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DISTRICT IV

June 10, 2021

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

2019AP1543-CRNM State of Wisconsin v. Austin D. King (L.C. # 2018CF460)

Before Blanchard, Kloppenburg, 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).

Attorney Jeremy Newman, appointed counsel for Austin King, 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). King was sent a copy of the report and has filed a

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

response. Upon consideration of the report, the response, 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.

King was charged with one count of stalking with a previous violent crime, as a repeater and as an act of domestic abuse. The case proceeded to a bench trial, and the circuit court found King guilty. The court sentenced King to an eight-year term of imprisonment consisting of four years of initial confinement and four years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support King's conviction. We agree with counsel that there is no arguable merit to this issue. 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 was sufficient. In his response to the no-merit report, King takes issue with whether the victim's testimony was credible, and King appears to contend that his testimony was more credible. However, it was for the circuit court as fact finder "to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." *See id.* at 503.

Other issues addressed in the no-merit report include whether King validly waived his right to a jury trial, whether the circuit court erroneously admitted other acts evidence against King, and whether the circuit court erred in its sentencing decision. We are satisfied that the report properly analyzes each of these issues as having no arguable merit.

Our review of the record discloses no other issues of arguable merit with respect to events before or during trial, including no issues with respect to the circuit court's pretrial rulings, King's decision to exercise his right to testify, or arguments by counsel. We also see no other arguable basis for King to challenge his sentence.

King's response to the no-merit report raises two potential claims of ineffective assistance of counsel. To show ineffective assistance of counsel, the 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, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice, "[t]he 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.

The first potential claim of ineffective assistance of counsel raised by King's response is whether trial counsel was ineffective by failing to pursue a plea of not guilty by reason of mental disease or defect (NGI). King alleges that he was previously subject to a WIS. STAT. ch. 51 commitment, that he was not taking his medication at the time he committed his crime, and that he was not in the "right state of mind at the time." We conclude that this potential claim lacks arguable merit. The presentence investigation report confirms that King was previously subject to a ch. 51 commitment and has a history of mental illness requiring treatment. However, counsel made statements at sentencing showing (1) that counsel was fully aware of King's mental health history as set forth in the PSI report, and (2) that counsel made a determination that King's mental health issues would not support an NGI plea. Considering these statements by

counsel, the record does not support a claim that counsel was ineffective by failing to pursue an NGI plea, and we conclude that King's response also does not support such a claim.

The second possible claim of ineffective assistance of counsel that King's response raises is whether trial counsel was ineffective by failing to call additional witnesses on King's behalf. King alleges that he provided counsel with contact information for witnesses. However, King makes no allegations as to whom trial counsel should have called as a witness or as to what testimony additional witnesses could have provided in support of his defense. Further, nothing in the record indicates that there were other witnesses who could have testified in support of King's defense. Accordingly, we conclude that there is no arguable merit to a claim that counsel was ineffective by failing to call additional witnesses.

We see no other assertions in King's response that could support any potential issues for appeal, and our review of the record discloses no other potential issues.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Jeremy Newman is relieved of any further representation of Austin King 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