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 I

May 3, 2017

To:

Hon. Timothy M. Witkowiak
Circuit Court Judge
Safety Building Courtroom, #113
821 W. State Street
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Marcella De Peters
Law Office of Marcella De Peters
PMB #318
6650 W. State St.
Wauwatosa, WI 53213

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Kareem N. Body-Etti 623260
Wisconsin Secure Program Facility
P.O. Box 9900
Boscobel, WI 53805-9900

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

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

2015AP2606-CRNM State of Wisconsin v. Kareem N. Body-Etti
(L.C. # 2014CF2049)

Before Brennan, P.J., Brash and Dugan, JJ.

A jury found Kareem N. Body-Etti guilty of five counts of armed robbery and one count of attempted armed robbery, all as a party to a crime. The circuit court imposed six five-year terms of imprisonment, each bifurcated as three years of initial confinement and two years of extended supervision. The circuit court ordered Body-Etti to serve three of the sentences consecutively and to serve the remaining three sentences concurrently with any other sentence, resulting in an aggregate sentence of nine years of initial confinement and six years of extended supervision. The circuit court also found that Body-Etti would be eligible for the Wisconsin

substance abuse program and the challenge incarceration program after he serves five years of initial confinement and ordered him to pay restitution of $800 to one of the victims. He appeals.

Body-Etti's appointed appellate counsel, Attorney Marcella De Peters, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Body-Etti filed a response and, at our request, Attorney De Peters filed a supplemental no-merit report in reply. This court has considered the no-merit reports and Body-Etti's response, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

In a criminal complaint filed in mid-May 2014, the State alleged that Body-Etti, along with three co-actors, robbed two men at gunpoint on the south side of Milwaukee, Wisconsin, at approximately 12:30 a.m. on May 11, 2014. The State further alleged that about thirty minutes later, Body-Etti and another man robbed two women at gunpoint in the same south side Milwaukee neighborhood. Finally, the State alleged that on the evening of April 9, 2014, on the south side of Milwaukee, Body-Etti and an unidentified person robbed a woman at gunpoint and attempted to rob her male companion. Body-Etti denied the allegations, and the matters proceeded to trial.

We first consider whether the evidence was sufficient to convict Body-Etti of the six crimes charged. When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence,

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

viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force … 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).

The circuit court instructed the jury in conformity with WIS JI—CRIMINAL 401 about party-to-a-crime liability. *See* WIS. STAT. § 939.05. The circuit court then instructed the jury that before it could find Body-Etti guilty of armed robbery as a party to the crime, the State was required to prove beyond a reasonable doubt that, as to the particular armed robbery under consideration, the alleged victim was the owner of the property and that Body-Etti as a party to the crime: (1) took and carried away property from the person or presence of the victim; (2) took the property with intent to steal; (3) acted forcibly; and (4) threatened to use a dangerous weapon. *See* WIS. STAT. § 943.32(2); *see also* WIS JI—CRIMINAL 1480. The circuit court further instructed the jury that before it could find Body-Etti guilty of attempted armed robbery as a party to the crime, the State was required to prove beyond a reasonable doubt that Body-Etti intended to commit the crime of armed robbery, which the circuit court again defined, and that, as a party to the crime, he did acts toward the commission of the crime of armed robbery that demonstrated unequivocally, under all of the circumstances, that he intended to and would have committed the crime except for the intervention of another person or some other extraneous factor. *See* WIS JI—CRIMINAL 580; *see also* WIS. STAT. § 939.32 (3).

The State presented testimony from R.O., who said that early on the morning of May 11, 2014, he was walking with his friend M.R. near Third and Walker Streets in Milwaukee when he was confronted by three young black men, two with guns. R.O. said that one of the young men struck him with the gun, kicked him in the face when he fell, and then went through his pockets and took his cell phone, which he retrieved from the police a few days later.

M.R. testified that he was with R.O. on May 11, 2014, when three men approached and demanded "everything.... All [his] money." One of the men wore his hair in short dreadlocks and two of the men carried guns. M.R. said he surrendered his wallet, keys, and cell phone.

N.T. testified that at approximately 1:00 a.m. on May 11, 2014, she was walking to her car on Third and Walker Streets with her cousin, K.S. They were approached by two young armed black men who said "give me all your stuff." N.T. testified that she gave up her purse, which contained her cell phone. N.T. examined photographs of purses found inside the trunk of a car and said one of the purses was taken from her during the robbery and the other purse was taken from K.S.

K.S. testified that on May 11, 2014, she and N.T. were robbed at gunpoint by two men who "demanded [her] stuff." She surrendered her purse, which contained money, a cell phone, and credit cards. She identified her purse as an exhibit in the courtroom.

Officer Kenneth Justus testified that on the night of May 11, 2014, he and his partner were dispatched to an area of Milwaukee where police had just received complaints of multiple armed robberies. Justus saw people matching the descriptions of the suspects and followed them into a gas station market where he observed them talking to one another. One of those suspects wore his hair in short dreadlocks and was later identified as Body-Etti. In the store's chips aisle, Justus found a cell phone later determined to belong to a female robbery victim. After detaining two suspects in the store, Justus observed that a third suspect had left the store and was standing near a Mitsubishi Eclipse that contained a fourth person, subsequently identified as Deviondre Jackson. Justus went on to testify that the Mitsubishi contained a black ski mask, two loaded revolvers, two purses, a wallet and several cell phones.

Jackson testified for the State. He said that on May 11, 2014, he, Body-Etti and D.T. were passengers in a car driven by J.T.[2] Jackson said that he and his companions spent the evening "wandering around robbing people," and he then described four robberies. Jackson said that while J.T. waited in the car, Body-Etti, D.T., and Jackson robbed two men at gunpoint and took a wallet and a cell phone from the victims. Shortly thereafter, while Jackson stayed in the car with J.T., Body-Etti and D.T. robbed two women. Jackson said Body-Etti and D.T. returned to the car with a purse and a bag. Jackson said that J.T. then drove the four co-actors to a gas station where the police caught them "red handed," arrested them and found the victims' property in the car. Finally, Jackson said that while in custody following his arrest, he told an investigating officer about a conversation in which Body-Etti said he had "robbed a lady from out of town ... about a month ago" and taken "a lot of money, a stack." Jackson said he understood a "stack" meant $1000.

B.J. testified that on the evening of April 9, 2014, she was sitting behind the south side Milwaukee residence she shared with her boyfriend B.E when two men approached. One pointed a gun and demanded everything that she had. She gave the robbers her purse. B.J. said that the purse contained $800 in cash, a cell phone, and her "green card," which she explained was a "permanent residence card" for the United States. B.J. also identified a video recording that had captured portions of the April 9, 2014 armed robbery as it occurred, and she narrated the events while the video played in the courtroom. She acknowledged, however, that she could not identify either of the robbers.

[2] D.T. is a juvenile and has the same surname as his brother, J.T. Accordingly, we use initials to identify both D.T. and J.T.

B.E. then testified about the April 9, 2014 incident and described how two men demanded his property that evening at gunpoint. B.E. said he pulled only cigarettes from his pocket and did not give anything to the robbers. He also identified the video recording of the incident and confirmed that the video showed what happened to him and to B.J. on April 9, 2014. He said that he recognized one of the robbers as someone who lived in his neighborhood. He also testified that, during a line-up on May 13, 2014, he picked Body-Etti as one of the robbers. B.E. went on to identify Body-Etti in the courtroom as one of the men who robbed B.J. and attempted to rob B.E. on April 9, 2014.

In the response to the no-merit report, Body-Etti suggests that the evidence was not sufficient to convict him. He says his fingerprints were not found on the physical evidence, police did not see him in the Mitsubishi that contained the victims' stolen property, and he cooperated with the arresting officers. He also points out that the witnesses were not entirely consistent in their testimony. These contentions do not support a challenge to the sufficiency of the evidence. The credibility of the witnesses and the weight of the evidence are determinations that rest with the factfinder. *See* ***Poellinger***, 153 Wis. 2d at 504. "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***Id.*** at 506. The evidence presented by the State supports each element of the six charges against Body-Etti. A challenge to the sufficiency of the evidence would lack arguable merit.

We have also considered whether Body-Etti can raise an arguably meritorious claim that the circuit court erroneously denied his motion for a mistrial in the face of his complaint that the witnesses violated the sequestration order. In reviewing a circuit court's decision on a motion for a mistrial, we consider whether the circuit court erroneously exercised its discretion. *See*

State v. Foy, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). We uphold a discretionary decision if the circuit court has "examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *See* ***id.***

Here, Body-Etti alleged after jury selection that his trial counsel observed the witnesses in the courthouse hallway all watching and discussing the video of the April 9, 2014 incident. Outside the jury's presence, he moved for a mistrial on the ground that the witnesses' actions violated a pretrial order preventing the witnesses from discussing their testimony, proposed or completed, with other witnesses. The State preliminarily responded to the motion for mistrial by explaining that B.E. and B.J. watched the video so that they could identify it in the courtroom. The State then presented several witnesses to testify about the matter.

