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DISTRICT I

May 17, 2022

To:

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Electronic Notice

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Circuit Court Judge
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John Duane Theurich
5926 S. Packard Avenue, #109
Cudahy, WI 53110

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

2019AP1382-CRNM State of Wisconsin v. John Duane Theurich (L.C. # 2016CM3606)

Before Donald, P.J.[1]

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).

John Duane Theurich appeals from a judgment, entered upon a jury's verdict, convicting him of one count of disorderly conduct contrary to WIS. STAT. § 947.01(1), a Class B misdemeanor. Theurich also appeals from an order denying his postconviction motion for a new

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

trial. Appellate counsel has filed a no-merit report.[2] *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Theurich has filed a response. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's report, and Theurich's response, we conclude that there are no arguably meritorious issues that could be pursued on appeal. Thus, we summarily affirm the judgment and order.

BACKGROUND

According to the criminal complaint, H.D. was visiting P.H. at P.H.'s home in Cudahy. Around 4 a.m., Theurich, described in the complaint as P.H.'s "live-in boyfriend," entered the residence unannounced. He began yelling at P.H., calling her names including "bitch," "cunt," and "slut." At one point, H.D. alleged, Theurich grabbed P.H.'s neck and forced her onto the bed. He left the room but returned and drew a gun from his holster, yelling at P.H., "I'll fucking kill you." H.D. called police. When interviewed by police, Theurich said he was already upset when he arrived at the home and began yelling and verbally fighting with P.H. He said he took out his gun to show P.H. and H.D. that it was unloaded, after which he tossed it onto the bed and left the room.

Theurich was charged with one count of disorderly conduct with a dangerous weapon as an act of domestic abuse. Prior to trial, the State dismissed the weapons enhancer. The matter was tried to a jury, which convicted Theurich of disorderly conduct. The trial court sentenced

[2] The no-merit report was filed by Attorney Nicole M. Masnica, who has been replaced by Attorney Pamela Moorshead as Theurich's appellate counsel.

Theurich to seventy-five days in jail, imposed and stayed for nine months of probation. It also ordered Theurich to pay the "domestic violence assessments."

Theurich filed a postconviction motion seeking a new trial.[3] He first alleged that he received ineffective assistance of counsel when trial counsel failed to object to the inaccurate presentation of inadmissible other-acts evidence. Specifically, when P.H. testified, the State inquired whether there had been any physical violence, and the following exchange occurred:

> [State]: Do you recall telling officers that at one point he entered through this bedroom and grabbed your neck while you were sitting on the bed?
>
> [P.H.]: No. He never touched my neck.
>
> Q: Do you recall telling officers that while holding your neck with one hand, he held it about two to three seconds and eventually pushed you back?
>
> A: No. I don't remember telling them he touched my neck, because he never touched my neck.
>
> Q: Do you recall telling officers that when he grabbed your neck, that it caused you a small amount of pain, but it did not impede your breathing?
>
> A: No. I did not tell them that.

The details of Theurich allegedly grabbing P.H.'s neck were also presented to the jury through the testimony of Officer Michael Merucci, the officer who took P.H.'s statement.

Theurich claimed this testimony was inaccurate, arguing that based on P.H.'s two recorded interviews with police, she had never given any such description of events. In her

[3] The Honorable Jeffrey A. Kremers presided at trial and imposed sentence and will be referred to as the trial court. The Honorable Mary M. Kuhnmuench reviewed and denied the postconviction motion and will be referred to as the circuit court.

initial interview, P.H. reported that Theurich had yelled at her and called her names but she denied that he had assaulted her. Later, when asked why she had kicked Theurich out of the home, she explained that a few days earlier, he had put his hands on her throat but "didn't squeeze or anything." The State's manner of examining her, however, implied that the incident happened on the night for which he was charged. Theurich thus contends that, because any grabbing of P.H.'s neck occurred on a different night, any testimony about it was inaccurate and impermissible other-acts evidence. He contends that neither interview supports the narrative advanced by the State and Officer Merucci and asserts that trial counsel should have objected to the testimony and moved for a mistrial.

Theurich's postconviction motion also alleged that the State committed a due process violation when it failed to disclose that, prior to trial, P.H. told the district attorney's office that nothing physical occurred between her and Theurich. In an affidavit prepared for the postconviction motion, P.H. averred that:

> while this matter was pending and prior to trial, I went to a meeting at the Milwaukee County District Attorney's office. During that interview, I told the State's representative that the incident between Mr. Theurich and me was a verbal argument. I explained that Mr. Theurich did not put his hands on me in any way during that incident.

The circuit court viewed the recordings of P.H.'s interviews and observed that in her second interview, P.H. told Office Merucci that Theurich put his hand around her throat, leaving a mark. Attached to the State's response was a "Domestic Violence Supplementary Incident Report," signed by P.H. and dated the night of the incident, indicating injury to her neck. The circuit court noted that P.H.'s statements "appear to relate to the incident at issue in this case" and requested Theurich to clarify his argument in a supplemental brief.

After receiving the supplement, the circuit court denied the motion, further explaining that P.H.'s "statements during her second interview appear to pertain to the disorderly conduct charge in this case, not the prior incident[.]" The circuit court also concluded that even if trial counsel had been deficient, Theurich had not been prejudiced; P.H. had testified repeatedly that she did not tell police Theurich put his hands on her, but there was also ample uncontroverted evidence to support the guilty verdict even without any evidence that Theurich had touched her. Similarly, the circuit court noted that to the extent the State had failed to disclose any exculpatory evidence, Theurich had not been prejudiced by the nondisclosure.

DISCUSSION

I. Ineffective Assistance of Trial Counsel

The first issue appellate counsel discusses in the no-merit report is whether Theurich received ineffective assistance from trial counsel. In his response, Theurich contends he "was not represented properly" because his attorney "never objected to anything" the State said.

"There are two elements that underlie every claim of ineffective assistance of counsel[.]" ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. "[F]irst, the person making the claim must demonstrate that his or her counsel's performance was deficient[.]" ***Id.*** To demonstrate deficient performance, the person must show that counsel's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. Second, the person "must demonstrate that this deficient performance was prejudicial." ***Mayo***, 301 Wis. 2d 642, ¶60. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***McDougle***, 347 Wis. 2d 302, ¶13 (citation

omitted). We need not address both elements if the defendant cannot make a sufficient showing as to one or the other. ***Mayo***, 301 Wis. 2d 642, ¶61.

Appellate counsel discusses trial counsel's failure to object to the "inadmissible other-acts evidence," noting that although trial counsel was deficient for not so objecting, there was no prejudice because there is no reasonable probability of a different result. We agree.

There are two elements to disorderly conduct: the defendant engaged in violent, abusive, indecent, boisterous, unreasonably loud, or otherwise disorderly conduct; and the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance. *See* WIS. STAT. § 947.01; WIS JI—CRIMINAL 1900. At trial, P.H. acknowledged telling police that she and Theurich had a verbal altercation in which Theurich was "extremely upset and screaming" at her and called her pejoratives like "bitch," "cunt," and "slut." P.H. also acknowledged telling police that Theurich threw things, including a cell phone, at her in an attempt to scare her. Theurich's behavior was disturbing enough for H.D. to call police. Officer Merucci testified that Theurich said he arrived "very upset from a prior incident" and, because of that, "he began yelling and screaming at" P.H. Thus, even without evidence of a physical altercation between P.H. and Theurich—or, alternatively, even if the jury believed that Theurich did not put his hands on P.H.'s neck—there was still ample evidence of disorderly conduct. Therefore, assuming without deciding that trial counsel was deficient for not objecting to the

"other acts" testimony,[4] Theurich suffered no prejudice. There is no arguably meritorious claim of ineffective assistance of trial counsel.

II. Discovery Violation

The no-merit report next discusses whether the State committed a discovery violation contrary to ***Brady v. Maryland***, 373 U.S. 83 (1963), when it failed to disclosed that P.H. had contacted the district attorney's office prior to trial and informed it that the incident had not been physical.

The State is required to disclose any exculpatory evidence to a defendant. *See* WIS. STAT. § 971.23(1)(h). Suppression by the State of evidence favorable to the accused, where the evidence is material to guilt or punishment, violates due process regardless of good faith or bad faith by the prosecution. *See* ***Brady***, 373 U.S. at 87. Therefore, to establish a ***Brady*** violation, a defendant must establish that the withheld evidence is material and favorable. *See* ***State v. Harris***, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Id.***, ¶14 (citation omitted). This is the same test as the prejudice prong of an ineffective-assistance analysis. *See* ***id.***

As with our prior discussion on ineffective assistance, assuming without deciding that evidence of P.H.'s pretrial contact with the district attorney was favorable, it is not material. Not only was there sufficient evidence of disorderly conduct without any evidence that the argument

[4] We note that, according to the circuit court's findings, the discussion of the physical altercation may not even be "inaccurate" evidence or "other acts" evidence. To the extent that P.H. was not describing an earlier incident, trial counsel was not ineffective for failing to make a meritless objection.

had turned physical, P.H. actually testified that Theurich had not gotten physical with her that night. An additional denial would not have changed the result. There is no arguable merit to raising a ***Brady*** violation.

III. Sufficiency of the Evidence

A. Disorderly Conduct

The third issue appellate counsel discusses in the no-merit report is whether sufficient evidence supports the jury's verdict. In his response, Theurich asserts that there "were no witnesses to see if anything event took place so I do not even see how I was convicted in the first place. My girlfriend told them that I neve[r] harmed her in anyway and they ignored what she had to say."

On review of a jury's verdict, we view the evidence in the light most favorable to the verdicts and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506. "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

As noted in the preceding sections, there was ample evidence of disorderly conduct based on Theurich's yelling, calling P.H. profane names, throwing things, and making threats that led

H.D. to call police. Physical harm to a person is not an element of disorderly conduct. There is no arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdict.

B. Domestic Abuse

The trial court also required Theurich to pay the "domestic violence assessments." Theurich wonders in his response why he was charged with an act of domestic abuse "when we were in her home."

"Domestic abuse" is not a standalone crime but, rather, a modifier that can be attached to other offenses. Domestic abuse includes "[i]ntentional infliction of physical pain, physical injury or illness" or a "physical act that may cause the other person reasonably to fear imminent engagement" in that conduct, "by an adult person … against an adult with whom the person resides or formerly resided[.]" *See* WIS. STAT. § 968.075(1). Upon conviction for a specified crime, *see* WIS. STAT. § 973.055(1)(a)1.,[5] the trial court shall impose a $100 domestic abuse surcharge if the court also finds the offense involved an act by the adult defendant against an adult with whom the defendant resides or formerly resided, *see* § 973.055(1)(a)2.

The trial court did not make an express finding that this case involved domestic abuse, but it did make an implicit finding when it specifically directed Theurich to pay the "domestic violence assessments" rather than issuing a generic order to pay all applicable surcharges. The record amply supports this conclusion. *See* ***Dalka v. Wisconsin Cent., Ltd.***, 2012 WI App 22, ¶51, 339 Wis. 2d 361, 811 N.W.2d 834 ("If the trial court failed to 'adequately explain its

[5] Disorderly conduct contrary to WIS. STAT. § 947.01 is one of the specified crimes.

reasoning, we may search the record to determine if it supports the court's discretionary decision.'" (citation omitted)); ***State v. Schulpius***, 2006 WI App 263, ¶13, 298 Wis. 2d 155, 726 N.W.2d 706 ("appellate court must 'search the record to support the conclusion reached by the fact finder'" (citation omitted)). Although P.H. told the trial court at sentencing that Theurich "has his own residence" and never lived with her, that statement was contrary to her trial testimony that Theurich "lived there" and "it's his house." Officer Merucci also testified that P.H. reported she and Theurich had been in a romantic relationship for eight to nine years, and had cohabitated for six to eight years. There is no arguable merit to challenging the imposition of the domestic abuse surcharge.

C. Affirmative Defense

Theurich also complains in this no-merit response that his trial attorney "never brought up that I had a [concussion] and a broken eye socket with head [injuries] and I was not in my right mind at the time[.]" To the extent that Theurich may be claiming trial counsel should have pursued a not-guilty-by-reason-of-mental-disease-or-defect (NGI) defense, the record does not support any such defense. Although Theurich had sustained some sort of facial injury prior to his confrontation with P.H., there are no medical records to indicate that Theurich was formally diagnosed with a concussion or any other brain injury, nor are there records to indicate that such injury caused Theurich to lack substantial capacity either to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. *See* ***State v. Magett***, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W.2d 42; *see also* WIS. STAT. § 971.15(1). Accordingly, there is no arguable merit to claiming that trial counsel should have pursued an NGI defense.

IV. Sentencing Discretion

The final issue appellate counsel addresses in the no-merit report is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. Theurich's sentence was within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, this court is satisfied that the no-merit report properly analyzes this issue as without arguable merit.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of further representation of Theurich 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