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DISTRICT II

April 26, 2023

To:

Hon. L. Edward Stengel
Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Sheboygan County Courthouse
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David Stephen Boozer
5730 N. Ballard Rd.
Appleton, WI 54913

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

2022AP270-CRNM State of Wisconsin v. David Stephen Boozer (L.C. #2019CF487)

Before Gundrum, P.J., Grogan and Lazar, 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).

David Stephen Boozer appeals a judgment of conviction for two counts of intentional abuse of a patient contrary to WIS. STAT. § 940.295(3)(a)1. (2021-22)[1] and two counts of aggravated battery to an elderly person contrary to WIS. STAT. § 940.19(6)(a). Boozer's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Boozer has filed a response and made other filings, and counsel has filed two supplemental no-merit reports, one responding to the issues Boozer

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

raises and one in response to this court's order dated February 7, 2023. Upon consideration of the no-merit report, Boozer's response and other filings, and the supplemental no-merit reports, and following an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal. We therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

Boozer was initially charged with the two aggravated battery counts and two counts of abuse of an at-risk individual contrary to WIS. STAT. § 940.285(2)(a)1. While his cases were pending, Boozer repeatedly invoked his right to a speedy trial, but his cases were delayed several times after he expressed dissatisfaction with the frequency and manner of his attorneys' communications. On the eve of the trial, the State sought to amend the Information to remove the charges under § 940.285 and add the two charges under WIS. STAT. § 940.295.[2] There was no objection and the court permitted the amendment.

At the jury trial, several of Boozer's former coworkers at the Sunny Ridge nursing facility testified that they witnessed Boozer use physical force with an elderly patient with dementia. Brian Harney testified that the victim had wandered into another patient's room, at which time Boozer grabbed the victim's shirt from behind and pulled him to the ground. Harney testified that Boozer then retrieved a wheelchair, put the victim in it, and forcefully wheeled him back into his room.

[2] Broadly speaking, WIS. STAT. §§ 940.285 and 940.295 proscribe similar criminal conduct (i.e., the abuse of at-risk individuals), but § 940.285(2)(a) specifically exempts from its reach persons who are "in charge of or employed … in a facility or program under s. 940.295(2)."

Another certified nursing assistant, Jasmine Johnson, corroborated Harney's account, adding that the staff was trying to coax the victim into a wheelchair at the time Boozer became physical. The victim was "a little resistant, but not violent," and after Boozer "yanked him down," Boozer put his foot on the victim's chest. Johnson testified that after the assault she and another staff member helped the patient into a wheelchair and returned him to his room.

Johnson testified about a second incident that night. The victim became agitated again, not in an aggressive way but "[j]ust walking around and yelling" for his wife. Johnson testified that she saw Boozer exit an elevator and heard him say, "This motherfucker wants some more?" The victim started walking away from Boozer, saying, "Get him away from me." Johnson said she witnessed Boozer grab the victim by the shirt, slam him to the ground, punch him, kick him, and choke him. During the altercation, the victim was shouting for help and trying to block the blows.

Johnson testified that Boozer and another staff member then put the victim in a wheelchair, and Boozer took him to the facility wing where his room was located. Boozer was holding the back of the victim's shirt collar to restrain him. According to Johnson, when they arrived at the victim's room, Boozer flung the wheelchair inside. The victim "flipped over out of the chair, and the chair flipped on top of him." During cross-examination, Johnson acknowledged that she had not immediately informed supervisors after the first incident, in violation of facility policy.

After the second incident, a nurse supervisor received the report of the incidents and examined the patient. The supervisor made a report to law enforcement. Police arrived and

documented the patient's injuries, which included redness and bruising to his neck, chest, arm and eye. Police also noted the patient's shirt was torn.

Boozer testified in his own defense. As to the first incident, he stated that the patient was on his knees on the floor at the time he arrived, and he helped the man into a wheelchair. As to the second incident, Boozer testified the patient fell on top of him as he was trying to escort him out of a room. Boozer denied ever punching or hitting the victim.

During the jury instruction conference, the circuit court inquired as to which theory the prosecution was pursuing regarding WIS. STAT. § 940.295. Subsection (3) of that statute contains a penalty structure that increases based upon the severity of the injuries (or potential injuries) arising from the proscribed conduct. The Amended Information alleged that Boozer had abused the victim under circumstances that were likely to cause great bodily harm—a Class G felony pursuant to § 940.295(3)(b)1r. During the jury instruction conference, the court determined that at most, the evidence established that Boozer's conduct had caused bodily harm—a Class H felony. *See* § 940.295(3)(b)2. This was the standard used to instruct the jury.[3]

[3] At first blush, there appears to be some tension between the circuit court's conclusion that the evidence did not meet "likely to cause great bodily harm" standard and the notion that the evidence was sufficient to instruct the jury regarding WIS. STAT. § 940.19(6), which proscribes battery that "creates a substantial risk of great bodily harm." However, amongst other differences between § 940.19(6) and WIS. STAT. § 940.295, the former statute, unlike the latter, establishes a rebuttable presumption that there is a substantial risk of great bodily harm if the person injured is sixty-two years of age or older. *See* § 940.19(6)(a).

