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

2013AP1506-CRNM State v. Timothy John Lemere (L. C. No. 2012CF128)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Timothy Lemere filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge Lemere's convictions for operating while intoxicated, as a seventh offense; obstructing an officer; and possession of Tetrahydrocannabinol (THC)—all counts as a repeater. Lemere filed a response challenging the

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

effectiveness of his trial counsel and requesting a new trial in the interest of justice. Counsel filed a supplemental no-merit report addressing Lemere's concerns. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Lemere with OWI and operating with a prohibited alcohol concentration, both as a seventh offense; obstructing an officer; and possession of THC, all counts as a repeater. A jury found Lemere guilty of the crimes charged.[2] Out of a maximum possible sentence of nineteen years and three months, the court imposed concurrent sentences totaling fourteen years, consisting of nine years' initial confinement and five years' extended supervision.

Any challenge to the jury's verdicts would lack arguable merit. 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). At trial, the jury heard testimony that in the early morning hours of September 15, 2012, Lemere and his cousin, Jason Skenandore, traveled from Green Bay to the Wausaukee home of Lemere's sister, Tina Lemere. Tina testified that the three drank beer at her house, and Lemere and Skenandore left after about four hours, at what Tina estimated to be around 8 a.m. Although Tina testified that Skenandore was driving, the jury heard that she gave a statement to police

[2] In accordance with WIS. STAT. § 346.63(1)(c), the operating with a prohibited alcohol concentration charge was dismissed on the State's motion.

indicating that from where she was seated in the house, she could not see who was driving when the pair left.

Timothy McFadden, a volunteer firefighter, testified he was in his garage around 10:20 a.m. on September 15, 2012 when he heard squealing tires and a loud crash. McFadden grabbed his cell phone and drove his truck toward the sound of what he presumed was an accident, estimating it took him approximately ninety seconds to reach a vehicle located up the road, "at a tree right in the corn." McFadden noted the air bags had recently deployed, as he saw air bag powder in the air. McFadden saw two men standing outside the car—one wearing a white tank top and the other wearing a plaid shirt. McFadden identified Lemere as the man in the white tank top. According to McFadden, the man in the plaid shirt, Skenandore, asked if McFadden could tow the car from the ditch. McFadden testified that in addition to believing he would not be able to tow the vehicle out, he refused because he could smell alcohol and he "didn't want to have any part of it." McFadden further testified that Lemere said his sister was coming to pick them up. After the men indicated they were uninjured, McFadden returned to his home, but later saw the two men walk away from the vehicle and run into the woods.

Skenandore testified he and Lemere were using a car belonging to Skenandore's girlfriend. Skenandore stated he drove the car to Tina's house, but did not know who was driving after leaving Tina's home. Skenandore testified, however, that after the vehicle crashed, he recalled waking up in the passenger seat so he "knew" he was not driving.

Sheriff's deputy Jamie Curran testified that when she arrived at the scene of the accident, nobody was there, but she was soon approached by an individual who informed her that the people who crashed the vehicle were his cousins, and they were now in the individual's garage.

The individual guided Curran to the open garage where she noticed Lemere had problems with dexterity and had a "moderate" odor of intoxicants. Lemere admitted both that he had been drinking and that he left the scene of the crash, but claimed an individual named "Frank" was driving and disappeared into the woods. Curran noticed air bag burns on the inside of Lemere's forearms, consistent with driver's side air bag burns Curran had seen in numerous crashes investigated during her seventeen years in law enforcement. Although Skenandore had scrapes on the outside of his forearms, Curran explained that when the driver's side air bag deploys, "it leaves burns on the inside of your [arm] because of the position on the steering wheel of your hands." Based on her observations, Curran placed Lemere under arrest and, during a search, discovered a baggie of what was later identified as THC in Lemere's back pocket.

Curran testified that Lemere subsequently failed field sobriety tests and was transported to the hospital where Lemere consented to a blood draw after Curran read him the Informing the Accused form. The jury heard testimony that blood drawn from Lemere at 1:20 p.m. had a blood alcohol concentration of .108. After Curran read Lemere his ***Miranda***[3] rights, Lemere agreed to speak to the officer, and admitted he started drinking at approximately 9:30 p.m. the night before the accident. Lemere further offered that he drank "over a 20-pack," but stated that Skenandore was driving at the time of the accident.

A State Crime Lab DNA analyst testified that from the DNA detected on the driver's side airbag, he was able to separate out a "major mixture component" from the rest of the DNA mixture. According to the analyst, Lemere was included as a possible contributor to the major

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

mixture component profile detected on the driver's side airbag. The analyst further noted that "[t]he probability of randomly selecting an unrelated individual that could have contributed to the major component profile is approximately one in six billion." Although Skenandore was excluded as a contributor to the major mixture component, the analyst testified he could not conclusively determine whether Skenandore was a contributor to the remaining mixture as there was insufficient DNA to test.

To the extent there was conflicting testimony, it was the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it finds credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Lemere's convictions.

The no-merit report addresses whether there is any arguable merit to a claim that Lemere's prior OWI convictions and repeater status were not proven beyond a reasonable doubt. Here, the State offered a judgment of conviction for felony bail jumping within five years of the offense, and Lemere admitted that conviction. With respect to the prior OWI convictions, the State provided evidence of six prior OWI convictions, and Lemere both admitted the prior convictions and stipulated to the prior convictions to keep them from the jury. Any claim that the State failed to prove Lemere's repeater status or prior OWIs would lack arguable merit.

The no-merit report also addresses whether there is any arguable merit to challenge Lemere's waiver of his right to testify. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The trial court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Lemere in an on-the-record colloquy, informing him of both his right to testify and his right not to testify, including a discussion of some of the consequences of both decisions. After indicating that he had sufficient time to discuss his rights with counsel, Lemere confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

The record discloses no arguable basis for challenging the effectiveness of Lemere's trial counsel. To establish ineffective assistance of counsel, Lemere must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the case. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Any claim of ineffective assistance must first be raised in the trial court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

The no-merit report addresses whether trial counsel was ineffective by failing to move for suppression of Lemere's pre- and post-***Miranda*** statements. A person is in custody for ***Miranda*** purposes if, under the totality of the circumstances, a reasonable person in that situation would not feel free to terminate the interview and depart. ***State v. Lonkoski***, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552. In assessing the totality of the circumstances, the court considers "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." ***Id.*** Here, nothing in the record suggests Lemere was in custody when

deputy Curran asked questions about the accident after she was guided to the open garage belonging to Lemere's cousin. With respect to any post-***Miranda*** statements, the record supports the conclusion that Lemere knowingly waived his rights before talking to Curran. Any challenge to the effectiveness of counsel based on a failure to move for suppression of Lemere's statements would lack arguable merit.

The no-merit report also questions whether counsel was ineffective by failing to move to suppress DNA test results of the airbags, as the airbags were seized from the vehicle without a warrant. The no-merit report asserts counsel was not ineffective in this regard because Lemere lacked standing to challenge the seizure. The United States Supreme Court has stated that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." ***Rakas v. Illinois***, 439 U.S. 128, 144 n.12 (1981). Our supreme court has held that

> [t]he determination of whether an accused has a reasonable or legitimate expectation of privacy in the place invaded depends on (1) whether the individual has by his or her conduct exhibited an actual (subjective) expectation of privacy in the area searched and in the seized item, and (2) whether such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable.

State v. Dixon, 177 Wis. 2d 461, 468, 501 N.W.2d 442 (1993).

Here, Lemere did not own the vehicle; he abandoned the vehicle after the accident; and he maintained that he was not driving the vehicle. Lemere, therefore, could not establish he had a reasonable expectation of privacy in the vehicle. Even were we to conclude counsel was deficient by failing to challenge the DNA evidence as fruit of an illegal seizure, given the other

evidence of Lemere's guilt, there is no arguable merit to a claim that exclusion of the airbag DNA evidence would have altered the outcome.

Next, the no-merit report questions whether trial counsel was ineffective by failing to challenge the warrantless blood draw. Lemere, however, consented to the blood draw under Wisconsin's Implied Consent Law after he was read the "Informing the Accused" form. *See* WIS. STAT. § 343.305(4). The United States Supreme Court has recognized that implied consent laws are among the "broad range of legal tools" used by states "to enforce their drunk-driving laws and to secure [blood alcohol content] evidence." ***Missouri v. McNeely***, 133 S. Ct. 1552, 1566-67 (2013). Because Lemere consented to the blood draw, any claim that counsel was ineffective by failing to challenge it would lack arguable merit.

There is likewise no arguable merit to a claim that counsel was ineffective by failing to object to the chain of custody for the OWI blood test kit. The parties entered into a stipulation agreeing that Lemere's blood alcohol test results were "admissible without the testimony of the phlebotomist, Gina Ihander, Deputy Brad Wyss who repackaged the blood for mailing to the State Crime Laboratory or the ethanol analyst, Molly Ross." There is nothing in the record to suggest there was a break in the chain of custody.

In his response to the no-merit report, Lemere agrees with counsel's conclusion that there is no arguable merit to the possible issues discussed above. Lemere contends, however, that his trial counsel's "advice or lack thereof" made the waiver of his right to testify unknowing, unintelligent and involuntary. As noted above, however, the court engaged Lemere in a colloquy and explained consequences of a decision to testify or not testify. Further, Lemere acknowledged that the decision whether to testify was his alone to make, even if his attorney

advised him to the contrary. Although Lemere now claims he has "very serious comprehension problems," the record does not support a claim that Lemere could not comprehend the proceedings. Because the record shows that Lemere made a knowing and valid waiver of his right to testify, any claim that counsel was ineffective with respect to that waiver would lack arguable merit.

Lemere nevertheless argues counsel should have told Lemere to testify in order to impeach Skenandore, by informing the jury that it was Skenandore who fabricated the third-party driver story. Lemere also contends he is entitled to a new trial in the interest of justice, claiming the real controversy—i.e., Skenandore's credibility—was not fully tried in the absence of Lemere's testimony. As noted above, however, Lemere validly waived his right to testify. Moreover, the record shows that trial counsel elicited testimony from McFadden—the first person to arrive at the scene of the accident—that it was Skenandore, not Lemere, who claimed a third person was driving the car and "took off." McFadden also testified that when Skenandore asked Lemere if he saw which way the third person went, Lemere looked confused. Trial counsel then emphasized McFadden's testimony on this point during closing arguments. Any claim that counsel was ineffective by failing to impeach Skenandore regarding the origin of the third-party driver story would lack arguable merit. Lemere's derivative argument for a new trial in the interest of justice likewise fails.

The no-merit report and Lemere's response also question whether counsel was ineffective by failing to object when the trial court read the preliminary jury instructions during the time the attorneys were making their peremptory challenges and before the jury panel was sworn. WISCONSIN STAT. § 972.10(1)(b) provides, in relevant part:

> The court *may* give additional preliminary instructions to assist the jury in understanding its duty and the evidence it will hear. The preliminary instructions may include, without limitation, the elements of any offense charged, what constitutes evidence and what does not, guidance regarding the burden of proof and the credibility of witnesses, and directions not to discuss the case until deliberations begin.

(Emphasis added.) Whether to give the preliminary instructions was discretionary, so counsel was not deficient for failing to object when the court read them "early." Further, there is no reason to believe the prospective jurors were not listening to the instructions. There is no arguable merit to a claim that the outcome would have been different had the instructions been read *after* the jury panel was sworn.

The no-merit report also questions whether trial counsel adequately presented a theory of defense. Trial counsel presented evidence that it was Skenandore who fabricated the third-party driver story. Trial counsel also presented evidence that the vehicle was owned by Skenandore's girlfriend, who did not normally allow others to drive her car without permission. Counsel elicited testimony that Lemere's airbag burns could have come from him raising his arms to brace for impact as the passenger. Further, because the car was stuck in the ditch, counsel suggested the possibility that Lemere's DNA was found on the driver's side airbag because he had to crawl out of the driver's side door. Finally, counsel obtained testimony from Lemere's sister, Tina, that even though she told the police she did not see who was driving when the pair left her house, she since remembered it was Skenandore. Ultimately, the fact that a reasonable strategy fails does not make the attorney's representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

Finally, there is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Lemere's character, including his criminal history; the need to protect the public; and the mitigating circumstances Lemere raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence imposed was less than the maximum permitted by law. Under these circumstances, it cannot reasonably be argued that Lemere's sentence is 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 issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney William J. Donarski is relieved of further representing Lemere in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals