

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 1, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1858-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARLOS LUCHO PHILLIPS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. A jury found Carlos Lucho Phillips guilty of aggravated battery, while armed, in violation of §§ 940.19(2) and 939.63, STATS. He was convicted and sentenced to the maximum sentence of fifteen years in prison, with credit for 172 days presentence incarceration.

The state public defender appointed Michael W. Schnake to represent Phillips on appeal. Schnake has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Phillips received a copy of the no merit report and filed a response.

According to the testimony of the victim, DeEtta J. Bell, she was talking on the telephone when Phillips arrived at her home. She opened the door for him and resumed her conversation. Without warning, Phillips sat on her lap, pinning her arms down. He wrapped the telephone cord around her neck and cut her with a knife. Bell testified that Phillips asked why she did not love him and why she had left him. He also said that if he could not be with her, no one would. Bell testified that after she managed to slide to the floor, Phillips cut the back of her neck and ran from the house. Bell also left the house and ran across the street for help. Phillips grabbed her after she crossed the street, commenting that she was not dead yet and asking if she wanted more. As Phillips and Bell struggled, Phillips slashed and kicked Bell. Bell ultimately lost consciousness. She had cuts on her back, neck, arms, shoulders, and legs.

The emergency room doctor who treated Bell testified that 175 stitches were required to close the cuts. Although none of the wounds was life-threatening, they were inflicted in a way that caused considerable scarring and pain.

Both the no merit report and Phillips's response raise the issue of whether the trial court erroneously exercised its discretion when it allowed the information to be amended and denied Phillips's request for a preliminary hearing. Schnake correctly concludes that the issue lacks arguable merit.

Phillips was originally charged with second-degree reckless injury in violation of § 940.23(2), STATS. Concerned that testimony might cause the prosecution to increase the charge, Phillips made a strategic decision to waive the preliminary hearing. This strategy was unsuccessful. After Phillips waived the preliminary hearing and was arraigned, the information was amended to the greater, enhanced charge for which he was convicted.

The district attorney may increase a charge after waiver of the preliminary hearing provided the new charge is supported by the facts in the original complaint. *State v. Michels*, 141 Wis.2d 81, 89, 414 N.W.2d 311, 313 (Ct. App. 1987). Additionally, a trial court may allow amendment of the information between the time of arraignment and trial if there is no prejudice to the defendant's right to notice, speedy trial, or opportunity to defend. *Whitaker v. State*, 83 Wis.2d 368, 374, 265 N.W.2d 575, 579 (1978). Phillips was not prejudiced by the amendment. Further, he requested a new preliminary hearing for discovery purposes; however, discovery is not a purpose of the preliminary hearing. *State v. Camara*, 28 Wis.2d 365, 372-73, 137 N.W.2d 1, 5 (1965).

The no merit report and Phillips's response also address whether the trial court erroneously exercised its discretion when it denied a mistrial. Phillips moved for a mistrial when a witness testified, in violation of a prior court ruling, that Phillips was on parole and supporting himself by selling blood. The testimony occurred during Phillips's cross-examination of the officer who interrogated him.

The court noted that several prior questions about the content of Phillips's statement had been answered in narrative form, and the officer had followed this pattern. The court concluded that the officer was not trying to sneak in the information and, because Phillips had testified, the jury knew he had two prior convictions. The trial court concluded that the testimony was harmless. A motion for a mistrial is discretionary, *Haskins v. State*, 97 Wis.2d 408, 419, 294 N.W.2d 25, 33 (1980), and here there was no erroneous exercise of discretion.

Additionally, the no merit report addresses the issue of juror bias raised in a letter Phillips sent to the trial court prior to sentencing. Schnake concludes that this possible issue lacks merit. Based upon our independent review of the record, including the letter, we conclude that counsel is correct.

In his response, Phillips contends that his right to a speedy trial was violated and that his case was unfairly reassigned to a different trial court. Pursuant to § 971.10(2)(a) & (b), STATS., the trial of a felony defendant is to commence within ninety days from the date a speedy trial is demanded even if

reassignment to a different court is necessary. Phillips made his speedy trial demand on September 13. The ninetieth day fell on Sunday, December 12. On Monday, December 13, the case was assigned to a different court, and trial commenced. The trial was timely because the ninety-day deadline fell on a weekend. See §§ 972.11 (1) and 801.15(1)(b), STATS. The assignment to a different trial court was necessary to comply with the speedy trial demand.

Finally, Phillips alleges in his response that trial counsel failed to call the witnesses he asked counsel to subpoena. Phillips does not identify the potential witnesses nor their expected testimony. Absent such factual assertions, this conclusory allegation is inadequate to raise a potential appealable issue. See *State v. Washington*, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993).

Based upon our independent review of the record, we also conclude that a challenge to the sufficiency of the evidence lacks arguable merit. An appellate court will affirm a conviction if it can conclude that a jury, acting reasonably, could be convinced, beyond a reasonable doubt, by evidence the jurors had a right to believe and accept as true. *State v. Teynor*, 141 Wis.2d 187, 204, 414 N.W.2d 76, 82 (Ct. App. 1987). The reviewing court considers the evidence in the light most favorable to the jury's verdict. *State v. Barksdale*, 160 Wis.2d 284, 289-90, 466 N.W.2d 198, 200 (Ct. App. 1991). Bell's testimony, summarized earlier, together with the testimony of the emergency room physician, adequately supports the verdict.

The record also establishes that the trial court did not erroneously exercise its discretion when imposing sentence. Sentencing is within the trial court's discretion, *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987), and the court is presumed to have acted reasonably, *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). A defendant bears the burden of showing, from the record, that a sentence is unreasonable. *Id.* The trial court emphasized the brutal, vicious nature of the attack and its long-term impact, as well as Phillips's total denial of responsibility and his illogical self-defense claim. The court also considered the need to deter similar behavior in the future and to protect the public.

Our independent review of the record did not disclose any additional potential issues for appeal. Therefore, any further proceedings on Phillips's behalf would be frivolous and without arguable merit within the meaning of *Anders* and RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Schnake is relieved of any further representation of Phillips in this appeal.

By the Court. – Judgment affirmed.