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November 26, 2019

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

2016AP2308-CRNM State of Wisconsin v. Shawn W. Tomow (L. C. No. 2013CF1963)

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).

Counsel for Shawn Tomow has filed a no-merit report concluding there is no arguable merit to any issue that could be raised on appeal from a judgment of conviction and

postconviction order entered after a jury found Tomow guilty of three felonies.¹ Tomow has responded, and counsel submitted a supplemental no-merit report. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), no issues of arguable merit appear. Therefore, the judgment and order are summarily affirmed. See WIS. STAT. RULE 809.21 (2017-18).²

Tomow was charged with three felonies: (1) first-degree intentional homicide, by use of a dangerous weapon; (2) attempted armed robbery with use of force; and (3) possession of a firearm by a felon. The charges stemmed from the attempted robbery of an individual while he was allegedly soliciting a prostitute named Lisa Goodman in a Milwaukee alley. Goodman testified at Tomow's trial that she had been a crack cocaine addict for thirty years and her prostitution paid for the crack cocaine. She further testified that Tomow, whom she had known for about three years, was her favorite crack dealer.

Goodman testified that the victim encountered her on the street in the early morning hours and she got into his vehicle. Goodman then testified:

We talked about what we were going to do. I said, Well I'm hungry. I want some crack and then take care of his business. So we went to the bank. And then I was calling like it was between [Tomow] and another person who didn't want to show up. It was probably about a bazillion calls. And then [Tomow] is the one that showed up. So we went to go meet him.

¹ Pursuant to our order dated February 28, 2019, we held this matter in abeyance pending a decision by our supreme court in *State v. Trammell*, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564, which was decided on May 31, 2019.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Goodman testified that both vehicles pulled into the same alley. She stated, "I got out and he was like, oh, I'm coming over to your car." Tomow entered the back seat of the victim's vehicle, pointed a "big gun" at the victim's head, and demanded money. The victim "went to reach for the gun," and Tomow pulled the gun back. The gun fired, and the victim exited the driver's door. Tomow also exited the vehicle and said, "You think this is a game, Mother Fucker?" Then "two shots were fired outside the car." Goodman testified that Tomow "took off" in his car, and she then ran out of the alley "as fast as [she] could" because she was scared. She testified that a person living in a nearby house took her back to the crime scene as she "was going to call 911." Goodman said she saw the victim's cell phone on the ground and "a bullet hanging in his head here." Goodman called 911 using the victim's phone. She testified that she did not identify Tomow to the 911 dispatcher because she was a "wreck." She initially denied that she had used the term "Mexican" to describe the shooter to the 911 dispatcher, but she eventually conceded that after a tape of the 911 call was played at trial in which she told the dispatcher that she believed the shooter was "Mexican."

On cross-examination, Goodman said she knew Tomow's family, as she had stayed with them for a period of time, and that he was Native American. She also described how she had been using drugs throughout the day of the homicide and had been without sleep the prior three or four days.

Richard Moreno testified that he had been a friend of Tomow's for about eight months prior to the murder. Moreno stated that he also supplied crack cocaine to Goodman, whom he knew from his relationship with Tomow. Moreno stated that he and Tomow had met up earlier in the day, and they were making "stops" to purchase marijuana or sell crack cocaine. Moreno testified that they were using "weed" and Percocet the day of the homicide and also that Tomow

had a revolver. Moreno testified that Tomow was emotional that day because “he was dealing with a lot, and just a lot of drugs.”

Moreno testified that at some point early in the morning, Goodman called to buy crack cocaine. He rode with Tomow to the alley behind 14th and Hayes Streets where Tomow got out of his car and walked toward the headlights of another vehicle. Moreno testified that within about a minute he heard shots, but he never left Tomow’s vehicle. Tomow then returned to his vehicle, and they left the scene. Moreno testified that when interviewed by police, he initially denied any crime scene involvement because he did not want to “snitch” on Tomow. He said that when they were locked up next to each other in jail, Tomow told him to keep his mouth closed or Moreno’s mother might get hurt.

Thomas Tomow testified that Tomow was his “little cousin.” Thomas testified that he was from the same neighborhood as Tomow and Goodman. He also stated that Goodman was a prostitute involved in drugs who had suggested they “would take one of her clients either to an alley or garage, a dark area, and then basically have us run up to them and rob ’em.” However, he testified neither he nor Tomow ever did that, and “we all thought it was silly.”

A DNA analyst testified that swabs recovered from the inside of the victim’s vehicle excluded Moreno. She said that at different points in the vehicle, the testing both excluded Tomow and was inconclusive as to whether Tomow was a possible contributor.

Tomow testified in his own defense that he had been selling drugs for fifteen years—since he was ten years old—and that he worked with three others as a “team.” He described Goodman as his “number one customer” and testified that she bought crack cocaine from him every day. He further described how Goodman would do a “lick, which would be a robbery” of

a customer, and “she would call me up and say, ‘It’s Christmastime,’ and meaning usually she had people[s’] debit cards or large amounts of cash and would take me shopping and basically do whatever I wanted.”

Tomow testified that he got up the day of the homicide and “rolled a blunt.” Tomow also testified that he and Moreno were doing Percocet for hours before the homicide. However, Tomow testified Goodman lied about him being in the alley and, further, that Goodman mistook him for Moreno. He also testified that both Goodman and Moreno lied about Tomow jumping into the back of the victim’s vehicle, and he testified “I’m not in that alley, sir.” Tomow testified that it was Moreno that “went and took care of her needs.” He also said Moreno was lying about Tomow having a revolver on the day of the homicide, and that he never told Moreno to “keep his mouth shut.”

Tomow was found guilty by a jury of all three counts. The circuit court imposed a life sentence without eligibility for extended supervision on the homicide count, and five years’ initial confinement and five years’ extended supervision on counts two and three, concurrently.³

The no-merit report addresses potential issues regarding: the sufficiency of the evidence; whether Tomow’s trial counsel’s performance was reasonable; whether the circuit court properly exercised its sentencing discretion; and whether the court properly granted the postconviction motion to partially vacate the DNA surcharges. Upon our independent review of the record, we

³ The circuit court subsequently vacated DNA surcharges for counts two and three. *See State v. Scruggs*, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 746.

agree with counsel's description, analysis, and conclusion that any challenge to these issues would lack arguable merit.

Tomow's response to the no-merit report argues that he is Native American and that the State's peremptory challenge to the only Native American prospective juror was improper under *Batson v. Kentucky*, 476 U.S. 79 (1986).⁴ Tomow also argues his trial counsel was ineffective for not objecting to the peremptory strike, for ineffectively cross-examining Goodman and Moreno, and for failing to seek a competency evaluation of Tomow. Tomow also argues he was entitled, as a matter of law, "to a DNA testing that was conclusive at public expense." According to Tomow, "Further testing can not only more conclusively exclude Mr. Tomow from the crime scene evidence, it might also determine the identity of the actual perpetrator [sic]."

Regarding the challenged peremptory strike, the record fails to establish that the prosecution, defense counsel, or the circuit court were aware during voir dire that the prospective juror was in fact Native American. Tomow concedes the juror's "only discussion during voir dire" was the following: "Prospective juror: My name is []. I live on the east side of Milwaukee. No spouse, no kids. I'm an event coordinator at the Milwaukee Art Museum. No prior jury service, and I like dog walks, yoga, and bars."

Tomow insists in his response that "defense counsel was aware" that the juror was Native American, but this assertion is conclusory. Indeed, Tomow does not indicate in the response to the no-merit report how defense counsel knew the prospective juror was

⁴ Tomow uses the phrase "abuse[d its] discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase with "erroneous exercise of discretion." See, e.g., *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

Native American, and the assertion is without support in the voir dire transcript. In any event, the record fails to establish any evidence that members of Tomow's race were purposely excluded. *See id.* at 85-86.

Tomow fails to identify in what respect his trial counsel's cross-examination of Goodman and Moreno was deficient, other than to contend in conclusory fashion that trial counsel did not adequately "impeach their credibility." Our independent review of the record reveals that the cross-examination of those witnesses was neither deficient nor prejudicial. The record also fails to establish a basis to conclude trial counsel was deficient for failing to seek a competency evaluation of Tomow. Tomow argues that Moreno testified Tomow "was going through bouts of crying spells, and feeling a lack of self-worth; Lisa Goodman testified that defendant had split personalities, the Shawn persona was caring and considerate, while the [other] persona was mean and violent." Regardless, there is no basis in the record to conclude that Tomow lacked the present capacity to understand the nature of the proceedings, or to assist in the preparation of his own defense. *See State v. Byrge*, 2000 WI 101, ¶49, 237 Wis. 2d 197, 614 N.W.2d 477.

Finally, Tomow's contention that he was entitled to a DNA test that was conclusive, at public expense, improperly assumes that further DNA testing would be conclusive. Tomow provides no factual or legal basis to believe further DNA testing was required or that it would be conclusive in excluding him from the crime scene or further identifying a different "perpetrator."

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney James A. Rebholz is relieved of further representing Shawn Tomow 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