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September 29, 2015

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

2014AP716-CRNM State of Wisconsin v. Maurice D. Dixon (L.C. # 2013CF29)

Before Lundsten, Higginbotham, and Blanchard, JJ.

Maurice Dixon appeals a judgment convicting him, following a jury trial, of two counts of first-degree reckless homicide and two counts of attempted armed robbery, as a party to a crime. *See* WIS. STAT. §§ 939.05, 940.02(1), 939.32, 943.32(2) (2013-14).[1] His appellate counsel, Attorney Michael Backes, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Dixon filed multiple responses to the no-

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

merit report, alleging ineffective assistance of trial counsel on various grounds. Upon order of this court, Attorney Backes filed a supplemental no-merit report addressing Dixon's arguments not already addressed in the original no-merit report. After consideration of the no-merit reports, responses, and an independent review of the record, we conclude that there are no arguably meritorious appellate issues.

First, counsel asserts that there would be no arguable merit to an argument that trial counsel was ineffective for failing to challenge Dixon's statements to law enforcement. Dixon contends that counsel should have filed a motion to suppress his statements. However, the record reflects that, at a pre-trial motion hearing, trial counsel represented to the court that, after viewing the DVDs of the interrogation, it was his opinion there was no basis upon which to deny that the statements of Dixon were voluntarily made after being properly read his ***Miranda***[2] warnings. The court then asked Dixon directly if he agreed with his counsel, and Dixon responded yes. The court further asked Dixon if he agreed that his ***Miranda*** rights were given, whether he voluntarily waived them, and whether he made the statements to law enforcement voluntarily and without coercion. Dixon replied yes to each question. Dixon also expressly waived his right, on the record, to have a hearing on the issue. Based on the foregoing reasons, we are satisfied that any argument on appeal that Dixon's counsel was ineffective for failing to move to suppress Dixon's statements to law enforcement would be without merit.

Next, counsel discusses in the no-merit report and supplemental response whether there would be any arguable merit to challenging Dixon's waiver of the right not to testify or to

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

challenge trial counsel's effectiveness in advising Dixon on that issue. A criminal defendant's waiver of his right not to testify must be knowing, voluntary, and intelligent. ***State v. Denson***, 2011 WI 70, ¶56, 335 Wis. 2d 681, 799 N.W.2d 831. Here, the circuit court did not engage Dixon in an on-the-record colloquy regarding his waiver. Although such a colloquy is considered the better practice, no such colloquy is required. *See* ***id.***, ¶¶63, 80. Counsel informs us in the supplemental no-merit report that, based on a conversation with Dixon, he is confident that Dixon knew at the time he decided to testify that he had a right not to do so. Counsel further informs us that, based on this conversation, he is confident that Dixon knew that a decision not to testify would not be allowed to be argued to the jury by the State and that the jury would be instructed not to hold that decision against him. Counsel further asserts in the supplemental no-merit report that he spoke with Dixon's trial counsel, who informed him that he had reviewed the right not to testify with Dixon, as he does with all clients who are considering going to trial. Based on the foregoing, we agree with counsel's assessment that there would be no arguable merit to arguing on appeal that Dixon's waiver of the right to testify was not knowing, voluntary, and intelligent or that counsel was ineffective in advising Dixon on the issue.

In his responses, Dixon challenges the sufficiency of the evidence to support his conviction. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). Dixon was charged, as a party to a crime, with two counts of attempted armed robbery and two counts of first-degree intentional homicide. The jury returned guilty verdicts on both of the attempted armed robbery counts and on two counts of first-degree reckless homicide, a lesser included offense of first-degree intentional homicide. *See* WIS. STAT.

§§ 939.05, 940.02(1), 939.32, 943.32(2). We are satisfied that the evidence was sufficient to support the jury's verdicts.

The complaint alleged that Dixon served as the lookout while two co-actors entered the residence of a drug dealer for the purpose of robbing him. The complaint further alleged that the dealer resisted the robbery, was shot by one of the co-actors, ran into the street, collapsed and died. Another person who was at the residence at the time was also shot and killed. Police recovered a cell phone from the front lawn of the residence. The State presented evidence at trial that the cell phone belonged to one of Dixon's co-actors, and that Dixon's name and number were stored inside the phone.

Dixon and both co-actors made statements to police regarding their involvement in the crime. Dixon's co-actors confirmed that Dixon never entered the residence, but remained outside as a lookout, which corroborated Dixon's own statement. Dixon told police that he was able to see what was going on inside the residence through a window. He described the shootings and admitted seeing one of the co-actors smashing through the picture window. Dixon admitted to running from the scene with the other co-actors. He also told police that the gun that was used had previously been stored in the basement of his home. Dixon testified at trial regarding his statements to police, and the recorded statements were played for the jury.

Video evidence obtained from a store about two blocks from the crime scene showed Dixon and the two co-actors walking toward the crime scene at approximately 1:30 a.m. on the date of the incident. A civilian witness who was present at the crime scene testified as to the time of the shooting being approximately 1:40 a.m. on that same day. In the video, Dixon was wearing a distinctive jacket. Dixon was later arrested wearing that same distinctive jacket. In

light of all of the above, we are satisfied that this evidence was sufficient to support the jury's verdicts, such that any appellate argument to the contrary would be without arguable merit.

Dixon also argues that his trial counsel was ineffective because he failed to elicit testimony from Dixon's co-actors regarding the statements they gave to police. To establish ineffective assistance of counsel, Dixon must show that his counsel's performance was deficient and that the deficiency caused him prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 688. To prove prejudice, the 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.

The statements given by Dixon's co-actors to police supported trial counsel's strategy, as conveyed to us by Attorney Backes in the supplemental no-merit report. That strategy was to concede that Dixon was at the scene of the crime, but to emphasize that Dixon was not involved in the shooting. We are not persuaded that this strategy falls below an objective standard of reasonableness for counsel's conduct. However, even if we assume, without deciding the issue, that trial counsel's performance was deficient, Dixon fails to allege any specific facts indicating what his co-actors would have testified to, had they been called as witnesses, and how that would have changed the outcome of his trial. Thus, Dixon does not establish that he was prejudiced by trial counsel's failure to elicit testimony from his co-actors.

The record also discloses no arguable basis for challenging the sentence imposed. The court considered the seriousness of the offenses, Dixon's character, age, and educational background, as well as his drug and alcohol issues and significant criminal history. The court

imposed fifteen years of initial confinement and seven years of extended supervision on each of the reckless homicide counts, to run consecutively. On the attempted armed robbery counts, the court imposed seven years of initial confinement and seven years of extended supervision on each count, to run concurrent to each other and concurrent to any other sentence. The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 940.02(1) (classifying first-degree reckless homicide as a Class B felony); 943.32(2) (classifying armed robbery as a Class C felony); 973.01(2)(b)1. and (d)1. (providing maximum terms of forty years of initial confinement and twenty years of extended supervision for a Class B felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). Under the circumstances, it cannot reasonably be argued that Dixon's sentences are so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issues for appeal.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Michael Backes is relieved of any further representation of Maurice Dixon in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals