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DISTRICT I

November 23, 2021

To:

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Circuit Court Judge
Electronic notice

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

2020AP1822-CRNM State of Wisconsin v. Quentin L. Gillespie (L.C. # 2017CF3747)

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).

A jury found Quentin L. Gillespie guilty of second-degree sexual assault of a child younger than sixteen years old. He faced maximum penalties of a $100,000 fine and forty years of imprisonment. *See* WIS. STAT. §§ 948.02(2), 939.50(3)(c) (2017-18).[1] The circuit court imposed sixteen years and six months of imprisonment, bifurcated as nine years and six months of initial confinement and seven years of extended supervision. Gillespie, by Attorney

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Thomas J. Erickson, pursued an appeal under the no-merit procedure set forth in WIS. STAT. RULE 809.32, then voluntarily dismissed that appeal to pursue a claim for additional sentence credit. The circuit court granted Gillespie's postconviction motion for sentence credit. Gillespie again appeals.

Attorney Erickson filed a no-merit report on Gillespie's behalf pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20). Gillespie filed multiple responses, and Attorney Erickson filed three supplemental no-merit reports. This court has considered the no-merit reports and Gillespie's responses, and we have independently reviewed the record as mandated by ***Anders***. We conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21 (2019-20).

The State filed a criminal complaint on August 17, 2017, charging Gillespie with second-degree sexual assault of D.J.L., a child younger than sixteen years of age. *See* WIS. STAT. § 948.02(2). The complaint alleged that, on or about June 27, 2017, while Gillespie and D.J.L. were guests in a third party's home, Gillespie touched D.J.L.'s breasts and penetrated her vagina with his fingers. Gillespie pled not guilty, and the matter proceeded to trial.

Lashanda Hall testified at trial that in late June of 2017, D.J.L. babysat for Hall during the day and then spent the night at Hall's home in Milwaukee. At approximately 1:00 a.m., Hall's friend Gillespie knocked on the door, and Hall permitted him to come in because she could tell he was intoxicated and needed a place to rest. Hall instructed Gillespie to sleep on the couch where D.J.L. was watching television, and Hall told D.J.L. that when she was ready to sleep, she should come to Hall's bedroom. Hall said that she awoke several times during the night and

each time she saw both Gillespie and D.J.L. on the couch. Gillespie left Hall's home at approximately 5:00 a.m. that morning.

D.J.L. testified that she was born in July 2002 and that she was a high school freshman. She said that at the end of June 2017, when she was fourteen years old, she spent the night at Hall's home. While she was watching television on the couch, a man she did not know knocked on the door, and Hall allowed him to come in and spend the night. The man sat on the couch near D.J.L. and appeared to doze off, but then he said he "liked to touch." He put his hand in her pants and inserted his finger in her vagina. She denied that he touched her anywhere else. D.J.L. said that during the assault, Gillespie asked her age and she said she was fourteen years old, but "he just kept going." When she started to cry, Gillespie again asked her age, then said that had he "known [her age, he] wouldn't have done that," and that he was "so sorry." Eventually, he fell asleep. D.J.L. identified Gillespie in the courtroom as the man who assaulted her in June 2017.[2]

D.J.L. acknowledged that she did not immediately tell Hall what had happened, and D.J.L. admitted that she did not report the assault to her mother. In August 2017, D.J.L. went to summer camp and told a camp counselor about the assault. On cross-examination, Gillespie questioned D.J.L. about the timing of her disclosure and suggested that she alleged a sexual assault because she did not want to stay at camp and because she sought attention from her mother.

[2] The testimony established that the incident occurred in late June 2017. The State's inability to establish the precise date of the incident does not give rise to an arguably meritorious issue. "'[T]ime is not of the essence in child sexual assault cases[.]'" ***State v.Kempainen***, 2015 WI 32, ¶22, 361 Wis. 2d 450, 862 N.W.2d 587 (citation and one set of brackets omitted).

D.J.L.'s mother, C.L., testified that she learned from a camp counselor that D.J.L. had reported a sexual assault, and C.L. described calling the police in response. She confirmed that D.J.L. had not previously said that anyone touched her inappropriately at Hall's home.

Yadda Lang testified that in August 2017, she worked as a counselor at a summer camp where D.J.L. was a camper. D.J.L. approached Lang in private and disclosed that a man D.J.L. did not know had touched her vagina while she was a guest at the home of a third party. On cross-examination, Yang acknowledged that D.J.L. had also alleged that the man touched her breast.

Milwaukee Police Officer Joshua Tryan said that he interviewed D.J.L. in August 2017, shortly after she reported a sexual assault, and the interview was recorded with his body camera. The jury watched the portion of the video in which D.J.L. described the assault and said that it involved sexual touching of both her vaginal area and her breast. Officer Joan Mueller testified that she showed D.J.L. a photo array from which D.J.L. identified Gillespie as her assailant.

After the State rested, Gillespie told the circuit court that he intended to testify on his own behalf. The circuit court granted the State's motion to bar Gillespie from repeating a statement he made to police "about the victim making similar allegations about her brother sexually assaulting her." The circuit court explained that no one could testify about any other assault that D.J.L. might have alleged unless the circuit court first held a hearing to determine the admissibility of the evidence. Defense counsel said that he did not intend to present any such evidence because, in counsel's view, testimony about a prior assault risked arousing the jury's sympathy for the victim. Gillespie also responded personally to the circuit court's ruling, stating that he "wasn't going to bring it up anyway."

Gillespie then took the stand. He admitted two prior criminal convictions.[3] He went on to testify that, late on a night in June 2017, he went to Hall's home after drinking beer at a nearby tavern. Hall told Gillespie that he could sleep on the couch, and he fell asleep there. He did not recall that anyone else was on the couch when he fell asleep, and he denied that he touched anyone during the night. He admitted that someone was on the couch when he woke up. On cross-examination, he denied that he was intoxicated when he arrived at Hall's home, and he denied seeing D.J.L. that night.

The no-merit report first considers whether the State presented sufficient evidence to sustain Gillespie's conviction. When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that ... as a matter of law ... 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). Before the jury could find Gillespie guilty in this case, the State was required to prove beyond a reasonable doubt that: (1) Gillespie had sexual contact or sexual intercourse with D.J.L.; and (2) D.J.L. was younger than sixteen years old at the time of the alleged sexual contact or sexual intercourse. *See* WIS JI—CRIMINAL 2104; WIS. STAT. § 948.02(2). The evidence presented at trial amply satisfied the State's burden. We have considered Gillespie's response

[3] The circuit court ruled that the State could impeach Gillespie with the fact of two prior convictions, and that Gillespie's other criminal convictions were either too remote in time or too minor for impeachment purposes.

asserting a contrary position, and we are satisfied that further pursuit of such a claim would be frivolous within the meaning of ***Anders***.

We next consider Gillespie's contentions that the circuit court improperly instructed the jury by failing to define "sexual intercourse" as "finger intrusion" and by failing to incorporate the term "vulvar penetration" in the definition. The circuit court instructed the jury that sexual intercourse means "any intrusion however slight by any part of a person's body or any object into the genital or anal opening of another." Because this instruction is in conformity with the definition in WIS. STAT. § 948.01(6), further pursuit of this issue would lack arguable merit.

Gillespie suggests that he can pursue an arguably meritorious claim that the jury instructions deprived him of his right to a unanimous verdict because the circuit court "defined sexual intercourse with two different meanings." We cannot agree.

The circuit court determined that it should instruct the jury as to both sexual contact and sexual intercourse, and the circuit court subsequently advised the parties that it would instruct the jury that sexual contact means touching "the groin, pubic mound, and vagina of [the victim] with intent to become sexually aroused or gratified." *See* WIS. STAT. §§ 939.22(19), 948.01(5)(a)1. It appears from the transcript, however, that the circuit court misspoke while reading the instructions and defined "sexual intercourse" as touching those body parts with sexual intent. The circuit court went on also to define "sexual intercourse" in conformity with § 948.01(6). The circuit court's slip of the tongue had no effect on Gillespie's right to jury unanimity, however, because WIS. STAT. § 948.02(2), defines second-degree sexual assault as "sexual contact or sexual intercourse" with a person younger than sixteen years of age. "[W]hen the statute in question establishes different modes or means by which the offense may be committed,

unanimity is generally not required on the alternate modes or means of commission." ***State v. Johnson***, 2001 WI 52, ¶11, 243 Wis. 2d 365, 627 N.W.2d 455. Thus, the jury deciding Gillespie's case could properly reach a unanimous verdict without agreeing on which definition of "sexual intercourse" applied, just as a jury could reach a unanimous verdict without agreeing whether the accused engaged in sexual contact or sexual intercourse. Further pursuit of this issue would lack arguable merit.

We also conclude that Gillespie could not pursue an arguably meritorious challenge to the circuit court's use of WIS JI—CRIMINAL 140 to instruct the jury on reasonable doubt. Although he suggests that the instruction may have reduced the State's burden of proof below the constitutional standard, our supreme court has explicitly approved the instruction. *See* ***State v. Trammell***, 2019 WI 59, ¶2, 387 Wis. 2d 156, 928 N.W.2d 564. Further pursuit of this issue would lack arguable merit.

We turn to Gillespie's claims of ineffective assistance of trial counsel. A defendant who claims that counsel was ineffective must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one prong of the analysis, a reviewing court need not address the other. *See* ***id.*** at 697.

"[T]he test for whether counsel's performance was deficient is objective, not subjective." ***State v. Carlson***, 2014 WI App 124, ¶30, 359 Wis. 2d 123, 857 N.W.2d 446 (citation omitted). Accordingly, when considering the deficiency prong of ***Strickland***, we "determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms." *See* ***Kimbrough***, 246 Wis. 2d 648, ¶31. Our inquiry is thus whether, "considering all

the circumstances ... decision[s] would have been reasonable if defense counsel had made [them] for strategic reasons." ***Id.*** As for prejudice, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

Gillespie asserts that his trial counsel performed deficiently by failing to ensure that the jury learned about inconsistencies and alleged anomalies in the witnesses' stories. The record does not support this claim. Trial counsel highlighted the victim's inconsistent description of the sexual assault, pointing out that D.J.L. claimed at trial that Gillespie touched only her vaginal area when she alleged before trial that he also touched her breast. Moreover, trial counsel drew attention to D.J.L.'s failure to report the incident promptly and suggested motives for her to make a false report. In sum, trial counsel challenged D.J.L.'s credibility and ensured that the jury had ample opportunity to assess her allegations in light of discrepancies in the evidence. Pursuit of a challenge to trial counsel's effectiveness on this basis would lack arguable merit.

Gillespie argues in multiple submissions that his trial counsel was ineffective for failing to cross-examine D.J.L. about her description of him to police as "6'0, 6'2 and 'cockeyed.'" He asserts that he is "5'10 and straight-eyed," and that D.J.L.'s description of him is evidence of "mistaken identity." As appellate counsel accurately explains, however, identification was not an issue in this case. Hall testified that Gillespie was the person who slept on her couch on the night that D.J.L. claimed she was assaulted there; D.J.L. identified Gillespie in court as her assailant; and Gillespie admitted that he spent the night on Hall's couch. Accordingly, Gillespie was not prejudiced by the alleged deficiency. Moreover, the extent and scope of cross-examination is a strategic decision, *see* ***State v. Smith***, 2016 WI App 8, ¶14, 366 Wis. 2d 613,

874 N.W.2d 610, and we will not conclude that such decisions constitute ineffective assistance of counsel when the record reveals a strategic basis for trial counsel's actions, *see* ***Kimbrough***, 246 Wis. 2d 648, ¶¶31-32. Trial counsel could reasonably conclude that drawing attention to D.J.L.'s description of Gillespie's height would bolster her credibility because her estimate was off by only a few inches. As to her description of Gillespie as "cockeyed," trial counsel could reasonably conclude that the observation might serve to emphasize his level of intoxication. Further pursuit of this issue would lack arguable merit.

Gillespie next asserts that his trial counsel was ineffective for failing to "investigate [D.J.L.'s] reputation for veracity." "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." ***Strickland***, 466 U.S. at 691. Nothing in the record here suggests that D.J.L. had a reputation for untruthfulness. Therefore, a decision not to pursue an investigation of her reputation was objectively reasonable. Further pursuit of this issue would lack arguable merit.

Relatedly, Gillespie complains that his trial counsel failed to object when the State's witnesses attested to the victim's credibility and truthfulness. We agree with appellate counsel that the record does not reflect such testimony. Accordingly, further pursuit of this issue would lack arguable merit.

Gillespie next asserts that his trial counsel was ineffective for failing to offer evidence that approximately a year before the incident in this case, D.J.L. falsely accused Hall's son of sexual assault. Attorney Erickson addressed this contention in the no-merit reports, explaining that he retained an investigator to explore the matter but was unable to substantiate Gillespie's

claim. We have reviewed the investigator's reports, which Attorney Erickson provided with his submissions. Hall told the investigator that "[D.J.L.] never made any accusations against [Hall's] son," and D.J.L.'s mother told the investigator that D.J.L. had not previously reported a sexual assault. Finally, Attorney Erickson advises that he consulted with the district attorney, who had no information about a prior false report involving D.J.L. Because nothing presented to this court supports a claim that D.J.L. made a prior false report of sexual assault, no arguably meritorious basis exists to fault trial counsel for failing to present such evidence.

Relatedly, Gillespie alleges that his trial counsel mishandled D.J.L.'s trial testimony. He emphasizes that when the State asked D.J.L. why she did not immediately tell her mother about Gillespie's assault, D.J.L. said: "I didn't know what my mom was going to say because it's not the first time that I've been ...." At that point, the State asked another question. Gillespie asserts that his trial counsel was ineffective for failing to insist that D.J.L. "finish her statement" because "[t]his could be construed as [an] admission that she has lied before." Nothing in the record or in submissions to this court on appeal suggests that D.J.L. would have revealed a prior false allegation. *Cf.* ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647 (stating that a defendant claiming that trial counsel was ineffective for failing to present testimony must demonstrate with specificity what the witness would have said). To the contrary, the materials indicate that, following a diligent investigation, appellate counsel was unable to substantiate Gillespie's claim that D.J.L. made a false allegation against anyone. Further pursuit of this issue would lack arguable merit.

Gillespie also implies that a prior allegation of sexual assault, truthful or false, would have been material to his case, and trial counsel was therefore ineffective for failing to probe for such an allegation. To the contrary, Wisconsin law provides that when a defendant is accused of

a sexual assault, the complaining witness's sexual conduct with third parties is normally irrelevant. *See* WIS. STAT. § 972.11(2)(b); ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). Further, trial counsel explicitly stated during the trial that, in counsel's view, any testimony that D.J.L. had previously been sexually assaulted would risk arousing sympathy for her, and therefore the defense would "strategically" not pursue any such testimony. This was a reasonable strategic decision. *See* ***State v. Carter***, 2010 WI 40, ¶33, 324 Wis. 2d 640, 782 N.W.2d 695. Accordingly, further pursuit of this issue would lack arguable merit.

Gillespie next contends that the prosecutor engaged in misconduct during closing argument by referring to his prior criminal convictions. The prosecutor argued that the jury could consider his prior convictions in assessing his credibility. As appellate counsel correctly explains, this argument was consistent with WIS JI—CRIMINAL 327 and WIS. STAT. § 906.09(1). Further pursuit of this claim would be frivolous within the meaning of ***Anders***.

Gillespie next asserts that the investigator's reports regarding the victim's alleged prior accusation of sexual assault constitute newly discovered evidence warranting a new trial. We agree with appellate counsel's conclusion that those reports do not provide any evidence of a prior allegation of assault. Because nothing presented to this court reveals that the reports contain new information bearing on Gillespie's guilt, we conclude that further pursuit of this issue would lack arguable merit.

We turn to whether Gillespie could pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We conclude that he could not do so. The circuit court stated that protection of the community and punishment were the primary sentencing goals, and the

circuit court discussed the sentencing factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The sentence that the circuit court selected was well within the limits of the maximum sentence allowed by law and therefore was presumptively not unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Further pursuit of this issue would lack arguable merit.

Gillespie also could not pursue an arguably meritorious challenge to the circuit court's sentencing decision finding him ineligible to participate in either the challenge incarceration program or the Wisconsin substance abuse program. *See* WIS. STAT. §§ 302.045, 302.05. A person who is incarcerated for a crime specified in WIS. STAT. § 948.02 is statutorily disqualified from participation in either program. *See* §§ 302.045(2)(c); 302.05(3)(a)1.

Our independent review of the record does not disclose any other issue warranting discussion. To the extent that we may not have addressed some aspects of the issues that Gillespie raised in his responses to the no-merit report and supplements, we are either satisfied that appellate counsel has addressed the matters sufficiently or that no discussion is warranted. Our review satisfies us that any postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32 (2019-20).[4]

[4] Gillespie contends in his responses that he is entitled to a discretionary reversal of his conviction. *See* WIS. STAT. § 752.35 (2019-20) (permitting this court to reverse a judgment if "the real controversy has not been fully tried" or if "it is probable that justice has for any reason miscarried"). In a no-merit proceeding, our role is to determine whether the record reveals a potential issue with arguable merit. *See* ***State v. Tillman***, 2005 WI App 71, ¶17, 281 Wis. 2d 157, 696 N.W.2d 574. As our discussion reflects, we are satisfied that no such issues exist in this case and, accordingly, there is no basis to disturb the judgment of conviction.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2019-20).

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of any further representation of Quentin L. Gillespie. *See* WIS. STAT. RULE 809.32(3) (2019-20).

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

Sheila T. Reiff
Clerk of Court of Appeals