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**DISTRICT IV/I**

July 24, 2019

To:

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

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2018AP33-CRNM      State of Wisconsin v. Wayne M. Davidson (L.C. # 2017CF72)

Before Brash, P.J., Kessler and Dugan, 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).**

Wayne M. Davidson appeals a judgment convicting him after a jury trial of one count of battery, one count of disorderly conduct, and one count of unlawfully possessing a firearm as a convicted felon, all as a repeater. His appellate counsel, Vicki Zick, has filed a no-merit report

pursuant to WIS. STAT. RULE 809.32 (2017-18),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Davidson was informed of his right to file a response, but he did not respond. After considering the report and conducting an independent review of the record, we conclude that the judgment should be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses whether Davidson received constitutionally ineffective assistance because his trial counsel did not adequately put before the jury an alternate explanation for the loud sound heard by the victim's neighbor. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that such deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The no-merit report reviews the testimony that trial counsel elicited in support of trial counsel's closing argument that the sound could have been made by something other than a gunshot, such as a car backfiring or a metal padlock or flask, both of which were on the scene, being thrown against a garage door. Because counsel elicited testimony and made an argument to the jury regarding alternate sources for the noise, there would be no arguable merit to a claim that Davidson's trial counsel performed deficiently with regard to this issue.

The no-merit report next addresses whether Davidson received ineffective assistance of counsel because his trial counsel should have argued that the police never found any gunshot residue in Davidson's car despite the fact that the victim initially said that Davidson fired a gun out the window. Trial counsel asked Police Officer Jason Steinke during trial whether gunshot

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

residue was found in the car. Officer Steinke testified that no test was done for gunshot residue. During Davidson's counsel's opening statement, he argued that there was no physical evidence that a shot was ever fired. Because trial counsel raised the issue, there would be no arguable merit to a claim that Davidson received ineffective assistance of trial counsel due to his counsel's failure to raise the issue that no gunshot residue was found.

The no-merit report addresses whether the trial court erred in denying Davidson's mistrial motions. Two separate times during trial, State witnesses inadvertently gave testimony that the trial court had previously excluded. In each instance, the trial court gave curative instructions to the jury. Because the errors were relatively minor and the trial court instructed the jury to disregard the information, we conclude that there would be no arguable merit to an appellate argument that the trial court erred in denying Davidson's mistrial motions.

The no-merit report addresses whether there would be arguable merit to a claim that the trial court misused its discretion in sentencing Davidson. The trial court sentenced Davidson to eight years of imprisonment for unlawfully possessing a firearm, divided into four years of initial confinement and four years of extended supervision, to be served consecutively to a sentence Davidson was serving in a prior criminal case. The trial court also imposed two years for each of the enhanced misdemeanors, with eighteen months of initial confinement and six months of extended supervision, both to run concurrently to the gun possession conviction. The trial court considered appropriate factors and applied them to the facts of this case in a reasoned and reasonable manner. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, we conclude that there would be no arguable merit to an appellate challenge to the trial court's exercise of sentencing discretion.

Our review of the record discloses no other potential issues for appeal. Accordingly, we accept the no-merit report, affirm the conviction, and discharge appellate counsel of the obligation to represent Davidson further in this appeal.

Upon the foregoing reasons,

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 from further representing Wayne M. Davidson in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

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