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**DISTRICT IV**

August 18, 2016

To:

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

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2016AP473-CRNM      State of Wisconsin v. James D. Jenkins (L.C. # 2015CF19)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

James Jenkins appeals from a judgment of conviction following a jury trial in which he was convicted of two counts of prisoner expelling bodily substances (spitting) as a repeater. WIS. STAT. §§ 939.62(1)(b); 946.43(2m)(a) (2013-14).<sup>1</sup> Attorney Vicki Zick has filed a no-merit report and seeks to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *see also Anders v. California*, 386 U.S. 738, 744 (1967) and *State ex rel. McCoy v. Wisconsin Court of Appeals*,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence at trial and the effective assistance of trial counsel during closing arguments at trial. Jenkins was provided a copy of the report, but has not filed a response. Upon our independent review of the record and the report, we conclude that there are no arguably meritorious appellate issues.

Following a jury trial, Jenkins, a prisoner at the Wisconsin Secure Program Facility, was convicted of having spat on two prison guards. Both of the guards testified at trial and explained that as they prepared to escort Jenkins to the Health Services Unit, Jenkins spat on them without their consent, despite the fact that Jenkins was wearing a “spit mask.” In addition, the supervising captain testified he saw Jenkins make a spitting “motion.” One of the guards and the captain also explained that protocol dictated that someone would have inspected the spit mask prior to it having been given to Jenkins to put on, and testified that holes were discovered in the mask after the spitting incident. Neither witness was able to explain the origin of the holes. The defense presented no witnesses.

We agree with appellate counsel that there is no meritorious argument on appeal regarding the sufficiency of the evidence underlying the conviction. We review the sufficiency of the evidence in the light most favorable to sustaining the conviction, *State v. Hanson*, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390, and will sustain the conviction unless “it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more than one inference can be drawn from the evidence, we adopt the inference that supports the conviction. *State v. Long*, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557.

The evidence at trial consisted primarily of the two guards' and the captain's testimony. The jury also saw the spit mask Jenkins had worn. The circuit court instructed the jury that the State bore the burden of proving five elements beyond a reasonable doubt: (1) that Jenkins was a prisoner; (2) that each of the two victims was a prison officer; (3) that Jenkins threw or expelled a bodily substance;<sup>2</sup> (4) that Jenkins intended to abuse each of the two victims; and (5) that neither of the officers consented. We agree with appellate counsel's conclusion that the evidence presented was sufficient to support each of the five elements, and, thus, the conviction. Therefore, insufficiency of the evidence is not a meritorious basis for reversal.

The second issue appellate counsel discusses is whether Jenkins' trial counsel rendered ineffective assistance of counsel by commenting in his closing argument that he did not doubt the honesty of the testifying officers and was not suggesting that they were lying.<sup>3</sup> We agree with appellate counsel that trial counsel employed a reasonable strategy in crafting a theory of the defense consistent with the evidence presented. Trial counsel's theory proposed that if, in fact, saliva came out of Jenkins' mouth, it was not the result of an intent to spit on the officers.

An ineffective assistance claim requires a showing that counsel's performance was deficient and that the deficiency prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). When reviewing claims of ineffective assistance of counsel, we defer to trial counsel's reasonable defense strategies. *State v. Elm*, 201 Wis.2d 452, 464-65, 549

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<sup>2</sup> The circuit court advised the jury in its instructions that saliva qualifies as a bodily substance.

<sup>3</sup> At one point during closing arguments trial counsel stated: "I'm not calling the officers liars. I don't know what happened. I'm not there." At another point, counsel stated: "Again, Officer [C.F.]—again, I don't doubt his being as honest as he could." And finally, counsel stated: "I'm not saying those officers lied when they got up there. I thought they told the truth. Something might have hit them, but it wasn't the intentional act of Mr. Jenkins."

N.W.2d 471 (Ct. App. 1996). We agree with appellate counsel that it would likely have been strategically unwise for trial counsel to have suggested in his closing arguments that all three prison officers were lying, and that there is no meritorious argument to be made that the approach trial counsel took was unreasonable and impractical in light of the testimony at trial and the theory of defense that there was no intent to spit on the officers. As a result, there is no meritorious argument that trial counsel's performance was deficient. In the absence of deficient performance, we do not consider the prejudice prong. *State v. Ortiz-Mondragon*, 2015 WI 73, ¶32, 364 Wis. 2d 1, 866 N.W.2d 717.

Upon our independent review of the record, we have found no other arguable bases for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of any further representation of James Jenkins in this matter pursuant to WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*