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June 7, 2019

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

2018AP1071-CRNM State of Wisconsin v. Nathan I. Gaustad (L.C. # 2017CM134)

Before Kloppenburg, 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).

Attorney Vicki Zick, appointed counsel for Nathan Gaustad, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 and *Anders v.*

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

California, 386 U.S. 738 (1967). Gaustad was sent a copy of the report and has not filed a response. I conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Upon consideration of the report and an independent review of the record, I conclude there is no arguable merit to any issue that could be raised on appeal.

Gaustad was charged with one count of disorderly conduct for an incident of “road rage.” He chose to proceed without an attorney and to take the case to trial. Several witnesses testified for the State. Gaustad did not testify. The jury found Gaustad guilty. The circuit court sentenced Gaustad to thirty days of jail time, consecutive to any previous sentence.

The no-merit report addresses two colloquies the circuit court used to ensure that Gaustad knowingly and voluntarily waived his right to counsel. I agree with counsel that there is no arguable merit to this issue. Gaustad unequivocally indicated his preference to proceed pro se, and the court ensured that Gaustad understood all the necessary information. *See State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). The record reveals no basis to argue that the court erred in concluding that Gaustad was competent to represent himself.

The no-merit report addresses whether the circuit court committed reversible error by declining to appoint stand-by counsel. I agree with counsel that there is no arguable merit to this issue. The primary purpose of stand-by counsel is to serve the circuit court’s interests, not the defendant’s interests. *State v. Lehman*, 137 Wis. 2d 65, 77-78, 403 N.W.2d 438 (1987). The court’s decision whether to appoint stand-by counsel is discretionary. *Id.* at 77. Here, the record discloses no basis to argue that the court misused its discretion in not appointing stand-by counsel.

The no-merit report addresses whether the circuit court erred in denying Gaustad's motion to dismiss on the ground of selective prosecution. In a related discussion, the no-merit report also addresses whether the circuit court misstated the law when the court told Gaustad that the police were free to use Gaustad's prior criminal record as a basis to charge Gaustad instead of another driver involved in the road rage incident. I agree with counsel that there is no arguable merit to these issues. Gaustad's selective prosecution claim was based on his assertion that it was unfair for law enforcement to prosecute him but not the other driver. However, Gaustad never established that the other driver's conduct was as egregious as Gaustad's conduct, or that Gaustad and the other driver were otherwise similarly situated. *See State v. Kramer*, 2001 WI 132, ¶18, 248 Wis. 2d 1009, 637 N.W.2d 35 (To establish a prima facie showing on a selective prosecution claim, "a defendant must show that he or she has been singled out for prosecution while others similarly situated have not ...").

The no-merit report addresses whether the circuit court erred by excluding on hearsay grounds an out-of-court statement of a passenger in Gaustad's vehicle. I agree with counsel that there is no arguable merit to this issue because Gaustad was unable to point to any applicable hearsay exception when the court gave him the opportunity to do so.

The no-merit report includes a section heading titled: "Whether the [circuit] court correctly informed Gaustad on how his prior convictions could be used against him at trial." The circuit court accurately informed Gaustad of the general rule that a witness may be asked how many prior convictions the witness has for impeachment purposes. *See WIS. STAT. § 906.09(1)*. However, counsel's discussion under this heading raises the issue of whether the court erroneously exercised its discretion in ruling that, if Gaustad chose to testify, he would not be allowed to explain that his convictions occurred many years ago without opening the door to

additional information relating to those convictions. I agree with counsel that there is no arguable merit to this issue. *See Nicholas v. State*, 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971) (explaining that, if a witness answers truthfully as to the number of prior convictions, “then no further inquiry may be made”).

Finally, the no-merit report briefly addresses whether there is arguable merit to any issue relating to jury selection; opening statements and closing arguments; the circuit court’s colloquy with Gaustad regarding Gaustad’s right to testify or not testify; and sentencing. I agree with counsel that the record reveals no arguable merit to any such issue.

This court’s review of the record discloses no other potential 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 Attorney Vicki Zick is relieved of any further representation of Nathan Gaustad 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