OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

August 20, 2013

To:

Hon. Steven G. Bauer
Circuit Court Judge
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Steven D. Grunder
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

James T. Sempf
Asst. District Attorney
210 W. Center Street
Juneau, WI 53039

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Dewhite Johnson 463305
Wisconsin Secure Program Facility
P.O. Box 9900
Boscobel, WI 53805-9900

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

2012AP576-CRNM State of Wisconsin v. Dewhite Johnson (L.C. # 2010CF325)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Attorney Steven Grunder, appointed counsel for Dewhite Johnson, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) whether the evidence was sufficient to support the conviction; (2) whether there would be arguable merit to a motion for a new trial; and (3) whether there would be arguable merit to a challenge to the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

sentence imposed by the circuit court. Johnson has responded to the no-merit report, arguing that the evidence was insufficient, trial counsel was ineffective, and that he should be granted a new trial in the interest of justice. Upon independently reviewing the entire record, as well as the no-merit report and responses, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Johnson was convicted of battery by prisoner following a jury trial. The court sentenced Johnson to two years of initial confinement and two years of extended supervision.

The no-merit report and responses address whether the evidence was sufficient to support the conviction. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed 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 have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here.

At trial, Officer James Teachout testified that Johnson kicked Teachout in the shin while Teachout and several other officers were physically removing Johnson from the prison dining area after Johnson refused officer commands to leave. Teachout testified that Johnson kicked backwards as the officers were removing Johnson from the dining area; that Johnson's second kick connected with Teachout's shin; that Teachout did not give Johnson permission to kick him; and that the kick caused Teachout pain and left a mark. Officer Richard Rasmussen testified that he ordered Johnson to leave the dining area because Johnson was being disrespectful toward staff. Rasmussen testified that, when Johnson did not leave, Rasmussen ordered officers to

physically remove Johnson; officers then physically removed Johnson from the area; and that, in the process of being removed, Johnson kicked backwards, making contact with Teachout. Johnson stipulated that he was a prisoner at Dodge Correctional Institution during the time of the charged offense. This evidence was sufficient to support the conviction of battery by prisoner. *See* WIS. STAT. § 940.20(1).

Johnson argues that the evidence was insufficient because there were inconsistencies between the testimony of Teachout and Rasmussen. However, Johnson does not identify any inconsistencies that would render the officer testimony inherently incredible. To the extent that Johnson argues that the inconsistencies called the officers' credibility into question, it was the role of the jury to weigh the witnesses' credibility. The jury was entitled to believe the officer testimony despite conflicts between them as to the details of the dining area incident and, if believed, the testimony was sufficient to support the conviction.

Johnson also argues that the evidence was insufficient because no reasonable jury could conclude on the evidence presented that Johnson intentionally caused injury to Teachout. He points to officer testimony that multiple officers were working together to secure Johnson, covering his eyes and attempting to get him off-balance. However, the officers also testified that, despite their attempts to secure Johnson, Johnson was able to kick backward, making contact with Teachout. The jury was entitled to infer that Johnson intended his kick to make contact with one of the officers.

Next, the no-merit report addresses whether there would be arguable merit to a motion for a new trial based on trial error. Specifically, counsel addresses: (1) the circuit court order denying the defense motion for a change of venue or a jury from a different county; (2) the

circuit court decision for Johnson to wear a stun belt during trial; and (3) the circuit court denying a defense request for an instruction on misdemeanor battery as a lesser-included offense. We agree with counsel's assessment that none of these issues would have arguable merit on appeal.

Johnson moved to change venue or for a jury from a different county, arguing that Dodge County had a high percentage of population affiliated with the prison and thus a high potential for a biased jury. The circuit court denied the motion, explaining that there had been no pretrial publicity, and jury voir dire would eliminate any potential for biased jurors based on ties to law enforcement. We agree with counsel that there is no arguable merit to a challenge to the court's determination. *See* ***State v. Messelt***, 178 Wis. 2d 320, 327, 504 N.W.2d 362 (Ct. App. 1993) (circuit court decision on motion for change of venue is reviewed for erroneous exercise of discretion).

The court found that the stun belt Johnson wore during trial was not visible to the jury, and was necessary based on the charge of battery to a correctional officer and Johnson's close proximity to the jury and an unlocked door. Again, we agree that a challenge to the court's exercise of discretion would lack arguable merit. *See* ***State v. Champlain***, 2008 WI App 5, ¶33, 307 Wis. 2d 232, 744 N.W.2d 889.

As to the request for an instruction on misdemeanor battery as a lesser-included offense, we agree with counsel that, in this case, misdemeanor battery was not a lesser-included offense. Johnson stipulated that he was a prisoner, which is the only element that distinguishes battery by prisoner from misdemeanor battery. *See* WIS. STAT. §§ 940.19(1) (setting forth the elements of misdemeanor battery) and 940.20(1) (setting forth the elements of battery by prisoner). Thus,

once the elements for misdemeanor battery were established the elements for battery by prisoner were met, and thus a lesser-included instruction was not appropriate. *See* ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317 (1989) ("The submission of a lesser-included offense is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense.").

Johnson also argues that his trial counsel was ineffective by failing to argue that Teachout injured himself by falling rather than being kicked by Johnson. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficiency prejudiced the defense). Johnson asserts that he told his trial counsel prior to trial that Teachout injured himself by falling, and that counsel should have made that argument to the jury.

However, Johnson testified in his own defense, and did not say that Teachout had fallen. Defense counsel asked Johnson the open-ended question of what happened on the day of the incident. Johnson described being grabbed by officers and dragged out of the dining area, and stated that he did not kick anyone, but did not state that Teachout fell. Moreover, even if Johnson had seen Teachout fall and injure himself, that would not negate Teachout's testimony that Johnson had kicked Teachout, causing pain. That is, even if the marks on Teachout's leg were caused by a separate falling incident, Teachout's testimony that Johnson kicked him, causing pain, was sufficient to support the conviction. *See* WIS. STAT. §§ 940.20(1) (battery by prisoner is committed when a prisoner intentionally causes bodily harm to an officer, without the officer's consent); 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition"). Thus, we discern no arguable merit to a claim of ineffective assistance of counsel on these facts.

Johnson also argues a new trial is required in the interest of justice. *See* WIS. STAT. § 752.35. Johnson argues that a new trial is required because the jury never heard that Teachout fell, causing his injury; the officer testimony was inconsistent; and the jury could have inferred that, because Johnson was taken off-balance by the officers, the kick was accidental rather than intentional. We disagree that any of these points would support an argument for a new trial in the interest of justice. We have already addressed Johnson's assertion that Teachout fell and his argument that the officer testimony was inconsistent. For the reasons explained above, those claims would not support an argument for a new trial in the interest of justice. As to Johnson's assertion that the jury could have inferred the kick was accidental, that issue was fully litigated at trial. While the jury could have made that inference, it did not.

Additionally, Johnson argues his counsel erred by failing to obtain a competency evaluation of Johnson. Johnson asserts that he lacked the substantial mental capacity to understand the proceedings or assist in his own defense. Johnson points out that he sought psychiatric help prior to the incident in this case. However, Johnson does not point to any facts that would support an arguable claim that Johnson was incompetent to stand trial, and the facts before us negate that argument. Johnson was able to testify coherently in his own defense at trial, and has submitted coherent no-merit responses to this court. We conclude that, on this record, a claim that Johnson was incompetent to stand trial would lack arguable merit.

Finally, the no-merit report addresses whether a challenge to Johnson's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Johnson was afforded

the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Johnson's character and criminal history, the seriousness of the offense, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Johnson to two years of initial confinement and two years of extended supervision. The sentence was within the maximum Johnson faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances'" (quoted source omitted)). We discern no erroneous exercise of the court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Grunder is relieved of any further representation of Johnson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals