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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT III

July 12, 2022

To:

Hon. John P. Anderson
Circuit Court Judge
Electronic Notice

Kay Cederberg
Clerk of Circuit Court
Bayfield County Courthouse
Electronic Notice

Kimberly Allison Lawton
Electronic Notice

Dennis Schertz
Electronic Notice

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Angelyne C. Lapointe
37100 Hillside Drive
Bayfield, WI 54814

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

2019AP1354-CRNM State of Wisconsin v. Angelyne C. Lapointe (L. C. No. 2017CF5)

Before Stark, P.J., Hruz and Gill, 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).

Angelyne Lapointe appeals from convictions for robbery and substantial battery. Attorney Dennis Schertz has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).¹ The no-merit report sets forth the procedural history of the case and addresses the sufficiency of the evidence to support the charges, whether the terms of probation imposed were excessive, and trial counsel's performance. Lapointe was advised of her right to respond to the no-merit report, but she has not filed a response. Having

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

independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), we conclude there are no arguably meritorious issues for appeal.

The State charged Lapointe and her sister Marcella with being parties to the crimes of robbery with use of force, substantial battery intending bodily harm, intentional mistreatment of an animal, and misdemeanor theft. The complaint alleged that the sisters beat a woman whom we will call Carol² in her home, kicked her dog, and stole her phone.

The sisters proceeded to trial. The circuit court declared a mistrial at Lapointe's request, however, based upon the State's inadvertent failure to turn over some electronic photographs that had been referenced in a police report.

At a second trial again involving both sisters, Carol testified that she met Lapointe and Marcella for the first time at a bar on the evening of October 30, 2014. When the bar closed, Carol invited the sisters and an acquaintance, Dale Reinhart, to come to her home, where they all continued drinking and also smoked marijuana.

At some point after Reinhart left, Carol went to the bathroom. When Carol returned to her kitchen, she thought the mood "just felt very strange." Marcella tapped Lapointe on the shoulder and asked whether they should "do it." A bottle of Carol's brandy then fell out of one of the sisters' vests, and Carol noticed that the rest of the marijuana that she had left on the counter was gone. Carol told the sisters that if they were there to steal from her, they should take whatever they wanted and "probably think about getting a fucking job." The sisters then

² This matter involves the victim of a crime. Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

advanced on Carol and began punching and kicking her as she fell to her knees and tried to take cover under the kitchen table. The beating continued on and off “for quite some time,” while Carol attempted to throw things at the sisters and screamed for them to leave. When Carol’s dog came to her side, the sisters kicked him too, making him yelp and leaving him limping for days afterward. When Carol attempted to call 9-1-1 during the attack, one of the sisters grabbed her phone from her.

After the sisters finally left, Carol went to a neighbor’s house to seek help. Police eventually arrived and an ambulance transported Carol to the emergency room, where she was treated for a fractured eye socket, among other injuries. When Carol’s boyfriend brought Carol home from the hospital, he discovered Marcella’s wallet in the kitchen, and he and Carol turned the wallet over to the police.

Carol’s neighbor, Ann Hill, confirmed that Carol had knocked on her door seeking help. Hill did not recognize Carol at first because her face was so “beaten up” and swollen. Hill also observed that Carol appeared “shaken” and “traumatized.” Hill, who worked as a bartender, estimated Carol’s level of intoxication as a three on a scale from one to ten—with one being “stone cold sober” and then being “blackout drunk.” Hill called the police, even though Carol expressed reservations about doing so, out of fear that the women who attacked her could still be in the area.

Washburn Police Officer Nicholas Suminski responded to the dispatch call to Hill’s house and made contact with Carol, who was crying and “obviously upset.” Carol identified her assailants as Native American sisters who played on a pool team, but whose names she could not recall. Suminski observed injuries to Carol’s face—including a swollen eye, blood on her lips,

and other abrasions—and decided to call for an ambulance. The emergency room doctor who treated Carol testified that Carol had a fractured eye socket and multiple abrasions on her face.

After the ambulance arrived, Suminski went to Carol’s house, where he found the door open and several items lying on the floor in the “kitchen/dining area.” Suminski contacted someone from the Red Cliff Police Department, who gave him the names of Angelyne Lapointe and Marcella Lapointe as women potentially matching the descriptions provided. When Suminski showed Carol pictures of Lapointe and Marcella, Carol identified them as her assailants.

Carol purchased a new phone to replace her stolen one.³ When she activated the new phone and synched it to her iCloud account, a number of new digital photographs appeared showing children and houses that Carol had never seen before. Carol turned the digital photographs over to the police. The chief of police for the Red Cliff Band of Lake Superior Chippewa testified that, at the time of Carol’s assault, Marcella Lapointe was living in one of the houses depicted in the digital photographs.

Marcella testified that she and Lapointe had left the bar and gone to Carol’s house to smoke marijuana and drink “hot toddies.” Marcella said that Carol was flirting with her and became upset that Marcella was not going to “sleep over” after Carol had “wasted” time and “booze” on her. As Marcella was heading out the door, Carol “whip[ped] ... out” Marcella’s wallet and started “taunting” Marcella by withholding the wallet as Marcella tried to get it back. Marcella said that she hit Carol about three times as the two of them were scuffling over the

³ Carol’s prior phone was later anonymously turned in to the police.

wallet. According to Marcella, Lapointe broke up the fight and led Marcella out of the house. Marcella admitted that the digital photographs that showed up on Carol's iCloud account depicted homes in her neighborhood, but she denied that she had taken them.

Lapointe did not testify. The circuit court conducted a colloquy to verify that Lapointe made that decision knowingly and voluntarily. In addition to standard instructions, the court also instructed the jury over Lapointe's objection:

Now, evidence has been presented that the defendants possessed recently stolen property. Whether the evidence shows the defendants either knew the property had been stolen, or participated in some way in taking the property, is exclusively for you to decide. Consider the time and the circumstances of the possession in determining the weight you give the evidence.

See WIS JI—CRIMINAL 173.

The jury returned guilty verdicts on the robbery with use of force, substantial battery, and theft counts for each defendant, and not guilty verdicts on each defendant's respective count of mistreating an animal. The circuit court subsequently determined, on a motion after verdict, that theft was a lesser-included offense of robbery with use of force, and it vacated the theft count for each defendant on double jeopardy grounds. The court denied Lapointe's requests for the alternate remedies of mistrial or vacation of the robbery count.

The circuit court held a sentencing hearing at which the parties addressed the presentence investigation report and Lapointe declined her right of allocution. After hearing from victim and the parties, the court discussed proper sentencing factors, including the gravity of the offenses, the need to protect the public, and the character of the offender. The court then sentenced Lapointe to concurrent terms of six years' initial confinement followed by six years' extended

supervision on the robbery count and three and one-half years' initial confinement followed by eighteen months' extended supervision on the battery count. The court stayed the sentences, however, subject to a six-year term of probation with nine months of conditional jail time on the robbery count and, pursuant to an amended judgment, a concurrent five-year term of probation on the battery count.

We agree with counsel's description, analysis, and conclusion that any challenge to the sufficiency of the evidence, the terms of probation, or counsel's performance would lack arguable merit. We note, however, that the record shows several other potential issues that counsel has failed to address.

First, counsel does not address whether Lapointe's mistrial should have been granted with prejudice, as she requested. The Double Jeopardy Clause encompasses a defendant's right to have his or her trial completed by a particular tribunal and it protects a defendant against repeated attempts by the State to obtain a conviction. *State v. Hill*, 2000 WI App 259, ¶10 n.34, 240 Wis. 2d 1, 622 N.W.2d 34. Jeopardy attaches when a jury has been sworn in. WIS. STAT. § 972.07(2); *State v. Comstock*, 168 Wis. 2d 915, 937, 485 N.W.2d 354 (1992). Double jeopardy does not bar retrial after a mistrial granted at the defendant's own request, however, unless the basis for the mistrial is prosecutorial overreaching—meaning that the prosecutor acted with the intent to gain another chance to convict or harass the defendant with multiple prosecutions. *Hill*, 240 Wis. 2d 1, ¶¶11-12. Here, based upon the circuit court's determination that the State had not intentionally withheld the digital photographs from discovery, we are satisfied the court properly granted a mistrial without prejudice.

Second, counsel does not address the challenged jury instruction regarding using a defendant's possession of recently stolen property as circumstantial evidence of theft. We conclude that the instruction was appropriate because the jury could reasonably infer from the digital photographs that Lapointe's sister, Marcella, had possession of Carol's phone after the attack. That possession, in turn, provided corroborating circumstantial evidence in support of Carol's direct testimony that one of the sisters had grabbed the phone from her during the attack.

Third, counsel does not address the validity of the sentences imposed and withheld by the circuit court. We conclude that the sentences were within the applicable penalty ranges provided by law and were not unduly harsh, given Lapointe's lengthy criminal history and the violent nature of the current offenses.

Our independent review of the record discloses no other potential issues for appeal. We therefore conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders*. Accordingly, counsel shall be allowed to withdraw and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Angelyne Lapointe in this matter pursuant to 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