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February 28, 2017

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

2016AP520-CRNM State of Wisconsin v. Vance R. Ferron (L. C. No. 2014CF1749)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Vance Ferron has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[1] concluding no grounds exist to challenge Ferron's conviction for operating while intoxicated, as a sixth offense. Ferron was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Ferron with operating while intoxicated and with a prohibited alcohol concentration (PAC), both as a sixth offense. Ferron was convicted upon a jury's verdict of the crimes charged. The court imposed the maximum possible six-year sentence consisting of three years' initial confinement followed by three years' extended supervision on the OWI count.[2]

Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, the jury heard testimony that in the early morning of December 30, 2014, officers were dispatched to a home Ferron shared with Rochelle Moede, Ferron's then-girlfriend. Moede had locked herself in a bathroom and called 911 following a verbal argument with Ferron. When police arrived, Moede answered the door and informed the officers that Ferron was in the bedroom.

The officers found Ferron "pretending to sleep" in a back bedroom and observed signs of intoxication from Ferron, including the odor of intoxicants, slurred speech and bloodshot, glassy eyes. In order to keep the couple apart for the rest of the night, the officers directed Ferron to walk to the home of a relative who lived nearby, warning Ferron that he should not drive "based on his level of intoxication." The officers stayed until Ferron left on foot. Approximately one

[2] The court did not impose a sentence on the PAC count pursuant to WIS. STAT. § 346.63(1)(c), which provides that if a person is found guilty of both offenses "for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing."

hour later, Moede was lying on the living room couch when she heard Ferron say, "I can't believe you called the F'ing cops." Although Moede did not see Ferron, she called 911 and discovered the back door to the house was open. When returning to the residence for the second 911 call, Green Bay Police Officer Michael Luberda noticed that a blue Pontiac van that had been in the driveway earlier was missing. Luberda consequently directed other officers to search for the van on the roadways.

Green Bay Police Officers Craig Kolbeck and Sean Hammill spotted a blue Pontiac van traveling southbound as the officers traveled northbound on a residential street approximately one mile from the residence. Officers verified that the van's license plate was registered to Ferron. As the officers turned around, they lost sight of the van for approximately thirty seconds before locating the vehicle parked on a side street. Although neither officer saw Ferron driving the vehicle, Ferron was standing across the street from the van when the officers arrived. During the officers' interaction with Ferron, he was slurring his words and emanated a strong odor of intoxicants. Ferron maintained that Moede had driven him, though Moede was talking to Officer Luberda at the residence when the van was located. The officers did not observe anybody else in the vicinity, and traffic was described as "non-existent." Because of weather conditions, Ferron was transported to a local hospital for field sobriety tests. The van key was discovered in Ferron's pocket during a pat down prior to transport. During the subsequent field sobriety tests, the administering officer observed several clues of impairment, and Ferron ultimately submitted to a chemical test of his blood, which showed a blood alcohol concentration of 0.164.

To the extent there were any inconsistencies in the testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free

to piece together the bits of testimony it finds credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Ferron's conviction.

Any challenge to Ferron's waiver of his right to testify would lack arguable merit. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Ferron in an on-the-record colloquy, informing him of both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, Ferron confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

The record discloses no arguable basis for challenging the effectiveness of Ferron's trial counsel. To establish ineffective assistance of counsel, Ferron must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance affected the outcome of the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, Ferron may argue counsel was ineffective by failing to file a pretrial motion to suppress evidence on grounds the officers lacked reasonable suspicion to stop Ferron or probable cause to arrest him. Officers may stop and detain an individual if they have reasonable suspicion that the individual committed a crime. *See* ***Terry v. Ohio***, 392 U.S. 1, 30 (1968); ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987).

Probable cause to arrest "exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995).

Upon Officer Luberda's return dispatch to the residence, he was aware both that Ferron appeared intoxicated during his recent interaction with Ferron and that a blue van was now missing from the driveway. The officers who stopped Ferron identified the blue van as belonging to Ferron. They also determined that during the brief period in which they lost sight of the van, Ferron would have had time to park the vehicle and travel across the street on foot. Further, during the interaction with Ferron, he showed signs of intoxication; the police discovered he had the van keys in his pocket; and he claimed Moede had been driving when the officers knew she was, at that time, speaking to Officer Luberda at the residence. Ferron also exhibited several clues of impairment during field sobriety testing. Given the chain of events, we conclude the officers had reasonable suspicion to stop Ferron while he was walking on the street and probable cause to arrest him.

Ferron may also argue his trial counsel was ineffective by failing to move for a mistrial after a screen from the State's case management software program was briefly exposed to the jury at trial. Whether to grant a mistrial is within the circuit court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The circuit court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id.*** Here, defense counsel notified the circuit court that he saw the term "Protect 5" and a date that did not correspond to anything in this case. There is no indication in the record that the jury saw anything inappropriate and the circuit court noted the

text was quite small. Therefore, any claim that trial counsel was deficient by failing to pursue a mistrial on this ground would lack arguable merit. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[3] hearing.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Ferron's character, including his "lengthy" criminal history; the need to protect the public; and the mitigating circumstances Ferron raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court emphasized Ferron's "unsuccessful periods of supervision" in the past and determined that probation would unduly depreciate the severity of the offense. It cannot reasonably be argued that Ferron's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

There is likewise no arguable merit to challenge the circuit court's consideration of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment. The court properly utilized COMPAS consistent with our supreme court's decision in ***State v. Loomis***, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749. The record shows COMPAS was not "determinative" of the sentence imposed. It merely informed the circuit court's assessment of other, independent factors.

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[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Jaymes K. Fenton is relieved of further representing Ferron in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals