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

October 25, 2022

To:

Hon. David A. Hansher
Circuit Court Judge
Electronic Notice

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

Lauren Jane Breckenfelder
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

Eddie Lee Johnikin 270008
Columbia Corr. Inst.
PO Box 900
Portage, WI 53901-0900

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

2020AP37-CRNM State of Wisconsin v. Eddie Lee Johnikin (L.C. # 2017CF2889)

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).

Eddie Lee Johnikin appeals the judgment, entered upon his guilty pleas, convicting him of robbery of a financial institution; armed robbery with the threat of force; and taking hostages who are released without bodily harm. Johnikin also appeals the order denying his postconviction motion seeking plea withdrawal. His appellate counsel, Lauren Breckenfelder, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20) and ***Anders v. California***,

386 U.S. 738 (1967).[1] Johnikin responded. Upon consideration of the parties' submissions and an independent review of the record, we summarily affirm because there is no arguable merit to any issue that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

The complaint alleged that on June 16, 2017, Johnikin entered a credit union. When the branch manager, D.W.B., went to the teller window to assist him, Johnikin stated, "Give me your money, don't press any alarms." Johnikin then put a demand note on the counter that read: "[P]ut all the money in the bag and you won't get hurt no dye packs." D.W.B. told police that Johnikin kept his left hand in his pocket, leading her to believe he had a weapon. D.W.B. gave Johnikin the money in her teller drawer as well as a second teller drawer, putting it in a bag he provided.

The complaint further alleged that less than a week later, police officers were dispatched to a restaurant, where, upon arrival, they observed the restaurant's employees restraining Johnikin. The restaurant manager, N.P., told police that Johnikin came into the restaurant, pointed a knife at N.P.'s stomach, and ordered N.P. to give him money from the cash register. Another employee, W.D., reported that during this incident Johnikin grabbed her from behind, held a knife to her neck, and ordered N.P. to give him money or he would kill W.D. W.D. was able to escape and fled the restaurant. N.P. stated that he gave Johnikin money from the register, but that he and other restaurant employees then tackled and held Johnikin until police arrived.

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

The credit union's video surveillance captured the robbery as it occurred. Johnikin's agent from the Department of Corrections later identified him as the robber after viewing stills from the security footage. Following his arrest, Johnikin confessed to both robberies.

Johnikin subsequently sought to suppress statements he made based on an alleged ***Miranda*** violation.[2] Johnikin argued that he did not knowingly, intelligently, and voluntarily waive his ***Miranda*** rights because he suffered a concussion hours before making his statement and was still suffering the effects of that injury. The circuit court denied the motion following a hearing where both Johnikin and the detective who interviewed him testified and after watching the relevant portions of the recording of the interview.

Pursuant to a plea agreement, Johnikin pled guilty to robbery of a financial institution; armed robbery with the threat of force; and taking hostages who are released without bodily harm. In exchange for his pleas, the State agreed to recommend that Johnikin serve a global sentence comprised of eighteen years of initial confinement and seven years of extended supervision, which would run consecutively to any other sentence Johnikin was serving. The State additionally would request restitution totaling $3,999. At sentencing, the circuit court adopted the State's recommendation.

Postconviction, Johnikin filed a motion requesting plea withdrawal. Johnikin argued that the circuit court failed to establish that he understood the elements of the charge of robbery of a financial institution. The circuit court held a hearing during which Johnikin's trial counsel,

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Milwaukee Police Department investigator Jonathan Rivamonte, and Johnikin all testified. The circuit court denied Johnikin's motion.

The no-merit report addresses the circuit court's ruling on Johnikin's suppression motion, the validity of Johnikin's pleas,[3] the circuit court's denial of Johnikin's postconviction motion requesting plea withdrawal, and the circuit court's exercise of its sentencing discretion. This court is satisfied that the no-merit report properly concludes that the issues it raises are without arguable merit.

