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December 15, 2020

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

2017AP2434-CRNM State of Wisconsin v. Leshawn B. Brooks (L.C. # 2016CF3309)

Before Brash, P.J., 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).

Leshawn B. Brooks appeals from a judgment, entered upon a jury's verdict, convicting him on one count of armed robbery and one count of aggravated battery, both as a party to a crime. Appellate counsel, Bradley J. Lochowicz, filed a no-merit report pursuant to ***Anders v.***

California, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Brooks filed a response with two addenda. Appellate counsel also submitted a supplemental no-merit report. Upon our independent review of the record as mandated by ***Anders***, counsel's reports, and Brooks's response, we conclude that, subject to vacatur of two non-final civil judgments as described herein, there are no issues of arguable merit that could be pursued on appeal, so we summarily affirm the judgment of conviction.

BACKGROUND

According to the criminal complaint, Milwaukee Police Officers Ryan Casey and Melissa Toms responded to a shooting report. When they arrived at the scene, Casey spoke with the victim, sixty-three-year-old L.H., who was holding a blood-soaked towel to a gash in his head. L.H. reported that two suspects entered his residence and repeatedly struck him in the head with guns, then took money from his pockets and jewelry off his wrist. L.H. was not shot, though a gun discharged while he was being struck. Casey found an unfired 9mm cartridge on the bed in L.H.'s room, a spent 9mm casing on the floor, and a fresh bullet hole in the wall.

Toms spoke to J.S., who was in the residence during the incident. J.S. said she saw two black males approach the house from the back alley. She knew one of them as Theodore Bell, who also went by "Goldie," and she only knew the other man by the name "Lee." She reported that she hid in a bedroom before the two men entered; once they entered, she heard arguing and a gunshot. The two men left after being in the house for about ten minutes. L.H. later identified both Bell and Brooks in separate photo arrays.

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

Further investigation led the State to charge Brooks with three offenses: armed robbery, first-degree recklessly endangering safety while using a dangerous weapon, and criminal trespass, all as a party to a crime.[2] Prior to Brooks's trial, the State issued an amended information charging only two offenses: armed robbery and aggravated battery, both as a party to a crime. A jury convicted Brooks of both offenses. The trial court imposed fifteen years' initial confinement and five years' extended supervision for the armed robbery, and three years' initial confinement and two years' extended supervision for the aggravated battery. These sentences were set concurrent with each other but consecutive to any other sentence Brooks might be serving. The trial court additionally made Brooks ineligible for either the substance abuse or challenge incarceration programs. Brooks appeals. Additional facts will be described herein.

DISCUSSION

In the no-merit report, appellate counsel discusses several potential issues which he concludes lack arguable merit. Brooks's response and addenda discuss additional issues, which counsel addresses in his supplemental report. We also discuss an issue that we have independently identified.

I. Sufficiency of the Evidence

The first potential issue appellate counsel discusses is sufficiency of the evidence to support the verdicts. On review of a jury's verdicts, we view the evidence in the light most favorable to the verdicts. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752

[2] Bell was charged in the same complaint with five offenses.

(1990). If more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***id.*** "'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

To secure a conviction on armed robbery, the State had to prove: (1) L.H. was the owner of property; (2) Brooks took and carried away property from the person or from the presence of L.H.; (3) Brooks took the property with the intent to steal; (4) Brooks acted forcibly; and (5) at the time of the taking or carrying away, Brooks used or threatened to use a dangerous weapon, which includes any firearm. *See* WIS JI—CRIMINAL 1480.[3]

To secure a conviction on aggravated battery as charged in this case, the State had to prove: (1) Brooks caused bodily harm to L.H.; (2) Brooks intended to cause bodily harm to L.H.; (3) Brooks's conduct created a substantial risk of great bodily harm; and (4) Brooks knew that his conduct created a substantial risk of great bodily harm. *See* WIS JI—CRIMINAL 1226. When a victim is "62 years of age or older," the jury can rely on the victim's age alone to find that the defendant's conduct created a substantial risk of great bodily harm. *See* ***id.***; *see also* WIS. STAT. § 940.19(6)(a) (2015-16).

