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DISTRICT I

October 20, 2015

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

2014AP1745-CRNM State of Wisconsin v. Jovan Williams (L.C. #2012CF5345)

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

Jovan Williams appeals a judgment convicting him of felony murder, as a party to a crime, with armed robbery as the predicate offense. Attorney Jeffrey W. Jensen filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Williams filed a response. After considering the no-merit report and the response, and after conducting an independent review of the record,

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

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 Williams guilty of felony murder. 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 Williams of felony murder, the State was required to prove that Williams caused the death of another human being while committing a felony—here, armed robbery. *See* WIS. STAT. § 940.03. "An actor causes death if his or her conduct is a 'substantial factor' in bringing about that result." ***State v. Oimen***, 184 Wis. 2d 423, 435, 516 N.W.2d 399 (citation omitted). "As long as an actor's conduct is a 'substantial factor' in bringing about a death, the plain language of sec. 940.03 places no limits on whose death it is that results." ***Id.*** at 435-36 (citation omitted). Therefore, "a defendant can be charged with felony murder for the death of a co-felon when the killing was committed by the victim of the underlying felony." ***Id.*** at 428.

At trial, O.T. testified that he was sitting in his car with his six-year-old son, who was asleep, in the parking lot of an automobile dealership he owns. O.T. testified that he was looking at his phone when he heard a tap on the window. He looked up and saw two men standing by his window, one with a gun in his hand, who he later learned was Williams. The men told him not to move and demanded that he give them everything he had. O.T. testified that the men opened

the door and Williams hit him on the side of the head with the gun. The robbers went through his pockets and took his money. O.T. testified that the second man, later identified as Zaire Burris, then said, "He seen my face. I'm gonna kill him. Give me the gun." O.T. testified that he had been cooperative with the men until that point in an attempt to get them to leave without harming him or his son, but realized that he was going to be killed unless he took action. O.T. testified that he pulled out the loaded gun he was carrying strapped to his side and shot Burris just as Williams was giving a gun to Burris. O.T. testified that he grabbed his son and fled to the Sweet Shop across the street owned by his uncle, not realizing that he had been shot in the arm at the time. O.T. further testified that he had a concealed carry permit for his gun, but had not intended to use it until he realized he and his son were in mortal danger. O.T. identified Williams in a line-up at the police station as the second robber.

Michele Green testified that she was working at the Sweet Shop owned by O.T.'s uncle. She heard gunshots that sounded like they came from two different guns. Minutes later O.T. came to the door, looking upset and scared. Green testified that he said, "[T]hey tried to rob me, tried to rob me," and expressed concern for his son. Green left the shop with O.T. to check on O.T.'s son. Police testimony established that Burris died on the scene and that the weapon Burris and Williams had been carrying was found nearby on the ground.

The trial testimony, very briefly summarized above, was sufficient to support the jury's verdict finding Williams guilty of felony murder; Williams was committing an armed robbery when the victim shot Burris, causing his death. Williams argues in his response that there was insufficient evidence to convict him because there were no fingerprints taken from the gun and there "was not enough direct evidence." Fingerprints and other physical evidence are not necessary for a jury to convict a defendant of a crime. Moreover, O.T.'s testimony about what

occurred *is* direct evidence of the crime, although a jury may convict based on circumstantial evidence alone. *See* ***Poellinger***, 153 Wis. 2d at 501 ("It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial."). There would be no arguable merit to an appellate challenge based on the insufficiency of the evidence.

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 Williams to twenty-five years of imprisonment, with fifteen years of initial confinement and ten years of extended supervision. In framing Williams's sentence, the circuit court considered the need to punish Williams for his conduct, the need to deter others from engaging in criminal activity, and Williams's need for rehabilitation. The circuit court placed emphasis on the fact that Williams turned over the gun to Burris after Burris told Williams he intended to kill O.T. The circuit court also placed emphasis on the fact that Williams had been given several opportunities to change his criminal activities while on community supervision, but he had not done so. 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.

Williams argues in his response that O.T. was not a reliable witness because he was unable to identify him from a photo array, although O.T. later was able to identify Williams in a line-up. The fact that O.T. was not able to identify Williams in a photo array does not make him an unreliable witness. Moreover, there was no dispute about the fact that Williams was present when the shooting occurred; Williams admitted at trial that he was with Burris, who was armed with a pistol, when Burris was killed. Williams also contends that O.T. was an unreliable witness because details of his story changed over time. Williams's assertion that O.T. was not

reliable is not grounds for an appellate challenge because the credibility of the witnesses and the weight to be given to their testimony are questions committed to the jury as finder of fact. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. "The reason for this rule is that the trier of fact had the opportunity to observe the witnesses and their demeanor." ***Id.*** Moreover, Williams's lawyer was able to cross-examine O.T. to highlight any inconsistencies for the jury. There would be no arguable merit to a claim that the evidence was insufficient to support the verdict because O.T. was an unreliable witness.

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 Jeffrey W. Jensen is relieved of any further representation of Williams in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals