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November 15, 2017

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

2017AP290-CRNM State of Wisconsin v. Israel T. Littleton (L.C. # 2014CF755)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Israel T. Littleton appeals from a judgment of conviction of being a party to the crimes of attempted first-degree intentional homicide and two counts of first-degree recklessly endangering safety. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Littleton has filed a response to the no-merit report and counsel filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions 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.

Littleton was convicted after a three-day jury trial. The evidence at trial was that in the early morning hours of November 29, 2014, R.P. was shot three times, N.A, his female roommate, was shot once in the buttocks as she lay under covers in a nearby bed, and W.A. was fired at. The shooting occurred at R.P.'s Sheboygan home. Two men came to the home with W.A. to purchase marijuana from R.P. One man, an African-American with dreadlocks, argued with R.P. over the quality of the marijuana. Two guns appeared, shots were fired, and the two men ran from the home. W.A. knew one of the men as "Money." Money was not the man with the dreadlocks. W.A. admitted he had arranged the marijuana purchase between Money and R.P. He said the man with dreadlocks, whom he had never seen before, came along with Money into the home. Damon Smith was determined to be Money. Smith testified that the man with the dreadlocks was Littleton. Smith testified he went to R.P.'s home with W.A. and Littleton to buy marijuana, that Littleton drew both guns, and that Littleton was the only shooter.[2] Smith indicated that Littleton had picked him up in Sheboygan in a van which was shown to have license plates registered to Littleton. Cell phone records showed contact between W.A. and Smith, and Smith and Littleton in the hours before the shooting. Cell phone analysis also

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

[2] Both R.P. and W.A. testified that Smith and the man with dreadlocks each brandished a gun.

showed Littleton traveling from Milwaukee to Sheboygan before the shooting and back again to Milwaukee afterwards. A picture showed that in November 2014, Littleton had dreadlocks, although he had shaved them off by the time of his arrest in January, 2015.

The jury found Littleton guilty of being a party to the crimes of attempted first-degree intentional homicide and two counts of first-degree recklessly endangering safety. Before sentencing, Littleton moved for a new trial on the ground of newly discovered evidence. In support of his motion, Littleton offered a letter purportedly written by Smith stating that Smith had given false testimony at the trial and that Littleton was not involved in the crimes. At the hearing on the motion, Smith testified that he did not write the letter, the signature on the letter was not his, and that his trial testimony was not untruthful. The motion for a new trial was denied. Smith was sentenced to twenty years' initial confinement and five years' extended supervision on the attempted homicide conviction and concurrent terms of ten and five years' imprisonment on the two recklessly endangering safety convictions.

The no-merit report indicates that Littleton complains about two issues and the report only discusses those two issues. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial rulings, jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, propriety of opening

statements and closing arguments, results of polling the jury, and sufficiency of the evidence. By discussing only the issues Littleton complains about, the no-merit report is incomplete.[3]

Our review starts with the pretrial procedure. We observe that numerous pretrial rulings were made in Littleton's favor—denial of the prosecution's motion to admit other acts evidence and to permit a jury view of the crime scene. During jury selection, several jurors were excused for cause without objection from the defense and there was no basis to object. At trial, the trial court properly exercised its discretion the three times it overruled defense evidentiary objections. An adequate colloquy established that Littleton's decision to not testify was knowingly and voluntarily made. There was no improper argument during opening or closing arguments. The jury was properly instructed. Jury polling at the reading of the verdicts confirmed that the verdicts were unanimous. No issue of arguable merits exists from the trial procedure.

We consider whether there is arguable merit to a challenge to the sufficiency of the evidence to support the guilty verdicts. We may not reverse a conviction on the basis of insufficient evidence "unless 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

[3] Counsel is reminded that the no-merit report must do more than address issues raised by the appellant. Counsel has a duty to review the entire record for potential appellate issues. A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See* ***McCoy v. Wisconsin Court of Appeals***, 486 U.S. 429, 438 (1988). Although this court has the duty to make an independent review of the entire record, it places an unreasonable burden on the court when counsel fails to provide the necessary groundwork for consideration of potential issues. It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. *See* ***State v. Allen***, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). Attorney Andrew H. Morgan is admonished to make a complete discussion of all aspects of a jury trial and sentencing in future no-merit reports.

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). Although Smith was the only witness to the crimes who identified Littleton as being the shooter, Smith's testimony and other circumstantial evidence was sufficient to place Littleton at the house as a participant in the crimes. Thus, it cannot be argued that the evidence was insufficient to convict Littleton.

The trial court considered Littleton's motion for a new trial using the appropriate criteria. *See* ***State v. Boyce***, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977) (the five criteria for granting a new trial due to newly discovered evidence are: (1) the new evidence was not discovered until after trial; (2) the party moving for a new trial must not have been negligent in seeking to discover such new evidence; (3) the new evidence must be material to the issue; (4) the new evidence must not be merely cumulative to testimony introduced at the trial; and (5) the new evidence must be such that it will be reasonably probable that a different result would be reached on a new trial). The court found Smith's testimony that he did not write the letter recanting his trial testimony to be credible. That finding is not clearly erroneous. *See* ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (Ct. App. 1996) (trial court's finding as to a witness's credibility will not be overturned unless the finding is shown to be clearly erroneous). The trial court determined that Littleton had not demonstrated a reasonable probability of a different result at a new trial because Smith confirmed his trial testimony. There is no arguable merit to a claim that the motion for a new trial was improperly denied.

We have also considered whether the sentence was the result of an erroneous exercise of discretion.[4] *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion). The record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***Id.***, ¶76 (citation omitted). The court considered the seriousness of the offense, Littleton's character, and the need to protect the public. It concluded that twenty years' confinement was necessary to protect the public and serve as punishment. The sentences are well within the maximums and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("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 under the circumstances."). Restitution was agreed to and there is no suggestion of any basis to challenge the amount.[5] There would be no arguable merit to a challenge to the sentence.

We turn to Littleton's concerns discussed in the no-merit report and Littleton's response. The no-merit report first indicates that Littleton is concerned that Smith lied about Littleton's

[4] The no-merit report concludes in two sentences that there is no meritorious argument to challenging the sentencing terms. The discussion is inadequate because it fails to explain the conclusion in terms of the standard of review and sentencing court's findings and conclusions.

[5] Restitution was set at the amount determined to be owed at Smith's sentencing. The sentencing court denied an additional claim for lost wages to increase restitution.

participation in the crimes and trial counsel was ineffective in impeaching Smith's credibility. Littleton's response expands on this theme. Littleton claims that as Smith was being sworn in the prosecutor asked Smith whether he had received "any kind of recommendation or promises for his testimony" and that Smith falsely answered, "No." Littleton suggests that his trial counsel failed to object to Smith's perjured testimony on the point and that it was prosecutorial misconduct to present such perjured testimony.

The exchange Littleton describes never occurred. Smith was sworn in outside the presence of the jury so it could be determined if he would assert his right against self-incrimination and be afforded immunity for his testimony. When Smith started his testimony before the jury, he was not sworn in as the court advised the jury that he had already been sworn in. The prosecutor's direct examination of Smith did not include any questions about whether he had been offered consideration or promises in exchange for his testimony. The prosecutor elicited that Smith had been convicted of a crime six prior times, that Smith had been charged criminally as a result of the crimes, that Smith had entered a plea, and that as part of the plea negotiations, Smith agreed to testify truthfully in all criminal proceedings against Littleton. On cross-examination by Littleton, Smith acknowledged that he had been offered three different plea bargains. Defense counsel's questions demonstrated to the jury how the prosecution had made the deal more favorable as time went on and that the final deal was conditioned on Smith testifying against Littleton. Cross-examination also elicited Smith's acknowledgement that the prosecutors had met with him at the jail to review his potential testimony. Additionally, the jury was instructed that Smith

> has received immunity and concessions. "Immunity" means that Damon C. Smith's testimony and evidence derived from that testimony cannot be used in a later criminal prosecution against

> Damon C. Smith. The state has also agreed to recommend no more than 12 years of initial confinement in Mr. Smith's own case. This witness, like any other witness, may be prosecuted for testifying falsely. You should consider whether receiving immunity and concessions affected the testimony and give the testimony the weight you believe it is entitled to receive.

The claimed perjury never occurred. The jury heard evidence that Smith made a deal with the prosecutors. The jury was specifically charged to consider the concessions Smith was given in weighing his credibility. There is no basis to claim prosecutorial misconduct. Additionally, trial counsel tried to impeach Smith and there is no basis to claim ineffective assistance of counsel.

The no-merit report identifies Littleton's second main concern as the cell phone evidence. Littleton believes that because there was no direct evidence that he was the owner of the phone number associated with him, witnesses that testified that the phone number was Littleton's gave perjured testimony, all the cell phone evidence was inadmissible, and trial counsel should have objected to the cell phone evidence.[6] He also claims that the prosecution withheld the true identity of the listed owner of the cell phone number associated with him and perhaps committed a discovery violation. However, there was sufficient evidence to establish the phone number as associated with Littleton and direct proof of ownership of the number was not required. A detective testified that Smith told him the number he used to contact Littleton was a "(414) 699" number. The detective reviewed Smith's phone records with Smith and Smith identified the only "(414) 699" number on the record as Littleton's contact number. Smith also testified that

[6] Smith's former girlfriend testified she got Littleton's phone number from Littleton's former girlfriend. Contrary to Littleton's assertion, during her trial testimony Smith's former girlfriend did not repeat Littleton's phone number. Littleton's claim that her testimony was perjury or hearsay lacks merit because the testimony never happened.

Littleton's number was a "(414) 699" number. A proper foundation was laid for the expert analyst to use the "(414) 699" number as Littleton's and explain contact between the phones in the period before the crimes. Contrary to Littleton's claims, the cell phone evidence did not violate his right to confrontation, was not unduly misleading, and there was no basis for trial counsel to object to the evidence.[7]

Littleton's final claim is that he had an alibi defense that trial counsel failed to present. He claims he told trial counsel to call three potential exculpatory witnesses. Littleton claims that Jamonte Childs would have testified that he saw Smith in Sheboygan the night of the shooting with "CO" and that he never saw Littleton with Smith. Childs was listed on the defense witness list but was not called. As support for his claim that Childs would have provided exculpatory evidence, Littleton attaches a police report of an interview with Childs. Although Childs saw Smith at a club in Sheboygan with CO, Childs left the club between 11:40 p.m. and midnight. Childs could not refute the accuracy of Smith's testimony that Littleton picked Smith up after he left the club and cell phone evidence that Littleton did not reach Sheboygan until 12:45 a.m. Additionally, Childs' description of CO did not match the description by R.P. and W.A. of the man with dreadlocks. Childs was not a viable alibi witness.

Littleton claims that trial counsel knew that Sharese Miles, Littleton's mother, and Ieisha Williams, Littleton's sister, would have given testimony that Littleton was home on the night of

[7] Littleton attaches to his response pages from a police contact log that shows four other phone numbers associated with him between 2009 and September 27, 2014. He believes his trial counsel could have used this information to impeach trial testimony about his phone number. No reasonable strategy would involve using the pages showing Littleton to have multiple police contacts and the fluidity in an associated phone number. The pages would not serve to establish that Littleton was not using the "(414) 699" number that witnesses identified as his contact number at the time of the crimes.

the shooting. He attaches to his response statements[8] from Miles and Williams, made in June 2017, which have nearly identical text describing that each is "100% sure" that Littleton was home the night of the crime, that he never left home, and that Littleton had a friend over to the house playing dominos during the early morning hours of November 29, 2014. First, Littleton's desire to pursue an alibi defense after being convicted is too late.[9] If he was able to obtain his mother's and sister's information in June, 2017, he could have done so in 2015; they were witnesses known to him. Second, as appointed appellate counsel indicates, the alibi now provided by his mother and sister contradict Littleton's statement to appellate counsel that his alibi was that he was at a housewarming party on the night of the crime. Appellate counsel also provides a letter documenting a conversation appellate counsel had with Littleton's mother in January 2017 in which she was unable to provide any solid details supporting an alibi defense. Littleton's sister failed to return appellate counsel's call to give any alibi information. Since the record and postconviction investigation by appellate counsel fail to suggest any viable alibi witnesses, there is no arguable merit to a claim that trial counsel was deficient in not presenting an alibi defense.

[8] The statements are not affidavits signed under sworn oath to be truthful. The statements are notarized as to signature only.

[9] The record shows that Littleton's trial counsel, with Littleton present, had no objection to the prosecution's motion in limine that Littleton not be allowed to rely on an alibi defense.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Littleton further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Andrew H. Morgan is relieved from further representing Israel T. Littleton in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals