses the sufficiency of the evidence. We agree with counsel's assessment that there is no arguable merit to this issue. When addressing sufficiency of the evidence, an appellate court will not overturn a conviction "unless 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

[1] These cases involve two child victims.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting all of the trial evidence here, we are satisfied that it was sufficient to support each of Rodriguez-Cosme's convictions.

The no-merit report next addresses whether there are other arguably meritorious issues relating to the pretrial proceedings or the trial, including all of the following: the State's failure to timely file its witness list, joinder of charges, Rodriguez-Cosme's waiver of his right to a jury trial, the admissibility of the forensic interviews of the child victims, evidentiary objections by counsel at trial, and Rodriguez-Cosme's waiver of his right to testify. We are satisfied that appellate counsel has properly analyzed each of these issues as having no arguable merit, and we see no other issues of arguable merit relating to the pretrial proceedings or the trial.

In his response and supplemental response, Rodriguez-Cosme maintains that there are five issues with arguable merit relating to the pretrial proceedings or the trial. We now discuss each of those five issues and explain why we disagree.

The first issue that Rodriguez-Cosme raises is whether his trial counsel was ineffective by declining to object to the State's failure to timely file its witness list. The relevant background facts are as follows. On the day before trial, the State informed the court that it had prepared its witness list months in advance but had inadvertently failed to file the witness list until that day. Rodriguez-Cosme's co-defendant (the victims' mother) objected and requested exclusion of the State's witnesses. Rodriguez-Cosme's counsel did not join in the objection. The court denied the request to exclude the State's witnesses, finding that there was no surprise as to any of the witnesses. Rather, the witnesses were all identified in discovery and included the victims, the victims' father, the victims' forensic interviewers, and police officers involved.

To show ineffective assistance of counsel, the defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Further, a defendant is not entitled to a postconviction hearing on a motion claiming ineffective assistance of counsel if the defendant "fails to allege sufficient facts in [the] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief[.]" ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoted source omitted); *see also* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Rodriguez-Cosme contends that his trial counsel should have objected to the State's untimely witness list and sought a continuance that would have allowed counsel to further investigate the State's witnesses. However, Rodriguez-Cosme's allegations relating to counsel's investigation of the witnesses are conclusory and do not indicate any causal link between the timing of the State's witness list and the extent of counsel's investigation. The record establishes that counsel had ample time to investigate the witnesses because they were identified in discovery. Rodriguez-Cosme also alleges that the State's untimely witness list prevented him from calling a potential defense witness, M.A. This allegation is likewise conclusory. Rodriguez-Cosme does not make allegations connecting the timing of the State's witness list to counsel's decision not to call M.A., nor does he make allegations explaining how M.A.'s testimony could have bolstered his defense. *See* ***Allen***, 274 Wis. 2d 568, ¶23 (postconviction

motion must allege "who, what, where, when, why, and how"). Further, appellate counsel states in the supplemental no-merit report that a review of trial counsel's file revealed that M.A.'s testimony would not have supported the defense. For all of these reasons, we conclude that Rodriguez-Cosme's claim that his trial counsel was ineffective by failing to object to the State's untimely witness list and seek a continuance lacks arguable merit.

The second issue that Rodriguez-Cosme raises in his responses is whether his trial counsel was ineffective by failing to object to one of the forensic interviews of one of the victims. Rodriguez-Cosme contends that counsel could have objected to the second interview of this victim based on the interviewer's use of improper interview techniques. This issue lacks arguable merit because there is nothing in the record or in Rodriguez-Cosme's allegations to indicate that the interviewer used improper techniques. Rodriguez-Cosme appears to assert that, because the victim made assault allegations against Rodriguez-Cosme in her second interview but not in her first interview, the second interviewer's techniques were likely suggestive. This assertion is at best speculative, and speculation cannot support a claim for ineffective assistance of counsel. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) ("A showing of prejudice" in the context of ineffective assistance of counsel "requires more than speculation."). Further, the record shows that the most likely reason why the victim changed her story between her first interview and her second interview was that her mother had convinced her to lie in the first interview.[3]

[3] Rodriguez-Cosme also claims that the victim's second interview was inadmissible because a guardian ad litem was not present. There is no legal support for this claim.

The third issue that Rodriguez-Cosme raises in his responses is whether his trial counsel was ineffective by declining to cross-examine two of the State's witnesses. Rodriguez-Cosme argues that counsel's failure to cross-examine these two witnesses violated his right to confrontation and resulted in an unfair trial. Rodriguez-Cosme alleges that if counsel would have cross-examined these two witnesses, the witnesses may have revealed information helpful to his defense, that the witnesses could have been shown to be biased, or that the witnesses' credibility could have been damaged in other ways. Rodriguez-Cosme's allegations are too non-specific to establish how or why it was important for counsel to cross-examine the two witnesses. Rodriguez-Cosme may be categorically asserting that counsel must cross-examine each opposing witness to be constitutionally effective. Such an assertion would lack arguable merit. Counsel may have sound reasons for declining to cross-examine some witnesses, and requiring counsel to cross-examine each and every witness regardless of the circumstances would intrude on counsel's advocacy role. *See* ***Strickland***, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential.").

The fourth issue that Rodriguez-Cosme raises in his responses is whether the State failed to disclose exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). "A ***Brady*** violation has three components[.]" ***State v. Wayerski***, 2019 WI 11, ¶35, 385 Wis. 2d 344, 922 N.W.2d 468. First, "the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching[.]" ***Id.*** Second, "the evidence must have been suppressed by the State, either willfully or inadvertently[.]" ***Id.*** Third, "the evidence must be material." ***Id.*** The materiality requirement of ***Brady*** is the same as the prejudice prong of the test for ineffective assistance of counsel. ***Wayerski***, 385 Wis. 2d 344, ¶36. Accordingly, "[e]vidence is not material

under ***Brady*** unless the nondisclosure 'was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" ***Id.*** (quoted source omitted).

Rodriguez-Cosme alleges that a ***Brady*** violation occurred because the State failed to disclose medical records from a medical examination of one of the victims that showed no evidence of sexual assault. We conclude that this alleged ***Brady*** violation lacks arguable merit for two reasons.

First, appellate counsel's analysis of this issue in the supplemental no-merit report satisfies us that Rodriguez-Cosme would be unable to prove that the State suppressed the medical records. Appellate counsel states that his review of trial counsel's file shows that the State disclosed the records. Appellate counsel also states that his review of the records shows no inconsistencies between the results of the limited medical examination and the victim's sexual assault allegations against Rodriguez-Cosme, which did not involve vaginal intercourse.

The second reason we conclude that the alleged ***Brady*** violation lacks arguable merit is that, even if the State had failed to disclose the medical records, our review of the record satisfies us that Rodriguez-Cosme would not be able to satisfy the materiality requirement for a ***Brady*** violation. There was testimony at trial that the medical examination of the victim revealed nothing significant. Accordingly, the trial court, sitting as the fact finder, heard evidence that the medical examination was not incriminating, and there is not a reasonable probability that the availability of the medical records would have made a difference in the outcome of trial.

We turn next to the the fifth and final issue that Rodriguez-Cosme raises in his responses, which is whether this court should reverse his convictions in the interest of justice. We have

discretion to reverse a conviction and order a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. However, "[w]e exercise our authority to reverse in the interest of justice under WIS. STAT. § 752.35 sparingly and only in the most exceptional cases." ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. Here, none of Rodriguez-Cosme's allegations support an arguably meritorious claim for reversal in the interest of justice.

We turn finally to the circuit court's exercise of its sentencing discretion. We agree with appellate counsel that there is no arguable merit to this issue. The court considered the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not consider any improper factors. Rodriguez-Cosme's sentences were within the maximum allowed and, under the circumstances, the sentences could not be challenged as unduly harsh or so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other basis upon which Rodriguez-Cosme might challenge his sentences.

Based upon our independent review of the record, we have found no other arguable basis to pursue further appellate proceedings, and there is nothing further in Rodriguez-Cosme's responses that raises any other issue of arguable merit. 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 circuit court's judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jay R. Pucek is relieved of any further representation of Jose Rodriguez-Cosme in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals