COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP418-CR **Cir. Ct. No. 2002CF85**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHANIEL A. LINDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VAN DEHEY, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Nathaniel Lindell, pro se, appeals a judgment convicting him of one count of battery by a prisoner and an order denying his motion for postconviction relief. We affirm.

¶2 Lindell first argues that the circuit court erred in not granting his motion for postconviction discovery. "[A] defendant has a right to post-conviction discovery when the sought-after evidence is relevant to an issue of consequence." ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). "Evidence is consequential 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.*** at 320-21 (brackets, quotation marks and footnote omitted).

¶3 Lindell argues that he was entitled to postconviction discovery of a videotape of the cell extraction. The prosecution introduced a videotape of the incident into evidence at trial, but Lindell appears to contend that a second videotape exists from an in-cell camera. We reject this argument because Lindell does not adequately explain why another videotape of the cell extraction, if one exists, would undermine what the first videotape showed. Because Lindell has not explained why the second videotape would be of consequence, he is not entitled to discovery of the tape.

¶4 Lindell next contends that he should have been allowed postconviction discovery regarding records of prosecutions of prison staff for incidents related to cell extraction. These records, if they exist, would not have been relevant to *this* trial. The records would not have been probative of whether Lindell intentionally caused bodily harm to a correctional officer without his consent. Finally, Lindell contends that he should have been provided postconviction discovery of the victim's medical records. Once again, these records would have had no relevance to any issue of consequence at trial. The circuit court properly denied Lindell's postconviction discovery requests.

¶5 Lindell next argues that he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶6 First, Lindell contends his counsel should have argued that the victim consented to being injured. He points to the victim's testimony that he knew he could be injured if he participated in the cell extraction. Even if the victim was aware of the danger of his job, that does not mean that he consented to the injury. The undisputed testimony shows that the victim did *not* give Lindell permission to injure him. Second, Lindell contends that counsel should have argued that he was acting in self-defense because the guards denied him the right to his legal papers, which provoked the cell extraction, and forced Lindell to defend himself. Lindell was not "forced to defend himself." He was not being assaulted; he was being forcibly removed from his cell pursuant to prison policy. The facts did not support a claim of self-defense. Third, Lindell argues that counsel was ineffective for failing to enter a plea of not guilty by reason of mental disease or defect. The expert appointed by the court to evaluate Lindell's competence to stand trial submitted a report in which he stated that Lindell had a mental illness that contributed to the incident, but that Lindell knew that his actions were illegal and could comprehend the difference between right and wrong. There would have been no factual basis for a plea of not guilty by reason of mental disease or defect. In sum, because none of these arguments would have been successful, we reject Lindell's claim of ineffective assistance of counsel.

¶7 Lindell next argues that he was denied access to his attorney at a proceeding held August 19, 2002. Lindell appeared by video conference at the hearing, during which the court ordered a competency hearing, while his attorney

appeared in person. Lindell was not prejudiced by his lack of ability to communicate privately with counsel because any private communication between them would not have changed this result. *See* ***State v. Peterson***, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998) (any statutory or constitutional violation of the defendant's right to be present at a criminal proceeding is harmless error if the defendant's counsel is present and fully participates, and the defendant has "not advance[d] on appeal any specific contribution he would have made had he been present").

¶8 Lindell next argues that he should have been present at a December 2, 2002 status conference. We reject this claim because Lindell did not have a statutory right to be present. *See* WIS. STAT. § 971.04(1) (2003-04).[1] Finally, Lindell argues that he had a right to be present at an April 15, 2003 discovery motion hearing. Assuming Lindell had a right to be present, his absence was harmless error because counsel successfully argued the motion on his behalf. *See* ***Peterson***, 220 Wis. 2d at 489. Lindell's presence would not have contributed to a more favorable result.

¶9 Finally, Lindell argues that the State presented insufficient evidence to support his conviction. In reviewing the sufficiency of the evidence, we will "not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

N.W.2d 752 (1990) (citation omitted). Lindell contends that the evidence is insufficient because the State did not prove that the victim did not consent. As noted above, the victim unequivocally testified that he did not consent. Therefore, we reject this argument.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.