

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

June 12, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 97-0127-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**FLOYD E. MURPHY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Vernon County:  
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

DYKMAN, P.J. Floyd E. Murphy appeals from a judgment of conviction for misdemeanors involving domestic violence.<sup>1</sup> The state public defender appointed Attorney Timothy J. Gaskell as Murphy's appellate counsel. Attorney Gaskell served and filed a no merit report pursuant to *Anders v.*

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

*California*, 386 U.S. 738 (1967), and RULE 809.32(1), STATS., to which Murphy responded. After an independent review of the record as mandated by *Anders*, we conclude that any further appellate proceedings would lack arguable merit.

A jury found Murphy guilty of battery, contrary to § 940.19(1), STATS., and of intimidating a victim by attempting to dissuade her from reporting a crime, contrary to § 940.44(1), STATS. The trial court withheld sentence and imposed an eighteen-month term of probation.

Murphy and his wife had an argument which escalated into violence. Murphy kicked the telephone jack to prevent his wife from telephoning police, but she did so from a neighbor's home. When the investigating officer arrived, he spoke with Mrs. Murphy twice. Initially, he inquired generally about what had happened. He then tape-recorded a more detailed interview with Mrs. Murphy. The no merit report and the response raise the same potential issue, namely whether the trial court erroneously exercised its discretion in submitting an excerpt of the transcribed interview into the jury room.<sup>2</sup>

Mrs. Murphy's version of events in the interview is more damaging to Murphy than was her courtroom testimony of that same incident. Mrs. Murphy testified that she was scratching, choking and kicking her husband, whereas her account of the incident during the interview did not mention her physically aggressive behavior. At trial, she testified that she tried to hang herself, yet failed

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<sup>2</sup> Murphy also claimed that submission of the interview prompted the jury to inquire why Mrs. Murphy's nine-year-old daughter, who witnessed much of the incident, had not testified. However, this issue was raised strictly in the context of submitting the interview to the jury during deliberations.

to mention her suicide attempt during the interview.<sup>3</sup> Although Mrs. Murphy never mentioned this during the interview, she testified that she was in a volatile state at the time of the incident because she was not on her medication.<sup>4</sup> Mrs. Murphy admitted that her testimonial version of the incident differed substantially from what she told the officer during the interview. The jury heard a significant amount of testimony and argument about the substantial differences in Mrs. Murphy's versions of the incident and the possible reasons for those differences.

Defense counsel objected to submission of the interview principally as irrelevant hearsay. The prosecutor argued that the interview was relevant and was not admitted for the truth of its contents, but to counter the defense's assertion that the victim was "out of control" when this occurred. The trial court granted the State's request to submit Mrs. Murphy's interview to the jury during deliberations. Murphy contends that submitting this interview to the jury during deliberations was unfairly prejudicial because his wife admitted that, although she was truthful in court, she had lied during the interview.

To determine whether to submit an exhibit to the jury during deliberations requires consideration of three factors: (1) whether the exhibit will aid the jury in considering the case; (2) whether submission of the exhibit will be unduly prejudicial; and (3) whether the exhibit could be subjected to improper use by the jury. See *State v. Jensen*, 147 Wis.2d 240, 260, 432 N.W.2d 913, 921-22 (1988). Our review of that determination is limited to whether the trial court

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<sup>3</sup> During the interview, she said that she could not breathe because Murphy was choking her.

<sup>4</sup> Because Mrs. Murphy was pregnant at the time of the incident, she had discontinued using her Prozac.

erroneously exercised its discretion. *See State v. Larsen*, 165 Wis.2d 316, 321-22, 477 N.W.2d 87, 89 (Ct. App. 1991). “[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987) (alteration in original) (citations omitted).

The transcribed interview was received into evidence without any objection from defense counsel. The trial court reasoned that the jury was entitled to consider Mrs. Murphy’s prior inconsistent statements in their proper context. The trial court excised the irrelevant and unfairly prejudicial parts of the interview which referred to the parties’ history of domestic violence.

We conclude that challenging the trial court’s submission of the interview to the jury as an erroneous exercise of discretion under these circumstances would lack arguable merit. The trial court concluded that review of the interview would aid the jury in assessing the witnesses’ credibility. It allowed only the relevant excerpts into the jury room to avoid any undue prejudice or improper use which could have resulted from consideration of Murphy’s history of domestic violence. *See Jensen*, 147 Wis.2d at 260, 432 N.W.2d at 921-22.

Upon our independent review of the record as mandated by *Anders* and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further appellate proceedings would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Timothy J. Gaskell of any further appellate representation of Floyd E. Murphy.

*By the Court.*—Judgment affirmed.

