

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 29, 1997

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.

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

No. 96-3309-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES WARREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Counsel for James Warren has filed a no merit report pursuant to RULE 809.32, STATS. Warren has responded to the report. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. We therefore affirm the trial court's judgment.

The victim in this case, D.R., was a co-worker of Warren at the Miles Kimball Company in Oshkosh. Just before her shift started, D.R. was abducted from the factory parking lot, driven to another location and sexually assaulted at knife point. Shortly afterward, Warren reported for work. However, he left the building without speaking to anyone immediately after employees were notified of the assault. When arrested later that day on a detention request from Illinois probation and parole, he was wearing a jacket similar to the one D.R. described her assailant as wearing.

Police obtained a warrant to seize and examine Warren's coat based on an officer's affidavit stating that Warren resembled D.R.'s description of her assailant, he fled his work premises after the assault was announced, and he owned a coat matching D.R.'s description of her assailant's coat.

After the coat was seized, D.R. could not positively identify it as her assailant's coat. The next day the police obtained a warrant to seize hair, blood and saliva samples from Warren, using the identical affidavit used to obtain a warrant for the coat.

The State charged Warren with two counts of first-degree sexual assault while armed and masked, kidnapping while masked, false imprisonment with a dangerous weapon, and auto theft with a dangerous weapon. At trial, the State's evidence included the victim's testimony, DNA test results and other crimes evidence. The jury found Warren guilty on all counts. The court imposed sentences totaling eighty-nine years.

Counsel's no merit report identifies as potential issues: (1) whether the search warrants were based on probable cause; (2) whether the charges were multiplicitous; (3) whether the trial court properly denied a motion for mistrial on

the grounds that the jury array violated the “fair cross-section” requirement of the Sixth Amendment; (4) whether the trial court properly allowed the chief investigating officer to remain in the courtroom during the trial; (5) whether the court properly denied Warren’s motion to exclude the DNA evidence; (6) whether the court properly allowed the other crimes evidence; (7) whether the court properly allowed the State to impeach Warren with evidence of his prior convictions; (8) whether there was improper pressure placed on the jury to arrive at a verdict; and (9) whether the trial court properly exercised its sentencing discretion. We conclude that appellate counsel’s analysis of these issues is correct in all respects, as is her conclusion that none have merit.

In his response to the no merit report, Warren charges that the second search warrant affidavit contained false information because police knew by the time they applied for it that D.R. had failed to identify Warren’s coat as that of her assailant. That argument fails for two reasons. First, the fact that D.R. failed to definitely identify the coat does not render untruthful the statement that it matched the description of her attacker’s coat. Second, there was ample basis to issue the second search warrant in any event, based on the evidence of Warren’s flight and his reported resemblance to the assailant.

Warren also contends that the State presented insufficient evidence to convict him. The DNA tests introduced at trial showed a less than 1 in 5.5 billion chance that someone else was the source of bodily fluids found on the victim and in her car. Warren fled when the assault became known. He matched the assailant’s description. Several years earlier he had committed a virtually identical kidnapping and assault. Contrary to Warren’s assertion, he was not exonerated by the timeline, which left him ample opportunity to commit the crime and still report for work less than an hour later. Based on the evidence presented,

a reasonable trier of fact could have found Warren guilty beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990).

Finally, Warren contends that the trial court erroneously exercised its discretion by allowing the State to introduce other crimes evidence. That evidence consisted of testimony from a victim of a sexual assault Warren committed in 1981. The assault took place under remarkably similar circumstances to that involving D.R. The trial court therefore reasonably allowed the testimony to prove the identity of the assailant, despite the prior act's remoteness in time.

Our independent review of the record discloses no other potential issues for appeal. We therefore affirm the judgment of conviction and relieve Warren's counsel of any further representation of him in this matter.

By the Court.—Judgment affirmed.