A police officer described showing the video to B.E. and B.J., but the officer was unable to say whether any other witness also watched the video. B.E. and B.J. each testified that they watched the video with the officer but did not discuss it with each other or with any other witness. Neither B.E. nor B.J. thought that anyone else in the hallway could possibly have watched the video with them. The circuit court credited the testimony and concluded that no witness had discussed his or her testimony with any other witness. The circuit court therefore denied the motion for a mistrial.

We sustain a circuit court's factual findings unless they are clearly erroneous. *See* ***Manitowoc Cty. v. Samuel J.H.***, 2013 WI 68, ¶18, 349 Wis. 2d 202, 833 N.W.2d 109. The circuit court's finding that the witnesses did not discuss their testimony with one another is not clearly erroneous. In light of the circuit court's finding, there is no arguably meritorious basis to challenge the decision to deny a mistrial.

Body-Etti says in his response to the no-merit report that his trial counsel "never called or tr[i]ed to present the witness that [Body-Etti] said would help [his] case." We understand Body-Etti to complain that his trial counsel was ineffective for failing to call witnesses to testify for him. To show ineffective assistance of trial counsel, a defendant must demonstrate both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We asked Attorney De Peters to respond to Body-Etti's complaint, and she replied that she spoke to the investigator that trial counsel retained on Body-Etti's behalf. The investigator revealed that she interviewed several proposed defense witnesses but none of them supported the alibi that Body-Etti hoped to establish, and one of the witnesses offered information that would have aided the State. On this record, we are unable to conclude that trial counsel performed deficiently by failing to present the witnesses that Body-Etti suggested. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶31 ("[O]ur function upon appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms.").

We next consider whether Body-Etti could mount an arguably meritorious claim that trial counsel was ineffective for failing to challenge joinder of the charges against him or to request severance of those charges. Joinder of multiple crimes in the same complaint or information is permitted "if the crimes charged ... are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." *See* WIS. STAT. § 971.12(1). We construe § 971.12(1) "broadly in favor of initial joinder." *See* ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982).

> [T]he … phrase "connected together or constituting parts of a common scheme or plan" has been interpreted, among other things, to mean "that the crimes charged have a common factor or factors of substantial factual importance, *e.g.*, time, place or *modus operandi*, so that the evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator."

State v. Salinas, 2016 WI 44, ¶37, 369 Wis. 2d 9, 879 N.W.2d 609 (citation omitted).

The five armed robberies and one attempted armed robbery charged in this case were all the same type of offense, all were close in time (some only minutes apart), and each involved the same *modus operandi*, namely, multiple co-actors approaching a pair of citizens in public on the south side of Milwaukee, displaying a gun, and demanding money and valuables. No arguably meritorious argument exists that joinder was improper. Accordingly, trial counsel had no obligation to object to joinder. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (counsel not ineffective for refraining from making a futile motion).

When joinder is proper in the first instance, the circuit court may nonetheless sever counts if it appears that a joint trial would prejudice the defendant, *see* ***State v. Leach***, 124 Wis. 2d 648, 668, 370 N.W.2d 240 (1985), but "[i]f the offenses meet the criteria for joinder, it is presumed that the defendant will suffer no prejudice from a joint trial," ***id.*** at 669. To overcome the presumption, the defendant must demonstrate a '"certainty of prejudice.'" *See* ***State v. Linton***, 2010 WI App 129, ¶21, 329 Wis. 2d 687, 791 N.W.2d 222 (citation omitted). There is no basis in the record to suggest that Body-Etti could have made such a showing. Moreover, the circuit court properly instructed the jury that it must consider each of the six counts separately and not allow the verdict for one count to affect the verdict for any other count. The danger of prejudice arising from joinder '"can be overcome by the giving of a proper cautionary instruction.'" ***Id.***, ¶22 (citation and one set of quotation marks omitted). Accordingly, any claim

that Body-Etti was prejudiced by trial counsel's failure to seek severance of the joined counts would lack arguable merit.

We have also considered whether Body-Etti could pursue an arguably meritorious claim that his trial counsel was ineffective for failing to seek suppression of the evidence that police found in the Mitsubishi. *See* U.S. CONST. AMEND. IV & WIS. CONST. art. I, § 11 (prohibiting unreasonable searches and seizures). We conclude he could not.

"A party attempting to exclude evidence obtained as a result of a search or seizure ... must demonstrate a legitimate expectation of his own privacy in the object of the search." ***State v. Malone***, 2004 WI 108, ¶22, 274 Wis. 2d 540, 683 N.W.2d 1. Here, the evidence at trial included testimony that Body-Etti was a passenger in the Mitsubishi on the night of May 11, 2014. The evidence further showed that when the police found the Mitsubishi stopped at a gas station that night, Body-Etti was in the gas station's market, not in the car. Generally, passengers cannot assert a reasonable expectation of privacy in a car after exiting it. *See* ***State v. Wisumierski***, 106 Wis. 2d 722, 734, 317 N.W.2d 484 (1982) (citation omitted). Body-Etti did not demonstrate that he had another relationship to the car other than former passenger. To the contrary, he established through cross-examination of an arresting officer that he was not the owner of the Mitsubishi, and he did not concede any connection to the Mitsubishi. In short, he "'asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.'" *See* ***State v. Benton***, 2001 WI App 81, ¶11, 243 Wis. 2d 54, 625 N.W.2d 923 (citation omitted). The record thus makes clear that Body-Etti could not establish a reasonable expectation of privacy in the Mitsubishi that would allow him to challenge the search. *See* ***id.*** Further pursuit of this issue would lack arguable merit.

We next consider whether Body-Etti could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, 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 may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine the factors that are relevant in fashioning the sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court considered the gravity of the offenses, finding that Body-Etti had committed "vicious" crimes. In considering Body-Etti's character, the circuit court discussed the remarks of family members who described him as goodhearted and helpful. The circuit court also took into account that Body-Etti was only eighteen years old and that he had no prior criminal convictions.

The circuit court considered the need to protect the public, noting the "potential of what could have occurred to [the victims] where you're taking a gun and pointing it at people."

The circuit court identified rehabilitation and punishment as the primary sentencing goals. Referencing trial counsel's statements that Body-Etti had improved his reading skills from a fifth grade level to a seventh grade level while in jail, the circuit court found that Body-Etti "does well while in custody as far as participating in activities, learning.... The problem is that he didn't do that while he was out." The circuit court further found that imprisonment was a necessary consequence of the dangerous activity at issue in this case. Accordingly, the circuit court determined that probation was "n[o]t ... appropriate under the circumstances." *See* ***Gallion***, 270 Wis. 2d 535, ¶25 (stating that the circuit court should consider probation as the first sentencing alternative). Instead, the circuit court concluded that imprisonment was required to punish Body-Etti and to ensure that he would "learn from these incidents [and] ... never be part of the system again."

The circuit court appropriately considered Body-Etti's request to be found eligible to participate in the Wisconsin substance abuse program and the challenge incarceration program. Both prison programs offer substance abuse treatment, and an inmate who successfully completes either program may convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. A circuit court has discretion to determine both a defendant's eligibility for these programs and when the defendant's eligibility may begin. *See* ***State v. White***, 2004 WI App 237, ¶¶2, 6-10,

277 Wis. 2d 580, 690 N.W.2d 880; WIS. STAT. § 973.01(3g)-(3m).[3] We will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187. In this case, the circuit court noted that Body-Etti acknowledged having "some AODA issues, some problems with marijuana" and, emphasizing both his youth and the need for sufficient incarceration, determined that Body-Etti would be eligible for both prison treatment programs after serving five years of initial confinement.

The circuit court identified the factors that it considered when fashioning sentences in these matters. The factors are proper and relevant. Moreover, the sentences are not unduly harsh. A sentence is unduly harsh "'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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Here, Body-Etti faced forty years of imprisonment and a $100,000 fine for each armed robbery that he committed, and he faced an additional twenty years of imprisonment and a $50,000 fine for the attempted armed robbery. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c), 939.32. The penalties imposed are far less than the law allows. '"[A] sentence well within the limits of the maximum sentence ... is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper

[3] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

under the circumstances.'" ***State v. Mursal***, 2013 WI App 125, ¶24, 351 Wis. 2d 180, 839 N.W.2d 173 (citation omitted). Accordingly, Body-Etti's sentences are not unduly harsh or excessive. We conclude that a further challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

Last, we conclude that Body-Etti could not contest the order that he pay $800 in restitution to B.J. Before the sentencing court ordered restitution, Body-Etti agreed B.J. lost $800 in the robbery, and he constructively stipulated to the restitution order when he did not object to it. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126. Therefore, he could not pursue an arguably meritorious challenge to the order. *See* ***id.***

Based on an independent review of the record, we conclude there are no additional potential issues warranting discussion. Any further proceedings would be without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Kareem N. Body-Etti on appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals