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April 27, 2015

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

2013AP1559-CRNM State of Wisconsin v. Daniel F. Stoddard (L.C. #2011CF414)

Before Curley, P.J., Kessler and Brennan, JJ.

Daniel F. Stoddard appeals from a judgment of conviction, entered upon a jury's verdicts, on one count each of aggravated battery with a dangerous weapon, aggravated battery, first-degree reckless injury with a dangerous weapon, and first-degree reckless injury.[1] Appellate

[1] "Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony." WIS. STAT. § 940.19(5) (2011-12) (aggravated battery). "Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony." WIS. STAT. § 940.23(1)(a) (2011-12) (first-degree reckless injury).

counsel, Dennis Schertz, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[2] Stoddard was advised of his right to file a response, and he has responded. Counsel filed a supplemental report in reply to Stoddard's response; counsel also filed a second supplemental report pursuant to this court's order. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Stoddard's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Background

According to the criminal complaint, La Crosse police were dispatched in response to a call around 6 a.m. on July 29, 2011. Two women had shown up at the caller's door, covered in blood, and said they had been beaten up.

Victim P.T. told the officer that victim T.L.'s boyfriend, Stoddard, had caused their injuries. P.T. explained that she had been visiting her friend, T.L., who lived with Stoddard. They and Stoddard had spent most of the prior day fishing and drinking. Sometime the next morning, Stoddard became jealous of T.L., accusing her of cheating on him and calling both T.L. and P.T. sluts, whores, and bitches. P.T. reported that Stoddard said, "Bitch, you're going to pay," before going after T.L. When P.T. told Stoddard to leave T.L. alone, Stoddard attacked P.T., punching her in the head and causing her to fall to the ground and lose consciousness. When P.T. came to, she saw Stoddard kicking and hitting T.L. P.T. thought that Stoddard had a hammer, wrench, and knife around, but her vision was blurry and she could not see if he was

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

using any of them. When Stoddard saw P.T. was awake, he came over and began kicking her in the head. P.T. told T.L. to get out of the house and get help. P.T. was able to flee after kicking Stoddard in the groin. P.T. and T.L. made it to a neighbor's home; the neighbor called police.

T.L. told police that she had a friend over to the house she shared with Stoddard and they all began drinking. T.L. was unable to remember her friend's name. She said Stoddard had become angry but she did not know why. She also could not recall arguing or being attacked, though when asked who injured her, she told police it was Stoddard.

Police photographed the scene. There was blood around the exterior of Stoddard's home. Inside, "there were things strewn all over the house." There was a foot stool on top of a sofa and blankets, pillows on the floor, a cabinet tossed over in the kitchen, and blood on the stove and countertop. Two large two-by-four pieces of wood with large blood stains were on the floor, near other blood stains. In the bathroom, there was a "chunk" of long hair and blood, plus a broken vodka bottle covered with blood and hair. A white knife with a seven-inch blade with blood on it was on the floor, near a scissors and blood drops. A hammer was found on a counter near the home's entrance, which opened into the kitchen,

When Stoddard was interviewed by police, he attributed scratches on his body to P.T. rather than T.L. However, he claimed no recollection of what happened, including attacking P.T. or T.L.

P.T.'s injuries, as recited in the complaint, included a broken left hand, a laceration on her head requiring thirty-two staples, a concussion, a dislocated shoulder, and multiple cuts and bruises. Her treating physician also testified at trial that P.T. had suffered a traumatic brain

injury. T.L.'s injuries included lacerations, puncture wounds, bruises, a skull fracture, and a traumatic brain injury.

Stoddard was charged on August 4, 2011, with two counts of aggravated battery with a dangerous weapon. An information filed on August 18, 2011, charged two counts of aggravated battery with a dangerous weapon, two counts of first-degree reckless injury with a dangerous weapon, and two counts of false imprisonment. An amended information later eliminated the false imprisonment charges and revised the remaining charges to one count each of aggravated battery with a dangerous weapon, aggravated battery, first-degree reckless injury with a dangerous weapon, and first-degree reckless injury. The "dangerous weapon" charges corresponded to victim T.L.; the other two charges corresponded to victim P.T.

At trial, Stoddard testified in his own defense, telling the jury that P.T. had attacked T.L., and he attempted to intervene to protect T.L. He claimed that P.T. hit him in the head with a hammer, and that P.T.'s injuries must have occurred as he was attempting to get her away from T.L.

The jury convicted Stoddard on the four charges from the amended information. The circuit court sentenced him to a combination of concurrent and consecutive sentences totaling fifteen years' initial confinement and twenty years' extended supervision. It also ordered Stoddard to pay over $17,000 in restitution to the Crime Victims' Compensation Fund on P.T.'s behalf. Additional facts will be discussed herein as necessary.

Discussion

In the main no-merit report, counsel discusses three potential issues, each of which he concludes lack arguable merit: whether Stoddard received a fair trial at which there was sufficient evidence for conviction; whether Stoddard received effective assistance from trial counsel; and whether Stoddard's sentence was excessive. In the supplemental no-merit report that we ordered, we asked counsel to address restitution and a postconviction motion that appeared unresolved. In his response, Stoddard raises several issues that we will address within the context of issues that counsel has raised and that we have independently identified.

A. *Riverside* violation.

We first consider whether there is any arguable merit to claiming a violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991), which held that there must be a probable cause determination made within forty-eight hours of a warrantless arrests. *See* ***State v. Koch***, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (1993) (adopting ***Riverside*** in Wisconsin). Stoddard was arrested at 6:25 a.m. on July 29, 2011. There are two "Probable Cause Statement and Judicial Determination" forms in the record. The first is signed by the circuit court on July 31, 2011, at 8:15 a.m., but it contains no documentation. The second statement is signed August 1, 2011, at 1:28 p.m., and contains supporting documentation in the form of a La Crosse Police Department arrest report and supplemental documents.

Both probable cause determinations are outside the forty-eight hour window. However, a ***Riverside*** violation is not a jurisdictional defect. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). Rather, "[t]he appropriate remedy for a ***Riverside*** violation may be suppression of evidence that is obtained as a result of the violation—*i.e.*, after the point at which

the delay became unreasonable." *See* ***Golden***, 185 Wis. 2d at 769. Here, the first probable cause determination was made less than two hours late. Even disregarding that determination because it lacked supporting documentation, the second probable cause determination was just over thirty-one hours late. Nothing in the record indicates that any evidence used against Stoddard was obtained through either ***Riverside*** violation, so there is no arguable merit to raising such a challenge.

B. Multiplicity and Consistency.

We next consider whether there is any arguable merit to challenging the nature of the charges. Specifically, we consider whether it is either multiplicitous or inconsistent to have charged Stoddard with both aggravated battery and first-degree reckless injury to each of his victims.

Multiplicity concerns arise where a single offense is charged as multiple counts rather than merged. *See* ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. It is not multiplicitous to have two counts each of aggravated battery and first-degree reckless injury because there are two victims. *See* ***State v. Rabe***, 96 Wis. 2d 48, 66, 291 N.W.2d 809 (1980). The question is whether it is multiplicitous to charge both aggravated battery and first-degree reckless injury for the same series of events as to each victim. However, there is no arguable merit to a claim of a multiplicity violation because aggravated battery and first-degree reckless injury are not the same offense—that is, they are not identical in law. *See* ***State v. Eastman***, 185

Wis. 2d 405, 412, 518 N.W.2d 257 (Ct. App. 1994).[3] Though there appears to be one long series of events, based on P.T.'s recollection of the events, Stoddard's attack on each woman was interrupted by an attack on the other. The temporal break as to each woman, then, allows for multiple charges for attacking each woman. *See* ***State v. Koller***, 2001 WI App 253, ¶¶30-31, 248 Wis. 2d 259, 635 N.W.2d 838.

A related question is whether the charges are somehow inconsistent, as aggravated battery requires *intent* to cause great bodily harm while first-degree reckless injury punishes causing great bodily harm by *reckless* conduct. However, there is no *per se* requirement that verdicts in criminal cases be consistent. *See* ***State v. Thomas***, 2004 WI App 115, ¶¶42-43, 274 Wis. 2d 513, 683 N.W.2d 497. Inconsistent criminal verdicts are generally evaluated for sufficient evidence to support each verdict, *see* ***United States v. Powell***, 469 U.S. 57, 67 (1984), which will be discussed below. Further, it is not inconsistent to ask a jury to consider whether, in the course of his attacks, some of Stoddard's actions were intentional, while others were reckless. *See* ***Eastman***, 185 Wis. 2d at 414. There is no arguable merit to a multiplicity challenge or a challenge to the consistency of the verdicts.

C. Sufficiency of the Evidence.

Counsel discusses briefly whether there was sufficient evidence to support the guilty verdicts against Stoddard. He notes only that the State did not offer into evidence any particular

[3] ***State v. Eastman***, 185 Wis. 2d 405, 518 N.W.2d 257 (Ct. App. 1994), dealt with aggravated battery, contrary to WIS. STAT. § 940.19(2) (1992-93). That statute is substantively identical to WIS. STAT. § 940.19(5) (2011-12), the aggravated battery statute under which Stoddard was charged, in that both required causing bodily harm with the intent to cause great bodily harm.

object or weapon relating to the "dangerous weapon" enhancer, but that it would not have been unreasonable for the jury to conclude that that State had met its burden of proof on that element. Counsel also notes simply that there was sufficient evidence from which a reasonable jury could find guilt.

We view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). "'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

The jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. A jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony and reject another portion; a jury can find that a witness is partially truthful and partially untruthful. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

A conviction may be supported by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *See* ***Poellinger***, 153 Wis. 2d at 501-02. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. *See* ***id.*** at 503.

To secure convictions on aggravated battery, the State must prove beyond a reasonable doubt that Stoddard caused great bodily harm to T.L. and P.T. and that he intended to do so. *See* WIS JI—CRIMINAL 1225A. "Great bodily harm" is "[i]njury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protected loss or impairment of the function of any bodily member or organ, or other serious bodily injury." ***Id.*** Further, because Stoddard raised defense-of-others at trial, the State also had to satisfy the jury that Stoddard did not act lawfully in defense of another.

To secure a conviction on first-degree reckless injury, the State had to show that Stoddard caused great bodily harm to T.L. and P.T. by criminally reckless conduct under circumstances that showed utter disregard for human life. WIS JI—CRIMINAL 1250. "Criminally reckless conduct" is conduct that creates an unreasonable and substantial risk of death or great bodily harm to another person, and the defendant must have been aware that his conduct created such risk. *See* ***id.***

With respect to T.L., on both charges involving her, Stoddard was alleged to have used a dangerous weapon. A "dangerous weapon" includes "any device or instrumentality which, in the matter it is used or intended to be used, is likely to produce death or great bodily harm." *See* WIS JI—CRIMINAL 910.

P.T. testified that she woke to Stoddard yelling at a petrified T.L. When P.T. told Stoddard not to talk to T.L. like that, Stoddard hit P.T. in the face, causing her to fall to the floor, where Stoddard began kicking her in the head until she lost consciousness. When she came to, P.T. saw Stoddard attack T.L. with an object, although P.T. could not see what the object was. Stoddard was also kicking T.L. P.T. got up, grabbed something, swung at Stoddard, and told T.L. to get out. T.L. ran out and P.T. followed her to the neighbors' homes—the first neighbor was not home, but the second answered the door and called 911.

T.L. testified, but she had next to no recollection of events and offered nothing of substance. Officer Teri Roden testified that she made contact with T.L. and observed T.L. to have multiple injuries, including a laceration over her left ear and a puncture wound under her right eye. Roden testified that T.L. told her that Stoddard had gotten angry at her, though she did not recall why. According to the officer's testimony, when Roden asked T.L. who caused her injuries, she said, "My boyfriend, Daniel Stoddard."

The surgeon who treated P.T. testified about her injuries. P.T. suffered a scalp laceration with looseness to the tissues underneath, undermined by the force of whatever caused the laceration. She had several other lacerations as well. A CT scan revealed "some large scalp hematomas," which are collections of blood under the scalp. X-rays revealed that she had a broken hand. She was also diagnosed with a mild traumatic brain injury, which can have long term effects like headaches, impaired vision, nausea, and impaired cognition.

The attending admitting physician for trauma testified about T.L.'s injuries. He described her as "a patient who was severely beaten diffusely throughout her entire body." She had a skull fracture, an intracranial bleed from a head injury, multiple bruises and lacerations,

including a scalp laceration. The doctor explained that usually, an object or weapon has to cause a scalp laceration. To break a bone like the skull requires "a very sharp blow." T.L. was diagnosed with a closed head injury, which caused the intracranial bleed. The injury could lead to a cognitive disorder or memory loss, which could be lifelong.

The detective who interviewed Stoddard testified that Stoddard had scratches all over, though Stoddard told the detective he had no recollection of how he obtained them. The detective, however, testified that in his experience, they looked like injuries made by someone trying to get away from Stoddard.

Stoddard testified on his own behalf. He said that around 5 a.m. he was in the bedroom sorting bills when he heard both women screaming. He walked out and saw P.T. holding T.L.'s hair. When he told P.T. to get out, she split his head open with a hammer. When he came to, she hit him again.

There is sufficient evidence from which the jury could have convicted Stoddard, assuming that it believed the testimony of P.T., the officers, and the doctors. The direct blows to the heads of each victim could be viewed as the intentional acts necessary for the aggravated battery, while inflicting the other wounds by kicking the women could have been considered the recklessness with utter disregard of human life. If the jury believed the officers' testimony that T.L. told them Stoddard caused her injuries, it would have been able to reject the defense-of-others theory.

In his response, Stoddard complains that P.T. was a liar, and that it was never proven that he had used any weapons. As noted in our standard of review, witness credibility is solely within the jury's purview.[4] Further, though no specific weapon was introduced at trial, the jury could have accepted P.T.'s testimony about seeing Stoddard using an object, along with the doctor's testimony that a tool of some sort would have been necessary to cause T.L.'s scalp laceration, and officers' testimony about various tools around the house in order to deduce that Stoddard had used a dangerous weapon. The State is not required to prove that a specific item was used. There is no arguable merit to a challenge to the sufficiency of the evidence.

D. Whether the Trial Court Should Have Declared a Mistrial.

At the start of the second day of trial, the court informed the parties that one of the jurors had approached the deputy clerk to report that another juror had made a statement along the lines of "why don't we just convict him and get this over with." Both counsel and Stoddard discuss this issue in their submissions.

The trial court first spoke to the reporting juror privately, then brought that juror to the courtroom. The court explained that the problem was not as bad as they originally thought: the reporting juror explained that the reported juror seemed resentful generally about having to serve on another jury soon after her prior service. The trial court then excused the reporting juror and called the reported juror in, so the parties could ask about what precisely she had said. However,

[4] Stoddard likely lost his credibility with the jury, and bolstered P.T.'s, if the jury noticed him, as the trial court admonished outside the jury's presence, "snickering, smiling, looking at people in the audience, and in every shape or form interfering with the ability of individuals in this courtroom to concentrate on the evidence" while P.T. was testifying.

the reported juror did not recall making any comments at all, and denied speaking to the other jurors.

Stoddard's trial attorney moved for a mistrial, but the trial court denied the motion. It noted that, based on what the two jurors told the parties, it appeared that the reported comment was directed more at the process generally than Stoddard specifically and, as the reported juror evidently had a negative attitude the whole time, the comment was unlikely to have prejudiced the entire panel, even if they had heard it. The circuit court then dismissed the reported juror as one of two alternates as a further remedy.

"The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court." *See* ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. In light of the circuit court's factual findings regarding the context and nature of the reported juror's comments, along with the remedial step of dismissing the juror, there is no arguable merit to a claim that the trial court erroneously exercised its discretion in denying the motion for a mistrial.

E. Sentencing.

Another issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of

the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The trial court described this situation as "one of the most severe incidents of domestic violence that I've seen short of homicide." It noted the similarities between this incident and a 2004 incident between Stoddard and T.L.: heavy drinking, arguing, puncture wounds to T.L., and accusations of cheating. It noted that alcohol use was a concern that had not been successfully addressed in the past, but also that something more than alcohol had to be in play to make Stoddard want to humiliate T.L. and P.T. While T.L. was hopeful that Stoddard would not have to serve a lengthy sentence so that he could return home to her, the trial court did not believe T.L. would be able to protect herself despite having a "safety plan." The trial court also observed that Stoddard showed no remorse for his actions, and the only mitigating factor was that Stoddard's criminal record was small. It further noted that it was imposing consecutive sentences based on the fact that there were two separate victims. It is evident from the trial court's comments that it thought the protection and punishment/rehabilitation objectives were paramount.

The maximum possible sentence Stoddard could have received was ninety years' imprisonment. The sentence totaling thirty-five years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion in setting the length of the sentence.

At sentencing, the circuit court also determined that restitution would be appropriate, and it gave the State sixty days to determine the amount. After that, Stoddard would have sixty days to request a hearing if he wanted to dispute the amount. The circuit court directed that twenty-five-percent of Stoddard's inmate funds could be used to pay restitution. Subsequently, the trial court signed an order for $17,021.04 to be paid to the Crime Victims' Compensation Fund on behalf of P.T. We asked counsel to file a supplemental report on whether there would be any arguable merit to a challenge to the restitution order, either because the amount is unsupported or because the trial court failed to consider appropriate factors.

Counsel notes simply that Stoddard's income comes from social security disability payments, which was noted in both the presentence investigation report and an alternate report. Thus, the circuit court was well aware of Stoddard's financial resources and earning capacity when it ordered restitution be paid at sentencing. *See* WIS. STAT. § 973.20(13)(a)2.-3. We note that although the final amount was determined after the sentencing hearing, Stoddard did not object to the restitution request, despite being given the opportunity to do so. As a result, Stoddard effectively stipulated to the restitution request, so it was not an erroneous exercise of the trial court's discretion to order restitution in the amount sought. *See* ***State v. Hopkins***, 196 Wis. 2d 36, 43, 538 N.W.2d 543 (Ct. App. 1995). There is, therefore, no arguable merit to a challenge to the restitution portion of Stoddard's sentence.

F. Effective Assistance of Trial Counsel.

Appellate counsel spends one paragraph considering whether Stoddard might be able to claim ineffective assistance of trial counsel, ultimately concluding that trial counsel "did everything he could have done in this case." Stoddard, however, complains that trial counsel

failed to call any witnesses to counter P.T.'s testimony and that trial counsel failed to utilize any DNA or fingerprint evidence. We also discuss whether trial counsel should have raised an intoxication defense.

There are two parts to an ineffective-assistance claim: deficient performance by counsel and prejudice resulting from that performance. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To provide deficient performance, a defendant must overcome a strong presumption that counsel acted reasonably within professional norms and that counsel made errors so serious that he was essentially not functioning as the constitutionally guaranteed counsel. *See* ***id.*** To prove prejudice, the defendant must show that counsel's errors made the resulting conviction unreliable in light of other evidence presented. *See* ***id.*** We need not address both elements if the defendant fails to make an adequate showing on one of them. *See* ***id.***

Stoddard claims that P.T. is a pathological liar and that his attorney refused to bring in any witnesses because counsel "kept saying this is not about [P.T.,] this is about you." Although the defendant may present evidence of a pertinent trait of the character of a victim, *see* WIS. STAT. § 904.04(1)(b), Stoddard would have only been able to introduce, at best, evidence of P.T.'s character for truthfulness; he could not use specific instances of conduct. *See* ***State v. Evans***, 187 Wis. 2d 66, 80-82, 522 N.W.2d 554 (Ct. App. 1994). Stoddard does not identify any witnesses who could have so testified. More significantly, though, we do not think there is any prejudice from a failure to impeach P.T.'s testimony with evidence of her truthfulness; the real damning testimony was not P.T.'s, but Officer Roden's testimony that T.L. identified Stoddard, not P.T., as her attacker.

Stoddard also complains that his trial attorney failed to bring in fingerprint or DNA evidence, despite Stoddard's insistence that counsel do so. Stoddard claims such evidence would have proved it was him, not P.T., who was unconscious on the floor. He also contends that P.T.'s fingerprints should not have been on any tools in his home, so her fingerprints on those items would have proven she was the aggressor.

The record does not indicate that fingerprint or DNA evidence was collected. If it was not collected, trial counsel could not have been deficient for not utilizing it. Even if it had been collected and processed, though, such evidence would not be nearly as exculpatory as Stoddard seems to believe. P.T. does not deny hitting Stoddard with something, and she had spent many hours in the home, so finding her fingerprints on things would not have been surprising. Further, it was not disputed that Stoddard was also injured and bleeding, so it would not have been surprising to find Stoddard's blood on the floor. But while DNA evidence might tell whose blood was where, it would not necessarily confirm the volume of each person's blood in each stain, nor could it prove how that blood came to be in the stain. We discern no arguably meritorious claim that trial counsel was ineffective for failing to seek nonexculpatory evidence of indeterminable value.[5]

We have also considered whether trial counsel was ineffective for failing to pursue an intoxication defense. Stoddard had a blood-alcohol level of .209 when his blood was collected shortly after arrest. However, to warrant using the voluntary intoxication defense, there must be sufficient evidence that the intoxicant negated the mental state required for an offense, like

[5] In his response Stoddard complains about being assessed $5300 for forensic testing not utilized in his trial. The record reveals no such obligation.

intent. *See* ***State v. Strege***, 116 Wis. 2d 477, 486, 343 N.W.2d 100 (1984); *see also* WIS JI—CRIMINAL 765.

Here, while there is evidence of excessive consumption of alcohol, there is no evidence that Stoddard's mental state was impaired. *See* ***Strege***, 116 Wis. 2d at 486. Moreover, the voluntary intoxication defense would be inconsistent with Stoddard's defense that P.T. was the one who injured T.L. and that any injuries to P.T. were sustained when he tried to rescue T.L. Accordingly, trial counsel was not deficient for failing to raise intoxication as a defense, so there is no arguable merit to a claim of ineffective assistance.

G. Additional Issues.

We further asked appellate counsel to address the fate of a motion for postconviction discovery, where he had requested access to P.T.'s medical records to possibly support a motion for resentencing because of inaccurate information. The trial court had agreed to an *in camera* review of the records, P.T. signed a release, and a status conference was scheduled for July 8, 2013, but counsel filed the notice of appeal on July 5, 2013. Counsel explains that he actually received a copy of the medical records and concluded they did not support the issue he thought they might, so it was not necessary to proceed with the status conference. We have reviewed the records submitted and, like counsel, discerned no basis on which resentencing could have been sought.

We also note that Stoddard complains that his judge, the Honorable Scott L. Horne, should have recused himself because he was the district attorney for the 2004 case involving Stoddard and T.L. WISCONSIN STAT. § 757.19 governs disqualification of judges. There is no arguable merit to a claim that Judge Horne was objectively biased under any of the scenarios set

forth in § 757.19(2)(a)-(f). That leaves only a question of subjective bias under § 757.19(2)(g), which requires a judge to disqualify himself or herself when the judge determines "that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

First, Judge Horne did not actually preside over the trial in this case—he was unavailable due to a family issue and the Honorable Ramona A. Gonzales conducted the trial, though Judge Horne returned for sentencing. Second, there is no indication that Judge Horne had an independent recollection of the 2004 case. While he noted the similarities between this case and the 2004 case when imposing sentence, we do not think this demonstrates subjective bias: it is self-evident that *any* judge presiding over sentencing in this case would have noted the similarities between the cases. There is no arguable merit to a claim of judicial bias in this case.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

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

Diane M. Fremgen
Clerk of Court of Appeals