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November 19, 2015

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

2014AP1978-CRNM State of Wisconsin v. Nate A. Lindell (L.C. # 2012CF285)

Before Higginbotham, Sherman and Blanchard, JJ.

Attorney Angela Henderson, appointed counsel for Nate Lindell, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to further proceedings claiming that: (1) the circuit court erroneously exercised its discretion as to pretrial rulings; (2) the court erred by denying Lindell's motion to strike a potential juror for cause; (3) Lindell did not validly waive his right to testify at the guilt

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

phase and his right to remain silent at the responsibility phase; (4) Lindell's trial counsel was ineffective by failing to obtain an expert to testify more favorably to the defense in support of Lindell's plea of not guilty by reason of insanity (NGI); (5) the evidence was insufficient to support the jury verdicts; (6) the jury instructions were improper; or (7) the circuit court erred in its imposition of sentence. Lindell has responded to the no-merit report, arguing that his trial counsel was ineffective by counseling Lindell to testify falsely that his original report to an investigating officer was untrue and by failing to obtain an expert to testify more favorably to Lindell's NGI plea. Attorney Henderson has filed a supplemental no-merit report, concluding that Lindell's claims of ineffective assistance of counsel would lack arguable merit. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Lindell was charged with assault by prisoner as a repeater and entered not guilty and NGI pleas. At a bifurcated jury trial, the jury found that Lindell was guilty of assault by prisoner and that Lindell did not lack the substantial capacity to appreciate the wrongfulness of the conduct or to conform his conduct to the law. The court sentenced Lindell to two years of initial confinement and one and a half years of extended supervision.

The no-merit report asserts that there would be no arguable merit to any issues as to any pretrial rulings by the circuit court. We agree with counsel's assessment.

The no-merit report also asserts that a challenge to the circuit court's decision denying Lindell's motion to strike one potential juror for cause would lack arguable merit. Counsel notes that the challenged juror did not sit on the jury panel, and concludes that the jury as impaneled

did not include any biased jurors. *See* ***State v. Lindell***, 2001 WI 108, ¶73, 245 Wis. 2d 689, 629 N.W.2d 223 (“‘An error assigned to a refusal to discharge a juror on challenge for cause cannot serve for reversal, since no prejudice resulted to appellants. The juror was removed on peremptory challenge, and no objection was made to the jury as finally impaneled.’” (quoted source omitted)). We agree with counsel’s assessment that this issue lacks arguable merit.

Next, the no-merit report concludes that any challenge to Lindell’s waiver of the right to testify at the guilt phase and the right to remain silent at the responsibility phase would lack arguable merit. We agree that any challenge to Lindell’s waiver of the right to testify in the first phase and to remain silent in the second phase would be wholly frivolous.

The no-merit report also asserts that Lindell’s trial counsel was not ineffective by failing to obtain an expert more favorable to the defense NGI plea. The no-merit report notes that the court-appointed psychologist, Dr. Dianne Lytton, testified that she diagnosed Lindell with mixed personality disorder and post-traumatic stress disorder (PTSD). The no-merit report opines that Dr. Lytton’s testimony was consistent with the defense NGI theory in that Dr. Lytton testified that long-term segregation can cause people with PTSD to have flashbacks of abuse, resulting in psychotic-like symptoms. The no-merit report asserts that, although Dr. Lytton testified that Lindell did not meet the criteria for NGI because he knew right from wrong and was able to conform his behavior to the requirements of the law, *see* WIS. STAT. § 971.15(1), any claim that a different expert would have reached a more favorable conclusion based on the agreed upon facts would be wholly frivolous.

Lindell argues in his no-merit response that he was denied the effective assistance of counsel at trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of

ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Lindell argues first that his trial counsel was ineffective by counseling Lindell to falsely testify that Lindell's original report to an investigating officer—that Lindell threw bodily substances at a correctional officer because he believed that the officer was using mind controlling death rays on him—was untrue. Lindell then argues that his counsel erred by failing to obtain a different expert to testify as to the effects of extended segregation on Lindell's diagnoses of bipolar disorder and PTSD. Lindell asserts that Dr. Lytton's testimony was unfavorable to the defense because, according to Lindell, Dr. Lytton disregarded Lindell's bipolar disorder diagnosis and focused exclusively on his PTSD diagnosis, and failed to testify as to the effects of segregation specifically as to Lindell. Lindell contends that his trial counsel was ineffective by failing to obtain a different expert to testify as to how the combination of Lindell's bipolar disorder and PTSD caused Lindell to fail to appreciate the wrongfulness of his acts and to lack the ability to control his behavior. Lindell has not asserted that an expert who would so testify was in fact available. The supplemental no-merit report asserts that a claim of ineffective assistance of counsel on either basis would lack arguable merit.

We agree with counsel's assessment that a claim of ineffective assistance of counsel would be wholly frivolous. At trial, Dr. Lytton testified that Lindell has a mixed personality disorder, problems with depression, mood and anxiety, and PTSD. She stated that, during her evaluation of Lindell, she did not observe any signs of a psychotic disorder, and that the prison staff notes from before and after the incident indicated that Lindell was not suffering from any

psychosis or psychotic mental disorder at the time. Dr. Lytton also testified that her review of prison staff notes indicated that Lindell had reported that he had planned the assault on staff for about a week prior to the incident. She concluded that Lindell was mentally ill, but that he knew right from wrong and was able to conform his behavior to the requirements of the law at the time of the offense.

On cross-examination, the defense elicited testimony from Dr. Lytton that Lindell exhibited paranoia, and that his PTSD could cause psychotic-like symptoms, causing flashbacks to earlier abuse. Dr. Lytton explained that Lindell had been living in very stressful circumstances, and that those circumstances could lead to a worsening of mental illness symptoms. Dr. Lytton also testified on cross-examination that Lindell had a long history of mental illness, including a diagnosis of bipolar disorder. Dr. Lytton explained that there were some limitations to her report, specifically because, in Dr. Lytton's clinical assessment, Lindell's mental illness had not been fully documented within the prison. Dr. Lytton expressed concern that there was more to Lindell's mental illness than had been documented, and that her assessment as to Lindell's NGI plea may have differed if there had been better independent documentation.

Lindell testified that he placed feces and urine in a container in his segregation cell with the intention of throwing the container at a cell across from his, in hopes that prison staff would move Lindell or the inmate in the other cell. He testified that, on the day of the incident, he was feeling spacey; that he had nightmares the night before about abuse he had endured as a child; and that when the officer appeared at Lindell's cell door, Lindell saw her as his childhood abuser, and lashed out. Lindell testified that he told the investigating officer that he had thrown the substances at the correctional officer because he believed she had mind controlling death rays

because, first, part of him did believe staff are involved in mind-controlling activities at the prison, and second because he did not trust the investigator and did not want to tell him what he had really experienced.

On this record, we conclude that it would be frivolous to argue that trial counsel was ineffective by counseling Lindell to recant his claim that he threw the bodily substances on the correctional officer because he believed she had mind controlling death rays in favor of a claim that he was having a flashback to childhood abuse and did not know what he was doing. The claim that Lindell was having a psychotic-like flashback to childhood abuse that caused him to lack the ability to understand the wrongfulness of his conduct and to conform his behavior to the law was more consistent with the NGI plea and at least somewhat supported by the expert testimony. In contrast, Lindell's claim that he threw the substances at the officer to ward of mind controlling death rays was more consistent with the State theory that Lindell planned the attack on the victim in advance, and chose to throw the substances despite knowing it was wrong and having the ability to control his behavior. That is, had Lindell testified that his belief in mind controlling death rays had been the motivation for the attack, there is no reasonable likelihood of a different outcome of the trial.

We also conclude that it would be frivolous to argue that counsel was ineffective by failing to obtain a different expert witness. Nothing in the record or Lindell's no-merit response indicates a possibility that a different expert would have reached a different opinion. As the no-merit report notes, Dr. Lytton reached her conclusions based on undisputed facts. Dr. Lytton testified specifically as to the possible effects of extended segregation on Lindell's mental illness, as well as her assessment of those effects on Lindell based on her review of his records

and her evaluation of him. Accordingly, there is no reasonable likelihood of a different result at trial had counsel obtained a different expert witness.

Next, we agree with counsel's assessment that there would be no arguable merit to a claim that the evidence was insufficient to support the jury verdicts. 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). Here, the testimony of the victim, the investigating officer and Dr. Lytton, if deemed credible by the jury, was sufficient to support the jury verdicts.

The no-merit report also addresses whether there would be arguable merit to any issue based on the jury instructions. We agree with counsel's assessment that there are no issues of arguable merit related to the jury instructions.

Finally, the no-merit report addresses whether a challenge to Lindell's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the trial 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 Lindell 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 the seriousness of the offense, the need to protect the public, and Lindell's particular needs and characteristics. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court

sentenced Lindell to two years of initial confinement and one and a half years of extended supervision. The sentence was within the maximum Lindell 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 Henderson is relieved of any further representation of Lindell in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals