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**DISTRICT III/II**

June 28, 2017

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Nhia Xiong  
1201 Meridian Heights, #3  
Eau Claire, WI 54701

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

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2016AP1327-CRNM      State of Wisconsin v. Nhia Xiong (L.C. #2015CF594)

Before Reilly, P.J.<sup>1</sup>

Nhia Xiong appeals from a judgment convicting him of obstructing an officer and disorderly conduct. Xiong's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Xiong filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports, and

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2015-16 version.

Xiong's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

Xiong was convicted following a jury trial of obstructing an officer and disorderly conduct. The charges stemmed from Xiong's combative behavior after police tried to arrest him for unlawful use of a telephone.<sup>2</sup> The circuit court placed Xiong on probation for a period of eighteen months. This no-merit appeal follows.

The no-merit report addresses whether the evidence at trial was sufficient to support Xiong's convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the convictions, is so lacking in force and probative value 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). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Xiong of his crimes. We agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). Its decision to place Xiong on probation for a period of eighteen months does not "shock public sentiment and violate the judgment of reasonable people concerning what is

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<sup>2</sup> Xiong was accused of threatening a neighbor with physical harm over the telephone. The jury acquitted him of that charge as well as a charge of misdemeanor bail jumping.

right and proper under the circumstances.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to the court’s sentencing decision would lack arguable merit.

Finally, the no-merit report addresses whether Xiong was afforded effective assistance of trial counsel. There is nothing in the record to suggest that Xiong’s trial counsel was ineffective. Indeed, counsel successfully defended Xiong from two charges at trial—unlawful use of a telephone and misdemeanor bail jumping. We are satisfied that the no-merit report properly analyzes this issue as without merit, and we will not discuss it further.

As noted, Xiong filed a response to counsel’s no-merit report. In it, he indicates that he wanted a court trial but that no one would listen to him. He also suggests that the circuit court judge was biased against him. We are not persuaded that these assertions present issues of arguable merit. There is no indication in the record that Xiong desired a court trial.<sup>3</sup> Even if he did, he could not have obtained one without consent of the State. *See* WIS. STAT. § 972.02(1). Likewise, there is no indication that the circuit court judge was biased. Xiong has done nothing to overcome the presumption that the judge was free of bias. *See State v. McBride*, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994).

In addition to the foregoing issues, we considered other potential issues that arise in cases tried to a jury, *e.g.*, jury selection, objections during trial, use of proper jury instructions, and propriety of opening statements and closing arguments. Here, the jury was selected in a lawful

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<sup>3</sup> The supplemental no-merit report also includes an affidavit from trial counsel, who has no recollection of Xiong requesting a court trial.

manner. Objections during trial were properly ruled on. The jury instructions accurately conveyed the applicable law and burden of proof. No improper arguments were made to the jury during opening statements or closing arguments. Accordingly, we conclude that such issues would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.<sup>4</sup> Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Richard Yonko of further representation in this matter.

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 Richard Yonko is relieved of further representation of Xiong in this matter.

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).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>4</sup> After submission of this appeal, counsel notified the court that Xiong has been recently determined incompetent to proceed in other, ongoing criminal matters. This subsequent determination of incompetency does not present an issue of arguable merit in this case.