As noted, Brooks was also charged as a party to a crime, meaning he was concerned in the commission of the crimes either by directly committing them or by intentionally aiding and

[3] One of the issues Brooks raises in his no-merit response discusses the fact that the trial court did not use WIS JI—CRIMINAL 1480 when instructing the jury; we will discuss this concern at a later point in this opinion.

abetting the person who directly committed them. *See* WIS JI—CRIMINAL 400. To intentionally aid and abet, the defendant must know that another person is committing or intends to commit a crime and have the purpose to assist the commission of that crime. *See **id.*** A person does not aid and abet if he or she is only a bystander or spectator and does nothing to assist the commission of a crime. *See **id.*** Thus, the State had to establish that the armed robbery and aggravated battery were committed directly by Brooks or by another person whom Brooks was aiding and abetting.

Witness J.M.S., who was living in L.H.'s home at the time, testified that she came home from work and took a shower. When she got out, she heard voices in the kitchen, even though she thought she was alone. She went to the kitchen and saw L.H. and Brooks, whom she had known for about thirty years. She exchanged greetings with Brooks and returned to her room. Shortly thereafter, she heard arguing coming from L.H.'s room. When she looked to see what was happening, she saw Brooks "on top of [L.H.], gonna hit him." She also saw another man she did not know in the room. She saw Brooks hit L.H. with closed fists and saw the other man hit L.H. in the head with a gun. At that point, she fled the house. When she turned back, she saw L.H. bleeding.

A business near L.H.'s home had a surveillance camera that included L.H.'s back door in its visual field. Video from the business showed Brooks and Bell walk up to L.H.'s back door. The video also showed another man, A.A., approach the back door and knock on a window. L.H. admitted A.A., who had arrived carrying a backpack, then stepped outside to speak to Brooks. L.H. let Brooks inside, but Bell stayed outside. Later footage shows Brooks and Bell running out L.H.'s back door; one is carrying a backpack and the other is carrying something he appears to tuck into his waistband under his shirt.

L.H. testified that Bell had been at the house earlier in the day, looking for J.S., and he and Bell had argued. L.H. said he told Brooks that he did not want Bell in the house, and that he closed and locked the back door after Brooks entered. L.H. told Brooks to wait in the kitchen and went to his room to secure certain items. Brooks then entered the bedroom with Bell behind him. L.H. and Bell exchanged words, and Bell hit L.H. with his gun, causing a gash in his head that began to bleed. A fight ensued, and L.H. testified that Brooks pushed him, causing him to fall on the bed. He indicated that it was difficult to tell at first if Brooks was trying to hit him or protect him, but then he heard Brooks say, "[P]ut two hot ones in him, Goldie." He also saw Brooks appear to gather up L.H.'s personal items from the table; L.H. testified that money, a watch, and rings were taken from his home. L.H. also testified that staples were needed to close the gash in his head, that Brooks later returned some of L.H.'s credit cards, and that he was sixty-three years old at the time of the incident.

Milwaukee Police Officer Eulia Kazachenko testified that she and her partner were on duty around 9:00 p.m. on the day of the incident. They were flagged down by a bartender from a nearby tavern, who reported that he had recently observed, on the tavern's surveillance camera live feed, two black males drop something large in the bar's dumpster. The officers investigated the dumpster and found a large camouflage backpack with, according to Kazachenko, a bloody watch on top of the bag. There was also a pink camouflage gun case in the dumpster. The officers contacted their sergeant, who was investigating the robbery of L.H., and determined that these items matched ones reportedly taken in the robbery.

Brooks testified in his own defense. He stated that on the day of the incident, he ran into Bell at a gas station. They walked to L.H.'s house, where Brooks planned to buy heroin for his girlfriend and retrieve her pink camouflage backpack. They approached L.H.'s back door, and

L.H. told Bell to stay outside. Brooks and L.H. went inside; Brooks claimed that he did not know if L.H. locked the door and, further, denied unlocking the door for Bell. L.H. told Brooks to wait in the kitchen, but Brooks followed L.H. to his bedroom so he could ask Brooks for a bag to split the heroin he was about to purchase. As Brooks reached for the bag of drugs that L.H. was handing him, he saw L.H. look past him; before Brooks could turn around, Bell swung at L.H. with his gun. Brooks said he was surprised by Bell's entrance. Brooks acknowledged that he pushed L.H., who fell to a mattress on the floor, but claimed he did this for L.H.'s protection. Brooks admitted he had been on top of L.H. but said he was telling L.H. to stay down for his own protection. Brooks also acknowledged that he and Bell were on the tavern video but denied taking any of L.H.'s personal property.

While Brooks attempted to cast doubt on various elements of the State's case against him, highlighting among other things various inconsistencies between L.H.'s testimony and his statements to police, the standard of review requires us to construe the evidence in the light most favorable to the conviction. *See* ***Poellinger***, 153 Wis. 2d at 504. Applying that standard, there is more than ample evidence to support the convictions, so there is no arguable merit to a claim that insufficient evidence supported the jury's verdicts.

II. Jury Selection and the Wayward Juror

Appellate counsel discusses whether there are any postconviction or appellate issues "with regard to the impaneling of the jury." Here, we agree with appellate counsel's analysis and conclusion that there are no arguably meritorious issues with regard to jury selection.

Appellate counsel also discusses whether there is any arguably meritorious issue stemming from an incident where a juror walked into the courtroom during an evidentiary

hearing. The trial court was conducting a hearing to determine whether L.H.'s statements to police were admissible under the excited utterance hearsay exception, and Officer Casey was testifying. During cross-examination, the trial court interrupted. It noted that a juror had entered the courtroom and paused proceedings while the bailiff helped the juror find the jury room. The trial court then made a record that it had heard a commotion outside and stopped the hearing "immediately as I saw" the juror enter. The trial court further stated that it did not believe the juror had an opportunity to hear any of Casey's testimony, and neither the State nor Brooks's attorney had any concerns. We thus agree with appellate counsel's analysis and our review of the record satisfies us that there is no arguably meritorious issue to be raised relating to this juror.

III. Whether L.H. was Competent to Testify

Appellate counsel next discusses whether L.H. was competent to testify, noting there was a concern that he might have been under the influence of an illegal substance at the time of his testimony. Counsel notes that "every person is competent to be a witness," *see* WIS. STAT. § 906.01, and asserts that the determination of witness competency is a matter of trial court discretion, *see* ***State v. Davis***, 66 Wis. 2d 636, 645-46, 225 N.W.2d 505 (1975).

The general rule of witness competency is indeed that "[e]very person is competent to be a witness except as otherwise provided" by the rules of evidence. *See* WIS. STAT. § 906.01. The main listed exclusion is that a witness may not testify to matters about which he or she lacks personal knowledge. *See* WIS. STAT. § 906.02. Beyond the enumerated exclusions, however, "competency is no longer a test for the admission of a witness' testimony[.]" *See* ***State v. Hanson***, 149 Wis. 2d 474, 482, 439 N.W.2d 133 (1989). ***Davis*** involved a crime committed in 1972, before the adoption of new rules of evidence that took effect on January 1, 1974; these

rules "nullified the holdings of ***Davis*** and previous cases" regarding witness competency. *See* ***Hanson***, 149 Wis. 2d at 477.

"Competency issues are now generally issues of credibility to be dealt with by the trier of fact in arriving at the decision on the merits."[4] ***State v. Dwyer***, 149 Wis. 2d 850, 856, 440 N.W.2d 344 (1989). "Wisconsin judges are no longer empowered to exclude a witness on grounds of incompetency[.]" ***Id.*** at 855-56. Accordingly, there is no arguably meritorious claim that L.H. was incompetent to testify.

IV. Surveillance Video Issues

A. Whether there was a ***Brady*** Violation

Appellate counsel next discusses whether the State failed to disclose surveillance video from the tavern that shows the dumpster after Brooks and Bell appeared, specifically, any video of the police going through the dumpster. Counsel notes that "Brooks'[s] concern is that the entire video was not played for the jury which he asserts would have supported his defense that he did not have possession of L.H.'s watch." At trial, Brooks had denied taking or having L.H.'s watch, with trial counsel eliciting testimony that police photos showed it sitting on the dumpster's edge even though Officer Kazachenko testified that she saw it on top of the backpack inside the dumpster.

A district attorney is required to disclose any exculpatory evidence to a defendant. *See* WIS. STAT. § 971.23(1)(h). Suppression by the State of evidence favorable to the accused, where

[4] While L.H. had appeared "woozy or sleepy" during his testimony, he explained that this was an after-effect of being struck in the head multiple times.

the evidence is material to guilt or punishment, violates due process regardless of good faith or bad faith by the prosecution. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963).

However, there is nothing in the record to suggest that the State was in possession of additional video other than what was previously made available. Indeed, Officer Casey testified that to his knowledge, there was no such additional footage recovered by police. Accordingly, the record does not support an arguably meritorious ***Brady*** discovery violation claim.

B. Ineffective Assistance of Trial Counsel

Relatedly, Brooks claims in his no-merit response that trial counsel was ineffective for failing to have the tavern's existing surveillance tape played in its entirety. Brooks claims that if the video had continued to play, it would have shown the jury who actually put the watch in the dumpster—two men who appear on the video several minutes after Brooks and Bell.

We have reviewed the video. The footage Brooks describes shows two individuals who appear to be smoking and who may be tavern employees. While the men do open and look in the dumpster, the footage does not clearly show one of them placing a watch inside. Further, Brooks was not charged for putting a watch in the dumpster; he was charged with armed robbery, and this additional footage does not alter the fact that Brooks and Bell were shown leaving L.H.'s home with a backpack and Brooks was shown disposing of a backpack, nor does the footage refute the testimony from L.H. and J.M.S. Accordingly, even if trial counsel was deficient for not seeking to play more of the video, this deficiency was not prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶¶59-61, 301 Wis. 2d 642, 734 N.W.2d 115. Thus, there is no arguable merit to a claim of ineffective assistance of trial counsel regarding the surveillance video shown at trial.

V. Sentencing Discretion

Appellate counsel discusses whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***id.***

Our review of the record confirms that the trial court appropriately considered relevant sentencing objectives and factors. The concurrent sentences totaling twenty years' imprisonment are well within the forty-six-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Counsel additionally discusses whether the trial court erroneously exercised its discretion in declaring Brooks ineligible for the challenge incarceration and substance abuse programs. Counsel notes that Brooks was ineligible by statute for either program on the shorter battery sentence, but could have been made eligible on the longer armed robbery sentence. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1.

An eligibility decision for these programs is required as part of the court's exercise of sentencing discretion. *See* WIS. STAT. § 973.01(3g), (3m). While the trial court must state whether the defendant is eligible or ineligible for the programs, completely separate findings on the reasons for the eligibility decision are not required, so long as the overall sentencing rationale also justifies the eligibility determination. *See* ***State v. Owens***, 2008 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187. Nevertheless, the trial court explained that Brooks would not be eligible for these early release programs because the sentences being imposed represented "the minimum incarceration needed to protect the community and accomplishes the sentencing goals."

Based on the foregoing, we conclude there is no arguable merit to a challenge to the trial court's sentencing discretion.

VI. Other Jury Instruction Issues

In the no-merit response, Brooks complains about the manner in which the trial court instructed the jury on his armed robbery charge. Specifically, he believes that the trial court erred in using WIS JI—CRIMINAL 1479, which sets out four elements of robbery, instead of WIS JI—CRIMINAL 1480, which sets out five elements of armed robbery. Brooks protests that the trial court neglected to instruct the jury on the fifth element, which is that at the time of taking away L.H.'s property, Brooks "used or threatened to use a dangerous weapon." *See* ***id.***

"The purpose of a jury instruction is to fully and fairly inform the jury of a rule or principle of law applicable to a particular case." ***State v. Hubbard***, 2008 WI 92, ¶26, 313 Wis. 2d 1, 752 N.W.2d 839 (citations omitted). "The objective of 'an instruction is not only to state the law accurately but also to explain what the law means to persons who usually do not possess law degrees.'" ***Id.*** (citations omitted). We review jury instructions "'in the context of

the overall charge.'" *See* ***id.***, ¶27 (citations omitted). "If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist." ***Id.*** (citations omitted); *see also* ***State v. Langlois***, 2018 WI 73, ¶38, 382 Wis. 2d 414, 913 N.W.2d 812.

Here, the record reflects that the trial court actually did instruct the jury on all five elements of armed robbery—the first four elements of armed robbery are identical to the elements of robbery, and the trial court simply separated out the fifth element in the instructions. The record reflects that the trial court instructed the jury that if it found Brooks guilty of robbery, it should then decide whether he committed the robbery by use or threat of use of a dangerous weapon. This structure is reflected in the verdict form given to the jury, which had a separate question of whether Brooks used or threatened to use a dangerous weapon in the robbery.

Although it is unclear why the trial court instructed the jury in this fashion rather than using pattern jury instruction WIS JI—CRIMINAL 1480, use of the pattern instructions is not required: the instructions are persuasive, not precedential. *See* ***State v. Olson***, 175 Wis. 2d 628, 642 n.10, 498 N.W.2d 661 (1993); ***State v. Harvey***, 2006 WI App 26, ¶13, 289 Wis. 2d 222, 710 N.W.2d 482. The complete instructions given properly instructed the jury on the law.

Counsel also discusses whether the trial court erred in adding a sentence to the battery instructions over Brooks's objections. The circuit court had read the pattern jury instruction, WIS JI—CRIMINAL 1226, to the jury before closing arguments. During a break in closing arguments, the court decided to add a sentence to the instructions: that "[k]nowledge of [L.H.'s] age is not required and mistakes regarding [his] age is not a defense." Brooks's attorney objected, but the trial court overruled the objection. It noted it was adding the instruction because counsel had already argued that that Brooks was not aware of L.H.'s age; however,

because the defense had not yet finished its closing argument, the trial court gave counsel an opportunity to address the jury after the court amended the instruction. This amended instruction properly informed the jury that the defendant is not required to know the victim's age.

Therefore, based on the foregoing, we conclude there are no arguably meritorious appellate issues relating to the jury instructions given by the trial court.

VII. Denial of the Right to Self-Representation

Before closing arguments began, Brooks told the trial court, "I don't want [defense counsel] to do my closing arguments…. He didn't come see me during the break or anything. I don't want no more parts of it. I don't want my life in his hands anymore." The trial court responded that the matter would continue with defense counsel and "if there are concerns about ineffective assistance of representation, at this point it seems to me that those concerns might be addressed in an appellate setting, but I'm not going to remove [defense counsel] as the attorney at this point." Brooks thus claims that the trial court violated his right to self-representation under ***Faretta v. California***, 422 U.S. 806, 819 (1975); he raises this issue both in his original response to the no-merit report and in his two addenda.

Defendants have a constitutional right to conduct their own defense, *see* ***id.***, provided they knowingly and intelligently waive the right to counsel and are able and willing to abide by rules of procedure and courtroom protocol, *see* ***McKaskle v. Wiggins***, 465 U.S. 168, 173 (1984). "Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact, which this court determines independently." ***State v. Imani***, 2010 WI 66, ¶19, 326 Wis. 2d 179, 786 N.W.2d 40. "[I]mproper denial of a defendant's constitutional right to self-representation is a structural error subject to automatic reversal." ***Id.***, ¶21.

A defendant seeking to self-represent must clearly and unequivocally express such a desire. *See* ***State v. Darby***, 2009 WI App 50, ¶1, 317 Wis. 2d 478, 766 N.W.2d 770. "[A] defendant's expressions of dissatisfaction with his or her current attorney or a request for another attorney do not constitute a clear and unequivocal declaration that the defendant wants to proceed *pro se*." ***Id.***, ¶26. We question whether Brooks's expression of frustration with his attorney rises to an unequivocal invocation of the right to self-representation.

Regardless, though, the right to self-representation must be timely raised. *See* ***United States v. Lawrence***, 605 F.2d 1321, 1324 (4th Cir. 1979); *see also* **Hamiel v. State**, 92 Wis. 2d 656, 672, 285 N.W.2d 639 (1979). "The right of a defendant in a criminal case to act as his own lawyer is unqualified *if invoked prior to the start of trial*." ***United States v. Denno***, 348 F.2d 12, 15 (2d Cir. 1965) (emphasis added). After trial has begun, whether to allow self-representation by a defendant is left to the trial court's discretion. *See* ***Lawrence***, 605 F.2d at 1324. As Brooks's supposed request to represent himself came at nearly the end of the trial, we discern no erroneous exercise of the trial court's discretion by continuing with defense counsel. Thus, there is no arguably meritorious claim that the trial court failed to honor Brooks's right to self-representation under ***Faretta***.

VIII. Newly Discovered Evidence

Brooks submitted an affidavit from J.S. in which she states that she saw A.A. unlock the door for Bell and that she observed Brooks trying to help L.H., essentially recanting her statement to police that she hid in a bedroom before Brooks and Bell entered. In the supplemental report, appellate counsel acknowledges that he spoke with J.S., who provided him

information consistent with her affidavit. Brooks thus claims that J.S.'s affidavit is newly discovered evidence which warrants a new trial.

A defendant seeking a new trial based on newly discovered evidence must establish "'by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). We question whether J.S.'s affidavit satisfies these requirements. Even if it does, appellate counsel correctly notes that when newly discovered evidence is a newly discovered recantation, it must be corroborated by other newly discovered evidence. *See* ***State v. Mayo***, 217 Wis. 2d 217, 226, 579 N.W.2d 768 (Ct. App. 1998). Upon review, there is no newly discovered evidence to corroborate J.S.'s recantation, so there can be no arguably meritorious newly discovered evidence claim based upon it.

IX. The Civil Judgments

Finally, we discuss an issue that we have independently identified. During trial, when it became apparent to the trial court that questions to L.H. would focus on illegal drug transactions that may have been occurring in his home, the trial court stopped the proceedings out of concern that the questions might cause L.H. to incriminate himself. When the trial court asked L.H. if he would like to consult with an attorney, L.H. said no. However, the trial court noted that L.H. was at a disadvantage for decision-making because he had no idea what questions would be asked of him. Mindful that it would be unreasonable to expect L.H. to expeditiously find or retain counsel even if he had the financial resources to do so, the trial court decided to have

counsel appointed, stating that it would make the appointment if the State Public Defender declined to appoint counsel for this purpose.

During the break in proceedings, an attorney for L.H. was found and appointed by the trial court at Milwaukee County's expense. On the form order appointing this attorney, the trial court crossed off preprinted findings that "the defendant agrees to repay Milwaukee County" and that "the defendant agrees to a wage assignment," initialing its strikethroughs. In the mandate section, the trial court did not select the box with the preprinted directive that "defendant is required to reimburse Milwaukee County," nor did the trial court specify any repayment terms in the space provided. At sentencing, the trial court did not specify that Brooks was required to reimburse the County for L.H.'s attorney as costs, restitution, a condition of extended supervision, or any other type of financial obligation. At no point in any of the proceedings did Brooks agree to pay for L.H.'s attorney, nor did the trial court ever allude to a possibility that Brooks might be required to do so.

Several months later, L.H.'s appointed attorney submitted a bill for $120, which a substitute judge approved with another form order. Within that form order, the substitute judge ordered Brooks to reimburse the County in three installments. When Brooks missed his first payment, a civil judgment was entered against him by the circuit court clerk.

A trial court may require repayment of certain attorney fees as part of a sentencing decision. *See, e.g.*, WIS. STAT. §§ 973.06(1)(e) (attorney fees "payable to the defense attorney by the county or the state" may be ordered as an item of costs); 973.09(1g) (as a condition of probation, defendant may be required to "reimburse the county or the state, as applicable, for any

costs for legal representation to the county or the state for the defense of the case"). Here, the record is quite clear that the sentencing court did not so require.

Still, a successor judge in a circuit court proceeding has the authority to modify decisions of a predecessor judge, as long as the predecessor was empowered to make such modifications, *see* ***Dietrich v. Elliot***, 190 Wis. 2d 816, 822, 528 N.W.2d 17 (Ct. App. 1995), and a sentencing court may modify a sentence after its imposition, *see* ***State v. Foellmi***, 57 Wis. 2d 572, 582, 205 N.W.2d 144 (1973), *overruled on other grounds by* ***Korpela v. State***, 63 Wis. 2d 697, 701-02, 218 N.W.2d 368 (1974). However, a sentence may not be modified "on 'reflection' alone or simply because [the court] has thought the matter over and has second thoughts. [The court] must base its modification on 'new factors' brought to its attention." *See* ***id.*** A circuit court can change a valid, imposed sentence to comport with the court's original intention, but its original intention must appear on the record of the original proceedings; amending a sentence to conform to the court's original, but unspoken intent, does not constitute a new factor upon which a circuit court may increase a defendant's sentence. *See* ***Scott v. State***, 64 Wis. 2d 54, 59-60, 218 N.W.2d 350 (1974).

Here, not only does the record reflect that the original intent of the trial court was that the County, not Brooks, would pay for L.H.'s attorney, but it also lacks any indication of why the substitute judge ordered otherwise. However, it is not necessary to instruct counsel to pursue this issue through a postconviction motion that would allow the trial court a chance to exercise its discretion, because ordering Brooks to pay for L.H.'s attorney was also an error of law.

When counsel is appointed for the court's benefit rather than defendant's, requiring reimbursement of attorney fees is inappropriate. *See* ***State v. Campbell***, 2006 WI 99, ¶77, 294

Wis. 2d 100, 718 N.W.2d 649; *see also* ***State ex rel. Chiarkas v. Skow***, 160 Wis. 2d 123, 141, 465 N.W.2d 625 (1991) (holding that counsel appointed "for the benefit of the court, not for the benefit of the individual … should be paid by the county").***State ex rel. Dressler v. Circuit Ct. for Racine Cnty., Branch 1***, 163 Wis. 2d 622, 633, 472 N.W.2d 532 (Ct. App. 1991) ("Where the service of counsel is indispensable to the efficient operation of the court, and the appointment of counsel is not for the benefit of the individual, the county of venue can be required to pay the compensation set by the court."). Here, L.H. declined counsel when the court offered it, but the trial court overrode that choice, and appointing counsel to represent L.H. was clearly not for Brooks's benefit. Accordingly, Brooks should not have been ordered to reimburse the County and a judgment on such order should not have been entered.

At the same time that the judgment for the attorney's bill was entered, a judgment for $10 was also entered against Brooks. This $10 appears to correspond with the $10 drug offender diversion surcharge authorized under WIS. STAT. § 973.043, but the record is even less illuminating on why this judgment has been entered; at sentencing, the trial court gave Brooks until 2031 to pay all surcharges before a civil judgment would be entered.[5]

Therefore, that portion of the June 23, 2017 circuit court order directing Brooks to reimburse Milwaukee County for L.H.'s attorney is reversed and, upon remittitur, we direct that both civil judgments against Brooks shall be vacated. He is not obligated to reimburse the County for L.H.'s attorney and, while he is obligated to pay the $10 drug offender diversion

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[5] If this $10 judgment is not for the drug offender diversion surcharge, then it clearly relates to and was precipitated by the judgment on the attorney fees, in which case it is equally invalid.

surcharge, judgment for that cannot be entered unless and until Brooks fails to pay that surcharge by December 31, 2031.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that upon remittitur, the civil judgments as described herein shall be vacated consistent with this opinion.

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

IT IS FURTHER ORDERED that Attorney Bradley J. Lochowicz is relieved of further representation of Brooks 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