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November 30, 2016

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

2015AP1767-CRNM State of Wisconsin v. Courtney Barnard Williams
(L.C. # 2012CF4916)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Attorney Pamela Moorshead, appointed counsel for Courtney Williams, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to further proceedings based on: (1) the court denying Williams's motion to sever the counts for trial; (2) the sufficiency of the evidence to support the jury verdict;

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

(3) the sentence imposed by the circuit court; (4) trial counsel's representation; or (5) testimony as to the victim's statement following a police photograph array identification procedure. Williams has responded to the no-merit report, arguing that: (1) the victim's testimony was the result of an unduly suggestive photograph array procedure; (2) the sentencing judge was biased, failed to adequately explain the sentence imposed, and relied on inaccurate information; and (3) Williams is entitled to 180 days of sentence credit. Counsel has filed a supplemental no-merit report, asserting that Williams is not entitled to any additional sentence credit. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

In October 2012, Williams was charged with armed robbery. The criminal complaint alleged that Williams had robbed D.G. at gunpoint just after midnight on September 24, 2012. Williams was bound over for trial following a preliminary hearing and the State filed a single-count information containing the same charge as the complaint. The State then filed an amended information adding charges of attempted armed robbery and first-degree recklessly endangering safety based on a separate incident, involving victim D.H. Following a second preliminary hearing, Williams was bound over for trial on the additional charges and the circuit court denied Williams's motion to sever the counts. Following a jury trial, Williams was convicted of first-degree recklessly endangering safety as to D.H., and acquitted of armed robbery as to D.G. and attempted armed robbery as to D.H.. The court sentenced Williams to seven years of initial confinement and five years of extended supervision, consecutive to a sentence Williams was currently serving.

The no-merit report first addresses whether the counts were properly joined for trial. The State charged all three offenses against Williams in a single amended information, and Williams moved to sever the original armed robbery count from the additional attempted armed robbery and recklessly endangering safety counts. Williams argued that the additional counts as to the incident involving D.H. were not properly joined with the original count as to the incident involving D.G. because the second incident occurred twenty-two hours later at a location three miles away from the first incident, and involved different evidence. Williams argued that severance was necessary to avoid unfair prejudice. The State opposed the motion, arguing that the testimony of the investigating officers would overlap, that the incidents were relatively close in time, and that joinder did not present a risk of unfair prejudice to Williams.

The circuit court denied the motion to sever the counts for trial, finding that the incidents occurred over a relatively short period of time and the evidence overlapped. *See* ***State v. Locke***, 177 Wis. 2d 590, 596-97, 502 N.W.2d 891 (Ct. App. 1993) (joinder is proper if the crimes "'are of the same or similar character,'" that is, where the crimes are "the same type of offense occurring over a relatively short period of time and the evidence as to each must overlap"). The court also determined that Williams would not be unfairly prejudiced by joinder. *See* ***id.*** (in exercising its discretion as to whether to sever counts for trial, a circuit court "must determine what, if any, prejudice would result from a trial on the joined offenses"). The court found that evidence as to the original and additional crimes would be admissible as other acts evidence in severed trials to show intent and motive, and that the prejudice from that evidence would not be unfair or substantial. *See* ***id.*** (question of prejudice in severance analysis turns on whether bad acts evidence as to each crime would be admissible at trial for the other; other acts evidence is admissible if the evidence is offered for a proper purpose under WIS. STAT. § 904.04(2),

including intent or motive, and the court determines that any prejudice resulting from the evidence does not outweigh its probative value). We agree with counsel's assessment that a challenge to the circuit court's decision would lack arguable merit. *See* ***id.*** (denial of motion to sever will be upheld if joinder was proper and the court denied severance as a proper exercise of discretion).

Next, the no-merit report addresses whether the evidence was sufficient to support the conviction. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including the testimony of the victim and investigating officers, was sufficient to support the jury's verdict.

The no-merit report and response address whether there would be arguable merit to further proceedings based on admission of testimony as to statements by D.G. and D.H. related to their participation in photograph identification array procedures. Prior to trial, Williams moved to suppress the photograph array evidence and any subsequent in-court identification, arguing that the police had conducted unduly suggestive photograph array identification procedures. At a motion hearing, the investigating officers testified as to the photograph identification procedures. The officers testified that neither D.G. nor D.H. made an identification during the procedures, but that D.G. indicated that the photograph of Williams looked like one of the men who robbed him based on his complexion and hair, and that D.H. made a statement after the procedure was completed. The court determined that the photograph array procedures were

not unduly suggestive, but that D.H.'s statement made after the procedure was completed would be inadmissible. It also determined that, if the State intended to introduce an in-court identification, Williams would be entitled to a hearing on that issue.

At trial, the State did not elicit an in-court identification from D.G. or D.H. The State asked D.H. whether any of the photographs stood out to him, and D.H. stated: "A little bit." Counsel opines that there would be no arguable merit to further proceedings on this issue.[2]

Williams contends that police conducted an unduly suggestive photograph array identification procedure. He argues that the results of the photograph array identification procedures were inadmissible under ***Foster v. California***, 394 U.S. 440, 442 n.2 (1969) ("[I]n some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law."). He also contends that he was prejudiced by impermissible in-court identification. However, neither D.G. nor D.H. provided an in-court identification. Additionally, there was no testimony at trial that D.H. indicated Williams's photograph in the array stood out from the others to D.H. We agree with counsel that further proceedings on this issue would lack arguable merit.

The no-merit report also addresses whether trial counsel was ineffective by failing to object to police testimony referring to the subject in surveillance videotape footage related to the charges involving D.H. as "Mr. Williams." No-merit counsel notes that trial counsel could have

[2] The State also introduced evidence as to the photograph array identification procedure conducted with D.G., including D.G.'s statements as to the photograph of Williams. However, Williams was acquitted of the charge related to D.G. Counsel opines that there would be no arguable merit to a claim that there were any errors in the admission of evidence as to D.G. that would have had any bearing on Williams's conviction for recklessly endangering safety as to D.H. We agree with counsel's assessment.

objected on grounds the testifying officer had no personal knowledge of the identity of the subject on the videotape, and that the identification of the subject as Williams invaded the province of the jury. No-merit counsel concludes, however, that a claim of ineffective assistance of counsel on this basis would lack arguable merit. Counsel notes that the jury was shown the surveillance videotape footage and that the State reminded the jury in closing arguments that the jury had to decide whether the subject in the videotape was Williams. On this record, we agree with counsel's assessment that a claim of ineffective assistance of counsel would lack arguable merit. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficiency prejudiced the defense).

Finally, both the no-merit report and no-merit response address whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

Williams contends that he was denied due process at sentencing because the sentencing judge was objectively and subjectively biased. *See* ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114 ("The test for bias comprises two inquiries, one subjective and one objective. Either sort of bias can violate a defendant's due process right to an impartial judge."). In support, Williams cites the sentencing judge's statements that: (1) the judge did not understand the jury's decision to acquit Williams of the two robbery charges but convict him of the recklessly endangering safety charge; (2) the judge had not viewed the case as the type where there would be mixed verdicts, and she did not recall a theory presented by the defense at trial

that supported that outcome; (3) the outcome "was a little mystifying" to her; (4) the judge was surprised that Williams was acquitted of the robbery charges given the strength of the State's case; and (5) the judge had heard on the radio that there had been multiple recent shootings, "[p]eople are picking up guns like it's nothing or hanging around with people who have guns," and Williams's case had involved a shooting. Williams argues that these statements demonstrate that the judge was biased in that she was uncomfortable with the not guilty verdicts reached by the jury, which the judge did not understand. Williams also points to the judge's statement that "I had really thought that there was a good chance that I would end up imposing the maximum sentence in this case," and argues that the judge had predetermined the sentence to impose. *See* ***State v. Goodson***, 2009 WI App 107, ¶¶10-13, 320 Wis. 2d 166, 771 N.W.2d 385 (sentencing court's statements that it had predetermined the sentence to impose demonstrated bias).

