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July 27, 2016

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

2014AP2303-CRNM State of Wisconsin v. Derrick D. Bradley (L.C. #2013CF226)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Derrick D. Bradley appeals from a judgment of conviction entered after a jury found him guilty of two counts of first-degree recklessly endangering safety while armed, and one count of possessing a firearm as a felon. Bradley's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967), to which

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

Bradley filed a response raising claims based on facts outside the record. We ordered counsel to file a supplemental no-merit report discussing seven potential issues.[2] Because the no-merit and supplemental no-merit reports do not establish that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and RULE 809.32, we reject the no-merit report, dismiss the appeal without prejudice, and extend the time for Bradley, by counsel, to file a notice of appeal or postconviction motion.

First, at Bradley's jury trial, a video of the charged incident was played during the State's direct examination of Investigator Muller. The State asked Muller to describe what he saw on the video and trial counsel objected, stating, "[T]he video is the best evidence of what's on the video so I think [Muller's] opinion of what's on the video is irrelevant." The court sustained the objection, stating, "The video will speak for itself." Despite the circuit court's ruling, Muller continued to describe what he believed was occurring on the video. Pursuant to our order, appellate counsel filed a supplemental no-merit report concluding that any error arising from Muller's continued commentary was harmless.[3] In deciding a no-merit appeal, the question is whether a potential issue would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. This standard means that the issue lacks a basis in fact or law.

[2] We do not address all seven issues, but focus on those which form the basis for our decision to reject the no-merit report.

[3] In support, the supplemental no-merit report asserts:

> While in deliberations the jury asked to view the video several times and view it at various speeds. During those viewings there was no commentary from any witness while the video was being replayed. It therefore ended up being a harmless error that Investigator Muller was permitted to make comments about the video after the court had sustained the defense objection.

McCoy v. Court of Appeals, 486 U.S. 429, 438 n.10 (1988). The test is not whether the attorney or court expects the argument to prevail. Although a harmless error analysis may apply, it is the State's burden to prove the error was harmless. ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500. A defendant may be entitled to advocacy of counsel with respect to the State's burden to prove harmless error. We cannot determine that any challenge to Muller's continued commentary would be wholly frivolous and we reject the no-merit report.

Second, over trial counsel's objection, the circuit court permitted Investigator Wall to testify about out-of-court statements made by Charline G. At a subsequent sidebar, trial counsel argued that the State should have called Charline G. to testify. The circuit court determined that the statements were admissible as they were not offered for the truth. We ordered counsel to address whether any challenge to the circuit court's ruling would be wholly frivolous. In his supplemental no-merit report, counsel states:

> The out-of-court statements from Charline G. were offered to inform the jury why Investigator Wall went to the storage locker to look for evidence. The statements did not implicate the defendant in the crimes of possessing a firearm or endangering safety with a firearm and were not offered for the truth of the matter. The trial court therefore did not err when overruling the defense objection on hearsay grounds. Any argument to the contrary is without merit.

However, Wall testified that after he seized the firearm at issue in the jury trial from Charline G.'s storage locker, she informed him the firearm "had been hidden by Derrick Bradley and that he had been possibly involved in several crimes," leading Wall to further investigate Bradley. The no-merit and supplemental no-merit reports are insufficient to establish that a challenge to the circuit court's ruling would be wholly frivolous.

Third, we ordered appellate counsel to address the claim made in Bradley's response that trial counsel was ineffective for conceding during closing argument that Bradley possessed a firearm. The supplemental no-merit report concludes there is no arguable merit to this claim. In support, appellate counsel attaches an affidavit averring that he spoke with trial counsel who informed him "that if he were called to testify about his representation in this matter he would indicate to the trial court that he shared his strategy for closing arguments with the defendant and the defendant was in agreement with that strategy." The supplemental no-merit report states:

> There is no merit to allege that trial counsel was ineffective for strategic decisions made during closing argument. Trial counsel discussed his strategy for closing argument with the defendant and the defendant agreed with that strategy, (see attached affidavit). Trial counsel vigorously argued to the jury that they should not believe the testimony of the prosecution's witnesses. Trial counsel argued that if the jury agreed with his assessment of the believability of the prosecution's witnesses that they could "disregard" their testimony.
>
> ….
>
> During closing arguments trial counsel went through the video for the jury. Trial counsel argued the video did not back the claims being made by the prosecution's witnesses. Although counsel referred to "the gun" during this portion of his argument, at no point did he concede to the jury that the defendant was guilty of either possessing a firearm or pointing one at anybody.
>
> Trial counsel elected to use his closing argument to attack the credibility of the prosecution witnesses claiming the defendant pointed a firearm at them. Trial counsel's strategic decision to use his closing argument to do that did not amount to ineffective assistance of counsel. Any argument to the contrary is without merit. (Internal record citations omitted.)

Wisconsin case law has addressed whether and when trial counsel's statements in closing argument might constitute an improper concession of the defendant's guilt supporting a claim of ineffective assistance of counsel. *See* ***State v. Gordon***, 2003 WI 69, ¶26, 262 Wis. 2d 380, 663 N.W.2d 765 (where trial counsel's concession during closing argument on a lesser charge did not

conflict with and was supported by the defendant's own testimony and counsel "argued vigorously for acquittal on the more serious" counts, counsel's conduct constituted "a reasonable tactical approach under the circumstances" that did not fall below an objective standard of reasonableness); ***State v. Silva***, 2003 WI App 191, ¶¶16-20, 266 Wis. 2d 906, 670 N.W.2d 385 (where trial counsel's concession during closing argument that defendant was "technically guilty" was found by the postconviction court to be a reasonable and appropriate strategy, counsel did not provide ineffective assistance). The no-merit and supplemental no-merit reports are insufficient to establish that a challenge to trial counsel's closing argument would be wholly frivolous. The affidavit does not address what "strategy" for closing argument was discussed with and approved by Bradley. Further, we do not share appellate counsel's confidence that it is beyond dispute that "at no point did [trial counsel] concede to the jury that the defendant was guilty of either possessing a firearm or pointing one at anybody."[4] This court cannot find facts. As in ***Gordon*** and ***Silva***, whether trial counsel provided ineffective assistance is a matter for the

[4] For example, in arguing that the gun was not pointed at two people and that there was no proof it was loaded so as to satisfy the element of "utter disregard" on the charge of reckless endangerment, trial counsel played the video for the jury and argued: "Now you'll see here you see the gun comes out. It's pointed. And then it's brought back down, okay." In disputing a victim's testimony that Bradley pointed the gun at her and then loaded it by racking the slide, trial counsel argued that racking the slide would require two hands, and:

> So when we look at this surveillance video we know there's not time for that to occur and we know it didn't happen because we can see the pointing of the gun, but we can't see another hand come over like that and load a bullet into the chamber. So the only way her testimony could be true is if the gun was pointed at her, then it was pointed towards the ground and at that point a bullet was loaded into the chamber. Okay, at that point it's not pointed at her anymore it's pointed towards the ground. And you can see from the surveillance video that it's never pointed at her again.

circuit court. We reject the no-merit and supplemental no-merit reports to enable Bradley, if he so chooses, to pursue a postconviction motion on this issue.

Fourth, prior to trial, the parties agreed that State's witness Darryl Harper had six prior convictions for impeachment purposes. At trial, Harper testified that he had four prior convictions. In response to our order for a supplemental no-merit report addressing this potential claim, appellate counsel asserts:

> Darryl Harper testified that he had "like four or six" convictions.[5] Trial counsel subsequently used this inconsistent answer to attack Harper's credibility during closing arguments. Trial counsel argued to the jury that: "Darryl Harper seems to have lost track of the number of times he's been convicted of a crime. He couldn't recall if it was six or four." It is clear that trial counsel made a strategic decision to use Harper's misstatement on his prior convictions as a means to attack his credibility. Employing that strategy as opposed to another one did not amount to ineffective assistance of counsel. Any argument to the contrary is without merit.

Pursuant to WIS. STAT. § 906.09, evidence of a witness's prior convictions or adjudications is admissible for purposes of attacking credibility. Where a witness answers truthfully and accurately in response to a question concerning the number of his or her prior

[5] On cross examination, Harper testified as follows:

> Q: And have you ever been convicted of a crime?
>
> A: Yes.
>
> Q: How many times?
>
> A: Like four or six, about four, four.
>
> Q: You said four or is it six?
>
> A: No, four.

convictions, further inquiry into the nature of the convictions is not permitted. *See* ***State v. Hungerford***, 54 Wis. 2d 744, 748, 196 N.W.2d 647 (1972). However, if the witness denies having been previously convicted, or fails to accurately state the number of convictions, further inquiry may be permitted to impeach the witness's credibility. ***Id***. at 748-49; ***State v. Pitsch***, 124 Wis. 2d 628, 631-32, 369 N.W.2d 711 (1985). To the extent appellate counsel implies that trial counsel made a strategic decision not to explore the possibility of conducting further inquiry into the nature of Harper's prior convictions, his assertion is speculative and conclusory. No postconviction motion was filed and there is neither a circuit court decision nor testimony of record to support the supplemental no-merit report's analysis and conclusion. Once again, the question in deciding a no-merit appeal is whether a potential claim would be wholly frivolous, not whether the attorney or court expects the argument to prevail. The no-merit and supplemental no-merit reports provide an insufficient basis for us to determine that the issue lacks any basis in fact or law. *See* ***McCoy***, 486 U.S. at 438 n.10. We reject the no-merit and supplemental no-merit reports to enable Bradley, if he so chooses, to pursue a postconviction motion on this issue.

The above discussion is not intended to suggest that we have conclusively determined that these are the only seemingly nonfrivolous issues arising in this case. Rather, we provide this discussion to explain our conclusion that the no-merit and supplemental no-merit reports have not demonstrated that there are no issues of arguable merit in this case.

Therefore,

IT IS ORDERED that the no-merit report is rejected, Attorney Patrick Flanagan's motion to be relieved of further representation of Derrick D. Bradley is denied, and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the time to file a postconviction motion or notice of appeal is extended to ninety days from the date of this opinion and order.

Diane M. Fremgen
Clerk of Court of Appeals