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April 14, 2016

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

2015AP1510-CRNM State of Wisconsin v. Cedrick D. Jones (L.C. #2014CF588)

Before Kessler, Brennan and Brash, JJ.

Cedrick D. Jones appeals from a judgment of conviction, entered upon a jury's verdicts, on seven felonies and a misdemeanor. Appellate counsel, Nicholas C. Zales, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Jones was advised of his right to file a response but has not responded. Upon this

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

court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. Subject to correction of scriveners' errors in the felony judgment of conviction, we summarily affirm the judgments.

On April 22, 2014, around 3:45 p.m., Racine police officers Juan Garcia and Michael Seeger were on routine patrol when they noticed an individual riding a bicycle on the sidewalk, contrary to local ordinance. A tattoo on the individual's face caught Garcia's attention. The individual was determined to be Jones, and the officers learned there was an outstanding commitment for him related to a ticket. Jones was out of the officers' sight before they could act further.

Later, around 6:30 p.m., the officers noticed Jones exiting a food mart. He got on his bike and again began riding it on the sidewalk. The officers began to follow him in their car. Seeger pulled the vehicle in front of the bike, and Garcia directed Jones to "come here." Jones accelerated on the bike and kept going, moving around the car. Garcia pursued him on foot while Seeger tried to drive ahead of him.

Jones got off his bike in front of a house and began running. Garcia saw him drop a cell phone but kept pursuit. As Jones continued to run, Garcia saw him reach into his waistband and toss a black object Garcia believed to be a firearm. Garcia was unable to catch Jones in the foot pursuit, and Seeger was unable to cut off Jones's escape route.

Garcia went back to the discarded black object, which had skidded under a vehicle in the driveway. An evidence technician was called to the scene to collect the gun. An officer collected the cell phone. Around 8:30 p.m., the phone began ringing. Garcia and Seeger did not

answer it, but decided to return the call and see if the caller could identify the phone's owner. A male voice told police the phone was his; officers made arrangements to meet the person at the food mart in a few minutes to return the phone. The officers went to the food mart and began surveillance; within ten minutes, Jones arrived. He was taken into custody.

Jones was charged with one count of possession of a firearm by a felon and obstructing an officer. He was also charged with three counts of felony bail jumping by use of a dangerous weapon and three counts of ordinary felony bail jumping. A jury convicted Jones of all eight counts. The trial court sentenced him to concurrent and consecutive sentences totaling five years' initial confinement and five years' extended supervision.

Appellate counsel raises four potential issues, each of which he concludes lacks arguable merit. The first of these is phrased as, "Was there conflicting testimony between the police officers that testified as to Mr. Jones's identification and his possessing a gun warranting a new trial?" The second issue counsel raises is whether a lack of DNA or fingerprint evidence warrants a new trial. We view these issues more generally in the context of sufficiency of the evidence to support the jury's verdicts.[2]

In reviewing the sufficiency of the evidence to support the jury's verdicts, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d

[2] Counsel notes that it is Jones's position "that he did not posses[s] any gun and that if he had he never would have returned to the food mart to retrieve the cell phone." Jones also contends "he did not receive a fair trial, and that the police officers lied about his having a gun."

752 (1990). If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***Id.*** at 506-07.

The elements of possession of a firearm by a felon are that Jones possessed a firearm and had been convicted of a felony prior to the offense date. *See* WIS. STAT. § 941.29(2); WIS JI—CRIMINAL 1343. The elements of obstructing an officer are that Jones obstructed, by preventing or making more difficult, the performance of the officer's duties; the officer was acting in an official capacity; the officer was acting with lawful authority; and Jones knew that the officer was an officer acting in an official capacity with lawful authority and knew that his conduct would obstruct the officer. *See* WIS. STAT. § 946.41(1); WIS JI—CRIMINAL 1766. The elements of felony bail jumping are that Jones was previously arrested for or charged with a felony; he was released from custody on bond; and he intentionally failed to comply with the terms of the bond. *See* WIS. STAT. § 946.49(1)(b); WIS JI—CRIMINAL 1795. The "dangerous weapon" modifier applies if Jones committed a crime "while possessing, using or threatening to use a dangerous weapon." WIS. STAT. § 939.63(1). A gun is a dangerous weapon. *See* WIS JI—CRIMINAL 990.

Certain elements of the offenses had been stipulated. Jones agreed that he was on bond in three felony cases with the condition that he commit no new offenses. He also agreed that he had one prior felony conviction. Thus, the main questions for the jury were whether Jones indeed possessed a firearm and his intent and knowledge related to his actions. The main defense strategy was one of identification—Jones argued he was not the individual chased from the food mart and, thus, not the one who had the gun.

The owner of the food mart testified about Jones and about surveillance video showing Jones in the store. The owner knew Jones because he was a frequent customer, and the owner recognized Jones from the tattoo on his face. The clothes Jones was wearing during the pursuit—a grey hoodie and black hat—matched the store's surveillance footage from just before officers saw him exit the food mart. Garcia testified about identifying Jones from his tattoo, the pursuit from the food mart, seeing Jones toss something from his waistband, and finding the revolver.

Trial counsel had attempted to cast doubt on the State's case by pointing out various "deficiencies," arguing, among other things, that: neither Garcia nor Seeger, who also testified, were reliable witnesses; Garcia was dishonest when he failed to identify himself as a police officer on the cell phone; the officers failed to attempt to confirm the number of the cell phone; the surveillance video did not show a gun in Jones's waistband; and there was no fingerprint or DNA evidence found on the gun.

The evidence here is circumstantial, but a conviction may be supported by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *See* ***Poellinger***, 153 Wis. 2d at 501. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503. An appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. ***Id.*** at 507-08.

Neither fingerprint nor DNA evidence is a prerequisite to conviction. *See* ***State v. Holt***, 128 Wis. 2d 110, 120, 382 N.W.2d 679 (Ct. App. 1985). To the extent there was conflicting testimony, it is the jury's role to sift and sort through conflicting testimony. *See* ***State v. Wilson***,

149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). To the extent there were questions of witness credibility, the jury is the sole arbiter thereof. *See* ***Poellinger***, 153 Wis. 2d at 506. Ultimately, there is sufficient evidence in this record to support the jury's verdicts, so there is no arguable merit to a challenge to the sufficiency of the evidence.

Counsel next discusses whether Jones "is entitled to a new trial because the State exercised its peremptory strikes in a racially discriminatory manner," contrary to ***Batson v. Kentucky***, 476 U.S. 79, 103-05 (1986). ***Batson*** forbids the State from striking jurors based solely on race. *See* ***State v. Lamon***, 2003 WI 78, ¶25, 262 Wis. 2d 747, 664 N.W.2d 607. However, the law guarantees only an impartial jury, not one of any particular racial composition. *See* ***State v. Horton***, 151 Wis. 2d 250, 257-60, 445 N.W.2d 46 (Ct. App. 1989).

We follow ***Batson***'s three-prong test for determining whether the State's peremptory strikes violate equal protection. *See* ***Lamon***, 262 Wis. 2d 747, ¶¶22, 27. First, the defendant must make a *prima facie* showing that he is a member of a cognizable group, that the State has used its strikes to remove members of defendant's race from the array, and that the circumstances give rise to an inference that the State used those strikes on account of the potential jurors' race. ***Id.***, ¶28. Second, if the *prima facie* case is made, the State has to provide a race-neutral explanation for the strike. ***Id.***, ¶29. Third, if the State provides a race-neutral explanation, the trial court must weigh credibility and determine whether purposeful discrimination has been established. ***Id.***, ¶32.

Jones raised a ***Batson*** challenge during jury selection, but there is no arguable merit to a claim that the trial court erroneously rejected that challenge. Jones is African-American, and the sole African-American juror was struck by the State. The trial court did not expressly conclude

that circumstances gave rise to an inference that the State struck the juror because of race, but it asked the State for its reasoning anyway. The State explained that the juror, like another juror it struck, was removed because of prior contact with or representation by the Racine public defender's office, which had provided Jones's representation. The State also noted that the juror had more than one prior arrest by the Racine police department and had two felony files with the district attorney's office. The trial court stated it was "satisfied that the state [had] offered a valid non-discriminatory reason" for striking the juror and denied the ***Batson*** challenge. We discern no arguable merit to a challenge to this determination.

The final issue appellate counsel raises is whether trial counsel was ineffective for failing to tell Jones about the option for a bench trial rather than a jury trial. A defendant claiming ineffective assistance of counsel "must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. Showing prejudice requires showing "'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***Id.*** (citations omitted).

Based on the evidence presented at trial, we are wholly unpersuaded that the trial court would have acquitted where the jury convicted. Consequently, there is no prejudice from trial counsel's alleged failure to counsel Jones on the possibility of a bench trial and no arguable merit to a claim of ineffective assistance of trial counsel for that failure.

Appellate counsel has not addressed whether the trial court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the

protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The ten-year sentence imposed is well within the sixty-one year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the court's sentencing discretion.

There are scrivener's errors in the felony portion of the judgment of conviction (record item 34). The judgment lists Jones's sentences on counts 3, 4, and 5 as six years' imprisonment, bifurcated into three years' initial confinement and three years' extended supervision. However, at sentencing, the trial court said:

> With respect to Count 3, which is bail jumping, it's the sentence and judgment of this Court that you be confined to the Wisconsin State Penitentiary for a period of *five years*. That will be bifurcated as three years of initial confinement and *two years of extended supervision*. … That sentence will run concurrent to other sentences in this matter. *The same sentence will be imposed for Count 4 and Count 5*.

(Emphasis added.) Thus, upon remittitur, the judgment of conviction must be corrected to reflect a five-year sentence on each of counts 3, 4, and 5, with appropriate bifurcation. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that, upon remittitur, the judgment of conviction shall be modified as described herein.

IT IS FURTHER ORDERED that the judgment, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Nicholas C. Zales is relieved of further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals