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 III

September 6, 2023

To:

Hon. Gregory J. Strasser
Circuit Court Judge
Electronic Notice

Shirley Lang
Clerk of Circuit Court
Marathon County Courthouse
Electronic Notice

Erica L. Bauer
Electronic Notice

Theresa Wetzsteon
Electronic Notice

Joseph N. Ehmann
State Public Defenders
P.O. box 7862
Madison, WI 53707-7862

Peter C. Buntrock 186078
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2020AP1023-CRNM State of Wisconsin v. Peter C. Buntrock
2020AP1024-CRNM (L. C. Nos. 2016CF583, 2016CF688)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Peter Buntrock filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22), concluding no grounds exist to challenge Buntrock's convictions for four counts of sexual assault of Melissa,[1] a child under the age of sixteen; two counts of exposing his genitals to

[1] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4) (2021-22), we use a pseudonym instead of the victim's name.

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

a child; one count of using a computer to facilitate a child sex crime; one count of possession of cocaine; one count of possession of child pornography; one count of exposing a child to harmful material; and one count of possession of tetrahydrocannabinols ("THC").

In his response to the no-merit report, Buntrock argued that he was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687-94 (1984). Buntrock claimed that his counsel was ineffective by erroneously advising him that a video of Melissa's interview at the Child Advocacy Center would not be admissible at trial, and by failing to seek a pretrial ruling on the admissibility of the video. He asserts that had he known the video of Melissa's interview was admissible at trial, he would have accepted the State's plea offer.

The United States Supreme Court has held that where the alleged prejudice is "[h]aving to stand trial," the defendant "must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)[.]" ***Lafler v. Cooper***, 566 U.S. 156, 163-64 (2012). Additionally, a defendant must prove that the court would have accepted the plea offer's terms and that the defendant's conviction, sentence, or both, "would have been less severe." ***Id.*** Even assuming Buntrock was convicted following an error-free trial, the ***Lafler*** Court rejected the argument that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining"). ***Id.*** at 169.

The record shows that the State offered to dismiss and read in fifteen of the seventeen charged crimes arising from three circuit court cases if Buntrock entered guilty or no-contest pleas to the remaining two charges—sexual assault of a child under the age of sixteen and possession of child pornography.[2] Under the plea agreement, a presentence investigation report would be ordered and the State would either stipulate to concurrent sentences consisting of fifteen years of initial confinement and seven years of extended supervision, or cap its recommendation at twenty years of initial confinement and five years of extended supervision. Buntrock asserts that he rejected this favorable plea offer and proceeded to trial based on his belief that the video of Melissa's interview would not be admitted at trial. A jury found Buntrock guilty of all eleven charges, and the court ultimately imposed concurrent sentences resulting in a twenty-five-year term, consisting of seventeen years of initial confinement followed by eight years of extended supervision. Buntrock contends that instead of being convicted of the eleven crimes in the two underlying cases that are now on appeal, Buntrock would have been convicted of only two crimes.

We directed counsel to either file a supplemental no-merit report addressing why it would be wholly frivolous to pursue a challenge to the effectiveness of trial counsel, or voluntarily dismiss these appeals and pursue a postconviction motion. Counsel has filed a supplemental no-merit report stating that trial counsel "adamantly" refutes Buntrock's assertion that counsel told him the interview would not be admissible at trial. Setting aside this dispute of fact,

[2] The no-merit report arises from Buntrock's convictions in Lincoln County case Nos. 2016CF583 and 2016CF688. The third case, No. 2016CF192—which involved six of the charges that would have been dismissed pursuant to the plea agreement—is not before us in these appeals.

appellate counsel asserts that Buntrock cannot show that his belief in the inadmissibility of the video influenced his decision to forgo the State's plea offer and proceed to trial.

Appellate counsel notes that trial counsel repeatedly encouraged Buntrock to accept the State's plea offer because of overwhelming corroborating evidence of Buntrock's guilt—specifically, text messages between Buntrock and Melissa that were "sexual in nature." According to appellate counsel, trial counsel informed Buntrock that even if Melissa ultimately recanted at trial, the text messages would still likely cause the jury to find Buntrock guilty, but Buntrock nevertheless opted not to take the deal because he was a "gambler." Appellate counsel therefore suggests that even assuming trial counsel misinformed Buntrock about the admissibility of the video, Buntrock's belief in this misinformation could not have been a "huge" factor in his decision to proceed to trial, especially given the "significance of the remaining evidence."

Buntrock, however, claims that while it is true that he expressed a desire to go to trial to prove his innocence, "that doesn't mean he wasn't amenable to settling the matter if [he knew] the video would have been allowed in." Buntrock further insists that despite other evidence of his guilt, he relied on trial counsel's assertion that he could effectively challenge Melissa's credibility because the video of her interview was inadmissible at trial. According to Buntrock, admissibility of the video was the "linchpin in his decision to go to trial versus taking a plea offer."

When counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967). The test is not whether the attorney expects the

argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for counsel to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S.429, 436 (1988).

Although appellate counsel suggests that Buntrock cannot show that he would have accepted the plea offer but for the purported misinformation from trial counsel, there are disputes of fact regarding the information trial counsel provided and Buntrock's claimed reliance on that information. This court does not engage in factfinding. *See* ***Lange v. LIRC***, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997).

Ultimately, counsel's supplemental no-merit report has not persuaded us that further proceedings would be wholly frivolous. Therefore, we will reject the no-merit report, dismiss these appeals without prejudice, and authorize the filing of a postconviction motion. We add that our decision does not mean we have reached a conclusion in regard to the arguable merit of any other potential issue in these cases. Buntrock is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

Upon the foregoing,

IT IS ORDERED that the no-merit report is rejected and these appeals are dismissed without prejudice.

IT IS FURTHER ORDERED that the time for filing a postconviction motion under WIS. STAT. RULE 809.30 is extended to forty-five days from the date of this order.

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

Samuel A. Christensen
Clerk of Court of Appeals