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December 6, 2019

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

2019AP770-CRNM State of Wisconsin v. Tyrone Montrell Lewis (L.C. # 2017CF246)

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).

Tyrone Montrell Lewis appeals from a judgment of conviction for party to the crime of robbery with use of force, three counts of felony bail jumping, misdemeanor theft, and fleeing or eluding an officer as a motor vehicle operator. He also appeals from an order denying his postconviction motion for sentence modification. Lewis's appellate counsel has filed a no-merit

report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Lewis filed a response to the no-merit report. *See* RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, the judgment and order are summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Over a four-day period, three different Speedway gas stations reported that a man grabbed and stole cartons of cigarettes. Immediately after the third robbery, a traffic stop was conducted of the car seen leaving the gas station. After the driver of the vehicle exited the car, Lewis, who was a passenger in the car, moved to the driver's seat and drove off. Lewis drove at excessive speeds to elude the police and eventually crashed the car. Lewis was charged with three counts of felony bail jumping, three counts of robbery by use of force, fleeing or eluding an officer, and second-degree recklessly endangering safety.

Pretrial proceedings included a competency evaluation. Lewis did not challenge the doctor's report that he was competent to stand trial. Lewis was convicted following a bench trial of party to the crime of robbery with threat of force, three counts of felony bail jumping, misdemeanor theft, and fleeing or eluding an officer. Lewis was sentenced to concurrent and consecutive terms totaling five years and nine months of initial confinement and five years of

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

extended supervision.[2] Lewis filed a postconviction motion requesting that he be made eligible for the substance abuse program (SAP) on the ground that the sentencing court was mistaken in believing that Lewis was statutorily ineligible for the program. The trial court denied the postconviction motion concluding that it did not have a misunderstanding as to Lewis's statutory eligibility and that, under the court's own criteria, it determined not to make Lewis eligible for early release programming.

The no-merit report addresses the potential issues of whether the evidence at trial was sufficient to convict Lewis, whether Lewis could be convicted of robbery by threat of force under WIS. STAT. § 943.32(1)(b) (robbery by threat of force) when the complaint charged a violation of § 943.32(1)(a) (robbery by use of force),[3] whether the trial court committed reversible error at the trial, whether Lewis was denied the effective assistance of trial counsel, whether his sentence was the result of an erroneous exercise of discretion or was unduly harsh or excessive, and whether his postconviction motion was properly denied. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further. We also have considered and rejected that any issue of arguable merit

[2] Lewis was sentenced to concurrent terms totaling three years of initial confinement and three years of extended supervision for robbery by use of force as party to a crime and the first bail jumping, a consecutive term of one year of initial confinement and one year of extended supervision for the second bail jumping, concurrent nine month terms in the house of corrections for theft and the third bail jumping to be served consecutive to the second bail jumping, and a consecutive term of one year of initial confinement and one year of extended supervision for fleeing or eluding an officer.

[3] Contrary to the trial court's oral pronouncement, the judgment of conviction states that Lewis was convicted of "robbery with use of force, § 943.32(1)(a)," rather than "robbery with threat of force, § 943.32(1)(b)." We direct that the trial court correct this scrivener's error in the judgment of conviction upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶29, 239 Wis. 2d 244, 618 N.W.2d 857. (Stating, "In Wisconsin, an unambiguous oral pronouncement of sentence controls over a written judgment of conviction.")

arises from the competency finding and the correction made to the amount of sentence credit on the judgment of conviction.

In his response, Lewis contends that a meritorious appeal can be brought on the ground that he was charged with robbery by use of force, a violation of WIS. STAT. § 943.32(1)(a); but, after the trial court found that no actual force was used, he was convicted of robbery with threat of force, a violation of § 943.32(1)(b). The no-merit report explains that, in ***Manson v. State***, 101 Wis. 2d 413, 423, 304 N.W.2d 729 (1981), the court held that § 943.32(1)(a) and (b) "define one offense and that the enumeration of the two kinds of conduct reflects different means of accomplishing the crime, not separate and distinct offenses." Thus, it is not error to have the jury or court consider either means of committing the crime of robbery. ***Manson***, 101 Wis. 2d at 430. Additionally, as ***State v. Cheers***, 102 Wis. 2d 367, 404-06, 306 N.W.2d 676 (1981), illustrates, a defendant's due process right to notice and opportunity to defend is not violated when the complaint or information only recites the language that the robbery occurred by use of force and the jury is charged to consider whether the robbery occurred by use of or threat of force.[4] Therefore, no issue of arguable merit exists from the robbery conviction.

[4] In any event, the information could have been amended to conform to the proof at trial, pursuant to WIS. STAT. § 971.29(2), which provides:

> At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.

(continued)

Having concluded that no issues of arguable merit exist for appeal, this court accepts the no-merit report, affirms the judgment and order, and discharges appellate counsel of the obligation to represent Lewis further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved from further representing Tyrone Montrell Lewis 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

Lewis would not have been prejudiced had the information been amended to conform to the proof offered at trial because WIS. STAT. § 943.32(1) defines only one crime. *See* ***State v. Nicholson***, 160 Wis. 2d 803, 806, 467 N.W.2d 139 (Ct. App. 1991) ("The trial court did not add an additional charge against Nicholson, it simply revised the information to conform with the proof that came out during the trial which is its prerogative.").