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May 23, 2017

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

2016AP446-CRNM State of Wisconsin v. James D. Jenkins (L.C. # 2012CF212)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

James Jenkins appeals a judgment convicting him, following a jury trial, of assault by a prisoner, contrary to WIS. STAT. § 946.43(2m)(a), after he spit on a correctional officer. Attorney Colleen Marion has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses Jenkins' competency to stand trial, whether any

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

reversible error occurred during jury selection, the sufficiency of the evidence, whether the court erred in overruling an objection during closing argument, and whether the circuit court properly exercised its sentencing discretion. Jenkins was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Competence

In Wisconsin, "[n]o person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1). In order to ascertain whether this standard has been satisfied, WIS. STAT. § 971.14(2) directs a Wisconsin court to "appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant," whenever the issue of competency is raised.

Here, the court properly ordered a compentency evaluation after defense counsel notified the court that he had doubts regarding Jenkins' competency to stand trial. Dr. Amelia Fystrom, a psychologist, met and observed Jenkins at Wisconsin Secure Program Facility (WSPF), interviewed staff and Jenkins' psychologist at WSPF, and reviewed his records. She filed a report with the court in which she opined that Jenkins was competent. The report noted that Dr. Fystrom found no evidence that would indicate a mental illness, cognitive defect, or decline in functioning that would cause Jenkins to lack the ability to assist his attorney in his defense.

The circuit court then held a competency hearing at which Fystrom testified by phone, opining that Jenkins had the mental capacity to understand the proceedings and assist in his own

defense. Fystrom testified that, although Jenkins was uncooperative when she interviewed him, she observed him talking with other inmates and with his psychologist. Fystrom opined that Jenkins' speech was organized and that he did not demonstrate any symptoms of delusions or hallucinations, mania or depression. Fystrom also testified that Jenkins had a history of engaging in manipulative behaviors. Defense counsel informed the court at the competency hearing that Jenkins was continuing to take the position that he was not competent. Jenkins told the court that Fystrom was lying. Based upon Fystrom's report and testimony at trial, the court found that Jenkins appeared to be malingering and concluded that he was competent to stand trial.

The issue of Jenkins' competency came up again when Jenkins was appointed new counsel after sentencing. Jenkins' successor counsel told the court he was having difficulties getting Jenkins to cooperate with him, and raised the issue of competency. The court again ordered a competency evaluation. Dr. Erik Knudson filed a report as a result of that evaluation, and opined that Jenkins was competent. Knudson also concluded that Jenkins was faking symptoms of mental illness. The court conducted a hearing at which defense counsel informed the court that Jenkins was not challenging Knudson's report or the conclusion that Jenkins was competent. The court therefore entered a finding that Jenkins was competent.

We will reverse a circuit court's determination regarding a defendant's competency to proceed only if the determination is clearly erroneous. ***State v. Garfoot***, 207 Wis. 2d 214, 223-25, 558 N.W.2d 626. That is not the case here. The circuit court properly ordered a competency evaluation of Jenkins both times the issue of competency was raised by defense counsel. When Jenkins disputed Fystrom's report, the court held a competency hearing as required under WIS. STAT. § 971.14(4)(b). The court's finding that Jenkins was competent was supported by Fystrom's written report and testimony. Jenkins did not contest the later report filed by Knudson

and, therefore, the court was not required to hold an evidentiary hearing. The court engaged in a colloquy with Jenkins, advising him that if he challenged the report's finding that he was competent, Jenkins would be entitled to an evidentiary hearing. Jenkins confirmed that he understood. The court entered a finding that Jenkins was competent, based on Knudson's report. In light of all of the above, we agree with counsel that any challenge to the circuit court's competency determinations would be without arguable merit on appeal.

Jury Selection

The no-merit report discusses whether there would be any arguable merit to challenging the court's denial of defense counsel's motion to strike a potential juror for cause. During voir dire, juror Kennet Peeler stated that he had watched a reality television program about prisoners where "people are bleeding and spitting." When defense counsel questioned Peeler if seeing the program would affect his ability to decide the case fairly, Peeler responded, "[That's] a tough question." The court asked additional questions, and Peeler ultimately responded "[y]es" when asked by the court if he could be fair and impartial. Defense counsel moved to strike Peeler for cause, and the court denied the motion, finding Peeler to be credible when he said he could be fair and impartial. Defense counsel later used a peremptory strike against Peeler and, as a result, Peeler did not sit on the jury that convicted Jenkins.

At most, Jenkins could argue that the court's denial of the motion to strike Peeler for cause resulted in the loss of use of a peremptory challenge that otherwise might have been used against another juror. However, there is no constitutional right to a peremptory challenge. *See* ***United States v. Martinez-Salazar***, 528 U.S. 304 (2000); ***Rivera v. Illinois***, 556 U.S. 148, 152 (2009). Moreover, nothing in the record or the no-merit report suggests that the jury that was

impaneled actually included any biased juror. Defense counsel noted during voir dire that everyone in the jury pool was white, but that Jenkins is African American. Nevertheless, counsel did not raise any ***Batson***[2] challenge, nor were any prospective African American jurors stricken from the jury pool. In light of all of the above, we agree with counsel that no issue of arguable appellate merit exists with respect to jury selection.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Here, there would be no arguable merit to challenging the sufficiency of the evidence to support the jury's guilty verdict. To prove Jenkins guilty of assault by a prisoner, the State needed to prove that (1) Jenkins was a prisoner, (2) the victim, D.T., was an officer, (3) Jenkins threw or expelled a bodily substance at or toward D.T. with intent that the substance come into contact with D.T., (4) Jenkins intended to abuse, harass, offend, intimidate or frighten D.T., and (5) D.T. did not consent. *See* WIS. STAT. § 946.43(2m)(a) and WIS JI—CRIMINAL 1779A.

As to the first element, the prison registrar testified that Jenkins was a prisoner at the time of the incident. As to the second, third, and fifth elements, D.T. testified that he was a correctional officer and that Jenkins spat at him without his consent. The State also introduced

[2] ***Batson v. Kentucky***, 476 U.S. 79, 103–105 (1986), forbids the State from striking jurors based solely on race.

DNA evidence linking Jenkins' DNA to the saliva on D.T.'s pants. As to the fourth element, the jury could infer Jenkins' intent to abuse, harass, offend, intimidate or frighten D.T. from D.T.'s testimony that he felt offended and abused. In light of these facts, we agree with counsel that there would be no arguable merit to challenging the sufficiency of the evidence on appeal.

Closing Argument

During the State's closing argument, defense counsel objected to the State's assertion that the correctional officer had no idea whether a surveillance camera in the area was pointed on him and, thus, would not have risked harming Jenkins. Defense counsel objected to the statement on the basis that there was no testimony about whether the officer knew where the camera was focused. The court overruled the objection, but did not provide a reason for doing so. However, a circuit court has discretion regarding the propriety of closing arguments. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). While argument on matters not in evidence is improper, ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196, counsel is permitted to draw any reasonable inference from the evidence. ***State v. Burns***, 2011 WI 22, ¶48, 332 Wis. 2d 730, 798 N.W.2d 166. We agree with counsel's analysis that the State's comment can be characterized as an argument regarding a potential inference to be drawn from the evidence, which is not improper. Accordingly, we agree with the conclusion in the no-merit report that any challenge to the court's ruling on defense counsel's objection during the State's closing argument would be without arguable merit on appeal.

Sentence

A challenge to Jenkins' sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and

it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court sentenced Jenkins to one year of initial confinement and two years of extended supervision, to be served consecutive to the sentence he was then serving. The components of the bifurcated sentence imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 946.43(2m)(a) (classifying assault by a prisoner by throwing or expelling saliva as a Class I felony); 973.01(2)(b)9. and (d)6. (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony). In imposing sentence, the court considered the gravity of the offense, Jenkins' criminal history, his character, and his rehabilitative needs. Under these circumstances, it cannot reasonably be argued that the sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Additionally, we agree with counsel that there would be no arguable merit to challenging Jenkins' waiver of his right to resentencing. Jenkins was appointed successor counsel after sentencing, after the prosecutor informed him that his trial counsel had been under the influence of alcohol at Jenkins' sentencing hearing. The court held a hearing at which Jenkins appeared with his successor counsel. The court informed Jenkins that he was entitled to a new sentencing hearing, and the State agreed. The court adjourned the hearing after Jenkins' successor counsel raised the issue of competency. The court reconvened at a later hearing, after an evaluation was conducted and a report was filed, concluding that Jenkins was competent, as discussed above. Jenkins' successor counsel informed the court that Jenkins did not wish to challenge the competency finding or proceed to resentencing. The court then engaged in a colloquy with Jenkins, confirming on the record that he understood he had a right to be resentenced, but that he

wished to let the existing sentence stand. The court further confirmed with Jenkins that no one had forced, threatened, or made any promises to him regarding his decision. Based on the record and the no-merit report, we are satisfied that there would be no arguable merit to a claim that Jenkins did not knowingly, voluntarily, and intelligently waive his right to be resentenced.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Colleen Marion is relieved of any further representation of Jenkins in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals