

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

APRIL 29, 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.

**NOTICE**

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

**No. 95-3071-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMIE LEE MOORE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Jamie Lee Moore appeals from a judgment of conviction for multiple counts of first-degree sexual assault and armed robbery. The state public defender appointed Attorney Karen Kotecki as Moore's appellate counsel. Attorney Kotecki served and filed a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Moore filed a

response. After an independent review of the record as mandated by *Anders*, we conclude that any further proceedings would lack arguable merit.

Moore was charged with first-degree sexual assault, armed robbery and burglary, as a habitual criminal. Moore was charged with three additional counts of first-degree sexual assault and armed robbery as a habitual criminal. The two cases were consolidated. The jury was unable to reach a verdict on the former charges, but convicted on the latter, contrary to §§ 940.225(1)(b), 943.32(2) and 939.62, STATS., 1991-92. The trial court imposed an aggregate sentence of one hundred twenty years, consisting of a thirty-year maximum sentence imposed consecutively on each count. *See* §§ 939.50(3)(b); 939.62(1)(c), STATS., 1991-92.

The no merit report addresses whether: (1) the trial court erroneously exercised its discretion in consolidating the two cases; (2) there was sufficient evidence to support the victim's eyewitness identification of Moore; (3) the trial court erroneously exercised its sentencing discretion when it imposed the maximum sentences consecutively; and (4) Moore received ineffective assistance of trial counsel. We agree with counsel's description, analysis and conclusion that pursuing these appellate issues would lack arguable merit. Moore's principal request is to review counsel's file, and the court record, specifically the transcripts. Moore requests additional response time once these documents have been forwarded to him. Moore also claims that: (1) he was substantially prejudiced by the consolidation of these cases; (2) the witnesses' testimony was inconsistent and the victim's "reliab[ility] ... was not proven;" and (3) he received ineffective assistance of appellate counsel. We address the issues Moore raises to explain why pursuing them would lack arguable merit.

Moore's principal complaint is that he is unable to file a meaningful response to the no merit report without access to the trial transcript, the remainder of the record, and counsel's file. On December 14, 1995, the trial court denied Moore's *pro se* motion to compel production of the transcripts. In that order, the trial court directed Moore to contact appellate counsel who had all of the transcripts.<sup>1</sup> In Moore's response to the no merit report, he claims that counsel refused to provide him with the transcripts and other documents. After having filed his response, Moore moved this court to direct appellate counsel to forward the transcripts to him. However, he did not advise us when he requested the transcripts and why appellate counsel refused his request. We denied his motion because "[t]he [trial] court advised appellant how to proceed in mid-December. He has not shown good cause why he has failed to follow the [trial] court's directive."

When we considered Moore's response to the no merit report, our concern prompted us to direct appellate counsel to advise us why she did not provide Moore with transcripts and other documents from the case file. She responded that the only time Moore requested transcripts from her was three years ago and she attached a copy of her January 10, 1994 correspondence to Moore in which she explained that the Public Defender only pays for one copy of the transcript for appellate counsel's review. *See* § 967.06, STATS. At that time, she advised Moore to wait until she received the transcripts to determine how much a copy would cost so that Moore could arrange to pay for his own copy, if he chose to do so. Moore never renewed his request to appellate counsel, despite the trial

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<sup>1</sup> The trial court included appellate counsel's name and complete address in the text of its order.

court's advice to do so. Likewise, Moore did not advise this court why he failed to follow the trial court's directive. We are compelled to conclude that Moore's characterizations of his request and appellate counsel's alleged refusal are incomplete and inaccurate.

When a no merit report is filed, we have the record with the original transcripts which we independently review to search for trial court error. Notwithstanding appellate counsel's alleged failure to provide Moore with the transcripts and other documents, we have independently reviewed the record and conclude that pursuing any further proceedings would lack arguable merit.

Moore claims that he was substantially prejudiced because these two cases were consolidated. Section 971.12(4), STATS., allows the trial court to consolidate separate charges "if the crimes and the defendant ... could have been joined in a single complaint, information or indictment." Here, Moore does not contend that these two cases could not be tried together, but that consolidation "substantially prejudiced" his defense because trial counsel did not have adequate time to prepare one of the cases.<sup>2</sup> In that instance, we review the consolidation order to determine whether the trial court erroneously exercised its discretion. *E.g., State v. Locke*, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993).

In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant. The test for failure to sever thus turns to an

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<sup>2</sup> Moore moved for an adjournment three days after the cases were consolidated. However, he sought an adjournment to prepare the case on which the jury could not reach a verdict. Accordingly, it would lack arguable merit to challenge that order.

analysis of other crimes evidence under *Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d 557 (1967).

*Id.* (citation omitted).

Trial counsel opposed consolidation to avoid the danger that the jury would confuse the evidence and allow the stronger evidence in one case to improperly bolster the weaker evidence in the other. The trial court considered Moore's reasons for opposing consolidation and recognized that, while each case has "some different nuances," the *Whitty* evidence would be admissible in both cases.<sup>3</sup> Despite consolidation, the jury could not return a verdict in one of the cases. To claim that the trial court erroneously exercised its discretion in consolidating these sexual assault and robbery charges which occurred within ten days of each other and contained at least nine factual similarities would lack arguable merit.<sup>4</sup>

Moore's next claim is that the testimony was inconsistent and the victim was not credible. Moore confuses our duty to independently review the record and search for trial court error, with a *de novo* standard of review. We review the record independently to determine whether to accept appellate counsel's no merit report. *See Anders*, 386 U.S. at 744-45. However, we are bound by the standards of appellate review; we do not re-try the case. *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). It is the jury's

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<sup>3</sup> Section 904.04(2), STATS.; *see Whitty v. State*, 34 Wis.2d 278, 294-95, 149 N.W.2d 557, 564-65 (1967), *cert. denied*, 390 U.S. 959 (1968).

<sup>4</sup> Trial counsel argued, in opposition to consolidation, that the prosecutor was using this as character evidence, to demonstrate that Moore was predisposed to commit these types of crimes. *See* § 904.04(2), STATS.; *see also Whitty*, 34 Wis.2d at 292-93, 149 N.W.2d at 563. However, trial counsel implicitly acknowledged that the evidence arguably demonstrated *modus operandi*, and that it would lack arguable merit to claim that the trial court erroneously exercised its discretion when it admitted that evidence. *See State v. Pharr*, 115 Wis.2d 334, 343-44, 340 N.W.2d 498, 501 (1983) (construing the admissibility of *Whitty* evidence under § 904.04(2)).

function “to decide which evidence is credible and which is not and how conflicts [or inconsistencies] in the evidence are to be resolved.” *Id.* at 503, 451 N.W.2d at 756. On appeal,

‘[t]he test is not whether this court or any of the members thereof are convinced of the defendant’s guilt beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted ....’

*Id.* at 503-04, 451 N.W.2d at 756 (citations omitted).

Moore did not testify. Consequently, in many instances the jury was not presented with conflicting versions of what occurred. When it was, it was the jury’s function to resolve those conflicts or inconsistencies. We have reviewed the record and conclude that challenging the sufficiency of the evidence supporting the jury’s finding of guilt would lack arguable merit. *See Poellinger*, 153 Wis.2d at 507-08, 451 N.W.2d at 758.

Moore claims that he received ineffective assistance of appellate counsel because she failed to provide him with the documents as previously addressed and she “refused to listen.” We will not review that claim on direct appeal. *See State v. Knight*, 168 Wis.2d 509, 512-13, 484 N.W.2d 540, 541 (1992). We will consider that claim only if pursued by a petition for a writ of habeas corpus in this court. *See id.* at 522, 484 N.W.2d at 545.

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 proceedings would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Karen Kotecki of any further representation of Jamie Lee Moore.

*By the Court.*—Judgment affirmed.

