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DISTRICT I

January 6, 2014

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

2013AP126-CRNM State of Wisconsin v. Deandre Wash (L.C. #2011CF1131)

Before Curley, P.J., Fine and Kessler, JJ.

Deandre Wash appeals a judgment convicting him of second-degree sexual assault with use or threat of force or violence, misdemeanor battery and false imprisonment. Appointed appellate counsel, Hans P. Koesser, filed a no-merit report seeking to withdraw. *See* WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Wash filed two responses to the report. After reviewing the no-merit report and the responses, and after

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conducting an independent review of the record, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction. See WIS. STAT. RULE 809.21.

The no-merit report addresses whether the evidence was sufficient to support the jury's verdict convicting Wash of three of the four crimes he was charged with committing, second-degree sexual assault, misdemeanor battery and false imprisonment.² When reviewing the sufficiency of the evidence, we look at whether “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. Zimmerman*, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). We will not overturn the verdict if “any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt.” See *Poellinger*, 153 Wis. 2d at 507. The State may prove its case either by direct evidence or by “evidence that is entirely circumstantial.” *Id.* at 501. “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict.” *Id.* at 507.

To convict a defendant of second-degree sexual assault by use or threat of force or violence, the State must show: (1) that the defendant had sexual contact or sexual intercourse with the victim; (2) that the victim did not consent to the sexual contact or sexual intercourse;

² The jury acquitted Wash of strangulation.

and (3) that the defendant had sexual contact or intercourse with the victim by use or threat of force or violence. WIS JI—CRIMINAL 1208. The victim testified that Wash demanded sex from her repeatedly and hit her and choked her until she could not breathe, causing bruising and cuts on her neck and face. The victim testified that she gave in to his demand for sex because it was the only way she could stop the physical violence. Amanda Jaeger-Jacobs, the sexual assault nurse examiner from the hospital where the victim sought care after the attack, testified that the victim's injuries included the red marks that were similar to bruises on the victim's neck from intense pressure and cuts to her face and neck. The testimony of the victim and the nurse was sufficient to support the conviction of second-degree sexual assault with use of force or violence. There would be no arguable merit to a claim that the evidence was insufficient as to this charge.

To convict a defendant of misdemeanor battery, the State must show: (1) that the defendant caused bodily harm to the victim; (2) that the defendant *intended* to cause that harm; (3) that the defendant caused the bodily harm without the consent of the victim; and (4) that the defendant knew that the victim did not consent. WIS JI—CRIMINAL 1220. The victim testified that Wash hit her, choked her, pushed her, and dragged her around the apartment, and that she tried to get him to stop by going into the bedroom of one of Wash's cousins for protection, but that Wash came after her and physically removed her from the bedroom. She testified that Wash was angry because he wanted to have sex and she was too tired. The victim's testimony was sufficient to show that Wash caused her bodily harm without her consent and he knew she did not consent. The jury could reasonably infer that Wash intended to cause the victim harm by choking and hitting her. Therefore, there would be no arguable merit to a claim that the evidence was insufficient for the jury to convict Wash of misdemeanor battery.

To convict a defendant of false imprisonment, the State must show: (1) that the defendant confined or restrained the victim; (2) that the defendant confined or restrained the victim intentionally; (3) that the victim did not consent to being confined or restrained; (4) that the defendant had no lawful authority to confine or restrain the victim; and (5) that the defendant knew that the victim did not consent and knew that he did not have lawful authority to confine or restrain the victim. WIS JI—CRIMINAL 1275. The victim testified that Wash would not let her leave the apartment after the sexual assault. When she tried to leave through the front door, he blocked it. The victim testified that she eventually jumped from the second-story porch to escape. Based on this testimony, there was sufficient evidence to support the conviction of false imprisonment. There would be no arguable merit to a claim that the evidence was insufficient as to this charge.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion. The circuit court sentenced Wash to fifteen years of imprisonment for second-degree sexual assault, with ten years of initial confinement and five years of extended supervision. The circuit court sentenced Wash to six years in prison for false imprisonment, with three years of initial confinement and three years of extended supervision, to be served concurrently. Finally, the circuit court sentenced Wash to nine months in jail for misdemeanor battery, to be served concurrently.

The circuit court considered the gravity of the offense, Wash's character and the need to protect the public. The circuit court found that Wash's conduct was outrageous, that he was dangerous and that he needed sex offender treatment. The circuit court noted that this was Wash's second conviction for sexual assault and he seemed to have no understanding of the harm his actions had caused. The circuit court explained its application of the various sentencing

considerations in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. There would be no arguable merit to a challenge to the sentence on appeal.

In his responses, Wash states that he is innocent and presents his version of the events that led to the charges against him. On appeal, we do not decide whether witnesses were telling the truth. That is the jury's job. "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Poellinger*, 153 Wis. 2d at 506. Here, the jury heard two different versions of what happened, the victim's version and Wash's version, and the jury believed the victim's version of events, which was corroborated by her physical injuries. Wash's assertion that the victim was not telling the truth is not a basis for an appellate challenge to his conviction. There is no arguable merit to Wash's arguments in this regard.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we conclude that further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Hans P. Koesser is relieved of any further representation of Wash in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals