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**DISTRICT IV/III**

February 25, 2020

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

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2018AP217-CRNM      State of Wisconsin v. Joshua R. Bella (L. C. No. 2014CF193)

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 Joshua Bella has filed a no-merit report concluding there is no basis to challenge Bella's convictions for attempted first-degree intentional homicide with use of a dangerous weapon; battery with substantial risk of great bodily harm while using a dangerous weapon; and armed burglary, all as repeaters. Bella has responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we modify the judgment

and, as modified, summarily affirm because there is no arguable issue of merit that could be raised on appeal. *See* WIS. STAT. § 809.21 (2017-18).<sup>1</sup>

According to the criminal complaint, police officers responded to a reported stabbing at approximately 1:46 a.m., at a residence on Division Street in Stevens Point. The first officer on the scene observed a suspect, later identified as Bella, pinned to the ground by the victim and two of the victim’s housemates. Bella had two oriental-style sheaths on his waistband—a longer sword was in the sheath attached to the left side, and a shorter sheath on the right side was empty. The victim had several stab wounds which were bleeding profusely. Four other officers momentarily arrived on the scene and observed the scene was “filled with blood.” Police recovered the sword used in the attack.

At trial, the victim testified that he had been sleeping when he awoke to the sound of someone walking around the house. The victim testified that he heard someone open his bedroom door and enter, closing the door behind him. The person called the victim’s name, and the victim responded affirmatively. The person then said something about an “emergency at the Oxford House.” The victim asked the person to turn on the light, to which there was no response. The victim then heard repeated “very powerful, very violent” thrusting of an object against his bed, which he described as “chopping on the bed and the slashing of the sheets,” as he felt the stabs or strikes getting closer to him. The victim attempted to slide off the bed but was stabbed three times before he could get out of the bed. The victim believed that the assailant was attempting to kill him, and he yelled for help as he attempted to fight off the assailant. The victim was able to “upper cut” the assailant, push him against the wall, and get him into a headlock. A housemate

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

then came out of the room next door and entered the victim's bedroom to help prevent the assailant from getting away. The victim testified his housemate pried the sword out of the assailant's hands and helped the victim hold the assailant down to prevent him from escaping. The victim testified, "I didn't even realize I was sliced open until the police came and said I was bleeding, and then I looked down, the blood was just spurting out."

The victim further testified that he participated in the homeless outreach community in Stevens Point and had an ownership interest in the Oxford House, a halfway house where recovering narcotic and alcohol dependents resided. He stated the primary rule at the Oxford House was absolute sobriety, and urinalysis tests were required. The victim stated that Bella had been a resident at the Oxford House prior to the sword attack and was suspected of having a relapse. Bella had at that time refused to provide urine for analysis and became irate, which resulted in the victim calling Bella's probation agent. Bella was subsequently removed from the Oxford House.

The victim testified that when he was stabbed, he remembered seeing that the assailant "was brandishing two samurai-type weapons; katana blade, samurai sword, and when [the housemate] came in, he took from [the assailant] the one blade that he was holding and threw it ...." The victim testified that when Bella lived at the Oxford House, he also had some swords with "red or black sheath and red and black handles, metal blade," but Bella was required to remove them because weapons were prohibited there.

One of the victim's housemates testified that his girlfriend woke him when she heard strange thumping noises, at which point he came to the victim's aid. The housemate entered the victim's room and turned on the light. He testified, "It looked like a murder scene." He observed

a person struggling with the victim, and the victim had “a large hole in his chest.” The assailant had a large sword in his hand, and the victim “was doing his best to keep this guy contained.”

The housemate testified that he twisted the sword out of the assailant’s hand, and threw the weapon in the bathroom. He told his girlfriend “to get it out of there.” The housemate got the assailant to the ground and began to punch him in the face. The housemate testified that he could smell “a strong odor of alcohol on him,” and that the assailant “was fighting like a wild cat while we were trying to restrain him or contain him.” He described it as a “life-or-death situation.” He also testified the victim was “looking pretty bad,” and looked “pretty gray, ashen.”

