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May 27, 2020

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

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2018AP784-CRNM State of Wisconsin v. Robert C. McMath (L.C. # 2015CF4511)

Before Brash, P.J., Dugan and White, 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 C. McMath appeals from a judgment of conviction for first-degree recklessly endangering safety by use of a dangerous weapon, endangering safety by discharging a firearm from a vehicle toward another, and felon in possession of a firearm. He also appeals from an order denying his postconviction motion. McMath's appellate counsel 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). After filing a response to the no-merit report, McMath was granted permission to file a revised response; appellate counsel then filed a revised supplemental no-merit report, and McMath filed a reply to counsel's revised supplemental no-merit report.[2] *See* RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record as mandated by ***Anders***, we reject the no-merit report, dismiss the appeal, and extend the time for McMath to file a WIS. STAT. RULE 809.30(2)(i) postconviction motion.

McMath was charged after a July 14, 2015 drive-by shooting at Milwaukee Auto Glass and Sound, a business that sells and installs car stereo systems. The case was tried to the court. Three employees of Milwaukee Auto testified. There was no dispute that McMath went to Milwaukee Auto on July 3, 2015, in a Chevrolet Impala, and purchased a car stereo. The Milwaukee Auto employees described the stereo as having a DVD player and flip out screen.

Milwaukee Auto employees E.D. and F.T. testified that McMath came back to the shop in the same Impala on July 14, 2015, and complained that the stereo was not working. F.T. worked on the car and got the stereo working. Then McMath complained that his backup camera was not functioning and that it had been functioning before F.T. worked on the car. A heated argument ensued over whether the backup camera could have been functioning or not. McMath was asked to leave the shop. E.D. heard McMath threaten F.T. and the shop's owner, E.O., who

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

[2] After appellate counsel filed a revised supplemental no-merit report, McMath moved for leave to file a reply to the supplemental no-merit report. While the motion was pending, McMath filed his reply. Although we do not generally permit a reply to the supplemental no-merit report because WIS. STAT. RULE 809.32 does not provide for it, McMath's reply was accepted.

was part of the argument. E.D. also talked directly to McMath to try and calm him and McMath said, "But you understand guns."

About two hours later, at approximately 2:20 p.m., shots were fired at the open work bays of Milwaukee Auto. F.T. testified that he saw McMath in the Impala just outside the shop's bays and that when McMath saw him, McMath pulled around into the Dollar Tree parking lot and fired shots from the driver's window. E.D. testified that, although he did not see the driver of the car, he saw the same Impala that McMath drove fleeing from the Dollar Tree store parking lot directly across the street from the shop's bays. E.O. also saw the Impala as it was fleeing; he did not see the driver of the car.

When E.O. was shown a photo array on July 14, 2015, he told the officer that he was 75% sure that the photo of McMath was the man who had been in the shop with the Impala that day, although he indicated on the police form that he had not identified the perpetrator. On July 14, 2015, F.T. identified someone other than McMath from the same photo array. E.D. identified McMath from a photo array he was shown on August 17, 2015.

McMath's theory of defense was alibi. McMath's father, Frank Lockett, and the mother of McMath's son, Shannon Miller, testified as to McMath's likely whereabouts on the day of the shooting. McMath also testified.

McMath disputed the employees' testimony that he paid $247 for the stereo and that a Milwaukee Auto employee installed the stereo in McMath's car on July 3, 2015. McMath testified that he had a cousin install the stereo.

McMath testified that he never went back to Milwaukee Auto after purchasing the stereo. He outlined his day on July 14, 2015 as follows: he was at the Milwaukee County Courthouse

until approximately 11:00 a.m., completing paperwork to file a motion to gain placement of the son he shares with Miller; after filing the motion, he texted Miller at 11:23 a.m. that he was on his way to her house; he then went to Miller's house to drop off the court papers and pick up his son; he stayed at Miller's house for thirty to forty-five minutes; McMath and his son returned to McMath's mother's house, arriving there about 1:00 p.m.; he had a short conversation with Lockett before Lockett left to go to the store; McMath then called the mother of his other son and asked her to bring the boy by so they could spend time together; McMath then took his daughter, who had been staying at his mother's house, and his son by Miller to the park and stayed there until about 4:00 p.m.

Miller testified that on July 14, 2015, McMath came to her house in the "mid-afternoon to late afternoon," and that she was uncertain how long he stayed, but maybe it was about an hour to two hours. McMath took their son when he left and Miller did not see McMath again that day.

Lockett testified that he saw McMath with his son by Miller at the house around 2:00 or 2:10 p.m., and then Lockett left to go to the store. When Lockett returned from the store at approximately 2:30 p.m., McMath was at the park with his daughter and his son by Miller.

In his response to the no-merit report, McMath claims he was denied the effective assistance of trial counsel.[3] He asserts that he told trial counsel about two witnesses that should be called at his trial and that his trial counsel failed to call them. The first witness he identifies is Corey Patterson—the "cousin"[4] who installed the car stereo in the Impala. McMath attached an affidavit from Patterson to his response in which Patterson indicates that he installed the car stereo for McMath on July 3, 2015, and that the stereo "did not have a TV screen, DVD, or camera capability." Patterson also indicates that the Impala did not have a backup camera. McMath contends that Patterson's testimony would have supported his assertion that the shop employees confused McMath with another customer and that McMath would have no reason to complain that his backup camera was not working because the Impala did not have one.

The other witness McMath identifies is Rhaneshia Allison, the mother of his other son. McMath contends that Allison could confirm that he called her at 2:00 p.m. on July 14, 2015, and asked her to bring their son to him. He attached an affidavit from Allison to his response. Allison's affidavit indicates that McMath called her at 2:00 p.m. on July 14, 2015, and that she arrived at McMath's mother's residence at 2:30 p.m. She found McMath at the park across the street from the residence and she pulled up there to drop off their son. She and McMath had a

[3] McMath also contends he has a meritorious argument for a new trial in the interests of justice because the real controversy was not fully tried and it was probable that there was a miscarriage of justice. He points to evidence he claims was improperly admitted, the employees' conflicting testimony on details like the manner in which he paid and the position of the fleeing Impala, and the employees' inability to identify him from the photo arrays shown on July 14, 2015. He also suggests that there was evidence the trial court did not hear regarding the reason he stopped driving the Impala and purchased a new car. Having concluded that the no-merit report must be rejected for other reasons, we do not address this potential issue.

[4] Patterson does not appear to be related to McMath. In an affidavit from Patterson attached to McMath's response, Patterson indicates that he is a friend of McMath's. Patterson states that he has known McMath and his family for over twenty-five years and that they refer to each other as cousins.

five to ten-minute conversation in which McMath told her he had filed paperwork to get placement of his son by Miller. Allison also avers that she discussed this information with McMath's trial counsel and that, on the day of trial, trial counsel told her that she would not be needed for the trial.[5] McMath contends Allison's testimony would have established that it was impossible for him to be the shooter at 2:20 p.m. at a location on the other side of town.

In the revised supplemental no-merit report, appellate counsel responds to McMath's claims. Appellate counsel first explains that he did not address potential testimony from Patterson because McMath did not provide him with Patterson's name until months after the no-merit report was filed. That may be, but appellate counsel does little to address McMath's claim that he told trial counsel about Patterson. In a no-merit appeal, we consider whether a no-merit conclusion is appropriate if the defendant's version of the facts are true. *See* WIS. STAT. RULE 809.32(1)(g). Based on the record, we cannot conclude that an ineffective assistance of counsel claim based on the failure to call Patterson as a trial witness lacks merit.

Appellate counsel also responds that Patterson's testimony would only have assisted the defense in impeaching the Milwaukee Auto employees' testimony that the stereo was installed at the shop. Appellate counsel characterizes this as "peripheral to the main factual issue at trial: whether on July 14, 2015 Mr. McMath got into a dispute with employees of Milwaukee Auto Glass and Sound the thereafter fired shots into the store." We do not agree that whether the shop or Patterson installed the stereo is "peripheral." The employees identified McMath based on

[5] At an earlier jury trial in the case, McMath's trial counsel indicated that Allison would testify that she dropped off the child around 2:30 p.m. on July 14, 2015. That jury trial ended in a mistrial before any evidence was taken. There is no explanation in the record regarding the reason Allison was not called as a witness at the subsequent trial to the court.

interactions they believed they had with him, while installing the stereo on July 3, 2015. If McMath had Patterson install the stereo, F.T. would not have had contact with McMath on July 3, 2015, and would not have recognized him as the customer who returned on July 14, 2015. Also, the dispute that preceded the shooting centered, in part, on whether the car stereo worked and if a backup camera was disabled by F.T.'s work on the stereo on July 14, 2015. Patterson's testimony would be relevant to whether McMath had prolonged contact with the employees on July 3, 2015, such that they could identify him as the customer who returned on July 14, 2015, as well as whether the Impala even had a backup camera. It is also notable that, in its decision, the trial court observed that McMath testified his cousin installed the stereo but "there was no backup for that testimony at all." The trial court was looking for some corroboration of McMath's testimony. Based on this record, we cannot conclude that as a matter of law a claim of ineffective assistance of trial counsel for failing to call Patterson lacks arguable merit.

As to Allison, appellate counsel again asserts he did not learn that McMath deemed Allison to be essential to McMath's alibi defense until after the no-merit report was filed. Again, this fact does nothing to address the potential issue regarding trial counsel's failure to call Allison, a witness who was listed on an amended witness list and mentioned on the first day of the jury trial that ended in a mistrial. On that point appellate counsel states: "By all appearances in the record, the defense witnesses called or not called seemed [to] be a matter of choice of Mr. McMath's counsel." But again, that fails to explain why trial counsel may have made the choice. "[S]trategic or tactical decisions must be based upon rationality founded on the facts and the law." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

We reject appellate counsel's assertion that Allison's testimony was actually inconsistent with the alibi defense McMath presented at trial. Appellate counsel explains this is so because

McMath did not mention in his testimony being with Allison or having a face-to-face meeting with her, and that Lockett did not mention seeing Allison when he returned from the store. However, McMath did testify that he called the mother of his other son. He just failed to mention Allison by name and was not asked to name her. Although the absence of any testimony mentioning Allison by name may draw her affidavit and potential testimony into question, we cannot make a credibility determination on appeal. On this record, we cannot conclude that there is no arguable merit to a claim that trial counsel was ineffective for not calling Allison.

Having concluded that there are issues of arguable merit, a no-merit conclusion is inappropriate. Accordingly, the no-merit report is rejected and appellate counsel's motion to withdraw from the obligation to represent McMath in pursuit of postconviction relief is denied.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and Attorney John T. Wasielewski's motion to withdraw from representation is denied.

IT IS FURTHER ORDERED that the appeal is dismissed; the time for Robert C. McMath to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30(2)(h), is extended to forty-five days after remittitur.

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*