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DISTRICT III

April 9, 2024

To:

Hon. Jon M. Theisen
Circuit Court Judge
Electronic Notice

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
Electronic Notice

Kirk D. Henley
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Robert A. Melsness
526 Dallas Street
Chetek, WI 54728

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

2022AP1015-CRNM State of Wisconsin v. Robert A. Melsness
(L. C. No. 2020CF1206)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Robert Melsness has filed a no-merit report concluding that no grounds exist to challenge Melsness's conviction for false imprisonment, as a repeater and as an act of domestic abuse. Melsness filed a response asserting his innocence and suggesting that two trial witnesses should be charged with perjury. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue

that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

The State charged Melsness with false imprisonment and disorderly conduct, both counts as a repeater and as acts of domestic abuse. At trial, Nancy[2] testified that at the time of the alleged crimes, she lived with a female housemate, Tanya, and three male housemates, including Melsness, who was her boyfriend at the time. According to Nancy, she had a "girls' night" out with Tanya, and, "at some point," she texted Melsness that he may not be able to contact her because her cell phone was "dying." Nancy testified that Melsness found her at a bar and forced her outside because he was upset that she had been drinking. Nancy and Melsness argued outside the bar and continued to argue when they arrived home.

Nancy testified that at one point she was seated on the couch, and when she tried to stand up and leave, Melsness put her in a "bear hug" and "pinned [her] down to the couch." According to Nancy, Tanya came out of her room when Nancy started yelling "let me go, get off of me." Tanya testified that she left her bedroom when she heard yelling. According to Tanya, it looked like Melsness was physically restraining Nancy on the couch, that Nancy wanted to leave, and that she could not get up. Tanya then called the police. A responding law enforcement officer testified that Melsness admitted to grabbing Nancy "at some point" and describing his action as a "bear hug."

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name. Because the judgment of conviction identifies Nancy's female housemate only by her initials, we will likewise use a pseudonym to refer to her.

After a colloquy in which Melsness confirmed he was voluntarily choosing to testify Melsness testified that when he described a bear hug to the police officer, he meant a hug that he gave to Nancy outside the bar. Melsness testified that he did not recall hugging Nancy in the house before Tanya called the police, and he denied using any force on Nancy "whatsoever."

Melsness was convicted upon a jury's verdict of the false imprisonment charge, but he was acquitted of the disorderly conduct charge. Out of a maximum possible ten-year sentence, the circuit court imposed and stayed a five-year sentence, consisting of twenty-four months of initial confinement followed by thirty-six months of extended supervision, and it placed Melsness on probation for thirty-six months, with twelve months in jail as a condition of probation.

In his response to the no-merit report, Melsness asserts that both Nancy and Tanya should have been charged with perjury. To the extent Melsness challenges the credibility of these witnesses, it was the jury's responsibility to decide what testimony was worthy of belief and to resolve any conflicts in the testimony. *See* ***State v. Below***, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95. This court cannot usurp the jury's role by reweighing the evidence on appeal. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (stating that the trier of fact, not an appellate court, is responsible for resolving conflicts in the testimony and weighing the evidence). Moreover, even if a witness testifies falsely, the State has "almost limitless" discretion in deciding whether to charge that witness with perjury. *See* ***State v. Kenyon***, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978). Ultimately, the State's discretionary decision whether to charge these trial witnesses with perjury has no relevance as to whether the evidence at Melsness's trial was sufficient to support the jury's verdict.

The no-merit report addresses whether Melsness's trial counsel was ineffective by failing to move to dismiss the charges for insufficient evidence at the close of the State's case. To establish ineffective assistance of counsel, Melsness must show that his counsel's performance was not "within the range of competence demanded of attorneys in criminal cases" and that the deficient performance affected the outcome of the trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (citation omitted).

Melsness was not prejudiced by his counsel's failure to move for dismissal at the close of the State's case. Had the motion been made, it would have been denied, as there was no basis for the circuit court to remove this case from the jury's consideration. A motion challenging the sufficiency of the evidence may not be granted unless the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party. *See* WIS. STAT. § 805.14(1). We agree with counsel's conclusion that the evidence submitted at trial is sufficient to support Melsness's conviction. The no-merit report sets forth an adequate discussion of this potential issue to support the no-merit conclusion, and we need not address it further.

Although the no-merit report does not review whether the circuit court properly exercised its sentencing discretion, this court has independently reviewed the record, and we conclude there is no arguable basis for challenging Melsness's sentence. Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offense; Melsness's character; the need to protect the public; and Melsness's allocution. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Noting that the factual basis for the conviction involved "violence, domestic abuse, and physically assaultive behavior," the court acknowledged that such behavior was very dangerous to the victim, to the community, to law enforcement, and to Melsness. There

is a presumption that Melsness's imposed and stayed sentence, which is well within the maximum allowed by law, is not unduly harsh or unconscionable, nor "so excessive and unusual" as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; *see also* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Further, there is no arguable merit to any claim that the conditions of extended supervision were not "reasonable and appropriate" under the circumstances of this case. *See* ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499 (2002).

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kirk D. Henley is relieved of his obligation to further represent Robert Melsness in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals