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February 12, 2014

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

2013AP990-CRNM State of Wisconsin v. Jeffrey B. Pipes (L.C. #2011CF293)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jeffrey B. Pipes appeals from a judgment of conviction for three counts of the delivery of cocaine, as a second and subsequent offense. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738 (1967).

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

Pipes has filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The evidence at the jury trial was that Pipes made three separate sales of crack cocaine to a person acting as a confidential informant.² The controlled buys were made at Pipes' apartment. At the time of the drug buys, there were other people in house. To establish that Pipes was the one conducting the transactions, sheriff deputies testified that they heard the sales take place over the wire worn by the informant and recognized Pipes' voice. The informant testified that Pipes sold her the cocaine. A portion of a transcript of one of the wire recordings was introduced at trial over an objection by the defense. Pipes was sentenced to three consecutive terms of three years' initial confinement and three years' extended supervision, to be served consecutive to another sentence Pipes was serving.

The no-merit report addresses the potential issues of whether the portion of the transcribed wire recording should have been excluded,³ whether a new trial should be granted because there was insufficient evidence to convict, and whether the sentence was the result of an

² The informant was identified at trial and known to Pipes. We see no need to identify her by name.

³ In the "Issues Presented" section of the no-merit report, this issue is listed as whether the denial of the defense motion to exclude recordings of phone calls Pipes made from the jail should be reversed. The discussion section of the no-merit only addresses the portion of the transcribed wire recording. As to the jail recordings, Pipes made a foundation objection. The trial court then required more of a foundation be laid for how the phone calls were recorded, stored, and made available. Although the precise location of the computer that stores the jail recordings was not established, the foundation laid was adequate and there is no issue of arguable merit with respect to the admission of the jail recordings.

erroneous exercise of discretion or harsh and excessive. We observe that the trial court did not give specific reasons for overruling Pipes' objection to admission of a portion of the transcribed wire recording. "[W]here the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). The record shows a reasonable basis for the ruling. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

Pipes had a jury trial and numerous other potential issues arise in cases tried to a jury, i.e., jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening and closing arguments. The no-merit report does not reflect that appointed appellate counsel considered these other potential issues. It is important that the no-merit report do so to provide a basis for a determination that the no-merit procedure has been complied with. *See State v Allen*, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). We address the potential issues not mentioned in the no-merit report to demonstrate that the no-merit procedure has been followed. *See id.*, ¶82 (difficult to know the nature and extent of the court of appeals' examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion).

Our review of the trial record discloses no issues of arguable merit. The ruling made on the motion in limine was proper. There was no disagreement during jury selection regarding

prospective jurors excused or struck for cause and there is no basis to challenge jury selection. The trial court's ruling on Pipes' objection to the informant testifying about other drug deals she saw Pipes conduct in the apartment was a proper exercise of discretion. The court also properly ruled that Pipes could not ask the informant about being a heroin dealer, an issue addressed twice at trial. No potentially objectionable testimony was elicited at trial. The trial court conducted a proper colloquy with Pipes about his waiver of the right to testify. The jury instructions accurately conveyed the applicable law and burden of proof. Although Pipes objected to the giving of the instruction about flight or concealment, WIS JI—CRIMINAL 172, the instruction was supported by the evidence that when authorities entered the apartment to execute a search warrant, Pipes locked himself in the bathroom. No improper arguments were made to the jury.

Pipes' response first contends that he was convicted on tainted information from the informant and a made-up story. The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony. See *State v. Wachsmuth*, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842, 846 (Ct. App. 1992). We will not disturb the jury's credibility determinations on appeal unless we determine that the testimony was incredible as a matter of law. *Id.* "That the witness's testimony may be false, however, does not go to the question of admissibility. Witness credibility is a separate determination to be made by the trier of fact." *State v. DeSantis*, 151 Wis. 2d 504, 511, 445 N.W.2d 331 (Ct. App. 1989).

The second point Pipes makes in his response concerns witnesses not presented at trial. He believes he was entitled to have testify at trial every person that was present at the apartment when the drug buys were made. He also suggests that the persons he was speaking to on the jail recordings should have testified. The prosecution was not required to present those witnesses.

Pipes believes every person in the apartment and on the phone calls should have been called by the defense to tell their side of the story. Pipes explains that his roommate, Randall Kurzinski, could have testified that the informant stayed at the apartment, had stuff hidden all over the apartment, and was the owner of a purple pouch, a heroin user's kit, found during the search which the informant denied was hers. As counsel's supplemental no-merit points out, Kurzinski was a potential source of damaging information about Pipes.⁴ No reasonable defense attorney would have called Kurzinski to the stand and raise the possibility of the damaging information being revealed. Pipes identifies two other persons as having been in the apartment but does not explain what helpful testimony they could have presented. He does not give any specific information about people on the other end of the jail recordings.

Even accepting Pipes' suggestion that other witnesses should have been called, Pipes could only raise the claim that trial counsel was ineffective for not calling them. In order to establish ineffective assistance of counsel, the defendant must demonstrate both deficient performance of counsel and prejudice to his defense resulting from the deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *Pitsch*, 124 Wis. 2d at 642. The measure of prejudice involves a determination of confidence in the result of the trial that took place. See *id.* (prejudice is not an outcome determinative test but rather focuses on reliability).

⁴ The record shows that a newspaper article linked Randall Kurzinski to a statement that Pipes had "put a hit out on" the informant.

There is no arguable merit to a claim that our confidence in the outcome would be undermined by the absence of testimony from other persons who may have been in the house or those who engaged in phone conversations with Pipes while he was in jail. Two bills of the buy money were found in Pipes' wallet. The informant's testimony about the controlled buys was corroborated by the officers as they monitored the transactions. The informant's motivation for conducting the controlled buys and assisting law enforcement was put before the jury. The informant's drug use and thefts she had committed to support her habit, including stealing checks from her grandmother, was also in evidence. The defense also was able to suggest circumstantially that the purple pouch that the informant denied was hers could belong to no one else since it had products used by a woman in it and the informant was the only woman in the apartment at the time of the search. The absence of potential further impeachment of the informant by the missing witnesses does not undermine our confidence in the result. There is no arguable merit to a claim that Pipes was denied the effective assistance of counsel.⁵

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Pipes further in this appeal.

⁵ Although we may not have specifically addressed each of Pipes' complaints regarding evidence or lack of it presented at trial, any other claims Pipes suggests that fall within the ineffective assistance of counsel rubric lack arguable merit for the same reason that our confidence in the result would not be undermined.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kathleen A. Lindgren is relieved from further representing Jeffrey B. Pipes in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals