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

2012AP413-CRNM State of Wisconsin v. Michael Devin Shelton (L.C. #2007CF4117

Before Lundsten, Higginbotham and Sherman, JJ.

Michael Shelton appeals a judgment convicting him, after a jury trial, of several felonies. [R.45] Attorney Paul Bonneson has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

evidence, Shelton's competency to represent himself, the validity of the sentence, and the circuit court's denial of Shelton's postconviction motions. Shelton was sent a copy of the report, and has filed two responses, in which he argues that he should have been allowed to proceed pro se. Upon reviewing the entire record, as well as the no-merit report and responses, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1).

To prove the defendant guilty of armed robbery with threat of force, counts 1-5 and 7, the State needed to provide evidence that Shelton, with intent to steal, by use or threat of a dangerous weapon, took property from its owner by threatening the imminent use of force, with intent to compel the owner to acquiesce in the taking and carrying away of the property. WIS. STAT. § 943.32(2). To prove the defendant guilty of attempted armed robbery in count 8, the State needed to provide evidence that Shelton attempted to commit the elements of armed robbery stated above. WIS. STAT. §§ 939.32 & 943.32(2).

To prove the defendant guilty of recklessly endangering safety in count 6, the State needed to provide evidence that Shelton endangered the safety of Felipa Jimenez by criminally reckless conduct and that the circumstances of his conduct showed utter disregard for human life.

WIS. STAT. § 941.30(1). To prove the defendant guilty of count 9, operating a motor vehicle to flee or attempt to elude an officer, the State was required to prove that Shelton was operating a motor vehicle on a highway after receiving a visual or audible signal from an officer and knowingly attempted to elude the traffic officer by increasing the speed of the vehicle in an attempt to elude the officer. WIS. STAT. § 346.04(3).

To prove the defendant guilty of the crime of felon in possession of a firearm, counts 10 through 12, the State was required to prove that Shelton was a convicted felon and that he possessed a firearm at the time of the alleged crimes and the time of his arrest on August 22, 2007. WIS. STAT. § 941.29(2). Shelton and the State stipulated to the fact that, at the time of the alleged crimes, Shelton was prohibited by law from possessing a firearm.

Sufficiency of the Evidence

Jimenez robbery

Shelton was convicted of armed robbery, reckless endangerment of safety, and possession of a firearm by a felon arising out of an incident that occurred on August 16, 2007, near Tres Hermanos restaurant in Milwaukee. Jessica Paredes testified that she was riding in her mother's white Ford Explorer with her mother, Felipa Jimenez, and her sister, brother, and infant son. Jimenez parked the Explorer and they went across the street to a bakery. When they returned to the vehicle, a black male with a gun in his hand appeared and pulled Paredes' hair and told her to get out of the car. The man shot Jimenez. Jimenez, Paredes, and the children got out of the car. Paredes asked the man if they could take their purses with them, and the man told her no and then got into the drivers' seat of the Explorer and drove off.

When Shelton was arrested a few days later, Paredes went to the police station to view an in-person lineup that was conducted by Detective Dale Bormann. Paredes identified person number two in the lineup as the person who had shot Jimenez and taken Jimenez's vehicle. Bormann testified that Shelton had been person number two in the lineup. We have reviewed the lineup procedure and find no arguable basis for challenging the fairness or reliability of the lineup.

Bormann testified that he and Detective James Campbell interviewed Shelton on the date of his arrest, August 22, 2007. Shelton admitted that he committed the robbery near Tres Hermanos on August 16, 2007, that he went to the passenger side of the Explorer, and that he pulled out a gun and demanded the driver's purse and money. He admitted to firing the gun and driving off with the Explorer. We find nothing in the record to indicate that Shelton's statements to Campbell and Bormann were made without a knowing and intelligent understanding of the constitutional rights being waived. *See* ***State v. Hindsley***, 2000 WI App 130, ¶30, 237 Wis. 2d 358, 614 N.W.2d 48. Shelton does not allege in his no-merit responses that the statements were involuntary. The record indicates that he was given a ***Miranda*** warning prior to questioning, and that he waived his ***Miranda*** rights. *See generally* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Thelen robbery

