COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 8, 1996

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. 95-3084-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUEGENE HAMPTON,

Defendant-Appellant.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Counsel for Luegene Hampton has filed a no merit report pursuant to RULE 809.32, STATS. Hampton filed a response arguing that the court should have instructed the jury on lesser-included offenses and that his trial counsel was ineffective for not interviewing and producing a potentially useful witness. Upon our independent review of the record as

mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

Hampton and his half-brother, Alonzo Perry, were charged with first-degree intentional homicide, two counts of attempted first-degree intentional homicide and armed robbery. The State presented evidence that Hampton and Perry, wearing masks, approached a car containing Harry Roberts, Michael Moore and Walter Parker. Hampton and Perry opened fire on the occupants of the car and stole money from Moore. Disappointed that Moore had only $20, one of the robbers told the other to shoot him again. Moore then told the robbers he had more money in his sock. One robber then took his sock with $360 in it. The robbers then abruptly fled. Police patrolling nearby saw the muzzle flashes and heard the gunshots and responded immediately. Hampton and Perry were apprehended near the scene attempting to hide from the police. They were returned to the scene and were positively identified based on physical characteristics and clothing. Roberts sustained five gunshot wounds to vital areas resulting in his death. Moore sustained five gunshot wounds to the upper body and Parker sustained wounds to his neck and upper body.[1]

Hampton made a written statement to the police. He admitted participation in the shootings. He stated that Roberts was reaching for his waistband when Hampton heard a shot fired. Hampton then panicked and began shooting.

The no merit report addresses five issues. It concludes that the show-up identification of Hampton was not unduly suggestive, that Hampton's statement to the police was properly admitted into evidence, that Hampton's trial counsel reasonably declined to submit the stocking masks for DNA or other scientific testing, that the evidence supports the verdicts and that the court properly exercised its sentencing discretion. We have independently reviewed the record and agree with counsel's analysis of these issues.

[1] The jury acquitted Hampton of the attempted murder of Parker.

In his response, Hampton argues that the trial court should have instructed the jury on reckless homicide because Hampton's statement to the police did not admit that he intentionally tried to kill anyone. He also suggests that his acts might reasonably be viewed as self-defense. We disagree. The submission of a lesser-included offense is proper only where there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. ***Hawthorne v. State***, 99 Wis.2d 673, 682, 299 N.W.2d 866, 870 (1981). We conclude that there was no reasonable basis for the jury to acquit on the greater charges. Hampton's intent may be ascertained from his acts. *See* ***Jacobs v. State***, 50 Wis.2d 361, 366, 184 N.W.2d 113, 116 (1971). Roberts and Moore were each shot five times in their upper bodies at close range while one of the perpetrators urged the other to shoot Moore again. Even if the jury believed that Hampton panicked when a shot was fired, this shooting cannot reasonably be described as mere recklessness.

Likewise, even if the jury believed that Roberts was reaching into his waistband before Hampton shot him, the shooting cannot reasonably be described as self-defense. The perpetrator of an armed robbery is not privileged to use lethal force against the robbery victim merely because the victim makes a gesture that the robber finds threatening. *See* ***Ruff v. State***, 65 Wis.2d 713, 725-27, 223 N.W.2d 446, 452-53 (1974).

There is no arguable merit to Hampton's argument that his trial counsel was ineffective for not interviewing and calling Jacqueline Brewer as a defense witness. Hampton states that Brewer would have corroborated his statements that Roberts was reaching into his waistband and that Brewer heard a sound similar to a gunshot before Hampton began firing.[2] Regardless of whether Brewer would have corroborated Hampton's description of the shooting, Hampton has established no prejudice from the absence of her testimony. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Her testimony would not have established self-defense, lack of intent or any other defense.

[2] Hampton alleges that he possesses an affidavit of Jacqueline Brewer confirming his version of the shooting. The affidavit of Jacqueline Brewer is listed in the table of contents to Hampton's appendix, but is not included in the appendix. In reaching this decision we assume that Brewer would have testified as Hampton's response suggests.

Our independent review of the record discloses no other potential issues for appeal. Therefore, we affirm the judgment of conviction and relieve Attorneys Michael Hicks and John Surma of further representing Hampton in this matter.

By the Court.—Judgment affirmed.