

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2402-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH C. CLARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
JAMES EVENSON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Attorney Steven G. Bauer, appointed counsel for Joseph C. Clark, has filed a no merit report pursuant to RULE 809.32, STATS. Counsel provided Clark with a copy of the report and advised him of his right to file a response. After several extensions of Clark's time to respond, we denied his most recent extension motion and he has not responded. Upon our independent

review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal.

Clark was charged with first-degree homicide, mayhem, and causing great bodily harm to a child, all arising from the same incident. The jury found him guilty on all counts. The court sentenced him to life on the first count with no parole for sixty years; forty years in prison, consecutive, on the mayhem charge; and ten years concurrent on the third charge.

The body of the victim, C.A.S., was found in the Wisconsin River. Approximately one year later, Clark was arrested for breaking the legs of another male minor, T.F.P. Based on statements Clark made to T.F.P. implicating himself in acts against C.A.S., C.A.S.'s body was exhumed and it was determined his legs were also broken. Some evidence of Clark's conduct with T.F.P. was admitted as other acts evidence in his trial on the charges for acts against C.A.S.

The no merit report first addresses the admission of other acts evidence, starting with certain lists taken from Clark's residence. There were three lists of names and telephone numbers with the headings "get to now," "can wait," and "leg thing." The State sought to admit these items as other acts evidence under § 904.04(2), STATS., and the trial court granted the motion. We note that lists are physical objects, not acts. However, apparently this exception was being used because the lists were also evidence of Clark's acts against T.F.P., which were other acts in the context of the charges regarding C.A.S. Additional other acts evidence was presented in the form of a surgeon's comparison of the injuries to T.F.P. and C.A.S., and the testimony of T.F.P. himself.

We conclude there is no arguable merit to this issue. The trial court properly exercised its discretion in determining that the evidence was relevant for

purposes of motive, plan, intent and identity, and in determining that its probative value was not outweighed by unfair prejudice under § 904.03, STATS. The trial court also gave an appropriate cautionary instruction on the permissible use of this evidence.

Clark twice moved for a postponement of the trial based on his trial counsel's need for further preparation. Although there are no orders disposing of the motions, they were apparently denied and the denial of the first one is recorded in the court docket entries. However, no transcript of any hearing on these motions appears in the record. The no merit report considers whether denial was an erroneous exercise of discretion. Although the trial court's reasons are not in the record, we agree the court could reasonably deny these motions based on the amount of time the case had been pending and the extensive arrangements that had been made.

The no merit report next discusses whether there would be merit to arguing that the trial court erred by denying Clark's request to change the jury instruction. Clark had requested that the word "allegedly" be inserted into the jury instruction's description of the information as charging that "the defendant did cause the death." As the trial court pointed out, this was merely a description of the charge and there is no arguable merit to this issue.

Finally, the no merit report addresses whether the court erroneously exercised its sentencing discretion. We will not disturb a sentence imposed by the trial court unless the court erroneously exercised its discretion. *State v. Thompson*, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). A trial court erroneously exercises its discretion:

when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factor in the face of other contravening considerations. The weight given to each sentencing factor, however, is left to the trial court's broad discretion. A trial court exceeds its discretion as to the length of the sentence imposed "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."

When imposing sentence, a trial court must consider: the gravity of the offense, the offender's character, and the public's need for protection. The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; and, the needs and rights of the public.

Id. at 264-65, 493 N.W.2d at 732-33 (citations omitted).

The trial court considered, among other things, Clark's prior conduct with T.F.P., the aggravated nature of this crime, the court's confidence in his guilt, and Clark's need for rehabilitation. There is no arguable merit to this issue.

Our review of the record discloses no other potential issues for appeal. Attorney Steven G. Bauer is relieved of further representing Clark in this matter.

By the Court.—Judgment affirmed.

