



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

July 5, 2023

To:

Hon. Dennis R. Cimpl
Circuit Court Judge
Electronic Notice

Winn S. Collins
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Andrew R. Walter
Electronic Notice

William Malcolm Smith Jr. 426839
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2018AP2119-CRNM State of Wisconsin v. William Malcolm Smith, Jr.
(L.C. # 2016CF4482)

Before Brash, C.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).

William Malcolm Smith appeals a judgment of conviction, following a jury trial, of one count of armed robbery and one count of being a felon in possession of a firearm. His appellate counsel, Andrew Walter, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),¹ and *Anders v. California*, 386 U.S. 738 (1967). Smith received a copy of the report, was advised of his right to respond, and has responded. Appellate counsel filed a supplemental no-merit report. We have independently reviewed the record, the no-merit report, the response,

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

and the supplemental no-merit report as mandated by *Anders*. We conclude that there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm.

On October 4, 2016, the State charged Smith with one count of armed robbery and one count of being a felon in possession of a firearm. According to the complaint, on the afternoon of September 30, 2016, Smith robbed a Subway restaurant in Wauwatosa at gunpoint. A customer saw a masked man enter the store and called 911, prompting an immediate police dispatch. Wauwatosa police saw a suspect matching the 911 caller's description and ordered him to stop, but the suspect fled. About thirty minutes later, police found Smith hiding in the rafters of a garage. Police found an orange backpack containing black pants and a black hooded sweatshirt, a fishing vest containing \$317 cash, purple latex gloves, and a black do-rag in the rafters. Along Smith's flight path, officers found a loaded .38 revolver and the same distinctively marked black jacket that Smith had been wearing when police ordered him to stop.

The matter proceeded to trial where multiple witnesses, including the victim and law enforcement, testified. The State also introduced surveillance video from the restaurant. The video shows a subject enter the restaurant wearing black pants, a black coat, gloves, and a black hooded sweatshirt. The coat has a large emblem on the front left chest area. The subject is wearing some type of dark gloves. There are two customers in the store, who both exit upon seeing the gunman. The subject points a handgun at the Subway employee, the employee gives the subject money from the register, and the subject exits the store. Law enforcement testified that they found a gun and a black jacket with a distinctive emblem along Smith's flight path, and that when they found Smith in the garage rafters, they located Smith's driver's license, black pants, a black do-rag, cash, and a black hooded sweatshirt.

The jury found Smith guilty as charged. The circuit court sentenced Smith to eight years of initial confinement and five years of extended supervision for the armed robbery, and three years of initial confinement and three years of extended supervision on the felon in possession charge, to run concurrent. This appeal follows.

Appellate counsel's no-merit report addresses: (1) the sufficiency of the evidence; (2) whether Smith could pursue a *Batson*² claim regarding the State's use of a peremptory strike of an African-American juror; (3) the circuit court's sentencing discretion; and (4) whether Smith could challenge any other procedural or evidentiary issues.

With regard to the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. See *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighting the evidence. See *id.* at 506. Although the evidence presented at Smith's trial was circumstantial, the standard of review is the same whether the conviction relies on direct or circumstantial evidence. See *id.* at 503. "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." *State v. Alles*, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). Here, the State introduced surveillance video showing the gunman wearing the same distinctive jacket officers found on Smith's flight path. The

² See *Batson v. Kentucky*, 476 U.S. 79 (1986).

officers also testified that when they confronted Smith, he was wearing the same jacket as he was before he fled. Police also found a gun along Smith's flight path, and when they ultimately found Smith hiding in a garage, they found cash, gloves, and clothing matching what was seen on the surveillance video. Appellate counsel properly analyzes this issue in the no-merit report, and we agree with his conclusion that there is no arguable merit to challenging the sufficiency of the evidence supporting the verdicts.

