COURT OF APPEALS
DECISION
DATED AND RELEASED

August 28, 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.

NOTICE

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

Nos. 96-2896-CR-NM
96-2897-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL C. GILBERT, JR.,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Dodge County: LEWIS W. CHARLES, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Carl C. Gilbert, Jr., entered ***Alford*** pleas[1] to two counts of battery by a prisoner, contrary to § 940.20(1), STATS. A repeater allegation was dismissed as part of a plea agreement. A jury trial was then held to resolve Gilbert's plea of not guilty by reason of mental disease or defect. *See* § 971.165, STATS. The jury found that Gilbert was not suffering from a mental disease at the time of the offenses. The court sentenced Gilbert to four years on each count, to run consecutively.

Gilbert's appellate counsel, Attorney Stanley B. Kaufman, has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Gilbert has filed a response. As required by ***Anders***, this court has independently reviewed the record to determine whether there are any arguably meritorious appellate issues. We conclude that there are no meritorious issues, and therefore, we affirm the judgments of conviction.

The criminal complaints allege the following batteries. On April 30, 1993, while a team of correctional officers was attempting to remove Gilbert from his cell, Gilbert stabbed one of the guards, Michael Asmus, with a pen. On June 7, 1994, Gilbert reached through the trap door of his cell and grabbed the hair of a social worker, Mischel Pomasl, pulling Ms. Pomasl's head into the trap and ripping her shirt. Gilbert entered pleas of not guilty and not guilty by reason of mental disease or defect to both charges.

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a guilty plea in which the defendant pleads guilty while either maintaining his innocence or not admitting having committed the crime. ***Alford*** pleas are permitted in Wisconsin. *See* ***State v. Garcia***, 192 Wis.2d 845, 532 N.W.2d 111 (1995).

The records reveal significant pretrial delay, including a period when Gilbert was adjudged not competent to proceed under § 971.14, STATS. Eventually, Gilbert was adjudged competent, and the parties reached a plea agreement. Under the terms of the agreement, Gilbert would enter ***Alford*** pleas to both charges in exchange for the State's dismissal of the repeater allegations under § 939.62, STATS. The parties also agreed that Gilbert's NGI plea would be tried to a jury, and if the jury rejected the plea, the State would recommend four years on each count, to run consecutive to each other and consecutive to any other sentence.

This court has reviewed the plea colloquy between Gilbert and the circuit court. The transcript shows that Gilbert's pleas were entered knowingly, voluntarily and intelligently. The colloquy satisfies the requirements set forth in ***State v. Bangert***, 131 Wis.2d 246, 266-72, 389 N.W.2d 12, 22-25 (1986), and § 971.08, STATS.

The court explained the characteristics of an ***Alford*** plea, and Gilbert indicated that he understood the plea. Gilbert further indicated that he understood that the court would find him guilty of both charges and that a jury trial would be held on Gilbert's NGI plea. Gilbert agreed with his attorney's description of the State's case as "strong" and that the credibility of Gilbert and other inmates "would be questionable in the eyes of a jury." Gilbert's attorney explained that her client wanted to enter an ***Alford*** plea because "the main issue in this case is the NGI plea."

A guilty/no contest plea questionnaire was completed by Gilbert, and the court reviewed the questionnaire with Gilbert. The form set forth the elements of the offenses and Gilbert's attorney informed the court that she had reviewed the elements with Gilbert. Gilbert indicated that he understood the

elements of the offenses. The questionnaire also enumerated the constitutional rights that would be waived by a plea, and Gilbert indicated that he understood those rights and that he was waiving them with respect to the issue of guilt.[2]

The court also reviewed the prior inquiries into Gilbert's competence to stand trial and noted that the examining physicians had concluded that Gilbert had regained his competence. Gilbert's attorney stated that she felt that Gilbert had regained his competence and that he was able to assist her in his defense.

The assistant district attorney summarized the evidence that would be offered at trial on each charge, and the court found that there was the required "strong proof of guilt" needed to support an ***Alford*** plea. *See* ***State v. Garcia***, 192 Wis.2d 845, 857-58, 532 N.W.2d 111, 115-16 (1995).

Upon a review of the plea colloquy, this court concludes that a postconviction challenge to the validity of Gilbert's ***Alford*** plea would lack arguable merit.

This court has also reviewed the transcript of the jury trial on Gilbert's NGI plea.[3] Three experts testified about their examination of Gilbert and

[2] The records contain several pretrial demands for a speedy trial, and the court denied Gilbert's motion to dismiss for violation of the speedy trial right. A guilty plea, properly made, constitutes a waiver of a claimed violation of the constitutional right to a speedy trial. ***Foster v. State***, 70 Wis.2d 12, 19-20, 233 N.W.2d 411, 415 (1975).

[3] The court denied Gilbert's request not to be shackled during trial. The court cited the nature of the conduct that led to Gilbert's incarceration, the nature of the present charges, and Gilbert's claim that he suffered from a mental disease or defect. The court further noted that Gilbert could minimize the visibility of the shackles by not standing up.

A trial court may order that a defendant remain shackled during trial if the court determines that restraints are necessary to protect the safety of those persons in the courtroom. ***State v. Grinder***, 190 Wis.2d 541, 552, 527 N.W.2d 326, 330 (1995); *see also* ***State v. Staples***, 99 Wis.2d 364, 374-75, 299 N.W.2d 270, 275 (Ct. App. 1980). The record shows that the court properly exercised its discretion.

offered opinions on whether he was suffering from a mental disease or defect at the time of the batteries. Dr. Suzanne J. Lisowski diagnosed Gilbert as a "bipolar disorder, specifically manic type" and opined that he was not able to conform his actions to the law during a manic episode. Two other experts, Dr. Frederick Fosdal and Dr. Gary Maier, testified that Gilbert did not suffer from a mental disease or defect.

The jury is the sole arbiter of witness credibility. ***State v. Serebin***, 119 Wis.2d 837, 842, 350 N.W.2d 65, 68 (1984). The jury, and not this court, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from basic facts to ultimate facts. ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). Upon a challenge to the sufficiency of evidence to support a jury finding of guilt, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 757-58. In light of the testimony of Drs. Fosdal and Maier, a challenge to the sufficiency of evidence would lack arguable merit.

In his response, Gilbert contends that his trial counsel was ineffective when she failed to object when Ms. Pomasl revealed that Gilbert had been convicted of a sex offense.[4] Ms. Pomasl's testimony was not responsive to the question, and

[4] In response to a question from Gilbert's counsel asking her to describe what happened while she was assisting Gilbert with making the phone calls, Ms. Pomasl stated:

> After he completed his phone calls, he attempted to speak to me through the upper trap door which has bars on it that go inward to the cell. He was speaking softly which is pretty common for people that have been convicted of sex offenses. They prefer to

(continued)

counsel's decision not to move to strike was a reasonable tactical decision so as to not draw the jury's attention to the statement. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983) (a reviewing court should refrain from second-guessing trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel).

We also note that during the jury instruction conference, Gilbert's counsel acknowledged that the statement was made "before I could try, you know, to make sure it didn't come in." Counsel then minimized the jury's exposure to Gilbert's underlying convictions when she successfully requested that a portion of Dr. Lisowski's report describing the nature of Gilbert's conviction be stricken from the report. In light of the strong presumption that counsel has rendered effective assistance and made all significant decisions exercising reasonable professional judgment, ***Strickland v. Washington***, 466 U.S. 668, 689 (1984), we conclude that a challenge to the effectiveness of counsel would lack arguable merit.

Based on an independent review of the record, this court finds no basis for reversing the judgments of conviction. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, the judgments of conviction are affirmed, and appellate counsel is relieved of any further representation of the defendant on this appeal.

By the Court.—Judgments affirmed.

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keep their business confidential. So he was speaking softly, and I could not hear him.