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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:

2018AP476-CRNM State of Wisconsin v. James M. Brooks (L.C. # 2013CF238)

Before Dugan, Donald 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).

James M. Brooks appeals from a judgment convicting him of attempted armed robbery with use of force and first-degree reckless injury with use of a dangerous weapon. Brooks also

appeals the order denying his postconviction motion.¹ His appellate counsel, Paul G. Bonneson, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18) and *Anders v. California*, 386 U.S. 738 (1967).² Brooks 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 no-merit report and an independent review of the record as mandated by *Anders*, we summarily affirm the judgment and the order because there is no arguable merit to any issue that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

The charges against Brooks stemmed from an incident that occurred during the early morning hours of December 25, 2012. The complaint alleged that police officers were dispatched to a restaurant at approximately 2:00 a.m. Upon their arrival, they located the victim in this matter in the lobby of the restaurant. The victim had three gunshot wounds. The victim told the police that a man he knew as “James,” later identified as Brooks, was at the restaurant and the victim had discussed selling marijuana to him. As the victim subsequently left the restaurant, Brooks and another person approached him. According to the complaint, Brooks pointed a gun at the victim and told him to “[g]ive me what you have and if you move I’m going to shoot you.” Brooks then shot the victim and left the scene.

The victim survived. When police officers showed him a photo array, the victim positively identified Brooks as the person who attempted to rob him and who shot him.

¹ The Honorable Timothy M. Witkowiak presided over Brooks’ trial and sentencing. The Honorable Dennis R. Cimprich issued the order denying Brooks’ postconviction motion.

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

The State charged Brooks with attempted armed robbery with use of force and first-degree reckless injury with use of a dangerous weapon. A jury found him guilty of both charges. On the armed robbery charge, the circuit court sentenced Brooks to serve eight years of initial confinement and eight years of extended supervision. On the first-degree reckless injury charge, the circuit court ordered Brooks to serve a sentence of thirteen years of initial confinement and ten years of extended supervision with the sentence to run concurrent to count one but consecutive to any other sentence Brooks was serving.

In his postconviction motion, Brooks sought to modify the judgment of conviction to limit collection of his financial obligations to twenty-five percent of his prison funds.³ Brooks argued that the Department of Corrections (DOC) was collecting fifty percent of his prison wages and funds for payment of his financial obligations. In its decision denying Brooks' motion, the circuit court explained that the DOC's interpretation of WIS. STAT. § 973.20(11)(c)—which allowed it to take fifty percent of Brooks' funds—was not subject to review because the circuit court has no jurisdiction or authority over the DOC's actions in that regard. The circuit court additionally explained that if Brooks believed the DOC was acting without authority, his remedy was to pursue a civil claim for relief.

This appeal follows. The no-merit report addresses the following potential issues: whether there was sufficient credible evidence to support the guilty verdicts; whether Brooks should receive a new jury trial because jurors were sleeping; whether the circuit court

³ At sentencing, the circuit court ordered: "All financial obligations shall be paid from up to 25 percent of prison funds collected by the Department of Corrections or any earnings over the course of supervision."

erroneously exercised its discretion during sentencing; and whether the circuit court erred when it denied Brooks' postconviction motion.

The report details the evidence that was presented at trial, which supports the jury's verdicts, and sets forth the applicable standard of review. We further conclude that no procedural errors occurred with respect to the jury selection, the colloquy concerning Brooks' waiver of his right to testify, the jury instructions, and the arguments of counsel.⁴ This court is satisfied that the no-merit report properly concludes the issues it raises are without merit, and we briefly elaborate only on the issue of the sleeping jurors and on the circuit court's restitution award.

The record in this case reveals that there were concerns during one day of trial that members of the jury appeared at times to be drowsy or sleeping. The prosecutor explained that she asked for a sidebar to discuss a juror who "was leaning on her hands and had her eyes closed." The prosecutor added, "I did not believe she was asleep, but she might have been going in that direction[.]" The prosecutor then noted that a second juror "definitely ... had her eyes closed. I was not certain from my vantage point if she was falling asleep or not, so I was bringing that to the [c]ourt's attention, and as we were walking back from the sidebar, the bailiff went up to the jury box and said, be awake or something to that effect." The prosecutor also

⁴ This court 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). At issue in *Trammell* was the continued viability of jury instruction WIS JI—CRIMINAL 140, an instruction that was given in Brooks' case. The supreme court has since 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." See *State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Consequently, there would be no arguable merit to pursue postconviction proceedings based on the use of jury instruction WIS JI—CRIMINAL 140 at Brooks' trial.

described her subsequent request that the circuit court take a break because “[t]he jury looks a little tired.” The prosecutor elaborated, “I don’t believe any [jurors] were asleep, but I think they were heading [in] that direction,” to which the circuit court responded “[r]ight.” Brooks’ trial counsel did not add anything or otherwise object to the prosecutor’s summary of what had transpired.

Later that day, the circuit court recapped a separate sidebar that “was again, a juror was kind of dozing off. I wanted to make sure the jury did hear all the testimony.” The circuit court continued: “I know this isn’t the most scintillating testimony, and I understand that jurors have had some difficulty, but we did release them a little bit early this afternoon because of the fact that it’s been a long day.”

“Article I, § 7 of the Wisconsin Constitution, guaranteeing an impartial jury, and the Sixth and Fourteenth Amendments to the United States Constitution, guaranteeing an impartial jury and due process, require that a criminal not be tried by a juror who cannot comprehend the testimony.” *State v. Hampton*, 201 Wis. 2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996). A sleeping juror falls within the category of a “juror who cannot comprehend the testimony.” *See id.* at 668-69. Whether these rights have been violated is a question of law that we review *de novo*, but in our review, we accept the factual findings of the circuit court unless they are clearly erroneous. *State v. Turner*, 186 Wis. 2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994).

Appellate counsel points out in his report that the record does not clearly establish that any jurors were sleeping. Instead, the record reflects that upon observing drowsiness, actions were taken to ensure alertness. Based on the record before us, there would be no arguable merit to a challenge on this basis.

We will also briefly discuss the circuit court's decision to award restitution totaling \$66,607 to the victim. During the sentencing hearing, Brooks did not object to restitution for the victim's hospital bills, which totaled \$64,607. Brooks did, however, take issue with the victim's restitution requests related to the cost of a jacket and boots he was wearing the night he was shot, reimbursement for a parking ticket, and the victim's claims for lost wages. Brooks' objections with regard to those claims were based on the lack of supporting documentation. In ordering restitution, the circuit court advised the parties that it had removed the claim for reimbursement related to a parking ticket and "rounded the restitution to a number I think is appropriate based upon what's provided to the [c]ourt."

WISCONSIN STAT. § 973.20(13)(c) provides in pertinent part that "[t]he court shall give the defendant the opportunity to stipulate to the restitution claimed by the victim.... If the defendant stipulates to the restitution claimed by the victim or if any restitution dispute can be fairly heard at the sentencing proceeding, the court shall determine the amount of restitution[.]" Here, Brooks stipulated to all but \$2000 of the restitution imposed. The record further supports the circuit court's exercise of discretion in ordering restitution for the victim's jacket, boots, and lost wages. *See State v. Madlock*, 230 Wis. 2d 324, 329, 602 N.W.2d 104 (Ct. App. 1999) (explaining that a request for restitution is addressed to the circuit court's discretion). As such, there would be no arguable merit to a challenge on this basis.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved from further representing James M. Brooks in this appeal. *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