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DISTRICT III

September 20, 2022

To:

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Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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Benjamin Alan Gunn 633356
Columbia Correctional Center
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You are hereby notified that the Court has entered the following opinion and order:

2020AP560-CRNM State of Wisconsin v. Benjamin Alan Gunn
(L. C. No. 2017CF1043)

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).

Counsel for Benjamin Gunn filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),¹ concluding that no grounds exist to challenge Gunn's convictions for second-degree reckless endangerment, disorderly conduct with use of a dangerous weapon, and criminal damage to property. Gunn filed a response that appears to challenge his convictions, generally, and the accuracy of the record. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue

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

that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Gunn with four counts of second-degree recklessly endangering safety, one count of criminal damage to property, and one count of disorderly conduct with use of a dangerous weapon. According to the complaint, law enforcement responded to reports of a white male chasing people with a machete. The complaint alleged that Andrea,² along with three other individuals, went to Andrea's mother's house, which her mother shared with Gunn, to retrieve Andrea's belongings. When Andrea arrived at the home, she observed Gunn throwing her possessions out of the house onto the back porch. Thereafter, an argument between Andrea and Gunn ensued. According to the complaint, Andrea then grabbed a hammer from inside the home to protect herself because Gunn had previously "tried to kill" her, and after she exited the residence, Gunn picked up a machete and began to swing it around. As Gunn approached Andrea while swinging the machete, she used the hammer to knock the machete out of the way. Two of the three individuals who had driven Andrea to the house then exited the vehicle to assist Andrea in removing items from the house. Gunn then threatened them with a machete. Before Andrea and her friends could leave, Gunn used the machete to break the vehicle's rear window and rear passenger side window, where the third individual had remained seated.

During pretrial proceedings, the circuit court granted defense counsel's request for a competency examination. An examining psychologist submitted a report opining that Gunn was competent to stand trial, and, after a hearing, Gunn was deemed competent to proceed.

² Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

At trial, Gunn moved for a mistrial based on the admission of evidence that was not initially authenticated. Specifically, one of three neighbors who called 911 testified about her observations. However, when the State played the recording of what it believed was that neighbor's 911 call, it was the 911 call of a different neighbor. The records custodian for the dispatch center, however, later testified that the 911 call played to the jury was one of three pertaining to the Gunn incident.

After the jury was excused following the first day of trial, the circuit court informed the parties that a juror wanted to speak to the court about another juror. Neither the defense counsel nor the prosecutor opposed the court talking to the juror alone. In fact, defense counsel noted that “[u]nder the circumstances it’s to the benefit of the defense that this person ... feel like they can be absolutely completely candid.” The court met with the juror, and before the start of the second day of trial, the court shared that Juror A expressed concern about Juror B’s mental stability, noting that Juror B had been “repeating the same stories over and over again” as if Juror B had dementia. According to the court, Juror A’s concern was consistent with the bailiff’s observations about Juror B’s inability to understand simple directions about the parking ramp and parking procedures. After discussing how to proceed, the parties agreed that Juror B would be designated as the alternate juror and excused at the close of trial.

The jury found Gunn guilty of second-degree recklessly endangering safety (as related to Andrea), disorderly conduct with use of a dangerous weapon, and criminal damage to property. Gunn was acquitted of the other charges. Out of a maximum possible sentence of eleven years and six months, the circuit court imposed concurrent sentences totaling nine years, consisting of four years of initial confinement followed by five years of extended supervision. Although the court awarded Gunn 502 days of sentence credit, the judgment of conviction reflected only 402

days of credit. Gunn subsequently moved to correct the sentence, and an amended judgment awarded him 502 days of sentence credit.

Although the no-merit report does not address the circuit court's determination of Gunn's competency, we conclude there is no arguable merit to challenge the court's competency determination. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." *State v. Byrge*, 2000 WI 101, ¶28, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the circuit court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. *Id.*, ¶¶30-31. A circuit court's competency determination should be reversed only when clearly erroneous. *Id.*, ¶46.

An examining psychiatrist submitted a report opining to a reasonable degree of medical certainty that Gunn did not lack the "substantial mental capacity to understand court proceedings or to assist in his defense," outlining his clinical findings and the reasoning behind his opinion. Before the scheduled competency hearing, defense counsel moved to withdraw at Gunn's request. Gunn also wrote a pro se letter to the circuit court asking for new counsel. At the hearing, the court granted counsel's motion to withdraw and it also acknowledged reviewing the competency report and the doctor's opinion, adding: "In other words, you're competent to proceed, and certainly, I see your letter. It's very well-written but we still need to make a record here and we need to get another attorney for you as soon as possible. So we'll see where they're at."

At a subsequent hearing, new counsel stated: “I note that the assessment says that Mr. Gunn is competent to stand trial. I know the prior attorney had questioned that. I don’t disagree with the findings in the report. I believe Mr. Gunn is competent so we would ask that you find that he’s competent.” The proceedings then continued. Based on the doctor’s report and defense counsel’s agreement with the report, the circuit court implicitly found Gunn competent to proceed. *See State v. Echols*, 175 Wis. 2d 653, 672-73, 499 N.W.2d 631 (1993) (holding that an implicit finding is sufficient when facts of record support circuit court’s decision). The record supports the court’s determination.

The no-merit report addresses whether the circuit court properly denied Gunn’s motion for a mistrial; whether the court properly excused a juror; whether there was sufficient credible evidence to support the guilty verdicts; and whether the court properly exercised its sentencing discretion. Upon reviewing the record, we agree with counsel’s description, analysis, and conclusion that none of these issues has arguable merit. The no-merit report sets forth an adequate discussion of these potential issues to support the no-merit conclusion, and we need not address them further.

In his response to the no-merit report, Gunn asserts that the transcripts have been “tampered with,” but he fails to identify any inaccuracies. To the extent Gunn contends that Andrea’s written statement to law enforcement has been omitted from the record, Gunn is mistaken, as the statement—which was admitted at trial as Exhibit No. 23—is included in the record as item No. 77. Gunn also claims that the statement somehow “incriminates” Andrea. If Gunn is challenging Andrea’s credibility as a witness, it is the jury’s function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *See Morden v. Continental AG*, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free

to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *State v. Sarabia*, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, “[f]acts may be inferred by a jury from the objective evidence in a case.” *Shelley v. State*, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). As discussed in the no-merit report, the evidence submitted at trial is sufficient to support Gunn’s convictions.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of her obligation to further represent Benjamin Gunn 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