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
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 28, 2013

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Glen B. Kulkoski
Carr, Kulkoski & Stuller, S.C.
16869 W. Greenfield Ave.
New Berlin, WI 53151

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Tyrone L. Howard 249514
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2012AP420-CRNM State of Wisconsin v. Tyrone L. Howard (L.C. #2007CF4049)

Before Curley, P.J., Kessler and Brennan, JJ.

Tyrone L. Howard appeals a judgment convicting him of second-degree sexual assault of a child. Appellate counsel, Glen B. Kulkoski, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Howard has responded. After reviewing the no-merit report and the response, and after conducting an independent review of the record, we agree with counsel's assessment

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses trial court proceedings in chronological order. We will address potential issues in order of importance, rather than chronologically. We first address whether there would be arguable merit to a claim that there is insufficient evidence to support the verdict. When reviewing the sufficiency of the evidence, we look at whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). When "more than one inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law." ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982) (citation and quotation marks omitted).

At trial, the victim provided detailed testimony of Howard's multiple sexual assaults when she was fifteen and sixteen years old. Detective Steve Wells testified that the victim had given a statement implicating Howard at the hospital, where she was taken when she informed her mother about the assaults. Detective Wells also testified that he had interviewed Howard, who confessed to assaulting the victim. The audio recording of Howard's confession was played for the jury. This evidence was more than sufficient to support the jury's verdict finding Howard was guilty of second-degree sexual assault of a child. Therefore, we conclude that there is no arguable merit to a challenge to the sufficiency of the evidence.

We next address whether there would be arguable merit to an appellate challenge to the sentence. The circuit court sentenced Howard to seventeen years of imprisonment, with twelve years of initial confinement and five years of extended supervision. In framing its sentence, a circuit court must consider the principle 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. Here, the circuit court considered appropriate factors in sentencing Howard, placing particular emphasis on the victim's vulnerability as the daughter of Howard's girlfriend and the lasting detrimental effects to the victim. The circuit court explained its application of the facts of this case to the sentencing factors and reached a result that was both reasoned and reasonable. *See* ***State v. Gallion***, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, we conclude that there is no arguable merit to a claim that the circuit court misused its sentencing discretion.

Howard argues in his response that he received ineffective assistance of trial counsel because his attorney should have moved to suppress Howard's statement to the police. To prove a claim of ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Howard argues that there were grounds to suppress his statement because Detective Wells intimidated and coerced him by lying to him about the strength of the evidence the police had gathered in an attempt to get him to confess to having consensual—as opposed to forced—sexual intercourse with the victim. Howard points out that Detective Wells acknowledged at trial that he lied to Howard during the interrogation by telling Howard that they had found his DNA during the victim's medical examination and by telling Howard that the victim stated that she had been raped by force. Howard contends that Detective

Wells's actions rendered his confession involuntary because he thought he had to confess to consensual sex with the victim to prevent more serious charges of "forcible rape."

"A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. To determine whether a confession is involuntary, a court must "independently examine the record and apply the totality of the circumstances test … weighing the defendant's personal characteristics against the pressures the police imposed upon the defendant to induce a response to the questioning." ***State v. Triggs***, 2003 WI App 91, ¶13, 264 Wis. 2d 861, 663 N.W.2d 396 (internal citation omitted). "'Of the numerous varieties of police trickery … a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary.'" ***Id.***, ¶19 (quoting ***Holland v. McGinnis***, 963 F.2d 1044, 1051 (7th Cir. 1992)). "Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion; if it did, all confessions following interrogations would be involuntary because 'it can almost always be said that the interrogation caused the confession.'" ***Id.*** (citation and one set of quotation marks omitted). "'Thus, the issue is not causation, but the degree of improper coercion.'" ***Id.*** (citation omitted).

Howard's personal characteristics did not make him particularly vulnerable to coercion from the police, Howard was not threatened or treated harshly during the interrogation, and the misrepresentations by the police were not in and of themselves inherently coercive. Howard's argument that his confession was coerced based solely on the lies is unavailing; instead, the circumstances surrounding the police deception when Howard confessed had bearing on the

weight of the evidence. Howard's attorney rigorously questioned Detective Wells about the interrogation, including his misrepresentations to Howard. Howard took the stand in his own defense, and told the jury that he falsely confessed because Detective Wells told him that his case would be sent to the District Attorney if he did not confess, which would look bad for him. The jury was therefore aware that Detective Wells had lied to Howard, and heard Howard's explanation that he falsely confessed because he did not want his case to be sent to the District Attorney's office for prosecution. The jury was able to consider Howard's explanation for his confession, and the detective's admission that he lied to Howard about the evidence implicating him, and use that information in deciding how much weight to give Howard's confession. Howard's attorney made a strategic decision to not file a suppression motion that he thought would not be successful, as he explained during a pre-trial hearing, and instead vigorously cross-examined the detective about the circumstances surrounding the confession. We will not second-guess a lawyer's "'exercise of professional judgment in the face of alternatives that have been weighed by … counsel.'" *See* ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). There would be no arguable merit to a claim that Howard's trial attorney rendered ineffective assistance by failing to move to suppress Howard's confession.

Howard next argues in his response that Attorney Haney, his earlier attorney, did not adequately read and review the discovery materials that been provided by the prosecution. Attorney Haney was no longer representing Howard during the preparation for trial and during the trial itself. There is no basis for a claim of ineffective assistance of counsel based on Attorney Haney's alleged lack of preparation because Howard cannot show that Attorney Haney's actions prejudiced him. Moreover, Howard does not fault the preparation of the

attorney who took his case to trial, and our review of the record shows that the attorney who tried the case was prepared and skillfully represented Howard.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we conclude that 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 summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Glen B. Kulkoski is relieved of any further representation of Howard in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals