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

2017AP376-CRNM State of Wisconsin v. Chyquele Donell Dawson
(L.C. # 2014CF3657)

Before Fitzpatrick, P.J., 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).

Attorney Michael Holzman, appointed counsel for Chyquele Dawson, 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). Dawson filed a response to the report, and counsel filed a supplemental no-merit

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

report. After reviewing the record, we ordered two additional supplemental no-merit reports, both of which Dawson responded to.[2] We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We conclude there is no arguable merit to any issue that could be raised on appeal.

After a jury trial, Dawson was convicted of one count of first-degree recklessly endangering safety and one count of an adjudged delinquent in possession of a firearm. The court imposed consecutive terms totaling thirteen years of initial confinement and six years of extended supervision.[3]

Several issues discussed below relate to ineffective assistance of counsel. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697.

To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

[2] We previously set a date of July 24, 2020, for Dawson to respond to counsel's third supplemental no-merit report. The court received that response, along with a motion to extend that time, on August 4, 2020. The envelope was postmarked July 28, 2020, and the contents were dated July 23, 2020. These dates suggest that the material may have been placed in the prison mail system by the deadline of July 24, 2020. Accordingly, if the prison mailbox rule is applied, the response is timely. In addition to Dawson's response, we received an uninvited reply by counsel to that response. We accept that for filing, as well.

[3] The judgment states that each term is consecutive to the other. A consecutive sentence is one that follows another sentence. Accordingly, one of Dawson's sentences must be the first imposed, and is not consecutive to the other.

different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

We first address sufficiency of the evidence. We 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 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.

At trial, prosecution witnesses testified that, during a police raid on a duplex, a shot was fired from a second-floor window in the rear of the house; that Dawson was the only person seen emerging from that room inside the house; that a firearm was found in that room; that DNA similar to Dawson's was found on the firearm; that trajectory analysis of a bullet found in a vehicle luggage rack to the rear of the house showed that the bullet came from the direction of the window; and that ballistic evidence showed the bullet was fired from the firearm found in the house.

This was sufficient evidence to support the convictions. It was reasonable for the jury to infer that Dawson was the only person in the room from which the shot was fired, at the time the shot was fired, and therefore that he fired that shot. Those inferences are sufficient to support the elements of both the endangering safety and firearm possession charges. There is no arguable merit to this issue.

In his responses, Dawson takes issue with another part of the State's evidence. A State's witness testified to his opinion that a cell phone recovered at the house belonged to Dawson, and that some photographs found on that phone were of Dawson in possession of the firearm that

fired the shot. However, the face of the person with the firearm was not shown in those photos, and Dawson disputes that it was his phone or him in the photos.

For purposes of sufficiency of the evidence, it does not matter whether the photos were of Dawson. As we described above, there was sufficient other evidence to tie Dawson to the scene and to the firearm found there, and to show that the shot was fired from that firearm. Even if we were to agree with Dawson that the photos were not of him, based on the other evidence we would still conclude that it is frivolous to argue that the evidence was insufficient.

The no-merit report addresses whether the circuit court erred in denying Dawson's postconviction motion. The report concludes that there is no merit to this issue because the motion was based on counsel's mistaken understanding of the layout of the residence. We agree that counsel's understanding was in error. This issue lacks arguable merit.

In Dawson's response, he raises several concerns about the DNA evidence. Dawson argues that the DNA evidence was weak, but he appears to have misunderstood the expert's testimony. Dawson appears to believe that the expert testified that there was a one in 12,000 chance that the DNA was from Dawson. However, the expert actually testified that "the probability of randomly selecting an unrelated individual who's – could be included as a possible contributor to this major mixture component was approximately one in 12,000." That is meaningful evidence.

Dawson also appears to suggest that his DNA may have been planted on the firearm by police. This speculation appears to be based on nothing more than the fact that police collected DNA from him twice. Planting of the evidence is not a reasonable inference from that fact. It would be frivolous to argue that Dawson's counsel was ineffective by not pursuing this issue.

Dawson appears to suggest that inferences against his guilt can be drawn from the fact that the probable cause statement after his arrest did not include the eventual charge of reckless endangerment. In our view, no inference can be drawn from this fact that was worth raising at trial. It would be frivolous to argue that Dawson's counsel was ineffective by not pursuing this issue.

In Dawson's responses, he raises several other issues. Dawson argues that his trial counsel was ineffective by not filing a suppression motion based on an illegal arrest of Dawson. He argues that the arrest was without probable cause because the contents of the probable cause affidavit did not support the charges named. However, this argument is frivolous because there was probable cause to arrest at the scene based on the fact that Dawson was the lone occupant of the room from which police believed a shot was fired.

Dawson also extends that argument to include that counsel should have challenged the probable cause determination to continue holding Dawson after arrest. That argument has no merit for the same reason.

Dawson asserts that his trial counsel was ineffective by not making an argument that Dawson was deprived of his right to counsel in connection with the judicial probable cause determination. However, the authority he cites does not hold that there is a right to counsel when that determination occurs outside of open court. Furthermore, as prejudice, Dawson asserts that such a deprivation of his right to counsel means that the State lacks jurisdiction of the case. We are not aware of any authority for that proposition, and Dawson cites none.

Dawson asserts that his counsel was ineffective for not calling as trial witnesses those officers who were at the scene but said they did not hear a shot fired. There is no merit to this

issue because Dawson's defense was based on arguing that the State failed to prove who fired the shot, not that it failed to prove that a shot was fired. Calling witnesses who did not hear a shot would not have been relevant to who fired the shot and would not have assisted Dawson's defense. Therefore, it would be frivolous to argue that he was prejudiced by their absence at trial.

We ordered Dawson's counsel to address three issues Dawson raised in his response. The first issue was whether certain photographs in the trial record found on a phone are of Dawson. In Dawson's response, he asserted that they are actually photos of someone else. With this court having no independent way to know what Dawson looks like, we ordered counsel to address this point further.

Counsel responded by providing an affidavit that includes the booking photo of Dawson. That photo resembles the person shown in the photos on the phone enough to support a conclusion that the face shown in the pictures on the phone is Dawson's face. Therefore, there is no arguable merit to any issue based on misidentification of the person shown in those facial photos on the phone. That still leaves room to debate whether it is Dawson in the photos that show a person holding guns, but do not show the face of the person. However, that lack of certainty was evident to the jury.

We also ordered Dawson's attorney to address the subject of police memo books. Dawson argued that his trial counsel was ineffective by not obtaining police memo books. In response, counsel avers by affidavit that he has now obtained the memo books through discovery and reviewed them, and that they do not contain any exculpatory information. Counsel stated that he provided these materials to Dawson for his review. Dawson did not respond further to

this point, and therefore we take that as agreement that no issue with arguable merit is presented by the memo books.

Finally, we ordered counsel to address Dawson's claim that his trial counsel was ineffective by not challenging the State's striking of "all" African-Americans from the jury pool. Counsel reports by affidavit of his investigator that the only two African-Americans in the pool were struck. One of those, C.H., was struck for cause with the defense joining in the request. Because this was a strike the defense joined in, we do not further discuss this juror.

The other struck juror, J.H., was removed as a peremptory strike by the State. However, Dawson's attorney has concluded that an ineffectiveness claim on this basis would be frivolous because the voir dire transcript shows that the State had potential race-neutral reasons for striking the juror. Counsel concludes that the State, if asked, would have been able to articulate sufficient race-neutral explanations for striking the juror.

Dawson responds to counsel's analysis in several ways. First, Dawson argues that his attorney, by proposing race-neutral reasons on behalf of the prosecution, is exceeding the requirements of ***Batson v. Kentucky***, 476 U.S. 79 (1986). Dawson argues that under ***Batson*** this burden is on the State, and Dawson should not be required to argue against his own attorney on whether there were race-neutral reasons. Phrased in terms of the no-merit context, Dawson appears to be arguing that a postconviction motion on this basis would not be frivolous because there was a basis for counsel to have made a ***Batson*** challenge at trial and, once such a motion is filed, the burden is then on the prosecution to offer race-neutral reasons.

While Dawson has correctly described the procedure that would occur at trial under ***Batson***, this case is in a different posture now. The question now is whether Dawson can pursue

an ineffective assistance of counsel claim based on the lack of a ***Batson*** challenge at the trial itself. And, in this context, the content of the voir dire transcript is an appropriate part of the record to consider for the reason we now explain.

An evidentiary hearing on a postconviction claim of this sort would not just be an attempt to recreate the ***Batson*** hearing that would have occurred at trial if such an objection had been made then. As stated above, part of a defendant's burden in an ineffectiveness claim is to show that counsel's performance was deficient. An attorney's failure to make a ***Batson*** challenge is not necessarily deficient performance in every case where the legal basis for such a challenge existed. That is because defense counsel may have agreed with the State's strikes for reasons of his or her own. Or, counsel may have believed that the voir dire testimony of the struck panel members showed obvious race-neutral reasons that the prosecutor could rely on, if asked.

In the latter situation, defense counsel can reasonably decide that raising a ***Batson*** issue would be a waste of time that would be better spent on other parts of the trial. This can be characterized as a strategic decision. The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, because this is an objective test, even if trial counsel lacked a strategic reason at the time, a claim of deficient performance fails if counsel's action was one that an attorney could reasonably have taken after considering the question, in light of the information available to trial counsel at the time. And, accordingly, sometimes the existence of a basis for a reasonable strategic decision may be visible in the record before the filing of a postconviction motion. For that reason, it was proper for Dawson's attorney to analyze the content of the voir

dire transcript in evaluating the potential merits of this ineffective assistance claim, and to note the race-neutral reasons that the State might have relied on.

We next conclude that, even though it appears that Dawson would have been entitled to make a ***Batson*** challenge at trial, it would be frivolous for Dawson to allege deficient performance now because the voir dire transcript shows that a reasonable defense attorney could have believed there were race-neutral reasons that the prosecutor would successfully rely on if defense counsel had made such a challenge. Dawson does not agree with his attorney that the transcript shows such reasons, and we address those points next.

Dawson argues that the supposed race-neutral reasons for striking the two jurors are not actually race-neutral because those same reasons were present for white jurors who the State did not strike. More specifically, one struck juror, J.H., was an African-American removed as a peremptory strike by the State. During voir dire, this juror described her potential family care responsibilities, leg pain, and a frightening and upsetting experience in her building with a police raid similar to the one in this case. Based on those characteristics, Dawson's attorney concludes that the State, if asked, would have been able to articulate sufficient race-neutral explanations for striking the juror.

Dawson asserts that juror number 13, J.R., had a similar medical issue, in that she was nursing and, therefore, would require a twenty-minute break every four hours. However, the court and the juror both agreed that this could be done during the court's usual lunch recess. This was not comparable to the leg pain discomfort or potential family care responsibility described by J.H.

Dawson also asserts that juror number 11, K.M., reported that she had been pulled over and ticketed for speeding. Dawson argues that this was a police experience comparable to J.H.'s experience with the police raid. However, again, the experience of J.H. appears to have been considerably more intense.

And, furthermore, even if the statements of these two white jurors were comparable to those of J.H., neither of them had all of those potential distractions combined in one juror. Therefore, the record shows significant race-neutral reasons to strike J.H.

Although Dawson initially raised only a claim about two African-Americans being struck from the jury, in counsel's third supplemental no-merit report counsel also addressed the striking of A.S., who was identified as an Hispanic juror. Counsel asserts that there was a potential race-neutral reason for striking A.S. because, as counsel describes it, A.S. testified during voir dire that his brother had been convicted of being a felon in possession of a firearm, which was also a charge against Dawson. Counsel asserts that it would be reasonable to assume the prosecutor did not want a juror who might have sympathy for a person charged with the same crime as his brother.

Dawson correctly notes that A.S. actually testified that his brother was convicted of a felony for possessing a firearm without a license, not for being a felon in possession of a firearm. However, counsel's point remains a valid one. Dawson's trial counsel could reasonably have viewed this as a race-neutral explanation that the State could offer, with the result that a ***Batson*** challenge as to this juror was unlikely to be successful.

Finally, in counsel's third supplemental no-merit report, counsel also discusses potential juror number 30, J.J. Counsel asserts that J.J. was an African-American, although that

information does not appear to be in the affidavit. Counsel explains that, although J.J. was part of the voir dire process, he was not selected because the process did not reach as high as his number.

Dawson responds to this by asserting that J.J. should have been drawn into the process after another African-American juror was struck for cause. If Dawson is suggesting that a juror who is struck for cause should be replaced by a juror of the same ethnicity, he does not cite any law that creates such a requirement, and we are not aware of one.

Dawson also relies on WIS. STAT. § 972.04(1), which requires the court to replace jurors who are excused for cause with a new juror, thus maintaining the required number of jurors in the jury box during voir dire. Dawson may be suggesting that compliance with this statute would have brought J.J. into the jury box.

Although the court in this case did not actually describe the process of replacing jurors who were excused for cause, that statute was complied with here because the court began the process with more than the required number of jurors in the box. By statute, the required number of jurors for voir dire was twenty-three, consisting of twelve jurors as required for trial, one alternate as ordered by the court, and ten additional jurors to accommodate the parties' total of ten peremptory strikes. *See* WIS. STAT. §§ 756.06(2)(a), 805.08(2), and 972.03.

Here, the court began the process with thirty jurors, seven more than the twenty-three required. Four jurors out of the first twenty-three on the list were struck for cause. Jurors numbered 24 through 27 then became part of the selection process to replace them. However, that meant that jurors numbered 28 through 30, including J.J., were left out of the final selection process, even though they participated in voir dire. This is confirmed by comparing the affidavit

identifying the jurors struck for cause and by the parties with the names of the original thirty jurors. The initials of jurors numbered 28 through 30 do not appear on those lists as being either on the jury or struck. This confirms that they were not part of the final selection process.

We next turn to sentencing. The no-merit report addresses whether the sentence is within the legal maximum and whether the 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. The sentences are within the legal maximum. There is no arguable merit to this issue.

In Dawson's second response, he asserted that the sentencing court showed bias against him in the way it considered his juvenile record. That record included an armed robbery with a firearm at an automated teller machine. The judge noted that he does not use such machines or buy gas at night because there is too much of this kind of crime. These were proper considerations. The court was describing the impact these crimes have on the community. The court also noted Dawson's apparent interest in using firearms, which properly goes to Dawson's character and need for rehabilitation. There is no arguable merit to this issue.

Dawson also asserted that the court improperly considered the drug house nature of the residence that Dawson was present in. Dawson asserts that this was an improper factor because his case was not related to drug activity and the record did not show that he "hung out" at the house. There is no arguable merit to this issue. While the record does not directly tie Dawson to

drug use or sales, he was clearly present at a house, which, as the court described, appeared to be functioning as a drug house, not as a legitimate residence.

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the appellant's response to the third supplemental no-merit report and counsel's reply to that response are accepted for filing.

IT IS FURTHER ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Holzman is relieved of further representation of Dawson 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