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April 15, 2020

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

2017AP1370-CRNM State v. Ezra R. French (L.C. #2014CF290)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

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).

Ezra R. French appeals from a judgment convicting him of possessing a firearm as a felon and of second-degree reckless homicide as a party to the crime.¹ His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),² and *Anders v. California*, 386 U.S. 738, 744 (1967). French received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there are no arguably meritorious issues for appeal. *See* WIS. STAT. RULE 809.21.

In November 2013, J.N. was shot in the vicinity of a Milwaukee nightclub while sitting in a car with his brother, R.B. J.N. died from the gunshot wound. R.B. identified French from a photo array as the shooter. French proceeded to trial on charges of (1) first-degree intentional homicide while using a dangerous weapon and (2) possessing a firearm as a felon.³

R.B. testified that he and J.N. were sitting in the front seat of a car when French approached and, after some small talk, pointed a gun through the passenger-side window, right by R.B.'s head. J.N. was in the driver's seat and tried to push the gun away as he opened his door. R.B. testified that French fired a shot at J.N. and that J.N. managed to get out of the car and start running from the scene. R.B. heard a second shot and saw French get into a car and drive away. R.B. got into the driver's seat to chase French but stopped when he saw his brother's body in the street. An

¹ The Honorable Timothy G. Dugan presided at the jury trial and sentenced French in connection with his conviction for possessing a firearm as a felon. The Honorable M. Joseph Donald sentenced French in connection with his homicide conviction.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

³ French was originally charged with first-degree reckless homicide by use of a dangerous weapon, but the State filed an amended information increasing French's exposure prior to trial, once French confirmed he would not accept the State's plea offer.

expert testified that DNA found on R.B.'s car window came from French. French was taken into custody weeks later, after he threw his gun into the snow while running from police. French testified that he had arranged to meet R.B. at the nightclub to buy marijuana and conceded that he brought a .38 caliber revolver with him. According to French, an unidentified subject showed up and pointed a gun through R.B.'s car window. French admitted that he discharged his gun a couple of times but said he was firing at the unidentified subject. The jury found French guilty of possessing a firearm as a felon but could not reach a verdict on the homicide count. The court entered judgment on the firearm charge and the homicide charge was rescheduled for trial. During the pendency of the rescheduled homicide case, the court sentenced French on the firearm charge to five years of initial confinement followed by five years of extended supervision.

Pursuant to a negotiated agreement with the State, French pled guilty to an amended charge of second-degree reckless homicide as a party to the crime. The State agreed to recommend consecutive prison in an amount to be determined by the circuit court, and French remained free to argue. The court imposed a twenty-year bifurcated sentence with thirteen years of initial confinement followed by seven years of extended supervision, to run consecutive to any other sentence.

Appellate counsel's no-merit report addresses (1) whether there was sufficient evidence to support the jury's guilty verdict on the charge of felon in possession of a firearm, (2) whether French's guilty plea was knowing, intelligent and voluntary, and (3) whether the circuit court properly exercised its discretion in imposing sentence.

The no-merit report first addresses whether there exists an arguably meritorious challenge to French's conviction for felon in possession of a firearm based on the sufficiency of the evidence.

We must affirm the verdict “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that” as a matter of law no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence are for the jury. *Id.* at 504. The no-merit report sets forth the essential elements of the offense and explains how the evidence at trial, including French’s own testimony, satisfied each element. We agree with counsel’s analysis and conclusion that a challenge to the sufficiency of the evidence would lack arguable merit, and we will not discuss this point further.

However, we consider the discussion of French’s jury trial incomplete. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial motions, jury selection, evidentiary objections during trial, confirmation that the court conducted a proper colloquy regarding the defendant’s decision to testify, use of proper jury instructions, and propriety of opening statements and closing arguments. The no-merit report fails to give any indication that appointed counsel considered whether these parts of the process give rise to potential appellate issues.⁴ As part of our independent review, we have considered each of these areas and determine that none gives rise to an arguably meritorious challenge. *See State v. Allen*, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (difficult to know the nature and extent

⁴ Counsel has a duty to review the entire record for potential appellate issues. A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 438 (1988). It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. *See State v. Allen*, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). Counsel should at least briefly address all aspects of a jury trial in future no-merit reports.

of the court of appeals’ “examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion”).

With the agreement of the parties, the circuit court excused several prospective jurors for cause and there was no objection to the jury as selected.⁵ The court properly exercised its discretion in ruling on motions before and during trial. It followed proper procedure in accepting French’s stipulation to the element that he was previously convicted of a felony and conducted a proper colloquy with French concerning his decision to testify. The record reveals no impropriety in the parties’ opening statements or closing arguments. The agreed-upon jury instructions properly stated the law, and where there was a dispute, the court properly exercised its discretion in deciding how to instruct the jury. Similarly, the court properly exercised its discretion in answering the jury’s questions during deliberations, and, following the guilty verdict, the jurors were individually polled.

Next, appellate counsel’s no-merit report discusses whether French’s guilty plea to the charge of second-degree reckless homicide as a party to the crime was knowing, intelligent, and voluntary. The circuit court engaged in an on-the-record colloquy that satisfied the requirements of WIS. STAT. § 971.08(1); *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906; and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. In addition to its substantive plea-taking colloquy, the circuit court properly relied on French’s signed plea questionnaire and its comprehensive attachments. See *State v. Moerderdorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). There is no indication of any other basis for plea

⁵ With the parties’ express consent, one of the jurors was excused after the first day of trial.

withdrawal. Accordingly, we agree with counsel's assessment that a challenge to French's plea would lack arguable merit.

The final issue addressed in counsel's no-merit report is whether any issue of arguable merit arises from either of French's sentencing hearings. At both sentencing hearings, the court considered the seriousness of the offense, French's character, and the need to protect the public. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. With regard to possessing a firearm as a felon, the court determined that the circumstances were "extremely aggravated[,]” finding that French lacked remorse and testified untruthfully at trial, and noting that by French's own account, he discharged a firearm he knew it was illegal to possess, and which, according to French, he knowingly brought to a drug sale. The court determined that a substantial prison sentence in a structured and confined setting was necessary to protect the public. This is a demonstrably proper exercise of discretion with which we will not interfere. See *State v. Gallion*, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197.

Similarly, the circuit court properly exercised its discretion in sentencing French on the homicide charge. In characterizing the offense as very serious, the court considered the grave impact on the victim's family, including R.B., who "had to witness something that no brother needs to witness.” The court took into account the nature of French's prior record and that he was on supervision when this crime was committed and determined that prison was necessary to address his "extensive treatment needs” as well as the danger he presented as a person who was not deterred by outside restrictions, the consequences of his actions, or "how much time they have hanging over their head.” These are proper considerations. Further, we cannot conclude that either sentence is so excessive or unusual as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the convictions, and discharges appellate counsel of the obligation to further represent French on appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Mark S. Rosen is relieved from further representing Ezra R. French in this appeal. 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