The first police officer who responded to the scene testified that when he arrived, he observed three individuals securing another person on the floor. Bella had a sheath on the left side of his belt with a sword inside it. On the right side on his belt was another smaller sheath with a missing sword. The officer removed the remaining sword and the empty sheath from Bella’s waistline and “threw them as far away as I could while we secured him.” Police recovered the sword used in the attack, which “look[ed] like it would belong” to the empty sheath on Bella’s right hip. There was a “large amount of blood,” and the victim “had blood smeared all over him.” The officer testified, “I know I was standing in blood. There was blood spattered on the wall of the bedroom, all over the floor.” Ultimately, the victim was removed from the scene by EMS. The officer testified that the only thing he heard Bella say the entire time the officer was at the scene was “some sort of utterance about the Congress Club, but nothing intelligible.”

Bella was interviewed by police after waiving his *Miranda* rights.<sup>2</sup> A police detective testified at trial that Bella said he did not care that he got kicked out of the Oxford House, and that he was planning on leaving anyway. Bella told the detective that he was initially upset about being kicked out of the Oxford House, but once he left he never looked back, and he never thought about the victim. Bella initially said he did not know where the victim lived; after talking with the detective for a while he identified the general area where the victim lived, but he denied ever being at the victim's house.

Bella's probation agent testified at trial that Bella was "very upset" about being kicked out of the Oxford House. He further testified that he counseled Bella "not to go after [the victim]" and "about the consequences of if he were to harm him."

A police officer testified that a search of Bella's apartment revealed a decorative rack on the wall in the kitchen holding a red sheathed sword, similar in size and design to the two he observed at the time of the attack on the victim. The officer also stated the sword at Bella's apartment was in a rack that had more than one place for a sword and that "there were swords missing." The sword at Bella's residence, as well as swords in a closet, were photographed for evidence.

A woman testified that she met Bella at a Narcotics Anonymous meeting and subsequently became friends with him. She testified that Bella had given her red samurai swords to "hold on to because he wasn't allowed to have them at the Oxford House." Bella told her the swords were "razor sharp for protection." After Bella left the Oxford House, she saw a set of three red swords

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<sup>2</sup> Referring to *Miranda v. Arizona*, 384 U.S. 436 (1966).

hanging on the wall above Bella's kitchen counter. When she was shown a photograph of Bella's apartment taken after the attack, she identified the rack with one sword and testified the red sword was representative of the swords she saw at Bella's apartment. Between 7:00 and 7:30 p.m. on the evening of the attack, she saw Bella "over by the gas station"<sup>3</sup> and offered Bella a ride in her truck to the corner right across from the Congress Club and Skipp's Bowling Alley. Bella was agitated and smelled like alcohol. She testified that Bella said he was drinking because he was mad: "Bella said he was trying to get drunk enough not to kill because he was pissed." Bella also talked about the woman who married his cousin, saying she ruined his life because she took his phone away.<sup>4</sup>

Bella's cousin's wife testified she originally met Bella through Narcotics Anonymous, and that Bella was "very upset" after being kicked out of the Oxford House. Bella stayed at her house for three weeks following his eviction from the Oxford House. While in a vehicle with Bella driving past the victim's house at Christmas, Bella told her that he would like to blow up or steal a nativity set in the victim's yard. On several other occasions while driving past the victim's home, Bella "had made comments about molitoff cocktail to the house and destruction to the home [sic]."

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<sup>3</sup> Testimony at trial revealed that Bella left the Congress Club and had gone to a nearby gas station to buy cigarettes at approximately 7:15 p.m., and then went back to the Congress Club.

<sup>4</sup> Bella's cousin's wife made a statement to police that she had purchased a Galaxy cell phone and activated it for Bella several weeks prior to the attack. Prior to this time, she had given Bella a different cell phone. Several days after activating the Galaxy phone, Bella had been out drinking and his wallet and cell phone were stolen. The phone was retrieved and Bella asked her if she would reactivate the phone. When she arrived at Bella's residence, he was sleeping and still drunk. She told Bella she would reactivate the phone on a later date. On the day prior to the attack, she told Bella she was not giving him the phone back. Bella became very angry and accused her of stealing his phone. Later in the evening preceding the attack, Bella left two messages with her. The second call came at approximately 10:37 p.m. and Bella left a "nasty message" talking about how he was going to kill her and "tell everyone her secrets." She also stated that Bella drinks every night, usually at a bar called the Congress Club.

The daughter of the Congress Club's owner testified that she started bartending at 7 p.m. on the evening of the attack. She said Bella was in the bar when she got there, and that he left the bar prior to bar time. Bella was in a "pissed-off mood" and was talking about someone who stole \$3000 and a phone from him. When asked why he didn't call the police, Bella said "I don't call the cops." Bella said he was "going to stay at the bar and get drunk and relax because he didn't want to go to jail because he didn't want to do anything stupid." At one point, Bella left the bar, but he then returned.

Another woman testified she was the bartender who opened the Congress Club the evening of the attack. She opened the bar at 3 p.m., and Bella came in shortly thereafter. She worked until 7 p.m., but returned at 10 p.m. and Bella was still there. While she was working, she heard Bella talking about how he was "pretty angry" because someone had "screwed him over" and he didn't know what to do. She told Bella "just don't get in any trouble." Bella said that he didn't want to go to jail.

Trial testimony from the attending emergency department physician, buttressed by medical records, confirmed the critically injured victim was admitted to the hospital emergency room as a "trauma red"<sup>5</sup> for stab wounds consisting of a six-centimeter laceration on his lateral anterior right chest, a four-centimeter gaping laceration on his inferior lateral right thorax, and a six-centimeter gaping laceration lateral to his scapula on the right, as well as a superficial thigh laceration on the left.

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<sup>5</sup> The emergency department physician testified that trauma red "will bring in the surgical team, anesthesiology, the surgeon on call, will activate radiology and the radiology techs to come to the ER, basically all of the support services that we would need to take care of a critically injured patient."

An amended Information charged Bella with: (1) attempted first-degree intentional homicide, with use of a dangerous weapon; (2) first-degree reckless injury, with use of a dangerous weapon; (3) aggravated battery, with use of a dangerous weapon; (4) armed burglary; and (5) carrying a concealed weapon, with all charges as repeaters. Following the jury trial, Bella was convicted of the attempted first-degree intentional homicide charge with use of a dangerous weapon; battery with substantial risk of great bodily harm while using a dangerous weapon, as a lesser included offense of the aggravated battery charge; and the armed burglary charge, all as repeaters. The jury found Bella not guilty of the first-degree reckless injury charge. Count five had previously been dismissed on the State's motion.

The circuit court imposed a sentence consisting of seventeen years' initial confinement and fifteen years' extended supervision on count one; three years' initial confinement and two years' extended supervision on count three, concurrent to count one; and eight years' initial confinement and three years' extended supervision on count four, concurrent to counts one and three. All counts were ordered to be served consecutive to any sentence Bella was serving.

The no-merit report discusses only two issues: (1) whether Bella's due process rights were violated when the State allegedly erased a potentially exculpatory jail phone call between Bella and two potential State witnesses; and (2) whether Bella received ineffective assistance of counsel due to his trial counsel's failure to investigate several of the State's witnesses' motives to falsely testify. Upon our independent review of the record, we agree with counsel's description, analysis, and conclusion that any challenges to the issues raised in the no-merit report would lack arguable merit, and we will not further address them.



The no-merit report fails to address issues relating to the sufficiency of the evidence and the circuit court's exercise of its sentencing discretion. We sustain a jury's verdict if there is any credible evidence to support it. *See Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979). Clearly, there was overwhelming evidence to support the jury's verdicts.

Bella insists he is "innocent" and "was not able to explain/tell his side of events." However, there was no issue with regard to the identification of the attacker. Bella was restrained by the victim himself as Bella attacked him with a sword, and he was secured on the floor by the victim and his housemates until police arrived and further immobilized Bella, eventually handcuffing him. Further, police recovered the sword used by Bella at the scene and they also removed a remaining sword and the sheath with a missing sword from Bella's waistline prior to further immobilizing him. The swords recovered were consistent with those that several witnesses had previously observed in Bella's possession.

There was also more than ample evidence from which a jury could infer Bella intended to kill the victim while using a dangerous weapon. He attacked the victim in the dark, viciously stabbing him multiple times with a sword. Bella seriously injured the victim and fiercely fought the victim and his housemates when they attempted to restrain him. He continued to do so until police arrived and further immobilized him. Bella's acts demonstrated unequivocally that he intended to kill, and would have killed, the victim while using a dangerous weapon except for the intervention of another person or some other extraneous factor. *See* WIS. STAT. §§ 940.01(1)(a); 939.32; 939.63.

Given the above, there was also sufficient evidence for the jury to find that Bella intentionally caused bodily harm to the victim by conduct creating a substantial risk of bodily

harm, while using a dangerous weapon. *See* WIS. STAT. §§ 940.19(6); 939.63(1)(b). Moreover, WIS. STAT. § 939.66(2m) permits the conviction of an included crime that is a less serious or equally serious type of battery than the one charged. It was conceded that Bella entered the victim's home without consent, and sufficient evidence supported the jury's determination that Bella entered the building with a dangerous weapon with the intent to commit a felony. *See* WIS. STAT. § 943.10(2)(a). There was also sufficient evidence to support Bella's convictions of the offenses as a repeater as Bella had been on supervision during the five-year period immediately preceding the commission of the present offenses for a conviction of receiving stolen property, a Class H felony.<sup>6</sup>

The record also discloses no basis for challenging the circuit court's sentencing discretion. The court considered proper sentencing factors, including Bella's character, the seriousness of the offenses, and the need to protect the public. *See State v. Harris* 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court's sentence was far less than the maximum allowable by law and therefore presumptively neither harsh nor excessive. *See State v. Grindemann*, 2002 WI App 106, ¶¶29-33, 255 Wis. 2d 632, 648 N.W.2d 507. Our independent review of the record discloses no issues of arguable merit regarding the sufficiency of the evidence to convict, or Bella's sentencing.<sup>7</sup>

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<sup>6</sup> It appears Bella was charged in Portage County case No. 2010CF95 with twenty-four counts, including one count of armed burglary, twenty-one counts of theft, one count of burglary, and one count of receiving stolen property. Bella pleaded guilty to one count of receiving stolen property and the remaining twenty-three counts were dismissed on the prosecutor's motion. Bella's supervision on the receiving stolen property count was subsequently revoked.

<sup>7</sup> Although not raised in the no-merit report, we note that the COMPAS risk assessment was mentioned during the sentencing arguments, but the record shows COMPAS was not determinative of the sentence imposed by the circuit court. *See State v. Loomis*, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749. Any challenge to the sentence based on COMPAS would therefore lack arguable merit.

In his response to the no-merit report, Bella contends he suffers from a rare genetic disorder, and he “is physical [sic] incapable of doing what the victim and witness says and Bella did not have the physical ability to kill the victim with his weapon.” Bella also argues the district attorney allowed perjured testimony and “put 2 witnesses on the stand to testify he knew intended to lie ....” Bella claims police deleted a phone call from the jail “that had them saying opposite of their statements and proved they stole Bella’s property ....” Bella further contends the circuit court erroneously exercised its discretion by refusing Bella’s eleventh-hour request to appoint new trial counsel. Bella insists “[a]bout 10-15 minutes of this, hearing was erased from transcripts except for the last couple of minutes where I was forced to keep a lawyer I openly argued with and threatened because I believe he was intending to lose trial.”

At the commencement of the first day of trial, with a prospective jury panel assembled, the circuit court addressed numerous issues Bella raised in a letter to the court. Bella asserted the defense was not prepared to go to trial, and various witnesses needed to be interviewed because they had motives to falsify their trial testimony. According to Bella, the woman who married his cousin and another witness wished him incarcerated so that they would be able to “raid his apartment and steal items ....” He claimed the allegedly deleted jail phone call would prove his contentions regarding the theft of items. Bella also suspected the victim’s housemates were “bribed” by the victim to testify falsely with “monetary contributions or possibly free rent.” Bella also claimed that when executing the search warrant on his residence, the police “cleaned my house out of everything I owned” and gave false statements. Finally, Bella requested that the court discharge his trial attorney.

Our independent review of the record reveals these issues lack arguable merit. Numerous witnesses testified as to Bella’s physical abilities while stabbing the victim and his bed with the

sword, and while “fighting like a wild cat” and attempting to escape as the victim and his housemates secured him prior to the arrival of the police. Bella fails to indicate how the purported perjured testimony could have changed the outcome of the trial, and our independent review of the record reveals no arguable issue for appeal in this regard. As mentioned, we agree with the conclusion of the no-merit report that any challenge to issues regarding the purported jail phone call would lack arguable merit. Further, we note that the circuit court, during discussion on the first day of trial, found there was no basis for Bella’s contention that a recording of a jail phone call was lost by the State as there was no indication it existed and “there is no indication that it was intentionally destroyed to avoid defendant having it.”

Regarding Bella’s request for a continuance, the circuit court noted “counsel advises that he is prepared for trial. He has his witnesses subpoenaed, that he felt prepared to present his case and [it] will be based [on the] merit[s], not on collateral matters that occurred after the incident.” The court also noted the matter “has already been set for trial once and rescheduled due to the defendant’s—His attorney ended up leaving because the defendant and his attorney could not agree ....” In addition, the court found the State would be prejudiced by further continuance, and that “it does not appear that the defense has sufficient merit to alter the outcome in the case based on the information that the court has.” The court also stated, “Do you understand that the trial that we’re having today is regarding the allegations that you went into a home and attempted to stab a person with a sword? It’s not about your property and what happened to your property.” The court found “there may be a disagreement on proceeding, but that counsel is prepared and ready to go forward.” Given these findings, the court reasonably exercised its discretion in denying Bella’s continuance motion. *See State v. Leighton*, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616

N.W.2d 126. Moreover, as to Bella's request to discharge his trial attorney, the court engaged Bella in a colloquy after which Bella stated that he wished his attorney to stay on the case.

Finally, although again not addressed in the no-merit report, we note the judgment of conviction reflects the proper statutory subsection and penalty for the lesser included offense of battery with substantial risk of great bodily harm, in conformity with the jury's verdict. *See* WIS. STAT. § 940.19(6). However, the judgment incorrectly describes the offense as aggravated battery.

At trial, the jury was read the jury instruction for the battery offense as charged in the amended Information: WIS JI—CRIMINAL 1225 Aggravated Battery With Intent To Cause Great Bodily Harm - § 940.19(5). The jury was also read the jury instruction for the lesser included offense under WIS. STAT. § 940.19(6), Battery With Substantial Risk Of Great Bodily Harm. *See* WIS JI—CRIMINAL 1226. The court further instructed:

You should make every reasonable effort to agree unanimously on your verdict on the charge of aggravated battery with intent to cause great bodily harm before considering the offense of battery with substantial risk of great bodily harm.

However, if after a full and complete consideration of the evidence you conclude that further deliberation would not result in a unanimous agreement on the charge of aggravated battery with intent to cause great bodily harm, *then you should consider whether the defendant is guilty of the battery with substantial risk of great bodily harm.*

(Emphasis added.)

As mentioned previously, the jury convicted Bella of battery with substantial risk of great bodily harm while using a dangerous weapon as a lesser included offense of the aggravated battery charge. The judgment of conviction, however, erroneously described the offense as aggravated battery. Accordingly, we modify the judgment and remand for correction of the judgment's

description of the WIS. STAT. § 940.19(6) offense as battery with substantial risk of great bodily harm.

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

Therefore,

IT IS ORDERED that the judgment is modified and, as modified, summarily affirmed because there is no arguable issue of merit that could be raised on appeal. *See* WIS. STAT. § 809.21.

IT IS FURTHER ORDERED that attorney Lane Fitzgerald is relieved of further representing Joshua Bella in this matter. *See* WIS. STAT. § 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*