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April 29, 2021

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

2020AP405-CRNM State of Wisconsin v. Ronald L. Kupsy (L.C. # 2017CF427)

Before Blanchard, Kloppenburg, and Graham, 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).

Attorney Angela Kachelski, appointed counsel for Ronald Kupsy, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Kupsy was sent a copy of the report and has

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

filed a response, and Attorney Kachelski filed a supplemental no-merit report. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Kupsky was charged with assault by a prisoner. The charge was based on an incident during which Kupsky spit into a correctional officer's face. During the incident, Kupsky also grabbed the officer's Taser and threw the officer's watch against a wall. Kupsky entered pleas of not guilty and not guilty by reason of mental defect.

The psychologist who evaluated Kupsky submitted a report that included her conclusions as to Kupsky's mental status and responsibility. She concluded that Kupsky suffered from Unspecified Depressive Disorder and Other Specified Personality Disorder with Antisocial and Schizoid Features. However, she also concluded that "I do not believe there is support for a conclusion that, as a result of a mental disease or defect, Mr. Kupsky lacked substantial capacity to appreciate the wrongfulness of his conduct or the capacity to conform his conduct to the requirements of the law."

The circuit court held a bifurcated jury trial consisting of a guilt phase and a responsibility phase. In the guilt phase, the jury found that Kupsky was guilty of the charge of assault by a prisoner.

In the responsibility phase, Kupsky was the sole witness presented for the defense; the examining psychologist did not testify. The jury was provided with a special verdict that, consistent with the Wisconsin pattern jury instructions, asked two questions: (1) "At the time the crime was committed, did the defendant have a mental disease or defect?" and (2) "As a result of

the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?” *See* WIS JI—CRIMINAL 605B. The jury answered the first question “no” and, therefore, did not answer the second question.

The circuit court sentenced Kupsy to a three-year term of imprisonment consisting of one year of initial confinement and two years of extended supervision, consecutive to any other sentence. The court also ordered \$295 in restitution to cover the cost of the correctional officer’s watch, which had been broken into pieces during the incident.

The no-merit report first discusses the procedural events prior to trial. Based on our review of the record, we agree with counsel’s conclusion that there is no arguable merit to pursuing any issue based on the events prior to trial. We now discuss the trial.

“When a criminal defendant pleads not guilty and not guilty by reason of mental disease or defect, the jury hears evidence relating to the defendant’s guilt in the first phase of the trial, and if the jury finds the defendant guilty, the trial proceeds to the second phase.” *State v. Magett*, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W.2d 42. The first phase proceeds as a regular criminal trial.

In the second phase, the jury considers whether the defendant had a mental disease or defect at the time of the crime and whether, “as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.”

Id. (quoting WIS. STAT. § 971.15(1)).

Guilt Phase

The no-merit report addresses whether there is arguable merit to pursuing any issue based on the guilt phase of Kupsky's trial. In his response to the report, Kupsky does not challenge any aspect of the guilt phase. Further, we agree with counsel that there are no issues of arguable merit to pursue based on this phase.

First, there is no basis to argue that the evidence was insufficient to support the jury's guilty verdict. We will not overturn 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." See *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting all of the evidence here, we are satisfied that it is sufficient.²

Second, the record discloses no issues of arguable merit with respect to the circuit court's rulings on motions in limine, jury selection, the circuit court's evidentiary rulings, Kupsky's decision not to testify during the guilt phase, the jury instructions, or arguments made to the jury. Our review of the record discloses no other issues of arguable merit with respect to the guilt phase.

² Kupsky stipulated to the first element of assault by a prisoner, namely, that he was a prisoner confined to a state prison as a result of a violation of law. The circuit court conducted an appropriate colloquy with Kupsky to ensure that he made a personal, knowing, and voluntarily waiver of his right to a jury trial on this element. See *State v. Hawk*, 2002 WI App 226, ¶¶32-36, 257 Wis. 2d 579, 652 N.W.2d 393 (explaining that a jury trial waiver analysis is the same when the defendant waives the right to a jury trial on one or more elements). We see no arguable basis to challenge Kupsky's waiver.

Responsibility Phase

We turn to the responsibility phase of Kupsky’s trial. “Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.” WIS. STAT. § 971.15(3); *see also Magett*, 355 Wis.2d 617, ¶39 (defendant has the burden of proof). “Ordinarily, the defendant will offer expert testimony,” but “a defendant is not required to present expert testimony to prove the elements of [this] defense.” *Magett*, 355 Wis. 2d 617, ¶7. The defendant may “offer testimony by lay witnesses as well as [the defendant’s] own testimony.” *Id.*

The no-merit report addresses whether there are any issues of arguable merit to pursue based on the responsibility phase of Kupsky’s trial. We agree with counsel that there are not. The record discloses no arguably meritorious issues with respect to the circuit court’s evidentiary rulings, Kupsky’s decision to testify during this phase,³ the jury instructions, or arguments made to the jury. Our review of the record discloses no other issues of arguable merit with respect to the responsibility phase.

In his response to the no-merit report, Kupsky claims that trial counsel was ineffective because counsel did not call the examining psychologist to testify. Kupsky argues that, if the psychologist had testified, the jury would have answered “yes” instead of “no” to the special verdict question that asked whether he had a mental disease or defect. As noted above, the psychologist concluded that Kupsky suffered from two mental conditions.

³ “[A]lthough a better practice, a circuit court is not required to conduct a right-to-testify colloquy at the responsibility phase of a bifurcated trial resulting from a plea of not guilty by reason of mental disease or defect.” *State v. Lagrone*, 2016 WI 26, ¶5, 368 Wis. 2d 1, 878 N.W.2d 636. Here, the court followed the “better practice” and conducted a separate colloquy during the responsibility phase.

No-merit counsel addresses Kupsky's ineffective assistance of trial counsel claim in the supplemental no-merit report and concludes that it lacks arguable merit. We agree that it lacks merit.

To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Here, regardless whether there is any basis to show that trial counsel performed deficiently, we see no arguable merit to claiming that Kupsky was prejudiced by the lack of testimony from the psychologist. Although the psychologist concluded that Kupsky had two mental conditions, she also concluded that there was no basis to find that, as a result of the mental conditions, Kupsky lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the law. Accordingly, testimony from the psychologist may have changed the jury's answer to the first special verdict question, but it would have worked against Kupsky on the second special verdict question and produced the same result of Kupsky being held responsible.

Sentencing

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The

circuit court discussed the required sentencing factors along with other relevant factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not rely on any improper factors. The sentence was within the maximum and was not excessive. We see no other arguable basis for Kupsky to challenge his sentence.

In his response to the no-merit report, Kupsky challenges the \$295 restitution award for the correctional officer's watch on two grounds. Counsel addresses both grounds in the supplemental no-merit report and concludes that neither has arguable merit. For the reasons we now explain, we agree with counsel's conclusions.

Kupsky's first contention as to the restitution award is difficult to understand. Kupsky appears to incorrectly believe that the exhaustion of administrative remedies doctrine applies to the restitution award, and to further believe that an internal conduct report the officer submitted precludes restitution for the watch. Kupsky has attached a copy of the conduct report to his response. We see no arguable basis upon which Kupsky might use the report to challenge the restitution award. We note that, at sentencing, Kupsky asserted during allocution that the correctional institution "found [him] not guilty of breaking [the] watch." However, the conduct report does not support this assertion. Further, there was ample evidence at trial that Kupsky broke the watch into several pieces.

Kupsky's second contention with respect to the restitution award is that the circuit court erred in the amount of the award because it did not take into account depreciation of the watch. However, the court was not required to depreciate the value of the watch. The restitution statute provides that the court may award the "reasonable repair or *replacement cost*." *See* WIS. STAT. § 973.20(2)(am)2. (emphasis added). Kupsky does not dispute that there was evidence

establishing \$295 as the replacement cost. We see no arguable merit to challenging the amount of the award.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Angela Kachelski is relieved of any further representation of Ronald Kupsky 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