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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 I

January 6, 2020

To:

Hon. Jonathan D. Watts
Circuit Court Judge, Br. 15
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

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

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

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

Rick Darnell Johnson Jr. 615554
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2016AP1798-CRNM State of Wisconsin v. Rick Darnell Johnson, Jr.
(L.C. # 2013CF3784)

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).

Rick Darnell Johnson, Jr. appeals a judgment convicting him of five crimes: armed robbery as a party to a crime; attempted first-degree intentional homicide with use of a dangerous weapon as a party to a crime; possession with intent to deliver a controlled substance (heroin), between ten and fifty grams; and two counts of possessing a firearm as a felon. His appellate counsel, Marcella De Peters, has filed a no-merit report pursuant to WIS. STAT.

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

The charges against Johnson stemmed from a shooting incident in 2012. According to the complaint, when police responded to the scene they found an unconscious victim who was not wearing any pants. The victim had two gunshot wounds, one to the left side of his head and the second to his right shoulder. The victim told police that Johnson, who had a gun in his right hand, and Torrence Gayton approached him. The victim remembered being struck in the head with the gun and falling to the ground but did not remember anything after that except waking up in the hospital. A citizen witness told police that she saw two individuals beat the victim and told police that they went through the victim's pockets as they removed his shorts. As the witness called police, she heard two or three shots fired.

Another citizen witness told police that he saw two individuals confront the victim and ask "where's my money at?" The witness heard the victim state, "I don't have it right now." An argument ensued and one of the individuals punched the victim in the face, which caused him to fall. The two individuals continued to demand money before one of the individuals produced a gun and pointed it at the victim. The witness relayed to the police that he walked away from the immediate area and then heard three gunshots.

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

The State initially charged Johnson as follows: count one, armed robbery, and count two, attempted first-degree intentional homicide with use of a dangerous weapon, both as a party to a crime. The State subsequently amended the charges to include three more counts: count three, possession of a firearm by a felon; count four, possession with intent to deliver a controlled substance (heroin), between ten and fifty grams; and count five, possession of a firearm by a felon. The addition of counts four and five stemmed from a search warrant executed at Johnson's residence where police found, among other things, a gun and approximately twelve grams of heroin.

A jury found Johnson guilty of all the charges. The trial court sentenced Johnson to a cumulative sentence of thirty years of initial confinement and fourteen years of extend supervision.

This appeal follows. The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts. The report details the evidence that was presented at trial, which supports the jury's verdicts, and sets forth the applicable standard of review. We further conclude that no procedural errors occurred with respect to jury selection, the colloquy concerning Johnson's waiver of his right to testify, the jury instructions, and the arguments of counsel.[2] The report concludes with a discussion of whether the sentences imposed were the

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[2] This court 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). At issue in ***Trammell*** was the continued viability of jury instruction WIS JI—CRIMINAL, an instruction that was given in Johnson's case. The supreme court has since issued a decision in ***Trammell***, holding "that WIS WIS JI—CRIMINAL does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Consequently, there would be no arguable merit to pursue postconviction proceedings based on the use of jury instruction WIS JI—CRIMINAL 140 at Johnson's trial.

result of an erroneous exercise of discretion or can be considered excessive. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit and that no procedural trial errors occurred. We discuss them further only insofar as they relate to issues Johnson presents in his no-merit response.

In his response, Johnson presents the following issues: (1) whether his judgment of conviction incorrectly identifies the class of felony for attempted first-degree intentional homicide as Class A when it should be Class B; (2) whether his trial counsel was ineffective in a number of ways; (3) whether the trial court erroneously exercised its discretion by imposing disparate sentences; and (4) whether the trial court erred when it permitted the victim in this case to testify without first requiring that he be evaluated for competency.

As to the first issue Johnson raises, the corrected judgment of conviction in this matter, which was entered on July 23, 2014, properly designates his conviction for attempted first-degree intentional homicide as a Class B felony.[3]

Next, we consider some of Johnson's grounds for a claim that trial counsel was ineffective. A claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The claim must also show that "the deficient performance prejudiced

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[3] The original judgment of conviction did, however, improperly designate the crime as a Class A felony.

the defense"; that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.***

First, Johnson claims that trial counsel was ineffective for failing to move to suppress the gun and drugs that were recovered when police executed the search warrant in this matter. To support his position, Johnson points only to conflicting testimony that was presented at trial. Namely, Alexis Watson, the mother of Johnson's children, testified that when police arrived to execute a search warrant, she never told them that there was a gun beneath the mattress and heroin located in the bedroom at the residence. In contrast, a detective and a police officer who were involved in executing the search warrant testified that Watson directed the police to both items.

Johnson does not challenge the validity of the underlying search warrant itself and we do not discern a basis on which to do so from the record. Instead, Johnson focuses solely on the trial testimony related to consent. With a valid search warrant, however, the issue of consent becomes irrelevant. *See* WIS. STAT. § 968.10 (providing in part that a search of a place may be made and things may be seized when the search is made with consent *or* pursuant to a valid search warrant). There is no arguable merit to a claim of ineffective assistance of counsel on this basis.

Johnson also faults trial counsel for failing to object when the State increased the charges against him after he declined to enter a plea agreement. Johnson claims prosecutorial vindictiveness or overreaching because he views the State as punishing him for exercising his constitutional right to a jury trial.

"[I]t is a violation of due process when the [S]tate retaliates against a person 'for exercising a protected statutory or constitutional right.'" *See* ***State v. Johnson***, 2000 WI 12, ¶20, 232 Wis. 2d 679, 605 N.W.2d 846 (citation omitted). Thus, a presumption of vindictiveness applies when a court imposes a greater sentence after a successful appeal, or when a prosecutor increases the charges after a defendant secures a new trial. *See* ***id.***, ¶¶21-22. However, a similar presumption does not apply to a pretrial filing of increased charges. *See* ***id.***, ¶¶24-32. There is no arguable merit to a claim of prosecutorial misconduct, or related ineffective assistance of counsel, on this basis.

Next, Johnson argues trial counsel was ineffective for not obtaining and introducing phone records from the jail of calls between Gayton and Gayton's mother to impeach the testimony of Gayton's mother that she dropped Gayton and Johnson off in the area where the shooting occurred. Johnson claims that he was not dropped off by Gayton's mother and "it appeared that the only way she could have gotten the same exact matching information would have been from Gayton either through visitation or over the phone." Gayton testified that he could not remember getting a ride with his mother the night of the shooting or being dropped off.

Johnson's claims as to what the phone records would reveal are speculative at best. In any event, the testimony of Gayton's mother, which placed Johnson in the area where the shooting occurred, was cumulative given that both the victim and Gayton also placed him there. Therefore, even if Johnson could somehow show that trial counsel was deficient with regard to the speculative contents of the phone records, he would not be able to show prejudice. *See* ***Strickland***, 466 U.S. at 687. As such, there is no arguable merit to a claim of ineffective assistance of counsel on this basis.

In addition, Johnson contends that trial counsel was ineffective for not objecting "to the unqualified lay and expert testimony received from Police Lieutenant Herb Glidwell" concerning camera or photographic imaging of "a man wa[]ving a gun," "adjusting a gun," and further relating to the heroin found in the bedroom. We requested a supplemental no-merit report from counsel addressing whether Johnson could pursue an arguably meritorious claim that trial counsel was ineffective for not objecting based on ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), or on any other basis. Having reviewed the analysis and additional information provided in counsel's supplemental no-merit report, which need not be repeated here, we conclude there is no arguable merit to a claim of ineffective assistance of counsel on this basis.

Johnson goes on to challenge the disparity in the sentence that he received as compared to Gayton's sentence. For the charges of armed robbery as a party to a crime, attempted first-degree intentional homicide with use of a dangerous weapon as a party to a crime, and felon in possession of a firearm, which stemmed from the shooting incident, Johnson was sentenced to nineteen years of initial confinement and eight years of extended supervision. Pursuant to a plea agreement, Gayton was sentenced to four years of initial confinement and four years of extended supervision for his role in the crime, which was charged as attempted armed robbery as a party to a crime.

During its sentencing remarks, the trial court emphasized that Johnson was the shooter, despite the fact that he was prohibited from possessing a firearm, and highlighted the victim's grievous injuries. While "equality of treatment under the Fourteenth Amendment requires substantially the same sentence for substantially the same case histories, it does not preclude different sentences for persons convicted of the same crime based upon their individual

culpability and need for rehabilitation." ***Ocanas v. State***, 70 Wis. 2d 179, 186, 233 N.W.2d 457 (1975). Moreover, to constitute a denial of equal protection, the sentencing disparity either must be "arbitrary or based upon considerations not pertinent to proper sentencing discretion." ***Id.*** at 187. Johnson raises nothing, and our independent review reveals nothing, of that nature. We conclude there is no arguable merit to a claim based on sentencing disparity.

Lastly, Johnson argues that the victim should have been evaluated to determine whether he was competent to testify given the extent of his injuries. Johnson is wrong. Although the victim suffered serious injuries from this shooting incident and additionally testified that he previously was shot in the head in 2009, there is no indication in the record that this rendered him incompetent to testify. "Competency issues are … generally issues of credibility to be dealt with by the trier of fact in arriving at the decision on the merits." *See* ***State v. Dwyer***, 149 Wis. 2d 850, 855-56, 440 N.W.2d 344 (1989).

In his closing statement, Johnson's trial counsel highlighted the victim's severe vision problems and the fact that that he had been shot in the head prior to being shot in this case. The jury had the information it needed to assess the victim's credibility. There is no arguable merit to a claim that the trial court erred when it allowed the victim to testify.

Our review of the record discloses no other potential issues for appeal. This court has reviewed and considered the various issues raised by Johnson. To the extent we did not specifically address all of them, this court has concluded that they lack sufficient merit or importance to warrant individual attention. Accordingly, this court accepts the no-merit report, affirms the convictions and discharges appellate counsel of the obligation to represent Johnson further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved from further representing Rick Darnell Johnson, Jr. 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