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
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

October 2, 2013

To:

Hon. Faye M. Flancher
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Russell D. Bohach
The Gettelman Mansion
2929 W. Highland Blvd.
Milwaukee, WI 53208

W. Richard Chiapete
Assistant District Attorney
730 Wisconsin Ave.
Racine, WI 53403

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

Nick A. Cortese
1021 Hayes Ave., Upper
Racine, WI 53405

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

2011AP2488-CRNM State of Wisconsin v. Nick A. Cortese (L.C. #2009CF62)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Nick A. Cortese appeals from a judgment convicting him of battery, disorderly conduct, and false imprisonment. Cortese's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Cortese filed a response. Counsel then filed a letter addressing one of the claims raised in Cortese's response. After reviewing the record, counsel's no-merit report and letter, and Cortese's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

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

The charges against Cortese arose from an altercation he had with his wife on January 13, 2009. According to the victim, Cortese repeatedly punched her in the head, threatened to kill her, and ripped the house phone from the wall in order to prevent her from calling the police. When the victim tried to leave the residence, Cortese grabbed her by the arms and physically restrained her, causing bruising. Days later, when police went to the residence to conduct a welfare check, they found a note written by the victim on the day of the altercation inculpating Cortese.[2]

The no-merit report addresses the following appellate issues: (1) whether the circuit court properly admitted the victim's note inculpating Cortese, (2) whether the evidence at Cortese's jury trial was sufficient to support his convictions, and (3) whether the circuit court properly exercised its discretion at sentencing.

With respect to the victim's note, the record demonstrates that the circuit court properly admitted it. Cortese had moved to suppress the note on grounds that it had no probative value, was prejudicial, and constituted hearsay. Following a hearing on the matter, the circuit court denied Cortese's motion. The court determined that the note went to the credibility of the victim's account and was not unfairly prejudicial. The court also explained that the note reflected the victim's then existing state of mind, which is an exception to hearsay under WIS.

[2] The note read in relevant part:

> To whom it may concern. My husband Nick A. Cortese has been abbusing [sic] me and my 3 children[.] [I]f something happens to me he did it and please have my 3 children go to Pittsburgh and live with my dad George and charge Nick with my death[] so he cannot hurt anybody else[.] [A]lso give all my property to my 3 kids. I will miss you all.

STAT. § 908.03(3). We are satisfied that the no-merit report properly analyzes this issue as without merit, and we will not discuss it further.

With respect to the sufficiency of the evidence, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorable to the State and the convictions, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Cortese of his crimes.[3] Accordingly, we agree with counsel that any challenge to the sufficiency of the evidence would lack arguable merit.

Finally, with respect to the sentence imposed, the record reveals that the circuit court's sentencing decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In imposing an aggregate sentence of six years of imprisonment and nine months of jail, the court considered the seriousness of the offenses, Cortese's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Cortese's lack of remorse, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Cortese's sentence would lack arguable merit.

[3] In his response, Cortese focuses on his conviction for false imprisonment and cites the victim's ability to escape after he had grabbed her by the arms and physically restrained her. As the circuit court correctly noted in its instructions to the jury, "A reasonable opportunity to escape does not change confinement or restraint that has occurred." *See* WIS-JI Criminal 1275.

As noted, Cortese filed a response to counsel's no-merit report in which he raises several issues not addressed in the report. He first contends that his constitutional rights were violated because eighteen of the twenty-four individuals to be selected from in the jury pool were women.

The Sixth and Fourteenth Amendments to the United States Constitution grant the defendant the right to a "jury selected from a fair cross section of the community." ***Duren v. Missouri***, 439 U.S. 357, 359 (1979). A defendant has the burden of factually demonstrating that the jury selection system systematically excluded distinctive groups in the community. *See* ***id.*** at 364.

Here, Cortese objected to the gender make-up of the jury pool near the conclusion of voir dire. The circuit court rejected Cortese's objection because he had not shown any evidence of systematic exclusion in the jury selection process. The court noted that the jurors were selected randomly by use of either a driver's license or a State ID. Reviewing the circuit court's decision, we conclude that no issue of arguable merit could arise from this claim.

Cortese next contends that he was denied equal protection when the State used several of its peremptory challenges to remove males from the jury panel. The United States Supreme Court has outlined a three-step analysis for evaluating claims that a party has used peremptory challenges in a manner violating the Equal Protection Clause. First, the objecting party must make a prima facie showing of purposeful discrimination by showing that the opposing party has exercised peremptory challenges on the basis of race or gender. *See* ***Hernandez v. New York***, 500 U.S. 352, 358 (1991). Second, once the required showing is made, the burden shifts to the opposing party to articulate a race- or gender-neutral explanation for striking the jurors in question. ***Id.*** at 358-59. Third, the circuit court must determine whether the objecting party has

carried the burden of proving purposeful discrimination. ***Id.*** at 359. We defer to the circuit court's conclusions on these three prongs. *See* ***State v. Lopez***, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992).

During voir dire, the State used three of its peremptory challenges to strike males from the jury. Cortese objected,[4] and the circuit court asked the State to put on the record the reasons for its challenges. The State did so, and the circuit court determined that the jurors were not struck because of their gender. Because that determination is not clearly erroneous, we conclude that no issue of arguable merit could arise from this claim.

Finally, Cortese contends that his counsel was ineffective for failing to have witnesses present at a hearing on his motion for postconviction relief. Counsel had filed a motion for postconviction relief, arguing that newly discovered evidence existed in the form of two witnesses.[5] However, he subsequently withdrew the motion after the witnesses failed to show up at the hearing and could not be found.[6]

Counsel addressed Cortese's claim of ineffective assistance of counsel in a letter to the court. In it, he maintains that he did subpoena the witnesses in question. A review of the record

[4] The parties referred to Cortese's objection as a ***Batson*** claim because ***Batson*** is the seminal case precluding discrimination as a basis for striking a potential juror from the panel. *See* ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986) (prohibits racial discrimination). Cortese's objection was based more specifically on ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. 127, 144-45 (1994), which prohibits gender discrimination.

[5] The witnesses were the victim's half-brother and his fiancée. They purportedly overheard the victim telling her neighbor/boyfriend how she had conspired to set up Cortese with the alleged crimes.

[6] Counsel informed the postconviction court that he did not wish to litigate the motion, as he had no evidence to support it and did not want Cortese to be precluded from raising the matter again in the future should the witnesses reappear. These were sound strategic reasons for withdrawing the motion.

supports counsel's contention. Because counsel cannot be faulted for the witnesses' disregard of the subpoenas, we conclude that no issue of arguable merit could arise from this claim.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.[7] Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Russell D. Bohach of further representation in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of further representation of Cortese in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[7] At trial, Cortese indicated that he wished to have his children called to testify on his behalf. His trial counsel refused to do so. Counsel explained that, given what the children had told investigators, there was very little to be gained from such testimony and a good amount of harm that could be done. Because matters of trial strategy are left to counsel's professional judgment, we conclude that no issue of arguable merit could arise from this.