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October 30, 2018

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

2016AP1260-CRNM State of Wisconsin v. Raymond Jones (L. C. No. 2014CF33)

Before Stark, P.J., Hruz and Seidl, 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).

Raymond Jones appeals from a judgment of conviction for being a party to the crimes of aggravated battery, false imprisonment, kidnapping, attempted first-degree intentional homicide, strangulation, and two counts of contributing to the delinquency of a child. Jones was also convicted of disorderly conduct. 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). Jones filed several responses to the no-merit report, and his counsel filed a supplemental no-merit report. *See* RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Jones, his wife (April Jones), Justin Bey, and Samantha McClellan were charged as co-defendants as parties to the crimes of aggravated battery, false imprisonment, kidnapping, attempted first-degree intentional homicide, and two counts of intentionally contributing to the delinquency of a child. Jones and Bey were charged as parties to the crime of strangulation, and Jones was also charged with disorderly conduct. The charges stemmed from the treatment of S.R. over a two-day period in March 2014. S.R. was an adult guest in Jones's home. When Jones's eleven-year-old daughter reported that S.R. had touched her buttock, Jones and the others began to mistreat S.R. S.R. was pushed up against a wall and choked, beaten several times, not allowed to leave the home, made to clean the bathroom with his toothbrush and endure being urinated and defecated on. He was then transported to a location where he was again beaten and left in frigid temperatures, and then, after several hours, picked up and taken to another location where he was left exposed to the elements, bloody and severely injured. The perpetrators intended that he die from either exposure to the cold weather or a wolf attack. Jones's two children, ages thirteen and eleven, were participants in the beatings at Jones's direction. S.R. survived and was found during the afternoon the day after he had been left to die. S.R. suffered skull and facial fractures, including fractures to his nose and left eye socket. He had a broken

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

jaw and two broken ribs. He suffered from hypothermia and had serious frostbite over a large portion of his body. Due to his frostbite, the toes on one foot were amputated.

Jones's case was severed from the other co-defendants for trial. On the day of the jury trial, Jones entered no-contest pleas to the charges of false imprisonment, both counts of contributing to the delinquency of a child, strangulation, and disorderly conduct. At the jury trial on the aggravated battery, kidnapping, and attempted first-degree intentional homicide charges, the evidence included testimony from S.R., Bey, Jones's two children, and a jail inmate who testified about things Jones had told the inmate about the crimes while the two were housed together in jail. April Jones was called by the defense. The jury found Jones guilty of the charges. Jones was sentenced to twenty-four years of initial confinement and sixteen years of extended supervision on the attempted homicide conviction. The prison and jail terms on the other seven convictions were imposed concurrent to the attempted homicide sentence.

We first address whether Jones's pleas were knowingly, voluntarily, and intelligently entered. The record shows that the circuit court utilized the plea questionnaire form during the colloquy to make the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.[2] The court referenced the constitutional rights listed on the plea questionnaire and briefly summarized what the right to a jury trial meant.

[2] The circuit court did not give Jones the deportation warning required by WIS. STAT. § 971.08(2). However, the failure to give the warning is not grounds for relief because the record establishes that Jones was born in the United States and Jones could not show that his plea was likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1, *overruled on other grounds by* ***State v. Reyes Fuerte***, 2017 WI 104, ¶36, 378 Wis. 2d 504, 904 N.W.2d 773.

Jones indicated that he understood his waiver of those rights by entry of his pleas. The elements of the offenses were listed on an attachment to the plea questionnaire, and the court solicited Jones's confirmation that he went over the elements with counsel before signing the questionnaire.[3] Jones also confirmed that he understood the maximum penalties for the crimes as set forth on the attachment to the plea questionnaire. No issue of merit exists from the plea taking.[4]

We next consider whether any issues of arguable merit arise from the jury trial. The no-merit report addresses the sufficiency of the evidence, whether the evidentiary rulings were an erroneous exercise of discretion or unfairly prejudicial, the denial of the defense's request to remove two jury panel members for cause, and the denial of a defense motion for a mistrial. This court is satisfied that the no-merit report properly analyzes these issues as being without merit, and we will not discuss them further.

[3] Although Jones was charged as a party to the crimes, the elements attached to the questionnaire did not explain party to the crime liability. The circuit court used the criminal complaint as a factual basis for the convictions, and the complaint indicated that Jones had directly committed the crimes to which he pled. Because Jones directly committed the crimes, explanation of party to the crime liability was superfluous. *Cf.* ***State v. Brown***, 2012 WI App 139, ¶1, 345 Wis. 2d 333, 824 N.W.2d 916. The court's failure to ascertain Jones's understanding of party to the crime liability did not render the plea colloquy defective.

[4] Jones's pleas to multiple counts resulted in the assessment of multiple mandatory DNA surcharges—one for each crime to which he pled no contest. That potential financial obligation was not addressed during the plea colloquy. This appeal was previously put on hold for a decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument in the Wisconsin Supreme Court. This appeal was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, 383 Wis. 2d 733, 916 N.W.2d 643. ***Freiboth*** holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. ***Id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

In our review of the record, we have considered whether any arguable issues arise from jury selection, opening statements, the colloquy with Jones regarding his waiver of the right to testify, jury instructions, closing arguments, and polling of the jury after receipt of the verdicts. No meritorious issues exist from these components of the jury trial.

The no-merit report addresses whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the propriety of the sentence, and this court will not discuss it further. We further conclude that the sentence does not violate the judgment of reasonable people concerning what is right and proper under the circumstances, and it cannot be deemed excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We turn to consider the issues suggested by Jones's responses.[5] The central themes of Jones's responses are that there was prosecutorial misconduct, he was denied the effective assistance of trial and sentencing counsel, and there was "judicial abuse" at sentencing.

Jones asserts that there was prosecutorial misconduct because the prosecutor did not offer Jones a plea bargain, the prosecutor interfered with spousal privilege, and the prosecutor improperly brought up old charges from another state during sentencing. As the supplemental no-merit report concludes, these claims lack arguable merit. No law requires a prosecutor to offer a favorable plea agreement, and the cases Jones cites—***Missouri v. Frye***, 566 U.S. 134

[5] The supplemental no-merit report states that it is filed only in response to Jones's response received December 28, 2017. Thus, the supplemental no-merit report does not respond to a large amount of material received from Jones on September 20, 2017, and the very late "'Motion' objecting to the No-Merit Report Filed By Appellant Counsel," received May 15, 2018.

(2012), and ***Lafler v. Cooper***, 566 U.S. 156 (2012)—also do not require it.[6] The prosecutor did not interfere with Jones's privilege to prevent his wife from testifying as to confidential communications, *see* WIS. STAT. § 905.05(1), because the prosecutor did not call Jones's wife as a witness.[7] The defense called Jones's wife as a witness and specifically waived the privilege. Although the prosecutor commented on Jones's prior convictions at sentencing, it was a proper argument for sentencing. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984) (the defendant's record of past criminal offenses is a sentencing factor). Contrary to Jones's claims, his prior convictions were not argued to the jury.

Jones also claims that there was prosecutorial misconduct because the prosecutor did not charge S.R. with child sexual assault. The prosecutor's discretionary decision not to charge S.R. has nothing to do with the prosecution of Jones.

Jones asserts prosecutorial misconduct because the State's witnesses lied in their trial testimony. It is Jones's opinion that the witnesses lied. The jury, not Jones, is the ultimate arbiter of credibility. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). There is no suggestion on this record that the prosecutor knowingly presented false evidence. There is no arguable merit to any of Jones's claims of prosecutorial misconduct.

[6] ***Missouri v. Frye***, 566 U.S. 134, 148 (2012), states "a defendant has no right to be offered a plea."

[7] Although the prosecutor subpoenaed April Jones, issuance of the subpoena did not violate the spousal privilege. Had the prosecution called her as a witness, it would have been necessary for the circuit court to decide if the privilege applied. *See* WIS. STAT. § 905.05(3)(a) (an exception to the confidential communication privilege exists when both husband and wife are parties to the action).

The supplemental no-merit report lays out the law applicable to a claim of ineffective assistance of counsel—including that it is the defendant's burden to show deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Jones asserts his trial counsel was ineffective because counsel was playing a video game on his cell phone during the trial. The record does not reflect that Jones's counsel was inattentive during the trial. In a letter dated April 18, 2017, from Jones to his trial attorney, Jones states that his counsel was playing a card game on his phone on the last day of trial.[8] The last day of trial consisted of the jury instructions conference, instructing the jury, and closing arguments. Counsel was actively responding to the circuit court's queries during the jury instructions conference. Even if counsel was on his phone during the prosecutor's closing argument, our review of the record does not reveal any obviously objectionable portions of the prosecutor's argument that were not objected to. Indeed, counsel made two objections during the prosecutor's arguments. Inattentiveness, if any, when instructions were read to the jury, was also not prejudicial, as the instructions were agreed upon by the parties and read verbatim to the jury. As the supplemental no-merit report concludes, no issue of arguable merit exists from the claim that counsel was playing a game on his cell phone on the last day of trial.

Jones claims his trial counsel was ineffective for refusing "to challenge the spousal privileges clause of the 5th Amendment [as] my wife wished not to testify." The defense called Jones's wife as a witness. It was a strategic choice. Counsel's strategic decision will be upheld as long as it is founded on rationality of fact and law. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28,

[8] Jones also attached correspondence he received from the Office of Lawyer Regulation which advised Jones that, as result of his grievance against trial counsel, counsel entered into a diversion agreement and that the diversion agreement was ultimately satisfied.

496 N.W.2d 96 (Ct. App. 1992). The strategy was reasonable because April Jones testified that, other than the time Jones put S.R. against the wall by his neck, she did not see Jones beat S.R. Moreover, the privilege applies only to confidential communications, not to April's observations. Even if the privilege applied, Jones's counsel acted reasonably in eliciting April's testimony that Jones told her he thought Bey had killed S.R. That testimony was evidence that tended to make Bey the principal actor.

In a conclusory fashion, Jones asserts his trial counsel was ineffective for not getting a competency evaluation done, for not challenging the admission of his statement to police that Jones claims was coerced, and for not presenting an expert witness to dispute the testimony of S.R.'s treating physician. These complaints have no footing in the record. Nothing in the record suggests that Jones's competency to proceed to trial was in question. An evaluation was done to see if a not guilty by reason of mental disease or defect (NGI) defense was supported. The evaluation did not support the defense.[9] There is nothing in the record that suggests that Jones's statement to police was coerced. The treating physician's testimony about S.R.'s injuries was objective and not subject to differing medical interpretation such that an opposing expert would have been beneficial to the defense.

New counsel was appointed for Jones for his sentencing. Jones claims his sentencing counsel was ineffective for commenting negatively on Jones's mental health and character during sentencing argument. Given the nature of the crimes and the cruel treatment of S.R., it

[9] Nothing in the record suggests that Jones's counsel should have pursued a second NGI defense evaluation. Trial counsel pursued, but was unable to produce, records from treatment Jones may have received years earlier in Utah. The no-merit report indicates that a postconviction investigation was done and that Utah records probably do not exist.

was reasonable strategy for counsel not to paint Jones as a stellar citizen and free from blame. It was reasonable for sentencing counsel to acknowledge some of Jones's bad behavior and character flaws. Sentencing counsel was not ineffective for his strategic argument.

Jones's response includes a reference to a defendant's right to waive venue. It may be that Jones believes a change of venue due to pretrial publicity about the case was warranted or, at a minimum, a jury should have been brought in from another county. The record does not suggest any excessive publicity about the case or Jones's participation in the crimes. Although a number of jurors indicated that they knew law enforcement witnesses and had heard something about the crimes, each juror acknowledged that he or she could be impartial and decide the case only on the evidence presented.

Finally, Jones argues that the sentencing judge violated the Establishment Clause in the First Amendment to the United States Constitution regarding separation of church and state by quoting the Bible at sentencing. The supplemental no-merit report addresses this claim and concludes that the sentencing court's quotation of a Bible verse did not amount to reliance on an improper factor in determining the sentence. We agree with the assessment that the quotation was in fair response to Jones's personal remarks at sentencing in which he attempted to mitigate his behavior because he had contacted his Christian motorcycle club for advice on how to punish S.R. for touching Jones's daughter. The sentence was not based on the quoted verse but on other appropriate facts and considerations. There is no arguable merit to a claim that the sentencing judge improperly invoked religious beliefs in determining the sentence.

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 Jones further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that attorney James Rebholz is relieved from further representing Raymond Jones 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