In his response, Johnikin presents a new twist on his originally filed postconviction motion. He now contends that trial counsel was ineffective for not providing him with the correct jury instruction on the charge of robbery of a financial institution. Johnikin asserts that he asked his postconviction counsel to file an ineffective assistance claim against his trial counsel, but she refused to do so and instead "put all blame" on the circuit court. According to Johnikin, the circuit court is only partially to blame for not making sure that Johnikin understood the elements of the charge. Johnikin reiterates his postconviction argument that he should be allowed to withdraw his plea on the charge of robbery of a financial institution because he did

[3] We note that during its colloquy with Johnikin, the circuit court did not specifically inquire as to whether any promises, agreements, or threats were made in connection with Johnikin's plea. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Unfortunately, only the first page of the plea questionnaire and waiver of rights form is in the record. Appellate counsel advises that she contacted the e-filing Criminal Division and was informed that the physical file likewise contains only the first page of the plea questionnaire. Were the second page of the plea questionnaire and waiver of rights form in the record, it presumably would have contained the form language indicating: "I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." Notwithstanding this record defect, the circuit court did confirm with Johnikin's attorney that he was satisfied Johnikin's pleas were freely, voluntarily, and intelligently made. We conclude there would be no merit to pursuing this issue.

not understand the nature of the charge and because the plea colloquy was deficient. *See* WIS. STAT. § 971.08(1)(a).

During the evidentiary hearing addressing Johnikin's postconviction motion, trial counsel testified that he met with Johnikin in the jail to discuss the plea and sentencing hearing. Trial counsel testified that he went over the complaint and the information with Johnikin, and specifically read him the charging language for the robbery of a financial institution charge. He further explained that he read the part of the documents that recites the elements of the charge. He also testified that "robbery of a financial institution" was written on the plea questionnaire that was submitted to the court and that he would have read that to Johnikin.

Trial counsel additionally confirmed that as part of his representation, he had watched the video recording of Johnikin's police interrogation with Johnikin, during which the police ask him about the credit union robbery. Trial counsel testified that he did not have any concerns about whether Johnikin misunderstood that the charge of robbery of a financial institution involved a bank robbery.

Trial counsel acknowledged that he submitted WIS JI—CRIMINAL 1479, which corresponds to robbery with use of force, rather than WIS JI—CRIMINAL 1522, for robbery of a financial institution, in conjunction with the plea questionnaire and waiver of rights form.[4] He

[4] The elements set forth in WIS JI—CRIMINAL 1479 are as follows: (1) (Name) was the owner of property; (2) The defendant took and carried away property from the person or from the presence of (name); (3) The defendant took the property with the intent to steal; and (4) The defendant acted forcibly.

The elements set forth in WIS JI—CRIMINAL 1522, which was approved in 2016, are as follows: (1) (Name financial institution) was a financial institution; (2) (Name financial institution) was the owner of or had the custody or control of [money] [property]; (3) The defendant took and carried away [money] [property] from an individual or from the presence of an individual; and (4) The defendant acted forcibly.

explained that he did so because for many years, there was not a standard jury instruction for robbery of a financial institution. Trial counsel testified that he explained to Johnikin that the elements between the two charges are similar, but that robbery of a financial institution included an additional element "that the victim or the owner of property was in fact a financial institution." Trial counsel testified that he had "no doubts" that Johnikin understood the elements of the charge. On cross-examination, trial counsel confirmed that robbery of a financial institution does not contain the element that the defendant took property with the intent to steal, an additional distinction from the charge of robbery with use of force.

Following the testimony from all of the witnesses, including Johnikin, the circuit court found that trial counsel's testimony was credible and "[trial counsel] explained everything to the defendant." The circuit court continued:

> There's no question in my mind …. This is not even a close case. That [Johnikin] freely, voluntarily and intelligently understood that count one was a robbery of a financial institution. The fact that there was—I don't wan[t to] say the wrong one, a newer jury instruction that was not attached but an older one they used, I don't think makes this plea inadequate. It does not void the plea.

Under these circumstances, there would be no arguable merit to a claim that trial counsel was ineffective for not ensuring that Johnikin understood the nature of charge. The circuit court already found that he understood, WIS JI—CRIMINAL 1479 notwithstanding. Consequently, Johnikin would not be able to establish that trial counsel's performance was deficient. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (holding that to prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense); *see also* ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979) ("[W]hen the trial judge acts as

the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses.").

Our review of the record discloses no other potential issues for appeal. This court has reviewed and considered the various issues raised by Johnikin. To the extent we did not specifically address all of them, this court has concluded that they lack sufficient merit or importance to warrant individual attention. Accordingly, this court accepts the no-merit report, affirms the judgment and order, and discharges appellate counsel of the obligation to represent Johnikin further in this appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Lauren Breckenfelder is relieved of further representation of Eddie Lee Johnikin 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