Shelton was convicted of armed robbery for the robbery of a Concordia College student named Cynthia Thelen. Amanda Jenich, another student, testified at trial that, on August 22, 2007, she saw a green Ford Explorer with New York license plates leaving the parking lot of the college. Jenich knew the Explorer belonged to Thelen, but she did not see Thelen inside the vehicle. Jenich saw Thelen running up the stairs into the school. Jenich approached Thelen and

observed Thelen crying and shaking. Shelton admitted to Bormann and Campbell that he committed the robbery of Thelen. He admitted that he saw a female in a truck near the college and that he took out his gun, pointed it at her, demanded her purse, and then asked for her keys and drove away.

Cross robbery

Shelton was convicted of the armed robbery of Betty Cross. Cross testified at trial that, on August 22, 2007, she was walking to her parked truck when she observed a green SUV approach and come very close to her truck. When Cross was about to open the door of her truck, she heard someone demand her purse and the click of a gun. Cross turned around and saw a gun pointed at her. She did not recognize the man holding the gun as anyone she knew. Cross testified that the man took her purse from her. Shelton admitted to Campbell and Bormann that he committed the offense against Cross. He admitted that he pulled up next to her and pointed a gun at her and he demanded her purse. He dumped the purse after he discovered there was no money in it.

Greer robbery

Shelton was convicted of the armed robbery of Dutricia Greer. Greer testified that on August 22, 2007, she was at a bus stop with her four-year-old daughter. A man pulled up in a truck, pointed a gun at Greer, and demanded her purse. Greer gave the man her purse and then called the police. Greer later identified person number 2 in the police lineup as the person who robbed her. Shelton later admitted to Campbell and Bormann that he robbed Greer and fled the scene in the vehicle that he had taken earlier that day.

Williamson robbery

Shelton was convicted of the armed robbery of Helen Williamson. Helen Williamson testified at trial that on August 22, 2007, she was in her car with her son. When she got out of her car, a person driving a green SUV with New York license plates demanded her purse while holding a gun. Williamson threw her purse toward the SUV and into the driver's vehicle window. The man then drove away. Shelton admitted to Campbell and Bormann that he robbed Williamson.

Family Dollar robbery

Shelton was convicted of armed robbery and possession of a firearm by a felon, for an incident at Family Dollar store on August 19, 2007. Daniel Woodard testified at trial that he was working the checkout counter at Family Dollar when a man entered the store, tossed a plastic bag on the counter, and demanded that Woodard fill it with money. The man pulled a gun halfway out of his pocket. Woodard pulled open the cash drawer and the man with the gun took money from it and left the store. The man then came back and demanded more money, but Woodard told him there was no more money. A video surveillance tape of the incident was played in front of the jury. Detective Joanne Blake testified that she interviewed Shelton later that month with another detective, and that Shelton admitted that he committed the robbery at the Family Dollar store, as well as the armed robberies on August 22, 2007. There is nothing in the record that suggests that Shelton's statements to Blake were not knowing, voluntary, and intelligent.

Lawrence attempted robbery

Brian Lawrence testified at trial that, on August 22, 2007, he parked his car in the parking lot of an apartment complex. Lawrence observed a green Ford Explorer pull up next to him, and the driver stuck a gun out of the window and demanded Lawrence's wallet. Lawrence tried to grab the gun but the man pulled it back. Lawrence called 911 on his cell phone and the truck backed up. Lawrence heard a gunshot go off. The next day, Lawrence picked Shelton out of a police line-up as person number two. Shelton admitted to Campbell and Bormann that he committed this attempted armed robbery, and that he did not obtain any of the victim's property. Shelton stated that his gun may have fired accidentally during the incident.

