OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

February 4, 2021

To:

Hon. Chris Taylor
Hon. Jill Karofsky
Circuit Court Judges
Dane County Courthouse
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Michael J. Herbert
P.O. Box 4
Sun Prairie, WI 53590

Dallas Montano
Assistant District Attorney
215 S. Hamilton St., Rm.. 3000
Madison, WI 53703

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Roosevelt Mitchell
3734 Karstens Dr. Apt. C
Madison, WI 53704

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

2019AP1245-CRNM State of Wisconsin v. Roosevelt Mitchell (L.C. # 2017CM2192)

Before Kloppenburg, J.[1]

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).

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Roosevelt Mitchell appeals a judgment, following a jury trial, convicting him of two misdemeanors. Attorney Michael Herbert has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Mitchell was sent a copy of the report and has not filed a response. Upon reviewing the entire record, as well as the no-merit report, I conclude that there are no arguably meritorious appellate issues.

Mitchell was charged with one count of disorderly conduct and one count of knowingly violating a harassment restraining order or injunction, contrary to WIS. STAT. §§ 947.01(1) and 813.125(7). The charges arose from an incident in which J.C.C., a former neighbor of Mitchell, called the police following an encounter with Mitchell outside a McDonald's restaurant. When police officers arrived at the McDonald's in response to the call, J.C.C. informed the officers that she had been granted a restraining order against Mitchell the prior year. According to the criminal complaint, J.C.C. parked her vehicle, got out of the vehicle, and was walking toward the restaurant when Mitchell, who had been in the drive-thru lane, stopped his car, got out, and took a few steps toward J.C.C., yelling, "I'm still gonna get you. You just wait!" A witness also reported seeing J.C.C. trying to avoid Mitchell, who was standing near the drive-thru and yelling "the f-word" at J.C.C.

A trial was held and the jury found Mitchell guilty on both counts. The circuit court sentenced Mitchell to twenty days in the Dane County jail on each count, with the sentences to run concurrently. Mitchell appealed, and his counsel filed a no-merit report. The no-merit report addresses whether Mitchell was denied his right to a fair and impartial jury, whether the evidence was sufficient to support the jury's verdicts, whether the court erroneously exercised its

sentencing discretion, and whether Mitchell was denied his right to the effective assistance of counsel. I address each of these issues below.

I turn first to the issue of whether Mitchell was denied his right to a fair and impartial jury. The record reflects that, at the beginning of jury selection, Mitchell's trial counsel objected on the record that the jury pool of thirty individuals was all white. Mitchell is African-American and, thus, could argue that the jury pool did not represent a fair cross-section of the community because it did not contain a percentage of minorities in proportion to their presence in the county. In order to show a prima facie violation of the Sixth Amendment fair cross-section requirement, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process. ***State v. Pruitt***, 95 Wis. 2d 69, 74-75, 289 N.W.2d 343 (Ct. App. 1980).

As to the first prong of the ***Pruitt*** test, I agree with counsel's assertion that there is no reasonable dispute that African-Americans are a distinctive group within the Dane County community and, thus, the first requirement has been met in this case. As to the second and third prongs, counsel asserts in the no-merit report that he reviewed Dane County census data, consulted with the Dane County Clerk of Courts about the jury pool selection process, and reviewed jury pool demographics from 2018, the year that Mitchell was tried. Counsel asserts that, based on his review of that information, he is unable to conclude that there is general underrepresentation of African-Americans on jury pools in Dane County or that any underrepresentation of African-Americans was due to a systemic exclusion. With regard to the third prong of the test, a disproportionate representation of a distinctive group on one jury panel

is not sufficient to prove systematic exclusion of that group. ***Pruitt***, 95 Wis. 2d at 76. Thus, to prove the third prong, a defendant must show either "a jury selection process that in itself tends to exclude members of the underrepresented group, or a disproportionate representation of a group on juries over a period of time." ***Id.*** at 77. There is nothing in the record or the no-merit report to support such a showing. Because all three prongs of the ***Pruitt*** test have not been satisfied, I agree with counsel that the issue of whether Mitchell was denied the right to a jury representing a fair cross-section of the community is without arguable merit.

The no-merit report also discusses the sufficiency of the evidence. When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

In order for Mitchell to be found guilty of disorderly conduct under WIS. STAT. § 947.01, the State had the burden of proving beyond a reasonable doubt that Mitchell engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct and that the conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance. *See* WIS JI—CRIMINAL 1900. In order for Mitchell to be found guilty of violating a harassment injunction order under WIS. STAT. § 813.125(7), the State had the burden of proving beyond a reasonable doubt that an injunction was issued against Mitchell in favor of J.C.C., that Mitchell committed an act that violated the terms of the injunction, and that Mitchell knew the injunction had been issued and knew that his acts violated its terms. *See* WIS JI—CRIMINAL 2040.

The evidence in the record is sufficient to satisfy all of the elements of both crimes. The State introduced into evidence a copy of a harassment injunction issued against Mitchell on August 17, 2016, and effective until August 17, 2020, with J.C.C. listed as the petitioner. The injunction orders Mitchell to "cease or avoid the harassment of the petitioner," to avoid the petitioner's residence or any premises temporarily occupied by the petitioner, and to "avoid contact that harasses or intimidates the petitioner." A court manager for the Dane County Clerk of Courts Office testified as to the authenticity of the copy of the injunction that was admitted into evidence, and also testified that Mitchell was personally served with a copy of the injunction.

The State also called J.C.C. as a witness. J.C.C. testified that she was in the McDonald's parking lot when she heard someone yelling. She turned around and saw Mitchell yelling at her, asking her if she was "still bleeding," and saying that she was "going to get what's coming." J.C.C. testified that Mitchell was fifteen yards away from her and approached five yards. J.C.C. further testified that she felt "[s]tartled, annoyed, and fearful," that she felt that Mitchell was threatening to harm her, and that, when Mitchell drove off at a fast rate of speed, she was concerned that he might hit her with his car.

The State also proffered the testimony of another witness, R.S.H., who testified that she was coming around the drive-thru attempting to park when she noticed a man getting out of a vehicle, yelling curse words, and pointing his finger at and looking like he was moving toward a woman who kept backing up. R.S.H. identified Mitchell in court as the man she had seen. R.S.H. testified that Mitchell's conduct made her uncomfortable and that she was not sure what would happen.

The State also elicited testimony from police officer Adria Ehly, who was dispatched to the incident at the McDonald's. Officer Ehly testified that J.C.C. was "[s]lightly upset, annoyed, and frustrated." Ehly made contact with Mitchell by telephone. According to Ehly's testimony, Mitchell stated that he knew there was a restraining order and indicated that he would turn himself in. Ehly also confirmed with Mitchell that he had been served with the restraining order.

The evidence summarized above suffices to support the jury's findings that Mitchell was guilty of disorderly conduct and violating a harassment injunction. Any claim to the contrary would be without arguable merit on appeal.

A challenge to Mitchell's sentence also would be without arguable merit. The circuit court considered the seriousness of the offenses, Mitchell's character, and protection of the public before imposing a sentence authorized by law. *See* WIS. STAT. § 813.125(7) ("Whoever violates a temporary restraining order or injunction issued under this section shall be fined not more than $10,000 or imprisoned not more than 9 months or both.") *See also* WIS. STAT. § 947.01(1) (classifying disorderly conduct as a Class B misdemeanor) and § 939.51(3)(b) (providing maximum imprisonment of ninety days for a Class B misdemeanor). Under these circumstances, it cannot reasonably be argued that the sentences were so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (circuit court has discretion to determine sentence within range set by law and "an [erroneous exercise] of this discretion will be found only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment.") (internal citations omitted).

Finally, the record discloses no arguable basis for challenging the effectiveness of Mitchell's trial counsel. To establish ineffective assistance of counsel, Mitchell must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's ineffective performance, the outcome of the trial would have been different. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In reviewing trial counsel's performance, "every effort is made to avoid determinations of ineffectiveness based on hindsight….and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Therefore, the court judges "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of the counsel's conduct" and applies an objective standard of reasonableness. ***Strickland***, 466 U.S. at 690. This court's review of the record and the no-merit report discloses no basis for challenging trial counsel's performance.

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

Accordingly,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Michael Herbert is relieved of any further representation of Roosevelt Mitchell in this matter pursuant to 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