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**DISTRICT IV**

June 6, 2019

To:

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

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2018AP285-CRNM      State of Wisconsin v. Markus D. Evans (L.C. # 2016CF241)

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

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Markus D. Evans appeals a judgment convicting him of battery by a prisoner, as a repeater. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2017-18),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Evans received a copy of the report, was advised of his right to respond, and has not filed a response. Upon consideration of the no-merit report and our independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Evans was previously convicted of first-degree intentional homicide and sentenced to life in prison without the possibility of release. While incarcerated at the Wisconsin Secure Program Facility, he was charged with battery by a prisoner, as a repeater. The complaint alleged that Evans struck a correctional officer in the face without the officer's consent. The officer was taken to the hospital and treated for a broken nose. Following pretrial litigation, a jury convicted Evans of the sole charge, and the circuit court imposed a \$500 fine and a five-year bifurcated sentence, with three years of initial confinement followed by two years of extended supervision, to run consecutive to his life sentence.

Counsel's no-merit report addresses whether there was sufficient credible evidence to support the guilty verdict. We must affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. *Id.* at 504. Counsel's no-merit report sets forth the applicable standard of review and the evidence satisfying each element of the crime. The State's evidence included two eyewitnesses

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

who saw Evans hit the victim, as well as a video of the incident. We agree with appellate counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also discusses the circuit court's pretrial rulings and concludes that none gives rise to a meritorious challenge. Specifically, the no-merit report addresses the court's decisions allowing Evans to be shackled at trial, and denying Evans's motions to appoint a special prosecutor; to admit other acts evidence; to instruct the jury on self-defense; to strike the repeater enhancer as unconstitutional; and to dismiss based on the rule of lenity. Having independently reviewed the record, we conclude that appellate counsel's no-merit report properly analyzes potential issues concerning these pretrial rulings as without arguable merit and we will not discuss them further.

Counsel's no-merit report concludes with a discussion of whether the sentence was the result of an erroneous exercise of discretion or was unduly harsh or excessive,<sup>2</sup> whether the sentencing court relied on inaccurate information, and whether any new factor exists to support sentence modification. This court is satisfied that the no-merit report properly analyzes these potential sentencing issues as without arguable merit and this court will not discuss these points further.

The no-merit report does not discuss several potential issues that arise in cases tried to a jury, *i.e.*, jury selection, evidentiary objections during trial, the defendant's decision whether or

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<sup>2</sup> In addition to appellate counsel's discussion, the record demonstrates that the circuit court properly exercised its discretion in imposing a \$500 fine, observing that while the consecutive nature of the sentence might have no "worth," "[t]here is some merit to the idea that a court obligation hanging out there may [be a] consequence [to] Mr. Evans for some period of time maybe."

not to testify, jury instructions, and the propriety of the attorneys' opening and closing statements. We address these potential issues to demonstrate that the no-merit procedure has been followed. *See State v. Allen*, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (difficult to know the nature and extent of the Court of Appeals' examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion).

Our independent review of the record discloses no issue of arguable merit. The record reveals no impropriety in the jury selection and no objection was made to the jury's composition. There is no basis to challenge the circuit court's rulings on evidentiary objections. The court conducted a proper colloquy with Evans about his waiver of the right to testify. The jury did not ask any questions during deliberations, which lasted less than twenty minutes. After the guilty verdict, the jurors were individually polled, and the court properly denied Evans's motion for judgment notwithstanding the verdict.

The jury instructions conveyed the applicable law and burden of proof. In particular, trial counsel objected to WIS JI—CRIMINAL 140, which is the pattern jury instruction on the burden of proof and presumption of innocence. Trial counsel challenged as misleading the instruction's standard language that: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth." The circuit court agreed and substituted the disputed language with the following: "You are to search the evidence for the truth, but if in your search you have any reasonable doubt about the truth, the State has not met its burden."

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Evans on appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorneys Kelsey Loshaw and Andrew R. Hinkel are relieved from further representing Markus D. Evans in this appeal. WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*