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September 2, 2020

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

2019AP2355-CRNM State of Wisconsin v. David J. Cook, Jr. (L.C. #2017CF358)

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

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).

David J. Cook, Jr., appeals from a judgment of conviction of first-degree sexual assault of a child under thirteen by sexual contact with the child. Cook's appointed appellate counsel has

filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). He was advised of his right to file a response but has not done so. Upon consideration of the no-merit report, the supplemental no-merit report appointed counsel was ordered to file, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we are unable to conclude that further proceedings as to the admission of two pieces of evidence at trial, including related claims regarding trial counsel's effectiveness in failing to object to the evidence, would lack arguable merit. We therefore summarily reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for Owens to file a postconviction motion or notice of appeal. *See* WIS. STAT. RULE 809.21.

A seven-year-old child reported that the night before her report, she woke to find Cook with his hand under her underwear and rubbing her private parts. She observed Cook pulling on his own private part. The child had been asleep in the living room of a residence where Cook was also staying. Cook was charged with first-degree sexual assault of a child under thirteen by sexual contact with the child and exposing genitals to a child.

A jury trial was held. The child testified and her audiovisual recorded forensic interview was played for the jury. The investigating police detective testified about his interview of Cook that took place about two weeks after the assault. The detective identified an exhibit which was a picture of a meme depicting an adult male following a little girl with the caption, "When you are finally off probation." The detective indicated he had found the meme posted on Cook's Facebook page when investigating Cook's background. The detective described the image as "a

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

little disturbing." During the interview, the officer had confronted Cook with the printed picture of the meme and Cook admitted he posted the meme to "get a rise out of people." Cook did not testify at trial.

The jury found Cook guilty of both charges. At the start of the sentencing hearing, the exposing genitals to a child conviction was dismissed because the prosecution had failed to present evidence that Cook was over seventeen years of age at the time of the offense. Cook was sentenced to ten years of initial confinement and ten years of extended supervision on the sexual assault conviction.

The admission of two pieces of evidence leads to our rejection of the no-merit report. The no-merit report does not examine the admission of either one.

The audiovisual recording of the child's forensic interview was played for the jury. WISCONSIN STAT. § 908.08 permits the admission of audiovisual recordings of statements by children but requires that certain procedures be followed. Section 980.08(3)(b) requires that upon notice that a party intends to offer a child's audiovisual recorded statement, the trial court shall conduct a hearing on the statement's admissibility and shall view the statement before or at the hearing. The recording shall be admitted upon the court finding that all the criteria in § 980.08(3)(a)-(e) are satisfied.

The record establishes that the trial court was provided a copy of the audiovisual recording but does not establish that the trial court viewed it or that the trial court made the

requisite findings as to its admissibility.[2] In ***State v. Mercado***, 2020 WI App 14, ¶39, 391 Wis. 2d 304, ___ N.W.2d ___, *pet. for rev. granted* (WI May 19, 2020), we recognized that WIS. STAT. § 908.08(2)(b) specifically instructs the trial court to review the audiovisual recording at or prior to a hearing on admissibility. In ***Mercado***, we held that the trial court did not satisfy the statutory requirement to view the recordings prior to admitting them into evidence when it stated at the pretrial hearing that it had viewed "relevant portions" of the recordings with no explanation of what that entailed. ***Mercado***, 391 Wis. 2d, ¶41. ***Mercado*** lends itself to an argument that strict compliance with § 908.08 is required. *See also* ***Mercado***, 391 Wis. 2d, ¶57 (trial court erroneously failed to comply with the unambiguous requirement that the showing of the recording precede direct and cross-examination). Although the recording was admitted without objection, it may be arguably meritorious to assert that compliance with § 908.08(2)(b) and (3) was still required. *See* ***Mercado***, 391 Wis. 2d, ¶32 n.6.

