OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 13, 2017

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Marcella De Peters
Law Office of Marcella De Peters
PMB #318
6650 W. State St.
Wauwatosa, WI 53213

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Frederick Eugene Walker 391209
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

Joseph Ehmann
First State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Andrea Taylor Cornwall
Asst. State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

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

2016AP450-CRNM State of Wisconsin v. Frederick Eugene Walker
(L.C. # 2014CF1018)

Before Kessler, Brash and Dugan, JJ.

Frederick Eugene Walker appeals a judgment of conviction entered after a jury found him guilty of one count of repeated sexual assault of a child, T.C.B. *See* WIS. STAT.

§ 948.025(1)(e) (2011-12).[1] Attorney Marcella De Peters filed a no-merit report stating that no arguably meritorious issues exist for appeal. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738 (1967). Walker filed a response. At our request, Attorney De Peters filed a supplemental no-merit report, and we permitted Walker to file an additional reply. Upon review of the record and the submissions from Attorney De Peters and Walker, we are unable to conclude that further proceedings as to at least two issues would lack arguable merit. Therefore, we reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for Walker to file a postconviction motion.

The rule is long established that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). In this case, T.C.B.'s mother, N.S., testified for the prosecution, told the jury that she and Walker had been boyfriend-girlfriend "on and off" for many years, and went on to describe the first time she had a conversation with T.C.B. about her allegations against Walker:

> I looked at her, and when I looked at her face, I'm, like, she doesn't lie. She's not going to lie. I'm, like I just can't believe – and I just honestly could not believe that the situation she was in took place. And quite honestly, just was baffled. I was stuck for a long time. Still kind of numb about the situation. But [T.C.B.] don't lie.

Trial counsel did not object.

[1] All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

We asked appellate counsel to address why N.S.'s testimony did not give rise to an arguably meritorious claim for postconviction relief. She responded that, because Walker's trial counsel did not object to the testimony, "the error is analyzed under ***Strickland v. Washington***, 466 U.S. 668 (1984)." Under ***Strickland***, a defendant receives ineffective assistance of counsel if counsel's performance was deficient and the deficiency prejudiced the defense. ***Id.*** at 687. Appellate counsel asserted that, while trial counsel "could have objected," she concluded that Walker did not suffer any prejudice from the error. We are not persuaded that it would be frivolous to argue on Walker's behalf that failure to object to the testimony was prejudicial.

Appellate counsel suggests that any claim of prejudice arising from an alleged ***Haseltine*** violation would be frivolous because the jury hearing Walker's case was more likely to discount than to credit a parent's credibility assessment. Counsel offers no citation to support the conclusion.[2] In fact, Wisconsin case law teaches that testimony from one witness that another witness is telling the truth can interfere with the jury's role and require reversal in the interest of justice. *See* ***State v. Romero***, 147 Wis. 2d 264, 277-78, 432 N.W.2d 899 (1988) (erroneously admitted testimony from social worker and police officer that victim was being honest required a new trial in the interest of justice); *see also* ***State v. Echols***, 2013 WI App 58, ¶¶26-27, 348 Wis. 2d 81, 831 N.W.2d 768 (error to deny motion for mistrial after lay witness testified that defendant stutters when lying, particularly in a case that depends substantially on a credibility assessment).

[2] Counsel cites only ***Strickland v. Washington***, 466 U.S. 668 (1984), in analyzing whether Walker can pursue an arguably meritorious claim for relief based on an alleged violation of ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (1984).

Appellate counsel also relies on T.C.B.'s testimony as a reason to conclude that any claim of prejudice would be frivolous. The question, however, is whether Walker can pursue an arguably meritorious claim that he was prejudiced because N.S. improperly bolstered T.C.B.'s credibility. In the instant case, which did not include corroborating forensic evidence and which required the jury to believe or reject the complaining witness's testimony, we conclude that an argument based on ***Haseltine***, ***Romero***, and their progeny would not be wholly frivolous.

As a second matter, we observe that testimony offered by the State can open the door to evidence otherwise inadmissible under WIS. STAT. § 972.11(2), the rape shield law. *See* ***State v. Dunlap***, 2002 WI 19, ¶¶30-41, 250 Wis. 2d 466, 640 N.W.2d 112. In this case, T.C.B. testified in response to questions from the State that she obtained birth control because she was sexually active, and Walker used the condoms she obtained "every time he would do [a sexual assault]." The circuit court rejected Walker's efforts to counter that testimony with evidence that the sexual activity T.C.B. referenced was not with Walker. Appellate counsel does not discuss this issue. We conclude it would not be wholly frivolous to seek postconviction relief based on T.C.B.'s testimony and the response that followed.

When appointed counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders***, 386 U.S. at 744. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988).

We cannot conclude that further proceedings in this matter would lack arguable merit. We therefore will reject the no-merit report filed by appellate counsel, dismiss this appeal, and extend the deadline for filing a postconviction motion in this matter.[3]

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Walker, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Walker or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Walker to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the State Public Defender's Office that it has appointed new counsel for Walker or that new counsel will not be appointed.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Walker may, of course, pursue postconviction relief on grounds in addition to those discussed in this order.