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DISTRICT I

December 15, 2020

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Reserve Judge

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

2019AP1087-CRNM State of Wisconsin v. Darion Ezell Parker (L.C. # 2014CF4284)

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).

Darion Ezell Parker appeals a judgment of conviction entered after a jury found him guilty of three crimes. His appellate counsel, Attorney Kathleen A. Lindgren, filed a no-merit report, contending that no grounds exist for a meritorious appeal. *See* WIS. STAT. RULE 809.32

(2017-18).[1] Parker filed a response. Upon review of the no-merit report, Parker's response, and an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm.

The State filed a criminal complaint alleging that on June 28, 2014, Parker and several co-actors forced their way into M.W.'s home. Parker fired a shotgun and robbed M.W.'s guests, D.S. and M.G. The State charged Parker, as a party to a crime, with second-degree recklessly endangering safety, a class G felony, and two counts of armed robbery, each a Class C felony. *See* WIS. STAT. §§ 941.30(2), 943.32(2). Parker pled not guilty and requested a jury trial.[2]

On the morning of trial, the parties advised the circuit court that Parker had rejected an offer from the State to resolve the case with a plea agreement in which Parker would plead guilty to second-degree recklessly endangering safety, the State would recommend a prison sentence without specifying the length of a recommended term, and the State would move to dismiss and read in the two armed robbery counts. The circuit court asked Parker if the information about the plea negotiations was correct. Parker responded, "[y]es, your honor, it is." The matter then proceeded to trial. The jury found Parker guilty as charged.

[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Although Parker entered not guilty pleas in this case, the judgment of conviction shows that he entered no-contest pleas. We therefore direct that, upon remittitur, the circuit court shall oversee the entry of an amended judgment of conviction reflecting that Parker pled not guilty to each charge. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (a court may correct clerical errors at any time).

At sentencing, Parker faced maximum penalties of ten years of imprisonment and a $25,000 fine for second-degree recklessly endangering safety. *See* WIS. STAT. § 939.50(3)(g). He faced maximum penalties of forty years of imprisonment and a $100,000 fine for each armed robbery. *See* § 939.50(3)(c). The circuit court imposed an evenly bifurcated eight-year term of imprisonment for second-degree recklessly endangering safety and ordered that Parker serve the sentence consecutively to any previously imposed sentence. As for the armed robberies, the circuit court imposed two consecutive twelve-year terms of imprisonment, each term bifurcated as seven years of initial confinement and five years of extended supervision. The circuit court found Parker eligible for the challenge incarceration program and the Wisconsin substance abuse program and did not order any restitution.

We first consider whether Parker could pursue an arguably meritorious claim that the State failed to present sufficient evidence to support the guilty verdicts. Before the jury could find Parker guilty of second degree recklessly endangering safety, the State was required to prove beyond a reasonable doubt that: (1) he endangered the safety of another human being; and (2) he endangered the safety of another by criminally reckless conduct. *See* WIS. STAT. § 941.30(2); WIS JI—CRIMINAL 1347. Before the jury could find Parker guilty of armed robbery, the State was required to prove that: (1) the alleged victim was the owner of property; (2) Parker took and carried away property from either the person or presence of the alleged victim; (3) Parker took the property with the intent to steal; (4) he acted forcibly; and (5) at the time of the taking or carrying away, he used or threatened to use a dangerous weapon. *See* WIS. STAT. § 943.32(2); WIS JI—CRIMINAL 1480. Additionally, because the State charged Parker as a party to a crime, the State was required to prove that, as to each crime, Parker either directly

committed the crime or intentionally aided and abetted the commission of the crime. *See* WIS. STAT. § 939.05; WIS JI—CRIMINAL 400.

M.W. testified, in pertinent part, that on June 28, 2014, she lived in the lower unit of a duplex in the 5600 block of North 61st Street in Milwaukee. At approximately 10:00 p.m. that evening, she and some friends were having drinks on her porch when a car drove up to the house and two men got out of the vehicle. She recognized one of the men, whom she knew by the nickname "D," because at one time he had lived in the upper unit of the duplex with the mother of his child. M.W. said that the two men went upstairs and when they came back down, D had a shotgun. D fired the gun, and M.W. fled into the home. D followed, pointing the gun at her and demanding that she "give him everything." D's companion pushed the gun, and D fired a shot into the residence. D then pursued M.W.'s guests into a back bedroom, and M.W. escaped, running to a neighbor's home to call the police. M.W. subsequently viewed a photo array and selected Parker as the gunman. In the courtroom, she identified Parker as "D." She testified that she knew his face from "when he stayed upstairs," and that she was "positive" he was the gunman in her home on June 28, 2014, because he had not worn a mask.

D.S. testified that she, her infant daughter, and the infant's father, M.G., were visiting M.W. at her home on the evening of June 28, 2014. A car pulled up and four men got out. D.S. told the jury that she recognized one of the men as a resident in the upper unit because she had seen him during prior visits to M.W.'s home. D.S. said that on this occasion, the man produced a gun, fired it, and demanded: "give me everything." D.S. fled into a back bedroom where she hid with M.G. and their infant. The gunman and a companion eventually entered the bedroom, and she watched them search M.G.'s pockets and take some money and two cell phones. As D.S. tried to run from the room, the gunman grabbed her purse and wrested it from her grasp.

The intruders then left the bedroom, and D.S. escaped through a window with M.G. and their infant.

D.S. testified that she returned to M.W.'s residence after police said she could do so. She found her purse inside, with its contents scattered on the floor.

D.S. further testified that police showed her a photo array but she was unable to identify anyone in the array as a suspect. She added that, upon reflection, she believed that the gunman was in the array but at the time she viewed the pictures she was not sufficiently confident to make an identification because "the hair was different." She identified Parker in the courtroom as the gunman and said she was certain of her identification.

M.G. told police that he, D.S., and their infant were visiting M.W. on June 28, 2014, when a car pulled up and three men emerged. M.G. identified Parker in the courtroom as one of the men. M.G. said that Parker went into the residence and then came back out with a shotgun. He fired a shot and M.G. fled into the home, but the gunman and one of his companions found M.G. hiding in a bedroom with D.S. and their infant. The gunman robbed M.G. of two cell phones, a cigar filled with marijuana, and approximately ten dollars while the gunman's companion searched through D.S.'s purse. The intruders then left the room, and M.G. and his family escaped from the home. M.G. subsequently viewed a photo array and identified Parker as the gunman. M.G. testified that he did not know Parker and had never seen him before the night of June 28, 2014.

In addition to the three victims, the State presented testimony from two investigating officers. Officer James Jordan testified that he showed a photo array to M.W., D.S. and M.G. M.W. and M.G. identified Parker as the person who victimized them on June 28, 2014, while

D.S. was unable to make an identification. Officer Jake Puschnig testified that on June 28, 2014, he responded to M.W.'s home following a report of gun fire. He described and authenticated the photographs he took at the scene, including photographs of bullet spray inside the residence. Parker elected not to testify and did not present any witnesses.

When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that ... no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The finder of fact, not this court, considers the weight of the evidence and the credibility of the witnesses and resolves any conflicts in the testimony. *See* ***id.*** at 503. Upon review of the proceedings, we conclude that the evidence summarized above amply satisfied the State's burden of proof as to each crime. Further pursuit of this issue would lack arguable merit.

We next consider whether Parker could pursue an arguably meritorious claim that he did not validly waive his right to testify at trial. The record shows that the circuit court conducted a colloquy with Parker and established that he was aware of his right to testify, had discussed it with his counsel, and had decided not to exercise that right. The colloquy fully satisfied the obligations imposed by ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. Further pursuit of this issue would lack arguable merit.

In response to the no-merit report, Parker contends that he could pursue arguably meritorious claims that his trial counsel was ineffective. A defendant who claims that counsel

was ineffective must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

Parker first claims that his trial counsel was ineffective in cross-examining the three victims. In support, he submits police reports prepared by officers who did not testify at trial, and he says that trial counsel performed deficiently by failing to show the jury that the victims offered testimony that differed in some respects from the statements that those officers summarized in their reports. He particularly emphasizes that one of the police reports does not include any statement by D.S. alleging that she was robbed and that another report does not include any allegation by M.W. that an intruder pointed a gun at her. He complains that his trial counsel did not focus on these omissions or on other inconsistencies between the statements and the testimony.

We are satisfied that the record does not support an arguably meritorious claim that Parker was prejudiced by the alleged deficiencies. It is readily apparent why D.S., when reporting a home invasion by armed intruders, might not focus her initial narrative on the purse that the intruders ultimately left behind. Accordingly, no reasonable probability exists that the outcome of the trial would have been different if trial counsel had cross examined her about this alleged omission. As to the claim that trial counsel neglected to question M.W. about her alleged

failure to tell police that "D" pointed a gun at her head, the record shows that M.W. understood trial counsel to question her about that very matter. In response to trial counsel's cross-examination regarding her statement to police, she testified:

> I told [police that] when we were outside [the gunman] shot up in the air; and then the other gunshot I felt like it was meant for me because he was pointing at my head and if his friend would have never moved his hand then I would be dead; yes I told them that.

No reasonable probability exists that the verdicts would have been different if trial counsel had further questioned M.W. about her alleged failure to tell police that Parker aimed a gun at her head.

Moreover, our inquiry on appeal is "whether defense counsel's performance was objectively reasonable according to prevailing professional norms." *See* ***Kimbrough***, 246 Wis. 2d 648, ¶31. Here, the record shows that trial counsel conducted a vigorous cross-examination of each victim, exposing variations in each victim's description of the events and drawing the jury's attention to the victims' consumption of alcohol on the night of the incident. Trial counsel's strategy adequately developed the discrepancies in the victims' testimonies and provided a sufficient basis for the jury to assess the credibility of the witnesses and the weight of the evidence. Further pursuit of this issue would be frivolous within the meaning of ***Anders.***

Parker next contends that he can pursue an arguably meritorious claim that his trial counsel was ineffective for failing to seek suppression of the victims' out-of-court identifications of him in the photo array. We cannot agree.

We first note that Parker refers to an out-of-court identification by D.S. as well as by M.W. and M.G. The record is clear, however, that D.S. was unable to identify a suspect in the

photographic array that police showed her. Because D.S. did not make an out-of-court identification, a motion to suppress such an identification would have lacked arguable merit.

As to the identifications made by M.W. and M.G., Parker asserts that they were impermissibly suggestive because, of the six people pictured in the photo array, he was the only person wearing a hoodie and the only person pictured against a dark purple background. However, ordinary clothing is not impermissibly suggestive. *See* ***Simos v. State***, 83 Wis. 2d 251, 257, 265 N.W.2d 278 (1978) (concluding that the defendant's blue trousers were not unduly suggestive). Similarly, a photographic lineup is not impermissibly suggestive merely because the target's picture is in color when other persons are pictured in black and white. *See* ***Holmes v. State***, 59 Wis. 2d 488, 497, 208 N.W.2d 815 (1973). Accordingly, Parker cannot make an arguably meritorious claim that trial counsel performed deficiently by failing to seek suppression of M.G.'s and M.W.'s out-of-court identifications.

Moreover, Parker cannot make an arguably meritorious claim that he was prejudiced by any alleged deficiency. The victims identified him in court as the gunman, and an in-court identification is admissible even when the out-of-court identification is suppressed so long as the in-court identification is based on observations of the suspect other than those made during the out-of-court identification procedures. *See* ***State v. McMorris,*** 213 Wis. 2d 156, 167, 570 N.W.2d 384 (1997). Here, M.W. recognized Parker as D, the upstairs neighbor. M.G. observed Parker at close range while he was rifling through M.G.'s pockets and taking M.G.'s money and belongings during the home invasion. *See* ***Holmes***, 59 Wis. 2d at 499 (holding that a victim who observed an unmasked suspect during a home invasion had an independent basis for identifying the suspect in the courtroom). Further pursuit of this issue would lack arguable merit.

Parker next contends that he can raise an arguably meritorious claim that trial counsel was ineffective for failing to request jury instructions on lesser-included offenses. Again, we disagree.

Parker argues that, as to the offense of second-degree recklessly endangering safety, trial counsel should have requested an instruction on the allegedly lesser-included offense of negligently handling a dangerous weapon in violation of WIS. STAT. § 941.20(1)(a). A crime is a lesser-included offense, however, "only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the 'greater' offense. Conversely, an offense is not a lesser-included one if it contains an additional statutory element." ***State v. Carrington***, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986) (citation and ellipsis omitted). To prove a person guilty of negligently handling a weapon under WIS. STAT. § 941.20(1)(a), the State must prove, *inter alia*, that the person acted in a criminally negligent manner and that the person handled a dangerous weapon. *See* ***id.***; *see also* WIS JI—CRIMINAL 1320. Neither of those elements is required for proof of second-degree recklessly endangering safety. *See* WIS. STAT. § 941.30(2); *see also* WIS JI—CRIMINAL 1347. Accordingly, a violation of § 941.20(1)(a) is not a lesser included offense in relation to a violation of § 941.30(2). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

As to the two armed robbery charges, Parker argues that trial counsel should have requested an instruction on attempted armed robbery. Assuming without discussion that attempted armed robbery is a lesser-included offense in relation to armed robbery, a party is not entitled to a lesser-included instruction unless "there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." *See* ***State v. Fitzgerald***, 2000 WI App 55, ¶7, 233 Wis. 2d 584, 608 N.W.2d 391 (citations omitted). Here, Parker asserts

that, as to D.S., the jury could have acquitted him of armed robbery but found him guilty of attempted armed robbery because he left her purse in the home. As we have seen, however, armed robbery requires proof that the defendant carried away the property of another, that is, proof of asportation. *See* WIS JI— CRIMINAL 1480 & n.vi. "The slightest movement is sufficient to meet the element of asportation." ***State v. Johnson***, 207 Wis. 2d 239, 246-47, 558 N.W.2d 375 (1997) (recognizing the rule and declining to amend it). Accordingly, if the jury believed that Parker seized property from D.S. but abandoned it, the State proved armed robbery, not attempted armed robbery.[3] *See* ***Ryan v. State***, 95 Wis. 2d 83, 100, 289 N.W.2d 349 (Ct App. 1980), *overruled on other grounds by* ***State v. Anderson***, 141 Wis. 2d 653, 666-67, 416 N.W.2d 276 (1987) (holding that evidence of defendant seizing and then dropping the victim's purse satisfied the asportation requirement).

As to M.G., Parker asserts that the jury could have acquitted him of armed robbery but convicted him of attempted armed robbery because, he alleges, M.W. subsequently found one of

[3] Of course, if the jury did not believe that Parker took D.S.'s property at all, the jury's duty was to acquit him. The jury's verdicts reflect, however, that the jurors believed D.S. and concluded that Parker took her property. In this regard, we have taken into account that the jury asked during deliberations: "in order to convict of armed robbery count number two [as to D.S.] does property have to be taken or can there only be attempt to take?" The parties agreed with the circuit court's decision to answer this question by telling the jury to rely on its collective memory and by directing the jurors to review the elements of armed robbery as set forth in the jury instructions. No arguably meritorious basis exists to challenge trial counsel's acquiescence to this response. *See* ***State v. Simplot***, 180 Wis. 2d 383, 405, 509 N.W.2d 338 (Ct. App. 1993) (holding that the circuit court properly exercised its discretion by answering jury's query by re-reading a correct instruction).

M.G.'s stolen cell phones. The jury, however, never heard any such evidence.[4] Further, Parker's theory of the case does not account for the second cell phone and other items stolen from M.G.

In sum, the record shows that trial counsel had no basis for requesting an instruction on attempted armed robbery. Further pursuit of this issue would lack arguable merit.

Parker next asserts that he could pursue an arguably meritorious claim that trial counsel was ineffective for failing to object to certain remarks the State made during closing argument. Specifically, he complains that the State: (1) "subtle[y]" implied that certain events happened contemporaneously when the testimony was that they happened in succession; and (2) wrongly stated that the gun that Parker used was "working" and "functional" when it was not recovered and tested. A lawyer, however, has substantial latitude in closing argument. *See* ***State v. Draize***, 88 Wis. 2d 445, 456, 276 N.W.2d 784 (1979). Here, the State's characterization of how events unfolded reasonably described the testimony. As to Parker's arguments about the functionality of the gun, we remind Parker that the victims testified that he fired the gun and police identified bullet spray in the home. The State therefore drew the logical conclusion that the gun was functional. *See* ***id.*** at 454 (explaining that a prosecutor may comment on the evidence and draw reasonable inferences from it). Moreover, the circuit court instructed the jury that the arguments, conclusions, and opinions of counsel are not evidence and that the jurors must rely on the evidence to reach their verdicts. We assume that juries follow their instructions. *See* ***State v.***

[4] Parker's submission to this court includes a police report with information suggesting that M.W. found one of M.G.'s stolen cell phones. The police report was not admitted in evidence and the officer who wrote it did not testify. At trial, M.G. denied that he recovered any of his stolen property.

Truax, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Parker next asserts that he can pursue an arguably meritorious claim that his trial counsel was ineffective during plea negotiations. He first complains because trial counsel negotiated a deal "at the last minute." The materials that Parker provided show that two weeks before trial, the State offered to dismiss the charge of second-degree reckless injury and one count of armed robbery if he pled guilty to the other armed robbery count. In an email to trial counsel, the State added that it was "not sure [it] can move much more than that but again, always willing to listen." Defense counsel's brinksmanship earned Parker a better offer on the day of trial, namely, an offer to dismiss both armed robberies if he agreed to plead guilty to the less serious offense of second-degree recklessly endangering safety. Therefore, he cannot show a deficiency here.

Parker also asserts that trial counsel was ineffective in the plea bargaining process because trial counsel did not explain to him the maximum sentence that he faced upon conviction of second-degree recklessly endangering safety "as opposed to all three nor did she advise him the likely sentence under this offer versus what he would receive if convicted at trial." The record shows, however, that at Parker's initial appearance, he received advisements from the presiding court commissioner about the maximum sentences he faced, and he also received a copy of the complaint describing the maximum sentence for each offense. Thus, assuming without discussion that trial counsel performed deficiently during the plea bargaining process by failing to reiterate the maximum sentences that he faced, Parker fails to demonstrate any prejudice. As to trial counsel's alleged failure to advise Parker about the likely sentences that he would receive, we remind him that sentencing decisions rest within the circuit court's discretion,

see ***State v. Gallion***, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197, and trial counsel cannot promise a defendant that he or she will receive any particular disposition, *see* ***State v. Hampton***, 2004 WI 107, ¶42, 274 Wis. 2d 379, 683 N.W.2d 14. Moreover, the rule in Wisconsin is that predictions as to sentencing outcomes will not support a claim of ineffective assistance of counsel. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. Therefore, there is no merit to this claim.

Parker next asserts that trial counsel was ineffective because she told him that she was prepared to attack the armed robbery charges and advised him to reject the State's proposed plea agreement. Parker also tells us, however, that ten days before the trial began, his trial counsel advised him that he did not have a viable defense and that "all the State had to do was connect the dots." His submission thus indicates that his trial counsel warned him about the risks of going to trial and gave him that warning in sufficient time for him to consider how to proceed.[5] Moreover, the record shows that the circuit court asked Parker directly whether he wanted to reject the State's offer. Parker replied that he did. Thus, Parker had the opportunity to decide for himself whether he wanted to have a trial notwithstanding his lawyer's assessment that the State's case was strong; or instead accept a favorable plea agreement that included dismissal of the two most serious charges against him. He chose to proceed to trial. That decision was his alone to make, *see* ***State v. Albright***, 96 Wis. 2d 122, 129-30, 291 N.W.2d 487 (1980), and nothing in the record or in his response to the no-merit report supports an arguably meritorious claim that his trial counsel was ineffective in regard to the decision that he made.

[5] Parker responded to trial counsel's warnings about the weakness of his case by asking trial counsel to withdraw. Counsel made the motion, but Parker changed his mind after the circuit court advised him on the record that if trial counsel withdrew, he might be dissatisfied with successor counsel.

We last consider the sentencing proceedings. We agree with appellate counsel that the circuit court properly exercised its sentencing discretion in fashioning Parker's sentences. *See* ***Gallion***, 270 Wis. 2d 535, ¶17. The circuit court indicated that protection of the community was the primary sentencing objective, and the circuit court discussed appropriate factors that it viewed as relevant to achieving that objective. *See* ***id.***, ¶¶41-43. Moreover, none of the sentences exceeded the maximum sentences allowed by law, and the aggregate eighteen years of initial confinement and fourteen years of extended supervision imposed was far less than the aggregate fifty-five years of initial confinement, thirty-five years of extended supervision and $225,000 in fines that Parker faced upon conviction. Parker therefore cannot mount an arguably meritorious claim that his sentences are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173.

Our independent review of the record does not disclose any other issue warranting discussion as a potential basis for appeal. To the extent that we may not have addressed some nuance of an issue that Parker raised in his response to the no-merit report, we have nonetheless concluded that neither the record nor the submissions to this court provide a basis for further postconviction or appellate litigation. We therefore accept the no-merit report and relieve Attorney Lindgren of further representation of Parker.

IT IS ORDERED that the judgment of conviction, amended as required by footnote two, is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that Attorney Kathleen A. Lindgren is relieved of any further representation of Darion Ezell Parker effective on the date that the circuit court enters an

amended judgment of conviction as required by footnote two of this opinion . *See* WIS. STAT. RULE 809.32(3) (2017-18).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals