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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

September 25, 2019

To:

Hon. Guy D. Dutcher
Circuit Court Judge
Waushara County Courthouse
209 S. Saint Marie St.
Wautoma, WI 54982

Marcella De Peters
Law Office of Marcella De Peters
PMB #318
6650 W. State St.
Wauwatosa, WI 53213

Melissa M. Zamzow
Clerk of Circuit Court
Waushara County Courthouse
209 S. Saint Marie St. P.O. Box 507
Wautoma, WI 54982-0507

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

Scott Chester Blader
District Attorney
P.O. Box 490
Wautoma, WI 54982-0490

Travis L. Petersen 160842
Columbia Correctional Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2018AP1568-CRNM State of Wisconsin v. Travis L. Petersen (L.C. # 2013CF38)

Before Blanchard, Kloppenburg and Nashold, 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 Marcella De Peters, appointed counsel for Travis Petersen, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

would be arguable merit to a challenge to: (1) the circuit court's decision allowing the State to introduce expert testimony by a forensic podiatrist; (2) the sufficiency of the evidence to support the jury verdict; (3) the sentence imposed by the court; or (4) the court's order denying Petersen's postconviction motion to vacate the DNA surcharge. Petersen has responded to the no-merit report, arguing that: (1) the evidence was insufficient to support the jury verdict; (2) the crime scene was not adequately secured during the police investigation; (3) a State's witness testified with hopes of leniency in his own criminal case and the prosecutor failed to disclose to the jury letters between the prosecutor and the witness's attorney; (4) the State improperly introduced a photograph of a psychology book located in Petersen's apartment and used it to prejudice the jury; (5) the forensic podiatrist was provided too many photographs; and (6) the DNA surcharge was improperly imposed. 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.[2] Accordingly, we affirm.

Petersen was charged with first-degree intentional homicide based on the death of Robert Kasun at the Mount Morris Motel. According to the criminal complaint, Kasun was found dead in his motel room on March 6, 2013, with injuries police believed were consistent with a

[2] This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in ***State v. Trammell***, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). The order noted that here, at trial, jury instruction WIS JI—CRIMINAL 140 was given to the jury, and that the supreme court granted review in ***Trammell*** to address whether the holding in ***State v. Avila***, 192 Wis. 2d 870, 532 N.W.2d 423 (1995)—that it is "not reasonably likely" that WIS JI—CRIMINAL 140 reduces the State's burden of proof—is good law; or whether ***Avila*** should be overruled on the ground that it stands rebutted by empirical evidence. The supreme court has now issued a decision in ***Trammell***, holding "that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

physical altercation. An autopsy indicated that Kasun had suffered blunt force trauma that fractured his orbital bones, a portion of his skull, and ten rib bones, and severed his aorta.

Police made contact with Petersen, who was staying in the motel room next to Kasun's. Petersen admitted to police that he had been drinking beer with Kasun in Kasun's room on the afternoon of March 5, 2013, but asserted that he left Kasun's room around 3:30 p.m., and denied hurting Kasun. Further investigation by law enforcement revealed bloody footprint evidence in Kasun's room that appeared to have been left by a person not wearing shoes. It also revealed bloody footprint evidence in Petersen's room. Police obtained photographs of Petersen's feet, and believed that the footprints from both rooms were consistent in size and shape with Petersen's feet. An analysis by the Wisconsin State Crime Lab indicated that blood evidence retrieved from a rug in Petersen's room belonged to Kasun.

Prior to trial, the State moved to admit expert testimony by a forensic podiatrist comparing a bloody footprint retrieved from Kasun's room to Petersen's footprint. Petersen objected to the expert testimony under WIS. STAT. § 907.02. The circuit court held an evidentiary hearing, at which the forensic podiatrist testified. At the conclusion of the hearing, Petersen argued that the forensic podiatrist's opinion should be admitted as lay, rather than expert, testimony. Petersen argued that much of the testimony by the podiatrist to explain similarities between the crime scene footprint and Petersen's footprint could be provided by a lay witness. He argued that there was an insufficient scientific foundation for the podiatrist to testify as an expert that the footprints were a "match." The court determined that the expert testimony was admissible.

At trial, the State's evidence included testimony by the investigating officers; expert testimony as to the footprint and blood evidence recovered from Kasun's and Petersen's motel rooms; expert testimony as to the extent of Kasun's physical injuries that caused his death; and testimony by an inmate housed with Petersen in jail who claimed that Petersen had admitted to him that he killed Kasun. Relying on that evidence, the State argued that Petersen and Kasun had an altercation in which Petersen beat Kasun to death and then returned to his own room. Petersen's attorneys argued that Petersen had entered Kasun's room at some point after Kasun's death on March 5, 2013, and had found Kasun's dead body, but that Petersen had been too intoxicated to contact police. They argued that Petersen lied to police when he stated that he had not returned to Kasun's room, and then maintained that lie throughout the investigation. The jury returned a guilty verdict. The court sentenced Petersen to life in prison without the possibility of release to extended supervision. Petersen challenged the imposition of the DNA surcharge, and the court denied the motion.

The no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision allowing the State to introduce expert testimony by a forensic podiatrist. We agree with counsel that this issue lacks arguable merit.

Under WIS. STAT. § 907.02, expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," provided that "the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." The court's function in deciding whether to admit expert testimony "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***State v. Giese***, 2014 WI App 92, ¶18, 356

Wis. 2d 796, 854 N.W.2d 687. "The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Id.***, ¶19. This court upholds a circuit court's discretionary decision to admit expert testimony "if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record." ***State v. Smith***, 2016 WI App 8, ¶4, 366 Wis. 2d 613, 874 N.W.2d 610 (2015) (quoted source omitted).

The circuit court determined that the proposed testimony was relevant and the product of reliable principles and methods, and that the podiatrist applied the science in a reliable manner. The court also determined that the podiatrist was qualified as an expert in forensic podiatry based on his experience, publications, and leadership in the field. A challenge to the court's exercise of discretion in admitting the evidence would be wholly frivolous.

The no-merit report and response address 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 lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that this standard has been met here. The evidence at trial, set forth above, was sufficient to sustain the jury's verdict. *See* WIS. STAT. § 940.01(1)(a) (first-degree intentional homicide committed by causing the death of another human being with the intent to kill that person or another).

Petersen argues that the evidence was insufficient because, he contends, the State established only that there was a possibility that Petersen killed Kasun. He argues that the jury was allowed to theorize based on that mere possibility in reaching its verdict. However, we must

affirm a jury verdict "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." ***Poellinger***, 153 Wis. 2d at 507. Our "review of the sufficiency of evidence to support a conviction is the same whether the evidence presented at trial is direct or circumstantial." ***Id.*** at 503. Thus, an argument that the evidence was insufficient because the jury drew inferences from the evidence to find Petersen guilty would lack arguable merit.

Petersen also argues that the evidence was insufficient because there was no x-ray evidence supporting the autopsy results and because there was no evidence establishing the time of death. These contentions lack arguable merit. The expert testimony as to the results of the autopsy thoroughly explained how the autopsy results were reached, and nothing before us would support a non-frivolous contention that x-ray evidence was required to support the results. As to time of death, "the State need not prove that the defendant committed the charged offense on the precise date alleged if the evidence shows that the offense was committed on a date near the date alleged." ***State v. Dodson***, 219 Wis. 2d 65, 86, 580 N.W.2d 181 (1998). Thus, the lack of exact time-of-death evidence did not render the evidence insufficient. To the extent that Petersen argues that time-of-death evidence was required to establish who last saw Kasun alive, we reject that contention as wholly frivolous. As set forth above, there was sufficient circumstantial evidence to sustain the jury's verdict that Peterson was the one who killed Kasun on or around March 5, 2013.

Petersen also argues that the crime scene was not secured during the investigation. He contends that Kasun's motel room was not taped off and that investigators walked into Kasun's room and then Petersen's room without protective covering for their shoes, and thus may have tracked blood between the rooms. Petersen contends that investigators transferred blood out of

Kasun's room onto the doormat in front of the room, and that Petersen then walked in front of that room to the dumpster and back into his own room, which Petersen believes explains how Kasun's blood was transferred into Petersen's room.

Because this argument was not raised at trial, it would need to be raised, if at all, under the rubric of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (we address claims of error that were not raised in the circuit court under the rubric of ineffective assistance of counsel). Thus, Petersen would need to establish that his counsel performed deficiently by failing to argue that the bloody footprint evidence was transferred by investigators and that Petersen was prejudiced by his counsel's failure to pursue that argument. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and also that the deficient performance prejudiced the defense). Here, however, a claim of ineffective assistance of counsel on this basis would be wholly frivolous. Investigators explained at trial how the crime scene was secured and that their procedure was to always wear protective shoe coverings when entering a crime scene. Additionally, the testimony at trial established that the blood in Kasun's room had already dried by the time investigators arrived. Moreover, Petersen does not explain how any transfer of blood by investigators could have resulted in bloody footprints made by sock-clad feet in both rooms that were matched by the forensic podiatrist to Petersen's footprint. Thus, any argument that Petersen's counsel was ineffective by failing to pursue this issue would lack arguable merit. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (claim of ineffective assistance of counsel for failing to pursue argument must show that the argument would have succeeded).

Petersen also argues that the witness who testified that Petersen admitted killing Kasun testified against Petersen with hopes of leniency in his own criminal case. However, defense counsel elicited from the witness that he told detectives that he hoped for leniency when he provided information about Petersen. Thus, that information was provided to the jury. Petersen also contends that the prosecutor had an obligation to disclose communications between the prosecutor and the witness's attorney in which the State took the position that it would take into account the witness's cooperation and the weight of his testimony during resolution of the witness's cases. Petersen points out that the prosecutor elicited testimony from the witness that the witness had not received any deals in exchange for his testimony. He argues that the prosecutor had an obligation to inform the jury as to the possibility of leniency for the witness for his testimony. However, in the letters Petersen attached to his no-merit response, the prosecutor stated that, while he would take the witness's cooperation and the weight of his testimony into consideration during resolution of the witness's cases, he could not make any promises or provide any consideration in exchange for the witness's testimony. Thus, the letters were consistent with the witness's testimony that he asked for leniency but that he did not receive any deals in exchange for his testimony.[3] The prosecutor did not have an obligation to present evidence of the letters that were consistent with the witness's testimony. This issue lacks arguable merit.

[3] Petersen notes that the witness testified that he was unaware of any letters between the prosecutor and his counsel. Whether or not the witness was ever aware of the actual letters, nothing in the letters contradicted his testimony that he asked for leniency, but did not get any deals in exchange for his testimony.

Petersen also contends that the prosecutor improperly displayed a photograph of an abnormal psychology book located in Petersen's motel room and improperly referenced the book in closing arguments to prejudice the jury. The prosecutor reminded the jury that the book was called "Abnormal Psychology. The Problem of Maladaptive Behavior." The prosecutor stated, "Use your common sense and better judgment. Who has a book like that laying around? There is [a] strong suggestion that Mr. Petersen himself knew his own problems." The court sustained the defense's objection to that statement. And, as Petersen acknowledges, the court issued a curative statement directing the jury not to consider the book as indicating anything disparaging about Petersen's character. The jury is presumed to have followed the curative instruction. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). This issue lacks arguable merit.

Petersen also asserts that the forensic podiatrist was provided too many photographs. However, Petersen does not explain what argument could be raised on appeal based on the number of photographs provided to the forensic podiatrist. We discern no arguable merit to this issue.

The no-merit report addresses whether a challenge to Petersen's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] 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 Petersen 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 Petersen'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 Petersen to life in prison without the possibility of release to extended supervision. The sentence was authorized by law 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.

Finally, both the no-merit report and response address whether there would be arguable merit to a challenge to the circuit court's order denying Petersen's postconviction motion to vacate his DNA surcharge. The court did not state at the sentencing hearing that it was imposing the DNA surcharge, which was discretionary at the time Petersen committed his offense. *See* WIS. STAT. § 973.046(1g) (2011-12). However, the surcharge was added to the judgment of conviction by the clerk of the circuit court because, at the time of sentencing, the surcharge was mandatory. *See* WIS. STAT. § 973.046(1r)(a) (2013-14). Petersen argued in his postconviction motion that the surcharge should be vacated because the imposition of the mandatory DNA surcharge, which was discretionary when the crime was committed, violated the ex post facto prohibition because Petersen had already given a DNA sample. *See* ***State v. Williams***, 2017 WI App 46, 377 Wis. 2d 247, 900 N.W.2d 310. He also argued that, while the court could have imposed the surcharge as an exercise of discretion, it failed to do so here. The court denied the motion on grounds that the supreme court held in ***State v. Williams***, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373, that the imposition of the DNA surcharge in this scenario is not a

violation of the ex post facto prohibition. We agree with no-merit counsel that a challenge to the court's decision would lack arguable merit.

Petersen maintains that the surcharge was improperly imposed because the circuit court never stated that it was imposing the surcharge. However, under WIS. STAT. § 973.046(1r) and ***Williams***, imposition of the DNA surcharge at the time of Petersen's sentencing was mandatory. Accordingly, the surcharge was required to be included on the judgment of conviction by the clerk of the circuit court.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction or the order denying postconviction relief. 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 and order are affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Travis Petersen 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