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October 26, 2015

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Devontes D. Harris
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You are hereby notified that the Court has entered the following opinion and order:

2014AP2217-CRNM State of Wisconsin v. Devontes D. Harris (L.C. # 2012CF5373)

Before Lundsten, Higginbotham and Sherman, JJ.

Devontes D. Harris appeals a judgment of conviction, entered after a jury trial, of one count of strangulation and suffocation, during a domestic violence incident. *See* WIS. STAT. §§ 940.235(1) and 968.075(1)(a)1. (2013-14).[1] The court sentenced Harris to two years of initial confinement and two years of extended supervision, stayed the sentence, and placed Harris on probation for four years. The court ordered that Harris serve five months in the House of

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

Corrections and successfully complete various treatment programs. Attorney Randall E. Paulson has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 93-95, 403 N.W.2d 449 (1987), *aff'd* 486 U.S. 429 (1988). Harris was sent a copy of the report. He has not filed a response. After reviewing the entire record and counsel's report, we conclude there are no arguably meritorious appellate issues.

The no-merit report first addresses jury selection and instruction. During voir dire, each juror who was questioned in depth about an issue indicated that he or she could be fair and impartial as to the charge against Harris. No potential juror was struck for cause. Upon the completion of the peremptory challenges, Harris's trial attorney did not object to the composition of the panel. No arguably meritorious issue regarding jury composition exists.

The parties agreed on the jury instructions. The court gave the standard instruction for the charged crime. *See* WIS JI—CRIMINAL 1255. Because the victim had testified about other incidents of domestic violence, the court gave the "other acts" cautionary instruction, WIS JI—CRIMINAL 275. Although Harris indicated, in pretrial motions, that he had acted in self-defense, he ultimately chose not to testify.[2] There was no basis for a self-defense instruction, and the court properly did not instruct the jury on that point. During deliberations, the jury informed the court they were "split" on the question of intent and also asked to review the victim's statement

[2] The circuit court conducted the required colloquy to ensure that Harris was knowingly, voluntarily, and intelligently waiving his right to testify. *See* ***State v. Weed***, 2003 WI 85, ¶¶40-43, 263 Wis. 2d 434, 666 N.W.2d 485.

about the incident. After discussion with counsel, the court referred the jury to the two jury instructions that speak to intent and to their collective memory and notes. We discern no arguably meritorious appellate issue.

We next consider the sufficiency of the evidence. Harris was charged with the strangulation of his live-in girlfriend. At trial, she testified that the couple had gone to separate Halloween parties, and when she returned home, Harris was waiting for her. Harris started yelling at the victim, asking her where she had been and who she had been with. The victim testified that Harris grabbed her around the collar, pushed her against a door and "started choking" her. Harris then threw the victim to the floor and choked her again. Harris then picked her up, threw her on the couch, and put both his hands around her neck. The victim testified that she had difficulty breathing while Harris had his hands around her neck on the couch. She testified that she was screaming for help and telling Harris that she was going to call "911." Harris finally stopped and the victim called the police. The State introduced photographs of the victim's neck, taken by a police officer who responded to the house, that showed what were alleged to be "scratches," "fingerprints," and "fingernail marks" on her neck. The victim also testified about two earlier incidents when Harris got "jealous," accused her of cheating on him, and put his hands around her neck.[3]

[3] We agree with appellate counsel that the other acts evidence was properly admitted under WIS. STAT. § 904.04(2)(a) (evidence of other crimes, wrongs, or acts may be admissible when offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The State offered the evidence for a proper purpose—to show Harris's motive and intent. The evidence was relevant—the two prior incidents were close in time (six months and four months previous) and factually similar to the charged crime. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The victim testified about both incidents. Harris's (continued)

Upon a challenge to the sufficiency of the evidence to support a jury finding of guilt, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** The jury is the sole arbiter of witness credibility. *See* ***State v. Serebin***, 119 Wis. 2d 837, 842, 350 N.W.2d 65 (1984). The jury, and not this court, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from basic facts to ultimate facts. ***Poellinger***, 153 Wis. 2d at 506. When the record contains facts which support more than one reasonable inference, this court must accept and follow the inference drawn by the jury unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07.

The State was required to prove that Harris "intentionally" "impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth" of the victim. WIS JI—CRIMINAL 1255. The victim's testimony establishes those elements. An appellate challenge to the sufficiency of the evidence would lack arguable merit.[4]

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defense was to attack the victim's credibility, a defense that traveled to both the other acts evidence and the underlying crime.

[4] Appellate counsel acknowledges that the arresting police officer testified that Harris "had a warrant." Harris's trial attorney did not object and the existence of an outstanding warrant was not mentioned again at trial. We concur in appellate counsel's assessment that the admission of such evidence, assuming its irrelevance, was harmless error in light of the wealth of evidence of guilt. *See* ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (an error is harmless if there is no (continued)

We next consider the sentence. On appeal, this court's review of sentencing is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***Id.***, ¶18 (quoted source omitted). "'Sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.*** (alteration in original) (quoting another source). "'[T]he sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***Id.***, ¶23 (quoting another source).

The court considered the nature of the offense, the community's interest in not having Harris commit a similar crime in the future, and Harris's character. The court indicated that it had crafted a sentence to give Harris the "opportunity to demonstrate whether [he could] follow rules and complete [domestic violence offender] treatment." An appellate challenge to the sentence would lack arguable merit.

Upon our independent review of the record, we have found no arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1,

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reasonable possibility that the error contributed to the conviction; "[a] reasonable possibility is a possibility sufficient to undermine confidence in the conviction").

786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Pamela Moorshead is relieved of any further representation of Harris in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals