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DISTRICT IV

December 30, 2021

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

2019AP1979-CRNM State of Wisconsin v. Paris J. Whittington (L.C. # 2016CF130)

Before Kloppenburg, Fitzpatrick, and Graham, 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 Steven Zaleski, appointed counsel for Paris Whittington, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Whittington was sent a copy of the report and has filed a response. Counsel then filed a supplemental no-merit report, and Whittington filed a supplemental response. Upon consideration of the report and Whittington's response, the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

supplemental report and Whittington's supplemental response, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Whittington was charged with one count of armed robbery as party to a crime, four counts of false imprisonment as party to a crime, one count of criminal damage to property as party to a crime, and one count of receiving stolen property. The charges arose out of a home invasion and robbery incident that implicated several individuals including Whittington.

The case proceeded to a jury trial where it was established that three of the individuals entered the residence wearing masks and carrying guns. They removed a safe containing cash and other items. The safe was later recovered and had been broken into.

DNA from Whittington was found on two gloves recovered with the safe. Whittington initially told a sheriff's investigator that he had no involvement in the robbery. After being confronted with the DNA evidence, he made a number of admissions regarding his involvement. He stated that he was with the other individuals involved in the robbery on the night it occurred; that he knew they were going to commit the robbery; that he told them to take the safe; that he tried to break open the safe with a shovel; and that he received $200 from the safe.[2] Whittington maintained, however, that he was not one of the three individuals who entered the residence to commit the robbery. He claimed that he remained behind at a separate location.

[2] There was other evidence that Whittington received $700 from the safe.

The jury found Whittington guilty on the charges for armed robbery as party to a crime, criminal damage to property as party to a crime, and receiving stolen property. It found Whittington not guilty on the charges for false imprisonment.

The circuit court sentenced Whittington to ten years of initial confinement and five years of extended supervision on the armed robbery charge. It sentenced Whittington to nine months of concurrent jail time on each of the charges for criminal damage to property and receiving stolen property.

The no-merit report addresses sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. We will not overturn a conviction "unless 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." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting the evidence in further detail, we are satisfied that it was sufficient to support each of Whittington's convictions. We note that the guilty verdicts against Whittington were strongly supported by the DNA evidence and by Whittington's own statements to law enforcement.

The no-merit report also addresses whether there is arguable merit to pursuing issues related to the charging documents, jury selection, opening statements and closing arguments, jury instructions, and other matters relating to trial. We are satisfied that the report properly analyzes each of these issues as having no arguable merit. Our review of the record discloses no other issues of arguable merit with respect to the events before or during trial.

Whittington contends that the circuit court erred by admitting hearsay statements by one of the other individuals involved in the robbery, D.M.,[3] that connected Whittington to the robbery as a possible suspect. There is no arguable merit to this issue. Given the DNA evidence and Whittington's own statements to law enforcement, we see no basis to argue that the exclusion of hearsay statements by D.M. could have had any conceivable effect on the outcome of Whittington's trial.

Whittington next contends that trial counsel was ineffective in multiple respects. For the reasons we explain below, we agree with no-merit counsel that Whittington's claims of ineffective assistance of counsel have no arguable merit.

To show ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

All but one of Whittington's ineffective assistance of counsel claims relate to D.M. We will discuss all of those claims before turning to the remaining claim that does not relate to D.M.

[3] The no-merit report refers to other individuals involved in the robbery by their initials, we presume because one or more of the individuals was a minor at the time of the robbery or was not charged with a crime. We too will refer to these individuals by their initials.

Whittington first contends that trial counsel was ineffective by failing to challenge a warrant that was obtained, in part, using D.M.'s statements to law enforcement implicating Whittington. Whittington argues that trial counsel should have challenged the warrant under ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), because the warrant affidavit omitted the fact that law enforcement accidentally lost or misplaced a partial recording of D.M.'s statements.

Under ***Franks*** and ***Mann***, the defendant may challenge a warrant based on missing information if the information was "'critical to an impartial judge's fair determination of probable cause.'" *See* ***State v. Jones***, 2002 WI App 196, ¶25, 257 Wis. 2d 319, 651 N.W.2d 305 (quoting ***Mann***, 123 Wis. 2d at 388). Whittington seeks to assert, as we understand it, that information about the recording being accidentally lost or misplaced was critical because D.M. was coerced into providing statements. However, there is nothing in the record to suggest that D.M. was coerced, and Whittington does not provide any specific allegations that, if true, would show that D.M. was coerced. Whittington likewise also does not allege any basis to believe that the recording itself would reveal coercion. Whittington provides only conclusory allegations that D.M. was coerced. A claim for ineffective assistance of counsel cannot proceed based solely on conclusory allegations. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Next, Whittington contends that trial counsel was ineffective by failing to seek suppression of D.M.'s statements as coerced and involuntary under ***State v. Clappes***, 136 Wis. 2d 222, 401 N.W.2d 759 (1987). As already explained, however, Whittington's coercion allegations have no factual support. Moreover, the ***Clappes*** coercion standard does not apply to the suppression of third-party statements. *See* ***State v. Samuel***, 2002 WI 34, ¶¶30-31, 252

Wis. 2d 26, 643 N.W.2d 423. Whittington makes no allegation regarding the heightened standard that applies to such statements.

Whittington next contends that trial counsel was ineffective by failing to raise a discovery violation based on the State's failure to preserve the partial recording of D.M.'s statements. Whittington asserts that he needed the recording to "impeach" D.M. This claim lacks arguable merit because D.M. did not testify at trial. Further, there is no basis to argue that the State's failure to preserve the recording violated Whittington's right to due process. To show a due process violation, a defendant must establish that a government official either (1) "failed to preserve … evidence that is apparently exculpatory," or (2) "acted in bad faith by failing to preserve evidence which is potentially exculpatory." *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). Here, nothing in the record or in Whittington's allegations suggests that either of these two criteria could be satisfied.[4]

We turn to Whittington's final ineffective assistance of counsel claim. This claim relates to other individuals who were implicated in the robbery, S.K. and B.C.

Both S.K. and B.C. testified at trial and stated they had known Whittington for a year or more prior to the robbery. S.K. testified that she drove Whittington and two other individuals to the robbery site and that she received $50 from Whittington. B.C. testified that she was a

[4] Whittington also asserts that law enforcement violated WIS. STAT. § 968.073(2) by failing to record the entirety of D.M.'s interrogation. Assuming without deciding that a violation of this statute with respect to D.M. could provide Whittington grounds for relief, we see no arguable violation. The statute includes an exception for instances in which the individual being questioned refuses to proceed if the interrogation is recorded. *See* WIS. STAT. §§ 968.073(2) and 972.115(2)(a)1. Here, Whittington's submissions show that D.M. refused to continue with questioning if his statements continued to be recorded.

passenger in S.K.'s vehicle and received $40 from Whittington. Both S.K. and B.C. identified Whittington as one of the three individuals who entered the residence to directly commit the robbery.

Whittington argues that trial counsel should have raised the issue of the State's discovery violation by failing to disclose a promise, inducement, or "deal" between the prosecutor and S.K. and B.C. As support for this argument, Whittington has submitted an affidavit from a third party. The affidavit states that B.C. told the affiant that the District Attorney told S.K. and B.C. that if they did not testify against Whittington, they "could" be charged for their roles in driving Whittington to commit a crime and for receiving money from him.

No-merit counsel responds that the third-party affidavit is unreliable hearsay and is not a sufficient basis to support a claim that trial counsel was ineffective. No-merit counsel states that the affidavit does not show deficient performance because nothing in the record or in the discovery materials received from the State supports a conclusion that there was a deal between the prosecution and S.K. and B.C. No-merit counsel further states that, even if the assertions in the third-party affidavit are true, there would be no basis to argue prejudice.

We agree with no-merit counsel that there is no arguable merit to claiming ineffective assistance of trial counsel based on the alleged deal. First, the affidavit, even if assumed to be true, does not establish the existence of a deal. Second, even if we assumed that there was a deal as Whittington alleges, we would still conclude that there is no arguable prejudice. Evidence of a deal may have provided trial counsel with an additional basis to attack S.K.'s and B.C.'s credibility, but it would not have established that their testimony was false. More significantly, the DNA evidence and Whittington's own statements strongly supported his guilt on the charges

for which he was convicted: armed robbery as party to a crime, criminal damage to property as party to a crime, and receiving stolen property.

Whittington also appears to contend that the State committed a ***Brady***[5] violation by failing to disclose the existence of a deal with S.K. and B.C. This contention, too, lacks arguable merit. "Evidence is not material under ***Brady*** unless the nondisclosure 'was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" ***State v. Wayerski***, 2019 WI 11, ¶36, 385 Wis. 2d 344, 922 N.W.2d 468 (quoted source omitted). Here, for the reasons already explained, even if we assume that there was a deal as Whittington alleges, we see no basis to argue that the deal was material as defined by ***Brady***.

We turn to sentencing. The no-merit report addresses whether there is any arguable merit to issues relating to Whittington's sentences. We agree with counsel that there is not. The circuit court discussed the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not rely on any improper factors. The sentences were within the maximum allowed. Whittington agreed to restitution and, in an amended judgment of conviction, Whittington received the amount of sentence credit that counsel requested. We see no other arguable basis for Whittington to challenge his sentences.

Our review of the record discloses no other potential issues, and we see nothing further in Whittington's response or supplemental response that raises any other issue of arguable merit.

[5] *See* ***Brady v. Maryland***, 373 U.S. 83 (1963).

Therefore,

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

IT IS FURTHER ORDERED that Attorney Steven Zaleski is relieved of any further representation of Paris Whittington 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