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DISTRICT II

December 21, 2022

To:

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Circuit Court Judge
Electronic Notice

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

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Bobby L. Mitton, #422637
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You are hereby notified that the Court has entered the following opinion and order:

2020AP851-CRNM State of Wisconsin v. Bobby L. Mitton (L.C. #2016CF621)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Bobby L. Mitton appeals a judgment convicting him after a jury trial of one count of first-degree intentional homicide, as a party to a crime, and one count of theft of movable property, both convictions as a repeater. Appointed appellate counsel, Patrick Flanagan, filed a no-merit report. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967), and WIS. STAT.

RULE 809.32 (2019-20).[1] After considering the no-merit report and after conducting an independent review of the record, we conclude that there are no issues of arguable merit that Mitton could raise on appeal.[2] Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses whether there would be arguable merit to a claim that there was insufficient evidence to support Mitton'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).

Derryl Allen testified that he was at the home of the victim, Thomas Borglin, with Mitton and Mecquon Jones, the evening before Borglin was found dead. Allen testified that the men were drinking alcohol heavily when Borglin and Mitton began fighting over some petty matter. Allen testified that Mitton picked Borglin up by his legs, maneuvered him to the floor, got on top of him, and began hitting him. Allen testified that Jones then intervened in the fight and started stomping on Borglin until he was lying on the floor motionless. Allen further testified that Mitton grabbed Borglin's television set, and they all left. Racine Police Officer Douglas Cecchini testified that he discovered Borglin's body the next day when he received a call to

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

[2] Mitton was advised of his right to respond to the no-merit report. He sought repeated extensions of time to respond over a period of sixteen months, but did not file the response. On September 10, 2021, we denied Mitton's request for any additional extensions.

come check on an unresponsive male person. Based on our review of the trial transcript and other evidence, as briefly summarized here, we conclude that there was sufficient evidence for the jury to find Mitton guilty of the charges.

The no-merit report addresses whether there was sufficient evidence presented at trial to establish that Mitton intended to kill Borglin. Mitton contends that there were no statements made by the perpetrators evidencing an intent to kill, so no intent to kill was proven. He also contends that since Borglin was alive when he and his co-actors left the scene after they beat him, it proved that they did not seek to kill him.

Intent to kill is one of the elements of attempted first-degree intentional homicide. *See* WIS. STAT. § 940.01. "Since the law cannot enter the subjective mind of an individual accused, intent must be evidence[d] by inferences from the words and conduct of the actor and the circumstances surrounding the act." *See* ***State v. Schenk***, 53 Wis 2d 327, 332, 193 N.W. 2d 26 (1972). "The general rule is that an accused is presumed to intend the natural and probable consequences of his acts, voluntarily and knowingly performed." ***Id.*** Trial evidence established that Borglin was savagely beaten and left unconscious without medical assistance. It can be reasonably inferred that Mitton intended to kill Borglin, as a party to a crime with Jones, because he knocked Borglin to the floor and pummeled him with fists until Jones began stomping on Borglin, then left Borglin unconscious without medical assistance. There would be no arguable merit to a claim that there was insufficient evidence presented at trial to support the verdicts.

The no-merit report next addresses whether there would be arguable merit to an appellate challenge to Mitton's sentence. For first-degree intentional homicide, the circuit court sentenced Mitton to a mandatory life sentence plus two years for the repeater enhancement, making Mitton

eligible for parole after serving thirty-five years. For theft, the circuit court sentenced Mitton to eight months in jail, to be served concurrently. The circuit court considered all three primary sentencing factors in its comments at sentencing, characterizing the offense as aggravated. The circuit court explained how the sentence it imposed was based on the various 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.

The no-merit report next addresses whether Mitton was denied the effective assistance of trial counsel. A defendant receives constitutionally ineffective assistance of trial counsel if counsel performs deficiently and counsel's deficient performance prejudices the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We agree with the no-merit report's conclusion that the record does not support a claim of ineffective assistance of trial counsel. Trial counsel advocated appropriately for his client at trial. There would be no arguable merit to a claim that Mitton received ineffective assistance of trial counsel.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Accordingly, we affirm the judgment and relieve Attorney Patrick Flanagan of further representing Mitton.

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

IT IS FURTHER ORDERED that Attorney Patrick Flanagan is relieved of any further representation of Bobby L. Mitton 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