We do not agree that there would be arguable merit to a claim that the sentencing judge was biased. The judge's statements that she did not understand the acquittals for the robbery charges and the conviction for the recklessly endangering safety charge followed from the defense at trial that Williams was innocent of all charges. Defense counsel agreed with the sentencing court that there was no theory put forth that Williams possibly committed one of the charged crimes but not the others, and could not answer the judge's question as to why the jury may have reached the verdicts it did. Additionally, while the judge stated that she believed the State's case was strong as to the acquitted charges, and that the jury returned not guilty verdicts "for reasons that are not entirely clear," the judge also stated that "[t]he jury has the power to do so and we all have to respect the results." Nothing in the judge's comments would support a non-frivolous claim that the sentencing judge was objectively or subjectively biased. *See* ***id.***, ¶9 (explaining that objective bias exists "when a reasonable person could question the court's

impartiality based on the court's statements" or "where 'there are objective facts demonstrating … the trial judge in fact treated [the defendant] unfairly'" (quoted source omitted)); ***Gudgeon***, 295 Wis. 2d 189, ¶20 ("Judges must disqualify themselves based on subjective bias whenever they have any personal doubts as to whether they can avoid partiality to one side."). The judge's concern for the safety of the public based on the shooting in this case was a valid concern for the court to take into account at sentencing. Finally, the judge's statement that she had thought "there was a good chance that I would end up imposing the maximum sentence in this case" does not evidence that the judge had predetermined the sentence to impose. Rather, the judge's statement, together with the fact that the judge then took into account statements at the sentencing hearing in imposing a sentence less than the maximum, indicates the judge did not determine the sentence before the hearing.

Williams also contends that the circuit court did not adequately explain the sentence it imposed. He argues that the court did not provide an adequate explanation for imposing a near-maximum sentence, and did not provide any reasons to distinguish Williams's conviction from any other recklessly endangering safety conviction. He contends that the court failed to consider mitigating factors.

We discern no arguable merit to a challenge to the circuit court's exercise of its sentencing discretion. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Williams's character and criminal history, the seriousness of the offense, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court specifically considered that the victim had been shot three times, and could have died. The court also stated that it took into account Williams's statement at sentencing, in which Williams expressed remorse, and

Williams's father's statement on Williams's behalf, in imposing a less than maximum sentence. The court sentenced Williams to seven years of initial confinement and five years of extended supervision, consecutive to another sentence Williams was serving. Given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances'" (quoted source omitted)).

Williams also contends that the circuit court relied on inaccurate information at sentencing. He argues that the court assumed that Williams, rather than Williams's co-actor, fired the gun that shot the victim. Williams asserts that there was no evidence that Williams was the one who shot the gun. However, Williams was convicted of recklessly endangering safety as party to the crime. The circuit court stated that the crime demonstrated extremely dangerous behavior, but did not indicate a belief that Williams was the one who fired the gun. In sum, we discern no arguable merit to a challenge to the sentence imposed by the circuit court.[3]

[3] Because the circuit court referred to a COMPAS risk assessment at sentencing, we previously put this appeal on hold pending our supreme court's decision in ***State v. Loomis***, appeal No. 2015AP157-CR. The supreme court accepted certification in ***Loomis*** to address whether due process prohibits the circuit court from relying on COMPAS at sentencing, either because it is proprietary in nature, preventing the defense from challenging its scientific validity, or because it takes gender into account. The supreme court has now issued a decision in ***Loomis***, holding that sentencing courts may consider COMPAS assessments at sentencing but that the assessments may not be used: "(1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community." ***State v. Loomis***, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749. The court also stated that "a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing." ***Id.***, ¶99.

(continued)

Lastly, Williams contends that he is entitled to 180 days of sentence credit, for the time he served from his arrest to revocation of his extended supervision in an earlier case. In a supplemental no-merit report, no-merit counsel explains that Williams has received credit for the six months of incarceration towards his term of reconfinement following revocation of his extended supervision. Because the sentence in this case was imposed consecutively to the sentence in the earlier case, Williams is not entitled to credit in this case. *See* ***State v. Boettcher,*** 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) ("Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.").

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of any further representation of Courtney Williams in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

Counsel has informed us that the supreme court's decision in ***Loomis*** has not changed her assessment that there would be no arguable merit to further proceedings in this case. Counsel points out that the circuit court did not rely on the COMPAS assessments in determining the sentence to impose. We agree with counsel's conclusion that while the circuit court referenced COMPAS at sentencing, it was not "determinative" of the sentence imposed. Accordingly, we conclude that further proceedings on this possible issue would lack arguable merit.