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 IV/III

July 24, 2018

To:

Hon. William E. Hanrahan
Circuit Court Judge
Br. 7
215 S. Hamilton St., Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Joshua M. Bowland
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Vicki Zick
Zick Legal LLC
P.O. Box 325
Johnson Creek, WI 53038

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

Ian D. Humphrey
200 S. Jefferson Street
Verona, WI 53593

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

2015AP1059-CRNM State of Wisconsin v. Ian D. Humphrey (L. C. No. 2013CT676)

Before Seidl, J.[1]

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).

Counsel for Ian Humphrey filed a no-merit report concluding no grounds exist to challenge Humphrey's conviction for operating a motor vehicle while intoxicated ("OWI"), as a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

second offense. Humphrey filed a response raising several challenges to his conviction, and his counsel filed supplemental no-merit reports. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Humphrey with OWI and operating with a prohibited alcohol concentration ("PAC"), both as second offenses. The circuit court denied Humphrey's pretrial motion to suppress statements he made to law enforcement. After a trial, the jury returned verdicts finding Humphrey guilty of the crimes charged. Humphrey was convicted of OWI, second offense, and, out of a maximum possible six-month sentence, the circuit court imposed thirty days in jail.[2]

Upon our initial review of this matter, we noted that the judgment of conviction included a $200 DNA surcharge for Humphrey's misdemeanor conviction. When Humphrey committed his crime, the law did not contemplate a DNA surcharge for misdemeanor convictions. In June 2013, however, the legislature made the DNA surcharge mandatory at sentencing for all felony and misdemeanor convictions, *see* 2013 Wis. Act 20, §§ 2353-55, and the change was effective for all sentences imposed, rather than crimes committed, after January 1, 2014. *See* ***id.***, § 9426(1)(am). Ex post facto challenges were made to the mandatory surcharge where, as here, the offense occurred before January 1, 2014, but the sentencing occurred after that date.

After issuing an order identifying this possible issue, a second supplemental no-merit report informed this court that Humphrey had previously paid a DNA surcharge as part of a 2001 case. The question, therefore, remained whether there was arguable merit to a claim that the mandatory DNA surcharge is punitive in effect when applied to a defendant, such as Humphrey, who previously gave a DNA sample and paid a DNA surcharge. Although counsel suggested that the DNA surcharge in this case was automatically inserted in the judgment and would be "taken off," the judgment nevertheless reflected a $200 DNA surcharge. Thus, if it was determined that the surcharge was punitive under these facts, Humphrey would be entitled to have the surcharge removed from the judgment. We therefore placed this appeal on hold pending our supreme court's resolution of this possible issue.

In ***State v. Williams***, 2018 WI 59, ¶43, 377 Wis. 2d 247, 900 N.W.2d 310, our supreme court held that neither the intent nor the effect of the mandatory DNA surcharge is punitive. The court explained that the non-punitive purpose of the surcharge is not to cover DNA-analysis-related costs incurred for the specific conviction for which it is being imposed but, rather, to fund the costs associated with the DNA databank by charging those individuals necessitating its existence. ***Id.***, ¶29. Thus, "a defendant pays a surcharge for every conviction irrespective of whether his [or her] DNA profile already exists in the databank and whether he [or she] submits only one DNA sample." ***Id.*** In light of the ***Williams*** decision, any challenge to the imposition of the DNA surcharge in this case would lack arguable merit.

[2] The judgment recites that Humphrey was convicted of second-offense OWI and PAC, although the sentence imposed was for only the OWI offense. While WIS. STAT. § 346.63(1)(c) permits the charging of both OWI and PAC, it allows but a single conviction. Because this appears to be a clerical (continued)

Although the no-merit report does not specifically address it, we conclude that any challenge to the circuit court's denial of Humphrey's suppression motion would lack arguable merit. Humphrey moved to suppress inculpatory statements he made to law enforcement as being involuntary. Humphrey claimed he confessed to drinking beer and driving the vehicle only in response to what he perceived to be the police officer's threatening actions and only after the officer stated that whoever was driving would receive only a "citation."

