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DISTRICT I

January 11, 2022

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

2019AP1864-CRNM State of Wisconsin v. Sylvester Akeem Lewis
(L.C. # 2014CF2236)

Before Brash, C.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).

Sylvester Akeem Lewis appeals the judgment convicting him of first-degree reckless homicide and first-degree recklessly endangering safety, both charged with use of a dangerous weapon, and possession of a firearm as a felon. His appellate counsel, Angela C. Kachelski, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20), and ***Anders v. California***,

386 U.S. 738 (1967).[1] Lewis filed a response to the no-merit report and counsel filed a supplemental no-merit report addressing the issues raised by Lewis. We have now reviewed the reports and the response, and we have independently reviewed the record as mandated by ***Anders***.[2] We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The charges against Lewis stemmed from a shooting rampage that took place near an elementary school. K.G., who was twelve years old at the time, was standing near her sister, S.G., when the shots were fired. S.G. was shot in the head and ultimately died. Witnesses identified Lewis as the shooter, and in a statement to police, he admitted to firing a handgun toward a playground where several people, including children, were located.

The case proceeded to trial where a jury found Lewis guilty of all of the charges. The circuit court sentenced him to a cumulative sentence totaling sixty-one years, comprised of forty-four years of initial confinement and seventeen years of extended supervision.

The no-merit report addresses various pretrial rulings, the sufficiency of the evidence to support the verdicts, and the circuit court's exercise of its sentencing discretion. The no-merit report thoroughly addresses each of those issues, providing citations to the record and relevant

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

[2] Our review of this case was held in abeyance pending the Wisconsin Supreme Court's consideration of another defendant's appeal concerning jury instruction WIS JI—CRIMINAL 140, which was also used at Lewis's trial, and which he raises as an issue in his response. Based on the Wisconsin Supreme Court's resolution of that appeal, there would be no arguable merit to pursue postconviction proceedings based on the use of that jury instruction in this case. *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

authority. This court is satisfied that the no-merit report properly analyzes the issues it raises, and based on our independent review of the record, we agree with counsel's assessment that none of those issues has arguable merit.

In his response, Lewis raises numerous issues, including: the State failed to disclose out-of-court statements by witness Ashley Coleman until the "last minute"; trial counsel was ineffective for not following up with Coleman; trial counsel failed to develop an argument as to self-defense; and high publicity made it impossible for him to have a fair trial.

Coleman testified that on the night of the crimes, she was at an acquaintance's house. While she was there, she said that two men arrived, one of whom said that he "fucked up" and "didn't mean to do it." Coleman recalled that the man said something about hurting a child and testified that she subsequently ran to the nearest bar and called the police. She later identified the man who made the statements in a photo array.[3] However, when asked whether the person she identified was present in court, Coleman said she "really didn't catch a face" and did not identify Lewis.

After Coleman testified, the State called Detective Charles Mueller as a witness. Detective Mueller testified that as he exited the courtroom with Coleman, she started crying. According to Detective Mueller, Coleman said she had lied and that she recognized Lewis, but did not identify him because she was "afraid something would happen to her and her family."

[3] The detective who showed Coleman the photo array testified that she identified Lewis.

In her supplemental no-merit report, appellate counsel explains, and the record confirms, that trial counsel objected on grounds of hearsay after Detective Mueller began testifying about Coleman's out-of-court statements. The State argued that it was presenting impeachment evidence, and the circuit court allowed the questioning to continue.

Trial counsel subsequently moved to strike Detective Mueller's testimony, arguing that the defense was entitled to know about the statement prior to when Detective Mueller took the stand. Trial counsel additionally moved for a mistrial.

The prosecutor explained that because there was no written statement that needed to be turned over, there was no discovery violation. In addition, the prosecutor pointed out that the defense was able to cross-examine Detective Mueller and could also recall both Coleman and Detective Mueller.

Detective Mueller took the stand seventeen minutes after Coleman finished testifying, and the exchange between the two happened in the interim. The circuit court ruled that while trial counsel should have been put on notice before Detective Mueller took the stand, there was no discovery violation and the circumstances did not warrant a mistrial. The court noted for the record that Coleman "obviously seemed very scared as she was testifying" and that Detective Mueller's testimony provided "some context." The court then gave trial counsel the opportunity to meet with Coleman, who was still present at the courthouse. Trial counsel said he wished to do so with his investigator, and the record indicates that the parties made arrangements for that to occur the following day. Trial counsel did not recall Coleman to testify.

Given the sequence of events that transpired, we see no issue of arguable merit stemming from the "last minute" disclosure of Coleman's statement to Detective Mueller. Moreover, we

agree with counsel's analysis in the supplemental no-merit report that the decision not to recall Coleman—who was, by all indications in the record, a reluctant witness—did not amount to deficient performance by trial counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (stating that a claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defendant).

Regarding a self-defense instruction, Lewis's trial counsel argued that sufficient evidence had been presented to so instruct the jury. The prosecutor acknowledged that gunfire had been exchanged, but asserted that "the only evidence is that Mr. Lewis was the first one to fire, and … there has to be some state of mind that is introduced to the jury as to why Mr. Lewis felt he was acting in self[-]defense[.]" The prosecutor argued that no such evidence had been presented.[4] The circuit court agreed with the prosecutor and concluded that there was no basis for the self-defense instruction.

In his response, Lewis argues that his trial counsel was ineffective for failing to develop a self-defense claim. Lewis contends that he was fired upon first, which is directly contrary to eye witness testimony offered during trial. Lewis's conclusory assertion does not create an issue of arguable merit.

We have also considered Lewis's claim that he was prejudiced by the media's coverage of the case. Because a motion for a change of venue was not filed, we consider this issue framed as whether trial counsel was ineffective for not filing such a motion. During voir dire, a number

[4] Lewis ultimately chose not to testify after the circuit court conducted the required colloquy. *See* ***State v. Weed***, 2003 WI 85, ¶¶40-43, 263 Wis. 2d 434, 666 N.W.2d 485.

of jurors recalled media coverage relating to the shooting. However, to justify a change of venue there must be evidence of prejudice. *See* ***McKissick v. State***, 49 Wis. 2d 537, 544, 182 N.W.2d 282 (1971) (explaining that due process requires a change of venue "where adverse community prejudice will make a fair trial impossible?"). The jurors told the court that despite seeing or hearing such coverage, they had not formed an opinion about the case and would base their verdicts on the evidence that was presented during the trial. *See* ***Irvin v. Dowd***, 366 U.S. 717, 722-23 (1961) (explaining that prospective jurors who have been exposed to pretrial publicity and even those who may have formed preliminary opinions as to guilt or innocence, may nonetheless serve on a jury if the circuit court concludes they are able to set aside that information and those opinions), *superseded by statute on other grounds as stated by* ***Moffat v. Gilmore***, 113 F.3d 698, 701 (7th Cir. 1997). The record does not reflect any prejudice from having a local jury decide the case.

Our review of the record discloses no other potential issues for appeal. This court has reviewed and considered the various issues raised by Lewis. To the extent we did not specifically address all of them, this court has concluded that they lack sufficient merit or importance to warrant individual attention. Accordingly, this court accepts the no-merit reports, affirms the convictions, and discharges appellate counsel of the obligation to represent Lewis further in this appeal.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Angela C. Kachelski is relieved of further representation of Sylvester Akeem Lewis 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