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

2016AP1719-CRNM State of Wisconsin v. Remo H. Daniels (L.C. #2015CF592)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Remo H. Daniels appeals from a judgment convicting him of assault by a prisoner. Daniels' appointed appellate counsel, Attorney Jaymes Fenton, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Daniels has exercised his right to file a response; Fenton filed a supplemental report and an affidavit. *See* RULE 809.32(1)(f). Upon consideration of the no-merit reports, the response, and

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that there is no arguable merit to any issue that could be raised on appeal. We summarily affirm the judgment.[2] *See* WIS. STAT. RULE 809.21.

Daniels is serving a lengthy prison sentence for other crimes. On the pretext of having cut his arm, he summoned a correctional officer, Wesley Kubiak, to his cell. When Kubiak approached, Daniels threw urine at him. A jury found Daniels guilty of assault by a prisoner, a Class I felony. The trial court sentenced him to eighteen months' initial confinement and two years' extended supervision consecutive to the sentence he already is serving. *See* WIS. STAT. §§ 939.50(3)(i) and 946.43(2m)(b). This no-merit appeal followed.

The no-merit report addresses the following issues: whether (1) sufficient evidence supports the jury verdict, (2) trial counsel provided ineffective assistance of counsel in regard to the NGI plea, and (3) the trial court erroneously exercised its sentencing discretion. We agree with Fenton that none of the issues have arguable appellate merit.

Upon a challenge to the sufficiency of the evidence to support a jury finding of guilt, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. ***Id.*** The jury is the

[2] Daniels does not appeal from the order denying his pro se motion for postconviction relief in which he challenged the imposition of the mandatory DNA surcharge.

sole arbiter of witness credibility. ***State v. Serebin***, 119 Wis. 2d 837, 842, 350 N.W.2d 65 (1984). The jury, and not this court, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from basic facts to ultimate facts. ***Poellinger***, 153 Wis. 2d at 506.

Kubiak testified that Daniels is a prisoner confined to a state prison and was the sole occupant of his cell; that he threw a liquid toward Kubiak, who, by the odor, color, and consistency, knew the substance to be urine; that the urine came into contact with Kubiak's neck, shoulder, ears, nose, eyes, mouth, and shirt; that Daniels threw the urine with intent to "abuse, harass, offend, intimidate, or frighten" Kubiak; and that Kubiak did not consent to Daniels' action. *See* WIS. STAT. § 946.43(2m)(a)1.-3.; *see also* WIS JI—CRIMINAL 1779A. Kubiak testified that after throwing the substance, Daniels repeatedly yelled, "I got that CO with piss," loud enough for all on the wing to hear. Sufficient evidence supports the jury's verdict, and an appellate challenge to the sufficiency of the evidence would lack arguable merit.

Daniels initially pled both not guilty and not guilty by reason of mental disease or defect (NGI). Defense counsel, appointed by the State Public Defender (SPD), applied for funding for an expert due to Daniels' mental health history and his intermittent placement at the Wisconsin Resource Center. The SPD denied funding. The court determined that trial would proceed as scheduled and informed Daniels personally that the jury first would determine his guilt or innocence, that if it found him guilty and he still wanted to pursue an NGI defense, trial would move to the responsibility phase without expert testimony but he could testify if he so chose. At the end of the guilt phase, however, Daniels waived his right to testify and the defense rested.

The SPD must provide legal services to indigent persons charged with a felony. WIS. STAT. § 977.05(4)(h), (i). Inherent in that duty "is the obligation to provide expert assistance

when essential to a criminal defense." ***Polk Cty. v. State Public Defender***, 179 Wis. 2d 312, 318, 507 N.W.2d 576 (Ct. App. 1993).

Nothing in the record supports a finding that Daniels suffered from a mental disease or defect that rendered him unable to conform his behavior to the requirements of the law such that expert testimony was essential to his defense. The court's colloquy with Daniels regarding his decision not to testify indicates he made his election knowingly, voluntarily, and intelligently.

Given the denial of funding, the lack of evidence to support an NGI defense, and Daniels' informed decision not to testify, counsel's decision not to pursue an NGI defense was one of strategy. Tactical or strategic decisions rationally founded on the facts and the law will not be found to constitute ineffective assistance of counsel. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Further, withdrawing an NGI plea abandons all defenses premised upon nonresponsibility. ***State v. Skamfer***, 176 Wis. 2d 304, 312, 500 N.W.2d 369 (Ct. App. 1993). We see no arguable basis for a claim that counsel's decision not to continue with an NGI defense was either deficient or prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

The no-merit report next considers whether a challenge to the sentence would be meritorious. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See* ***State v. Haskins***, 139 Wis. 2d 257, 268, 407 N.W.2d 309 (Ct. App. 1987). The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

The trial court acknowledged that, as Daniels' anticipated release date is in 2057, the protection of the public had a lesser impact on its sentencing decision. The message it chose to send was that "we're all in a world together," and that "the only thing that keeps us as an organized, civilized society is that we at least try to … treat all the other human beings around us with dignity and respect." It found that Daniels' action was motivated by mean-spiritedness and a desire to cause as much anguish as possible to Kubiak. It therefore imposed the maximum term, necessarily consecutive to his current sentence. *See* WIS. STAT. § 946.43(2m)(b). No basis exists to disturb the sentence.

In his response, Daniels alleges that he received ineffective assistance of counsel from the SPD as an entity for denying funds for a mental health expert so that he could pursue an NGI defense.[3] Again, trial counsel made reasonable efforts to obtain funding for a mental health expert; in any event, one was not essential to his defense. Appellate counsel and this court are unaware of any law allowing a claim of ineffective assistance of counsel against the SPD itself.[4]

Daniels next contends Kubiak lied under oath about the incident; that he could not have assaulted Kubiak by throwing urine because, as he was "on restriction," he had no kind of container in his cell to hold any liquid; that his DNA was not on Kubiak's shirt; that he has

[3] Daniels also raises in his response several issues related to defense counsel's decision not to pursue an NGI defense. Having already addressed that issue, we discuss it no further.

[4] Indigent defendants generally have no constitutional right to state-paid expert witnesses, except for psychiatric experts on the insanity issue in capital crimes. *See* ***Ake v. Oklahoma***, 470 U.S. 68, 83-84 (1985). If Daniels is suggesting that the trial court should have ordered either the SPD to fund an expert witness or the county to assume the cost, he is mistaken. As noted, the record does not indicate that a mental health expert was necessary to his defense. *See* ***State ex rel. Dressler v. Circuit Court for Racine Cty.***, 163 Wis. 2d 622, 640, 472 N.W.2d 532 (Ct. App. 1991).

witnesses who would have corroborated his claim; and that trial and appellate counsel were ineffective for failing to raise these issues.

First, Kubiak did not testify, nor does the two-page conduct report describing the incident received into evidence at trial say, that Daniels used any type of container to throw the urine. Daniels could have used his hand.

Second, Fenton avers in his affidavit that Daniels initially named as a witness an inmate with the surname "Belter" and never identified the second alleged witness. Fenton could not locate Belter and later learned the inmate's surname was "Bethel." Fenton states he did not raise the issue of trial counsel's ineffectiveness because no DNA testing was done on Kubiak's shirt; from further conversations with Daniels, he believes Daniels did not tell trial counsel about Bethel or the other purported witness; Daniels did not say what Bethel would have testified to and Bethel could not have witnessed much, as his cell was down the hall from Daniels' cell; and even if credible, Bethel's testimony could not be newly discovered evidence. *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590.

Given the conduct report and Kubiak's testimony, whatever Bethel's testimony might have been likely would not have undermined the reliability of the trial. *See* ***Strickland***, 466 U.S. at 687. As to Kubiak "lying," Kubiak testified that he could tell the liquid was urine because he tasted it when some got in his mouth but wrote in his report that he did not taste it. Trial counsel probed those inconsistencies. Inconsistencies between trial testimony and previous statements do not by themselves render a witness wholly incredible. ***State v. Smith***, 2002 WI App 118, ¶20, 254 Wis. 2d 654, 648 N.W.2d 15. Moreover, whether Kubiak tasted the substance is not critical. He testified that it looked and smelled like urine and that he may have been confusing the

particulars of that incident with another, as such things have happened to him "multiple times." Kubiak's medical follow-up was documented. His credibility was for the jury to determine. *See* ***Serebin***, 119 Wis. 2d at 842.

Daniels then names two civil matters that appear to involve himself. He does not explain their relevance and we are unable to locate on CCAP the case numbers he provides. In the same paragraph he complains generally about Fenton having filed a no-merit report at all, as Daniels apparently believes the arguments raised in his response show that his case has merit. We already have explained why they do not.

Lastly, Daniels, who is twenty-nine, contends that he cannot properly respond to the no-merit report because he reads, writes, and spells at a fourth-grade level; he therefore asks that we appoint counsel to assist him in drafting a response. We decline his request He has adequately communicated his numerous points to this court. Further, our independent review of the record convinces us that any further proceedings would be frivolous and without arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jaymes K. Fenton is relieved of further representing Daniels in this matter.

Diane M. Fremgen
Clerk of Court of Appeals