We review a circuit court's decision resolving a motion to suppress statements under the following two-part standard of review: we will uphold the circuit court's factual findings unless they are clearly erroneous, but we review de novo whether those facts warrant suppression under the applicable law. *See* ***State v. Hampton***, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901. Our supreme court has held that a defendant's statements are voluntary if they are "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. In determining whether Humphrey's statements were voluntary, we consider the totality of the circumstances. ***Id.***, ¶38. This test requires balancing the personal characteristics of the defendant against the pressures and tactics law enforcement officers employed to induce the statement—pressures and tactics such as:

---

error, upon remittitur, the circuit court shall enter an amended judgment of conviction correctly reciting but one conviction for OWI, second offense.

> the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by
>
> the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id., ¶39.

At the suppression motion hearing, Verona police officer Shawn Van Heuklon testified that at approximately 2:20 a.m., he was on a meal break at Kwik Trip when Humphrey and Amanda Craven approached him with questions about removing a vehicle "out of a ditch or out of the roadway." Van Heuklon recounted that during this interaction, he smelled the odor of intoxicants on Humphrey's breath and inquired who was driving the vehicle. Van Heuklon testified that Humphrey showed no reluctance in admitting that he was the driver. Although Van Heuklon conceded he was wearing his uniform and carrying a firearm, he denied making any threats or promises to Humphrey during his investigation of the crash. In turn, Humphrey testified that he wanted to simply alert law enforcement about the crash, answer no questions, "get the vehicle problem resolved and go home." Humphrey further testified that he ultimately answered questions because the officer's "tone was aggressive," he "didn't feel comfortable," and he believed he would only get a "citation."

In denying the suppression motion, the circuit court determined that any allegation of police misconduct during the interaction with Humphrey was not supported by the evidence. The court found that no threats were made to Humphrey, and he was questioned in a "brightly lit public place"—not in a "back room or an alleyway … shielded from public view." The court also found that Humphrey is a "smart guy" who "is uncommonly unintimidated by law

enforcement." Therefore, the court determined that Humphrey's testimony regarding his "subjective expressions of fear … are plainly not credible." Nothing in the record would support a nonfrivolous challenge to the order denying Humphrey's suppression motion.

Any challenge to the jury's verdicts would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, Van Heuklon testified about his interaction with Humphrey at Kwik Trip—namely, that Humphrey reported the vehicle crash, that he had the "odor of an intoxicating beverage coming from his breath," and that he admitted to driving the vehicle. Van Heuklon further testified that Humphrey exhibited clues of intoxication during field sobriety testing and that an "intoximeter" of Humphrey's breath reported a value of .10 grams per 210 milliliters. The jury also saw squad car dash cam video of the field sobriety tests, during which Humphrey stated that he turned the steering wheel "too sharp," tried to adjust and hit the curb before the car "flipped over."

Both Humphrey and Craven testified that an unidentified man was driving the car and left the scene.[3] It is, however, the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from

[3] Craven testified she borrowed the car from her roommate's boyfriend.

the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Humphrey's conviction.

The no-merit report and Humphrey's response address whether: (1) the circuit court erred by giving the ***Allen***[4] instruction when, after four hours of deliberation, the jury indicated it could not agree; (2) the circuit court erred by giving the jury the option to continue deliberating past 9:00 p.m. or to return the following day; (3) the circuit court violated Humphrey's right to defend himself when it cautioned Humphrey against outbursts in the courtroom; and (4) Humphrey's trial counsel was ineffective by failing to move the trial judge to recuse himself for bias. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues have arguable merit.

Humphrey's response raises additional challenges to the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Humphrey must show both that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result

[4] The "Supplemental Instruction on Agreement," WIS JI—CRIMINAL 520 (Apr. 2001), is commonly referred to as the "***Allen*** charge" after ***Allen v. United States***, 164 U.S. 492 (1896). The instruction provides:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> You will please retire again to the jury room.

of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 687, 694 (1984).

Humphrey claims his trial counsel was ineffective by failing to present "two critical components of his case" at both the suppression motion hearing and at the trial. Specifically, Humphrey asserts that his past history of "assault by law enforcement officers" and the impulsivity caused by his bipolar disorder supported his claim that he confessed to driving the car to avoid a possible physical altercation with police. In a response attached to the supplemental no-merit report, trial counsel explained that he made a strategic decision to avoid presenting evidence of Humphrey's history of mental illness or his prior bad experiences with law enforcement, as he did not want to highlight evidence that he believed would make Humphrey less credible. Actions constituting a reasonable trial strategy by counsel, such as occurred here, are virtually unassailable. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. In any event, given the overwhelming evidence supporting both the order denying the suppression motion and the jury's verdicts, we are not persuaded there is any arguable merit to a claim that counsel's error, if any, in failing to present this information resulted in prejudice to Humphrey.

Humphrey also claims his trial counsel was ineffective by failing to move for a mistrial when the jury "asked for evidence that did not exist." During deliberations, the jury asked: "We would like to view the signed statement of confession by Humphrey if possible." The attorneys and the court, determining that no signed confession had been presented to the jury, agreed that the court should respond: "You must rely upon your recollection regarding this issue." Even assuming the jury was mistaken about the existence of a written confession by Humphrey, the jury heard testimony and saw squad car dash cam video in which Humphrey admitted he was the

driver. Any claim that trial counsel was ineffective by failing to move for a mistrial on this ground would therefore lack arguable merit. To the extent Humphrey claims his trial counsel was ineffective by failing to present a crash expert, there is no reasonable probability that a crash expert's testimony would have changed the outcome at trial given the evidence of record, including Humphrey's description of how the crash occurred. The record, therefore, does not support a nonfrivolous claim that counsel was deficient in this regard.

Humphrey additionally asserts his trial counsel was ineffective when he implied Humphrey and Craven had no significant relationship, as the jury had seen the two enter the courtroom together and go to lunch together. Humphrey contends his trial counsel made the defense look "dishonest for no good purpose." During closing arguments, trial counsel stated there was no evidence of "what exactly [Craven]'s current relationship is with [Humphrey]" while acknowledging that "one could assume that they're friends of some sort." Ultimately, defense counsel argued there was no evidence to show that Craven "personally has a stake in how this all turns out." It appears, therefore, that trial counsel's description of the possible relationship between the two was neither dishonest nor deficient. Rather, it was reasonable trial strategy for counsel to attempt to frame the relationship in a way that bolstered Craven's credibility. A review of the record and the no-merit reports discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[5] hearing.

Humphrey next argues the circuit court should not have accepted the jury's verdict, claiming it was the product of coercion brought on by both the ***Allen*** instruction and the court's

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

decision to give the jury the option to continue deliberating past 9:00 p.m. or to return the following day. *See* ***Allen v. United States***, 164 U.S. 492 (1896). As noted above, we agree with counsel's conclusion that any challenge to the circuit court's decisions to give the ***Allen*** instruction or to give the jury the option whether to continue deliberating that night would lack arguable merit. Therefore, Humphrey's derivative challenge to the verdict likewise lacks arguable merit. Humphrey also contends that the jurors appeared "hesitant, reluctant, frustrated and exhausted" when polled and their "demeanor" evinced "coercion." That the jurors' demeanor at nearly 10:00 p.m. differed from their demeanor on the morning of the trial does not support a nonfrivolous challenge to the verdict.

Humphrey also argues the prosecutor engaged in misconduct when he made opening and closing arguments, impeached Craven's testimony, and cross-examined Humphrey. We review allegations of prosecutorial misconduct in light of the entire record of the case. ***State v. Lettice***, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996). We will overturn a conviction for prosecutorial misconduct only if the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted). It is the defendant's burden to establish prosecutorial misconduct. *See* ***State v. Harrel***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978). Because Humphrey's complaints demonstrate nothing more than advocacy by the prosecutor, there would be no arguable merit to a claim that the prosecutor's conduct so infected the trial with unfairness "as to make the resulting conviction a denial of due process." ***Neuser***, 191 Wis. 2d at 136.

Humphrey also claims that cumulative error deprived him of a fair trial and justifies "discretionary reversal." We have determined that Humphrey's various challenges to his

conviction lack arguable merit. "Adding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offense; Humphrey's character; the need to protect the public; and the mitigating factors Humphrey raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. There is a presumption that Humphrey's sentence, which is well within the maximum allowed by law, is not unduly harsh or unconscionable, nor "so excessive and unusual" as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; *see also* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

An independent review of the record discloses no other potential issues for appeal. Therefore,

IT IS ORDERED that the judgment is modified and, as modified, affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Vicki Zick is relieved of further representing Humphrey in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals