OFFICE OF THE CLERK

WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

April 18, 2023

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
Electronic Notice

Hans P. Koesser
Electronic Notice

Kendrick L. Walker 623279
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

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

2020AP1562-CRNM State of Wisconsin v. Kendrick L. Walker (L.C. # 2019CF237)

Before Brash, C.J., Donald, P.J., and White, 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).

Kendrick L. Walker appeals from a judgment, entered on a jury's verdict, convicting him on one count of first-degree sexual assault. Appellate counsel, Hans P. Koesser, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Walker was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's

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

report, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Around 3:30 a.m. on October 20, 2018, S.D.E. was walking home from a relative's house. A man she did not know started walking next to her and talking to her. He asked if he could walk with her; she said she was already taken. He asked for a cigarette and offered her money; she said she did not want his money. As they passed an alley, the man grabbed her arm and pulled her into the alley. He told her "don't even cry" and said "I'll shoot you" while patting the right side of his body. The man forced S.D.E. to perform fellatio. He attempted to perform penis-to-vagina intercourse but was unable to maintain an erection, so he forced his penis into her mouth again, then pulled it out and masturbated until he ejaculated on the ground. He told S.D.E. not to tell anyone what happened, took a picture of her with his phone, and left. S.D.E. went home, woke up her sister, and told her what happened. The sister called an ambulance.

A sexual assault examination was performed. Swabs were collected for potential evidence and sent to the crime lab for analysis. Testing yielded a database match to Walker, which was confirmed after police obtained a buccal swab from Walker for reference. Police showed a photo array to S.D.E.; she identified Walker as her assailant. Walker was charged with one count of first-degree sexual assault.[2] The matter was tried to a jury, which convicted Walker

[2] Whoever "[h]as sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon" is guilty of a Class B felony. *See* WIS. STAT. § 940.225(1)(b) (2017-18). "Sexual intercourse" includes vulvar penetration "as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening" by the defendant. *See* WIS. STAT. §§ 940.225(5)(c) (2017-18), 939.22(36) (2017-18).

as charged. The trial court sentenced Walker to sixteen years of initial confinement and nine years of extended supervision. Walker appeals.

DISCUSSION

I. Sufficiency of the Evidence

The first issue appellate counsel addresses in the no-merit report is whether sufficient evidence supports the jury's verdict. On review of a jury's verdict, we view the evidence in the light most favorable to the State and the verdict. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). The no-merit report sets forth the applicable standard of review and the evidence satisfying the elements of each crime, including S.D.E.'s testimony about her ordeal. This court is satisfied that the no-merit report properly analyzes this issue as lacking arguable merit.

II. Multiplicity and Double Jeopardy

In a lengthy footnote, the no-merit report states that the DNA evidence in this case "corroborated [S.D.E.'s] testimony about the fellatio but not the penis to vagina sexual intercourse."[3] The report goes on to explain that either act "could have served as the basis" for

[3] Swabs collected from S.D.E.'s lips and right breast contained sufficient genetic material for the crime lab to develop a Y-STR profile for comparison. Swabs collected from other parts of S.D.E.'s body either had no genetic material or an amount too small to develop a suitable profile.

the charge, and then discusses why the State could have issued separate charges for each without running afoul of multiplicity concerns.

Multiplicity challenges usually arise in one of two ways, and the one to which the no-merit report appears to be alluding occurs when a single course of conduct is charged in multiple counts of the same statutory offense.[4] *See* ***State v. Derango***, 2000 WI 89, ¶27, 236 Wis. 2d 721, 613 N.W.2d 833. This need for this discussion is unclear: by definition, there is no multiplicity issue with a solitary charge.

A related concern, however, is duplicity. "Duplicity is the joining in a single count of two or more separate offenses." *See* ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983). "The first step in determining whether a criminal complaint is duplicitous is to examine its factual allegations to determine whether it states more than one offense." ***Id.*** at 587. "If a complaint joins several criminal acts which can properly be characterized as a continuing offense in one count and is challenged by the defendant on grounds of duplicity," then we must examine the allegations in light of the purposes of the prohibition against duplicity. *See* ***id.*** at 589.

The complaint in this case alleged that Walker forced S.D.E. to perform at least three separate acts of sexual intercourse, but describes these events as one continuing course of conduct and charges only a single offense. This initial charging decision is not, in and of itself, problematic: "separately chargeable offenses, 'when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one

[4] The second situation occurs "when a single criminal act encompasses the elements of more than one distinct statutory crime." *See* ***State v. Derango***, 2000 WI 89, ¶27, 236 Wis. 2d 721, 613 N.W.2d 833.

count as constituting but one offense' without violating the rule against duplicity." *See* ***id.*** at 587. "[I]t is up to the [S]tate to determine the appropriate charging unit for a particular criminal episode." ***Id.*** at 588.

However, because the complaint can be said to describe multiple offenses, we must review the allegations in light of the purposes for prohibiting duplicity. These purposes are: (1) to assure the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity. ***Id.*** at 586-87. "A complaint may be found to be duplicitous only if any of these dangers are present and cannot be cured by instructions to the jury." ***Id.*** at 589. Of these five concerns, the only one even potentially arguable is the jury unanimity concern; in this case, that presents as a question of whether the jury must agree on which act or acts Walker committed in order to convict him.

The threshold question in a jury unanimity analysis is whether the statute in question "creates multiple offenses or a single offense with multiple modes of commission." *See* ***Derango***, 236 Wis. 2d 721, ¶14. Jury unanimity is required "only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and. . . not. . . with respect to the alternative means or ways in which the crime can be committed." *See* ***id.*** (citation omitted; ellipses in ***Derango***).

This matter, at least as to Walker's particular offense, is settled. The legislature, by enacting WIS. STAT. § 940.225(5)(c) to define the acts that constitute "sexual intercourse," created an offense with multiple modes of commission. *See* ***Lomagro***, 113 Wis. 2d at 593.

Accordingly, the jury in this case did not need to agree on which of Walker's acts of sexual intercourse occurred, only that some act did occur. Therefore, there is no arguable merit to a duplicity or jury unanimity challenge.

III. Ineffective Assistance of Trial Counsel

The no-merit report discusses two potential claims of ineffective assistance of trial counsel for counsel's failure to object to certain testimony and to then take remedial measures, such as moving to strike the testimony, moving for a mistrial, or requesting a curative instruction. "There are two elements that underlie every claim of ineffective assistance of counsel[,]" deficient performance and prejudice therefrom. ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. To demonstrate deficient performance, the person must show that counsel's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** (citation omitted). We need not address both elements if the defendant cannot make a sufficient showing as to one or the other. ***Mayo***, 301 Wis. 2d 641, ¶61.

A. Other Acts Evidence

After S.D.E. testified, the State called Milwaukee Police Officer Barbara Court. She testified that she was dispatched to the hospital to interview S.D.E. and that S.D.E. did not know the identity of her assailant. A few days later, Officer Court took S.D.E. on a "scene visit" to trace the path S.D.E. had taken when walking home, determine the precise location of the assault, and look for other potential evidence. The State asked the officer if she "had another

opportunity to speak with" S.D.E. after this initial period in October. The officer answered that she contacted S.D.E. the following January, and the State asked her why they spoke again. Court answered, "I spoke to her because I wanted to meet up with her. Apparently there was a DNA hit from her hospital evidence that was *linked to a convicted offender*. So I wanted to go and meet with her and show her a photo array." (Emphasis added.)

The no-merit report states that Walker's "prior record was not admissible for impeachment … or for 'other acts' evidence" and notes that trial counsel "did not object to this testimony" or take other remedial action. The no-merit report says that "defense counsel's failure to object may have constituted deficient performance" but appellate counsel "decided not to raise the issue because counsel did not believe he would be able to prove prejudice."

We note that the no-merit report does not clearly examine how trial counsel performed deficiently because it does not discuss why the statement was objectionable in the first instance; Court's statement was not offered to impeach Walker, nor was it offered as character evidence to prove Walker acted in conformity with that character. *See* WIS. STAT. § 904.04(1). It was simply part of the narrative of the police investigation.

The implication from the no-merit report is that the jury would hear the phrase "convicted offender" and use that against Walker, even though no evidence of any prior convictions was introduced, thereby prejudicing the jury against him. Presumably, then, appellate counsel meant to reference WIS. STAT. § 904.03, which provides in part that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" However, the far more damning part of the officer's testimony was that there was a DNA match, not that the match came from the offender database. Even if Court had used neutral language, the result

would have been the same. We therefore agree with appellate counsel's ultimate conclusion that there is no arguable merit to challenging trial counsel's failure to object to the "convicted offender" language because even if counsel were deficient for failing to object, there is no prejudice from that failure.

B. Sister's Testimony

Appellate counsel also discusses S.D.E.'s sister's testimony. The sister's testimony was brief; she testified that S.D.E. came home and woke her up, telling her "that she had been raped" and that "somebody sexually assaulted her in the alley." The no-merit report discusses whether trial counsel should have made a contemporaneous hearsay objection.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Hearsay is typically inadmissible, except as provided for by other statute or rule. *See* WIS. STAT. § 908.02.

Here, S.D.E.'s statements to her sister were admissible under at least the excited utterance exception to the hearsay exclusionary rule. *See* WIS. STAT. § 908.03(2); ***State v. Boshcka***, 178 Wis. 2d 628, 639-41, 496 N.W.2d 627 (Ct. App. 1992) (holding that statements of an adult victim describing a sexual assault within a few hours after the occurrence are admissible as excited utterances when made under the stress of the event). Trial counsel was not deficient for failing to object to the testimony, and there is no arguable merit to claiming otherwise.

IV. Sentencing Discretion

The final issue counsel addresses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

We agree with appellate counsel's observation that the trial court's sentencing comments, which occupy fewer than two pages of transcript, are sparse. Nevertheless, our review of the record confirms that the court considered relevant sentencing objectives and factors. The sentencing court rejected probation because it would unduly depreciate the seriousness of the offense. It noted that Walker had put S.D.E. in a "very serious, dangerous position" and caused her "terror" that she will have to live with for the rest of her life. It acknowledged that Walker was working and had no history of sexual assaults but did have at least one prior felony conviction. The twenty-five-year sentence imposed is well within the sixty-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70

Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2021-22).

IT IS FURTHER ORDERED that Attorney Hans P. Koesser is relieved of further representation of Walker in this matter. *See* WIS. STAT. RULE 809.32(3) (2021-22).

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

Sheila T. Reiff
Clerk of Court of Appeals