COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0331-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC DAVIS,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

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

PER CURIAM. A jury found Eric Davis guilty of one count of burglary while armed with a dangerous weapon, three counts of bail jumping, and one count each of obstructing an officer and disorderly conduct. The court withheld sentence on the armed burglary charge, and placed Davis on probation for ten years, with one year in jail with Huber privileges as a condition of

probation. The court also withheld sentence on the other counts, and placed Davis on probation for two years for each count, to run concurrent to the ten-year probation term.

Davis's appellate counsel, Attorney Mark G. Sukowaty, has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Davis has filed a response. This court has independently reviewed the record and considered counsel's report and the response. Because there are no arguably meritorious appellate issues, we affirm the judgments of conviction.

FACTS

At trial, Yarees Sanders testified that, in the early morning hours of October 5, 1996, he awoke to find an intruder in his bedroom. Sanders testified that the intruder was wearing dark, hooded clothes and he was carrying a gun and a flashlight. The intruder grabbed a laptop computer, and told Yarees not to move or he would be killed. After the man left, Yarees discovered several electronic items and some money missing. When he tried to call police, he discovered that the telephone wires had been cut.

At the preliminary hearing, Yarees's wife, Jenna, testified that she woke up at the same time as her husband and that she recognized the intruder as Davis. Jenna did not testify at trial for medical reasons. At trial, Yarees identified Davis as the burglar, but testified that he had never seen him before the morning of October 5.

At 2:20 p.m. on October 5, police were dispatched to investigate a suspicious person report. When officers arrived, they spoke with Tina Schuller

who told them she had seen a man in her backyard, looking into her apartment window. Ms. Schuller watched the man go to a nearby vehicle and take some clothes out of the trunk. The man then returned to Ms. Schuller's yard and threw something into the bushes. The man then jumped the fence and went into a neighboring building. Officers later recovered a box of rubber gloves from the bushes.

One of the investigating officers, Officer Murphy, testified that she recognized the vehicle as belonging to Eric Davis. After speaking with Ms. Schuller, Officer Murphy looked into the vehicle and saw the handle of a gun protruding from under an armrest in the front seat. Officer Murphy also noticed a pair of wire cutters or pliers on the passenger-side floor.

As the officers waited for assistance, Officer Murphy saw Davis look around the corner of a nearby building. Officer Murphy yelled, "Eric, stop," at which point Davis turned and ran. Officer Murphy pursued Davis, who was able to elude Murphy by jumping over a chain link fence. Another officer eventually apprehended Davis and brought him back to the area, and Ms. Schuller identified Davis as the man she had seen in her backyard.

Davis was charged with the armed burglary of the Sanders apartment. In a separate criminal complaint, Davis was charged with disorderly conduct, obstructing, and three counts of misdemeanor bail jumping. The matters were joined for trial, and the jury found Davis guilty on all counts. Further facts concerning procedure at trial will be set forth below.

DISCUSSION

A. Double Jeopardy

In his no merit report, counsel first discusses whether Davis's conviction raises an issue of double jeopardy[1] because a jury was selected but dismissed before the jurors were sworn, after Davis raised a tardy alibi defense. Because jeopardy in a jury trial does not attach until the jury is sworn, counsel correctly concludes that an appeal on this point would lack arguable merit. *See* § 972.07(2), STATS.

B. Joinder

Counsel next discusses whether the felony armed burglary charge was properly joined for trial with the misdemeanor charges. Counsel concludes that joinder was proper and that an appeal on that issue would lack arguable merit. In his response, Davis disagrees, arguing that the incidents took place in different parts of town[2] and that none of the misdemeanor charges were lesser included offenses of the armed burglary charge. Davis also argues that his trial attorney was ineffective because she did not object to joinder and did not tell him until after trial that he could object to joinder.[3]

[1] U.S. CONST. Amend. V; WIS. CONST. art. I, § 8. The state and federal double jeopardy guarantees are "identical in scope and purpose." ***Day v. State,*** 76 Wis.2d 588, 591, 251 N.W.2d 811, 812-13 (1977).

[2] The armed burglary occurred at a Troy Drive apartment and the misdemeanors occurred on Clyde Gallagher Drive. Both locations are on the east side of Madison.

[3] When the charges were initially joined, Davis's counsel did not object. Immediately before trial, counsel advised the court that Davis now objected to joinder. The court denied the objection as untimely. The record defeats Davis's assertion that counsel did not tell him until after trial that he could object to joinder.

Whether the crimes were properly joined is a question of law. *See* ***State v. Locke,*** 177 Wis.2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993). Joinder is proper when two or more crimes "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." Section 971.12(1), STATS. Crimes are considered the same or similar in character if they are the same type of offense that occurred over a relatively short period of time and the evidence as to each overlaps. ***Locke,*** 177 Wis.2d at 596, 502 N.W.2d at 894.

These cases were properly joined for trial. The crimes occurred on the same day, and in relatively close geographical proximity. Items used in the armed burglary, a gun and wire cutters, were found in Davis's car. The officers investigating the afternoon incident, and the evidence recovered in their investigation, would have to testify in the armed burglary prosecution. The evidence overlapped, and therefore, joinder was appropriate. No arguably meritorious appellate issue exists.[4]

C. Davis's Testimony

Davis testified in his own defense. He did so against the advice of counsel, and she did not participate in the questioning due to ethical constraints. Counsel also moved to withdraw at that point, and the court denied the motion. Davis then testified in a narrative fashion, and indicated that he had spent the night

[4] Davis's objection to joinder, made immediately before trial, was denied as untimely. A motion to sever is addressed to the trial court's discretion. *See* ***State v. Locke,*** 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993). Because Davis was not prejudiced by joinder, the refusal to sever was not an erroneous exercise of discretion.

at a friend's apartment and did not leave until the next afternoon, shortly before he was apprehended by police. Davis also gave a short closing argument, in addition to that given by counsel.

Appellate counsel discusses whether the State improperly asked Davis, on cross-examination, how many times he had been convicted of a crime. Such an inquiry is permissible under § 906.09(1), STATS.[5] The trial court's decision to permit Davis to testify, without participation of counsel, was a proper response to the ethical conflict facing Davis's attorney. *See* Comments to SCR 20:3.3.

D. Pretrial Motion to Withdraw

In his response, Davis argues that the trial court should have permitted his attorney to withdraw and appointed new counsel to represent him.[6] Davis requested new counsel after the jury was selected, just before the start of trial. Davis asserts that the court miscounted the number of prior attorneys and, therefore, his request for new counsel should have been granted. The record does not support Davis's assertion.

A request for a new attorney is addressed to the discretion of the trial court. ***State v. Lomax,*** 146 Wis.2d 356, 359-60, 432 N.W.2d 89, 90 (1988). A court should balance the defendant's constitutional right to counsel against the

[5] The State also asked Davis if he had "used the name Kenneth Taylor in the past," to which Davis replied, "That was a crime I was convicted for." Davis's answer was not responsive to the question, which did not inquire into the nature of the prior conviction. The State cannot be faulted for Davis's ambiguous answer.

[6] Davis is not referring to counsel's motion to withdraw made just prior to his testimony, but rather to an earlier motion made prior to the beginning of the trial.

public's interest in the prompt and efficient administration of justice. *See* ***id.*** at 360, 432 N.W.2d at 91. A showing of good cause is required to warrant substitution of appointed counsel. *See* ***id.*** When reviewing a trial court's denial of a request for new counsel, we consider the adequacy of the trial court's inquiry into the defendant's complaint, the timeliness of the motion, and the nature of the conflict, including the potential impact on the defense and fair presentation of the defense. *See* ***id.*** at 359-60, 432 N.W.2d at 90-91.

The record shows that the court asked about the nature of Davis's dissatisfaction with counsel. Davis told the court, "We had a conflict. I felt, you know, she shouldn't represent me if we would have a conflict like that." Davis did not elaborate on the specifics of the conflict. The court replied that conflicts between counsel and a defendant are not unusual, that certain decisions are made by counsel and that some decisions, such as whether to testify, must be made by the defendant. The court considered the fact that Davis had previously been represented by another appointed attorney and that a previous jury trial had been adjourned after jury selection to accommodate Davis's alibi defense. The trial court properly exercised its discretion and an appellate challenge to the pre-trial motion to withdraw would lack arguable merit.

E. Cross-examination of State's Witnesses

Davis also complains that he was not permitted to cross-examine Jenna Sanders, who had recognized Davis as the intruder. The State did not call Jenna to testify at trial because she was on doctor-ordered bed rest in the late stages of pregnancy. The State was not required to call Jenna as a witness. Yarees identified Davis as the man he saw in this apartment on October 5, 1996.

Additional testimony from his wife was not required. Davis cannot rest a meritorious appeal upon the failure of Jenna Sanders to testify.

Davis next complains that his trial counsel "did not do an effective job discrediting" the testimony of Yarees Sanders. Davis suggests that Yarees's trial testimony differed from his preliminary hearing testimony. The record shows that Davis's counsel cross-examined Yarees about several discrepancies between his preliminary hearing testimony and his trial testimony. An appeal on this basis would be frivolous.

F. Seizure of Gun from Car

Lastly, Davis argues that the seizure of the gun from his car violated his constitutional rights. A challenge to the seizure of the gun would lack arguable merit. Officer Murphy testified that she could see the handle of a handgun protruding from under a front seat armrest. Because the gun was in plain view, Davis had "no reasonable expectation of privacy" and its seizure "is not the product of a search." ***State v. Edgeberg,*** 188 Wis.2d 339, 345, 524 N.W.2d 911, 914 (Ct. App. 1994). An appeal on this basis would lack arguable merit.

Based on an independent review of the record, this court finds no basis for reversing the judgments of conviction. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Therefore, the judgments of convictions are affirmed, and appellate counsel is relieved of any further representation of Davis on this appeal.

By the Court.—Judgments affirmed.

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