

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 30, 1996

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.

NOTICE

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

No. 95-2831-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES C. SMITH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County:
N. PATRICK CROOKS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Counsel for James C. Smith has filed a no merit report pursuant to RULE 809.32, STATS. Smith has responded to the report. On our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

The State charged Smith with attempted second-degree sexual assault of a child, as a repeater. At trial, the fourteen-year-old victim testified that Smith used force in an attempt to obtain oral sex from him. Other witnesses testified that the victim was in a severely disturbed emotional state after the attempt. Smith admitted that he was with the juvenile at the time of the assault, but testified that nothing happened. The jury returned a guilty verdict, and the trial court sentenced Smith to an eight-year prison term.

Counsel's no merit report addresses whether counsel reasonably chose not to request a psychological examination of the victim, whether a biased jury was selected, whether Smith was prejudiced by the jurors observing him in the custody of prison guards, and whether Smith could challenge the victim's credibility on appeal. We conclude that counsel's analysis of these issues is correct, as is his conclusion that there is no merit to the appeal.

On our own review of the record, we have also examined whether the jury heard sufficient evidence to convict Smith, and whether the court properly sentenced him. We conclude that the victim's testimony as well as the evidence that substantiated it, if deemed credible, was plainly sufficient to convict. We also conclude that the trial court properly exercised its sentencing discretion.

In his response to the no merit report, Smith argues that counsel acted ineffectively when he failed to raise the issue whether Smith was involuntarily intoxicated when he committed the assault. However, Smith testified that no assault occurred. Counsel cannot be deemed ineffective for choosing not to raise a defense that was inconsistent with that testimony.

In the supplement to his response, Smith characterized trial counsel's and appellate counsel's performance as "bizarre." However, he provides no specifics. Our review of the record and counsel's no merit brief indicates that both counsel provided effective representation. Additionally, Smith contends that the State's use of "mathematical probability statistics" was unfairly prejudicial. From our review of the record we are unable to determine what evidence Smith is referring to. The State's case was based on testimony from the victim, and from other witnesses who observed the victim and Smith after the assault occurred. There was no statistical evidence introduced.

Our review of the record discloses no other potential issues for appeal. Therefore, we affirm the judgment and relieve Smith's counsel of any further representation of him in this matter.

By the Court.—Judgment affirmed.