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October 29, 2014

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

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2013AP2620-CRNM State of Wisconsin v. Felipe Martinez (L.C. #2008CF1225)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Felipe Martinez appeals from a judgment of conviction for first-degree sexual assault of a child by sexual contact with a person under age thirteen. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Through counsel Martinez has filed a response to the no-merit report.[2] RULE

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

[2] Felipe Martinez does not read or write English. After the no-merit report was filed, appointed counsel met with Martinez and with the assistance of an interpreter documented Martinez's response to the report.

809.32(1)(e). Upon consideration of these submissions and an independent review of the record, including the transcripts of the jury trial, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The evidence at trial was that on September 9, 2008, when she was nine years old,[3] E.R. was playing with Martinez's daughter on a swing set in Martinez's backyard. At their request, Martinez lifted the girls into a toddler swing on the swing set. He then lifted them up to the top of the slide. After a turn, E.R. ran into the house and reported to her grandmother that Martinez had touched in her "private part." Later E.R. explained that while she sat on the top of the slide Martinez put his hand down her pants and under her underwear and rubbed her "private part." She also said Martinez had one hand over her mouth and touched her butt. After Martinez was found guilty, he was sentenced to five years' initial confinement and five years' extended supervision.

The no-merit report first discusses whether there is arguable merit to a challenge to the sufficiency of the evidence to support the guilty verdict. Martinez's response relates to this potential issue as he asserts in his response that the jury verdict is incorrect, that he is innocent, that the police did not find any evidence that he had improperly touched E.R., and that the jury made a mistake in finding him guilty. We may not reverse a conviction on the basis of insufficient evidence "unless 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

[3] Because Martinez was absent from Wisconsin between April 2009 and December 2011, the jury trial was not held until August 2012.

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). Here the jury was presented with the audiovisual recording of E.R.'s interview during which she related that Martinez had touched her. Her testimony was sufficient to satisfy all the elements of the offense, including the requirement that the contact be undertaken "for the purpose of ... sexually arousing or gratifying the defendant." WIS. STAT. § 940.225(5)(b)1. "Intent to become sexually aroused or gratified ... may be inferred from the defendant's conduct and from the general circumstances of the case...." ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987). We must accept the inference drawn by the finder of fact. *See* ***id.*** at 325. Although on cross-examination at trial E.R. gave conflicting testimony about the details of the crime and her version of what occurred differed from the testimony of Martinez's daughter, it is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony. ***Poellinger***, 153 Wis. 2d at 506. Thus, despite Martinez's continued assertion of innocence, it cannot be argued that the evidence was insufficient to convict him.

The no-merit report next addresses whether the trial court erroneously exercised its discretion in admitting evidence that Martinez had missed court dates, was absent from Wisconsin for more than two years, and was extradited from Texas. When the prosecution moved pretrial to admit evidence of Martinez's flight from Wisconsin, Martinez objected on the ground that the evidence was unduly prejudicial because he could only explain the reason for his

absence by his own testimony.[4] He also argued that the evidence would confuse the jury and divert attention from the real issue at hand. The trial court ruled that the evidence was relevant and not unduly prejudicial. "[T]he admissibility of flight evidence is committed to the trial court's discretion." ***State v. Knighten***, 212 Wis. 2d 833, 839, 569 N.W.2d 770 (Ct. App. 1997). Evidence of flight has probative value as to guilt. ***Id.*** "To be admissible, the defendant's flight need not occur immediately following commission of the crime." ***State v. Miller***, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999). Although Martinez advanced an independent reason for flight, the reason itself was not prejudicial to him. *See* ***id.*** at 461. His difficulty in establishing the reason other than by his own testimony did not establish undue prejudice from the evidence.[5] The trial court properly exercised its discretion in admitting the evidence.

A related potential claim not discussed by the no-merit report is whether the trial court properly instructed the jury that: "Evidence has been presented relating to the defendant's

[4] Martinez missed the arraignment scheduled for April 15, 2009. On April 14, 2009, his attorney wrote the court commissioner indicating that Martinez's father, who lived in Mexico, was gravely ill and Martinez was en route to visit his father before the father's death. Counsel indicated that she expected Martinez to be back in the area within two weeks and requested that his nonappearance be excused. At another missed court date in 2009, Martinez's attorney explained that he had gone to Mexico to care for a sick relative and he did not have enough money to return. The hearing on the prosecution's motion to admit evidence of flight was just one week before trial. Defense counsel indicated that it would be impossible for her to get witnesses from Mexico to explain what was going on in the family or that Martinez was voluntarily headed back to Wisconsin when he was picked up at border patrol because of the outstanding warrant.

[5] At trial Martinez's twelve-year-old daughter testified that he had gone to Mexico in 2009 because he had sick relatives there. She explained that her father was working there to support the family but left to go back to the United States leaving her, her mother, and sister still in Mexico.

conduct after the defendant was accused of a crime. Whether the evidence shows a consciousness of guilt and whether consciousness of guilt shows actual guilt are matters exclusively for you to decide." Martinez objected to giving the instruction and proposed a lengthy instruction telling the jury to disregard evidence of the defendant's whereabouts if it determined that his whereabouts did not amount to a consciousness of guilt or that he left the state to visit his gravely ill father or in fear of his safety because he had been violently assaulted by relatives of the victim.

> A trial judge may exercise wide discretion in selecting jury instructions based on the facts and circumstances of the case. This discretion extends to both choice of language and emphasis. ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988). "The court's discretion should be exercised to 'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Id.*** (citing ***State v. Dix***, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979)). Although the judge is granted such broad discretion, the question of whether the circuit court correctly instructed the jury is one of law which this court reviews de novo, without deference to the lower courts. ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989).

***State v. Sartin***, 200 Wis. 2d 47, 52-53, 546 N.W.2d 449 (1996). We conclude that the flight instruction given was appropriate and accurately informed the jury of the purpose of the evidence. There is no arguable merit to a claim that the trial court erroneously exercised its discretion in rejecting Martinez's proposed instruction and instructing the jury as it did.

The no-merit report also concludes that there is no arguable merit to a claim that it was error to admit the testimony of E.R.'s grandmother as to what E.R. told her. The evidence was admitted under the excited utterance exception to the hearsay rule. We agree with the report's conclusion. A proper foundation was established that even after leaving the Martinez residence, E.R. was still under the stress of excitement caused by the crime when relating what happened to

her at her grandmother's house. The trial court properly noted "[a] broad and more liberal interpretation is given to what constitutes an excited utterance when applied to young children especially when the child is alleged to have been the victim of sexual assault." ***State ex rel. Harris v. Schmidt***, 69 Wis. 2d 668, 684, 230 N.W.2d 890 (1975).

The final issue discussed in the no-merit report is whether the sentence was the result of an erroneous exercise of discretion. The report states the correct standard of review and discusses the parts of the sentencing court's remarks which demonstrate that the court adequately discussed the facts and factors relevant to sentencing and identified proper objectives of the sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197 (the court is to identify the general objective of most import). The ten-year sentence is well within the sixty-year maximum and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). We accept the conclusion in the no-merit report that there is no arguable merit to any challenge to the sentence.

We consider the no-merit report incomplete. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial rulings, jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. The no-merit report fails to give any indication that appointed counsel considered whether those parts of the process give rise to potential appellate issues. Moreover, the report fails to acknowledge that defense motions for

release of E.R.'s juvenile court and treatment records and to exclude Martinez's statement to police were denied, that the objection to the prosecution's use of E.R.'s recorded interview under WIS. STAT. § 908.08 was rejected, that the jury sent out a question during deliberations, and that the jury was not individually polled.[6] We address the potential issues not mentioned in the no-merit report to demonstrate that the no-merit procedure has been followed. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (difficult to know the nature and extent of the court of appeals' examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion).

Before trial Martinez moved for disclosure of E.R.'s human service, juvenile court, and counseling records because it had been reported that E.R.'s mother did not have placement since E.R.'s birth and E.R. had been the victim of a prior sexual assault. Martinez sought an in-camera inspection of the records on the grounds that it was possible E.R. had undergone counseling and psychological testing and that the requested records may contain admissible evidence. The trial court denied the motion because it was not established that any human service or juvenile court

[6] Counsel has a duty to review the entire record for potential appellate issues. A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See* ***McCoy v. Wisconsin Court of Appeals***, 486 U.S. 429, 438 (1988). Appointed counsel is reminded that a no-merit report must satisfy the discussion rule which requires a statement of reasons why the appeal lacks merit by a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. ***Id.*** at 440. Although this court has the duty to make an independent review of the entire record, it places an unreasonable burden on the court when counsel fails to provide the necessary groundwork for consideration of potential issues. It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. *See* ***State v. Allen***, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). Counsel is admonished to make a complete discussion of all aspects of a jury trial in future no-merit reports.

records existed and Martinez had not met his burden that information in the requested records would bear on E.R.'s ability to recall or truthfully relate the events. We review de novo whether the defendant submitted a preliminary evidentiary showing sufficient for an in-camera review. ***State v. Green***, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298. In order to obtain an in-camera review of the privileged records, the defendant had to "show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." ***Id.***, ¶32. "The mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault is insufficient." ***Id.***, ¶33. Under the applicable standard of review, we conclude there is no arguable merit to a claim that the trial court erred in denying Martinez's motion for disclosure of the records.

Also before trial a hearing was held on the prosecution's notice of intent to use the audiovisual recording of E.R.'s statement under WIS. STAT. § 908.08. E.R.'s grandmother testified at the hearing that E.R. was still distressed when near Martinez's neighborhood or asked to recall the crime. Martinez argued that the recording not be admitted because E.R., nearly 13 years old at the time of trial, suffered no physical or emotional impairment to giving live testimony. Martinez also pointed out that E.R. had no close relationship with him such that it would be difficult to testify in his presence. The trial court rejected Martinez's objection and admitted the recording finding that it was free from alteration and audio or visual distortions, that it demonstrated E.R.'s understanding of the difference between a truth and a lie, that it otherwise had indicia of trustworthiness, and that the interests of justice warranted its admission as the child was still very young and under emotional strain. We review the trial court's ruling under § 908.08 for an erroneous exercise of discretion. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. Here the trial court tracked the statutory criteria for admission of

the recording. *See* § 908.08(3), (4). It was a proper exercise of discretion and there is no arguable merit to a claim that the recording should have been excluded.

