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DISTRICT I

June 8, 2018

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

2016AP2233-CRNM State of Wisconsin v. Terrance T. Travis (L.C. # 2015CF1077)

Before Kessler, P.J., Brennan and Brash, 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).

Terrance T. Travis, by Attorney Patrick Ritter, appeals a judgment of conviction pursuant to the no-merit procedure set forth in WIS. STAT. RULE 809.32 (2015-16).[1] A jury found Travis

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

guilty of one count of physical abuse of a child and one count of disorderly conduct. *See* WIS. STAT. §§ 948.03(2)(b), 947.01(1). Attorney Ritter filed a no-merit report and a supplemental no-merit report asserting that further proceedings would be frivolous within the meaning of ***Anders v. California***, 386 U.S. 738 (1967). Upon review of the record and the no-merit reports, we conclude that arguably meritorious issues exist. Accordingly, we reject the no-merit report, dismiss the appeal without prejudice, and extend appellate deadlines.

The State filed a criminal complaint alleging that on March 6, 2015, Travis returned intoxicated to the home he shared with A.E. and her four children, including her fourteen-year-old son, J.T.E. According to the complaint, Travis punched holes in a door and struck A.E. and J.T.E. The State charged Travis with one count of battery to A.E., one count of physical abuse of a child, and one count of disorderly conduct. Travis exercised his right to a jury trial. The jury acquitted Travis of battery but convicted him of the other two charges.

Following receipt of a no-merit report, we asked Attorney Ritter to address two matters regarding the jury instructions that he did not examine in his submission, and specifically to discuss the matters in light of any potential claim of trial counsel's ineffectiveness for failure to object to the instructions. A convicted person alleging ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate counsel filed a supplemental no-merit report advising that, in his view, Travis cannot mount an arguably meritorious challenge based on either the deficiency prong or the prejudice prong of ***Strickland*** and therefore cannot pursue an arguably meritorious claim that trial counsel was ineffective in regard to the jury instructions.

A. Instruction regarding intent

To obtain a conviction on the charge that Travis physically abused J.T.E. in violation of WIS. STAT. § 948.03(2)(b), the State was required to prove that: (1) Travis caused bodily harm to J.T.E.; (2) Travis intentionally caused the bodily harm; and (3) J.T.E. had not attained the age of eighteen years at the time of the alleged offense. *See* WIS. JI—CRIMINAL 2109. The circuit court, however, instructed the jury without objection that "[t]here was evidence received on the issue of intent. What was the defendant's state of mind. This is not required for the offense charged but as to context or background that is to provide a more complete presentation of the evidence relating to the offense charged." "[J]ury instructions that have the effect of relieving the State of its burden of proving beyond a reasonable doubt every element of the offense charged are unconstitutional." ***State v. Harvey***, 2002 WI 93, ¶23, 254 Wis. 2d 442, 647 N.W.2d 189. Accordingly, we asked appellate counsel to discuss trial counsel's failure to object to the instruction regarding intent.

In response, appellate counsel first maintains that Travis cannot demonstrate any prejudice as a result of the jury instruction because the jury acquitted him of battery, an offense that also requires intent. The acquittal, says counsel, "shows that the jury did not improperly believe that the State was not required to prove intent." We cannot agree. Intent to cause bodily harm is an element of battery, *see* WIS. JI—CRIMINAL 1220, but not the only element of battery. To convict a person of battery, the State must also prove that the defendant caused bodily harm, the person harmed did not consent, and the defendant knew the person harmed did not consent. *See* ***id***. If the jurors mistakenly believed that the State was not required to prove intent before they could find Travis guilty of battery, they could nonetheless have acquitted him of that crime because they concluded that the State failed to prove some other element. At the same time, if

the jurors believed that the State was not required to prove intent before they could find Travis guilty of physically abusing a child, they could have convicted him solely on proof of the remaining two elements of that crime.

Turning to the deficiency prong, appellate counsel observes that, in regard to the charge of physically abusing a child, the circuit court instructed the jury: "the State must prove that the defendant intentionally caused bodily harm. This requires that the defendant had the mental purpose to cause bodily harm to [J.T.E.] and he was aware that his contact was particularly certain to cause that result." Appellate counsel maintains that because "the [circuit] court correctly instructed the jury as to the intent element ... Travis cannot argue that his counsel's performance was deficient." This instruction, however, did not include a retraction of the instruction that proof of intent "is not required for the offense charged." Although a reviewing court assesses jury instructions as a whole, *see* ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258, appellate counsel does not explain why Travis cannot pursue a claim that inconsistent statements regarding intent misled the jury. In sum, we are not persuaded that a challenge based on trial counsel's failure to object to the instruction would be frivolous within the meaning of ***Anders***.

B. Instruction regarding prior acts

The circuit court instructed the jury that "evidence has been presented regarding conduct of the defendant for which the defendant is not on trial.... You may consider this as evidence to include the defendant's character and not what he has been charged with here." With exceptions not relevant to this case, however, WIS. STAT. § 904.04(2), provides that "evidence of other

crimes, wrong, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."

In the supplemental no-merit report, appellate counsel concludes that, in light of the deference owed to trial counsel's strategic decisions, Travis cannot pursue an arguably meritorious claim that trial counsel performed deficiently by failing to object to the jury instruction regarding prior acts. While we agree that reviewing courts defer to trial counsel's objectively reasonable decisions, *see* ***State v. Kimbrough***, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752, appellate counsel does not hypothesize a strategy underlying the failure to object.

Turning to the question of prejudice, appellate counsel maintains that a challenge on this prong would lack arguable merit because Travis was acquitted of one charge. We observe, however, that acquittal on one of several charges does not automatically require a conclusion that a defendant suffered no prejudice from an error. *Cf.* ***State v. Sullivan***, 216 Wis. 2d 768, 790-91, 576 N.W.2d 30 (1998) (rejecting an argument that acquittal on two charges showed jury was not improperly influenced by other acts evidence in convicting on other charges). Appellate counsel also maintains Travis cannot make an arguably meritorious claim of prejudice based on the prior acts instruction because the State offered ample evidence to convict him without regard to the prior acts. Although appellate counsel appears to view the other acts evidence as superfluous, we observe that the trial included evidence that J.T.E. cut Travis with a knife, and the State argued: "I submit to you that [J.T.E.] getting a knife was entirely reasonable. Why is it reasonable? It's based on those past acts. Acts he knew what was going to happen. He knew what was going to happen." Given the State's argument regarding the significance of the other acts evidence here, we are not persuaded, under the totality of the circumstances, that Travis's

appellate counsel would risk an accusation of making a frivolous argument if counsel pursued a claim based on an improper instruction regarding that evidence.

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988).

We conclude that further proceedings to challenge trial counsel's effectiveness in regard to the jury instructions would not be wholly frivolous. Therefore, we must reject the no-report report filed in this matter. We add that our decision does not mean we have reached a conclusion about the arguable merit of any other potential issue in the case. Travis is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Travis, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Travis or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Travis to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the State Public Defender's Office advising either that it has appointed new counsel for Travis or that new counsel will not be appointed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals