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**DISTRICT II**

March 7, 2018

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

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2017AP1050-CRNM State of Wisconsin v. Darin L. Beverly (L.C. #2015CF16)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

**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).**

Darin L. Beverly appeals from a judgment convicting him as a repeater of theft from a financial institution (< = $500). 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). Beverly filed

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

several responses and motions; counsel filed two supplemental reports.[2] Upon consideration of all of the filings and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there are no issues with arguable merit for appeal. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Poorly disguised as a woman in a fur coat and boa or scarf, Beverly entered a bank and passed a teller a note that read, "All the money no die pack." The teller's initial fear heightened upon seeing the word "die." She gave him small-denomination bills amounting to $370. Beverly was charged with robbery of a financial institution, which requires proof of use of force or threat to use imminent force. WIS. STAT. § 943.87. Beverly's efforts before and after the preliminary examination to dismiss the complaint as insufficient and to challenge the bindover were unsuccessful. The State ultimately filed an amended complaint alleging theft from a financial institution (< = $500), contrary to WIS. STAT. § 943.81, which does not have force or threat of force as an element. Beverly pled no contest to the offense and a repeater enhancer.

Beverly's presentence motion to withdraw his plea failed. Consistent with the State's recommendation, the court sentenced him to five and one-half years' initial confinement (IC) and two years' extended supervision (ES), consecutive to any other sentence. This appeal followed.

[2] Counsel clearly has invested significant time in this appeal. We nonetheless must make the following observation. Except for the complaints, the informations, and a motion to dismiss, every record citation in the no-merit report is wrong. The page numbers are correct but the document numbers are way off. The citation to R. 57 should be R. 119. The cite to R.20:2-4, 6, 16-17 is impossible: R. 20 is a two-page document; it should be R. 117. R. 117 should be R. 135. Et cetera. Our independent review of the record on a no-merit appeal is not a small undertaking and benefits from a well-cited presentation of the facts. When poorly cited, it hampers the progress of this high-volume court and unnecessarily delays getting the defendant the timely answer he or she deserves.

The no-merit report considers whether: (1) the criminal complaint was insufficient such that the trial court improperly denied Beverly's motion to dismiss it, (2) he was improperly bound over at the preliminary examination, (3) the trial court erroneously exercised its discretion in denying his presentence motion to withdraw his plea, (4) his plea was not knowingly and voluntarily entered such that he should be allowed to withdraw it now, and (5) the trial court erroneously exercised its discretion in sentencing him. Upon review of the record, we are satisfied that the no-merit report properly analyzes the issues it raises, and we discuss them no further.

Beverly responds that (1) the trial court erroneously exercised its discretion by denying his motions to dismiss the complaint and by "hearing [its] own bindover decision at the preliminary hearing and the arraignment";[3] (2) the prosecutor erroneously exercised his discretion by charging him with robbery, a charge "of doubtful merit," to coerce him into pleading no contest, *see* ***Thompson v. State***, 61 Wis. 2d 325, 330, 212 N.W.2d 109 (1973), when the charge should have been misdemeanor theft from a person, and by "using misinformation," i.e., promoting the falsehood that the teller was frightened and felt threatened; (3) defense counsel rendered ineffective assistance throughout the case in a host of ways, particularly by not petitioning for interlocutory review regarding the bindover, by inadequately investigating the case, and by colluding with the State and the court to railroad him into pleading no contest.

[3] We understand Beverly to mean that by "hearing [its] own bindover decision" the court relied on its earlier findings of probable cause and should have recused itself. Beverly does not expand on the claim. We do not consider arguments that are undeveloped or unsupported by references to legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Beverly's issues all implicate to some extent the fact that he believes he initially was wrongly charged with robbery of a financial institution solely to coerce a plea. A guilty or no-contest plea waives all nonjurisdictional[4] defects and defenses except motions to suppress. *See* ***State v. Popp***, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471. In our discretion, however, we may review issues so waived. *See* ***State v. Grayson***, 165 Wis. 2d 557, 561, 478 N.W.2d 390 (Ct. App. 1991). To put a stop to his persistent filings, we will speak to his claims.

The complaint charged Beverly with robbery of a financial institution, contrary to WIS. STAT. § 943.87, which provides:

> Whoever by use of force or threat to use imminent force takes from an individual or in the presence of an individual money or property that is owned by or under the custody or control of a financial institution is guilty of Class C felony.

"A complaint passes muster if it recites facts that 'would lead a reasonable person to conclude'" a crime probably had been committed and the named defendant probably was the culpable party. ***State v. Blalock***, 150 Wis. 2d 688, 694, 442 N.W.2d 514 (Ct. App. 1989) (citation omitted). It need not contain all the allegations of fact that, if proved, would be necessary to convict. ***State ex rel. Cullen v. Ceci***, 45 Wis. 2d 432, 442, 173 N.W.2d 175 (1970). Beverly contends the complaint was insufficient because he did not use or threaten force. One who demands money from a bank teller plausibly could be armed, however, implying a threat of imminent force. The complaint answered: "What is the charge? Who is charged? When and where is the offense alleged to have taken place? Why is this particular person being charged? [and] Who says so?" ***State v. Williamson***, 113 Wis. 2d 389, 395, 335 N.W.2d 814 (1983)

[4] We assume counsel's statement that a guilty plea waives all "jurisdictional" arguments was a typographical error.

(alteration in original; citation omitted). The information submitted in support of the complaint was sufficient for the court to conclude that the charges were not capricious and were sufficiently supported to justify bringing into play further steps of the criminal process. ***Id.*** at 396.[5]

A prosecutor has broad discretion in determining whether to charge an accused, what offense to charge, and under which statute to charge. ***State v. Krueger***, 224 Wis. 2d 59, 68, 588 N.W.2d 921 (1999). Checks may be placed upon a prosecutor's charging decision "[o]nly where there has been an aura of discrimination." ***State v. Annala***, 168 Wis. 2d 453, 473, 484 N.W.2d 138 (1992) (alteration in original; citation omitted). None is seen here. Beverly's theft of $500 or less from a financial institution under WIS. STAT. § 943.81 is a Class I felony because he had two prior felony convictions within five years for violations of WIS. STAT. § 943.23(2). *See* WIS. STAT. § 943.91(2). We do not follow his logic that he should have been charged with misdemeanor theft from a person.

Beverly complains that the prosecutor purposefully mischaracterized the bank teller as fearful. In the interview with an investigator she laughed or giggled at times, said she thought Beverly's disguise looked "silly," said she pressed the alarm button several times and held back money in her cash drawer, instead "fluffing" the bills she did give him to make them look like more. He contends these facts prove she was not frightened during the holdup, rendering the robbery charge baseless. They prove nothing. Her laughter could have been nervous laughter;

[5] Even if the court had dismissed the criminal complaint, it would have been without prejudice. *See* ***State v. Braunsdorf***, 98 Wis. 2d 569, 578, 297 N.W.2d 808 (1980) (trial court without power to dismiss criminal complaint with prejudice before jeopardy attaches absent violation of constitutional right to speedy trial). The prosecutor likely would have reissued a criminal complaint, either alleging additional evidence or charging Beverly with theft from a financial institution (not in excess of $500), which does not have a force element and is the crime to which he pled. *See* WIS. STAT. § 943.81. No issue of arguable merit could arise from this point.

an over six-foot-tall man wearing a woman's fur coat, a fur boa or scarf, pink or purple slippers and lipstick and blue eyeliner likely did look silly. Commendably, the teller was able to keep her wits about her and follow her training. None of these facts negate the reasonable inference that she was frightened or believed he could be armed. There is no arguable merit to Beverly's claims of misuse of prosecutorial discretion.

Beverly also complains that defense counsel was ineffective, mainly for not seeking interlocutory review of alleged errors at the preliminary hearing, allowing him to be bound over. A defendant claiming error at the preliminary hearing may obtain relief only before trial. ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). We thus address his claim in the context of counsel's effectiveness. To prove ineffective assistance of counsel, a defendant must show deficient performance and prejudice as a result of the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Failing to prove either prong defeats the entire claim. *See* ***id.*** at 697.

Our review of a circuit court's probable cause determination at a preliminary hearing is de novo. *See* ***State v. Johnson***, 231 Wis. 2d 58, 66, 604 N.W.2d 902 (Ct. App. 1999). Probable cause exists when there is a "believable or plausible account" that a felony was committed. ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). A preliminary hearing is not a preliminary trial or a full evidentiary trial on guilt beyond a reasonable doubt. *See* ***id.*** at 396. Rather, it is "intended to be a summary proceeding for the purpose of determining whether there is a reasonable probability that the defendant committed a felony and thus 'a substantial basis for bringing the prosecution and further denying the accused his right to liberty.'" *See* ***State v. Hooper***, 101 Wis. 2d 517, 544-45, 305 N.W.2d 110 (1981) (citation omitted). The hearing's focus is on "whether the facts and the reasonable inferences drawn therefrom support the

conclusion that the defendant probably committed a felony." ***Dunn***, 121 Wis. 2d at 397-98. It is not the forum for choosing between competing facts or inferences, or for weighing the State's evidence against evidence favorable to the defendant. ***Id.*** at 398. All that must be established to support the bindover is a believable account of the defendant's commission of a felony. *See* ***State v. Cotton***, 2003 WI App 154, ¶12, 266 Wis. 2d 308, 668 N.W.2d 346.

To establish threat of force, the State does not need to show "express threats of bodily harm." ***Johnson***, 231 Wis. 2d at 69. The State establishes threat of force if it shows that "the taking of the property is attended with ... threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a person to part with property for his or her safety." ***Id.*** (brackets and citation omitted). "The victim is not required to engage in an altercation with the assailant and subject herself to physical violence and possible injury before a defendant can be found to have committed the crime of robbery." ***Walton v. State***, 64 Wis. 2d 36, 44, 218 N.W.2d 309 (1974). There is no arguable merit to a claim that the bindover was not supported by a substantial basis.

We do not decide that counsel should have petitioned for interlocutory review of the bindover decision; we do decide that there was no prejudice in her decision not to do so. Leave to appeal may be granted when it will materially advance the termination of the litigation, clarify further circuit court proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance to the administration of justice. WIS. STAT. § 808.03(2). Inherent in the criteria for granting leave to appeal is the requirement that the petitioner demonstrate a substantial likelihood of success on appeal. ***Webb***, 160 Wis. 2d at 632. There is no arguable likelihood that this court would have granted leave to appeal. Counsel is not ineffective for not

pursuing a meritless strategy. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

As noted, Beverly criticizes defense counsel's allegedly inadequate discovery and investigation of the bank surveillance video footage that he claims was edited and tampered with. He also complains that she refused to respond to his communications, to help him, and to follow through on avenues he wanted pursued. We have carefully reviewed all of Beverly's submissions. We are satisfied that they have no merit. The test for deficient performance is not whether counsel defended the client in the manner the client desired or even whether, in hindsight, a different defense strategy might have better served the defendant. Beverly has not identified acts or omissions that were not the result of defense counsel's reasonable professional judgment. *See* ***Strickland***, 466 U.S. at 690. Beverly's right under the Sixth Amendment is to a competent lawyer, not to the best lawyer; he has not shown that counsel's acts or omissions were outside the broad range of professionally competent assistance or overcome the strong presumption that his counsel employed reasonable professional judgment in making all significant decisions. *See* ***id.***

Beverly also claims that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. If Beverly wishes to pursue this claim, he must file a petition for a writ of habeas corpus in this court. *See* ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). We will not review it on direct appeal. *See* ***id.*** at 512-13.

In Beverly's most recent submission to this court, he requests that we reconsider "an earlier ruling" denying his request to compel Wells Fargo to forward all digital surveillance video recordings it has in its data bank relative to date of the theft and to stay and remand the

matter to the circuit court for an evidentiary hearing to authenticate the video footage. The order on the "earlier ruling" was issued on October 30, 2017. A motion for reconsideration must be filed within twenty days after the date of the decision. WIS. STAT. RULE 809.24(1). The time may not be enlarged. WIS. STAT. RULE 809.82(2)(e). We also decline to remand for an evidentiary hearing. Beverly also adds a message to appellate counsel, Timothy T. O'Connell, asking that O'Connell forward him certain information and a transcript so that he can "continue [his] research of this case." This case has come to an end.

To the extent any issues were not expressly addressed in this decision, we assure Beverly that all were carefully considered. We are satisfied that none raise points of arguable merit. Our independent review of the record discloses no other potentially meritorious issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that all requests for relief are denied.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Beverly in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

*Sheila T. Reiff*
*Clerk of Court of Appeals*