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January 29, 2013

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

2011AP2843-CRNM State of Wisconsin v. Carl J. Mahler (L.C. # 2010CF1006)

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

Counsel for Carl Mahler has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] concluding no grounds exist to challenge Mahler's convictions for two counts of assault by a prisoner (expelling a bodily substance), contrary to WIS. STAT. § 946.43(2m)(a). Mahler filed a response raising several challenges to his convictions. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Mahler with two counts of assault by a prisoner for allegedly spitting on two correctional officers as they attempted to collect a DNA sample from him. Out of a maximum possible seven-year sentence, the court imposed two-year sentences on each count consisting of eighteen months' initial confinement and six months' extended supervision. The sentences were ordered to run concurrently with each other, but consecutive to the sentence Mahler was already serving.

There is no arguable merit to challenge the circuit court's determination that Mahler was competent to proceed. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. ***Id.***, ¶31. A trial court's competency determination should be reversed only when clearly erroneous. ***Id.***, ¶45.

Before the preliminary hearing, defense counsel questioned Mahler's competency to proceed. The court consequently deferred the preliminary hearing and ordered a competency evaluation. An evaluating physician submitted a report opining to a reasonable degree of medical certainty that Mahler "has substantial capacity to understand court proceedings and to assist in his own defense." At the competency hearing, neither the State nor Mahler challenged the report and Mahler claimed that he was competent. The court implicitly accepted the doctor's

opinion and scheduled the preliminary hearing.[2] The record supports the trial court's determination.

Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). Here, the State was required to prove that: (1) Mahler was a prisoner; (2) the victims of the offense were officers at the prison; (3) Mahler threw or expelled a bodily substance at or toward the victims with intent that the bodily substance come into contact with them; (4) Mahler intended to abuse, harass, offend, intimidate or frighten the victims; and (5) the victims did not consent to the substance being thrown or expelled at or toward them. *See* WIS JI—CRIMINAL 1779A (2001).

At trial, William Swiekatowski, a supervising officer at Green Bay Correctional Institution, testified that he spoke to Mahler about his need to provide a DNA sample.[3] When Mahler indicated he did not believe the officers had a right to take a sample, Swiekatowski gave Mahler time to research whether he was required to comply. Approximately ten days later, Swiekatowski again told Mahler he was required to give a sample. While attempting to obtain the court-ordered DNA sample, Mahler spit, striking Swiekatowski in the neck and chest area. Swiekatowski put his hand up to block him from spitting again, but Mahler continued to spit

[2] To the extent the no-merit report addresses possible challenges to Mahler's preliminary hearing, a conviction resulting from a fair and errorless trial cures any error at the preliminary hearing. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Any challenge to the preliminary hearing at this juncture therefore lacks arguable merit.

[3] Under WIS. STAT. § 165.76(1)(ar), any person in prison on or after January 1, 2000 for a felony committed in this state must provide a biological specimen for DNA analysis.

multiple times, while calling Swiekatowski and another officer "dirty bastards." The other officer, Timothy Watermolen, testified that his hand and face were indirectly struck with saliva that appeared to be directed at Swiekatowski. Neither officer consented to being spit on. The jury also saw video of the incident. Mahler nevertheless argued that he did not spit with the intent to abuse, harass, offend, intimidate or frighten the victims. Rather, his belief that he should not have to give the DNA sample caused a "reflex reaction."

To the extent there may have been conflicting or inconsistent testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The officers' testimony, as well as the totality of the event as depicted on the video, provided an ample basis for the jury to conclude that Mahler was not acting reflexively, but with the intent to abuse, harass, offend or intimidate the officers. The evidence submitted at trial is sufficient to support Mahler's convictions.

The no-merit report addresses whether there is any arguable merit to challenge the jury instruction on "transferred intent" (as it related to Watermolen). The court instructed the jury as follows:

> It is immaterial that a defendant acts toward another but strikes a different person. If you determine that the defendant intended to expel saliva on Lieutenant Swiekatowski but his expelled saliva struck Officer Watermelon [sic], you may but you are not required

> to find that the intent and purpose he had in expelling the substance on Lieutenant Swiekatowski is transferred to Officer Watermelon [sic].

The trial court has broad discretion in instructing a jury, *see* ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996), and its instructions do not have to conform to the standard jury instructions, *see* ***State v. Camacho***, 176 Wis. 2d 860, 883, 501 N.W.2d 380 (1993). An instruction is appropriate unless, when viewed as a whole, it misstates the law or misdirects the jury. ***State v. Pettit***, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992). Wisconsin recognizes the law of transferred intent, *see* ***State v. Gould***, 56 Wis. 2d 808, 810, 202 N.W.2d 903 (1973), and the instruction given is an accurate statement of the law of transferred intent. Any challenge to this instruction would therefore lack arguable merit.

In his response to the no-merit report, Mahler appears to challenge the effectiveness of his trial counsel, indicating that counsel "did nothing to defend" him. To establish ineffective assistance of counsel, Mahler must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Mahler claims counsel was ineffective by failing to object to Mahler having to wear a "stun belt" at trial.

Generally, a defendant should be free of restraints during trial to ensure not only a fair trial, but the appearance of a fair trial. ***Flowers v. State***, 43 Wis. 2d 352, 362, 168 N.W.2d 843 (1969). A defendant may be subjected to physical restraint while in court if the trial judge, in the exercise of its discretion, has found such restraint reasonably necessary to maintain order and has set forth in the record its reasons justifying the restraints. ***State v. Champlain***, 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889. The duty imposed by ***Champlain***, however, does not apply in situations in which the jury cannot see the restraints. ***State v. Miller***, 2011 WI App 34,

¶¶7-10, 331 Wis. 2d 732, 797 N.W.2d 528. In the absence of a statement on the record regarding the need for restraints, the sole question becomes whether the restraint was visible to the jury. ***Id.***, ¶11.

Here, the record shows that before trial, the court authorized the stun belt to be worn by Mahler under loose clothing. Although the court made no record of its reason for requiring Mahler to wear the belt, the court was cognizant that the belt should not be visible to the jury and there is no reason to believe that the jury saw it. Because the record does not establish that Mahler was prejudiced by wearing the stun belt, counsel was not ineffective for failing to raise an objection.

Mahler also claims counsel was ineffective by "cutting off" the video of the incident too soon, as it allegedly showed "a criminal act of deliberate injury" to Mahler after he spit on the officers. To the extent Mahler believes the officer's post-spitting conduct creates an affirmative defense to the spitting, Mahler is mistaken. Counsel was not deficient for failing to present irrelevant evidence.

The no-merit report addresses whether counsel was ineffective by failing to suggest jury instructions relevant to defense matters. Mahler claims he had the right to resist what he characterizes as an "unlawful search." Even assuming Mahler had a right to resist an "unlawful search," there is no law to support his contention that taking a biological sample for DNA testing from a prison inmate constitutes an unlawful search. In fact, a federal court of appeals has concluded:

> Wisconsin's DNA collection statute is, we think, narrowly drawn, and it serves an important state interest. Those inmates subject to testing because they are in custody, are already "seized," and given

> that DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs—we see no Fourth Amendment impediments to collecting DNA samples from them pursuant to the Wisconsin law. The Wisconsin law withstands constitutional attack under the firmly entrenched "special needs" doctrine.

Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004). Ultimately, there is no arguable merit to claim the jury should have been instructed on the right to resist a lawful search.

The no-merit report alternatively acknowledges that the self-defense statute includes the privilege to use force to prevent or terminate what the person *reasonably* believes to be an "unlawful interference with his or her person." WIS. STAT. § 939.48(1). For purposes of this defense, "unlawful" means either tortious conduct or conduct prohibited by criminal law or both. *See* WIS JI—CRIMINAL 800 n.1 (2001). Here, Mahler was told by prison officials that he was required to provide a sample and he was given time to research the law on the matter before the sample was taken. Under these circumstances, Mahler could not reasonably believe that the taking of the sample was unlawful. Any claim that the jury should have received this self-defense instruction therefore lacks arguable merit.

Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[4] hearing. We therefore conclude there is no arguable merit to a claim that Mahler was denied the effective assistance of counsel.

Finally, the record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

offense, noting that the policy behind the law was based on public health concerns and that spitting at the officers was "totally inappropriate" and "foul." The court also commented on the need to deter others from similar conduct and the moral need for punishment. The court implicitly found some rehabilitative prospect in Mahler, as it authorized a risk reduction sentence. Ultimately, the court considered appropriate and relevant sentencing factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Although the court did not go into great detail, it sufficiently explained the sentence it imposed based on relevant factors. Under these circumstances, it cannot reasonably be argued that Mahler's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Jefren E. Olsen is relieved of further representing Mahler in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals