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March 7, 2016

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

2015AP526-CRNM State of Wisconsin v. David A. Fillyaw (L.C. # 2012CF169)

Before Sherman, J.¹

Attorney Katie York, appointed counsel for David Fillyaw, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to any claims based on: (1) the sufficiency of the evidence to support the conviction for fourth-degree sexual assault; (2) the circuit court's decision denying Fillyaw's

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

motion for a new trial based on judicial bias; (3) the circuit court's decision denying Fillyaw's motion for reconsideration based on new evidence contradicting testimony by a State witness; (4) Fillyaw's jury trial waiver; (5) procedural issues; or (6) the sentence imposed by the circuit court. Fillyaw was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Fillyaw was charged with second-degree sexual assault. Following a bench trial, Fillyaw was convicted of fourth-degree sexual assault. Fillyaw moved for reconsideration. He asserted that he did not go to high school with one of the State's witnesses, contrary to that witness's testimony, and that the court would not have believed the witness's testimony in light of that evidence. Fillyaw also moved for a new trial, arguing that the judge should have recused himself based on his history with a defense witness and that the court failed to apply the reasonable doubt standard. The court denied the motions. The court ordered Fillyaw to serve two years of probation with sixty days of conditional jail time, with an imposed and stayed sentence of nine months of jail.

The no-merit report addresses whether the evidence was sufficient to support the conviction. 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). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including the testimony of

the victim and the investigating officers, was sufficient to support a finding of guilty of the lesser included offense of fourth-degree sexual assault. Additionally, the court adequately explained its application of the reasonable doubt standard in denying Fillyaw's motion for a new trial on grounds the circuit court misapplied the standard of proof. Accordingly, any challenge to the sufficiency of the evidence would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a claim of judicial bias based on the judge disclosing that one of the defense witnesses had previously left harassing phone messages for the judge related to a different case. We agree with counsel that this issue would lack arguable merit. The judge explained that he had no animosity toward the witness and that his prior interaction with the witness did not affect his decision. The judge explained that he found the witness credible and that his history with the witness did not make any difference to him. On this record, a claim of judicial bias would be wholly frivolous. *See State v. Gudgeon*, 2006 WI App 143, ¶¶20-24, 295 Wis. 2d 189, 720 N.W.2d 114 (claim of judicial bias must show either subjective bias, meaning that the judge has "personal doubts as to whether [he or she] can avoid partiality to one side," or objective bias, meaning that "a reasonable person could question the judge's impartiality").

The no-merit report also addresses whether there would be arguable merit to a claim that the circuit court erred by denying Fillyaw's motion for reconsideration based on new information as to one of the State's witnesses. We agree with counsel that this issue would lack arguable merit. The court explained that the new information—that Fillyaw did not go to high school with the witness, as the witness testified—would not have affected the court's decision. The court explained that the witness's testimony was significant in that he was reluctant to give any information incriminating Fillyaw, which lent credibility to the information he provided police

that was favorable to the State. On this record, we agree that further proceedings on this issue would be wholly frivolous.

The no-merit report also addresses whether there would be arguable merit to a challenge to Fillyaw's jury trial waiver. We agree with counsel's assessment that a challenge to the validity of the waiver would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to any claims of procedural error. The no-merit report addresses the circuit court's rulings on the defense motions to introduce evidence as to: (1) a prior sexual assault against the victim to demonstrate inconsistency with the victim's statement to police that nothing like this had happened to her before; and (2) an allegation that the victim stole money from a prior employer. We agree that further proceedings as to either evidentiary issue would be wholly frivolous.

Finally, the no-merit report addresses whether a challenge to Fillyaw's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] 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 Fillyaw 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 gravity of the offense, Fillyaw's character and criminal history, and the need to protect the public. See *State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court imposed two years of probation with sixty days of jail time and an imposed and stayed sentence of nine months of jail. The sentence was within the maximum Fillyaw 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 Katie York is relieved of any further representation of David Fillyaw in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals