

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 14, 1996

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.

NOTICE

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

No. 96-2084-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT R. SHAFFER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

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

PER CURIAM. Counsel for Robert R. Shaffer has filed a no merit report pursuant to RULE 809.32, STATS. Shaffer was informed of his right to respond to the no merit report and has elected not to respond. 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.

Shaffer was charged with second-degree sexual assault and bail jumping as a habitual offender. The victim testified that she awakened to find Shaffer inserting his finger into her vagina. The State presented other acts evidence relating to Shaffer's two previous sexual assault convictions. It also presented evidence that this offense was committed while Shaffer was released on bail, thereby violating the conditions of his bail. The defense called no witnesses. The jury found Shaffer guilty of both counts and the court imposed consecutive sentences totaling twenty years.

The no merit report addresses only one issue: whether the State proved that Shaffer was a repeat offender subject to an enhanced penalty under § 939.62, STATS. We agree with counsel's analysis of this issue. The presentence report, which contained the date of a previous conviction within the preceding five years, presented adequate proof of Shaffer's repeater status. See *State v. Farr*, 119 Wis.2d 651, 658, 350 N.W.2d 640, 644-45 (1984).

We have also independently reviewed the record to determine whether sufficient evidence supports the convictions, whether Shaffer received effective assistance of counsel and whether the sentences constitute an appropriate exercise of the trial court's discretion. We conclude that none of these issues provides a basis for an appeal.

The State presented sufficient evidence to support the convictions. The test is whether the evidence adduced, believed and rationally considered by the jury was sufficient to prove Shaffer's guilt beyond a reasonable doubt. See *State v. Koller*, 87 Wis.2d 253, 266, 274 N.W.2d 651, 658 (1979). We must uphold the verdict unless the evidence, when considered 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 be convinced beyond a reasonable doubt. *Id.* The victim's testimony is sufficient to establish all of the elements of second-degree sexual assault. The defense stipulated that this offense was committed while Shaffer was released on bond.

The record discloses no basis for challenging the effective assistance of Shaffer's trial counsel. To establish ineffective assistance of counsel, Shaffer would have to show that his counsel's performance fell below an objective standard of reasonableness and that his counsel's deficient

performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Counsel's decision to present no defense does not establish deficient performance. Nothing in the record suggests that Shaffer had a defense to present. Shaffer's prior record and confrontational attitude would have made him a poor witness. Shaffer concurred in the strategic decision not to testify. Shaffer's counsel succeeded in limiting the evidence relating to other sexual assaults Shaffer committed. He counseled Shaffer against wearing his jail uniform at trial, advice that Shaffer rejected. Counsel also argued several mitigating factors for the court to consider at sentencing. The record before this court does not establish deficient performance by Shaffer's trial counsel.

Finally, the trial court properly exercised its sentencing discretion. In addition to the seriousness of the offenses, the court appropriately considered Shaffer's prior convictions, his character and social traits, the need for close rehabilitative control and the rights of the public. *State v. Tew*, 54 Wis.2d 361, 367-68, 195 N.W.2d 615, 619 (1972).

Our independent review of the record discloses no other possible basis for appeal. Therefore, we relieve Attorney Thomas E. Knothe from further representing Shaffer in this matter and affirm the judgment of conviction.

By the Court. – Judgment affirmed.