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DISTRICT IV

February 10, 2022

To:

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Wayne Edward Murphy 686324
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P.O. Box 2000
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1968-CRNM State of Wisconsin v. Wayne Edward Murphy
(L.C. # 2018CF265)

Before Fitzpatrick, Graham, and Nashold, 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 Patricia A. FitzGerald, appointed counsel for Wayne Edward Murphy, 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). Murphy was sent a copy of the report and has filed a response. Upon consideration of the report, the response, and an

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

independent review of the record, we conclude that there is no arguable merit to any issue that could be pursued on appeal. Accordingly, we affirm.

Murphy was charged with forty-six offenses arising out of an incident in which he struck a school bus on the freeway and injured multiple victims while operating his semi-truck under the influence of a controlled substance. The forty-six offenses included counts of injury by intoxicated use of a vehicle, second-degree reckless injury, operating while intoxicated causing injury, and reckless driving causing injury. The case proceeded to a jury trial, and the jury found Murphy guilty of thirty offenses. Murphy received a total aggregate sentence of thirty-three and one-half years with twenty and one-half years of confinement in prison and thirteen years of extended supervision.[2]

The no-merit report addresses whether there is arguable merit to challenging the 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 all of the evidence here, we are satisfied that it was sufficient as to each offense.

[2] The circuit court imposed both prison sentences and jail sentences, some consecutive and some concurrent. Because Murphy received prison sentences, his jail sentences are served in state prison. *See* WIS. STAT. § 973.03(2) ("A defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons.").

The no-merit report addresses whether there is arguable merit to pursuing issues relating to the prosecutor's charging discretion, the circuit court's pretrial rulings and evidentiary rulings at trial, jury selection, an amendment to the information, Murphy's decision to testify, the jury instructions, and a question from the jury. We are satisfied that the no-merit report properly analyzes each of these issues as having no arguable merit.

The no-merit report also addresses whether the circuit court erroneously exercised its discretion in denying Murphy's motion for a mistrial. We agree with counsel that there is no arguable merit to this issue. Murphy moved for a mistrial after the court informed the parties that some of the trial proceedings had been livestreamed with one segment that showed about eighty percent of the jurors on camera. Murphy asserted that the jury could have been tainted. The court denied Murphy's motion for a mistrial because Murphy made no factual showing that the jury had been tainted or that jurors were even aware of the livestreaming. The court stated that it would revisit the issue if Murphy later made such a showing. Because there has been no such showing, we see no arguable basis for Murphy to challenge the circuit court's ruling on his motion for a mistrial.

In his response to the no-merit report, Murphy raises a related issue of whether the circuit court should have granted his request that the court place a gag order on the media. The no-merit report does not address this request as a separate issue, but based upon our independent review of the record we conclude that the issue has no arguable merit. Murphy contends, as we understand it, that the jury might have been influenced by inaccurate news reports surrounding his trial or by the sheer volume of news reports. However, neither the record nor Murphy's response provides any objective basis to conclude that the jury saw or was influenced by news reports surrounding Murphy's trial. The court repeatedly instructed the jury not to view or read any news regarding

Murphy's case, whether on television, in the newspaper, or online. "We presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Murphy's subjective belief that the jury might have been influenced by news reports, without any objective basis to support his belief, cannot rebut this presumption.

We turn to discuss potential claims for ineffective assistance of trial counsel. To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

The no-merit report addresses whether Murphy could claim that trial counsel was ineffective because counsel did not object to allowing one of the State's witnesses to testify by telephone. For the reasons we now explain, we agree that this claim would have no arguable merit.

The witness was an officer at the trucking company where Murphy worked. He testified that, on the day of the crash, he received calls about Murphy's erratic driving and that he contacted the state patrol to stop Murphy and conduct a welfare check.

No-merit counsel maintains that, even if trial counsel performed deficiently by failing to object to allowing the truck company officer to testify by telephone, Murphy could not establish prejudice because the testimony was not central to the State's case. We agree.

Although the truck company officer's testimony was compelling evidence of Murphy's intoxication and reckless driving on the day of the crash, it was far from the only such evidence. There was, for example, extensive testimony by a truck driver who witnessed Murphy's driving on the freeway over a number of miles prior to the crash. The truck driver testified that he called Murphy's truck company to complain about Murphy's erratic driving. He testified that he first called the company after he noticed Murphy swerving to the right over the fog line, and that he knew something was wrong because Murphy's truck was not staying straight on the road. The truck driver further testified that Murphy continued to swerve over the fog line and that, at one point, Murphy hit a mile marker. The truck driver also testified that, after he witnessed Murphy hit the mile marker, he called the trucking company again, to tell the company that Murphy had just hit a sign and that "they needed to try to get [him] stopped."

Based on our independent review of the record, we see no other arguable claims for ineffective assistance of trial counsel. In his response to the no-merit report, Murphy makes a number of allegations relating to trial counsel's performance, but none of those allegations amounts to a cognizable claim for a claim of ineffective assistance of counsel.

As an example, Murphy alleges that counsel should have cross-examined one of the State's law enforcement witnesses with evidence that there was wind on the day of the crash. However, Murphy does not clearly identify which of the witnesses he means. Regardless, we see no arguable basis to his claim that counsel was ineffective by failing to cross-examine a law

enforcement witness regarding the amount of wind. There was evidence from multiple witnesses, including non-law enforcement witnesses, establishing that the wind was not sufficient to have been the cause.

Based upon our independent review of the record, we see no other issues of arguable merit with respect to events before or during trial. We turn to sentencing.

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. 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.

In sentencing Murphy, the circuit court imposed the maximum of twelve and one-half years on two of Murphy's thirty offenses. The court explained that the two sentences would be concurrent with one another because they involved the same victim, but that the court was imposing the maximum because the victim was so severely injured. Under the circumstances, Murphy could not reasonably argue that these sentences (or his other sentences, all well within

the maximum) were "'harsh and excessive'" or "shock[] the public sentiment." *See* ***id.***, ¶74 (quoted source omitted). We see no other arguable issues relating to sentencing.[3]

In his response to the no-merit report, Murphy claims that the circuit court structured his sentencing "out of spite" and imposed a harsh sentence because he took his case to trial. Murphy does not point to any factual support for this claim. Regardless, based upon our independent review of the record, we conclude that it would be frivolous to pursue such a claim. It is true that, during the sentencing hearing, the court referenced Murphy's decision to reject a plea offer. In context, however, it is clear that the court was not punishing Murphy for rejecting the offer but was instead discussing the plea offer in the context of Murphy's attempts to shift blame. The court listed several ways that Murphy had made excuses or tried to shift blame and, as one example, the court stated that Murphy "almost went to blaming the State for not offering you a better plea deal as to why we went to trial."

Finally, Murphy's response appears to raise the issue of whether his sentences should be modified based on a new factor. According to Murphy, the department of corrections has determined that he is not eligible for the Substance Abuse Program, contrary to the circuit court's determination. We see no arguable merit to seeking sentence modification on this basis. A

[3] There is a clerical error in the judgment of conviction that we order corrected upon remand as directed in the mandate of this opinion. The judgment states that Murphy's sentences on Count 25 and Count 27 are "[c]onsecutive," without clearly indicating whether the sentences on those counts are consecutive to all counts or only some counts. However, in the circuit court's oral sentencing pronouncement, the court unambiguously stated that the sentence on Count 25 would be concurrent with the sentence on Count 16, and that the sentence on Count 27 would be concurrent with the sentence on Count 18. The court's unambiguous oral pronouncement is controlling. *See* ***State v. Oglesby***, 2006 WI App 95, ¶16, 292 Wis. 2d 716, 715 N.W.2d 727. Accordingly, upon remand, the circuit court shall modify the judgment of conviction to state that Count 25 is concurrent with Count 16 and that Count 27 is concurrent with Count 18.

sentence may be modified based on a new factor, but a new factor is one that is "highly relevant to the imposition of sentence." *See* ***State v. Carroll***, 2012 WI App 83, ¶7, 343 Wis. 2d 509, 819 N.W.2d 343. Here, the record does not support an argument that Murphy's eligibility or ineligibility for the Substance Abuse Program was highly relevant to the imposition of sentence. The circuit court did not state that Murphy should serve time in prison or serve a sentence of any particular length based on his eligibility for the Program, nor did the court otherwise indicate that it was fashioning Murphy's sentence based on his eligibility. Accordingly, Murphy's ineligibility for the Program could not be a new factor to justify sentence modification.

Our review of the record discloses no other issues with arguable merit, and we see nothing further in Murphy's response that raises any other issues with arguable merit.

Therefore,

IT IS ORDERED that the judgment of conviction shall be modified to state that Count 25 is concurrent with Count 16 and Count 27 is concurrent with Count 18, that the judgment is summarily affirmed as modified, and that the cause is remanded for entry of the modified judgment. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patricia A. FitzGerald is relieved of any further representation of Wayne Edward Murphy 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