Fleeing an officer

Shelton was convicted of fleeing an officer and possession of a firearm by a felon, for events that occurred from the 4000 block of Garfield Avenue to 2127 North 31st Street in Milwaukee. Officer Richard Wearing testified at trial that, on August 22, 2007, he saw a green Ford Explorer with New York plates and began to follow it. Wearing was aware from reports over the police radio that several armed robberies had been committed within the area involving a vehicle of that description. The Explorer increased its speed and Wearing's partner activated the lights of the squad card. The Explorer continued to flee and went through a stop sign. The Explorer stopped and the driver, whom Wearing identified in court as Shelton, got out and ran. Wearing got out and ran after Shelton while the squad car followed. Wearing told Shelton to get down on the ground. A handgun fell out of Shelton's pants leg. The property of Cross, Greer, and Williamson was recovered from the SUV that Shelton had been driving.

In light of all of the evidence discussed above, we agree with counsel that there would be no arguable merit on appeal to challenging the sufficiency of the evidence to support the jury's verdicts.

Circuit Court's Denial of Shelton's Request to Proceed Pro Se

On the second day of his jury trial, Shelton requested to proceed pro se. The circuit court denied the request and found that, although Shelton was making his waiver knowingly and intelligently, Shelton was not competent to represent himself. "When a defendant seeks to proceed pro se, the circuit court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). In making a determination on a defendant's competency to represent himself, the circuit court should consider factors such as "the defendant's education, literacy, language fluency, and any physical or psychological disability." ***State v. Imani***, 2010 WI 66, ¶37, 326 Wis. 2d 179, 786 N.W.2d 786. We will uphold a trial court's determination of competency to proceed pro se unless it is unsupported by the facts. ***Id.***

The record reflects that the circuit court considered the above factors. ***Id.*** The court noted that Shelton had difficulty expressing himself, had only completed tenth grade, and appeared nervous in front of the court. The court stated that it had difficulty understanding Shelton and that Shelton would have a hard time making himself understood by the jury. Shelton admitted that he had trouble expressing his thoughts and that he was nervous. Given these record facts in support of the circuit court's finding that Shelton was not competent to

represent himself, we agree with counsel that there would be no arguable merit to challenging the court's denial of Shelton's request to proceed pro se.

Sentence

A challenge to the defendant's sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that the defendant was afforded an opportunity to address the court prior to sentencing, and that he did so. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

Regarding the severity of the offense, the court stated that the crimes Shelton had committed were serious ones. The court also considered the fact that Shelton had repeated or attempted to repeat the same types of crimes within a matter of days. With respect to the defendant's character, the court noted that, although Shelton had tried to be polite with some of his victims, he did in fact commit crimes against them. The court concluded that a prison term was necessary to adequately punish Shelton.

Shelton faced a potential prison sentence of over one hundred years. The court imposed a sentence consisting of thirty-five years of initial confinement and thirteen years of extended supervision. It also awarded 666 days of sentence credit and ordered restitution in the amount of $1,500 on count 1, $61 on count 2, $400 on count 3, and $50 on count 8. The court imposed standard costs and conditions of supervision; directed the defendant to provide a DNA sample

and assessed a DNA surcharge of $250; and determined that the defendant was not eligible for the challenge incarceration program or the earned release program.

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting another source). That is the case here. There would be no merit to challenging the sentences on appeal.

DNA surcharge

We likewise conclude that a challenge to the circuit court's order denying Shelton's motion to vacate the DNA surcharge would be without merit. A circuit court's decision whether to impose a DNA surcharge under WIS. STAT. § 973.046(1g) involves the exercise of the court's discretion. ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. Here, the court properly exercised its discretion by considering the specific circumstances of Shelton's case, noting that the surcharge was appropriate given the nature of the offenses and the likelihood that the State would need to use Shelton's DNA in the future.

Sentence Credit

Shelton wrote a letter to the circuit court after sentencing, requesting that he be awarded additional presentence credit on consecutive sentences. The trial court denied the motion, citing ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988), which holds that a defendant is not entitled to presentence credit on consecutive sentences. Because the circuit court applied the proper legal standard, we conclude that a challenge to the circuit court's decision on Shelton's motion for presentence credit would be without arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals