COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 20, 1997

NOTICE

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.

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No. 96-1700-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEPHEN L. GRANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Stephen L. Grant appeals from a judgment of conviction for multiple counts of sexual assault and armed robbery. The state public defender appointed Attorney Mark Lukoff as Grant's appellate counsel. Attorney Lukoff served and filed a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Grant filed a

response. After an independent review of the record as mandated by ***Anders***, we conclude that any further proceedings would lack arguable merit.

A jury found Grant guilty of eight counts of first-degree sexual assault, contrary to § 940.225(1)(b), STATS., 1989-90, two counts of second-degree sexual assault, contrary to § 940.225(2)(a), STATS., 1989-90, and seven counts of armed robbery, contrary to § 943.32(2), STATS., 1989-90, as a habitual criminal, contrary to § 939.62, STATS., 1989-90. The trial court imposed a total prison sentence of 320 years.[1]

The no merit report addresses potential double jeopardy claims and the sufficiency of the evidence. It also addresses whether the trial court erroneously exercised its discretion in: (1) denying Grant's suppression motion; (2) admitting deoxyribonucleic acid and polymerase chain reaction evidence; (3) allowing Detective Nowakowski to testify about the demeanor of the sexual assault victims;[2] and (4) sentencing. We agree with appellate counsel's extensive description, analysis and conclusion that pursuing these appellate issues would lack arguable merit.

Grant filed a response and raised nineteen issues which we consolidate into four: (1) whether the trial court erroneously exercised its discretion in failing to conduct a more extensive *voir dire* of panelist Lori Sheahan; (2) whether Grant's constitutional rights against double jeopardy were

[1] The trial court imposed twenty-year consecutive sentences on every count except the two counts of second-degree sexual assault, on which it imposed ten-year consecutive sentences.

[2] Appellate counsel explains that this testimony was admissible on the post-assault behavior of sexual assault victims under ***State v. Jensen***, 147 Wis.2d 240, 245-46, 432 N.W.2d 913, 915-16 (1988), not an impermissible comment on the veracity of the victims, precluded by ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984).

violated; (3) whether the trial court erroneously exercised its discretion in denying Grant's motion to allow trial counsel to withdraw and for the appointment of successor counsel; and (4) whether Grant received ineffective assistance of trial counsel. We address these four consolidated issues to supplement appellate counsel's analysis that further proceedings would lack arguable merit.

Grant contends that the trial court erred when it failed to conduct a more extensive *voir dire* of panelist Lori Sheahan because she was "obviously irritated and visually upset" when she was selected as a juror and "she seldom took notes and was visually paying attention to the interior of the courtroom, rather than the testimony of the witnesses." Although the trial court knew that Sheahan was a day care teacher at the University and would not be paid while serving on the jury, neither party questioned her further or moved to strike her from the panel. Grant's trial counsel alerted the trial court that Sheahan was upset when she was selected, although he acknowledged that "[he didn't] know what her attitude would be tomorrow [when trial began]." The trial court assured counsel that it would "keep [its] eyes on Ms. Sheahan, and if any matters related to her service arise, we will deal with it at that time." However, nothing further was noted about Sheahan. Because there is no record on which to challenge Sheahan, there is no basis or arguable merit to pursue this issue.

Grant also contends that his constitutional rights against double jeopardy were violated because he was charged with two acts of intercourse when the acts were with the same victim on the same date. Grant is in error because whenever a different bodily orifice is invaded, a separate charge can result. *See* ***State v. Eisch***, 96 Wis.2d 25, 26, 291 N.W.2d 800, 801 (1980); ***State v. Kruzycki***,

192 Wis.2d 509, 522-24, 531 N.W.2d 429, 434 (Ct. App. 1995).[3] Grant alleges his "belie[f] that it does not matter whether a bodily orifice was invaded or if the sexual assault was by multiple touching. What matters and is of most importance is that the duplicity of the elements required to prove guilt for counts 9 and 10 are the same ...." Grant cites no legal authority to support his belief, which is contrary to Wisconsin law. Appellate counsel explains that there was evidence supporting these two discrete assaults.

Grant also challenges counts thirteen and fourteen as duplicitous. Appellate counsel explains that the State charged two counts of first-degree sexual assault, but produced proof of more than two acts. Appellate counsel explains that "[t]he jury need not agree on which act of sexual intercourse occurred; only that an act of sexual intercourse occurred." ***State v. McMahon***, 186 Wis.2d 68, 82, 519 N.W.2d 621, 627 (Ct. App. 1994); *see also* ***State v. Lomagro***, 113 Wis.2d 582, 594, 335 N.W.2d 583, 590 (1983). Because these alleged acts were interrupted, two charges were proper. *See* ***Lomagro,*** 113 Wis.2d at 587, 335 N.W.2d at 587. We conclude that pursuing these issues would lack arguable merit.

Grant also claims that the trial court erroneously exercised its discretion in denying his motion to replace trial counsel. The trial court questioned Grant about his criticisms and considered trial counsel's responses. The trial court denied Grant's motion.[4] The trial court's responses to Grant's

[3] This is distinguishable from multiple touching. *See* ***State v. Hirsch***, 140 Wis.2d 468, 474-75, 410 N.W.2d 638, 641 (Ct. App. 1987).

[4] The trial court concluded that:

> there is an appropriate amount of time and resources available to address all of the issues that Mr. Grant has raised. And if there are factors that arise, for example, that deal with the reports being provided and some other bases for the motion to be raised

(continued)

specific criticisms *seriatim*, persuade us that pursuing an appellate challenge to the trial court's denial of Grant's motion would lack arguable merit.

Grant raises sixteen claims of ineffective assistance of trial counsel.[5] We have reviewed Grant's claims of ineffective assistance, many of which relate to substantive issues addressed by appellate counsel. We independently conclude that pursuing an ineffective assistance claim would lack arguable merit.

Upon our independent review of the record, as mandated by ***Anders*** and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further proceedings would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Mark Lukoff of any further appellate representation of Stephen L. Grant.

By the Court.—Judgment affirmed.

> because of the lack of exchange or Cellmark can't respond to what's being provided to it by the State as it relates to the incoming DNA crime lab reports, the Court will allow Mr. Grant and Mr. Anderson [Grant's trial counsel] to be heard further. But as of this date and as of this time, the reasons that have been proffered in the record are the types of things that can still be addressed by Mr. Grant with his counsel and, therefore, the Court denies the motion to withdraw.

[5] Grant filed a *pro se* motion to remand for a ***Machner*** hearing on his ineffective assistance claims. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). We denied that motion. However, we advised Grant that we would independently assess his ineffective assistance claims and if there were any issues of arguable merit, we would reject the no merit report.