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April 23, 2018

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

2017AP524-CRNM State of Wisconsin v. Christopher M. Fischer (L.C. # 2014CF1488)

Before Lundsten, P.J., Sherman and Fitzpatrick, 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).

Attorney Colleen Marion, appointed counsel for Christopher Fischer, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the

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

sufficiency of the evidence to support the jury verdict finding Fischer guilty of burglary as party to a crime; (2) whether there would be arguable merit to a claim of trial error; and (3) whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. Fischer has responded to the no-merit report, arguing that: (1) the jurors should be questioned to determine if they understood the verdict they reached, (2) the circuit court erred by allowing the State to introduce other acts evidence at trial; (3) his trial counsel was ineffective by failing to file an earlier speedy trial demand, failing to question State witnesses if any of them had seen Fischer exit the home during the burglary, and failing to discuss Fischer's trial testimony with him before he testified; and (4) the presence of deputies next to Fischer when he testified was prejudicial. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Fischer was convicted of burglary as party to a crime for a burglary that occurred in Dane County. The court sentenced Fischer to three years of initial confinement and four years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the conviction. A claim of insufficiency of the evidence requires a showing that "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 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). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including the testimony of

Fischer's co-actor that he and Fischer had committed the burglary together as part of a series of burglaries over several days, was sufficient to support the jury's verdict.

Next, the no-merit report addresses whether there would be arguable merit to a motion for a new trial based on trial error. Specifically, counsel addresses: (1) the defense motion to strike two jurors for cause; (2) the circuit court allowing other acts evidence of burglaries committed by Fischer and his co-actor in the days around the burglary charged in this case; (3) Fischer's objection to use of cell phone data evidence at trial; and (4) Fischer's request for the bystander jury instruction.

After jury voir dire, defense counsel moved to strike two prospective jurors for cause. However, the State indicated that it had planned to use two peremptory strikes for those jurors, and neither disputed prospective juror served on the jury. We agree with counsel's assessment that further proceedings on this issue would be wholly frivolous.

The State filed a pretrial motion to admit other acts evidence that Fischer and his co-actor committed two burglaries in Waukesha County and one burglary in Columbia County within several days of the burglary charged in this case. The State offered the evidence of the other burglaries to establish motive, opportunity, plan, and identity. The State argued the similarities between the burglaries and their nearness in time supported those proper purposes. *See* WIS. STAT. § 904.04(2)(a) (providing that other acts evidence is admissible only if offered for a proper purpose). Fischer objected to the use of the other acts evidence, arguing that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The circuit court determined that the evidence of the other burglaries was admissible for the proper purposes of showing plan, motive, and identity, and that the evidence was not unfairly prejudicial. The court

gave a cautionary instruction to the jury not to consider the evidence as character evidence. We agree that a challenge to the circuit court's exercise of discretion in admitting the other acts evidence would lack arguable merit. *See* ***State v. Oberlander***, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989) (circuit court's evidentiary ruling is reviewed for an erroneous exercise of discretion).

Fischer argues that the evidence of the other burglaries was a waste of time and needless presentation of evidence, and that it confused the jury. However, as set forth above, the circuit court exercised its discretion to admit the other acts evidence, and we discern no arguable merit to a challenge to that exercise of discretion.

The circuit court granted the defense motion to prevent the State from using any cell phone evidence. Defense counsel withdrew its request for the bystander instruction, explaining that defense counsel thought it would confuse the jury. We agree with counsel's assessment that these issues would lack arguable merit on appeal.

Fischer argues that his trial counsel was ineffective by failing to pursue an earlier speedy trial demand, question State witnesses if any of them had seen Fischer exit the home during the burglary, or discuss Fischer's trial testimony with him before he took the stand. We disagree that a claim of ineffective assistance of counsel would have arguable merit.

A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984). Fischer asserts that he asked his trial counsel to pursue a speedy trial demand in July 2015. However, nothing in the record or Fischer's no-merit response would support a claim that Fischer was prejudiced by counsel's failure to file a speedy trial demand at

that time. Counsel filed a speedy trial demand in October 2015, but then withdrew the request to allow Fischer the opportunity to review evidence. Nothing before us indicates the outcome of this case would have been different had counsel filed an earlier speedy trial demand.

We also conclude that it would be wholly frivolous to argue that trial counsel was ineffective by failing to ask the State's witnesses whether any of them had seen Fischer exiting the victims' home in Dane County. The State did not argue that any witness other than Fischer's co-actor had personally witnessed the burglary. Rather, the State presented testimony by Fischer's co-actor that he and Fischer committed the burglary in Dane County, testimony from police as to recovery of the items stolen from the home which were found in the co-actor's motel room, and testimony from the victim as to her return home after the burglary and the items that were missing. We discern no arguable merit to a claim that counsel was ineffective by failing to ask witnesses about whether they had seen Fischer exit the house, when a claim of eyewitness identification of the burglary was not part of the State's case.

We also conclude that it would be wholly frivolous to argue that counsel was ineffective by failing to discuss Fischer's testimony with him before he testified. Fischer testified in his own defense that he loaned his vehicle to his co-actor on the day of the Dane County burglary and that he was not present when the burglary occurred. He admitted participating in burglaries with his co-actor in Waukesha and Columbia County, but argued that he had no involvement in the Dane County burglary. Nothing before us indicates that Fischer was unprepared to testify, and Fischer has not explained how the outcome of the trial would have been different if he had any other preparation for his testimony.

Fischer contends that the jurors should be questioned as to why they reached a guilty verdict and whether they understood the elements of the offense. At sentencing, defense counsel stated that, after trial, one juror indicated a belief that Fischer was guilty as party to the crime of burglary based on evidence that Fischer loaned his co-actor his car and that they had later turned in change that was taken from the burglary. However, under WIS. STAT. § 906.06(2), "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's … mind or emotions as influencing the juror to assent to … the verdict … or concerning the juror's mental processes in connection therewith." Accordingly, there would be no arguable merit to further proceedings challenging the mental processes of the jury in reaching their verdict.

Fischer also argues that the defense was prejudiced when deputies stood by him when he testified. He asserts that the deputies were positioned near him as they had been positioned next to two witnesses who testified in jail clothing, which indicated to the jury that those witnesses were in custody. He argues that the jury was influenced against him by the positioning of the deputies. However, the transcript of the jury trial indicates that Fischer wore plain clothes at trial and that he took the stand before the jury entered the room so that it would not be apparent to the jury that he was in custody. Additionally, the court discussed with the defense where two deputies would be positioned in the courtroom during Fischer's testimony, and defense counsel indicated that he agreed that the positioning of the deputies was appropriate for courtroom

security.[2] We note that the jury was certainly aware that Fischer was the defendant in this case, and having deputies nearby as he testified would not necessarily have caused the jury to suspect that Fischer was in custody. *See* ***State v. Clifton***, 150 Wis. 2d 673, 682, 443 N.W.2d 26 (Ct. App. 1989) ("Deployment of courtroom security is not an inherently prejudicial matter because a jury may infer nothing from the presence of officers, or it may conclude that they are present to prevent outside disruptive elements."). Additionally, it is a matter within the circuit court's discretion to place deputies to control courtroom security. ***Id.*** at 682-83. Because the circuit court explained that it placed the deputies to control courtroom security, and nothing before us indicates that the placement of the deputies was prejudicial to Fischer, we conclude that any further proceedings on this issue would lack arguable merit.

Finally, the no-merit report addresses whether a challenge to Fischer's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that Fischer was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Fisher's character and criminal history, the seriousness of the offense, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced

[2] It is not entirely clear from the transcript where the deputies were standing. Fischer asserts two deputies stood near him. It appears from the transcript that one deputy sat near the courtroom door and one stood near Fischer. In any event, even if two deputies stood near Fischer as he testified, we discern no arguable merit to further proceedings on this issue.

Fischer to three years of initial confinement and four years of extended supervision. The sentence was within the maximum Fischer faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "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" (citation omitted)). We discern no erroneous exercise of the court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Colleen Marion is relieved of any further representation of Christopher Fischer in this matter. *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