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

2018AP1533-CRNM State of Wisconsin v. Brian Keith Mitchell (L.C. # 2012CF5378)
2018AP1534-CRNM State of Wisconsin v. Brian Keith Mitchell (L.C. # 2012CF5556)

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).

Brian Keith Mitchell appeals two judgments, each convicting him of one count of burglary, as a party to a crime. He also appeals the circuit court's order denying his postconviction motion to vacate the DNA surcharge imposed in one of the cases. Appointed

appellate counsel, James A. Rebholz, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Mitchell responded. After reviewing the no-merit report and the response, and after conducting an independent review of the record as mandated by ***Anders***, we conclude that there are no issues of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgments and the order.

Mitchell was charged with four counts of burglary in three separate cases that were all joined for trial. The circuit court dismissed one of the charges at the close of the State's evidence for failure to prosecute. The jury acquitted Mitchell of one count and convicted him of the other two counts.

The no-merit report first addresses whether there would be any arguable merit to a claim that the verdicts were not supported by sufficient evidence. A person is guilty of burglary if the person intentionally enters a building or dwelling without the consent of the person in lawful possession of the building or dwelling with the intent to steal or commit a felony. *See* WIS. STAT. § 943.10(1m)(a). We view the evidence presented to the jury in the light most favorable to the verdict, and if more than one inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative

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

value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

M.K. testified that she lives at 2748 North 4th Street in Milwaukee. She was home alone sleeping on July 23, 2012, when she heard a sound that awakened her. She then heard people whispering in her apartment, with the sound coming from near her living room. She called 911 to tell the police that someone was inside her apartment. Then she shouted from her bedroom to ask who was there. She heard someone leaving through her back door. M.K. further testified her laptop computer and book bag were taken and that she did not give the intruders permission to be in her apartment.

City of Milwaukee Police Officer Alfred Herrmann testified that he responded to a call about an intruder at 2748 North 4th Street, M.K.'s home. He found that the back door had been kicked in. He also found that a garbage can had been moved under a lower window to allow a person to crawl into the house through the window. Michael Winker testified that he is a forensic investigator for the City of Milwaukee Police Department. He testified that he found fingerprints on the back bedroom window of M.K.'s home. David Wagoner testified that he works for the City of Milwaukee Police Department as a fingerprint examiner. He identified the fingerprints found at M.K.'s house as belonging to Mitchell.

Turning to the second robbery, S.J. testified that he lives at 1748-A North 18th Street in Milwaukee. On November 16, 2011, at 4:20 p.m., he heard a loud sound and saw two men breaking the door down to his sister's apartment, which was located directly in front of his apartment at 1748-B North 18th Street in Milwaukee. S.J. testified that he called 911, and then watched his sister's apartment while he waited for the police to respond. He said that he saw two

men taking items from his sister's apartment and that one of the men was wearing a black hoodie-style jacket. L.J., S.J.'s sister, testified that she did not give anyone permission to enter her home and that some of her property was taken, including an Xbox, a TV, and a PlayStation. Matthew Maudlin testified that he works for the Milwaukee Police Department as a fingerprint examiner. He testified that one of the fingerprints found at L.J.'s apartment belonged to Mitchell.

Tiffany Garrett, who lives several blocks from L.J., testified that shortly after L.J.'s apartment was robbed—something about which she had no knowledge at the time—a man came running through her backyard and asked her for a ride. She refused to give him a ride. Later that day, her son found a hoodie jacket, cell phones, and cigarettes abandoned in her back yard. She called the police. The police later had her come to the station to view photos. She identified Mitchell as the man who asked her for a ride.

The testimony, the fingerprint evidence, and Garrett's identification of Mitchell in the photo array constitute sufficient evidence to support the jury's verdicts. There would be no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erred when it granted the State's motion to join the four counts of burglary. The initial decision on joinder is a question of law that we review de novo." ***State v. Salinas***, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609. "The court may order 2 or more complaints … to be tried together if the crimes … could have been joined in a single complaint[.]" WIS. STAT. § 971.12(4). "To be of the 'same or similar character' under [§] 971.12(1) … [the] crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as

to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). Joinder is proper "where crimes charged involved two or more incidents which exhibited the same modus operandi, were close in time, and occurred within the same geographic area" because "the acts were connected or constituted parts of a common scheme or plan which tended to establish the identity of the perpetrator." ***Id.*** at 139.

The record supports the circuit court's order joining the counts for trial. The burglaries all occurred in residential properties relatively near to each other and three of the four counts were committed within weeks of each other. The burglaries were committed in a similar manner, with the burglars gaining entry through a door or window and taking portable electronic equipment. Because the circuit court's order complies with WIS. STAT. § 971.12(4) and applicable case law, there would be no arguable merit to a claim that the cases were improperly joined for trial.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court improperly denied Mitchell's motion to suppress Garrett's identification of him in the photo array. "A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923 (citations and internal quotation marks omitted). The defendant has the initial burden of showing that the procedure was impermissibly suggestive. ***Id.*** If the defendant makes that showing, then "the State must prove that the identification was reliable under the totality of the circumstances in order for the identification to be admissible." ***Id.*** Whether the identification was impermissibly suggestive is a question of law. ***Id.***

At the suppression hearing, Police Officer Brian Matte testified about the procedure he used to develop the photo array. The computer provided him with five hundred similar photos based on the suspect's age, gender, and ethnicity. He then sorted the photos to choose the five photos that would accompany Mitchell's photo, looking at age, ethnicity, clothing, lighting, facial hair, hairstyle, and background. Officer Matte testified that he chose some pictures with woven hair and some without woven hair because "hair can change."

Mitchell argued that the array was impermissibly suggestive because three of the six photos had braided or woven hair, but three did not. Mitchell's hair is braided. The circuit court properly concluded that Mitchell had not met his burden of showing that the array was impermissibly suggestive because the array included various hairstyles and hairstyles are not a fixed characteristic. There would be no arguable merit to a claim that the photo array was impermissibly suggestive.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion when it imposed an aggregate term of seven years of initial confinement and seven years of extended supervision. At sentencing, a court must consider the principal objectives of sentencing, including "the protection of the community, the punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. "A sentencing court should indicate the general objectives of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives." ***Id.***

The circuit court told Mitchell that he had been given many opportunities to change his criminal behavior, but he continued to commit crimes. The circuit court pointed out that Mitchell had a juvenile record and an adult record. The circuit court said that Mitchell needed to spend time in prison to protect the public, punish him, and to get him to start thinking about how he needed to change his actions. Because the circuit court engaged in a thorough examination of the relevant sentencing criteria and reached a reasoned and reasonable result, we conclude that there would be no arguable merit to a claim that the circuit court misused its sentencing discretion. ***Id.***, ¶21 ("Discretion contemplates a process of reasoning, which depends on the facts of record or that are reasonably derived by inference from the record, and a conclusion based on a logical rationale founded upon proper legal standards.").

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court improperly denied Mitchell's motion to discharge his appointed counsel so that Mitchell could proceed *pro se* during postconviction and appellate proceedings. Before allowing a defendant to discharge counsel, the circuit court must determine whether the defendant is knowingly and voluntarily waiving the right to counsel. ***State v. Thornton***, 2002 WI App 294, ¶14, 259 Wis. 2d 157, 656 N.W.2d 45. The circuit court issued an order explaining to Mitchell the difficulties he would face proceeding without counsel. The circuit court directed Mitchell to respond within twenty days by writing a letter explaining that he was aware of the risks and consequences of proceeding *pro se* and that he understood that successor counsel would not be appointed to represent him. The circuit court also directed Mitchell to affirmatively state that he wanted to discharge his appointed counsel and was unaware of any reason that would render him unable to represent himself. The circuit court informed Mitchel that it would presume that he did not wish to proceed *pro se* if he did not respond. *See* ***State v. Klessig***, 211 Wis. 2d 194, 204, 564

N.W.2d 716 (1997) (stating that non-waiver of the right to counsel is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary). Mitchell did not respond. Therefore, the circuit court properly presumed that Mitchell did not wish to proceed *pro se*. There would be no arguable merit to a claim that Mitchell was improperly prohibited from representing himself.

Finally, the no-merit report addresses whether there would be arguable merit to an appellate challenge to the DNA surcharges imposed on Mitchell. The no-merit report accurately recounts the procedural history regarding the surcharges and the changes in case law over the last several years. We agree with the no-merit report's analysis of this issue and its conclusion that there would be no arguable merit to a challenge to the DNA surcharges.

In his response, Mitchell asks this court "to review all angles of [his] case even things that [he] didn't mention" in the response. We advise Mitchell that we thoroughly reviewed the entire record, looking for potential circuit court errors and/or issues that Mitchell could raise on appeal. In particular, we looked at potential problems identified by Mitchell in his response, including errors with the fingerprint evidence. However, we did not find any potential ground for reversing the convictions.

Our independent review of the record reveals no other potential issues of arguable merit.

Therefore,

IT IS ORDERED that the judgments and the order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney James A. Rebholz is relieved from further representation of Mitchell in these matters. *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