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 II

June 17, 2015

To:

Hon. Scott C. Woldt
Circuit Court Judge
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903-2808

Melissa M. Konrad
Clerk of Circuit Court
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Christian A. Gossett
District Attorney
P.O. Box 2808
Oshkosh, WI 54903-2808

Michael G. Schaefer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-1221

Christina C. Starner
P.O. Box 8808
Green Bay, WI 54308-8808

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

Joseph N. Ehmann
First Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Kenneth S. Shong, #180137
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2014AP317-CRNM State of Wisconsin v. Kenneth S. Shong (L.C. #2012CF8)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Kenneth S. Shong appeals from a judgment convicting him of fraudulent writings, contrary to WIS. STAT. § 943.39(2) (2013-14).[1] Shong's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738

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

(1967). Shong exercised his right to file a response. Upon consideration of the report, the response, and our independent review of the record as mandated by ***Anders***, we conclude that the judgment may be summarily affirmed. *See* WIS. STAT. RULE 809.21. As there are no issues of arguable appellate merit, we accept the no-merit report and relieve Attorney Christina C. Starner of further representing Shong in this matter.[2]

Shong was charged with being party to the crime of fraudulent writings as a repeater. While incarcerated at Oshkosh and Racine Correctional Institutions (OCI, RCI), he operated "Carlingford University," a "distance" university purportedly registered in Alabama and Delaware, chartered in the United Kingdom, and capable of conferring degrees. Shong represented to prospective students that he owned or held stock in and was on the board of Carlingford and that various foreign ministries of education authorized Carlingford to grant international degrees that, because of the broader base of study, were viewed as superior to American degrees.

Kenneth Fleming, another OCI inmate, paid $1740 in tuition, via his mother who sent a postal money order to Carlingford at a P.O. box address in Mobile, Alabama. The address was associated with the office of an attorney, Robert Ratliff, who ran Carlingford out of his law office.[3] Shong had engaged Ratliff to charter Carlingford in Alabama and Delaware and to retain

[2] Attorney Farheen M. Ansari filed the no-merit report. By order dated March 13, 2015, this court granted her motion to withdraw because she accepted out-of-state employment. Attorney Starner then was appointed to represent Shong.

[3] Ratliff had a telephone line in his office that was answered in the name of Carlingford University and assigned his legal secretary to serve as Carlingford's "registrar" in the United States.

an attorney in the U.K. to represent Carlingford there and to provide a London, England mailing address and telephone number.[4]

Fleming filed a consumer protection complaint when, after sending a few modules and textbooks, Carlingford ceased grading his work, sending additional modules, and communicating with him. After a two-day bench trial, the court found Shong guilty. The court imposed the maximum sentence of seven years' initial confinement and three years' extended supervision, consecutive to the sentence he was serving. This no-merit appeal followed.

The no-merit report first considers whether the evidence presented at the preliminary hearing was sufficient to support the bindover, a claim Shong raised pretrial. "A defendant may be bound over for trial when the evidence at the preliminary hearing is sufficient to establish probable cause that a felony has been committed and that the defendant probably committed it." ***State v. Dunn***, 121 Wis. 2d 389, 393, 359 N.W.2d 151 (1984). Viewed in light of that low threshold, the preliminary hearing transcript compels us to agree that there was sufficient evidence to determine probable cause existed to bind Shong over for trial. A challenge would be frivolous and without arguable merit.

The report next examines whether the trial court erroneously exercised its discretion in its pretrial motion rulings. The court denied Shong's motion to suppress evidence obtained when RCI personnel searched and photocopied his incoming mail, and granted the State's motion to allow testimony by videoconferencing at trial. Neither presents an issue of arguable merit.

[4] The London address turned out to be an empty storefront.

Shong was transferred from OCI to RCI. While at RCI, Shong was regularly communicating with an OCI inmate, David Kaster, who, on his release, worked for Shong in the Carlingford endeavor. Kaster's role, Shong testified, was to expand "the North American Division." Kaster's address was a P.O. box in Green Bay. The trial court found that the legislature has caused to be put in place rules regarding inmate mail, one of them being safety of the institution, the staff, the inmates, and the public. *See* WIS. ADMIN. CODE § DOC 309.04(4)(b). It found that defrauding other inmates posed a legitimate institutional concern, such that RCI officials were authorized to read and copy his mail to further their investigation of his activities. These findings are not clearly erroneous, and we see no constitutional violation. *See* ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

The State moved to have three of its witnesses—the education department officials from Alabama, Delaware, and the U.K.—testify by videoconference. When a defendant in a criminal case objects to a witness testifying by videoconferencing at a proceeding the defendant is entitled to physically attend, "the court shall sustain the objection." WIS. STAT. § 885.60(2)(d). Shong's counsel made a qualified objection at the motion hearing, noting that "we may be willing to agree with that after we've had an opportunity to examine what it is that the people are specifically going to testify." The defense did not renew the objection at trial. It is reasonable to assume that, once the discovery was reviewed, the objection no longer stood.

The witnesses testified about their ministerial duties and that Carlingford never was authorized to grant degrees in their jurisdictions. Questioning and cross-examining them in person would have made little if any difference.

The no-merit report addresses whether the evidence was sufficient to convict Shong. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. ***Id.*** at 504.

The court heard testimony from, among others, Fleming, the OCI inmate Shong duped, Fleming's mother, the RCI official who searched Shong's incoming mail, officials in the Alabama, Delaware, and U.K. agencies that authorize higher-education academic institutions to offer degrees, former OCI inmate Kaster, the Department of Justice special agent who investigated Shong's scheme, an inmate who testified on Shong's behalf, and Shong himself. The court rejected Shong's testimony as "totally lack[ing] all credibility whatsoever." In light of the standard of review, the record does not permit an arguably meritorious claim that the evidence was insufficient to support Shong's conviction.

Shong's response revisits the testimony, highlighting certain portions and drawing alternative inferences from it, and claims Kaster testified falsely to get immunity. He also points to evidence not presented and witnesses not called that he claims would support his version of events. A reviewing court need not concern itself in any way with evidence that might support other theories or conclusions. *See* ***id.*** at 507-08. It need decide only "whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict." *See* ***id.*** at 508. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** at 507. The record here establishes that the evidence presented, and the

reasonable inferences the court drew from it, is sufficient. There is no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report also considers whether an arguable issue of merit exists in regard to Shong's motion to dismiss at the close of the State's case. He argued that the State had not proved that he obtained a signature to a writing subject to forgery by means of deceit, as a money order need not be signed, or that he acted with intent to defraud. *See* WIS. STAT. § 943.39(2); *see also* WIS JI—CRIMINAL 1486. A reasonable fact-finder could infer from the evidence that Shong intended to defraud Fleming by getting him to send a money order for tuition. A bank employee testified that, at the time, the bank required a money order purchaser's signature. Section 943.39(2) does not require proof of a forgery but only that a falsely made writing could be the basis for a forgery prosecution. ***State v. Weister***, 125 Wis. 2d 54, 58, 61, 370 N.W.2d 278 (Ct. App. 1985). In any event, Shong has waived that argument for appeal because he presented his own evidence after the motion was denied and the entire evidence is sufficient to sustain his conviction. *See* ***State v. Scott***, 2000 WI App 51, ¶6, 234 Wis. 2d 129, 608 N.W.2d 753.

The report addresses whether the sentence imposed presents an issue of arguable merit. The court considered the primary sentencing factors of "the gravity of the offense, the character of the offender, and the need for protection of the public." *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). It observed that while this case involved only about $1700, the offense was "the first piece of sand coming out of the hourglass" from which Shong hoped to make millions of dollars, that Shong refused to use his talents to work toward positive goals, and that, now forty-six years old, he had been defrauding and taking advantage of people since he was twenty-one, even while in prison. Appellate review of sentencing "'is limited to

determining whether there was an [erroneous exercise] of discretion.'" ***Id.*** at 426 (citation omitted). An arguably meritorious challenge to the sentencing could not be sustained.

Shong contends that he merits acquittal because venue was improper as the money order was purchased at a Rock county bank. The offense of fraudulent writings requires proof of three elements. WIS JI—CRIMINAL 1486. Deceit and an intent to defraud occurred in Winnebago county, making venue in that county proper. *See* WIS. STAT. § 971.19(2); *see also* ***State v. Swinson***, 2003 WI App 45, ¶¶20-21, 261 Wis. 2d 633, 660 N.W.2d 12.

We reject Shong's claim that the real controversy was not fully tried. We exercise our power of discretionary reversal only in exceptional cases. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. Here, the State presented substantial evidence and the critical issues were vigorously litigated. Shong testified in his own defense. Pursuit of a claim that the real controversy was not fully tried would be futile.

Although raised under the rubric of the real controversy not being tried, some of Shong's complaints might be construed as alleging ineffective assistance of trial counsel. "[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). It is inappropriate for this court to determine the professional competence of trial counsel based only on a disappointed defendant's unsupported allegations. ***State v. Simmons***, 57 Wis. 2d 285, 297, 203 N.W.2d 887 (1973). Nonetheless, we have examined the record to determine whether Shong's allegations might warrant a remand for a ***Machner*** hearing.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466

U.S. 668, 687 (1984). Proving deficient performance requires a showing that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is reviewed from counsel's perspective at the time of representation, and the onus is on the defendant to overcome the strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 127, 129. The appropriate measure of the performance is reasonableness, considering all of the circumstances. ***State v. Brooks***, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

Shong primarily argues that counsel failed to call Carlingford–associated witnesses he proposed. He contends they would have testified that they believed Carlingford was a legal degree-granting university because Ratliff told them it was. Shong's counsel may have concluded from the thousands of pages of discovery that other participants in the Carlingford scheme would not be of benefit to his defense. "An attorney's strategic decision based upon a reasonable view of the facts not to call a witness is within the realm of an independent professional judgment." ***Whitmore v. State***, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973).

Counsel cross-examined the State's witnesses and pointed out their prior inconsistent statements. The jury had the right to believe those witnesses despite their inconsistencies. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Our review of the record and of Shong's response to the no-merit report discloses no basis for a meritorious challenge to trial counsel's performance and no grounds to remand for a ***Machner*** hearing.

Shong raised many issues in his response to the no-merit report. To the extent that we have not addressed a specific contention in this opinion, we have nonetheless considered his concerns in light of the record. We have also independently reviewed the record, as mandated by ***Anders***, and determined that there are no other potentially meritorious issues warranting discussion. We conclude that further pursuit of the matter would lack arguable merit.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Christina C. Starner is relieved of any further representation of Kenneth S. Shong in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals