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August 22, 2014

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

2013AP243-CRNM State of Wisconsin v. Jivonte M. Jones (L.C. #2011CF1134)

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

Jivonte M. Jones appeals a judgment convicting him of first-degree reckless homicide with use of a dangerous weapon and armed robbery with use of force, both as a party to a crime. Appellate counsel, Hans P. Koesser, 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. 738, 744 (1967). Jones filed a response. After considering the no-merit report and the response, and after

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

conducting an independent review of the record, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether the evidence was sufficient to support the jury's verdict finding Jones guilty of first-degree reckless homicide, with use of a dangerous weapon, and armed robbery, as a party to a crime.[2] When reviewing the sufficiency of the evidence, we look at 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)).

To convict Jones of first-degree reckless homicide with use of a dangerous weapon, the State was required to show: (1) that Jones, or a person with whom Jones acted as a party to a crime, caused the death of the victim, Oscar Vega; (2) that Jones, or a person with whom Jones acted as a party to a crime, caused the death by criminally reckless conduct; and (3) that the circumstances of Jones's conduct, or the conduct of a person with whom Jones acted as a party to a crime, showed utter disregard for human life. WIS JI—CRIMINAL 1020. "Criminally reckless conduct" means "the conduct created a risk of death or great bodily harm to another person" and "the risk of death or great bodily harm was unreasonable and substantial" and "the defendant or a

[2] The jury acquitted Jones of first-degree intentional homicide, as a party to a crime.

person with whom the defendant acted as a party to a crime was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm." ***Id.***

To convict Jones of armed robbery, the State was required to show: (1) that Israel Vega, Oscar Vega's brother, was the owner of property; (2) that Jones, or another person with whom he was acting as a party to a crime, took and carried away property from Israel Vega; (3) that Jones, or a person with whom Jones was acting as a party to a crime, took the property with the intent to steal; and (4) that Jones, or a person with whom Jones was acting as a party to a crime, acted forcibly. WIS JI——CRIMINAL 1480.

At trial, Israel Vega testified that he went with his brother Oscar Vega and Oscar's girlfriend, Gilda Hernandez, to purchase a television from Jones. He and Oscar left the money for the purchase in their truck with Hernandez and went with Jones and another man into a house. They went up to the second floor, where Jones pulled out a gun and told them to hand over the money for the television. Vega testified that they told Jones they did not have the money with them. Jones and his accomplice took their cell phones and their wallets at gunpoint. Vega testified that Jones began hitting Oscar in the face with the gun, and told them to take off their clothing, leaving them wearing nothing but their boxers.

Vega testified that Jones then took the car keys from Oscar and told his accomplice to go down to the truck to see if they left the money with Hernandez. After a few minutes passed, Jones decided to go check what was happening at the truck, so he gathered up their clothes and went down the steps. Vega testified that he told Oscar that they should leave. As they were getting their shoes on, which Jones had left behind, the truck alarm sounded. They started down the stairs, fearing for Hernandez's safety. Jones heard them coming and warned them to stay

upstairs or he would shoot them. Worried about Hernandez, Oscar continued down the stairs. Vega testified that he heard two shots. When he reached the bottom of the steps, he saw Oscar lying on the floor bleeding near the door and saw Jones walking away with the gun in his hand. Vega testified that he dragged Oscar from the front door out into the snow. Vega testified that Jones turned around and shot at them three or four more times after he reached the sidewalk.

Hernandez testified that on the day of the murder, she waited in the truck while Oscar and Israel went with Jones and another man into the house. After about five minutes, she saw the man who had been with Jones come outside and walk across the street. She testified that she then saw Jones come out of the house. He stood near the door and told her that Oscar needed her to come inside. As she got out of the truck, the alarm began to sound. She started walking toward the house with the alarm sounding but, before she got to the door, Jones ran out into the yard, shooting his gun toward the house. Then she saw Oscar lying on the ground injured, with Israel trying to pick him up.

Lennis McDuffie testified that he was fixing his van around the corner from his house on the day of the murder. Jones and his cousin approached him and Jones asked if he could use McDuffie's house to "bag up some weed." McDuffie testified that he told him "no." Jones walked away in the direction of McDuffie's house. After chatting for a few minutes, Jones's cousin walked in the direction that Jones had gone. About fifteen to twenty minutes later, McDuffie heard gunshots coming from around the corner in the direction of his house. He quickly put the wheel back on his van and drove there. On the way, he saw Jones running with a gun. He saw Jones jump into a car, which drove quickly away. McDuffie testified that when he got back to his house, he saw a wounded man lying in the yard and saw that the front and back doors to his house were open.

Detective Dennis Devalkenaere testified that McDuffie identified Jones in a photo lineup. Devalkenaere also testified that McDuffie told the police he knew Jones from the neighborhood and he was the person who initially identified Jones for the police after the shooting.

Devontae Thames testified that he was with Teuntae Allen and Jones on the day of the murder. They met up with Israel and Oscar Vega and drove to a house where Jones said he was going to sell them a television. Jones and Allen got out of the car and told him to wait. Thames testified that about seven minutes later he heard gunshots. Allen ran up to the car and hopped in, saying "stupid nigger." Thames asked him why he was saying that and Thames said, referring to Jones, "he shot them." Thames testified that Jones then ran to the car and they drove from the scene. Thames testified that he got out of the car a few minutes later and walked away, telling Jones and Allen that he did not want to have anything to do with what had happened.

Ahmad Azzem testified that he worked at Payless Market, where he sold phones and tobacco. He testified that Jones came to the store at around 3:30 p.m. on the day of the murder, which was about twenty minutes after the shooting, and sold him a cell phone for $30. Azzem testified that he turned the cell phone over to the police and gave them a videotape of the transaction. The cell phone belonged to Oscar Vega.

Soua Vang, a neighbor, testified that he was getting ready for work when he heard gunshots. He looked out his window and saw a man standing in the middle of the street shooting toward the house across the street. Vang said he watched the scene unfold for a full minute, and that he saw a man, Oscar Vega, lying in the yard wounded.

We agree with the no-merit report that the evidence against Jones was overwhelming. Israel Vega testified that Jones robbed him and his brother Oscar at gunpoint and then shot

Oscar. Multiple witnesses placed Jones at the scene of Oscar Vega's murder with a gun, shooting in Vega's direction. The testimony of the witnesses, very briefly summarized above, was sufficient to support the jury's verdict finding Jones guilty of first-degree reckless homicide as to Oscar Vega and armed robbery as to Israel Vega. There would be no arguable merit to a claim that the evidence was insufficient to support the verdict.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion. The circuit court sentenced Jones to thirty-five years of imprisonment for first-degree reckless homicide, with twenty-five years of initial confinement and ten years of extended supervision. The circuit court also sentenced Jones to fifteen years of imprisonment for armed robbery, with ten years of initial confinement and five years of extended supervision, to be served consecutively to count one, but concurrently to Jones's revocation sentence.

In framing Jones's sentence, the circuit court considered the seriousness of the offense, the character of the offender and the need to protect the public. The circuit court placed great weight on the seriousness of the crime and aggravating circumstances that led to Vega's death; Jones lured Oscar and Israel Vega into a house to rob them and shot Oscar multiple times. With regard to Jones's character, the circuit court acknowledged Jones's statement that he did not set up the robbery with an intent to kill Vega, but the circuit court found very troubling the fact that Jones was on probation at the time he committed this crime and had failed to keep an appointment with his agent just a few days before the murder. The circuit court also looked at other aspects of Jones's character, including his lack of any significant work history, concluding that he was a very dangerous individual and that he needed to be incarcerated to protect society. The circuit court explained its application of the various sentencing considerations in accordance

with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. There would be no arguable merit to a challenge to the sentence on appeal.

In his response, Jones argues that he received ineffective assistance of counsel because his trial lawyer did not ask the right questions of the witnesses. He contends that the verdict would have been different had his lawyer done so. A claim of ineffective assistance of counsel has two parts: the defendant must show that his lawyer's performance was deficient and the defendant must show that his defense was prejudiced by his lawyer's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In deciding whether a lawyer has performed deficiently, we look at "whether counsel's assistance was reasonable considering all the circumstances." *See* ***id.*** at 688. To determine whether a lawyer's deficient performance prejudiced the defense, we look at whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694.

Jones does not specify what questions he believes that his lawyer should have asked. During our no-merit review, we act as an advocate, searching for any arguably meritorious issues for appeal. We have not found any instances during trial when Jones's lawyer performed in a deficient manner by failing to ask appropriate questions. There would be no arguable merit to this claim.

Jones next argues in his response that his trial lawyer was ineffective for failing to hire a private investigator to interview potential witnesses that could have been summoned to court. Jones does not specify which witnesses should have been interviewed or what information a private investigator might have discovered. Given the testimony at trial, as summarized above,

we are unable to conclude that additional unnamed witnesses would have changed the outcome of the trial. There would be no arguable merit to this claim.

Jones next argues in his response that the circuit court pressured the jury into coming up with a verdict. There is nothing in the record to support Jones's claim that the circuit court pressured the jury into reaching a verdict. The circuit court ordered the jury to come back a second day because they had not yet reached a verdict on the first day, but the jury never told the circuit court that it had reached an impasse or a deadlock in its deliberations. There would be no arguable merit to this claim.

Jones next contends that the circuit court should not have allowed pictures of the victim to be introduced at trial because their graphic content caused the jury to be biased against him. Before trial began, Jones's lawyer objected to introducing two pictures of the victim's wounds from the autopsy. The prosecutor sought to introduce the pictures to show the jury where Vega was shot, the closeness of the shot, and that Jones intended to kill Vega based on where he was shot. The circuit court concluded that the photos should be admitted because they were probative of whether Jones had an intent to kill and they were, for autopsy photos, relatively "clean," without unnecessary blood or gore. *See* WIS. STAT. §§ 904.02 and 904.03; *see also* ***Sage v. State***, 87 Wis. 2d 783, 788-90, 275 N.W.2d 705 (1979). The circuit court properly exercised its discretion in making this evidentiary ruling because it considered the appropriate legal standards and applied them to the facts of this case. There would be no arguable merit to this claim.

Jones next contends in his response that the circuit court should not have forced him to stay with a lawyer he did not like. Jones did not want Reyna Morales and Anne Jaspers, both of

whom had been appointed by the Office of the State Public Defender, to continue representing him because he did not think they were working hard enough on his behalf. After questioning them about their efforts on Jones's behalf, the circuit court denied Jones's motion to allow them to withdraw. The circuit court explained to Jones that Morales and Jasper were good lawyers who would be ready for trial. Because Jones did not agree with the circuit court's decision, he completely refused to cooperate with Morales and Jaspers in the weeks after the circuit court's ruling leading up to the trial, necessitating a postponement of his trial. At that point, the circuit court reluctantly allowed Morales and Jasper to withdraw. Patrick Earle then began representing Jones and continued to represent him through trial. Given this sequence of events, Jones has no appellate claim based on the fact that the circuit court initially denied his motion to discharge Morales and Jaspers; he forced the circuit court to allow them to withdraw by his actions and was represented by Earle at trial. There would be no arguable merit to this claim.

Finally, Jones argues in his response that one of the jurors was a firefighter and may have known some of the police officers, making the juror more favorably disposed to the police officers who testified, and thus the prosecution. Jones is mistaken. None of the jurors were firefighters. Perhaps Jones is referring to Juror Number 13, who is a banker, but served on the Police and Fire Commission from 1993 to 1998. Juror Number 13 explained that he did not know any of the police officers involved in the case by name and, even if he recognized some of

them from his time on the Commission, he could be fair in his treatment of all of the witnesses. There would be no arguable merit to this claim.[3]

Our independent review of the record reveals no other potential issues for appellate review. Therefore, we conclude that 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 summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hans P. Koesser, is relieved of any further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] We noticed several typographical errors in the voir dire transcript. For example, Juror Number 25 introduces herself to the court by stating, "I'm Janet Buda." Later, on the same page of the transcript, Juror Number 26 introduces herself to the court by saying the same thing: "I'm Janet Buda." One of these lines is obviously incorrect, but the error is not a basis for appellate relief.