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**DISTRICT IV**

September 10, 2020

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

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2018AP1702-CRNM      State of Wisconsin v. Randy J. Frye (L.C. # 2016CF1115)

Before Blanchard, Graham, and Nashold, 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).**

Attorney Steven Zaleski, appointed counsel for Randy Frye, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)<sup>1</sup> and *Anders*

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

*v. California*, 386 U.S. 738, 744 (1967). The no-merit report identifies the following potential issues: (1) errors during jury voir dire, or opening statements or closing arguments; (2) errors in the admission or exclusion of evidence, or in the jury instructions; (3) sufficiency of the evidence to support the jury verdict; (4) ineffective assistance of counsel; and (5) sentencing errors. Frye has filed a response, arguing that his trial counsel was ineffective. Counsel has filed a supplemental no-merit report, and Frye has filed a supplemental response. Upon independently reviewing the entire record, as well as the no-merit reports and responses, we agree with counsel's assessment that there are no issues of arguable merit. We affirm.

Frye was convicted, after a jury trial, of attempted first-degree intentional homicide by use of a dangerous weapon. The court sentenced Frye to 13 years of initial confinement and 10 years of extended supervision.

The no-merit report addresses whether there would be arguable merit to any claims of error based on jury voir dire, opening statements or closing arguments, admission or exclusion of evidence, or the jury instructions. We agree with counsel that none of those issues would support non-frivolous further proceedings.

The no-merit report also addresses whether the evidence was sufficient to support the conviction. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We conclude that the evidence at trial, including testimony by the victim and the

investigating officers, was sufficient to support the jury verdict. We agree that there would be no arguable merit to a claim of insufficiency of the evidence.

The no-merit report further addresses whether there would be arguable merit to a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel “must show that counsel’s performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and also that “the deficient performance prejudiced the defense,” that is, that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”). The no-merit report concludes that any claim of ineffective assistance of counsel would be wholly frivolous.

Frye has filed a no-merit response, arguing that his trial counsel was ineffective. Frye’s first claim of ineffective assistance of counsel is that his counsel failed to argue that Frye was not prevented from killing the victim by an intervening factor, but rather that Frye stopped short of killing the victim of his own accord. He asserts that he instructed his trial counsel to question the victim’s sister—who was present during the attack and testified that she intervened to protect the victim—regarding her ability to prevent the attack and whether it was possible that Frye voluntarily dropped the hammer he was using as a weapon. Frye argues that his counsel was ineffective by failing to ask such questions of the victim’s sister or to argue during closing argument that no intervening factor stopped Frye from killing the victim, but that Frye made the voluntary decision to stop the attack short of killing the victim.

No-merit counsel has filed a supplemental no-merit report concluding that this claim of ineffective assistance of counsel lacks arguable merit. The report points out that Frye’s trial

counsel did assert a defense based on a lack of intent. The report states that, in closing arguments, trial counsel emphasized facts to support the defense that Frye could have killed the victim if that had been his intent. Frye has filed a supplemental no-merit response, reiterating that his trial counsel failed to argue that no intervening factor prevented him from killing the victim, but that he instead stopped the attack of his own accord.

We conclude that a claim of ineffective assistance of counsel on this basis would lack arguable merit. Contrary to Frye's argument, Frye's trial counsel did argue that Frye lacked the intent to kill the victim at the time of the attack and that he was not stopped from killing her based on any intervening factor. In support of that defense, counsel argued that the evidence established that, based on the difference in their sizes, the weapon Frye used, and their positioning during the attack, Frye would have killed the victim had that been his intent. Counsel argued that the reason that Frye did not kill the victim was that he stopped short of killing her of his own accord, as demonstrated by the non-life threatening injuries that the victim sustained. He argued that neither the victim nor her sister could have been an intervening factor that prevented Frye from killing the victim, based on their smaller physical size compared to his, the victim's lack of defensive wounds on her arms and hands, and the victim's statement that she could not stop Frye from attacking her. Thus, as no-merit counsel asserts, Frye's trial counsel did present at trial the very argument that Frye now contends that his trial counsel should have asserted; that is, that Frye lacked the intent to kill the victim and that there was no intervening factor that prevented Frye from killing her. Nothing before this court would support a non-frivolous claim that counsel was ineffective by failing to argue that defense.

Frye's next claim of ineffective assistance of counsel is that his counsel failed to present Frye's side of the story to support the defense. Frye states that he expressed to his counsel his

concern that the victim's sister and the prosecutor referred to Frye as a "monster" and the impact that would have on the jury. He asserts that his side of the story, as follows, would have supported his defense. Before the attack, Frye had been clinically depressed and had recently been hospitalized for a suicide attempt. The victim had exploited Frye's mental health vulnerability in their custody dispute over their daughter. The victim had failed to prioritize their daughter's health in the past. Frye had witnessed the victim in a car with another man on the day before the attack, and discovery revealed text messages from the victim to a friend stating that the victim had performed sex acts with that man in the car on that day. Frye argues that his trial counsel should have had print-outs of the text messages to support counsel's request to introduce the text messages into evidence, and that counsel then would have been able to get more of Frye's side of the story in front of the jury.

The supplemental no-merit report concludes that this issue lacks arguable merit. The report asserts that the prosecutor properly commented on the evidence during closing argument by referencing the victim's sister's testimony that Frye looked like a "monster" during the attack. The report also asserts that Frye has not set forth a viable claim of ineffective assistance of counsel for failing to introduce additional evidence regarding Frye's divorce and custody disputes with the victim. Frye has filed a supplemental no-merit response arguing that his trial counsel should have introduced evidence of Frye's prior suicide attempt and treatment at a mental health facility, and reiterating that the victim exploited his mental health vulnerabilities in their custody battle. Frye also repeats his allegation of sexual conduct by the victim. He asserts that all of that evidence should have been presented to the jury to establish that his main goal was suicide, not to kill the victim.

We conclude that a claim of ineffective assistance of counsel on this basis would be wholly frivolous. The victim's sister testified that Frye looked like a "monster" during the attack, and the prosecutor commented on that testimony during closing argument. Frye's counsel argued in closing that Frye was not the "evil monster" that the victim and her sister believed him to be, and that the State portrayed him to be. Counsel attempted to introduce text messages describing the victim's alleged sexual conduct on the day before the attack, but the circuit court sustained the State's relevancy objection. We do not agree with Frye's contention that additional evidence as to Frye's suicidal intent would have supported the defense that Frye did not intend to kill the victim. The problem with this argument is that suicidal and homicidal intent are not mutually exclusive; indeed, here, the State's theory was that Frye intended to kill both the victim and himself. We discern no deficient performance or prejudice to Frye based on his counsel's failure to introduce additional evidence to establish Frye's suicidal intent, or any of the other assertions Frye makes in connection with this argument.

Next, Frye contends that his trial counsel was ineffective by exhibiting a negative bias against Frye based on Frye's prior suicide attempt, and that counsel refused to introduce evidence of Frye's mental health issues as part of the defense. He argues that his trial counsel was ineffective by arguing in closing that Frye had lacked the intent to kill himself after attacking the victim. Frye contends that his trial counsel should have elicited from the responding officer that Frye's request that officers "just let him die" was not in the context of wanting to avoid a prison sentence. Frye also asserts that he tried to refuse medical care, and that police did not honor that request on grounds that Frye was under arrest. Frye asserts that his

counsel should have used that information to elicit the fact that Frye was not given *Miranda*<sup>2</sup> warnings.

The supplemental no-merit report concludes that this issue lacks arguable merit. The report asserts that trial counsel's comments about Frye's suicide attempt were made in the context of the defense argument that Frye lacked the intent to kill either himself or the victim. Frye argues in a supplemental response that his trial counsel's statements in closing were inappropriate, and he reiterates that his counsel should have introduced evidence of Frye's mental health history.

We conclude that this issue also lacks arguable merit. Frye's trial counsel's closing argument was that Frye lost both the intent to kill the victim and to kill himself during the attack, as evidenced by his failure to accomplish either. As explained above, we discern no arguable merit to a claim of ineffective assistance of counsel based on counsel's failure to introduce additional evidence of Frye's mental health history. We also discern no basis to argue that trial counsel was ineffective by failing to pursue additional cross-examination of the responding officer. On direct examination, the officer testified that, while officers were treating Frye for his injuries, Frye stated that he did not want to go to jail for life and to just let him die. It is unclear how additional cross-examination on this point would have been helpful to the defense. Additionally, nothing before us would support a claim of custodial interrogation in violation of *Miranda*.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Frye's final claim of ineffective assistance of counsel is that his trial counsel pressured him not to testify in his own defense. He contends that his trial counsel told him that, in counsel's experience, people who testify on their own behalf usually lose. He states that he told his counsel that he wished to testify, and that his counsel repeatedly stated that it was a bad idea, and that juries usually do not believe defendants. Frye states that, if his counsel had not tried to dissuade him, he would have testified.

The supplemental no-merit report concludes that this issue lacks arguable merit. The report concludes that counsel's persuading Frye not to testify does not amount to ineffective assistance of counsel. It points to the circuit court's colloquy with Frye as to his decision not to testify. Frye argues in his supplemental response that he thought that he was making an informed decision not to testify, but that he now does not believe he made an informed decision, but rather was unfairly pressured by his counsel.

We conclude that this issue lacks arguable merit. Frye's argument that his counsel strongly advised him not to testify, stressing the negatives to Frye testifying, does not show that counsel performed deficiently. As no-merit counsel points out, the record demonstrates Frye's knowing waiver of his right to testify. Nothing before us would support a non-frivolous claim of ineffective assistance of counsel on this basis.

Finally, the no-merit report addresses whether there would be arguable merit to further proceedings based on sentencing. This court's review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the circuit court



explained that it considered facts pertinent to the standard sentencing factors and objectives, including Frye's character, the seriousness of the offense, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence imposed was within the maximum allowed by law and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive “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” (quoted source omitted)). We also agree with counsel's assessment that there would be no arguable merit to a challenge to the sentence based on the court viewing a videotape, over defense counsel's objection, of Frye interacting with his daughter several months before the attack. The videotape was described in the presentence investigation report as demonstrating the daughter crying and Frye “pacing and biting his hand and screaming and swearing at” her. In his allocution, Frye did not dispute the accuracy of the videotape, but stated that it did not depict how he usually interacted with his daughter. We discern no arguable merit to further proceedings on any sentencing issue.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Zaleski is relieved of any further representation of Randy Frye in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*