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

2017AP1607-CRNM State of Wisconsin v. Brian A. Ducksworth (L.C. # 2015CF822)

Before Brash, P.J., Dugan and White, 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).

A jury found Brian A. Ducksworth guilty of attempted second-degree sexual assault by use of force, burglary, intimidation of victim, strangulation, false imprisonment, misdemeanor battery, and misdemeanor disorderly conduct, all as a repeater. Ducksworth appeals from the judgment of conviction. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2017-18),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Upon consideration of the report, Ducksworth's response, and an independent review of the record, as mandated by ***Anders***, the judgment is summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

At a jury trial, a young woman testified that she encountered Ducksworth in the hallway of her apartment building when she returned home at 4:00 a.m. on a Saturday morning. Ducksworth asked if he could use her phone. She told him "no" and as she tried to enter her apartment, Ducksworth forced his way in. He grabbed the victim, told her to get down on her knees, and threatened that if she screamed, he would kill her. Ducksworth covered the victim's mouth as she attempted to scream and he made it difficult for the young woman to breathe. The victim reported that Ducksworth placed his hand on the strap of the tank top she was wearing. Because a neighbor had called police about a suspicious man in the apartment building's hallway and reported seeing the man go into her neighbor's apartment, police were on site and heard a muffled scream. The police forced entry into the apartment before anything else happened. After being convicted on all charges, Ducksworth was sentenced to concurrent terms. The controlling sentence is the sentence of fifteen years of initial confinement and seven years and six months of extended supervision on the attempted sexual assault conviction.[2]

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

[2] The original sentence on the attempted sexual assault conviction was for ten years of extended supervision. The sentencing court adjusted the sentence upon receipt of a letter from the Department of Corrections pointing out that the term of extended supervision exceeded the requirements of WIS. STAT. § 939.32(1m)(b).

The no-merit report addresses the potential issues of whether it was error to deny the defense motion to dismiss the attempted second-degree sexual assault charge because it was inadequately pled in the complaint, whether Ducksworth properly waived his right to remain silent before testifying, whether the evidence was sufficient to support the convictions, whether jury selection, opening and closing arguments, and the jury instructions were proper, and whether the sentences were the result of an erroneous exercise of discretion or were unduly harsh or excessive. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit, and this court will not discuss them further, except as necessary to address Ducksworth's response.

In his response to the no-merit report, Ducksworth first addresses the denial of his motion to dismiss the charge of attempted second-degree sexual assault by use of force. He claims the charge should have been dismissed because the complaint did not establish that the threat of violence was the means by which the attempted sexual assault occurred but only that the threat of violence was a mere concurrent circumstance. In support of his claim, Ducksworth cites to the court of appeals' decision in ***State v. Bonds***, 161 Wis. 2d 605, 469 N.W.2d 184 (Ct. App. 1991), *rev'd*, 165 Wis. 2d 27, 477 N.W.2d 265 (1991). As the citation reflects, the holding Ducksworth relies on was reversed by the Wisconsin Supreme Court. The supreme court disagreed with the court of appeals' interpretation of WIS. STAT. § 940.255(2)(a). ***Bonds***, 165 Wis. 2d at 31. It held that the requirement that sexual contact be "by use or threat of force or violence" does not mean that the force must be directed toward compelling the victim's submission and that the phrase "includes forcible contact or the force used as the means of making contact." ***Id.*** at 31-32.

The complaint alleged that Ducksworth was forcibly restraining the young woman with one hand on her mouth when he began to touch her tank top but was interrupted by entry of the

police. The complaint was sufficient to establish the probable cause that Ducksworth committed the crime of attempted second-degree sexual assault by use of force. *See* ***State v. Grimm***, 2002 WI App 242, ¶15, 258 Wis. 2d 166, 653 N.W.2d 284 (a complaint is sufficient if the facts and reasonable inferences drawn from the facts in the complaint allows a reasonable person to conclude that a crime was probably committed by the defendant). Therefore, there is no arguable merit to a claim that the motion to dismiss the attempted second-degree sexual assault charge should have been granted.

Ducksworth further asserts that the evidence was not sufficient on any of the charges. We have confirmed, however, appointed appellate counsel's conclusion that there was sufficient evidence. Ducksworth's assessment of the sufficiency of the evidence relies on his own testimony which contradicted that of the victim's and negated intent elements of the offenses.[3] The jury rejected his testimony, as it was free to do. We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). There is no arguable merit to a challenge to the sufficiency of the evidence.

