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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 IV

March 10, 2020

To:

Hon. William E. Hanrahan
Circuit Court Judge
Dane County Courthouse
215 S. Hamilton St., Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Suzanne Edwards
Law Office of Suzanne Edwards
P.O. Box 70
Dodgeville, WI 53533-0070

Andrea Beth Raymond
Assistant District Attorney
215 S. Hamilton St., Rm. 3000
Madison, WI 53703

Robert L. Brown 573336
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

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

2017AP2123-CRNM State of Wisconsin v. Robert L. Brown (L.C. # 2016CF322)

Before Kloppenburg, Graham and Nashold, 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).

Robert Brown appeals a judgment convicting him, following a jury trial, of being party to the crime of robbery with use of force, as a repeat offender. Attorney Suzanne Edwards has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-

18);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses trial counsel's performance and the sufficiency of the evidence to support the conviction. Brown was sent a copy of the report, and has filed a response challenging the amendment of the information, a sleeping juror, and trial counsel's failure to adequately impeach Brown's co-defendant. Edwards filed a supplement to her no-merit report further addressing the issues raised by Brown. Upon reviewing the entire record, as well as the no-merit report, response and supplement, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

To prove the defendant guilty of being party to the crime of robbery by use of force, the State needed to provide evidence that Brown intentionally aided and abetted or was a member of a conspiracy to take and carry away property in the possession of someone he knew owned it, without consent and with the intent to permanently deprive the owner of possession of the property, by using force to overcome the physical resistance of the property's owner. WIS. STAT. §§ 943.32(1) and 939.05 and WIS JI—CRIMINAL 1480 AND 401. When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762

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

(citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1).

Timothy Kohlman testified that he was awakened one evening by a loud knock on the door of the motel room where he had been living. When he opened the door, two men entered the room, immediately forced him down on the ground face first, and placed a pillowcase over his head. The men began hitting Kohlman in the head and asking him for his cash, marijuana and jewelry. The assailants subsequently removed the pillowcase to put duct tape over Kohlman's mouth, zip tied his hands and ankles and placed him in the bathtub. Kohlman heard the men rifling through his room, and when he was finally able to free himself, he discovered that his phone, laptop, a flat screen TV, a wooden jewelry box with mementos, some cash, his debit card, his Wisconsin ID card, and some marijuana were missing. Kohlman also lost a tooth as a result of being slammed to the floor.

The robbers told Kohlman that they knew he had money because they had been watching him. Kohlman had previously met Brown three or four times and smoked marijuana with him. Kohlman mentioned Brown to police as a possible suspect because Brown had previously come to Kohlman's room to use his phone and laptop and get out of the cold, wearing a green hooded sweatshirt similar to the one worn by one of the robbers.

The police tracked Kohlman's debit card to an attempted transaction at McDonalds in the early morning hours after the robbery. A car matching the description from the surveillance video at McDonalds was located in a lot of vehicles that had been towed. Police obtained a warrant to search the car, and recovered the victim's wooden jewelry box, along with some zip ties. The car belonged to Armand Baker.

Baker eventually admitted his involvement in the robbery, entered a plea, and testified against his co-defendant, Brown. Baker's testimony corroborated Kohlman's account. Baker stated that he and Brown had gone to Kohlman's to get money and marijuana; that Brown had wrestled Kohlman to the floor where Baker and Brown had zip-tied him and put duct tape over his mouth, before putting a pillowcase over his head and taking him to the bathroom. Baker and Brown then went through Kohlman's room and took his marijuana, television, laptop, and other items.

Finally, DNA testing on duct tape recovered from Kohlman's room showed Brown as a potential contributor to a partial profile developed from a mixed DNA sample. The probability that a random person's DNA would match the sample was 1 in 312,700.

In sum, the State produced evidence to support every element of the crime of conviction. Any challenge to the sufficiency of the evidence would lack arguable merit.

Amendment of the Information

Brown complains that the circuit court sua sponte amended a charge of attempted identity theft to a charge of identity theft during the trial. Brown asserts that only the district attorney has the authority to amend a charging document. However, WIS. STAT. § 971.29 provides the circuit court with authority to amend a charging document to conform with the evidence. In any event, Brown cannot demonstrate prejudice from the amendment because he was acquitted on the amended charge. Therefore, this issue does not provide an arguably meritorious basis for appeal.

Sleeping Juror

Brown complains that a juror appeared to be sleeping during closing argument. However, the circuit court questioned the juror and determined that he was listening with his eyes closed. Therefore, there is no factual basis to raise this issue on appeal.

Assistance of Counsel

Brown asserts that trial counsel had grounds to impeach Baker, but failed to do so. Brown does not identify what those grounds were. We agree with appellate counsel's assessment that the record shows that counsel adequately cross-examined Baker and satisfied the other obligations of his representation.

Sentence

A challenge to Brown's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Brown was afforded an opportunity to comment on the PSI, to present multiple character witness on his behalf, and to address the circuit court both personally and by counsel.

The circuit court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that it involved a brutal attack on a vulnerable victim. With respect to Brown's character, the court emphasized

Brown's lengthy criminal record and history of bad decisions and it noted that Brown had failed to take advantage of numerous services that had been offered to him over the years.

The circuit court then sentenced Brown to six years of initial confinement and five years of extended supervision. The components of the bifurcated sentence imposed were within the applicable penalty ranges and the total confinement period constituted about 52% of the maximum exposure Brown faced. *See* WIS. STAT. §§ 943.32(1)(a) (classifying robbery with use of force as a Class E felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 939.62(1)(c) (increasing maximum term of imprisonment by six years).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence imposed here was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶¶31, 32, 255 Wis. 2d 632, 648 N.W.2d 507.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Suzanne Edwards is relieved of any further representation of Robert Brown 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