COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 27, 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. 95-0104-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARNELL STEVENS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. A jury found Darnell Stevens guilty of first-degree sexual assault and kidnapping. The court sentenced Stevens to twenty years in prison on each count, to run consecutive to each other and concurrent to an unrelated sentence.

Stevens's appellate counsel, Attorney Michael J. Edmonds, has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Stevens has filed a response. As required by ***Anders,*** this court has independently reviewed the record. Because there are no arguable issues for appeal, we affirm the judgment of conviction.

In the no merit report, counsel first discusses whether the trial court erred when it refused to allow Stevens to fire his appointed attorney on the morning of trial. In his response, Stevens asserts that the trial court was obligated to permit counsel's withdrawal after counsel informed the court that he had "a certain fear of my own personal safety, based upon [Stevens's] actions in the bullpen and here in court." In denying counsel's request to withdraw, the court noted that Stevens's conduct could be "view[ed] ... as obstructing the process." After defense counsel reassured the court that he was prepared for trial, the court denied the motion to withdraw. In his no merit report, appellate counsel concludes that a challenge to that ruling would lack arguable merit. We agree.

A defendant's request for substitute appointed counsel is directed to the discretion of the trial court. *See* ***State v. Stinson,*** 134 Wis.2d 224, 244, 397 N.W.2d 136, 144 (Ct. App. 1986). A defendant must show good cause, and last-minute requests are frowned upon. ***State v. Haynes,*** 118 Wis.2d 21, 27-28, 345 N.W.2d 892, 896 (Ct. App. 1984). When deciding whether to permit substitution that would delay a trial, the court must weigh the impact of the delay on witnesses and the parties. *See* ***Stinson,*** 134 Wis.2d at 244, 397 N.W.2d at 144.

The record shows that the court properly exercised its discretion. Attorney Matthew Huppertz was the fourth lawyer appointed to represent Stevens.[1] The case was over two years old.[2] The case had been adjourned previously to allow Attorney Huppertz additional time to prepare. The State was prepared for trial, as was Attorney Huppertz. Despite Stevens's alleged threats, Attorney Huppertz advised the court that he was "ready to go forward."

[1] The court recognized that one of Stevens's attorneys withdrew for medical reasons.

[2] A previous trial had ended in a mistrial when some jurors could not get to court because of a snowstorm.

The court properly exercised its discretion when it refused Stevens's request for new counsel.

In his response, Stevens argues that the court should have considered WIS. ADM. CODE § SPD 2.04. That rule guides the state public defender's appointment of successor counsel upon a defendant's request for a new attorney. The rule has no bearing, however, on a court's decision whether to permit the withdrawal of counsel. The court did not err when it did not consider WIS. ADM. CODE § SPD 2.04.

Appellate counsel next addresses whether the court erroneously exercised its discretion when it denied Stevens's request for an adjournment of trial so that he could locate alibi witnesses. In denying the request, the court noted that the case had been pending for over two years, yet Stevens did not file a notice of alibi until shortly before trial.[3] Attorney Huppertz advised the court that he could not locate one of the alibi witnesses, and the assistant district attorney stated that police had looked for, but could not find, that witness.[4] The other alibi witness was available to testify. The court concluded that "diligent efforts" had been made to locate the missing witness, and the court declined to order a further adjournment. The court considered the proper factors, and it did not erroneously exercise its discretion. *See* ***State v. Berg,*** 116 Wis.2d 360, 369-70, 342 N.W.2d 258, 263 (Ct. App. 1983).

Appellate counsel next discusses whether Stevens's trial counsel was ineffective because he did not move to suppress the identification of Stevens. Stevens was apprehended by officers investigating a report of a sexual assault "in progress." Officers testified that Stevens was sweating heavily and his penis was visible through a large hole in his pants. His stature and clothes matched the general description of the assailant. In an on-the-scene show-up, officers presented Stevens to the victim and to a friend who had seen the assailant prior to the assault. Both identified Stevens. The circumstances surrounding the show-up do not reflect any improper police procedure or suggestiveness. An on-the-scene show-up is an acceptable identification

[3] No notice of alibi was filed prior to the trial that ended in a mistrial.

[4] Stevens's assertion in his response that his attorney was ineffective because he could not locate the witness rings hollow in light of the inability of the police to find her.

method. ***State v. Isham,*** 70 Wis.2d 718, 723-25, 235 N.W.2d 506, 509-10 (1975). Because a motion to suppress the identification would have been denied, trial counsel was not ineffective. *See* ***State v. Simpson,*** 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

The next potential appellate issue is whether sufficient evidence supports the conviction. This court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. The jury is the sole arbiter of witness credibility. ***State v. Serebin,*** 119 Wis.2d 837, 842, 350 N.W.2d 65, 68 (1984). The jury, and not this court, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from basic facts to ultimate facts. ***Poellinger,*** 153 Wis.2d at 506-07, 451 N.W.2d at 757.

The sole disputed issue at trial was whether Stevens was the assailant. While Stevens denied his guilt, both the victim and her friend identified him. Other circumstantial evidence linked Stevens to the crime. A challenge to the sufficiency of the evidence would be frivolous.

The final question is whether the court properly exercised its sentencing discretion. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See* ***State v. Haskins,*** 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.***

A review of the court's comments at sentencing reflects a proper exercise of sentencing discretion. The court considered the aggravated nature of the offenses, Stevens's prior criminal record, his failure to acknowledge responsibility for his actions, and the public's need for protection from further criminal conduct. The court considered the appropriate sentencing factors. *See* ***State v. Harris,*** 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). A challenge to the sentence would lack arguable merit.

Based on an independent review of the record, we find no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Michael J. Edmonds is relieved of any further representation of Stevens in this matter.

By the Court.—Judgment affirmed.