Appointed appellate counsel was directed to file a supplemental no-merit report addressing whether arguable merit exists to a claim that the audiovisual recording was improperly admitted under WIS. STAT. § 908.08, or in the alternative, whether trial counsel was

[2] After jury selection was completed and at the start of the trial, the trial court addressed the audiovisual recording as follows:

> Preliminary matter, the State had originally provided under 908.08 to the Court an audiovisual recording. There is also a transcript electronically filed seeking I assume the admission of the child's statement under 908.08(3)(a)1 since I believe the date of birth is 2010 so she's under 12. Counsel, did you have occasion I assume to read the transcript, look at that statement?

Defense counsel responded that he had the opportunity to review the transcript of the audiovisual recording. The trial court then asked, "Any evidentiary objections to the content?" Defense counsel answered, "No." The trial court then stated, "Okay. Then the Court finds that could be used at trial in that regard."

ineffective for not insisting on a hearing on the admissibility of the recording and the determination of the requisite findings. Appellate counsel's supplemental no-merit report acknowledges that it is not clear whether the trial court had, in fact, reviewed the audiovisual recording. Appellate counsel indicates that she took the trial court's statement that the court was given the recording to mean that the court had reviewed it. The supplemental report goes on to conclude that no issue of arguable merit exists from the admission of the recording even if the trial court had not reviewed it and failed to make requisite findings because there is no doubt that the recorded interview met the requirements of § 908.08. The supplemental report also engages in a lengthy discussion distinguishing ***Mercado*** and explaining that the audiovisual recording at Cook's trial was admissible under the residual hearsay exception under WIS. STAT. § 908.03(24), and the factors identified in ***State v. Huntington***, 216 Wis. 2d 671, 575 N.W.2d 268 (1998).

The supplemental report's discussion reads like a passage from a State's respondent's brief in a merits appeal where the State urges application of harmless error or an alternative means for affirmance. Suffice it to say that such discussion is inconsistent with appellate counsel's role as an advocate for Cook. *See* ***Anders***, 386 U.S. at 744 (constitutional requirements of substantial equality and fair process can only be met when counsel acts as an active advocate on behalf of his client). The supplemental report ignores that there is no apparent exercise of the trial court's discretion in the admission of the audiovisual recording under either WIS. STAT. § 908.08 or WIS. STAT. § 908.03(24), and that the failure to exercise discretion is itself an erroneous exercise of discretion. ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547, 552 (1983). Although a reviewing court is obliged to independently review the record and uphold a discretionary determination if the record provides a basis for the trial court's exercise of discretion, ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983), that should

only occur in a merits appeal with zealous advocacy on whether or not the record can establish grounds for the discretionary ruling. Otherwise, not only has appointed appellate counsel abandoned the duty of advocacy, but also this court's independent review of the record for arguable merit is skewed by arguments focused on the ultimate result. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶18, 20, 281 Wis. 2d 157, 696 N.W.2d 574 (a no-merit appeal affords the defendant "the benefit of a skilled and experienced appellate court also examining the record for issues of arguable merit," to ensure a process that "carries a sufficient degree of confidence" to forever bar the defendant from raising the examined issues).

As stated in our order requiring the supplemental no-merit report, in a no-merit appeal, the question is whether the potential arguments would be frivolous and the standard means that the issue is so lacking a basis in fact or law that it would be unethical for counsel to make the argument. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436-38 (1988). The test is not whether the appellate counsel expects the argument to prevail. With ***Mercado*** in hand, it would not be frivolous for appellate counsel to make an argument that WIS. STAT. § 980.08 was not complied with. That the Wisconsin Supreme Court has granted a petition for review in ***Mercado*** additionally suggests that there might be something to argue about. Because no objection was made to the admission of the audiovisual recording, we afford Cook the opportunity to file a

postconviction motion raising ineffective assistance of trial counsel should he and appellate counsel decide that is the prudent approach to take.[3]

The other evidence admitted that leads to rejection of the no-merit report is the photograph of the meme found on Cook's Facebook page. Trial counsel's only objection to admission of the evidence was that its probative value was far outweighed by unfair prejudice.[4] However, we are left to wonder what relevancy the picture had other than to suggest that Cook had a predilection for inappropriate behavior with little girls. *See* WIS. STAT. § 904.04(1) (evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion). Even allowing for the greater latitude rule in prosecutions of child sexual assault, § 904.04(2)(b) only permits "evidence of any similar acts by the accused." It appears at least arguable that the meme did not depict an act by Cook similar to what occurred in this case.

Even as to the objection trial counsel made—that the probative value was outweighed by unfair prejudice—there is arguable merit to a claim that the trial court's ruling was not a proper exercise of discretion. The trial court ruled: "I'm not sure based on the nature of the case it's

[3] Good appellate advocacy frequently necessitates winnowing out weaker arguments on appeal and focusing on one central issue, or at most on a few key issues. ***Jones v. Barnes***, 463 U.S. 745, 751-52 (1983). Although a defendant does not have a constitutional right to compel appointed counsel to raise every nonfrivolous issue, the defendant is entitled to consultation regarding counsel's exercise of professional judgment not to press certain points. *See* ***id.*** at 751.

[4] The stated objection was made and denied before the start of the evidentiary portion of the jury trial. During the police detective's testimony, trial counsel objected on the ground that a proper foundation had not been established for the picture. That foundation objection was overruled after the detective testified that Cook admitted to posting the meme on his Facebook page.

unfair prejudice. Obviously all evidence is prejudicial. There's different reasonable inferences that can be drawn from it so if he lays the proper foundation, I believe they can proceed."

The trial court's acknowledgement that different inferences could arise from evidence of the Facebook post failed to consider whether they were permissible inferences. The prosecutor's closing argument specifically drew the jury's attention to the post and highlighted the arguably impermissible inference that Cook would act in conformity with a person who likes to chase little girls.[5] At sentencing the trial court itself highlighted the impact of the Facebook post when it explained that it considered it to be one "very damaging piece of evidence." The court observed:

> But it's a Facebook page [with] a picture of an individual with a child behind, et cetera, which seems a very good, strong connotation it was all right to have a relationship sexually with a young child, at least that's one inference that could be drawn let's put it that way. And obviously in conjunction with the child's testimony it seemed to indicate a person who would engage I would have to say in deviant-type behavior, obviously to engage in sexual contact with a seven year old, just about eight I believe.

In addition to the inference that Cook was a person who believed it was acceptable to chase little girls, evidence of the post may have also suggested that Cook had prior convictions, had been placed on probation for a child sexual offense, and was freshly off probation when the assault occurred.

[5] In closing argument, the prosecutor questioned why Cook slept out in the living room when he had his own room at the residence. The prosecutor suggested Cook stayed in the living room because he saw an opportunity and that, "It's not like the thought hadn't crossed his mind before," as demonstrated by the Facebook post a month before.

As noted earlier, appellate counsel's no-merit report does not acknowledge the admission of the Facebook post and therefore, does not demonstrate why potential issues surrounding its admission lacks arguable merit. We need not decide at this juncture whether evidence of the Facebook post was proper. It is sufficient that there is arguable merit to claim that the evidence was irrelevant or improper and that the trial court erroneously exercised its discretion in considering whether unfair prejudice demanded exclusion of the evidence. *See* ***McCoy***, 486 U.S. at 436-38.

We therefore reject the no-merit report filed by appellate counsel, dismiss this appeal, and extend the deadline for filing a postconviction motion or notice of appeal. Cook may, of course, pursue postconviction relief on grounds other than those discussed in this order. A copy of this opinion and order is provided to the Office of the State Public Defender for informational purposes.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected, Attorney Marcella De Peters motion to withdraw as counsel is denied, and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion or notice of appeal is reinstated and extended to thirty days after remittitur.

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

Sheila T. Reiff
Clerk of Court of Appeals