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DISTRICT IV

March 7, 2024

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Circuit Court Judge
Electronic Notice

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

2023AP585-CRNM State of Wisconsin v. Kendrick C. Gatlin (L.C. # 2021CF239)

Before Kloppenburg, P.J., Nashold, and Taylor, 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).

Attorney Gregory Bates, appointed counsel for Kendrick Gatlin, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Gatlin was sent a copy of the report and filed a response, and counsel then filed a supplemental no-merit report. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we

[1] All references to the Wisconsin Statutes are to the 2021-22 version.

conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Gatlin was charged with battery by a prisoner, as a repeater. The charge was based on an incident in which he was alleged to have attacked another inmate in the inmate's cell. The case proceeded to a jury trial. The victim and Gatlin each testified. The jury found Gatlin guilty. At sentencing, the circuit court imposed a six-year bifurcated term of imprisonment consisting of three years of initial confinement and three years of extended supervision, consecutive to any other sentence Gatlin was already serving.

The no-merit report addresses the sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. An appellate court will not overturn a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting all of the evidence here, we are satisfied that it was sufficient.

In his response to the no-merit report, Gatlin claims that the State's proof was insufficient to prove two of the five elements of battery by a prisoner. Both elements relate to the victim's lack of consent. For these elements, the State was required to prove: (1) that the harm or injury that Gatlin caused to the victim was without the victim's consent, and (2) that Gatlin knew that the victim did not consent. *See* WIS. STAT. § 940.20(1); WIS JI—CRIMINAL 1228. Gatlin argues that the State failed to prove these elements because he and the victim engaged in a consensual fight. However, Gatlin's argument is based on his own trial testimony, and the victim testified

differently and denied that he agreed to fight Gatlin in his cell. The jury was free to credit that testimony over Gatlin's testimony to the contrary. *See* ***State v. Kucharski***, 2015 WI 64, ¶24, 363 Wis. 2d 658, 866 N.W.2d 697 ("'The credibility of the witnesses is properly the function of the jury ….'" (quoted source omitted)).

Turning to other potential issues, the no-merit report addresses whether there is arguable merit to any issue relating to pretrial motions, jury selection, opening statements, Gatlin's decision to testify, the jury instructions, closing arguments, and other events before and during trial. We are satisfied that the report properly analyzes each of these issues as having no arguable merit.[2]

In his response to the no-merit report, Gatlin raises additional issues relating to trial. We now address each of those issues and explain why we conclude that they lack arguable merit.[3]

Gatlin first claims that the jurors had difficulty hearing or were unable to hear one of the State's witnesses, and that the circuit court, therefore, should have declared a mistrial or repeated that witness's testimony. The witness was a detective whose testimony provided context for prison surveillance video played for the jury. Gatlin relies on the following exchange that occurred on the record immediately following the detective's testimony. The bailiff stated, apparently addressing the prosecutor, that "[t]he jury is saying that they were having have [sic] a

[2] The no-merit report refers to document 81 as the transcript including the circuit court's colloquy with Gatlin regarding his right to testify, but the correct transcript is document 79. We note this minor record citation error only to avoid the possibility of any future confusion over what the record shows.

[3] Although we agree with counsel that the issues raised by Gatlin's response lack arguable merit, we do not adopt all of counsel's reasoning. We rely instead on the reasoning set forth in this opinion, some of which differs from counsel's reasoning.

terrible time hearing you"; the prosecutor responded, "Just during the video thing, right?"; the bailiff replied, "I assume"; and the prosecutor then replied, "Okay." Gatlin argues that this exchange shows that the jurors were having a "terrible time" hearing the detective's testimony or that they did not hear it at all. Gatlin also argues that this exchange shows that the jurors did not follow the judge's earlier instruction to raise their hands if they were having difficulty hearing. Gatlin argues that the detective's testimony was critical and that it was unfair to his defense if the jurors did not hear it.

Trial counsel did not move for a mistrial or other relief based on this on-the-record exchange. Therefore, the question on appeal would be whether counsel was ineffective on this basis. Gatlin would have the burden to prove both that counsel performed deficiently and that counsel's deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish 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.

Applying these standards here, we conclude that Gatlin would be unable to establish prejudice. The detective's testimony was brief, and it consisted of identifying locations in the prison as shown in the prison surveillance video and pointing out the victim and Gatlin in those locations. Both the victim and Gatlin testified about the events shown in the video, and the victim admitted that the video showed a heated verbal exchange between the victim and Gatlin in the prison dayroom before the incident in the victim's cell. There was nothing about the detective's testimony that added to Gatlin's defense.

Gatlin next claims that trial counsel was ineffective because counsel declined to cross-examine the detective. According to Gatlin, counsel could have asked the detective to explain the events shown in the video in a manner favorable to his defense. This claim lacks arguable merit because the detective was not present for the events and was not in a position to interpret them.[4]

Gatlin next raises several issues relating to the victim's claim that Gatlin stabbed him with a scissors during the incident in the victim's cell. We discuss each of these issues after providing additional relevant background.

At trial, the victim testified that Gatlin not only beat him but also stabbed him in the left eye and stabbed him repeatedly in the left side of his chest with a scissors. Gatlin testified that he did not stab the victim and that he only struck the victim with his hands twice in the face and left eye area. Gatlin admitted that he possessed a scissors when he entered the victim's cell, but he denied using the scissors to fight in any way. He testified that he used the scissors for his prison laundry work, that he carried them everywhere he went outside his cell, and that they must have fallen out of his waistline.[5] A prison employee who collected the scissors from the victim's cell testified that they were small and lacked a "point" at the end, "like grade school scissors." The jury also learned that Gatlin's inmate number was etched onto the scissors.

As appellate counsel's supplemental no-merit report states, the State did not need to establish that Gatlin stabbed the victim to prove the elements of battery by a prisoner. Thus,

[4] The video lacked audio.

[5] Gatlin testified that he carried the scissors in his waistline because his prison clothing does not have pockets.

evidence that Gatlin stabbed the victim was not necessary to the State's proof. However, the issue of whether Gatlin stabbed the victim became relevant at trial because it bore on Gatlin's and the victim's credibility, and Gatlin's defense depended on whether the jury believed his version of events, including his testimony that he and the victim engaged in a consensual fight.

Gatlin claims that the prosecution argued facts not in evidence and engaged in misconduct by referring to a stabbing because: (1) the State offered no medical evidence to show that the victim was stabbed; (2) the State offered no scientific evidence to show that the scissors had blood or the victim's DNA on them; and (3) photographs of the victim's injuries shown to the jury established that the victim was *not* stabbed.

We conclude that Gatlin's claim of prosecutorial misconduct lacks arguable merit. The victim testified that Gatlin stabbed him, and the prosecutor was free to reference that testimony. Although medical or scientific evidence could have corroborated the victim's testimony, there is no legal basis to have required such evidence. The concept of a stabbing with scissors was well within the jurors' common knowledge. *See* ***State v. Owen***, 202 Wis. 2d 620, 632, 551 N.W.2d 50 (Ct. App. 1996) (explaining that the State was not required to provide expert testimony to establish a matter within the jury's common knowledge and experience). Additionally, we disagree with Gatlin that the photographs of the victim's injuries establish that he was not stabbed. Two of the photographs show serious injuries to the victim's face and left eye area that could be consistent with stab wounds from the scissors, and a third photograph appears to show scrapes and other minor wounds on the victim's upper left torso area that could be consistent with wounds from the scissors.

Gatlin next claims that trial counsel was ineffective by failing to object to the victim's testimony that Gatlin stabbed him with the scissors. This claim lacks arguable merit because there was no valid basis for counsel to have objected to that testimony as inadmissible.

Gatlin next claims that trial counsel was ineffective by failing to subpoena the victim's medical records and the medical staff who treated the victim's injuries. According to Gatlin, the medical records and the medical staff's testimony would have shown that the victim was not stabbed. We conclude that there is no arguable merit to this issue because Gatlin is speculating. "A showing of prejudice" in the context of ineffective assistance of counsel "requires more than speculation." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

We turn to sentencing. We agree with counsel's conclusion in the no-merit report that Gatlin has no nonfrivolous claims relating to sentencing. The circuit court considered the required sentencing factors along with other relevant factors, and it otherwise properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. Gatlin's six-year prison sentence was within the maximum, and he could not argue that the sentence was unduly harsh or so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).[6] We see no other basis upon which Gatlin might challenge his sentence.

In his response to the no-merit report, Gatlin claims that the circuit court relied on inaccurate information at sentencing. To prevail on a claim for sentencing based on inaccurate

[6] The maximum prison term for battery by a prisoner is six years, but because of the repeater allegation in this case, the maximum was increased by four years to a total of ten years. *See* WIS. STAT. §§ 940.20(1), 939.50(3)(h), 939.62(1)(b).

information, the defendant has the burden to prove by clear and convincing evidence both (1) that there was inaccurate information before the court at sentencing, and (2) that the court relied on the inaccurate information. ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. Here, Gatlin claims that the court relied on inaccurate information by treating his possession of the scissors as a serious aggravating factor and by finding that he stabbed or at least attempted to stab the victim. This claim lacks arguable merit. The court reasonably interpreted the evidence as establishing that Gatlin carried out a premediated plan to attack and stab the victim with the scissors. The court was not required to credit Gatlin's testimony to the contrary.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of any further representation of Kendrick Gatlin in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals