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April 12, 2023

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

2020AP595-CRNM State of Wisconsin v. Sammy Lee, III (L.C. #2016CF322)

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).

Sammy Lee, III appeals from a judgment, following a jury trial, convicting him of attempted first-degree intentional homicide with use of a dangerous weapon, armed robbery, and attempted armed robbery—all as a repeater. He also appeals from an order denying his postconviction motion. His appellate counsel filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Lee filed a response. Counsel then filed a supplemental no-merit report. Lee filed a second response. After reviewing the Record, counsel's reports, and Lee's responses, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. See WIS. STAT. RULE 809.21.

This case involves an armed robbery and stabbing that occurred at a motel called the Knights Inn in Racine. An intruder entered a motel room, implied he was armed, and wanted the two victims to empty their pockets. One of the victims had a knife and stabbed the intruder. The intruder, in turn, repeatedly stabbed that victim, who sustained life-threatening injuries. The dispute at trial mainly centered on whether Lee was the intruder. Lee testified he was in Kenosha at the time of the incident, and therefore he could not have been the intruder. The State introduced evidence to prove Lee was the intruder. The jury was given the alibi instruction and ultimately convicted Lee of armed robbery, attempted armed robbery, and attempted first-degree intentional homicide with use of a dangerous weapon. Lee was sentenced to an aggregate sentence of thirty-five years' initial confinement and twenty-five years' extended supervision.

The no-merit reports address whether the evidence was sufficient to support Lee's conviction, whether the circuit court properly exercised its discretion at sentencing, and whether the circuit court erroneously exercised its discretion by denying Lee's postconviction motion. Lee filed two responses identifying, in broad strokes, four issues of potential arguable merit: (1) trial counsel was ineffective for a variety of reasons; (2) the court lacked subject matter

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

jurisdiction; (3) the State withheld material evidence (*Brady*² violation); and (4) the court erroneously exercised its discretion in an evidentiary admission. We address each issue in turn.

The no-merit report first addresses whether the evidence at Lee’s jury trial was sufficient to support his convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury “unless the evidence, viewed most favorably to the state 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. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcript persuades us that the State produced ample evidence to convict Lee of his crimes.

To prove Lee was the intruder, the State introduced evidence that Lee’s cell phone was in the vicinity of the Knights Inn in Racine during the robbery/stabbing, the cell phone then traveled to Lee’s girlfriend’s residence in Racine, and then down to Kenosha, where Lee called 911 to report that he himself had been stabbed; Kenosha emergency personnel responded to Lee’s 911 call and provided Lee with emergency medical care for his stab wounds; one of the victims from the Knights Inn identified Lee from a photo array and was sixty-percent positive Lee was the intruder; the other victim and a witness from the Knights Inn testified that the intruder was wearing a brown leather jacket; Lee admitted he had been wearing a jacket with brown leather patches before he was stabbed in Kenosha; in a video played for the jury, Lee’s girlfriend admitted Lee left her residence in Racine, came back and told her someone from the Knights Inn stabbed him, and they then drove to Kenosha; one of Lee’s fellow inmates testified

² *Brady v. Maryland*, 373 U.S. 83 (1963).

Lee disclosed to him that Lee stabbed someone at the Knights Inn motel; and cell-phone records indicated there were calls/texts between Lee’s cell phone and another guest of the Knights Inn and her boyfriend during the time in question. Based on all the evidence supporting the jury’s verdict, we agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The Record reveals that the court’s sentencing decision had a “rational and explainable basis.” See *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). Moreover, the sentence imposed does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Lee’s sentence would lack arguable merit.

The no-merit report then addresses whether there is an issue of arguable merit to challenge the circuit court’s denial of Lee’s postconviction motion. To provide context, appellate counsel filed a postconviction motion alleging counsel was ineffective for failing to call two alibi witnesses—Sammy Lee, Jr. (Lee’s father) and Melissa Escamilla. He also alleged counsel was ineffective for failing to make an opening statement, failing to retain his own DNA analyst, and failing, at trial, to provide context for an incoming text message to Lee’s cell phone that was admitted into evidence. The court held a *Machner*³ hearing where it ultimately

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

determined trial counsel's performance was neither deficient nor prejudicial.⁴ As to the alibi witnesses, the court found trial counsel had a very strategic reason for not calling Lee's father given counsel was told by Lee that Lee and his father coordinated the story in prison.⁵ The court also found Escamilla's testimony not credible because it did not match the timeline of certain undisputed facts.⁶

We agree with counsel that any challenge to the circuit court's factual findings from the postconviction hearing would lack arguable merit. "Where the trial court is the finder of fact and there is conflicting evidence, the trial court is the ultimate arbiter of the credibility of witnesses." *State v. Ayala*, 2011 WI App 6, ¶10, 331 Wis. 2d 171, 793 N.W.2d 511. Given those factual determinations, we also agree with counsel that any ineffective-assistance-of-counsel challenge

⁴ Trial counsel testified he did not make an opening statement because when he is concerned about what may come up during trial, he omits an opening statement so that he is not locked into a version of events. Counsel explained the jury was paying attention and did not need further clarification about a text message. Counsel did not consider retaining his own DNA analyst because he knew the State's DNA analyst was going to testify favorably for the defense—specifically, that the State's testing did not reveal the presence of Lee's DNA (only the victim's DNA was found on the items tested).

⁵ Lee's father testified Lee had forgotten his cell phone in his father's car earlier that day and Lee's father dropped the cell phone off with Lee's girlfriend in Racine approximately five hours before the Knights Inn robbery/stabbing occurred. Lee's father's testimony would have bolstered Lee's testimony from trial that he did not have his cell phone at the time the robbery/stabbing occurred. Trial counsel testified he did not call Lee's father because Lee had advised counsel that he and his father coordinated the story while they were in prison together, counsel did not want the jury to have a perception that the defense was trying to "pull one over on them[,]"; counsel made the strategic decision not to call Lee's father, and Lee did not press the issue.

⁶ Escamilla testified she was staying at the Knights Inn, saw the intruder, and it was not Lee. Escamilla, who did not know Lee, testified she wrote to him in December 2015 or January 2016 while he was at the Racine County Jail to advise him that she knew he was not the intruder. Escamilla also attempted to contact Lee's trial counsel to report he was not the intruder, but counsel never returned her messages. Trial counsel testified that he was unaware of Escamilla, that, at the time she allegedly contacted Lee, Lee was not at the Racine County Jail (he was in prison), and that, at the time she allegedly contacted trial counsel, counsel had not yet been appointed (counsel was appointed ten months later).

on these bases would lack arguable merit. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring a defendant to demonstrate both deficient performance and prejudice to prove ineffective assistance).

As noted previously, Lee filed responses to the no-merit report. He first generally argues he received ineffective assistance of counsel. He renews his argument that counsel was ineffective for all the reasons alleged in his postconviction motion. However, we have already determined there is no arguable merit for alleging ineffective assistance of counsel on these bases.

Lee then argues counsel was ineffective for failing to call a witness who was friends with and also incarcerated with Lee and who would have testified that the inmate who testified for the State that Lee disclosed his involvement in the Knights Inn incident was lying. However, the State's inmate testimony was merely cumulative to other evidence, and not calling Lee's friend to rebut the inmate's testimony did not prejudice Lee. *See Strickland*, 466 U.S. at 687.

Lee also argues counsel was ineffective for failing to call Lee as a surrebuttal witness to "explain[] the phone calls ... from Lee's phone and who actually made the calls." To provide context, Lee testified at trial that he forgot his cell phone in a car earlier that day, and his father dropped his cell phone off at his girlfriend's residence in Racine while Lee was in Kenosha. Lee used a different cell phone that afternoon and evening. Lee said that while he was walking in Kenosha, a man stabbed him during a robbery. He called his girlfriend on the other cell phone to tell her that he was stabbed, and she came down to Kenosha with his cell phone. When she arrived, he used his cell phone to call 911 to report he was stabbed.

However, if Lee was not in possession of his cell phone because it was in Racine and he was in Kenosha as he testified, any testimony about who made the calls from his phone would have been speculative. As to the calls that occurred after Lee called 911 to report he was stabbed, the officer testified in the State's case-in-chief that the cell-phone records showed there were calls between Lee's cell phone and another guest of the Knights Inn and her boyfriend. Lee admitted on cross-examination that these individuals were a close friend and that friend's girlfriend. There is no arguable merit to a claim that counsel was ineffective on this basis. *See Strickland*, 466 U.S. at 687.

Lee contends there is arguable merit to a claim that the court lacked subject matter jurisdiction because Lee was wrongly taken into custody on a probation hold.⁷ There is no legal authority for Lee's position that an allegedly invalid probation hold deprives a circuit court of criminal subject matter jurisdiction. *See State v. Webster*, 196 Wis. 2d 308, 317, 538 N.W.2d 810 (Ct. App. 1995) ("The circuit court 'lacks criminal subject[] matter jurisdiction only where the complaint does not charge an offense known to law.'" (citation omitted)). Any challenge to the circuit court's jurisdiction lacks arguable merit.

Lee argues the State committed a *Brady* violation because his alibi witness "Escamilla stated she provided a statement to the police immediately following the robbery, yet no such statement was provided to the defense." Lee's argument assumes that Escamilla did in fact provide a statement to the police; however, at the postconviction hearing, the State advised the

⁷ At trial, Lee testified he was taken into custody on probation hold because he had been drinking and missed an appointment with his agent. However, he states in his response to the no-merit report that he was put on a probation hold because officers wanted to talk to him about the Knights Inn incident.

court that Escamilla was not in any of the police reports. *See State v. Harris*, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737 (the defendant bears the burden of establishing a *Brady* violation and must prove in part that evidence was withheld). More importantly, the circuit court found Escamilla was not credible. *See Ayala*, 331 Wis. 2d 171, ¶10. There is no arguable merit to a claim that the State withheld material evidence.

Lee next argues there is arguable merit to a claim involving a text message that was introduced over defense counsel's objection at trial. During trial, an officer testified he got a search warrant for Lee's cell-phone records. Many text messages appeared to have been deleted, but an undeleted text message in those records caused him concern. When asked what the message said, defense counsel objected on hearsay grounds, and the court overruled the objection. The officer then testified:

The text message read -- I would have to look at it to get it verbatim, but it talked about, I believe it said -- it referenced DNA being on the knife.

....

And whether -- and that he was okay as long as his DNA wasn't found on the knife.

The court then interjected,

And let me be very clear with respect to my ruling, because it is hearsay in that we don't have the witness here. But I am allowing it not for the truth of the matter asserted, but for the fact that it was received as an incoming text on his phone.

....

Therefore, we're not receiving it as something to be believed because we'd have to have a witness to testify to that, members of the jury. But by virtue of the fact it was indeed received on what I understand to be the defendant's cellphone, that was the ... testimony, I am permitting that evidence to come in.

Lee next argues there is arguable merit to a claim the circuit court erroneously exercised its discretion by admitting the text message into evidence. However, the text message was not admitted for truth of the matter asserted, and the State did not rely on the content of the text message to prove Lee's involvement in the Knights Inn. Moreover, the evidence of the text message was very limited in the context of the entire trial—the State did not even mention it in closing arguments. There is no arguable merit to claim the court erroneously exercised its discretion by admitting the text message. *See State v. Ringer*, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448.

Our independent review of the Record—including jury selection, jury instructions, Lee's waiver of his right to testify, and closing arguments—does not disclose any potentially meritorious issue for appeal.⁸ Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Dennis Schertz of further representation in this matter.

Upon the foregoing reasons,

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

⁸ To the extent Lee's responses make assertions not specifically addressed in this opinion, we have considered those assertions and conclude they would not support any issues of arguable merit.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of Sammy Lee, III 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