OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/II

March 29, 2017

To:

Hon. William M. Atkinson
Circuit Court Judge
Brown County Courthouse, Br. 8
100 S. Jefferson St.
P.O. Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Ralph Sczygelski
Sczygelski & Pangburn Law Firm, LLC.
713 Washington St.
Manitowoc, WI 54220-4525

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Paul O. Hujet, #624819
Kettle Moraine Corr. Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2016AP725-CRNM State of Wisconsin v. Paul O. Hujet (L.C. #2013CF1136)

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

Paul O. Hujet appeals from a judgment convicting him of first-degree recklessly endangering safety, disorderly conduct, and endangering safety with use of a dangerous weapon. Hujet's appellate counsel, Ralph Sczygelski, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Hujet filed four responses. Counsel filed a supplemental report, which includes an affidavit from Hujet's trial counsel. *See*

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

RULE 809.32(1)(f). After reviewing the no-merit reports, the responses, and the record, we conclude there are no issues with arguable merit for appeal and therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Police responded to a report of a domestic disturbance. They parked down the street. As they neared the residence on foot, they saw two women on the front porch. The front door was open; a man stood just inside. From at least a house away, the officers could hear a "heated discussion" between a man and a woman. When the officers approached the front door, the man stepped onto the porch. He had a gun tucked under his arm but dropped it on command. After being ordered several times to drop to the ground, he complied, and was handcuffed and arrested. The gun had a round in the chamber. The man told police he was "a special agent with law enforcement." The man was Hujet; the women were Hujet's mother and the victim, A.N.

A.N. testified that she was sleeping with her and Hujet's then four-year-old daughter when an "agitated" Hujet awakened her at about 2:30 a.m., insisting that she move out right then. An argument ensued. Hujet has several guns and a concealed carry (CCW) permit. Hujet, "frantic and twitching," waved a gun in her direction and tried to handcuff her in a "citizen's arrest." In her struggle to free herself, he shoved her into a table, bruising her thigh and breaking a window. Hujet claimed she accidentally stumbled into the table.

Hujet was charged with first-degree recklessly endangering safety, battery, disorderly conduct, and criminal damage to property, all with domestic abuse enhancers.[2] The disorderly conduct charge also carried a use-of-a-dangerous-weapon enhancer. Due to a history of mental

[2] A sixth count, obstructing an officer, was dismissed on the prosecutor's motion.

health issues and drug and alcohol abuse, Hujet underwent a competency examination. The examining psychologist opined that Hujet did not lack the substantial mental capacity to understand the proceedings or to assist in his own defense.

A jury found Hujet guilty of three of the five counts, acquitting him of battery and of endangering safety by use of a dangerous weapon. At sentencing, the court stated that it felt "[f]rom day one" that "this was a mental health case." On count one, the court withheld sentence and placed Hujet on three years' probation with the condition that he undergo a complete psychological examination and take all prescribed medications. It also ordered one year of jail time but gave him one year sentence credit. On counts three and four—disorderly conduct and criminal damage to property—it imposed concurrent ninety-day jail terms with ninety days credit on each count. This no-merit appeal followed.

Counsel's no-merit report first addresses the sufficiency of the evidence. We affirm a verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Matters of weight and credibility are for the jury. ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996). If the evidence permits the drawing of multiple reasonable inferences, we must accept the one the jury draws. ***Id.*** at 617-18.

The responding officers, A.N., and Hujet's mother testified. We agree with counsel that the elements of the charges on which the jury found Hujet guilty easily were proved by the evidence. No issue of arguable merit could be raised on this point.

The report also examines the exercise of sentencing discretion. Sentencing objectives include the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. A sentencing court should indicate the objectives of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives. ***Id.***, ¶¶41, 42. The primary sentencing factors a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Davis***, 2005 WI App 98, ¶13, 281 Wis. 2d 118, 698 N.W.2d 823. The weight to be given to each factor is within the discretion of the sentencing court. ***Id.***

The dual goals of probation are to rehabilitate the defendant and protect society without placing him or her in prison. ***State v. Gray***, 225 Wis. 2d 39, 68, 590 N.W.2d 918 (1999). The court explained the rationale for the conditions of probation it ordered. It emphasized that if Hujet got his mental health issues under control, "other things in your life will fall in place and you will not victimize [A.N.] again, I hope. I think if you are on your meds and you're okay, you won't pose a threat." The court also found that Hujet would be a better father to his young daughter, of whom he shared custody with A.N. The conditions were reasonable and appropriate, *see* WIS. STAT. § 973.09(1)(a), and foster probation's twin goals.

While the jail sentences imposed effectively were "cancelled out" by sentence credit, Hujet already had spent 483 days in jail between his arrest and sentencing. He also faced incarceration if he was unsuccessful on probation. It thus cannot be said that he emerged without punishment. We discern no issue of merit in regard to the exercise of sentencing discretion.

Hujet's responses raise a host of issues.[3] He first contends he was not given ***Miranda***[4] warnings, suggesting that some inculpatory statement(s) should have been suppressed. *See* ***State v. Leprich***, 160 Wis. 2d 472, 476, 465 N.W.2d 844 (Ct. App. 1991). He also asserts that police coerced him into divulging his cellphone password. Trial counsel avers in his affidavit that he did not believe a suppression motion was appropriate. We agree with counsel, as the record does not bear out Hujet's claim.

Green Bay Police Officer Thomas Denney responded to the disturbance at Hujet's residence and testified at trial. Denney's incident report, admitted into evidence, states:

> Given that Paul was in handcuffs in the back of a patrol vehicle, I read Paul the Miranda Warning. Before I was able to finish reading Paul the Miranda Warning, he informed me that he wanted an attorney. I audio-recorded my reading of Miranda to Paul.
>
> ….
>
> The audio recording of reading of Miranda to Paul was downloaded to this report.

Lieutenant Gary Richgels testified that, as he stood near the squad car where Hujet sat, Hujet signaled that he wanted to speak to him. Hujet indicated that he had videotaped the row with A.N. on his cellphone. Hujet told Richgels to look at the videos, as they would show A.N. attacking him. Richgels testified that Hujet volunteered his password and that he viewed only the videos Hujet wanted him to see.

[3] The no-merit report was filed November 2, 2016. In his first response, filed November 9, 2016, Hujet states that he "wholly disagree[s]" with the report. He states in his third response, filed November 28, 2016, that he "finally received" a copy of the report on November 21. The supplemental report was filed December 23, 2016.

[4] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

If the statements to which Hujet vaguely refers were in response to general on-the-scene questions police asked upon their arrival ("What's going on here?"), those questions were investigatory, not accusatory, in nature, so the ***Miranda*** rule does not apply. *See* ***Leprich***, 160 Wis. 2d at 477. Except for a blood test, it also does not appear from our review of the record that, even later, police took a statement from Hujet or that he made any type of confession.[5]

Hujet suffers from generalized anxiety, major depression, bipolar spectrum disorder, and attention deficit disorder (ADD), for which he takes a variety of medications. He asserts that his mental health issues were exacerbated that night by concerns for his daughter's safety and well-being.[6] He argues that his "newly administered" testosterone injections, coupled with his prescribed Adderall, could have made him incapable of appreciating his actions. Hujet suggests that his trial lawyer provided him with constitutionally ineffective assistance because counsel did not raise the defense of involuntary intoxication.[7] To prevail, he would have to show that his lawyer's performance was deficient and that he was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

[5] Due to his highly agitated state, police thought Hujet might be on a "methamphetamine high." The blood test results were negative.

[6] Hujet alleges that A.N. uses drugs, associates with inappropriate people, and is so negligent in her parenting that the child has ended up in the emergency room on five occasions with injuries that include a dog bite, disfiguring burns, and a dislocated arm.

[7] Hujet does not assert, and we agree, that his claim that he was incapable of appreciating his actions warranted an NGI defense. Trial counsel avers that he did not view an NGI defense as a viable option, as the competency evaluation did not give rise to support it and Hujet himself rejected pursuing it.

An involuntary intoxication defense is established if a defendant's intoxicated or drugged condition is involuntarily produced and either renders him or her incapable of distinguishing between right and wrong or "[n]egatives the existence of a state of mind essential to the crime." WIS. STAT. § 939.42; *see also* ***State v. Anderson***, 2014 WI 93, ¶22, 357 Wis. 2d 337, 851 N.W.2d 760. If the defense is applied successfully, the result is an acquittal on the charge. ***Anderson***, 357 Wis. 2d 337, ¶25.

This claim fails. Hujet could not show that such a defense was "clearly stronger" than the defense his trial lawyer presented, which was to minimize the seriousness of the altercation, show that Hujet had the gun pursuant to a CCW permit and that A.N. simply stumbled into the table, and to paint Hujet as the victim of A.N.'s anger and his own mental health issues. *See* ***State v. Starks***, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W. 2d 146. We cannot see how an involuntary intoxication defense would have been clearly stronger. There is no basis for challenging the effectiveness of counsel based upon an informed tactical decision to employ a plausible line of defense. *See* ***Strickland***, 466 U.S. at 689-90.

Hujet also claims counsel ineffectively failed to have an expert review the cellphone videotapes to confirm that A.N.'s testimony about how he held the gun while simultaneously videotaping is "virtually impossible." It is not at all clear how Hujet believes an expert would have benefited his defense. That he possessed a gun and had it out was not at issue. A.N. testified that he was "waving" it at her, his mother told police he was "flailing" it about, he admitted to police the item under his arm was a gun, and it fell on the porch floor when he was ordered to drop it. Furthermore, trial counsel states that he did not want to belabor the "shocking" video, which showed Hujet being "so loud and mean." We will not second-guess counsel's reasonable strategy.

Next, Hujet claims that a particular juror should have been stricken from the panel. This issue has no arguable merit. Hujet first asserts that the potential juror did not acknowledge knowing him although they attended the same church and martial arts school. Jurors were asked if any of them were "related by blood, marriage or adoption or is acquainted with" Hujet. The juror evidently was not; she may not even have recognized him. Moreover, Hujet does not give a time frame for the church and school attendance, say whether he brought the matter to counsel's attention, or allege that he and the potential juror knew each other personally or ever socialized or even had spoken to each other.

Hujet also complains that the juror should have been stricken because she verbalized a prejudice against firearms. Two jurors acknowledged during voir dire their disagreement with the CCW law; both said they could set their personal feelings aside and apply the law as it is. Finally, trial counsel avers that with only three strikes allotted, he had to make tactical decisions as to which jurors to strike.

The next issue Hujet raises is that police responded to a "double-hearsay call of a possible dispute at a residence."[8] The police are not bound by the rules of evidence in the course of their duties.

Hujet also criticizes how the police responded when they saw that he, "a card-carrying CCW member," had a gun. Domestic disturbances are fraught with the potential for violence. A CCW permit does not override misuse of a weapon. There is no merit to his claim.

[8] A.N. had called Hujet's parents. Mrs. Hujet dialed 911 but hung up, deciding she would just go to her son's house. Per policy, police respond to 911 hang-ups. Hujet's father gave them his son's address and said his wife was on the way there.

There also is no merit to his claim that, by forcing him to the ground, police assaulted him and, while "yelling" at him, put him, "injured," in the back of the squad car. Officer Denney testified that, per policy after taking a suspect to the ground, he asked Hujet if he was injured. Hujet said he was, and although Denney saw no injuries, he called for an ambulance. When it arrived, Hujet refused treatment.

Finally, Hujet asks that this court copy all necessary parties with each of his filings. We decline to do so. That is his responsibility, not this court's.

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Ralph Sczygelski is relieved of further representing Hujet in this matter.

IT IS FURTHER ORDERED that Hujet is responsible for copying necessary parties with his filings.

Diane M. Fremgen
Clerk of Court of Appeals