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January 26, 2016

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

2015AP1996-CRNM State of Wisconsin v. Wade M. Gregory (L. C. #2014CF120)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Wade Gregory has filed a no-merit report concluding there is no arguable basis for Gregory to challenge his convictions and sentences for false imprisonment, two counts of domestic disorderly conduct, and one count of domestic battery. Gregory filed a response arguing he should have been placed on probation and the court improperly considered facts related to charges for which the jury acquitted Gregory. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

Gregory was charged with offenses arising out of incidents that occurred April 14 and May 7, 2014, both involving the same victim. He was charged with substantial battery—domestic abuse, strangulation—domestic abuse, and disorderly conduct—domestic abuse, arising out of the April 14 incident in which the victim testified Gregory broke her arm, slapped her, and picked her up off the couch by grabbing her throat, choking her. The victim testified he then pushed her back and she fell, hitting the back of her head on a speaker. Gregory then hit her and kicked her while she was on the ground. The victim's hospital discharge papers state x-rays of her right elbow revealed a displaced fracture. During direct examination, the victim acknowledged initially lying about the incident, saying she fell down the steps because she was concerned child welfare workers might not allow her premature baby to be released to her home if they felt it was an unsafe environment.

Regarding the May 7 incident, Gregory was charged with false imprisonment, strangulation—domestic abuse, disorderly conduct—domestic abuse, and battery—domestic abuse. The victim testified Gregory threw a baby stroller at her, striking her in the head and leaving a scar. Gregory then put his hand around her neck and choked her. When she tried to leave, he leaned against the door, preventing her from exiting the basement where the incidents had occurred. When she eventually succeeded in getting to the kitchen door, he slammed the door on her arm, which was still in a cast from the April 14 incident. As she lay on the floor, he held his foot on her fractured arm, and when she tried to run, he threw the television remote control at her back. She estimated he prevented her from leaving the house for fifteen minutes. She then directed one of the children to go to a friend's house and call the police.

On cross-examination, the victim denied telling hospital staff she was pushed down the stairs by her husband and denied referring to Gregory as her husband. She also acknowledged

medical reports indicating that she denied having unusual pain in her neck, chest, and abdominal area, and that she had no trauma to her head.

The only other witness at the trial was the arresting officer, who confirmed the accuracy of the parts of the victim's account that occurred after he arrived at the scene, except that he did not see red marks on her neck at the time he responded to both of the incidents. After being advised of his right to testify, Gregory chose not to testify, and the defense called no witnesses. The jury found Gregory guilty of disorderly conduct arising out of the April 14 incident, and convicted him of false imprisonment, disorderly conduct, and battery arising out of the May 7 incident. Gregory was acquitted of all of the remaining charges. The court imposed concurrent sentences totaling two years' initial confinement and two years' extended supervision with jail credit of 216 days, and made Gregory eligible for the Challenge Incarceration Program and Substance Abuse Program.

Our independent review of the record discloses no arguable basis for challenging the sufficiency of the evidence to support the jury's verdicts. As the arbiter of the witnesses' credibility, the jury could reasonably accept the victim's account of the crimes. The jury is not required to accept or reject all of any witnesses' testimony, and can select any parts of the testimony it finds credible. *State v. Toy*, 125 Wis.2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). The victim's testimony, if believed by the jury, established all of the elements of false imprisonment, disorderly conduct—domestic abuse, and battery—domestic abuse.

The record also discloses no arguable basis for challenging the sentencing court's discretion. The court could have imposed consecutive sentences totaling seven years and three months' imprisonment, and fines totaling \$22,000. The court appropriately considered the

seriousness of the offenses, Gregory's character, and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

Gregory faults the sentencing court for considering crimes for which he was acquitted, and challenges in particular the court's statement: "She did walk out of there with a broken arm." The sentencing court is allowed to consider other undesirable behavior at sentencing, including conduct for which a defendant was acquitted. *State v. Bobbitt*, 178 Wis. 2d 11, 16-19, 503 N.W.2d 11 (Ct. App. 1993). The acquittals mean the jury had a reasonable doubt about whether Gregory committed the offenses. Proof beyond a reasonable doubt is not required for the sentencing court to consider a defendant's behavior. *Id.*

Gregory also calls attention to the court's statements: "You've been given the God-given ability of being a big guy and you've got to find a certain degree of gentleness in you so you can manage that so it doesn't threaten others. It's just kind of one of those things all right? It is one of those things." Gregory calls our attention to this statement, but does not argue how the statement creates an issue for appeal.

Finally, Gregory contends probation would have been appropriate in this case. Gregory had been placed on probation on two prior occasions for four offenses, and each time had his probation revoked. That fact, along with the seriousness of these offenses, supports the sentencing court's discretionary decision not to impose probation.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgments are summarily affirmed. WIS. STAT. RULE 809.21 (2013-14).

IT IS FURTHER ORDERED that attorney John Bachman is relieved of his obligation to further represent Gregory in this matter. *See* WIS. STAT. RULE 809.32(3) (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals