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**DISTRICT I**

November 5, 2015

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

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2014AP1459-CRNM      State of Wisconsin v. Leon G. Carter  
(L.C. #2011CF3689)

Before Curley, P.J., Kessler and Brennan, JJ.

Leon G. Carter appeals from convictions for six felonies, including second-degree sexual assault, kidnapping, and strangulation. Carter's postconviction/appellate counsel, Dennis Schertz, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).<sup>1</sup> Carter filed a response, and Schertz filed a supplemental no-merit report in response to an order from this court. We have independently reviewed the

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

record, the no-merit report, the supplemental no-merit report, and Carter's response as mandated by *Anders*. We conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The amended criminal complaint charged Carter with six felonies, including four counts of second-degree sexual assault (mouth to penis, penis to vagina, hand to breast, and finger to anus), kidnapping, and strangulation. All six counts involved the same victim, a woman named Smith,<sup>2</sup> with whom Carter was romantically involved for over ten years. The complaint stated that Carter "has severely physically, sexually and psychologically abused [Smith] for over ten years and treats her as his 'property.'" The complaint indicated that Carter had been criminally charged with sexually assaulting Smith in 2002 and 2004, and that he ultimately pled guilty to battering and intimidating Smith in those cases. Carter served time in prison for those convictions. In June 2010, shortly after his most recent release from prison, Carter reunited with Smith and they went to the transitional living center where he was living. Smith later told police that she was held there against her will over a period of two months, during which she was beaten and sexually assaulted.

From the outset of the case, Carter's defense was that he did not hold Smith against her will and that she was lying about being abused. To demonstrate that Smith was incredible, Carter sought information about Smith's past mental health treatment and a prior allegation against a police detective that resulted in an internal affairs report. Ultimately, the trial court ruled that information about those incidents could not be admitted at trial. In addition to ruling

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<sup>2</sup> The name Smith is a pseudonym that we will use in this opinion to protect the victim's identity.

on motions related to Smith's mental health history and the internal affairs report, the trial court granted the State's motion to admit evidence of Smith's prior abuse allegations against Carter, including those that resulted in criminal convictions.

The case was tried to a jury over five days and included extensive testimony from Smith. Carter chose not to testify. Carter was ultimately found guilty of all six counts and sentenced to a total of sixty-three years of initial confinement and twenty-three years of extended supervision, including: four consecutive terms of fifteen years of initial confinement and five years of extended supervision; one consecutive term of three years of initial confinement and three years of extended supervision; and one concurrent term of fifteen years of initial confinement and five years of extended supervision.<sup>3</sup>

Postconviction/appellate counsel filed a lengthy no-merit report that summarizes the testimony presented and the myriad motions and issues the trial court decided, including: (1) denial of Carter's *Shiffra*<sup>4</sup> motion to introduce Smith's mental health records; (2) granting of the State's motion to introduce other acts evidence concerning Carter's prior assaults of Smith; (3) denial of Carter's motion to introduce evidence that Smith did not appear to testify at the trial of another man alleged to have battered her; (4) deciding to dismiss one juror who failed to show up for the fourth day of trial and a second juror who had a previously scheduled doctor's appointment that would have interfered with jury deliberations; (5) deciding not to declare a

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<sup>3</sup> The jury found Carter guilty of three counts of second-degree sexual assault with use of force, one count of second-degree sexual assault causing injury to a sex organ, one count of strangulation and suffocation, and one count of kidnapping, contrary to WIS. STAT. §§ 940.225(2)(a), 940.225(2)(b), 940.235(1), and 940.31(1)(b) (2010-11).

<sup>4</sup> See *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), *abrogated by State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

mistrial when a State's witness referred to Carter as a sex offender; (6) denial of Carter's motion to introduce character evidence that Smith is untruthful; (7) denial of Carter's motion for a mistrial based on allegations that the trial court showed too much sympathy to Smith; (8) rejecting Carter's suggestion that new trial counsel may need to be appointed; and (9) denial of Carter's motion for a mistrial based on the fact that a bailiff answered the jury's question concerning the need for a unanimous verdict. The no-merit report concluded there would be no arguable merit to assert that Carter did not receive a fair trial, that he was denied the effective assistance of trial counsel, or that the sentence was excessive. This court directed postconviction/appellate counsel to provide additional analysis of two issues: the State's other acts motion and the State's witness's suggestion that Carter was a sex offender. We have carefully reviewed the record, the no-merit report, and the supplemental no-merit report, as well as Carter's response.<sup>5</sup> This court agrees with postconviction/appellate counsel's thorough description and analysis of the potential issues identified in the no-merit report and supplemental no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss several of the identified issues.<sup>6</sup>

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<sup>5</sup> Carter's response does not raise specific issues. He explains that he lacks legal training and has had to rely on postconviction/appellate counsel's analysis of his case. He also complains that the no-merit report "relied on unexplained assumptions and allegations that were conclusory." This court concluded that additional analysis of two key issues would be helpful, and we directed counsel to more fully develop those issues. Counsel's additional analysis convinces us that there would be no merit to pursuing a motion or appeal based on those or other previously identified issues.

