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May 21, 2020

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

2018AP816-CRNM State of Wisconsin v. Brandon S. Wright, Jr.
(L.C. # 2017CF1186)

Before Blanchard, Kloppenburg and Graham, 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).

Attorney Michael Herbert, appointed counsel for Brandon Wright, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Wright was provided a copy of the report, and has filed a response challenging the

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

admission of certain evidence at trial. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.[2]

After a jury trial, Wright was convicted of three felony counts: fleeing or eluding an officer, possession of cocaine, and possession of narcotic drugs as a second or subsequent offense. Wright also was convicted of one count of obstructing an officer and one count of disorderly conduct, both misdemeanors. He was convicted as a repeater on all five counts. *See* WIS. STAT. § 939.62(1). On the misdemeanor counts, Wright was sentenced to eighteen months of initial confinement and six months of extended supervision on each count, to run concurrently with each other. Wright was sentenced to two years of initial confinement and two years of extended supervision on each of the two drug charges, and three years of initial confinement and two years of extended supervision on the fleeing an officer charge. The sentences on the three felony counts were imposed to run concurrent to each other, but consecutive to the sentences imposed on the two misdemeanor counts.

We first address whether the evidence at trial was sufficient to support the convictions. This court will affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could

[2] This court previously 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). The order noted that here, at trial, jury instruction WIS JI-CRIMINAL 140 was given to the jury, and that the supreme court granted review in ***Trammell*** to address whether the holding in ***State v. Avila***, 192 Wis. 2d 870, 532 N.W.2d 423 (1995)—that it is "not reasonably likely" that WIS JI-CRIMINAL 140 reduces the State's burden of proof—is good law; or whether ***Avila*** should be overruled on the ground that it stands rebutted by empirical evidence. The Supreme Court has now issued a decision in ***Trammell***, holding "that WIS JI-CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. ***Id.*** at 504. Without attempting to review the evidence in detail here, we are satisfied that the testimony of the multiple witnesses proffered by the State was sufficient to support the convictions. The testimony was not inherently incredible and, if believed by the jury, was sufficient to meet all of the elements of all the charges. There would be no arguable merit to challenging the sufficiency of the evidence on appeal.

Both the no-merit report and Wright's response address whether the circuit court erred when it admitted recordings of a 911 call and phone calls purportedly made by Wright from jail, over Wright's objection. These issues are without arguable merit. The decision whether to admit or exclude evidence at trial is within the circuit court's discretion. ***State v. Richard G.B.***, 2003 WI App 13, ¶7, 259 Wis. 2d 730, 656 N.W.2d 469. Here, the circuit court properly exercised its discretion in admitting the 911 recording as an excited utterance under WIS. STAT. § 908.03(2). The court also properly exercised its discretion when it admitted recordings of phone calls purportedly made by Wright from jail using another inmate's pin number. The investigating police officer testified regarding how inmate calls are placed from jail, how the officer obtained recordings of the calls, and the procedure the officer used for listening to and logging the calls. After the audio recording of the jail calls was played for the jury, Wright's counsel cross-examined the police officer about the recording and the foundation for his testimony about the recording. The factual question of whether Wright was indeed the person who made the jailhouse calls was properly left for the jury to determine. There would be no arguable merit to challenging the circuit court's exercise of discretion in admitting the recordings.

Finally, the no-merit report addresses whether there would be any arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Upon an independent review of the record, the court has found no other arguable basis for reversing the judgment of conviction. Any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Michael Herbert is relieved of any further representation of Brandon Wright 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