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DISTRICT I

Amended as to first paragraph January 16, 2015
December 30, 2014

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

2013AP2517-CRNM State of Wisconsin v. Eddie James Wilkinson (L.C. #2011CF3237)

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

Eddie James Wilkinson appeals a judgment convicting him of two counts of burglary. Andrea Taylor Cornwall filed a no-merit report seeking to withdraw as appointed appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Wilkinson filed a response. After considering the no-merit report and the response, and

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

after 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.

Wilkinson was initially charged with one count of burglary, as a party to a crime, for entering a vacant home and removing stained glass windows and doors. A month before trial, the State filed an amended information, charging Wilkinson with two additional counts, burglary of a second property and receiving stolen property related to a third home invasion. The jury convicted Wilkinson of both burglary charges, but acquitted him of receiving stolen property.

The no-merit report addresses whether Wilkinson's trial lawyer provided constitutionally ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

The no-merit report addresses whether Wilkinson's trial lawyer should have challenged the amended information because it added two additional charges that were not related to the burglary charged in the complaint. The no-merit report points out that if Wilkinson's lawyer had challenged the amended information, the remedy would have been for the circuit court to dismiss the additional counts and allow the State to refile and conduct a new preliminary hearing on

them; therefore, Wilkinson was not prejudiced because there is not a reasonable probability that the result of the proceeding would have been different. The no-merit report also correctly points out that any error in the charging documents and resulting failure to hold a new preliminary hearing was cured by Wilkinson's fair and error-free trial. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Therefore, there would be no arguable merit to a claim that Wilkinson's trial lawyer provided constitutionally ineffective assistance by failing to challenge the amended complaint.

The no-merit report addresses whether Wilkinson's lawyer should have moved to sever the three charges in the amended information. Multiple crimes may be charged in the same complaint or information "if the crimes charged … are of the same or similar character." *See* WIS. STAT. § 971.12(1). For crimes to be "of the same or similar character," they "must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). The circuit court may sever charges when the defendant may be prejudiced by joining the charges for trial. § 971.12(3). We agree with the no-merit report's assessment that the crimes were properly charged together because all three counts involved home burglaries in Milwaukee where stained glass windows were removed from the home and all of the offenses occurred within a relatively short time frame, six months. There would be no arguable merit to a claim that Wilkinson's trial lawyer performed deficiently by failing to challenge the amended information.

The no-merit report and Wilkinson's response address whether Wilkinson's trial lawyer should have moved to strike Juror #6 for cause because he stated that he knew two of the State's witnesses, Karen Taylor and Dustin Lunde. Juror #6 said that he knew Taylor because they both worked for the City of Milwaukee and he knew Lunde, who was an antiques dealer, through his

work during college for another antiques dealer. The transcript reveals no evidence of subjective bias. Juror #6 stated in response to questioning that he could be fair and unbiased. As for objective bias, "'[a] prospective juror's knowledge of or acquaintance with a participant in the trial, without more, is insufficient grounds for disqualification.'" ***State v. Smith***, 2006 WI 74, ¶34, 291 Wis. 2d 569, 716 N.W.2d 482 (citation omitted; brackets in ***Smith***). There would be no arguable merit to a claim that trial counsel performed deficiently by not moving to strike this juror for cause.

The no-merit report addresses whether there is sufficient evidence to support the convictions. 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 (quotation marks and citation omitted). We will not overturn the verdict "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." ***Ibid.*** "The jury is the ultimate arbiter of a witness's credibility." *See* ***State v. Norman***, 2003 WI 72, ¶68, 262 Wis. 2d 506, 664 N.W.2d 97.

To prove that Wilkinson committed burglary, the State was required to prove beyond a reasonable doubt: (1) that Wilkinson intentionally entered a building; (2) that Wilkinson entered the building without the consent of the person in lawful possession; (3) that Wilkinson knew the entry was without consent; and (4) that Wilkinson entered the building with intent to steal. WIS JI—CRIMINAL 1421. "Intent to steal" means "that the defendant had the mental purpose to take and carry away movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property." ***Id.*** (footnote omitted).

At trial, Ann Brown testified that her deceased mother's home on North Teutonia Avenue was vacant and in the process of being sold. She testified that she had not given anyone permission to enter the home. When she went to the home, she saw that the alarm was torn out of the wall and stained glass windows had been ripped from their frames and were missing. She also testified that she saw part of a cigarette on the dining room floor and told police about it. Milwaukee Police Officer Michael Branski testified that he packaged and sealed the cigarette that Brown noticed on the floor and turned it in to be processed for DNA by the State Crime Lab. Police Detective Gena Malache testified that she sent the cigarette to the State Crime Lab as part of her investigation of the burglary and the State Crime Lab informed her that the DNA matched Wilkinson's DNA sample in the State DNA databank. She then obtained a search warrant and obtained a DNA sample from Wilkinson, which confirmed that the DNA on the cigarette was his.

Bernice Booker testified that she called the police in the middle of the night because she thought someone was trying to break into her house, but then realized the break-in was occurring next door when she saw a light from a flashlight coming from inside the vacant home next to her on North 39th Street. Police Officer Calvin Watson testified that when he arrived to investigate in response to Booker's call, he saw someone come out of the home, then run back inside when he saw the police. Watson testified that he called more police to the scene and they searched the house, finding Wilkinson inside. Police Sergeant Joshua Whiten testified that he was helping to search the home when he found Wilkinson hiding in the laundry shoot. Police Officer Daniel Priewe testified that when he was helping to search the home, he discovered stained glass windows inside the home that had been taken from their frames and were lying on the floor. He also found window frames with pry marks, a pry bar and a flashlight. Eric Reilly, a DNA analyst

from the State Crime Lab, testified that the DNA on the flashlight matched the DNA taken from Wilkinson.

The testimony and physical evidence were sufficient to support the jury's conclusion that Wilkinson had been inside Brown's home on Teutonia Avenue and that he did not have permission to be there. The testimony also showed that Wilkinson was apprehended in the vacant home on 39th Street. In both homes, stained glass windows had been pried from their frames and in the second home, the police found pry bars and a flashlight with Wilkinson's DNA on it. There would be no arguable merit to a claim that there was insufficient evidence to support the verdict.

The no-merit report also addresses whether there would be arguable merit to a claim that the circuit court misused its discretion when it sentenced Wilkinson to ten years of imprisonment on each count, with five years of initial confinement and five years of extended supervision, to be served consecutively. In deciding on Wilkinson's sentence, the circuit court placed primary emphasis on Wilkinson's extremely poor prior criminal record, which includes six counts of burglary, possession of tools used for burglary, resisting arrest, bail jumping, receiving stolen property, escape and possession of marijuana. Acknowledging that this was not a violent offense, the circuit court explained that the sentence was necessary to protect the community from further criminal activity by Wilkinson and that there was a problem in Milwaukee with vacant houses being burglarized. The circuit court properly exercised its discretion because it explained its sentence in accord 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.

We have carefully reviewed Wilkinson's response, but have not found any issues that would present arguable merit for appeal. Wilkinson argues that he received ineffective assistance of appellate counsel. Wilkinson made this argument before his appeal was considered by this court. The argument is therefore unavailing. Wilkinson argues that the prosecutor tampered with the evidence and knowingly used false evidence, but does not explain what the false evidence was or the basis for his claim that the prosecutor knowingly used false evidence. Wilkinson contends that his trial lawyer should have called an expert witness to present information about the false evidence, but does not explain what type of expert witness should have been called or why it would help. Wilkinson also argues at length about the testimony of the witnesses called to support the charge of receiving stolen property, Steve Mentecki, Patricia Mentecki and Dustin Lunde. Wilkinson was not convicted of that charge, so there would be no reason to challenge the testimony of the witnesses as to the charge in this appeal. Our independent review of the record reveals no other potential issues for appellate review. Therefore, we affirm the judgment of conviction. We also relieve Andrea Taylor Cornwall of further representation of Wilkinson in this matter.

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

IT IS FURTHER ORDERED that Andrea Taylor Cornwall is relieved of representation of Wilkinson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals