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DISTRICT IV

May 21, 2020

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

2019AP214-CRNM State of Wisconsin v. Jeik Romero (L.C. # 2017CF297)

Before Fitzpatrick, P.J., Blanchard, and Nashold, 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).

Jeik Romero appeals a judgment of conviction for assault by a prisoner. Attorney Jennifer Lohr, appointed counsel for Romero, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386

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

U.S. 738 (1967). Romero was sent a copy of the report and has not filed a response. Upon consideration of the report and an independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Romero's conviction was based on an incident in which Romero, while confined in a state prison, spit on a correctional officer as the officer was escorting him to a shower. The case was tried to a jury. After the jury found Romero guilty, the circuit court sentenced Romero to a four-year term of imprisonment consisting of two years of initial confinement and two years of extended supervision, consecutive to any other sentence. The court also imposed a \$1,000 fine.

The no-merit report first addresses sufficiency of the evidence. When addressing sufficiency of the evidence, "an appellate court may not reverse a conviction unless 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). "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Id.* at 506-07.

As relevant here, and as set forth in the instructions the jury received, the crime of assault by a prisoner requires the State to prove that: (1) the defendant was a prisoner confined to a state prison; (2) the victim was an officer of the prison; (3) the defendant threw or expelled a bodily substance (here, saliva) at or toward the officer with the intent that the substance come into contact with the officer; (4) the defendant intended to abuse, harass, offend, intimidate, or

frighten the officer; and (5) the officer did not consent to the substance being thrown or expelled at or toward the officer. *See* WIS. STAT. § 946.43(2m)(a) (2015-16).

We agree with counsel that there is no arguable merit to challenging the sufficiency of the evidence. Without reciting all of the trial evidence here, we are satisfied that it was sufficient. This evidence included the correctional officer's testimony describing Romero's act of spitting on her without her consent and the context surrounding the incident. Romero testified and admitted that he spit on the officer. He also effectively admitted that he intended for his saliva to contact the officer. He testified that he was "trying to hit her I guess, yeah," and that "if I was not trying to spit on her, then I would spit to the other side."

By the close of evidence, the only element that arguably remained in dispute was the fourth element, whether Romero intended to abuse, harass, offend, intimidate, or frighten the correctional officer. Thus, we will provide a bit more discussion of the evidence relating to that element. Romero provided conflicting testimony on this element, at times indicating that he did not know why he spit on the officer and at other times indicating that he was reacting to the officer's alleged refusal to loosen his restraints, or to his treatment in prison more generally. The officer testified that the only thing she recalled Romero stating to her during the time leading up to the incident was "you don't know who you're dealing with," and that she made no response to the statement so as not to escalate the situation. Romero admitted that he "[p]robably" made this statement to the officer. Further, as already noted, Romero effectively admitted that he intended to spit on the officer. Based on all of the evidence, the jury could reasonably infer that Romero intended to abuse, harass, offend, intimidate, or frighten the officer. Thus, there is no arguable merit to claiming that the evidence was insufficient as to the fourth element.

Having concluded that there is no arguable merit to challenging the sufficiency of the evidence, we turn to other potential issues.

The no-merit report points out that the correctional officer's testimony included references to the fact that Romero was in a maximum custody facility and that the incident took place in a segregation unit. Romero's trial counsel requested a sidebar to express concern about testimony regarding segregation that could imply that Romero had behavioral problems. The circuit court cautioned the prosecutor not to go further on that topic, and the prosecutor agreed. We agree with the no-merit report's implicit conclusion that there is no arguable merit to pursuing relief based on the officer's references to maximum custody and segregation. Under the circumstances, it would be frivolous to argue that these references affected the outcome.

Our review of the record discloses no other issues of arguable merit with respect to events before or during trial. We see no basis in the record to challenge the circuit court's pretrial rulings, jury selection, the circuit court's evidentiary rulings, Romero's decision to testify, or the jury instructions. No improper arguments were made to the jury.

Similarly, we see no issues of arguable merit with respect to sentencing. Romero's sentence to prison and a \$1,000 fine were within the maximums allowed, taking into consideration his repeater status as proven at sentencing. Although the circuit court's sentencing remarks were brief, the court referenced the required sentencing factors along with other relevant factors, and the court did not consider any inappropriate factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The record shows no other arguable basis for Romero to challenge his sentence.

Our review of the record discloses no other potential issues for appeal.

IT IS ORDERED that the judgement of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jennifer Lohr is relieved of any further representation of Jeik Romero in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals