OFFICE OF THE CLERK
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 I

September 13, 2022

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Electronic Notice

Hon. Carolina Stark
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Paul G. Bonneson
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

Harry A. Robinson 474405
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2019AP1313-CRNM State of Wisconsin v. Harry A. Robinson (L.C. # 2014CF1137)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Harry A. Robinson appeals a judgment convicting him after a jury trial of five counts of possession of heroin with intent to deliver, as a second or subsequent offense. He also appeals an order denying his postconviction motion. Appointed appellate counsel, Paul G. Bonneson, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32

(2019-20);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). Robinson was provided with a copy of the no-merit report and responded. Counsel then filed a supplemental no-merit report. After considering the no-merit reports and the response, and after conducting an independent review of the record as mandated by ***Anders***, we conclude that there are no issues of arguable merit that Robinson could raise on appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

Robinson was charged with five counts of delivering heroin, all as a second or subsequent offense. After a jury trial, he was convicted of all of the charges. The circuit court sentenced Robinson to a total of twenty years of initial confinement and eleven years of extended supervision. Robinson moved for postconviction relief, arguing that his trial counsel was ineffective for failing to investigate a third-party perpetrator defense and for failing to challenge his statement to police as involuntary. The circuit court denied the motion. This no-merit appeal follows.

The no-merit report first addresses whether there was sufficient evidence adduced at trial to support Robinson's convictions. When reviewing the sufficiency of the evidence, we look at whether "'the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted). "'If any possibility exists that the trier of fact could have drawn

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

the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn [the] verdict[.]'" ***Id.*** (citation omitted).

Special Agent Andrew Elmer of the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives testified at trial about his undercover investigation of Robinson. Elmer told the jury about the circumstances of his multiple drug purchases from Robinson. The State showed videotapes and presented audio-recordings of the drug sales to the jury. The State presented evidence about heroin and items used to sell drugs found in Robinson's home. Detective Charles Libal and Detective Keith Dodd from the Milwaukee Police Department testified about the statement Robinson made to them in which he admitted he was engaged in selling heroin. Based on our review of the trial transcripts and other evidence, as briefly summarized here, we conclude that there was sufficient evidence presented at the trial for the jury to find Robinson guilty of the charges. There would be no arguable merit to a claim that there was insufficient evidence presented at trial to support the verdict.

The no-merit report next address whether the circuit court properly exercised its discretion when it made an evidentiary ruling pertaining to a police report and other documents that referred to Robinson's twin brother, Harold Robinson. Robinson argued that he should be allowed to ask about the errors in police reports and other documents to show that the State's investigation was, as he characterized it, "sloppy." The State objected, arguing that mentioning Robinson's twin brother might lead the jury to believe that the twin brother committed the crimes. After considering the arguments from the parties, the circuit court ruled that Robinson's counsel could ask about the errors and refer to Robinson's brother, but prohibited any mention that Robinson's brother was a twin or shared the same birth date. The circuit properly exercised its discretion. *See* ***State v. Manuel***, 2005 WI 75, ¶24, 281 Wis. 2d 554, 697 N.W.2d 811 (the

circuit court properly exercises its discretion when its ruling is based on accepted legal standards and in accord with the facts of the case). There would be no arguable merit to this claim.

The no-merit report and Robinson's response both address whether Robinson is entitled to a new trial based on ineffective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). Robinson contends in his response that he received ineffective assistance because his trial counsel should have argued that Robinson's twin brother, rather than Robinson, committed some or all of the offenses.

A defendant may introduce third-party perpetrator evidence only if the defendant establishes that the third party had a motive to commit the crime, an opportunity to do so, and a direct connection to the crime. *See* ***State v. Denny***, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (1984). In his postconviction motion, Robinson argued that his trial counsel failed to investigate a third-party perpetrator claim prior to trial and failed to make an offer of proof prior to or at trial that Robinson's twin brother was the perpetrator. Robinson argued that his brother had a motive to sell drugs because selling drugs is profitable; that his brother had an opportunity to sell drugs because he had access to the home where the drugs and other incriminating items were found; and he had a direct connection to the crime because his name was found in the police reports. We agree with the postconviction court that this offer of proof is too speculative to support the admission of ***Denny*** evidence. Moreover, during a pretrial hearing Robinson informed the circuit court on the record that he did not want to pursue an allegation that his twin brother was the perpetrator. Therefore, there would be no arguable merit to a claim that Robinson's counsel

ineffectively represented him because he should have more vigorously pursued a third-party perpetrator defense.

Robinson also contends in his response that he received ineffective assistance of counsel because his trial counsel should have moved to suppress Robinson's statement to the police. During his trial testimony, Robinson testified that the police used physical violence against him, which caused him to involuntarily inculpate himself.

The circuit court stated at sentencing that it believed that Robinson committed perjury at trial when he claimed that the police officers took him to a secluded location and beat him before questioning him. The circuit court noted that Robinson had no injuries and the court stated that it found the testimony of the detectives credible that there was no use of force during questioning In addition, the circuit court ruled in its postconviction motion that even if trial counsel had successfully brought a motion to suppress Robinson's testimony before trial, there is no reasonable probability that the outcome of the trial would have been different given the other evidence against Robinson. *See* ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (to show 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.'" (citation omitted)). Therefore, we conclude that there would be no arguable merit to a claim that Robinson received ineffective assistance because his trial counsel did not move to suppress his statement to police.

The no-merit report next addresses whether there would be arguable merit to an appellate challenge to Robinson's sentence. The circuit court sentenced Robinson to an aggregate of twenty years of initial confinement and five years of extended supervision. The circuit court

considered the gravity of the offenses, Robinson's character and the need to protect the public. The court explained that it exceeded the State's recommendation because a longer sentence was necessary to protect the public given Robinson's extensive criminal history, the fact that he was on supervision when he committed these crimes, and the aggravated nature of the offenses. The sentence the circuit court imposed was based on appropriate sentencing criteria applied to the facts of this case. *See* ***State v. Brown***, 2006 WI 131, ¶26, 298 Wis. 2d 37, 725 N.W.2d 262. Because the circuit court properly exercised its discretion, there would be no arguable merit to an appellate challenge to the sentence.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction or the order denying postconviction relief. We have not explicitly addressed all of the issues raised in Robinson's response but agree with the supplemental no-merit report's analysis of the issues and its conclusion that they lack arguable merit. Therefore, we affirm the judgment and order, and we relieve Attorney Bonneson of further representation of Robinson.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved of any further representation of Robinson 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