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February 10, 2021

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

2019AP2062-CRNM State of Wisconsin v. Eli J. Edwards (L.C. #2015CF613)

Before Reilly, P.J., Gundrum and Davis, 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 Marcella De Peters, appointed counsel for Eli J. Edwards, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and

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

Anders v. California, 386 U.S. 738, 744 (1967). The no-merit report addresses the sufficiency of the evidence to support the jury verdicts and whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. Edwards has filed a response arguing that his trial counsel was ineffective. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Edwards was convicted following a jury trial of two counts of attempted first-degree intentional homicide and one count of mayhem. The court sentenced Edwards to eighty years of initial confinement and forty years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the convictions. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law 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). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including testimony by the victims, responding officers, and treating physicians, if deemed credible by the jury, was sufficient to support the verdicts.

The no-merit report also addresses whether a challenge to Edwards' sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336,

351 N.W.2d 738 (Ct. App. 1984). The record establishes that Edwards was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Edwards' character and criminal history, the seriousness of the offenses, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum sentence Edwards faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (citation omitted)). We discern no erroneous exercise of the court's sentencing discretion.

Edwards argues in his no-merit response that his trial counsel was ineffective. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (counsel ineffective if counsel's performance was deficient and deficient performance prejudiced the defense). First, Edwards contends that his trial counsel was ineffective by failing to pursue a suppression motion. He asserts that he asked his counsel to file a motion to suppress all evidence against him on the basis that none of the evidence linked him to the crimes and that his counsel refused to do so. He contends that a suppression motion would have been successful and that his counsel was ineffective by failing to pursue one. However, nothing in the record, the no-merit report, or the no-merit response establishes the basis for a successful motion to suppress. Contrary to Edwards' contention, an argument that the evidence did not link Edwards to the crimes is not a basis to suppress that evidence. *See* ***State v. Scull***, 2015 WI 22, ¶48, 361 Wis. 2d 288, 862 N.W.2d 562 (suppression of

evidence "is a judicially created remedy that may be applied to certain violations … of the United States Constitution and … the Wisconsin Constitution."). To the extent that Edwards is arguing that his trial counsel was ineffective by failing to object to admission of any evidence that did not specifically link Edwards to the crime scene as irrelevant, that argument also would have lacked merit. *See* WIS. STAT. §§ 904.01 and 904.02 (evidence is generally admissible if it is relevant, that is, if it has any tendency to make the existence of any fact of consequence to a determination of the action more or less probable than it would be without the evidence).

Additionally, on the first day of trial, defense counsel noted the potential for a motion to suppress Edwards' statements to police but explained that counsel had decided that there would be no merit to pursuing that motion. The circuit court conducted a colloquy with Edwards and ascertained that Edwards was voluntarily waiving his right to a ***Miranda***/***Goodchild*** hearing on the admissibility of his statements to police. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965); *see also* ***State v. Jiles***, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798 (explaining that a ***Miranda***/***Goodchild*** hearing is "designed to examine: (1) whether an accused in custody received ***Miranda*** warnings, understood them, and thereafter waived the right to remain silent and the right to the presence of an attorney, and (2) whether the admissions to police were the voluntary product of rational intellect and free, unconstrained will"). We conclude that nothing before this court would support a nonfrivolous claim of ineffective assistance of counsel on the basis that defense counsel failed to move to suppress or otherwise exclude evidence at trial. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (counsel is not ineffective for failing to pursue meritless motion).

Second, Edwards argues that his counsel was ineffective by failing to object to hearsay at trial. Edwards cites the court's questioning of defense counsel as to why counsel had not objected

to possible hearsay testimony by two police officers who responded to the crime scene and interviewed one of the victims at the hospital. Edwards notes that his counsel stated that he did not believe that the hearsay statements hurt the defense. Edwards then asserts that the court disagreed with defense counsel's position and that defense counsel did not have a good reason for failing to object. We disagree that this issue would have arguable merit. In response to the court's question as to why counsel did not object to the hearsay, counsel explained that he did not object because the declarants would be testifying; that he wished to have the statements available for possible impeachment; that he believed the testimony was admissible under the excited utterances exception, *see* WIS. STAT. § 908.03(2); and that he did not believe the hearsay statements hurt the defense's case. The court questioned counsel's position that the statements apparently identifying Edwards as the assailant did not hurt the defense but then agreed that the statements were admissible as excited utterances. Because the circuit court explained why it would have properly admitted the evidence over a hearsay objection, we conclude that it would be wholly frivolous to argue that counsel was ineffective by failing to object to the officers' testimony on hearsay grounds.

Finally, Edwards contends that his trial counsel was ineffective by failing to prepare a defense. Edwards argues that his counsel failed to investigate and call any defense witnesses, including self-defense, alibi, or expert witnesses, even though counsel knew such witnesses were necessary for the defense that Edwards was never at the crime scene. He also argues that his counsel was ineffective by failing to investigate and present mitigating or exculpatory evidence. However, nothing in the record, no-merit report, or no-merit response would support a nonfrivolous claim of ineffective assistance of counsel for failing to prepare a defense. Counsel argued at trial that the State had not proven beyond a reasonable doubt that Edwards had committed

the attacks, and pointed to evidence of frequent visitors and use of illegal substances at the residence where the attacks occurred. Edwards has not identified any witnesses that he believes his counsel should have contacted, nor has he explained what evidence any defense witnesses could have provided in support of his defense. Accordingly, a claim of ineffective assistance of counsel on this basis would lack arguable merit.

We briefly address several additional potential issues not identified in the no-merit report or response. First, after jury selection, defense counsel made a ***Batson*** challenge on grounds the State had struck the only potential African-American juror. *See* ***Batson v. Kentucky***, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."). Counsel for the State explained that she struck that potential juror based on her response to a question regarding evidence that would be introduced that one of the victims was engaged in selling illegal drugs, and her response to whether any jurors felt that victims who were engaged in illegal activity deserved what happened to them. The court found that the State had a sensible reason for the strike and that it was not based on race. *See* ***Hernandez v. New York***, 500 U.S. 352, 358-59 (1991) (***Batson*** challenge requires showing that the State exercised peremptory challenge on the basis of race; if that showing is made, the prosecutor must then provide a race-neutral explanation for the strike; and, if the prosecutor provides a race-neutral explanation, the circuit court must then "determine whether the defendant has carried his burden of proving purposeful discrimination"); *see also* ***State v. Lamon***, 2003 WI 78, ¶¶41-42, 262 Wis. 2d 747, 664 N.W.2d 607 (because the circuit court "is in the best position to determine the credibility of the state's race-neutral explanations," we give "great deference" to the court's ruling as to whether the prosecutor had racially discriminatory intent or purpose in exercising a strike). We conclude that a challenge

to the circuit court's decision or any other challenge based on jury voir dire or juror selection would lack arguable merit.

Second, following a colloquy with the circuit court, Edwards waived his right to testify in his own defense. However, after the State's closing argument, Edwards stated in front of the jury that he needed to testify to certain things. Defense counsel then moved for a mistrial. The court declined to reopen the evidence, finding that Edwards had validly waived his right to testify and that nothing had changed except the State had given its closing argument, and that it would be unfair to the State to allow Edwards to testify at that point. The court also denied the motion for a mistrial, finding that a curative instruction was a reasonable alternative. The court gave a curative instruction directing the jury to disregard Edwards' statement during closing argument and reminding it that statements made during closing arguments are not evidence, and also that the defendant has an absolute right not to testify at trial. We conclude that any argument that the circuit court erred by denying the motion for a mistrial would lack arguable merit. *See* ***State v. Ford***, 2007 WI 138, ¶¶28, 30, 306 Wis. 2d 1, 742 N.W.2d 61 (decision on motion for mistrial is committed to circuit court's discretion, which is properly exercised when court reached a rational decision based on the facts of record and proper legal standard); ***State v. Moeck***, 2005 WI 57, ¶ 72, 280 Wis. 2d 277, 695 N.W.2d 783 (in deciding motion for mistrial, "[s]ound discretion includes considering alternatives such as a curative jury instruction"); ***State v. Pitsch***, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985) (jury is presumed to follow curative instructions).

Lastly, following sentencing, the circuit court held a restitution hearing and awarded restitution to one of the victims based on the loss of her car in which she was stabbed. The victim testified as to the value of the car and the damage to the car due to her extensive bleeding following the stabbing. She also testified that she had been unable to drive the car due to her emotional

trauma associated with the stabbing and that she had not attempted to sell the car but rather had gotten rid of it. At the conclusion of the hearing, Edwards asserted that he believed that the victim had stated to the presentence investigation writer that she had sold the car. Following the hearing, the court issued a letter to Edwards explaining that the court had reviewed the presentence investigation report and that the victim had not stated that she had sold the car, but rather simply that she had to get rid of it. Our review of the record supports the circuit court's finding as to the victim's statements regarding the car. We conclude that there would be no arguable merit to a challenge to the circuit court's restitution award.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Eli J. Edwards 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