COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0352-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TREVOR ZELLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, Deininger and Vergeront, JJ.

PER CURIAM. Attorney Judith L. Maves-Klatt, appointed counsel for Trevor Zeller, has filed a no merit report pursuant to RULE 809.32, STATS. Zeller responded to the report. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal.

Zeller was charged with retail theft and first-degree reckless endangerment. At trial, a loss prevention officer from a department store testified that he observed Zeller conceal various items of clothing and then leave the store with them. He testified that in the parking lot he called to Zeller to stop, then stood behind Zeller's car to observe the license plate, and at that time Zeller drove the car quickly backwards, causing the officer to dive out of the way. Zeller then left the parking lot. Zeller testified that he was at the store that day and looked at various items, but that he did not take any items and did not ever see the officer or attempt to strike him with his car. The jury found Zeller guilty on both counts. The court sentenced him to thirty days in jail on the theft charge, and on the endangerment charge withheld sentence and placed him on four years' probation.

The no merit report addresses whether Zeller's due process rights were violated by the police failure to obtain and preserve a store videotape that Zeller claims would be exculpatory. However, his due process rights are violated only if the police (1) failed to preserve evidence that is apparently exculpatory, or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory. *See* ***State v. Greenwold***, 189 Wis.2d 59, 67-68, 525 N.W.2d 294, 297 (Ct. App. 1994). There is no evidence in the record that the tape was apparently exculpatory or that the police or prosecution acted in bad faith. There is no arguable merit to this issue.

The no merit report also addresses whether Zeller's trial counsel was ineffective by failing to file a discovery motion. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There is no evidence in this record that

filing a discovery motion would have produced exculpatory evidence. There is no arguable merit to this issue.

In his response to the no merit report, Zeller argues that his attorney erred by allowing evidence to be presented to the jury that Zeller was intoxicated and under the legal drinking age at the time of his arrest fourteen hours after the crime he was charged with. This evidence was in the form of a police officer's testimony that was completely irrelevant to the question asked.[1] It could be argued that Zeller's counsel was ineffective by failing to object to this testimony. We need not address both components of the ineffectiveness analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** There is no arguable merit to an argument that our confidence should be undermined by this evidence. There is no reasonable probability that information that the eighteen-year-old Zeller had consumed two or three beers would substantially affect the jury's assessment of his credibility or otherwise prejudice the jury against Zeller.

Zeller argues that there was error in connection with the jury being shown photographs of him taken after his arrest, allegedly wearing the same clothes that he was wearing at the time of the crimes. He asserts that the clothes were not, in fact, the same. This issue does not appear significant. Identity was

[1] The prosecutor asked: "Once you got to the police station, did you take any photographs?" The officer responded: "Well, on the way to the central station while we were in my squad car, you know, I noticed—I noted a strong odor of intoxicants on his person and I asked him if he had been drinking. He stated, yeah, he had two to three beers at the house there."

not a significant issue because Zeller testified that he was indeed at the store on the morning in question, in the department from which he was alleged to have stolen clothes. It is not clear how his clothing at the time of his arrest is relevant.

Zeller argues that no itemized list of stolen items was ever provided, that there were no store clerks or customers who could collaborate the guard's assertions, and no proof that anything was stolen. This goes to the sufficiency of the evidence. When reviewing sufficiency of the evidence, we may 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 that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 755 (1990). In this case, no physical evidence was necessary. The store officer's testimony, if believed by the jury, was sufficient to support the convictions.

Zeller argues that there was error in connection with a written statement by the store officer that was not provided to the defense. The defense learned about this statement at trial when the officer used it during his testimony. It could be argued that a proper discovery motion might have obtained the statement. However, there is no indication in this record that the late discovery of the statement prejudiced the defense in any way.

Our review of the record discloses no other potential issues for appeal. Attorney Maves-Klatt is relieved from further representing Zeller in this matter.

By the Court.—Judgment affirmed.