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

2011AP2893-CRNM State of Wisconsin v. Glen C. Sersted, III (L.C. # 2010CF514)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Attorney Timothy O'Connell, appointed counsel for Glen Sersted, III, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the sufficiency of the evidence to support the jury verdicts; (2) evidentiary issues; and (3) the sentence imposed by the circuit court. Sersted has responded to the report, stating his belief that postconviction proceedings would have merit but that he is unable to articulate his reasoning due

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to mental health issues.[2] Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Following a jury trial, Sersted was convicted of first-degree reckless injury and strangulation, both as a repeater. The court sentenced Sersted to a total of ten years of initial confinement and six years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the convictions. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that 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).

We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. Trial evidence established that the five-year-old victim sustained serious injuries while in Sersted's care, including two skull fractures, bruising on his face and ear, diffuse swelling on his forehead, and small rash-type bruising on his neck. The State's medical expert opined that the injuries were inflicted by hitting, punching, and strangulation. The State also presented a videotape of a Safe Harbor interview of the victim that was conducted several days after the victim was injured, in which the victim indicated that

[2] We directed counsel to confer with Sersted and inform this court whether there are additional issues Sersted wishes to raise that are not addressed in the no-merit report. Counsel then filed a supplemental no-merit report stating that counsel conferred further with Sersted and that Sersted did not provide any further information.

Sersted caused the injuries by punching him ten times in the head and choking him. The victim also testified at trial that Sersted had gotten mad and hurt him. That evidence was sufficient to sustain the convictions for first-degree reckless injury and strangulation.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to any of the circuit court's evidentiary rulings. Specifically, counsel addresses the circuit court decisions: (1) denying Sersted's motion for an in camera review of the victim's school records; (2) admitting evidence of Sersted's prior act of physically injuring the same victim; (3) admitting evidence that Sersted was subject to a no unsupervised contact order as to the victim and a no contact order as to the victim's mother at the time of the victim's injuries; (4) admitting into evidence letters Sersted wrote to the victim's mother after Sersted was arrested; and (5) overruling a hearsay objection to a detective's testimony that the victim indicated where he had been hurt by pointing to his head. We agree with counsel's assessment that none of these issues have arguable merit.

Prior to trial, Sersted moved for an in camera review of the victim's school records. Sersted asserted that the victim had previously exaggerated and misrepresented incidents of other students hurting him at school. The State opposed the motion, arguing that Sersted had not made a sufficient showing to warrant in camera review under ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, and ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). Sersted then argued that the ***Shiffra***/***Green*** standard had been met. The court determined that the ***Shiffra***/***Green*** standard had not been met, and denied the motion for in camera inspection.

No-merit counsel notes that it appears that ***Shiffra*/*Green*** is not the proper standard to apply in this context. Rather, no-merit counsel points to WIS. STAT. § 118.125(2)(f), which provides:

> Pupil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness's credibility or competency.

Here, however, defense counsel did not argue that Sersted was entitled to in camera review under WIS. STAT. § 118.125(2)(f). The question, then, is whether there would be arguable merit to a claim that Sersted was denied the effective assistance of trial counsel by his counsel's failure to seek in camera review under § 118.125(2)(f). We determine that there would be no arguable merit to a claim of ineffective assistance of counsel on this basis.

A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, a party must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** We determine that, in light of the strength of the State's evidence against Sersted, it would be frivolous to contend that counsel's failure to obtain in camera review of the victim's school records deprived Sersted of a fair trial with a reliable result.

Additionally, prior to trial, the State moved to introduce other acts evidence of Sersted's prior physical abuse of the same victim to establish state of mind, knowledge, and absence of mistake or accident. *See* WIS. STAT. § 904.04(2). Sersted objected. The circuit court reasoned

that the other acts evidence was offered for an acceptable purpose, and that the evidence was both relevant and not outweighed by the danger of unfair prejudice. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We agree with counsel's assessment that there would be no arguable merit to a challenge to the court's exercise of its discretion in admitting the other acts evidence. *See* ***id.*** at 780-81.

The parties also disputed admission of evidence that Sersted was subject to a no unsupervised contact order as to the victim and a no contact order as to the victim's mother following Sersted's prior abuse of the victim. The court determined that Sersted's knowledge that he was court ordered not to be in the victim's home and to have no unsupervised contact with the victim was relevant to the recklessness and utter disregard elements of first-degree reckless injury. The court also determined that the evidence was not unduly prejudicial. We determine that a challenge to the court's exercise of its discretion in admitting this evidence would lack arguable merit.

The court also addressed a dispute between the parties as to admission of letters Sersted wrote to the victim's mother from jail prior to trial, professing Sersted's love for the victim's mother and the victim and attempting to explain the victim's injuries by disclosing that the victim had fallen down the stairs. The circuit court determined that the letters were admissible to show consciousness of guilt. We agree with counsel that this issue lacks arguable merit for appeal.

The no-merit report addresses several instances of hearsay testimony as to the victim's statements to others that Sersted was the one who inflicted his injuries: (1) the victim's mother's testimony that, when she returned to her apartment where Sersted was caring for the victim and

discovered the victim's injuries, the victim told her, "Glen did it. Glen hit me"; (2) the victim's grandmother's testimony that she accompanied the victim and his mother to the hospital, and that the victim stated in the car, "Glen hurt me"; (3) the State's expert's testimony that she examined the victim at the hospital, and the victim stated, "Glen hit me," and "Glen choke me"; and (4) an investigating officer's testimony that she spoke with the victim at the hospital, and the victim stated, "Glen hit me in the head," and told her that Sersted punched him ten times in the head with a fist, hurt his knees, and choked him. Sersted did not object to that testimony. However, Sersted did object when the State asked the investigating officer whether the victim had pointed to his injuries, arguing that it called for hearsay.

The court determined that the testimony was admissible under the excited utterance exception for hearsay. *See* WIS. STAT. § 908.03(2). We agree with counsel's assessment that there would be no arguable merit to an argument that the circuit court erroneously exercised its discretion by admitting the testimony Sersted objected to, and that there would be no arguable merit to a claim that counsel was ineffective by failing to object to similar hearsay testimony that would fall under the same exception.

Additionally, our review of the record reveals that Sersted moved for a mistrial after the prosecutor's closing argument, arguing that the prosecutor made an impermissible argument by contending that Sersted may have lost his temper just like he had done previously, and tried to get away with it as he had tried to before. Sersted argued that the State had impermissibly used the other acts evidence to try to show that Sersted had a bad character and acted in conformity with that bad character. The court denied the motion as untimely because Sersted did not make a contemporaneous objection.

We determine that, whether or not the motion was timely, this issue lacks arguable merit. The State's argument that Sersted again lost his temper, harmed the victim, and tried to hide his actions was not improper use of the other acts evidence. Rather, the other acts evidence was argued to show what it was admitted to show: state of mind, knowledge, and absence of mistake or accident.

Finally, the no-merit report addresses whether a challenge to Sersted's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Sersted was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Sersted's character and criminal history, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Sersted to a total of ten years of initial confinement and six years of extended supervision. The sentence was within the maximum Sersted faced. *See* WIS. STAT. §§ 940.23(1)(a); 939.50(3)(d); 940.235(1); 939.50(3)(h); and 939.62(1)(b) and (c) (all 2007-08, Stats.). And, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances'" (quoted source omitted)). We discern no erroneous exercise of the circuit court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy O'Connell is relieved of any further representation of Glen Sersted in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals