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

2014AP2181-CRNM State of Wisconsin v. Jeremy Richard Boynton
(L.C. # 2012CF2709)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Jeremy Richard Boynton appeals from a judgment of conviction entered after a jury found him guilty of the following five counts: (1) possessing a firearm as a felon, (2) attempted armed robbery as to R.B., (3) attempted armed robbery as to J.M., (4) first-degree reckless injury by use of a dangerous weapon, and (5) attempted first-degree homicide by use of a dangerous weapon. Boynton's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Boynton received a copy of

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

the report and filed a response. Upon consideration of the report, the response, 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.

R.B., J.M., and J.P.G. were hanging out in J.P.G.'s garage on a Saturday night, relaxing and drinking beers. R.B. and J.M. were smoking outside the garage in the alley, when Boynton walked past. It is undisputed that an altercation ensued and that Boynton shot R.B. twice with Boynton's gun, causing R.B. to suffer great bodily harm. Boynton fired three additional shots which did not hit anyone. Boynton also aimed the gun at J.M.'s chest and pulled the trigger several times, but the gun did not discharge. According to the complaint and testimony at trial, R.B., J.M. and J.P.G. stated that Boynton approached them in the alley, pointed his gun, and demanded their money. The men struggled with Boynton, disarmed him, and called 911. At trial, Boynton testified that he was walking down the alley, the alleged victims tripped him, and Boynton fired the shots in self defense. The jury convicted Boynton on all counts and at sentencing, the circuit court imposed an aggregate bifurcated sentence totaling forty-five years, with twenty-five years of initial confinement and twenty years of extended supervision.[2]

[2] Specifically, the sentencing court imposed the following: On count one, five years of initial confinement followed by five years of extended supervision, to run consecutive to any other sentence; on count two, five years of initial confinement followed by five years of extended supervision, to run concurrent with count three but consecutive to any other sentence; on count three, five years of initial confinement followed by five years of extended supervision, to run concurrent with count two but consecutive to any other sentence; on count four, ten years of initial confinement followed by five years of extended supervision, to run consecutive; and on count five, five years of initial confinement followed by five years of extended supervision, to run consecutive.

The no-merit report concludes that any defect in the preliminary hearing is moot, jury selection was proper, any argument that there was improper opening or closing argument was forfeited by the failure to object, the trial court properly ruled on evidentiary objections made at trial, the trial court properly exercised its discretion in allowing Boynton to wear restraints at trial, Boynton knowingly, intelligently and voluntarily exercised his right to testify, the defense's motions to dismiss after the prosecution rested and at the close of the evidence were properly denied, and the trial court properly exercised its discretion in denying a motion for acquittal notwithstanding the verdict. We are satisfied that the no-merit report properly analyzes these issues as without arguable merit and this court will not address them further except as necessary to address Boynton's response. We have also considered whether there was any improper argument during opening and closing arguments,[3] whether the jury instructions were proper, and whether there was sufficient evidence to support the jury's verdicts. We conclude no issue of arguable merit arises from any of these points and will not discuss them further except as necessary to address Boynton's response.

Next, we agree with appellate counsel's no-merit report that no arguably meritorious issues arise from the sentencing proceedings in this case. In fashioning the sentence, the court considered the seriousness of the offenses, the defendant's character and history of prior offenses, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court identified as its primary goals the protection of the

[3] Although the no-merit report concludes that any issue about improper argument is forfeited for want of an objection, it is also appropriate to consider whether any objectionable argument actually occurred; if there was improper argument that passed without objection, a related claim of ineffective assistance of trial counsel might be arguably meritorious. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

community, punishment of the defendant, and general deterrence. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-41, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court made findings as to the gravity of each offense, determining, for example, that the felon in possession of a firearm was a "most aggravated" crime and a "worst case scenario," while the attempted first-degree homicide offense was mitigated by the fact that the victim was not injured. After considering Boynton's character, including his prior violent record, abysmal history on supervision, and lack of remorse, along with the fact that Boynton was on extended supervision at the time he committed the instant offenses, the circuit court determined that probation was inappropriate and that the sentence imposed was necessary to achieve its primary goals. This constitutes a proper exercise of sentencing discretion with which we will not interfere. ***Id.***, ¶¶17-18. Further, given that Boynton's forty-five-year sentence was far less than the maximum sentence of 145 years, we cannot conclude that the sentence imposed is so excessive or unusual as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶ 31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (there is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh).

We turn to Boynton's response suggesting five claims of ineffective assistance of trial counsel. Our consideration of Boynton's claims is limited because claims of ineffective assistance of counsel must first be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court normally declines to address such claims in the context of a no-merit review if the issue was not raised postconviction in the trial court. However, because appellate counsel asks to be discharged from the duty of representation, we must determine whether Boynton's claims have sufficient potential merit to require appointed

counsel to file a supplemental no-merit report, or to file a postconviction motion and request a ***Machner*** hearing.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant must show specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. Judicial review of an attorney's performance is "highly deferential" and the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. To prove prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694.

Boynton first claims that trial counsel performed deficiently by failing to object to "improper and prejudicial opening and closing jury instructions" which "stated that mens rea could not be taken into consideration." Here, it appears that Boynton is referring to the language in the pattern jury instructions which provides that in deciding about intent:

> You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

See, e.g., WIS JI—CRIMINAL 1070. We reject Boynton's suggestion that this standard language directs the jury that it need not find the defendant acted with intent in order to find him guilty. The jury was clearly instructed that to find Boynton guilty of attempted armed robbery and attempted first-degree intentional homicide, it had to find beyond a reasonable doubt that Boynton intended to commit these crimes but was unsuccessful. The instruction complained of

accounts for the fact that a jury literally "cannot look" inside a person's mind and is an accurate statement of the law. *See* ***State v. Webster***, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995) (intent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances). Any objection on this ground would have been frivolous. Trial counsel's failure to make a meritless objection does not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Next, Boynton's response asserts that trial counsel was ineffective for failing to object to the prosecutor's "badgering" questions asked of Boynton on cross-examination. We have reviewed the portions of the transcripts Boynton relies on in making this claim, and determine that the prosecutor's questions were not objectionable. On cross-examination of an adverse witness, a party is permitted to use leading questions. WIS. STAT. § 906.11(3). Trial counsel's failure to make a meritless objection does not constitute deficient performance. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.

In a related claim, Boynton states that trial counsel was ineffective for failing to bring in an expert to testify "to the actual probability of someone dying from a random gunshot to the chest." We disagree that this gives rise to an arguably meritorious ineffective assistance of counsel claim. First, the probability question is a matter of common knowledge properly decided by the jury; expert testimony is inappropriate. Second, our cases acknowledge that firing a gun at a person's chest or stomach may support an inference that the shooter intended to kill. *See, e.g.*, ***Webster***, 196 Wis. 2d at 323-24; ***Holmes v. State***, 63 Wis. 2d 389, 401-02, 217 N.W.2d 657 (1974).

Boynton's response also faults trial counsel for failing to use the victim's medical bills and lost wages as a "potential motivation for lying and fabricating testimony," asserting that Boynton asked trial counsel to pursue "this line of questioning." We conclude there is no arguable claim of prejudice resulting from trial counsel's failure to pursue this strategy. The theory of defense was that the victims concocted their story in order to avoid culpability by painting Boynton as the aggressor. The victims provided statements early on to police, before the victim knew the extent of his injuries or the amount of his medical bills.

Boynton's last claim of ineffective assistance relies on trial counsel's alleged failure to call corroborating witnesses, namely Boynton's mother, who would support his testimony that on the night in question, he left his house "to go to a party." We conclude that no issue of arguable merit arises from this claim. First, Boynton's initial reason for leaving home was not central to the issues before the jury. Second, the affidavit from Boynton's mother is inconsequential; she states only that Boynton told her "he was leaving to go to a party." The facts asserted do not require an evidentiary hearing because even if true, there is no reasonable probability that the admission of the mother's statement would have led to a different result.

Our review of the record discloses no other potential issues for appeal.[4] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Boynton in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Kevin M. Gaertner is relieved from further representing Jeremy Richard Boynton in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] We have considered whether any potentially meritorious issue arises from the monetary obligations on the judgment of conviction. Based on his stipulation, Boynton was ordered to pay restitution in the amount of $39,762.32. The judgment reflects that Boynton was ordered to pay $2200.33, as a five percent restitution administrative surcharge under WIS. STAT. § 973.20(11)(a). The five percent administrative surcharge is calculated using the total amount of fines, costs, restitution and surcharges imposed. Boynton was also ordered to pay $4041.23 under the category of "Other." Upon review, it appears that this "other" amount represents a small portion of the court costs along with the ten percent restitution surcharge required under WIS. STAT. § 973.06(1(g), which is separate from the restitution administrative surcharge imposed under § 973.20(11)(a).