At trial the prosecution sought to admit Martinez's written statement and on the second day of the trial a ***Miranda-Goodchild***[7] hearing was conducted. When it wants to use a custodial statement of the defendant the prosecution has the burden of proving, by a preponderance of the evidence, the sufficiency of the ***Miranda*** warnings and the knowing and intelligent waiver of ***Miranda*** rights. *See* ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594; ***State v. Santiago***, 206 Wis. 2d 3, 12, 556 N.W.2d 687 (1996). The State also has the burden of proving by a preponderance of the evidence that the defendant's statement was voluntary. *See* ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. We review both determinations de novo because questions of law are presented by the application of the constitutional standards to the historical facts. *See* ***State v. Turner***, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987); ***Agnello***, 269 Wis. 2d 260, ¶8; ***Santiago***, 206 Wis. 2d at 18. We will uphold the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *See* ***State v. Henderson***, 2001 WI 97, ¶16, 245 Wis. 2d 345, 629 N.W.2d 613.

Here an interpreter testified that he read Martinez the ***Miranda*** rights in Spanish and asked him if he understood each one. The interpreter also indicated that he read the statement written up by the police officer to Martinez in Spanish and that the statement was what Martinez had said. Martinez testified that he has zero education and does not read in Spanish or English.

[7] At the ***Miranda-Goodchild*** hearing the issues to be decided are "the voluntariness of the statements, the proper giving of the ***Miranda*** warnings and the intelligent waiver of the ***Miranda*** rights." ***Norwood v. State***, 74 Wis. 2d 343, 362, 246 N.W.2d 801 (1976).

He understood some words used by the interpreter but not others. He acknowledged wanting to give the police his side of the story. The trial court found that Martinez understood the ***Miranda*** warning given to him in Spanish and that Martinez, in his native language, confirmed that the statement was correct. There being no suggestion of police coercion, the court ruled that the statement was admissible.[8]

The trial court's findings of fact are not clearly erroneous. The State met its burden of showing that Martinez received and understood his ***Miranda*** warnings. When we consider the totality of the circumstances surrounding the statement, including the balance of Martinez's personal characteristics and his limited education, against the pressures imposed by the police, the statement was voluntary. *See* ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (the voluntariness of a statement is determined by the "totality of the circumstances" test which requires the court to balance the personal characteristics of the defendant against any police pressure). We conclude there is no arguable merit to a claim that the statement should not have been admitted at trial.

During deliberations the jury asked to view the recording of E.R.'s statement. There was no objection to permitting the jury to view it again. The recording was shown in its entirety to the jury in the courtroom. There is no arguable claim that the jury's request was improperly handled.

[8] Martinez's statement was not directly inculpatory. Martinez said he had only put his hands on E.R.'s shoulder and he denied that he had lifted E.R. onto the slide.

After the jury's verdict was read, the trial court asked the jury as a group to confirm that it was their verdict. The transcript reflects a group yes and that no one said no. When the trial court asked the defense if it wanted the jury polled, defense counsel said no. "The right to an individual polling of the jury is a significant right because it is a means to test the uncoerced unanimity of the verdict." ***State v. Yang***, 201 Wis. 2d 725, 745, 549 N.W.2d 769 (Ct. App. 1996). However, the decision to request that the jury be polled is one delegated to counsel. ***Id.*** at 744. Where, as here, the jury was instructed on a unanimous verdict and the trial court asked the jurors as a group if it was the verdict of each, trial counsel was not ineffective for not requesting that the jury be polled. ***Id.*** at 746.

No other aspect of the trial presents an issue of arguable merit for appeal. At the start of the trial, the trial court's denial of Martinez's motion to introduce evidence of a prior sexual assault of E.R. was a proper exercise of discretion. Jury selection was completed without any objection from either party with regard to jurors struck or excused for cause. The trial court's rulings on evidentiary objections made during trial were a proper exercise of discretion. The trial court conducted a proper colloquy with Martinez about his waiver of the right to testify. Even though Martinez became confused at one point during that colloquy, a break in the proceedings was taken to ensure that Martinez understood his right and was properly waiving it. The jury instructions properly stated the law. No improper arguments were made to the jury during opening or closing arguments. Accordingly, this court accepts the no-merit report, affirms the

conviction and discharges appellate counsel of the obligation to represent Martinez further in this appeal.[9]

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved from further representing Felipe Martinez in this appeal. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*
*Clerk of Court of Appeals*

[9] Although appointed counsel is discharged from further representation, it remains counsel's obligation to notify Martinez of this decision and inform Martinez of his right to petition the Wisconsin Supreme Court for review. *See* WIS. STAT. RULE 809.32(3). The record reflects that Martinez does not speak English, nor can he read in English or Spanish. We therefore decline to incur the expense of translating our opinion, and counsel may find it necessary to fulfill his obligations under RULE 809.32(3) by use of an interpreter.