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110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

July 30, 2013

To:

Hon. Richard J. Sankovitz
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jeffrey W. Jensen
735 W. Wisconsin Ave., 12th Fl.
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Rafael N. Bouldin 388551
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Jeremy C. Perri
First Asst. State Public Defender
735 N. Water St., #912
Milwaukee, WI 53203

You are hereby notified that the Court has entered the following opinion and order:

2011AP1615-CRNM State of Wisconsin v. Rafael N. Bouldin (L.C. # 2009CF4154)

Before Higginbotham, Blanchard and Kloppenburg, JJ.

Rafael Bouldin appeals a judgment of conviction and sentencing for armed robbery, following a jury trial. Attorney Jeffrey Jensen has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

738, 744 (1967). The no-merit report addresses: (1) whether Bouldin received the effective assistance of counsel; (2) the potential merit of a postconviction motion seeking to compel an alleged co-actor to submit a DNA sample; (3) whether the evidence was sufficient to support the jury verdict; (4) whether Bouldin's prosecution was barred by double jeopardy; and (5) whether the court properly exercised its discretion at sentencing. Bouldin has responded to the no-merit report, arguing that the criminal complaint was defective, that he was denied his right to counsel at a pretrial lineup, that his conviction violated his due process rights, and that the evidence was insufficient to support the conviction. Counsel then filed a supplemental no-merit report addressing those issues. Upon independently reviewing the entire record, as well as the no-merit reports and responses, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

First, we agree with counsel that a claim of ineffective assistance of trial counsel would lack arguable merit. Counsel notes that trial counsel did not move to suppress the in-court identification of Bouldin by Babette Ross, the victim of the armed robbery. Counsel notes that Ross had observed Bouldin at the preliminary hearing. However, as counsel also notes, Ross also identified Bouldin at the preliminary hearing. We agree that there would be no arguable merit to a claim that Ross' previous viewing of Bouldin was unduly suggestive. *See* ***Powell v. State***, 86 Wis. 2d 51, 64, 271 N.W.2d 610 (1978) (prohibiting a pretrial procedure that is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"). Thus, these facts do not provide an arguable basis for an ineffective assistance of counsel claim. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (a claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defendant).

Counsel opines that trial counsel was deficient by failing to object, on hearsay or confrontation grounds, to testimony by Detective Tracy Becker as to out-of-court statements by State witness Timothy Crawford, but that the error was not prejudicial. *See* ***id.*** (counsel's performance must be both deficient *and* prejudicial to support a claim of ineffective assistance of counsel); WIS. STAT. § 908.02 (setting forth the hearsay rule); ***State v. Jensen***, 2007 WI 26, ¶15, 299 Wis. 2d 267, 727 N.W.2d 518 ("[T]he Confrontation Clause bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement."). As counsel notes, Crawford later testified and was subject to cross-examination. Additionally, Detective Becker testified that Crawford informed him that Crawford lent his car to Bouldin on the night of the robbery, while Crawford testified at trial that he was actually driving the getaway car when Bouldin committed the robbery. Thus, the statement called into question rather than bolstered Crawford's credibility. We discern no basis to argue that Becker's testimony as to Crawford's prior statement prejudiced Bouldin's defense.

Counsel also notes that Bouldin wants to pursue a postconviction motion seeking to compel Crawford to submit DNA to compare with DNA samples obtained from a wig recovered from Crawford's car, which was worn by the perpetrator of the robbery. However, as counsel also notes, the State's DNA expert testified at trial that the DNA recovered from the wig could be used to exclude individuals, but could not be used to positively identify any individual. Thus, even if Crawford submitted a DNA sample and it was compared to the DNA obtained from the wig, the best Bouldin could obtain would be a result indicating Crawford was not excluded. We discern no arguably meritorious postconviction argument that could be based on that result.

Next, counsel addresses the sufficiency of the evidence to support the jury verdict. A claim of insufficiency of the evidence requires a showing that "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. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that the standard has been met here.

Crawford testified at trial that, on the night of the robbery, he and Bouldin were riding around in Crawford's car when Bouldin suggested robbing the Ambassador Inn. He testified that Bouldin left the car wearing the wig that police later recovered from Crawford's car, while Crawford waited in the car. Crawford also testified that Bouldin had a gun with him. Crawford stated that Bouldin was gone for about three minutes, and then ran back to the car. Additionally, the victim of the robbery, Ross, who was working at the Ambassador Inn at the time, testified as to the events of the robbery. Ross stated that a man came into the hotel lobby, shot a gun, and demanded money. Ross stated that she told him there was no money in the drawer, and that the man then told her to give him her money. Ross stated that she then gave the man $900 out of her purse. She identified the wig recovered from Crawford's car as the wig the man wore during the robbery. She also testified about identifying Bouldin in a police lineup, and again identified him in court. This evidence was sufficient to support the jury verdict finding Bouldin guilty of armed robbery. *See* WIS. STAT. § 943.32(2) (armed robbery is committed when the defendant takes property from the person of the owner, with intent to steal, by use or threat of use of a dangerous weapon).

Counsel also addresses whether there would be arguable merit to a double jeopardy claim. After the jury was sworn on the first day of the original trial, the court discovered juror issues that would have resulted in a trial with only ten jurors. Bouldin stated he would like to go to trial with ten jurors, but the State requested to reschedule trial, and defense counsel stated that he did not believe it was in Bouldin's best interest to go to trial with only ten jurors. The court declared a mistrial due to the unavailability of jurors and rescheduled the trial.

In a felony case, the parties may enter a stipulation, with the approval of the court, to have a jury of less than twelve members decide the case. WIS. STAT. § 972.02(2). Here, the State did not agree to proceed with a jury of less than twelve and the court indicated it would not approve such a stipulation. Thus, the lack of a sufficient number of jurors constituted a manifest necessity requiring a mistrial, and double jeopardy did not bar retrial. *See* ***State v. Mendoza***, 101 Wis. 2d 654, 658-62, 305 N.W.2d 166 (Ct. App. 1981). We agree with counsel that there are no arguably meritorious appellate issues based on these facts.

Finally, the no-merit report addresses whether a challenge to Bouldin's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Bouldin was afforded the opportunity to address the court prior to sentencing, and declined to do so. The State recommended twelve years of initial confinement and six years of extended supervision, based on the seriousness of the offense and Bouldin's prior criminal history. The State also reported restitution requests by the victim for $900 plus lost wages, and by the hotel for $2000 in lost business and repair costs. Defense counsel argued for a sentence of five years of initial

confinement. Defense counsel also disputed the victim's claim for lost wages and the hotel's restitution request.

The court explained that it considered the standard sentencing factors and objectives, including Bouldin's character and criminal history, the seriousness of the offense, and the need for punishment and to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Bouldin to ten years of initial confinement and three years of extended supervision. The court ordered Bouldin to pay the DNA surcharge, noting that Bouldin had not paid the surcharge at the time of his prior felony conviction. The court ordered $900 in restitution to the victim of the robbery, noting that Bouldin would have an adequate amount of time in prison and extended supervision to pay that amount. The court denied the victim's request for lost wages and the hotel's claim for restitution. The sentence was within the applicable penalty range. *See* WIS. STAT. §§ 943.32(2) (providing that armed robbery is a Class C felony); 939.50(3)(c) (providing that Class C felonies are punishable by up to forty years of imprisonment and/or a $100,000 fine); 973.01(2)(b)3. (under bifurcated sentence, maximum length of initial confinement for a Class C felony is twenty-five years). The sentence was well within the maximum Bouldin faced, and therefore was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no erroneous exercise of the court's sentencing discretion.

In Bouldin's no-merit responses, Bouldin contends that his conviction violated his due process rights because he was charged with the armed robbery of Ross, and the jury verdict found Bouldin guilty of the "Ambassador Inn robbery." Bouldin asserts that the jury found him guilty of robbing the Ambassador Inn, while he was charged with robbing Ross. Bouldin also asserts that the evidence was insufficient to support a conviction for robbery of the hotel because

the only evidence was that money was taken from Ross, rather than the hotel. However, the jury verdict actually states: "We, the Jury, find the Defendant, RAFAEL BOULDIN, guilty of armed robbery, as a party to a crime, as charged in Count 2 [of] the information (Ambassador Inn robbery)." The information charged Bouldin with two counts: count one charged Bouldin with committing an armed robbery of the Golden Chicken, at the Golden Chicken; count two charged Bouldin with committing an armed robbery of Ross, at the Ambassador Inn. Thus, the jury verdict reflects that the jury found Bouldin guilty of robbing Ross, at the Ambassador Inn. The term "Ambassador Inn robbery" distinguishes the robbery that occurred *at* the Ambassador Inn, not *of* the Ambassador Inn, from the robbery that occurred at the Golden Chicken. We do not agree with Bouldin that the record supports an arguably meritorious claim of a due process violation.

Bouldin also points to language in the criminal complaint stating that: "This complaint is further based on a report by Detective Edward McCrary that a line-up was conducted on September 8, 2009, after Bouldin was arrested. During the line-up, … Babette Ross … positively identified Crawford as the man who had shot the gun and robbed [her]." Bouldin contends that the complaint establishes that Crawford, not Bouldin, committed the robbery. However, at trial, Detective Michael Washington testified that he was present at the lineup and assisted Detective McCrary. Washington testified that the lineup was run twice, and that Ross then identified Bouldin as the man who had robbed her. Ross also testified that she identified Bouldin in the lineup. Crawford and a police officer both testified that Crawford was never put through a lineup. On this record, the criminal complaint appears to misstate that Ross identified Crawford, and in any event was negated by the trial evidence showing that Ross identified

Bouldin in the lineup. Accordingly, the statement in the complaint would not support any arguably meritorious postconviction arguments.

Bouldin also contends that the circuit court lacked jurisdiction over him because the criminal complaint was defective. Bouldin asserts that the complaint failed to set forth facts alleging that Bouldin committed the charged offense. He asserts that the complaint indicates Crawford was involved in the robbery, and that Crawford implicated Bouldin. He argues that Crawford's claim that Bouldin was involved in the robbery was insufficient to show that Bouldin was actually involved.

The complaint states that Milwaukee police officers reported the following: (1) Ross stated that a man wearing an Afro wig had entered the Ambassador Inn, where Ross was working, fired a gun, and took $900 from Ross; (2) a police officer viewed the surveillance video of the area outside the Ambassador Inn at the time of the robbery and, several days later, stopped a car matching the car the man in the wig entered upon exiting the Ambassador Inn; (3) the car was driven by Crawford and there was an Afro wig in the car; and (4) Crawford told police that he was involved in the Ambassador Inn robbery by driving the getaway car while Bouldin committed the robbery. This was sufficient to support the complaint. *See* ***State v. Gaudesi***, 112 Wis. 2d 213, 219-20, 332 N.W.2d 302 (1983) (explaining that a criminal complaint need only set forth facts which would lead a reasonable person to conclude that a crime has probably been committed by the named defendant).

Bouldin also asserts that he was denied his right to the assistance of counsel during the lineup at which Ross identified him as the robber. However, the lineup occurred on September 8, 2009, and charges were filed against Bouldin on September 10, 2009. Because

formal charges had not yet been filed at the time of the lineup, Bouldin did not have the right to counsel at the lineup.[2] *See* ***State v. Winters***, 2009 WI App 48, ¶32, 317 Wis. 2d 401, 766 N.W.2d 754 (explaining that "the presence of counsel at a lineup is not required if formal charges have not yet been filed against the suspect").

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jensen is relieved of any further representation of Bouldin in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[2] We note that no-merit counsel erroneously states that no evidence of the lineup was presented at trial. However, it remains that Bouldin did not have the right to counsel at the lineup, and thus this issue lacks arguable merit.