<sup>6</sup> This court will not attempt to address every issue that arose in this case. The thirty-nine page no-merit report and the twelve-page supplemental no-merit report provide an exhaustive summary of the numerous motions and rulings that occurred before and during trial. As noted, we agree with counsel's analysis and conclusion that none of the issues identified presents an issue of arguable merit.

We begin with the State's other acts motion. The State sought to admit evidence of Carter's prior abuse of Smith, in part to demonstrate the context of the offenses. See *State v. Hunt*, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771 (explaining that other acts evidence can be admitted "to show the context of the crime and to provide a complete explanation of the case," such as explaining abuse that took place in a home and the authority and control that an abuser exercised over his or her victims). The trial court engaged in the requisite analysis under *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Although the trial court did not explicitly discuss whether the danger of unfair prejudice was outweighed by the probative value of the proffered evidence, an appellate court will "independently review the evidence to determine if it supports the trial court's decision to admit the other crimes evidence." See *State v. Shillcutt*, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983). Having reviewed the record, we conclude that there would be no arguable merit to assert that the trial court's decision was unsupported by the record. Further, the trial court that actually tried the case reviewed the prior judge's ruling and explicitly addressed all three prongs of the *Sullivan* test, and it also gave the appropriate cautionary instructions.<sup>7</sup> We agree with postconviction/appellate counsel that there is no arguable basis to pursue an appeal based on the trial court's decision to allow the admission of other acts evidence.

Next, we consider the testimony of a Department of Corrections agent who was called by the State. On direct examination, as the agent was explaining that Carter was on her caseload and that she is a sex offender specialist, the agent added that Carter "has a prior sexual assault,

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<sup>7</sup> The Honorable David Borowski decided the pretrial motions and the Honorable Ellen R. Brostrom presided over the jury trial and sentenced Carter.

but he was actually on [supervision] for two counts of battery.” Later, the agent referred to Carter and the other men she supervised as “sex offenders.” Trial counsel sought a sidebar conference, after which the State clarified with the witness that the Department may put people under sex offender supervision “even if they were not in that instance convicted of a sex offense.” The State further clarified that Carter was on supervision for batteries. Later, outside the jury’s presence, trial counsel told the trial court that he thought the State had “cleaned up” the problem and that there was no need for a mistrial. The trial court recognized that trial counsel was not seeking a mistrial, but it nonetheless considered whether one should be granted and concluded that a mistrial was not warranted because the jury had already heard “a lot of evidence of sexual assault by Mr. Carter against [Smith], some charged and some as prior bad acts” and it was unlikely that the reference to sex offender supervision “would rise to the level of any kind of prejudice that would warrant a mistrial.” Before the case was submitted to the jury, trial counsel told the trial court that he did not want to have a curative instruction. We agree with postconviction/appellate counsel that there is no arguable basis to pursue a motion or appeal based on the witness’s statements, the trial court’s handling of the issue, or trial counsel’s decision not to seek a curative instruction concerning this issue.

This court has also considered trial counsel’s performance prior to and at the trial. We concur with postconviction/appellate counsel’s assessment that Smith was a particularly challenging witness to control, as she was extremely emotional and frequently volunteered information beyond that called for by particular questions. We have not identified any trial counsel actions or inactions that would rise to the level of ineffective assistance of counsel.

Finally, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see State v. Gallion*,

2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, see *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. See *Gallion*, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. The trial court discussed the severity of the abuse Smith suffered. It also discussed Carter's criminal history, which included a conviction for first-degree sexual assault of a child, prior convictions involving Smith, revocations of supervision, and witness intimidation. The trial court concluded that in order to prevent Smith from victimizing Smith or others again, it needed to impose a sentence that would "not allow Mr. Carter to see the light outside of a prison."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenging the trial court's compliance with *Gallion*. Further, there would be no merit to assert that the sentence was excessive. See *Ocanas*, 70 Wis. 2d at 185. While the sixty-three-year term of initial confinement is significant and is, in all likelihood, a life sentence, this court

recognizes that Carter was convicted of six serious felonies. He was facing over two hundred years of imprisonment. The sentence imposed was well within the maximum sentence and we discern no erroneous exercise of discretion. See *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 (“A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.”).

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of Carter in this matter. See WIS. STAT. RULE 809.32(3).

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