[3] Ducksworth testified that he intended no harm to the young woman and that he only entered her apartment to evade a person who was possibly pursuing him and intending to harm him.

Ducksworth contends that the trial court failed to give WIS JI—CRIMINAL 484.[4] Ducksworth is mistaken. The trial court gave the appropriate instruction to the jury but later noted that it had failed to print a copy of that instruction for the attorneys. The trial court supplied the printed copy. There is no arguable merit to a claim that the instruction was omitted.

Ducksworth also complains that veteran jurors were used and that the defense exhausted all of its peremptory strikes to remove the veteran jurors. About half the jury pool indicated that they had served on a jury the previous week. All the veteran jurors indicated that they could be fair and not one juror thought that past service on the jury would affect his or her ability to serve on the jury.[5] Contrary to Ducksworth's contention, the trial court was not required to remove veteran jurors as a matter of law. *See* ***State v. Kiernan***, 227 Wis. 2d 736, 747, 596 N.W.2d 760 (1999). The record does not indicate the type of case the veteran jurors heard the week before, which jurors were veteran jurors, or how preemptory strikes were used to reach the final jury

[4] WISCONSIN JI—CRIMINAL 484 introduces the reading of the forms of the verdict provided to the jury and informs:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the (information) (complaint). Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

[5] Only one juror indicated that he could not "wipe out what occurred last week," but that juror indicated he could be fair. That juror did not serve on the jury.

panel.[6] Consequently, the record does not permit any suggestion that Ducksworth could make the individualized showing necessary to give arguable merit to a claim that the veteran jurors were objectively biased based solely on past service. *See* ***id.*** at 749. There is no arguable merit to a claim that veteran jurors should have been removed for cause.

Ducksworth points to a portion of the transcript at the very beginning of the trial where the trial court was explaining to potential jury pool members how the proceeding would be conducted. Ducksworth contends the trial court's interaction with the jurors subtly persuaded the jury to quickly convict. Although the trial court suggested that it was likely Ducksworth's case would proceed faster than the case some pool members sat on the previous week, there was nothing in the words the trial court used that informed jurors that the trial court expected a quick conviction.[7] Further, the jury was instructed before deliberations that: "If any member of the jury has an impression of my opinion as to whether or not the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence." Juries are

[6] Ducksworth made no objection to the jury pool, did not request that any jurors be struck for cause, and did not object to the ultimate panel that was picked. Any claim of error was forfeited. If forfeiture applies to a claim, then the claim may be addressed within the rubric of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. There is no arguable merit to a claim that trial counsel was ineffective for not objecting to the use of veteran jurors. It was established during voir dire that the veteran jurors were not biased. There was no basis for an objection. "[T]rial counsel could not be ineffective for failing to make meritless arguments." ***State v. Allen***, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245.

[7] The trial court stated:

> The State will be able to present their case first. They have the burden of proof, so they will put their witnesses on. I expect this case, for those of you who served last week, to go a lot quicker than last week's case. Every case is unique. The parties are different, the witnesses are different. I just anticipate, given the nature of this case, that things will move along fairly rapidly. Don't draw any inferences from that. It's just the nature of how cases go.

presumed to follow properly given admonitory instructions. ***State v. Leach***, 124 Wis. 2d 648, 673, 370 N.W.2d 240 (1985). Therefore, there is no arguable merit to a claim that the trial court influenced the jury to convict Ducksworth.

Ducksworth further asserts that the prosecutor made improper comments in both the opening and closing arguments: that Ducksworth was prowling in the hallway looking for somebody to sexually assault, that what the victim said "makes the most sense," that what the victim said "is credible," that Ducksworth's story about what happened "isn't reasonable," that the victim's testimony was more credible than Ducksworth's testimony, and that the jury needed to hold Ducksworth accountable and find him guilty. Ducksworth also claims that the prosecutor invaded the province of the jury to determine credibility. "A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Also "a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented." ***Id.*** at 17. The prosecutor's comments were proper comments on the evidence and his view of the competing credibility of the witnesses.[8] Additionally, the jury was instructed that closing arguments were not evidence, but opinions, and that the jury should draw its own conclusions from the evidence. That standard instruction placed

