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September 27, 2017

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

2017AP20-CRNM State of Wisconsin v. Kevin L. Harris (L.C. #2010CF168)

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Kevin L. Harris appeals from a judgment of conviction for first-degree sexual assault of a child under thirteen years of age and an order denying his postconviction motion for relief from his restitution obligation. His appellate counsel has filed a no-merit report pursuant to Wis.

STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Harris received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment and order 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.

In 2010 Harris was charged with first-degree sexual assault of a child under thirteen after a seventeen-year-old girl reported that when she was seven years old, Harris took her into a backyard shed and had intercourse with her. The victim did not report the assault when it occurred because Harris told her not to tell or something bad would happen and the victim was afraid. Trial was to the court. The victim testified that she knew Harris as her next door neighbor, that one day when she was riding her bike in the driveway Harris approached her and asked her to talk with him, that Harris led her to the backyard shed, Harris asked the victim to sit on a reclining chair in the shed, and he removed her tights and underwear and had intercourse with her. The victim's mother testified about the victim's change in personality and habits after the incident. Other acts evidence was provided at trial by a sixteen-year-old girl who had been assaulted by Harris. The girl testified that when she was six, while waiting for a friend outside, Harris approached her and invited her to his residence. At Harris's apartment, Harris tried to kiss her, he touched her vagina over her clothing, and he did not let her leave the apartment when she first tried to go. Harris also testified at the trial. The court found Harris guilty. On

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

May 26, 2011, Harris was sentenced to thirty years' initial confinement and ten years' extended supervision, and ordered to pay \$1660 in restitution.

Nearly three years after sentencing, and after numerous extensions of the deadline under WIS. STAT. RULE 809.30 for filing a postconviction motion or notice of appeal, postconviction counsel filed a motion for a determination of Harris's competency to proceed with postconviction relief. At a May 21, 2015 hearing, the circuit court found that Harris was competent to proceed. A no-merit notice of appeal was filed August 3, 2015. Counsel's no-merit report was rejected because the record failed to establish any reason why Harris was not afforded a restitution hearing regarding his ability to pay after timely requesting one. *State v. Harris*, No. 2015AP1591-CRNM, unpublished slip op. (WI App May 6, 2016). The postconviction motion contemplated by the rejection of the no-merit report was filed July 27, 2016. A restitution hearing was held before a court commissioner and the determination that Harris had the ability to pay \$1660 as restitution was adopted by the trial court by an order entered October 7, 2016. This second no-merit appeal was then filed.

The no-merit report addresses the potential issues of whether Harris's waiver of his right to a jury trial was freely, voluntarily, and knowingly made, whether the evidence was sufficient to sustain the conviction, whether the sentence was the result of an erroneous exercise of discretion or unduly harsh or excessive, and whether the imposition of restitution based on the finding that Harris has the ability to pay was an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

The no-merit report fails to provide a discussion of whether the trial court's admission of the other acts evidence was a proper exercise of discretion and whether the postconviction determination that Harris was competent to proceed was clearly erroneous. Considering the standard of review for each potential issue and the record, we conclude there is no arguable merit to either. *See State v. Byrge*, 2000 WI 101, ¶45, 237 Wis. 2d 197, 614 N.W.2d 477 (the circuit court's competency determination is reviewed under a clearly erroneous standard of review); *State v. Veach*, 2002 WI 110, ¶55, 255 Wis. 2d 390, 648 N.W.2d 447 (the decision to admit the other acts evidence is reviewed under a discretionary standard).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Harris further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and order denying the postconviction motion are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved from further representing Kevin L. Harris in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals