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December 23, 2014

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

2014AP1379-CRNM State of Wisconsin v. Broderick S. Dixon (L.C. # 2013CF5)

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

Broderick Dixon appeals from a judgment of conviction for being a party to the crime of burglary, being a party to the crime of theft of firearms, possession of a firearm by a felon, and three counts of bail jumping. 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). Dixon has filed a response

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

to the no-merit report.[2] WIS. STAT. RULE 809.32(1)(e). Appointed counsel has filed two supplemental no-merit reports. RULE 809.32(1)(f). Upon consideration of these submissions and an independent review of the record, including the transcript of the jury trial, 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 trial was that on September 28, 2012, two persons, a black male and a white female, broke into a home, removed two chest lockers, and placed the lockers in a vehicle waiting in the home's driveway. A neighbor across the street saw the vehicle park in the driveway and observed that at least five people got out of the car but only two went up to the house. The neighbor also observed another person in the vehicle. The neighbor picked out Dixon's picture from a photo lineup as the person who had gone to the house and returned carrying the locker. Two females who were occupants in the car also identified Dixon as having participated in the burglary and theft. They reported that after leaving the house, the occupants of the vehicle were driven to Milwaukee. One of the lockers contained firearms, some of which were recovered in Milwaukee. Dixon presented an alibi defense. His sister testified that Dixon was at her home in the Chicago area on the day of the crime. The jury found Dixon guilty of all charges. Dixon was sentenced to a cumulative sentence of eight years' initial confinement and seven years' extended supervision to be served consecutive to a sentence in a prior case.[3]

[2] At the conclusion of his no-merit response Dixon asked for additional time to work on a response. After submission of the case, his request was discovered. Dixon was given an additional thirty days to file an additional response to the no-merit report. He did not file one.

[3] An order of November 4, 2014, required appointed counsel to file a supplemental no-merit report addressing whether Dixon is entitled to any sentence credit. The supplemental no-merit report demonstrates that Dixon was given appropriate sentence credit in another case and that he is not entitled to the same credit in this case.

The no-merit report discusses whether the bail jumping charges were multiplicitous,[4] whether striking the word "accurate" from the police detective's testimony that the neighbor's report was "thorough and accurate" was sufficient to negate any possible ***Haseltine*** violation,[5] whether the evidence is sufficient to support the guilty verdicts, whether Dixon was denied the effective assistance of trial counsel, and whether the sentence was the result of an erroneous exercise of discretion. The first supplemental no-merit report discusses claims in Dixon's response that the criminal complaint was fundamentally defective and that the jury was not made aware of inconsistencies in witnesses' accounts or factors affecting witness credibility, especially related to the two females who were present during the crime. This court is satisfied that the no-merit reports properly analyze the issues they discuss as without merit, and this court will not discuss these issues further.[6] Matters raised in Dixon's response not specifically addressed by counsel's no-merit reports raised by our independent review are discussed below.

[4] In his response Dixon cites ***State v. Anderson***, 214 Wis. 2d 126, 570 N.W.2d 872 (Ct. App. 1997), as support for his claim that the bail jumping convictions are multiplicitous. The decision Dixon cites was reversed by the supreme court in ***State v. Anderson***, 219 Wis. 2d 739, 757, 580 N.W.2d 329 (1998), which holds that multiple counts of bail jumping for violating separate terms of the same bond are not multiplicitous.

[5] ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), holds that a witness, expert or otherwise, may not testify that another physically and mentally competent witness is telling the truth.

[6] In discussing the claimed ***Haseltine*** violation, the no-merit report uses, in part, a harmless error analysis. However, the possibility that an evidentiary error might ultimately be determined to be harmless does not mean the potential issues surrounding admission of the evidence lack arguable merit. It is the State's burden to prove an error was harmless. ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500. A defendant may be entitled to advocacy of counsel with respect to the State's burden to prove harmless error. Here the potential ***Haseltine*** violation lacks merit because the trial court struck the potentially offending language and gave the jury the cautionary instruction to disregard stricken testimony. Juries are presumed to follow all the instructions given. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

In his response Dixon claims that there was no probable cause shown at the preliminary hearing because no evidence of the crime was found on his person, he was not identified or arrested at the scene of the crime, and the testimony of the two females present during the crime was inconsistent with their trial testimony. We need not consider the sufficiency of the evidence at the preliminary hearing. An error-free trial cures defects at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 632, 467 N.W.2d 108 (1991); ***State v. Noll***, 160 Wis. 2d 642, 645, 467 N.W.2d 116 (1991).

Dixon further contends that because the neighbor witness indicated only one black male approached the residence, he must be declared innocent because another black man, known as "Shoona," entered a guilty plea regarding his participation in the crime, and Shoona was caught in Milwaukee with some guns taken from the residence. The neighbor witness indicated another person was seen in the car. Dixon was placed at the scene of the crime by the two females. Shoona's guilt does not negate Dixon's guilt as a party to the crime.

Dixon points out that during closing argument the prosecutor told the jury that the police had not included a picture of a man known as "Snoop" in the photo line-ups because Snoop weighs 200 pounds and did not match the 130-pound weight estimate made by the neighbor. Dixon contends that the information is inaccurate and that Snoop weighs the same as he does, 130 pounds. He claims the prosecutor's untruthfulness had an effect on the jury's verdict. Dixon is correct that the prosecutor's statement was inaccurate. Evidence at trial was that Snoop weighed 130 pounds, and Shoona weighed 200 pounds. No objection was made to the prosecutor's misrepresentation and thus, the only potential claim is that trial counsel was ineffective for not objecting. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'" (quoted source omitted)).

One of the two-part showing necessary for a claim of ineffective assistance of counsel requires the defendant to prove that his defense was prejudiced by counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice the defendant must show there is a reasonable probability that the result of the proceeding would have been different in the absence of counsel's deficient performance. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** Dixon could not make that showing with respect to trial counsel's failure to object to the prosecutor's misrepresentation as to Snoop's weight. The argument came as part of the prosecutor's rebuttal argument and was not the central focus of the argument. It is presumed that the jury followed the instruction that the arguments of counsel were not evidence. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). Although during cross-examination of one police officer Dixon tried to show that the police had failed to consider Snoop as a suspect in the robbery, Dixon's theory of defense rested on his alibi witness, his sister. The jury was free to accept or reject her testimony. The prosecutor's misrepresentation as to why Snoop was not included in the photo line-ups does not relate to the jury's acceptance or rejection of his sister's alibi testimony. There is no arguable merit to a potential claim that trial counsel was ineffective for not objecting to the prosecutor's misrepresentation of Snoop's weight.

We have reviewed other aspects of the jury trial for the existence of potential appellate issues: jury selection, the one evidentiary objection during trial, the admission of a taped phone call with Dixon's sister, confirmation that Dixon's decision to not testify was knowingly made, use of proper jury instructions, the propriety of opening statements and closing arguments, how the jury's requests for exhibits were handled, and the polling of the jury. No other aspect of the trial presents an issue of arguable merit for appeal. Although the record does not include a transcript of the restitution hearing, the record reflects Dixon stipulated to the amount of restitution and he cannot

now challenge it. This court accepts the no-merit reports, affirms the conviction, and discharges appellate counsel of the obligation to represent Dixon further in this appeal.

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 Daniel R. Goggin, II, is relieved from further representing Broderick Dixon in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals