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April 21, 2016

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

2014AP2451-CRNM State of Wisconsin v. Jevon M. Simmons (L.C. #2013CF588)

Before Lundsten, Higginbotham and Sherman, JJ.

Jevon Simmons appeals from a judgment of conviction for two counts of armed robbery with use of force, as a party to a crime. Simmons' appellate counsel has filed a no-merit report and supplemental report pursuant to WIS. STAT. RULE 809.32 (2013-14),¹ and *Anders v. California*, 386 U.S. 738 (1967). Simmons received a copy of the report, was advised of his

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

right to file a response, and elected to do so. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Simmons was riding in a van that pulled over and stopped near T.D. and M.W., ages fourteen and fifteen, as they were walking to the store. Simmons and another teenage male got out of the van. One of them said, “give us all you got.” T.D. described Simmons as having dreadlocks and the other male as being taller. Simmons took five dollars from M.W., and the other male took a cell phone from T.D. In the course of the robbery, Simmons hit M.W. with a gun and knocked him to the ground. As they were leaving, the tall one took the gun from Simmons and pointed it at T.D.’s head and pulled the trigger. The gun clicked but did not fire. The two then got back into the van, laughing and shouting a reference to “CDS.” CDS is a gang of teenagers known in the neighborhood for similar attacks and robberies.

T.D. and M.W. returned home and told family members about the incident, who then called the police to report the crime. A relative looked on a social media website for photos posted by self-identified CDS members. She showed group photos she found to T.D. and M.W., separately. Each recognized a male in the photos who was later identified as Simmons. The police were given this information, and they subsequently prepared a photo array including Simmons’ photo. Both victims, interviewed separately, picked Simmons’ photo from the array. At trial, T.D. and M.W. testified and identified Simmons as one of the robbers. Messages sent by Simmons on a social media site showed that he had communicated with friends about obtaining a gun prior to the robbery, and text messages from his phone the next day boasting of

“hitting licks.” The jury heard testimony that one common meaning of that phrase is committing robberies and that Simmons had used the phrase in messages discussing committing robberies.

The jury found Simmons guilty on both charges. Simmons was sentenced to concurrent terms of ten years’ initial confinement and eight years’ extended supervision.

Appellate counsel addressed four issues. The first was whether there was sufficient credible evidence to support the guilty verdicts, and counsel concluded that an argument that the evidence is insufficient would be without merit. “[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless 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. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.” *Id.* The elements of the crime in this case are: (1) an intent to steal, (2) the taking of property from a person, (3) the use of force, and (4) the use of a dangerous weapon. *See* WIS. STAT. § 943.32(1), (2). A defendant may be convicted as a party to a crime under WIS. STAT. § 939.05, if he “[d]irectly commits the crime” or “[i]ntentionally aids and abets the commission of it.” WIS. STAT. § 939.05. For a guilty verdict where a defendant is charged as a party to a crime, a “jury must unanimously agree as to the defendant’s participation in the crime.” *State v. Hecht*, 116 Wis. 2d 605, 619, 342 N.W.2d 721 (1984) (emphasis omitted).

The jury heard testimony from both victims that Simmons hit D.W. with a gun and took money from D.W.'s pockets. Both victims described Simmons as acting in concert with the other male. Simmons testified that he was playing basketball at the Boys and Girls Club at the time of the robbery, but in trial testimony the person on duty at the club when Simmons arrived said Simmons had arrived much later and stayed only briefly. He testified that security camera footage corroborated this. We agree with counsel that there is no arguable merit to a challenge to the sufficiency of the evidence on this record.

The report next discussed whether the sentence, concurrent terms of ten years' incarceration and eight years' extended supervision, was arguably the result of an erroneous exercise of discretion or can be considered excessive. "[S]uch questions will be treated in light of a strong policy against interference with the discretion of the trial court in passing sentence." *Ocanas v. State*, 70 Wis. 2d 179, 183-84, 233 N.W.2d 457 (1975). "In reviewing a sentence to determine whether or not discretion has been exercised or whether such discretion has been abused, there is a presumption that the trial court acted reasonably and the complainant is required to show some unreasonable or unjustifiable basis of the record for the sentence complained of." *Id.* The length of the sentence as compared to the statutory maximum is a relevant consideration. See *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). "Courts must also identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision." *State v. Gallion*, 2004 WI 42, ¶43, 270 Wis. 2d 535, 678 N.W.2d 197. "In addition, the legislature has mandated consideration of applicable mitigating or aggravating factors." *Id.*

The circuit court stated the factors and purposes it was considering, including protecting the community from Simmons' violence, punishing Simmons for his behavior, and sending a

message to other gang members, innocent victims and the community and explained its reasons. The sentence represents a fraction of Simmons' maximum exposure of eighty years. On these facts, we agree with counsel that there would be no arguable merit to a challenge to the sentence.

The report also concluded that there would be no arguable merit to a claim of ineffective assistance of counsel based on counsel's representation at sentencing. To show ineffective assistance of counsel, Simmons must establish both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). Deficient performance is found only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Trial counsel made a relatively brief sentencing argument. Counsel included an affirmation that he had reviewed the presentence investigation report and criminal risk assessment "page by page" with Simmons. Partway through counsel's sentencing argument, the circuit court asked for clarification about a letter it had received regarding Simmons that referenced a change of heart and a resolution to put criminal conduct behind him. The circuit court asked counsel to clarify whether this meant that Simmons was accepting responsibility for the robbery and then took a brief recess to allow Simmons to confer with counsel. Upon return, counsel stated, "I'm going to step aside from my original argument," and his further remarks were limited to a reference to Simmons' mental health history and a recommendation of two years' confinement and four years' extended supervision. Simmons' mother spoke, and Simmons spoke, maintaining that he was innocent of the crime. Counsel explained to Simmons all the materials prepared for sentencing, addressed mitigating factors, and made a reasonable sentence recommendation for minimal prison time. We agree with appellate counsel that on this

record there is no arguable merit to a challenge based on the constitutional right to effective assistance of counsel.

In a supplemental report, counsel addressed a fourth potential issue concerning the circuit court's discretionary evidentiary ruling allowing testimony that when Simmons stated in messages that he was "hittin' licks," he used the phrase to mean he was committing robberies. In making evidentiary rulings, the circuit court has broad discretion. *State v. Oberlander*, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). "It is the general rule in this state that limiting and admonitory instructions are presumed to cure the prejudicial effect of erroneously admitted evidence." *State v. Jennaro*, 76 Wis. 2d 499, 508, 251 N.W.2d 800 (1977). The circuit court allowed the testimony after defense counsel, on cross-examination of a State witness, asked about other possible meanings for the word, such as earning money. The circuit court limited the testimony strictly to specific messages identified by the State and gave a limiting instruction to the jury on the evidence. The report concluded, and we agree, that in light of the deferential standard of review for evidentiary rulings and in light of the record showing the court's reasoned consideration of the facts and law, an argument that the evidentiary ruling was reversible error would be without merit.

In his response to the no-merit report, Simmons raised two issues. Simmons asserted that there is arguable merit to a claim that trial counsel was ineffective when he failed to move to suppress certain evidence that police learned of when interviewing Simmons prior to his initial appearance. Simmons argues that this evidence should have been suppressed because the interview was conducted while Simmons was being held without a probable cause determination for a period that exceeded the presumptively reasonable 48-hour period for such detentions.

An objection based on a defect in the institution of a criminal proceeding must be raised before trial by motion or be deemed waived. *See* WIS. STAT. § 971.31(2); *State v. Lampkins*, 51 Wis. 2d 564, 570, 187 N.W.2d 164 (1971). Challenges to the timing of an initial appearance and to the timing of a post-arrest determination of probable cause allege “defects in the institution of the proceeding.” *Desjarlais v. State*, 73 Wis. 2d 480, 490, 243 N.W.2d 453 (1976). In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the United States Supreme Court held that keeping a person arrested without a warrant in custody for up to forty-eight hours prior to a probable cause determination is presumptively reasonable, but longer detentions are presumptively unreasonable. *McLaughlin*, 500 U.S. 44, 56-57 (1991). In *Koch*, the Wisconsin Supreme Court considered “what consequences flow from the failure to comply with the requirements of *Riverside*.” *State v. Koch*, 175 Wis. 2d 684, 699, 499 N.W.2d 152 (1993). The defendant in that case had argued for the suppression of all evidence seized following a *Riverside* violation. *Id.* The court stated that “[t]here is no settled law on the remedy for non-compliance with *Riverside*.” *Id.* at 700, 711-12 (Abrahamson, J., dissenting). It concluded that suppression of evidence was neither required nor appropriate under the circumstances of that case, which were that “the arrest was made on probable cause which did not dissipate,” the evidence at issue “was not a consequence of the *Riverside* violation,” and the detention “was not for the purpose of gathering additional evidence to justify the arrest.” *Id.* at 699.

Simmons argues that the determination of probable cause was “delayed as a tactic by the MPD to interrogate him, and attempt to create inconsistencies within his statements.” However, Simmons did not raise his objection to the timing of his probable cause hearing and initial appearance until after his conviction. *See State v. Evans*, 187 Wis. 2d 66, 85, 522 N.W.2d 554 (Ct. App. 1994). It is therefore waived. Further, suppression of evidence has never been held to

be an automatic remedy for a *Riverside* violation, and Simmons has not shown that there is arguable merit to the argument that the law entitles him to the relief he seeks.

Simmons also contends that there is arguable merit to the issue of whether the victims' identification of him from photos a relative found on an online social media site deprived him of due process because it was unduly suggestive. He contends that the relative "conducted an independent photo array," that did not employ the safeguards of a police-conducted photo array. The United States Supreme Court has said that a due process analysis focuses on the propriety of state conduct: "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012). No Wisconsin case has held otherwise. We conclude that there is no arguable merit to a challenge to the admissibility of the identifications.

This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit and that no procedural trial errors occurred. We have considered Simmons' response and conclude that there is no arguable merit to the issues he raises. Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Simmons further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Matt Last is relieved from further representing Jevon Simmons in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals