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**DISTRICT I**

March 21, 2014

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

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2013AP1267-CRNM State of Wisconsin v. Edward Joseph Hicks
(L.C. #2011CF312)

Before Curley, P.J., Kessler and Brennan, JJ.

Edward Joseph Hicks appeals from a judgment of conviction for one count of second-degree recklessly endangering safety with use of a dangerous weapon, contrary to WIS. STAT. §§ 941.30(2) and 939.63(1)(b) (2007-08).[1] Appellate counsel, Natalia Lindval, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE

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

809.32, to which Hicks has not responded.[2] After independently reviewing the record and the no-merit report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

## BACKGROUND

The charge against Hicks stemmed from an incident that occurred in 2008. According to the complaint, Hicks got into a dispute with Gregory C. and proceeded to stab him four times with a knife. Gregory C. needed sixteen stitches as a result.

The case proceeded to trial where Hicks argued that he acted in self-defense. The jury was not persuaded and found Hicks guilty of second-degree recklessly endangering safety with use of a dangerous weapon.[3] He was sentenced to four years of initial confinement and five years of extended supervision.

[2] We granted Hicks' motion to extend the time for filing a response and advised that if he needed additional time beyond what was allotted, he could renew his request. He neither filed a response nor asked for additional time.

[3] The record indicates that Hicks was originally charged with misdemeanor battery while armed. On the day of trial in 2009, the trial court allowed the State to dismiss the original case against Hicks without prejudice. The State then recharged Hicks in this case in 2011. During a motion hearing, the prosecutor explained that after Hicks decided that he did not want to resolve the case and accept responsibility for the stabbing, a decision was made that the misdemeanor charge was no longer appropriate. The potential issue of prosecutorial vindictiveness is not addressed in counsel's report. It does not, however, appear to be supported by the record before us. *See* ***State v. Cameron***, 2012 WI App 93, ¶17, 344 Wis. 2d 101, 820 N.W.2d 433 ("The filing of these charges, even though filed after Cameron decided not to plead, does not alone establish presumptive or actual vindictiveness.") (citing ***Bordenkircher v. Hayes***, 434 U.S. 357, 365 (1978) (additional charges did no more than present defendant "with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution" and did not violate due process rights)); ***State v. Johnson***, 2000 WI 12, ¶55, 232 Wis. 2d 679, 605 N.W.2d 846 (the prosecutor's desire to obtain a guilty plea does not establish prosecutorial vindictiveness); ***State v. Williams***, 2004 WI App 56, ¶48, 270 Wis.2d 761, 677 N.W.2d 691 (no actual vindictiveness where prosecutor threatened defendant with additional charges if he insisted on going to trial).

The no-merit report addresses three issues: (1) whether Hicks can demonstrate trial counsel was ineffective; (2) the trial court's exercise of sentencing discretion; and (3) whether there is a basis for sentence modification.[4] In addition to addressing these issues, we also discuss Hicks' initial appearance, the trial court's pretrial ruling denying Hicks' motion to enter a letter purportedly written by Gregory C. into evidence, and the sufficiency of the evidence to support the verdict.

## DISCUSSION

### *A. Initial Appearance*

At the initial appearance, a copy of the complaint was provided to Hicks' trial counsel. The complaint properly identified the charge and the penalties, including the penalty for the weapons enhancer. The court commissioner, however, neglected to mention the penalty for the weapons enhancer when advising Hicks of the penalties for the felony with which he was charged. *See* WIS. STAT. § 970.02(1)(a); *see also* ***State v. Thompson***, 2012 WI 90, ¶62, 342 Wis. 2d 674, 818 N.W.2d 904 (setting forth mandatory duties under § 970.02(1)(a), including: "In the case of a felony, the judge *shall* personally inform the defendant of the penalties for the felony or felonies with which the defendant is charged.") (emphasis in ***Thompson***). The court commissioner stated:

> You need an attorney, which you heard me explain to everybody, because you face ten years in prison or a $25,000 fine if you're found guilty of this, as charged. Because it's a felony and

[4] Counsel should include appropriate record citations in future filings to this court. This entails identifying the document number relating to those parts of the record to which counsel is directing the court's attention.

> you could be sentenced to prison, you have the right to have a preliminary hearing on the case.[5]

Actually, Hicks' total imprisonment exposure was fifteen years: five years of initial confinement and five years of extended supervision for second-degree recklessly endangering safety with the possibility of an additional five years of initial confinement for using a dangerous weapon. *See* WIS. STAT. §§ 941.30(2), 939.63(1)(b), 939.50, & 973.01 (2007-08). However, if Hicks pursued a challenge based on the violation of WIS. STAT. § 970.02(1)(a), there is no indication in the record that he could make the requisite showing of prejudice. *See* ***Thompson***, 342 Wis. 2d 674, ¶11 ("The prejudice determination [in this scenario] must satisfy the traditional standard for overcoming harmless error, that is, there must be a reasonable probability that the error contributed to the outcome of the action or the proceeding at issue."). Likewise, even if Hicks argued that his trial counsel performed deficiently in not discovering this error, there is no indication in the record that he would be able to establish prejudice from the deficient performance. *See* ***id.***, ¶12.

### *B. Motion to Allow "Other Acts" Evidence at Trial*

Prior to trial, Hicks was placed in the House of Corrections. While there, he claimed he received an unsigned letter that was written by or on behalf of Gregory C. The letter indicated that the writer wanted $500 cash from Hicks and in exchange, the writer would not cooperate with the prosecutor. Among other things, the letter stated that Hicks had cost the writer "my job

[5] If the court commissioner was combining the initial confinement period for the charge of second-degree reckless endangering safety with the increased period of imprisonment under WIS. STAT. § 939.63(1)(b) when it made this statement, then it neglected to mention the period of extended supervision Hicks faced.

[and] my kids[’] Christmas.” To confirm Hicks’ agreement with the deal, the writer instructed him to call the writer’s roommate, “‘Jenny’” and say, “deal.”

Hicks filed a motion seeking to use the letter at the jury trial to impeach the credibility of Gregory C. Hicks argued that the letter showed Gregory C. was engaging in dishonest behavior. Hicks also argued that the letter was evidence of Gregory C.’s bias and because Hicks did not pay the money, Gregory C. would be motivated to testify falsely against Hicks at trial.

The court held a hearing. Hicks testified that while he was in the House of Corrections serving an unrelated sentence, he received an unsigned letter. Based on the details and information set forth in the letter, Hicks concluded it was from Gregory C. Other than providing it to trial counsel, Hicks said he took no action with regard to the letter. He held onto it from December 2009 until he was recharged in 2011.

The prosecutor, who became a potential witness due to the nature of the letter, testified that it was not clear to him that Gregory C. was the author of the letter. Gregory C. testified and denied that he authored the letter or that he had someone write it on his behalf. Gregory C. explained that while he had lost his job, it had nothing to do with the case involving Hicks and in fact, he had lost his job prior to the stabbing. He denied having a girlfriend named Jenny and further testified that he did not have any children.

The trial court denied the motion, explaining that Hicks had not demonstrated Gregory C. wrote the letter. As a result, Hicks was precluded from using the letter at trial. In light of the trial court’s findings and our deferential review of its decision, *see* ***Martindale v. Ripp***, 2001 WI 113, ¶¶28-29, 246 Wis.2d 67, 629 N.W.2d 698, there would be no arguable merit to challenging this issue.

### *C. Sufficiency of the Evidence*

We next address whether the evidence is sufficient to support the jury's verdict. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the inference necessarily drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury's verdict will be reversed "'only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

As summed up by Hicks' trial counsel in his opening statement, this case hinged on the jury's assessment of the witnesses' credibility as it related to self-defense. The State's theory was that Gregory C. was attacked by Hicks without cause after he called out to Hicks' girlfriend, a woman Gregory C. knew from high school.

Hicks' theory was that he acted in self-defense. He testified that Gregory C. followed him making rude comments as he walked with his girlfriend and that a fight ensued after Gregory C. refused to move out of Hicks' way. Hicks recalled seeing a flash of something that turned out to be a knife. Eventually Hicks was able to grab the knife that Gregory C. had dropped and Hicks proceeded to stab him. According to Hicks, he stabbed Gregory C. because he was afraid. Hicks thought that if he and his girlfriend tried to run away, Gregory C. would follow them. Hicks said that he had been stabbed six times prior to this incident. Before leaving the scene, Hicks asked witnesses to call 9-1-1. When Hicks got to his home, he asked his mother to call the police. Hicks testified that he takes medication because he is bipolar and suffers from

depression and schizophrenia. At the time of the incident, Hicks testified that he was taking all of his medications, but not as prescribed because they were making him tired and groggy.

To the extent Hicks might want to challenge inconsistencies in the testimony offered during trial, this does not present an issue of arguable merit. Gregory C. could not identify Hicks as the person who stabbed him. When he testified, Gregory C. admitted that he was "wasted" the night he was stabbed, having "polished off a bottle of Wild Turkey" with a friend. He also testified that he might have used marijuana earlier in the day. Despite any inconsistencies in statements he made following the incident and his testimony at trial, the jury ultimately believed Gregory C.

"It is the jury's task, … not this court's, to sift and winnow the credibility of the witnesses." *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985). Further, "[i]t is certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent." ***Id.*** There would be no merit to challenging the sufficiency of the evidence.

### *D. Sentencing Discretion*

We also conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence

to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Reflecting on the serious nature of the crime and the neighborhood where it occurred, the trial court noted that "the community wants their neighborhoods back." The trial court also commented on the fact that Hicks did not initially cooperate with the presentence investigation report writer and discussed Hicks' criminal record, which included an incident where he threatened his sister with a knife. The trial court sentenced Hicks to four years of initial confinement and five years of extended supervision, explaining "the maximum extended supervision because that is the only way I can protect the community when you get out of prison."

We agree with counsel's conclusions that the trial court did not erroneously exercise its sentencing discretion and that there is no basis to modify Hicks' sentence.

### *E. Ineffective Assistance of Counsel*

Finally, the no-merit report states that appellate counsel has not identified anything in the record indicating that circuit counsel was ineffective. Counsel relays:

> One of the points raised by Mr. Hicks as a potential appellate issue was that his trial counsel did not attempt to identify the person who owns the phone account that was listed in the letter he received while at the House of Corrections as the contact phone number to call if he wishes to pursue the deal of paying a small cash amount in exchange for [Gregory C.] not cooperating with the State.

However, as counsel notes:

> Even if the defense was able to prove that [Gregory C.] attempted to refuse to cooperate with the State in exchange for money from Mr. Hicks, it does not necessarily prove that Mr. Hicks did not stab [Gregory C.] It would have proven at most that [Gregory C.] was attempting to make it more difficult for the State to prove its case while … trying to achieve personal financial gain.

We agree. We have not identified an issue of arguable merit with respect to trial counsel's performance.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

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

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*Diane M. Fremgen*
*Clerk of Court of Appeals*