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DISTRICT I

February 15, 2022

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Elando Lee James 202418
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You are hereby notified that the Court has entered the following opinion and order:

2021AP128-CRNM State of Wisconsin v. Elando Lee James (L.C. # 2018CF3859)

Before Donald, P.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).

Elando Lee James appeals judgments entered after a jury found him guilty of two crimes. Appellate counsel, Attorney Katie Babe, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] James did not file a response. This court has considered the no-merit report, and we have independently reviewed the record as

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

mandated by ***Anders***. We conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State filed a criminal complaint alleging that on August 13, 2018, James and his co-defendant, Juanita Denise Tharp, battered their landlord, P.J.C., when he served them with an eviction notice at the rental premises in the 400 block of North 33rd Street, in Milwaukee. The complaint further alleged that P.J.C. was seventy-one years old. The State charged James, as a party to a crime, with battery creating a substantial risk of great bodily harm to a person sixty-two years of age or older, a Class H felony. *See* WIS. STAT. §§ 940.19(6)(a), 939.05 (2017-18). The State subsequently added a misdemeanor charge of bail jumping in violation of WIS. STAT. § 946.49(1)(a) (2017-18). The latter charge was based on allegations that on August 13, 2018, James faced a pending misdemeanor charge and was out of custody on bail with a condition that he not have any contact with Tharp. James pled not guilty to both battery and bail jumping and requested a trial.

The matters proceeded to a jury trial on January 23, 2019. The jury found James guilty as charged. At sentencing, he faced maximum penalties of a $10,000 fine and a six-year term of imprisonment for battery and a $10,000 fine and a nine-month jail sentence for bail jumping. *See* WIS. STAT. §§ 939.50(3)(h), 939.51(3)(a) (2017-18). The circuit court imposed an evenly bifurcated six-year term of imprisonment for the felony and a concurrent ninety-day jail sentence for the misdemeanor. The circuit court awarded James the 246 days of sentence credit that he requested and found him ineligible for the Wisconsin substance abuse program and the challenge incarceration program. At a subsequent restitution hearing held off the record, the circuit court set restitution at zero.

We first consider whether James could pursue an arguably meritorious claim that the evidence was insufficient to support the guilty verdicts. When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force 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). The finder of fact, not this court, considers the weight of the evidence and the credibility of the witnesses and resolves any conflicts in the testimony. *See* ***id.*** at 503.

The circuit court instructed the jury that, before it could find James guilty of battery in violation of WIS. STAT. § 940.19(6)(a) (2017-18), the State was required to prove beyond a reasonable doubt that: (1) James caused bodily harm to P.J.C.; (2) James intended to cause bodily harm to P.J.C.; (3) James's conduct created a substantial risk of great bodily harm; and (4) James knew that his conduct created a substantial risk of great bodily harm.[2] *See* ***id.***; *see also* WIS JI—CRIMINAL 1226. In regard to the third element, the circuit court instructed the jury that if it found that P.J.C. was sixty-two years of age or older on August 13, 2018, the jury could find from that fact alone that James's conduct created a substantial risk of great bodily harm. *See* WIS JI—CRIMINAL 1226. Additionally, because James successfully requested an instruction regarding the defense of others, the circuit court instructed the jury that the State was required to prove beyond a reasonable doubt that James did not reasonably believe that his actions were

[2] Although the State charged James as a party to the crime of battery and indicated at trial that the State was proceeding with the offense as charged, the State did not request an instruction regarding liability as a party to a crime, and the circuit court did not give such an instruction.

necessary to defend another person. *See* WIS. STAT. §939.48(1), (4) (2017-18); *see also* WIS JI—CRIMINAL 825.

The circuit court instructed the jury that, before it could find James guilty of bail jumping in violation of WIS. STAT. § 946.49(1)(a) (2017-18), the State was required to prove beyond a reasonable doubt that James: (1) was charged with a misdemeanor; (2) was released from custody on bond; and (3) intentionally failed to comply with the terms of the bond. *See **id.***; *see also* WIS. JI—CRIMINAL1795. The circuit court further instructed the jury that the parties had stipulated that, on August 13, 2018, James was out of custody on bail for a misdemeanor charge and that, as a condition of his bail, he was ordered not to have any contact with Tharp.

The evidence was sufficient to satisfy the elements of both crimes. P.J.C. testified that he was seventy-two years old and that in August 2018, James and Tharp were P.J.C.'s tenants. P.J.C. said that on or about August 11, 2018, he learned from James that James had been in a fight the previous evening with resultant disarray to the rental premises. On the morning of August 13, 2018, P.J.C. knocked on the door of James's and Tharp's apartment, seeking to talk to James about the condition of the hallway. P.J.C. said that Tharp answered the door and that James then appeared behind her and threatened P.J.C. According to P.J.C., he then left the premises but returned to the apartment building later that evening to serve James and Tharp with an eviction notice. On arrival, he saw James, Tharp, and several other people outside the building. P.J.C. said that when he tried to serve the notice on Tharp, James struck P.J.C. in the face. P.J.C. struck back, but James punched P.J.C. multiple times, and he fell to the ground. James and Tharp each kicked P.J.C. twice in the head, and then James hit P.J.C. with a traffic barricade. P.J.C. said that he escaped from the scene and made his way to the police station to report the incident.

P.J.C. went on to describe his injuries. He said that he suffered a broken cheekbone, a gash over his eyebrow that required stiches, and damage to one of his eyes. He also identified photographs of himself in the hospital showing injuries to his face and eyes.

James presented two witnesses on his own behalf. Each defense witness described seeing P.J.C. arrive at the North 33rd Street building on the evening of August 13, 2018, and attempt to serve a paper on James and Tharp. Both defense witnesses testified that P.J.C. hit Tharp in the face, that James struck P.J.C. in response, and that the two men "tussled." One of the witnesses said that during the tussle, James "whip[ped P.J.C.'s] ass."

James also testified. He acknowledged that, effective on June 26, 2018, a court order barred him from having contact with Tharp. He also acknowledged that on the morning of August 13, 2018, his landlord, P.J.C., knocked on James's apartment door and that Tharp was with James in the apartment and answered the door. James said that he then exchanged words with P.J.C. and closed the door on him. James admitted that Tharp remained with him that day, even though he knew that the no-contact order was in effect and barred him from having contact with her. Later that evening, P.J.C. returned to the apartment building with an eviction notice and approached James as he sat outside with Tharp and several companions. James said that, in his view, P.J.C. served the notice in a disrespectful manner, then "socked" Tharp in the eye and turned to hit James. James acknowledged that he responded by punching P.J.C. and that the two men then "tussled." James testified that he was "really off balance during the whole ordeal" because he had been stabbed in the ankle during a fight on August 10, 2018. He said that he and P.J.C. therefore "went to the ground," where they fought for approximately five minutes. P.J.C. next hit James with a traffic barricade, reinjuring James's ankle. P.J.C. then left the scene.

James offered his hospital records as exhibits in his defense. They showed that he received stitches in his ankle on August 11, 2018, and that he returned to the hospital on August 14, 2018, complaining that he had reinjured his ankle with exercise.

On cross-examination, the State asked James whether he believed that the blows he struck against P.J.C. were necessary to stop an attack on Tharp. James responded: "I didn't say it was necessary. I said he hit my wife. I - - He hit my wife. I'm gonna protect her."

The evidence summarized above was sufficient to permit the jury to find that the State proved the elements of battery and bail jumping beyond a reasonable doubt. Further, the evidence was sufficient to permit the jury to find that the State proved beyond a reasonable doubt that James did not act lawfully in defense of another. Any challenge to the sufficiency of the evidence would be frivolous within the meaning of ***Anders***.

We have considered whether James could pursue an arguably meritorious challenge to the circuit court's pretrial order regarding the State's motion to limit the testimony of his witnesses. The circuit court ruled that the defense witnesses could testify regarding their knowledge of the incident on August 13, 2018, but the circuit court found that any testimony about P.J.C.'s alleged sexual habits and alleged false statements in regard to ancillary matters were more prejudicial than probative. Evidentiary rulings are left to the circuit court's broad discretion, and we review such rulings under a highly deferential standard. *See* ***Pinczkowski v. Milwaukee Cnty.***, 2005 WI 161, ¶47, 286 Wis. 2d 339, 706 N.W.2d 642. In light of our standard of review, no arguably meritorious basis exists to challenge the circuit court's evidentiary ruling regarding the scope of testimony that the defense witnesses could offer.

We have also considered whether James could pursue an arguably meritorious claim that his trial counsel was ineffective for agreeing that the State could present certain evidence, specifically: (1) that James was in a fight on August 10, 2018; and (2) that P.J.C. had an encounter with James and Tharp in the morning of August 13, 2018. We conclude that James could not do so.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that trial counsel's performance was not objectively reasonable under prevailing professional norms. *See* ***id.*** at 687-88. To demonstrate prejudice, "[t]he 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. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

The State sought to admit evidence of both the August 10, 2018 fight and the August 13, 2018 morning interaction between P.J.C., Tharp, and James pursuant to WIS. STAT. § 904.04(2)(a). That section excludes evidence of other crimes, wrongs, or acts if it is offered to prove the character of the actor. *See* ***id.*** The statute does not exclude the evidence if it is offered for other purposes, if it is relevant, and if its probative value is not substantially outweighed by the danger of unfair prejudice. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

As the circuit court observed when responding to the State's motion, no basis existed under WIS. STAT. § 904.04(2)(a) to object to evidence of the encounter on the morning of

August 13, 2018. The evidence was not an "other act"; rather, the evidence was part of the proof of a crime for which James was on trial, specifically, having contact with Tharp on August 13, 2018, in violation of his bail conditions. Accordingly, James could not mount an arguably meritorious claim that his trial counsel was ineffective for failing to object to admission of that evidence. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (holding that failure to object to a correct ruling is not deficient performance). As to the evidence that James was in a fight on August 10, 2018, the record is clear that such evidence was central to James's theory of defense. The ankle injury and medical treatment that he received as a result of that fight formed a key component of his claims that he struck P.J.C. while hobbled and only to protect Tharp, and that P.J.C. was the aggressor whose actions led to an aggravation of James's own wounds. "An appellate court will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

We have considered whether James could pursue an arguably meritorious claim that his trial counsel was ineffective for failing to object to the form of the battery verdict, in which the jury found him guilty of battery as a party to a crime without receiving instructions on party to a crime liability. A defendant may be found guilty as a party to a crime upon proof that the defendant was the direct actor, or that the defendant aided and abetted the commission of the crime, or that the defendant conspired with another to commit the crime. *See* WIS. STAT. § 939.05(2)(a)-(c). Thus, a person who directly commits a crime is a party to the crime and may be charged and convicted as such. *See* ***State v. Brown***, 2012 WI App 139, ¶13, 345 Wis. 2d 333, 824 N.W.2d 916. The verdict form here was therefore proper and not objectionable.

We have also considered whether James could pursue an arguably meritorious claim that his trial counsel was ineffective for failing to object when the prosecutor in closing argument—and after the circuit court had instructed the jury—referred to the three ways that a person can be a party to a crime. We conclude that he could not make an arguably meritorious showing of prejudice. Following the State's abbreviated summary of the ways in which a person may be a party to a crime, the State turned to a review of how the evidence showed that James directly committed battery. Moreover, the circuit court instructed the jury regarding the elements that the State was required to prove beyond a reasonable doubt in order for the jury to find James guilty of battery as a direct actor, and the circuit court further instructed the jury that it must apply the law only as provided by the circuit court. We presume that jurors follow instructions. *See* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We next consider whether James could pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that deterrence, rehabilitation, and punishment were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The circuit court's discussion included consideration of the mandatory sentencing factors, namely, "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The aggregate penalty imposed was within the maximum allowed by law, *see* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173, and was not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***,

70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). No arguably meritorious basis exists to challenge the circuit court's exercise of sentencing discretion.

We last conclude that James could not pursue an arguably meritorious challenge to the circuit court's finding that he was ineligible to participate in either the challenge incarceration program or the Wisconsin substance abuse program. *See* WIS. STAT. §§ 302.045, 302.05. A person serving a sentence for a crime specified in WIS. STAT. ch. 940 is statutorily disqualified from participating in either program. *See* §§ 302.045(2)(c), 302.05(3)(a)1. James's sentence for battery in violation of WIS. STAT. § 940.19(6)(a) (2017-18), disqualified him from participation.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Katie Babe is relieved of any further representation of Elando Lee James. *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