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July 25, 2018

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

2017AP1401-CRNM State of Wisconsin v. Richard L. Keller (L.C. # 2014CF177)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, 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).

Richard L. Keller appeals from a judgment of conviction for ten counts of possession of child pornography. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),¹ and *Anders v. California*, 386 U.S. 738 (1967). Keller has filed a response to the no-merit report suggesting he received ineffective assistance of counsel and that

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the prosecutor committed discovery violations and misconduct. *See* RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The evidence at the jury trial was that Keller was arrested at 1:00 p.m. on an outstanding warrant at a residence in Ozaukee County. Keller was known to the leaseholder of the residence as “John Smith,” and he stored personal property at her residence. After Keller’s arrest, the leaseholder and some friends looked at Keller’s laptop and an external hard drive and found images of child erotica and child pornography. Around 3:30 p.m. that same day, the police were called and advised about what had been found on the computer devices. Before police returned to the residence, the leaseholder removed all of Keller’s personal property from the residence and placed it in Keller’s car which was parked at the residence. The police removed the car and searched the car and computer devices recovered from the car pursuant to a warrant. A compact disk (CD) recovered amongst a stack found in Keller’s car contained 3,549 images of child pornography. The jury found Keller guilty of all charged counts of possession of child pornography, ten counts in all. Keller was sentenced on count one to fifteen years’ initial confinement and ten years’ extended supervision and concurrent terms of five years’ initial confinement and ten years’ extended supervision on the remaining counts with those concurrent sentences to be served consecutive to the sentence on count one.

The no-merit report addresses the potential issues regarding the sufficiency of the evidence, whether Keller was denied the effective assistance of counsel at trial, and whether the sentence was the result of an erroneous exercise of discretion, unduly harsh or excessive, or otherwise subject to modification based on a new factor. This court is satisfied that the no-merit

report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

A jury trial has many components which must be examined for the existence of potential appellate issues, *e.g.*, pretrial rulings, jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. The no-merit report fails to give any indication that appointed counsel considered whether those parts of the process give rise to potential appellate issues. We conclude the jury trial does not give rise to any other potentially meritorious issues. Jury selection and the presentation of evidence were completed without any objections. An adequate colloquy with Keller demonstrated his knowing and voluntary waiver of his right to testify. Keller's objection to the giving of the circumstantial evidence jury instruction was duly considered by the court and properly overruled. The jury instructions properly stated the law. No improper argument was made.² Finally, the jury was polled and confirmed that determination of guilt was unanimous.

In his response, Keller asserts that his trial counsel was ineffective in at least thirteen different ways.³ Claims of ineffective assistance of trial counsel must first be raised in the circuit court. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court

² We note, as relevant to points made in Keller's response, that the prosecutor's closing argument included one minor misstatement. At trial one of the friends that helped pack up Keller's possessions and move them to his car testified that among Keller's things, she saw a number of driver's licenses from different states with Keller's picture on them. During closing argument, the prosecutor indicated that the witness had seen driver's licenses with different names on them. No objection was made. The misrepresentation was minor and no arguably meritorious issue arises from the misstatement.

³ To the extent we do not specifically address any of Keller's claims, they can be deemed to lack sufficient merit to warrant individual attention and because of their insufficient merit, our confidence in the result would not be undermined.

normally declines to address such questions in the context of a no-merit review if the issue was not first raised in a postconviction motion in the circuit court. However, because appellate counsel asks to be discharged from the duty of representation, we must determine whether an ineffective assistance of counsel claim has sufficient merit to require appellate counsel to file a postconviction motion and request a *Machner* hearing.

A claim of ineffective assistance of counsel has two parts: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The ultimate determination[s] of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). In determining whether appointed counsel is obligated to pursue a postconviction claim of ineffective assistance of trial counsel, we consider whether sufficient facts can be alleged to support a motion for a *Machner* hearing. See *State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (to be entitled to a hearing, the defendant's motion must provide sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle the defendant to relief). We also consider whether the defendant can establish prejudice from trial counsel's alleged deficient performance. If the defendant could not have been prejudiced by trial counsel's performance, whether such performance was deficient need not be addressed. See *State v. Kuhn*, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993). Prejudice exists if there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different," or stated alternatively, whether confidence in the outcome is undermined. *Allen*, 274 Wis. 2d 568, ¶26 (citation omitted).

First Keller asserts that trial counsel should have moved for a change of venue “for a more fair trial.” Nothing in this record suggests that Keller was unable to receive a fair trial in Ozaukee County. Indeed, not one member of the jury pool indicated that he or she had heard or read anything about Keller’s case.

Keller complains that his trial counsel failed to provide him with a complete copy of discovery, including the CD and videos of child erotica. Child pornography is illegal contraband that cannot be disseminated, especially to a prison inmate, as Keller was during the pendency of this action. It was not wrong for trial counsel to refuse to provide Keller with copies of child pornography or child erotica. The defense had access to the seized material and had its own expert examine it. Keller cannot demonstrate prejudice from the lack of a complete copy of discovery. Additionally, Keller claims that his trial counsel failed to inform him of fake identification cards the prosecutor referenced at trial. Keller’s response demonstrates that the prosecutor was not in possession of claimed fraudulent identification cards so his trial counsel cannot be deficient in not providing what was not available.

Next, Keller contends that his trial counsel failed to contact witness “Helen” and present her testimony at trial to establish that Keller was indeed living at the residence where he was arrested and that the leaseholder’s children had access to and used his laptop computer. Letters Keller wrote to his trial counsel and attached to his response indicate that Keller did not know Helen’s last name, that he only knew her as a babysitter for the leaseholder, and that Helen’s phone number could be found on his cell phone which was in the possession of the police. Even if this was sufficient information to enable counsel to contact Helen, her potential testimony would not have related to the CD on which the child pornography was found. No prejudice exists from not presenting a witness that would not have addressed the critical evidence.

In a conclusory fashion, Keller contends trial counsel was ineffective at trial for not arguing that the leaseholder's fiancée was a sex offender and the owner of the CD; not arguing that the fiancée's father was a retired Ozaukee County sheriff; not arguing that the leaseholder gave Keller the "false nickname" of John Smith; for not objecting to a single thing that Keller asked counsel to object to during trial; for failing to impeach witnesses; for letting witnesses leave immediately after their testimony and not recalling them to point out their lies; for inadequate cross-examination; for not calling a helpful expert; for making a "horrible argument" during closing argument comparing Keller's personal belongings to a junk drawer; and for not making opening and closing arguments raising every issue Keller includes in his response to the no-merit report. Having reviewed the entire record, we are not persuaded that Keller's points permit a meritorious claim of ineffective assistance of counsel. Counsel attempted to get a defense expert but the expert's report was not helpful. Trial counsel did the best with what he had to work with, including argument to the jury that possession of the CD had not been established. Further, the defense cannot simply suggest a third-party perpetrator without satisfying the legitimate tendency test which requires evidence, directly or indirectly, that the third-party perpetrator actually committed the crime. *State v. Wilson*, 2015 WI 48, ¶¶56-59, 362 Wis. 2d 193, 864 N.W.2d 52. Keller's conclusory assertions do not approach satisfying the test.

Keller claims trial counsel was ineffective for pushing him into a jury trial when he desired a bench trial. Even if true, Keller cannot demonstrate prejudice because at sentencing, the trial court indicated that upon hearing the evidence at the jury trial, it was convinced of Keller's guilt.

Keller also claims trial counsel failed to convey a plea deal offered by the prosecutor and would not allow Keller to testify at trial. The record belies both claims. At an August 17, 2015

status hearing, trial counsel explained to the court that the defense had received a plea offer from the prosecutor and that counsel spoke with Keller about it. Counsel indicated that the matter would proceed to trial at that point. An on-the-record colloquy with Keller at trial established that Keller made the decision to not testify.

With respect to sentencing, Keller claims trial counsel was ineffective for not going over the presentence investigation report with Keller and not investigating and challenging incorrect information in the report. No presentence investigation report was ordered or filed in this matter.

Finally, Keller asserts that trial counsel was ineffective for telling him that he could not fire counsel. Keller asserts that under public defender policy, he had the right to change counsel once. This record does not suggest that Keller had any dissatisfaction with counsel. Additionally, we have concluded that there are no meritorious claims of ineffective assistance of trial counsel. Thus, even if trial counsel had a duty to inform Keller, Keller was not prejudiced by not being informed that he could ask for new counsel.

Keller claims the prosecution committed discovery violations by not giving or informing Keller of child erotica videos and fraudulent identification cards. The record does not bear out the suggestion that the defense was not aware of child erotica found on the external hard drive retrieved from Keller's possession. As we have already observed, Keller's own response demonstrates that the prosecution was not in possession of identification cards bearing other names. No discovery violations are apparent on this record.

Keller claims prosecutorial misconduct by misuse of evidence, false comments, discovery violations previously addressed, failure to notify the defense of "material exculpatory evidence, and arguing false evidence to the jury. Although Keller may perceive the testimony presented at

trial to be untruthful, nothing in the record suggests that evidence was misused or knowingly false. Keller does not identify what exculpatory evidence the prosecution may have had. In sum, his claims of prosecutorial misconduct are too conclusory to be considered meritorious.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Keller further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Basil M. Loeb is relieved from further representing Richard L. Keller in this appeal. *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