The jury ultimately convicted Boozer of the offenses, and the circuit court withheld sentence and imposed a four-year probationary term on each count.[4] As a condition of probation, the court imposed six months' jail time on one of the counts. The judgment of conviction identifies that Boozer was convicted of two Class G felonies for intentional abuse of a patient likely to cause great bodily harm, as well as two Class H felonies for aggravated battery of an elderly person.

We first address the judgment of conviction, which appears to incorrectly identify the nature and severity of the WIS. STAT. § 940.295 offenses. Counsel's supplemental no-merit brief concludes no issue of arguable merit appears based on the misidentification of the crimes. Counsel asserts that, pursuant to WIS. STAT. § 971.29, the circuit court was permitted to amend the Information to conform to the proof at trial. Counsel concludes it was merely an oversight that the judgment of conviction reflects Class G felonies instead of Class H felonies for intentional abuse of a patient, and she represents that she has filed a motion in the circuit court seeking to amend the judgment of conviction to accurately reflect the crimes of conviction.[5]

[4] As the circuit court acknowledged at sentencing, the probationary term was influenced in part by the many positive character witnesses who made statements on Boozer's behalf. This court has received in connection with this no-merit appeal what appears to be a letter from one of Boozer's character witnesses, Penny Schweitzer. Our review is limited to the appellate record, and we will not consider assertions of fact outside the record. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 301 n.3, 594 Wis. 2d 309 (Ct. App. 1999). Regardless, even if we were to consider the contents of the Schweitzer letter, they seem merely to echo the issues Boozer seeks to raise in his response to the no-merit report. Those purported issues are addressed elsewhere in this opinion.

[5] On April 3, 2023, this court received a letter from Boozer expressing confusion regarding the purpose of a March 23, 2023 hearing on the motion to amend the judgment of conviction. This court cannot provide legal advice to litigants. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Questions regarding the purpose or nature of proceedings in the circuit court are best directed to appointed appellate counsel, who has a duty to keep him reasonably informed about the status of matters and a duty to promptly comply with reasonable requests for information. *See* SCR 20:1.4(a)(3), (a)(4), (b).

Based on counsel's representations, we agree with counsel's conclusion that no issue of arguable merit appears based on the amendment of the charges at trial. Because sentencing was withheld and Boozer was placed on probation, there is no basis to conclude that the misidentification of the felony classification had any impact on Boozer's sentence.

The no-merit report addresses whether Boozer could raise nonfrivolous arguments regarding the sufficiency of the evidence and the circuit court's exercise of sentencing discretion. Our review of the appellate record satisfies us that the no-merit report sufficiently analyzes these issues and properly concludes that any challenge predicated upon them would lack arguable merit.

Boozer's response to the no-merit report generally challenges the sufficiency of the evidence. He argues the witness accounts contained inaccuracies regarding some of the details and sequencing of the events. He also argues that Harney and Johnson are incredible as a matter of law: Harney, because he testified he could not remember all of the details of the first incident; and Johnson, because she failed to immediately report the first incident and because she is, in Boozer's words, a "narcissistic pathological liar."

Given Boozer's arguments, we expound on our conclusion that there would be no arguable merit to any challenge based on the sufficiency of the evidence. This court's appellate functions do not include determining which witnesses were truthful in their testimony. "The trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence." ***State v. Below***, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95. Additionally, "[i]t is exclusively within the trier of fact's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence." ***Id.*** The appellate

record in this case presents no meritorious basis for an argument that any of the relevant testimony was incredible as a matter of law.[6]

Boozer also appears to argue he received ineffective assistance of counsel in connection with his attorney's failure to impeach the nurse supervisor with evidence showing that the victim had prior altercations with patients. We presume he believes this evidence would have corroborated his testimony that he intervened out of concern that the victim might injure another patient. In his second no-merit response, Boozer also appears to suggest that the victim's injuries may have been caused by a scuffle with another patient.

A defendant alleging ineffective assistance of trial counsel must demonstrate that the attorney performed deficiently and that the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, there is no arguable merit to any assertion that evidence of prior altercations created a reasonable probability of a different outcome. The jury heard testimony from Harney that the victim had injured another worker at the facility and that Harney was scared of the victim and did not want to work on the same floor. Johnson likewise testified that she heard the victim had injured another worker. Moreover, the appellate record fails to substantiate Boozer's assertion that the victim's injuries could have been caused by another patient.

Boozer argues his Fifth Amendment right against self-incrimination was violated when police questioned him without providing ***Miranda***[7] warnings. The appellate record provides no

[6] For testimony to be incredible as a matter of law, evidence must be in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). No such conflict appears based on this appellate record.

basis for an argument that Boozer was in custody so as to necessitate such warnings. *See* ***State v. Lonkoski***, 2013 WI 30, ¶24, 346 Wis. 2d 523, 828 N.W.2d 552. Moreover, appellate counsel responds that the statements Boozer gave to police were consistent with his trial testimony, so achieving suppression of those statements would not have aided Boozer's defense.[8] We agree with counsel's conclusion that there is no merit to any argument that trial counsel should have sought to suppress Boozer's statements to police.

Next, Boozer argues a change-of-venue motion should have been granted because he is African-American and Sheboygan is, in his words, an "all-white community." Appellate counsel responds that the racial composition of Sheboygan County is similar to most other counties in Wisconsin, with the exception of Milwaukee County. Generally, a motion seeking a change of venue must be grounded on the notion that an impartial trial cannot be had in the county where the crime was committed. *See* WIS. STAT. § 971.22. Here, the appellate record provides no support for an argument that a jury selected from Sheboygan County would be inherently racially biased or decide his case based on improper factors. Moreover, "a motion to change venue is a tactical decision under the control of defense counsel." ***State v. Hereford***, 224 Wis. 2d 605, 619,

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[7] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[8] Theoretically, if Boozer's trial counsel had sought and obtained a favorable ruling on the suppression issue, that suppression determination might have informed his decision whether to testify at trial. In this case, though, the statements Boozer made to police inferentially buttressed his trial testimony by suggesting that even when the incidents occurred, Boozer believed that he had acted appropriately and that the victim was not injured.

Thus, in addition to the lack of custodial interrogation making any such motion frivolous, the statements themselves were not inculpatory. Under these circumstances, we cannot conclude there is any arguable merit to a claim that Boozer's trial counsel was constitutionally ineffective for failing to suppress the statements. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) ("[T]he defendant must show that the deficient performance prejudiced the defense.").

592 N.W.2d 247 (Ct. App. 1999). At a trial in a different county, the same eyewitnesses would have testified. Any argument that his trial attorney was constitutionally ineffective for failing to seek a change of venue under these circumstances would be frivolous.

Boozer also contends the jury foreperson was biased against him. The foreperson happened to be a retired Sheboygan County judge, the Hon. Terence Bourke. This matter was addressed on the record during the jury voir dire, at which time the defense chose not to object to Bourke sitting on the jury panel. "To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial." ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). During the voir dire, Bourke disclosed that he had worked in a nursing home decades earlier; he then pledged that, regardless of that matter and his contact with law enforcement as a judge, he could be fair and impartial. Based upon our review of the appellate record, we conclude there is no arguable merit to an assertion that Bourke was subjectively or objectively biased against Boozer so as to disqualify him as a juror.

Boozer's response also appears to argue meritorious issues exist regarding the circuit court's refusal to admit into evidence x-rays of back injuries Boozer suffered. Inferentially, he appears to argue the x-rays and other medical evidence would have demonstrated that he was incapable of performing the abusive acts the eyewitnesses claimed to have seen. This matter was addressed at trial, with the court ruling that Boozer would be allowed "some leeway in talking about his medical condition" but would not be permitted to present x-rays showing surgically implanted rods in his spine. Boozer then testified that he suffers from serious pain, he is incapable of picking up anything over fifteen pounds, and his ability to twist and bend is limited. The appellate record does not suggest any non-frivolous basis to challenge the circuit court's

exercise of discretion in excluding the medical exhibits. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

Boozer also argues his trial attorney performed deficiently by failing to timely file paperwork that would have allowed him to present expert testimony. At trial, defense counsel acknowledged that he had not filed expert reports or requested a ***Daubert***[9] hearing. Counsel made an offer of proof that the proposed experts would testify regarding "[t]heir expertise … that when caring for Alzheimer's patients, under certain circumstances, they should receive one-to-one care." This proposed testimony would not have established a justification for the behavior the eyewitnesses testified to, nor would it have made Boozer more credible in his denials of abuse. As a result, we conclude there is no merit to any argument that there exists a reasonable probability of a different outcome even if the jury had heard this information. *See* ***Strickland***, 466 U.S. at 694.

Our independent review of the record discloses no other potentially meritorious issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Annice Kelly shall continue the representation of David Stephen Boozer in connection with the motion to amend the judgment of

[9] *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993).

conviction. Upon completion of those proceedings, she is relieved of further responsibility for representing Boozer in connection with 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