COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1996

NOTICE

No. 95-2944-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS E. BLANKS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Travis E. Blanks appeals from a judgment of conviction for battery to a law enforcement officer as a habitual offender. Blanks' appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Blanks received a copy of the report and has filed a lengthy response.[1] Upon consideration of the report,

[1] Blanks' response is excessive in length and obviously contains materials merely copied from other sources and not drafted by Blanks independently. His appendix contains documents not of record and not at all related to this case. Because much of the

Blanks' response and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

The conviction arises out of an attack perpetrated by Blanks on jail officers while Blanks was an inmate at the Racine county jail. Following a jury trial, Blanks was sentenced to eight years in prison.

The no merit report addresses the issues of whether Blanks' competency to stand trial was adequately evaluated and reviewed, whether table covers and removal of arm shackles were adequate measures to hide Blanks' secured status from the jury during trial, whether the trial court properly exercised its discretion in denying a jury view of the jail cell in which the attack occurred and whether the sentence was a result of a misuse of discretion. We conclude that counsel's description and analysis of these issues as without merit are correct.

We have independently considered whether the evidence was sufficient to support the verdict. Our review of the sufficiency of the evidence is to determine whether 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. ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We conclude that there was sufficient evidence and that a challenge to the sufficiency of the evidence lacks merit.

In his response, Blanks first argues that he was denied due process and not properly arraigned because he was not personally informed of the charges, not personally handed the information and not personally questioned about waiving the reading of the information. He claims that the trial court lacked jurisdiction because § 971.05(3), STATS., was not complied with. He also asserts that trial counsel was ineffective for not requiring compliance with the statute. Finally, he asserts that the trial court and the prosecutor are guilty of

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response contains argument that we need not consider, we will accept the response as filed. We also grant Blanks' motion to waive the copy requirements.

misconduct in office for proceeding to trial in the absence of a valid arraignment.

The claim that the arraignment was defective lacks merit. The record reflects that in Blanks' presence his attorney was provided a copy of the information and the attorney indicated that a formal reading of the information was waived. The purpose of § 971.05(3), STATS., was satisfied when Blanks' attorney accepted a copy of the information. Nothing suggests that delivery to the attorney was anything other than delivery to Blanks. *See* §§ 972.11(1) and 801.14(2), STATS. (civil rules of practice applicable to criminal proceedings; service made on a party represented by counsel may be made by delivery to the party's attorney).

Further, Blanks did not object to his attorney's representation that the reading was waived. Blanks confuses his rights under § 971.05(3), STATS., with those basic decisions which must be made by the defendant personally, rather than by the defendant's counsel. The waiver of the reading of an information is a decision which a defendant delegates to his or her attorney. *See* ***State v. Wilkens***, 159 Wis.2d 618, 622-23, 465 N.W.2d 206, 208 (Ct. App. 1990) (right to have a public preliminary hearing waived by attorney).

An information will not be invalid, nor will proceedings be affected, because of an imperfection in form which does not prejudice the defendant. Section 971.26, STATS. In ***Hack v. State***, 141 Wis. 346, 124 N.W. 492 (1910), the court held that a defect in the arraignment procedure is waived by silence, "unless it shall appear that the error complained of has affected the substantial rights of the party complaining." ***Id.*** at 353, 124 N.W. at 495. *See also* ***Bies v. State***, 53 Wis.2d 322, 325, 193 N.W.2d 46, 48 (1972). Blanks has not alleged any prejudice from the fact that the information was not handed to him personally. There is no merit to a claim that the arraignment was defective.

Both Blanks' response and the no merit report address a possible challenge to the racial composition of the jury panel. The no merit report concludes that the challenge lacks merit because trial counsel did not timely object that the jury array failed to include any African-Americans. We agree that the objection made after voir dire and the exercise of peremptory strikes came too late. *See* ***Brown v. State***, 58 Wis.2d 158, 164, 205 N.W.2d 566, 570

(1973) ("[I]t is clear that the right to challenge a jury array as embodied in the jury list is at a time prior to trial and prior to the [e]mpaneling of a specific petit jury."). However, the no merit report fails to consider whether there is arguable merit to a claim that trial counsel was ineffective for not making a timely and proper challenge that the jury array failed to represent a fair cross-section of the community. Blanks raises this claim in his response.[2]

"The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984). That requires the ultimate determination of `whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' ***Id.*** at 686." ***State v. Johnson***, 153 Wis.2d 121, 126, 449 N.W.2d 845, 847 (1990). If we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient. *See* ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993). Here we move directly to the second prong of the test because we conclude that Blanks could not have been prejudiced by his trial counsel's failure to develop a challenge to the panel.

The record reflects that of the twenty-eight jurors from which the panel was drawn, not one person was African-American. A constitutionally valid venire is one drawn from a fair cross section of the community. *See* ***Holland v. Illinois***, 493 U.S. 474 (1980). The requirement of "a fair cross section

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[2] Blanks devotes a substantial portion of his response to advising this court on methods of statutory construction and arguing that the trial court lacks subject matter jurisdiction when the jury is not selected and impaneled through strict compliance with ch. 756, STATS. The response then goes on to make conclusory allegations that the jury array was not selected pursuant to ch. 756, including an allegation that the jury list was not certified, that the clerk failed to draw names from the tumbler in the presence of two jury commissioners, that juror names were not written upon separate cards and enclosed in opaque envelopes, and that jurors' names were not drawn from the tumbler in the presence of the court with the tumbler being rotated after each drawing.

Not only is the argument merely conclusory, substantial compliance with the jury selection law is all that is required. ***In re S.M.S.***, 129 Wis.2d 310, 316, 384 N.W.2d 709, 711 (Ct. App. 1986). Additionally, Blanks has not demonstrated any prejudice from the manner utilized to select the jury, and his claim must therefore fail. ***Id.*** at 317, 384 N.W.2d at 712. Finally, Blanks' claims of deficiencies are part of the response which is obviously pirated from another source. We do not consider it.

on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)." ***Id.*** at 480. To establish a prima facie violation of the fair cross section requirement, a defendant must prove: "(1) that the group alleged to be excluded is a `distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." ***Duren v. Missouri***, 439 U.S. 357, 364 (1979).

In discussing the untimely motion to impanel a different jury, the trial court took notice that "we have taken special steps within the last just few weeks to insure that the total jury pool is proper in all respects ... and so far we've never had any problems with them." The trial court found that the absence of any African-Americans in the venire was "just the luck of the draw." The trial court's comments belie any contention of systematic exclusion of African-Americans as jurors. Thus, even if counsel had made the timely objection, there was nothing to suggest that the venire pool was designed in any way to avoid having a fair cross section of the community represented. Additionally, Blanks has not shown that the jury which tried him lacked impartiality and his claim must fail.[3] *See* ***State v. Loukota***, 180 Wis.2d 191, 197, 508 N.W.2d 896, 898 (Ct. App. 1993).

We conclude that Blanks was not prejudiced by trial counsel's failure to make a timely objection to the composition of the jury venire. Thus, there is no arguable merit to a claim of ineffective assistance of counsel on that ground.[4]

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[3] Although Blanks' response contains argument that prejudice resulted from counsel's alleged deficiency, the argument is copied from another source and contains no references to the facts of Blanks' case. We do not consider it.

[4] In his response, Blanks makes blanket assertions that trial counsel was ineffective for failing to secure Blanks' attendance at the jury instruction conference, for failing to obtain a transcript of the instruction conference, in failing to assure Blanks' presence at all court proceedings and have all such proceedings recorded, and for failing to protect Blanks' right to a public trial. It is apparent that these allegations are copied from another source and should not be considered. None of the factual allegations are true. Blanks was

Our review of the record discloses no other potential issues for appeal. We conclude that any further proceedings on Blanks' 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 Attorney Eileen Miller-Carter is relieved of any further representation of Blanks on this appeal.

By the Court.—Judgment affirmed.

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present as jury instructions were discussed, extraordinary efforts were made to assure his appearance at all court proceedings, all proceedings were recorded and transcribed, and a public trial was held. These claims, even if developed, lack merit.