[8] In support of his claim that the prosecutor improperly suggested Ducksworth was prowling in the hall, Ducksworth cites ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980), where the court held it was improper for the prosecutor to argue there was no bias in the state trooper's testimony by commenting that the officer who issued the ticket did not get any bonus or brownie points. In ***Albright***, the prosecution had succeeded in preventing the defendant's counsel from raising and presenting evidence regarding the officer's entitlement to a bonus or brownie points in regard to the number of tickets issued. ***Id.*** Thus, the comment in the closing argument was improper because it raised matters not in evidence and on a prohibited subject. ***Id.*** The comment Ducksworth targets was not a factual statement but the prosecutor's impression of what Ducksworth was doing in the hall. The ***Albright*** holding applicable to arguing facts not of record has no application in Ducksworth's case.

the prosecutor's argument in proper perspective. ***State v. Draize***, 88 Wis. 2d 445, 456, 276 N.W.2d 784 (1979). Again, it is presumed that the jury followed that instruction. ***Leach***, 124 Wis. 2d at 673. There is no arguable merit to a claim that there was improper opening or closing argument.

Ducksworth suggests that the trial court erred in admitting testimony about the victim's credibility which interfered with the jury's role and caused the real controversy to not be tried. This is the one point in his response in which Ducksworth does not give a citation to the trial transcript. We are not directed to the testimony he considers to fall within this claim. He may be referring to the responding officer's testimony that the victim's statements about what happened were consistent.[9]

No witness may testify that another physically and mentally competent witness is telling the truth. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). There is no violation of that rule of law here because the officer's testimony that the victim was consistent in her statements did not have the purpose nor the effect of attesting to the victim's truthfulness. *See* ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App.1992) (officer's testimony that during the investigation he believed the accomplice's statements to police did not violate the

[9] The exchange was:

> Q: You interviewed [the victim] on the night of this offense right?
>
> A: Yes.
>
> Q: And you saw her testify today over eight months later, correct?
>
> A: Correct.
>
> Q: And was her statements or were her statements about what happened that night fairly consistent between the two dates?
>
> A: Yes.

Haseltine rule because "neither the purpose nor the effect of the testimony was to attest to [the witness's] truthfulness"). Rather, the testimony that the statements were consistent was merely evidence of a factor a jury could use to assess the victim's credibility—consistency. It was still left to the jury to assess the credibility of the witness. *See* ***State v. Davis***, 199 Wis. 2d 513, 521, 545 N.W.2d 244 (Ct. App. 1996) (officer's testimony that witnesses gave very good statements and were "excellent witnesses" was not a comment on their credibility, but rather related to their demeanors; the officer's testimony did not unfairly taint the fact-finding process). There is no arguable merit to a claim that improper testimony about credibility was admitted.

Ducksworth further claims he was denied the effective assistance of trial counsel because trial court failed to pursue an alibi defense. We summarily reject such a claim as having arguable merit because there was no dispute that Ducksworth was at the victim's apartment when the crimes occurred since he was found in the victim's apartment and he admitted being there. Ducksworth also has a laundry list of claims of ineffective trial counsel for: failing to object to the opening and closing arguments, failing to object to the jury panel, failing to properly investigate, and failing to call witnesses on his behalf. We have already determined that there is no arguable merit to potential claims about the jury panel and opening and closing arguments. Trial counsel could not have been ineffective with regard to those claims. This record does not permit a suggestion that trial counsel failed to investigate or call available witnesses. Therefore, there is no arguable merit to any claim that trial counsel was ineffective for the reasons Ducksworth identifies.

Finally, Ducksworth suggests several errors occurred at the preliminary hearing. He contends the evidence was not sufficient for bindover on the attempted sexual assault charge and that the officer's testimony was not consistent with his written report. He also asserts that his trial counsel was ineffective at the preliminary hearing for not objecting to the use of the officer's

testimony without a showing that the victim was unavailable, for not objecting to the officer's inconsistent testimony, for failing to challenge that there was no physical evidence produced at the preliminary hearing, for failing to call any witnesses, and for conceding all other charges in the criminal complaint.[10] We need not address potential claims of error at the preliminary hearing. An error free trial cures defects at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 632, 467 N.W.2d 108 (1991); ***State v. Noll***, 160 Wis. 2d 642, 645, 467 N.W.2d 116 (1991).

Our review of the record discloses no other potential meritorious issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Ducksworth further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Angela Dawn Wenzel is relieved from further representing Brian A. Ducksworth in this appeal. *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

[10] Ducksworth equates trial counsel's concession that the criminal complaint was adequate to all other charges except the attempted sexual assault charge as entry of a guilty plea without his consent. Obviously trial counsel's acknowledgement that the other charges were adequately pled did not have that effect since a jury trial was held.