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**DISTRICT IV**

September 17, 2015

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

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2014AP261-CRNM      State of Wisconsin v. Larry W. Clark (L.C. # 2010CF133)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Attorney James Rebholz has filed a no-merit report seeking to withdraw as appellate counsel for appellant Larry Clark. *See* WIS. STAT. RULE 809.32 (2013-14)<sup>1</sup> and *Anders v. California*, 386 U.S. 738, 744 (1967). Clark was sent a copy of the report and has filed several responses, and Rebholz has filed supplemental no-merit reports. Because the no-merit report

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

does not establish that further appellate proceedings would be wholly frivolous within the meaning of *Anders* and RULE 809.32, we reject the no-merit report.

After a five-day jury trial, Clark was convicted of first-degree intentional homicide, hiding a corpse, identity theft, two counts of forgery, and two counts of giving false information on a missing person. The no-merit report addresses whether there would be arguable merit to a challenge to: (1) the sufficiency of the evidence to support the jury verdicts; (2) the circuit court's ruling denying Clark's motion to suppress physical evidence obtained during execution of search warrants at Clark's home; (3) the circuit court's ruling denying in part Clark's motion to suppress statements Clark made to police; (4) the circuit court's ruling denying Clark's motion to exclude autopsy and in-life photographs of the victim; or (5) the sentence imposed by the court. We conclude that there is at least one issue in this case that is not wholly frivolous. Specifically, we determine that, at a minimum, there would be arguable merit to at least two issues related to Clark's motion to suppress his statements to police.

Prior to trial, Clark moved to suppress statements he made to police. The circuit court ruled that all but one statement that Clark made to police at the station after invoking his right to counsel would be excluded from trial. The court's ruling included the following: (1) the State was prohibited from introducing evidence that police informed Clark that they had found his mother and asked Clark if he was relieved, to which Clark responded, "No"; and (2) the State was allowed to introduce Clark's statement, "Besides them writing that down .... She was going to kill me, so," because that statement was not in response to police questioning. *See State v. Franklin*, 228 Wis. 2d 408, 412, 596 N.W.2d 855 (Ct. App. 1999) (statements obtained in violation of the defendant's right to counsel are inadmissible in the prosecution's case-in-chief).

In the State's case-in-chief, the State elicited testimony from an investigating officer that the officer informed Clark that police had found Clark's mother, and asked Clark if he was relieved, to which Clark responded, "No." Additionally, the State played a clip of the recorded interview that included that exchange, as well as Clark's statement, "She was going to kill me, so." The State cross-examined Clark as to those statements, and highlighted the statements in the beginning of its closing argument. The defense did not object to introduction of the statement that the court had held inadmissible.

The question in a no-merit appeal is whether further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32. Here, the no-merit report asserts that the circuit court's ruling excluding Clark's statements in the State's case-in-chief "is not at issue." However, the no-merit report does not explain why it would be wholly frivolous to argue that counsel was ineffective by failing to object when the State introduced a statement that the circuit court held was inadmissible. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient ... [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

Additionally, the no-merit report asserts that the court properly denied Clark's motion to suppress his statement "She was going to kill me, so," because the court found that Clark's statement was the result of Clark reinitiating contact with police. The no-merit report does not, however, provide any analysis of whether a challenge to the court's finding would lack arguable merit. Our review of the record indicates that Clark's "She was going to kill me, so" statement

followed closely after his “No” response to the question of whether he was relieved that police had found his mother. Counsel does not explain why there would be no arguable merit to a challenge to the court’s finding that only the first statement was the result of the officer’s impermissible questioning. Accordingly, we are not persuaded that further proceedings would be wholly frivolous.

By this discussion, we do not mean to suggest that we have determined that these are the only seemingly non-frivolous issues arising from the court’s admission and exclusion of Clark’s statements. Rather, we provide this discussion to explain our conclusion that the no-merit report has not demonstrated that there are no issues of arguable merit in this case.

Because we determine that there is at least one issue in this case that would have arguable merit, we reject the no-merit report. We do not provide an exhaustive analysis of whether there are any other issues with arguable merit in this case, beyond the issue identified above.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Rebholz or a successor appointed by the State Public Defender shall continue to represent Clark.

IT IS FURTHER ORDERED that the time for Clark to file a postconviction motion or notice of appeal is extended to November 13, 2015.

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