Appellate counsel's no-merit report next addresses whether Smith could pursue a *Batson* claim regarding the State's use of a peremptory strike of an African-American juror. The juror stated that he had been subject to racial profiling by members of the Wauwatosa Police Department, but stated he could be fair and impartial in this case. Smith raised an objection under *Batson*. After a brief hearing, the circuit court allowed the State to strike the juror.

There is no arguable merit to a *Batson* challenge in this case. The State explained that it did not strike three other African-American jurors, struck a higher percentage of white jurors, and decided to strike that particular juror based on his answer to a race-neutral question regarding experiences with the Wauwatosa Police Department. The circuit court accepted the State's explanation. See *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (*Batson* challenge requires showing that the State exercised peremptory challenge on the basis of race; if that showing is made, the prosecutor must then provide a race-neutral explanation for the strike; and, if the prosecutor provides a race-neutral explanation, the circuit court must then "determine whether the defendant has carried his burden of proving purposeful discrimination"); see also *State v. Lamon*, 2003 WI 78, ¶¶41-42, 262 Wis. 2d 747, 664 N.W.2d 607 (because the circuit court "is in the best position to determine the credibility of the state's race-neutral explanations," we give "great deference" to the court's ruling as to whether the prosecutor had racially

discriminatory intent or purpose in exercising a strike). We conclude that a challenge to the circuit court's decision would lack arguable merit.

Appellate counsel also addresses whether the circuit court erroneously exercised its sentencing discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the record confirms that the circuit court thoroughly considered the relevant sentencing objectives and factors. The sentence the circuit court imposed is within the range authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Appellate counsel also discusses whether Smith could pursue any other issues on appeal pertaining to any procedural or evidentiary defects. Upon our independent review of the record, we agree with appellate counsel's analysis.

Smith responded to counsel's no-merit report. His response: (1) challenges the sufficiency of the evidence; (2) alleges multiple instances of ineffective assistance of counsel; (3) alleges a violation of his *Miranda*³ rights; (4) alleges prosecutorial misconduct; and (5) alleges ineffective assistance of appellate counsel for filing a no-merit report, despite Smith's belief that there is merit to an appeal.

³ *See Miranda v. Arizona*, 384 U.S. 436 (1966).

As stated, the evidence was sufficient for the jury to find guilt. As to Smith's ineffective assistance of counsel claim, the record does not support his contention. To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that trial counsel's representation was deficient and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. See *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). In assessing prejudice, we consider the totality of the circumstances before the trier of fact. See *Sanchez*, 201 Wis. 2d at 236.

Smith alleges that his trial counsel was ineffective for failing to introduce a State Crime Lab report, failing to call the 911 caller as a witness, and failing to impeach the testimony of the owner of the garage in which Smith was found hiding. We agree with appellate counsel's assessment in his supplemental no-merit report that Smith's claims lack arguable merit because: (1) the alleged omissions support trial counsel's strategic decisions, and (2) Smith cannot demonstrate prejudice due to the overwhelming amount of circumstantial evidence.

There is also no arguable merit to a claim that Smith's *Miranda* rights were violated because the circuit court suppressed any statements obtained in violation of *Miranda*. Following Smith's arrest, he stated he did not wish to speak to police; however, police continued to

interview Smith. During the custodial interrogation, Smith admitted to taking a bus to Subway and needing money. Trial counsel moved to suppress the statements and the State conceded that the statements were taken in violation of *Miranda*. The statements were not used at trial and Smith suffered no prejudice as a result of these statements. Accordingly, there is no arguable merit to a *Miranda* issue.

Smith also alleges a claim of prosecutorial misconduct for eliciting false testimony from a witness. There is no evidence in the record supporting Smith's contention, we will not address this issue further.

Lastly, Smith contends that his appellate counsel was ineffective for filing a no-merit report despite Smith's belief that there is merit to an appeal. As detailed in this decision, Smith has not identified any arguably meritorious claims. In any event, claims of ineffective assistance of appellate counsel must be brought in the form of a petition for a writ of habeas corpus with this court. See *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992).

To the extent Smith raised issues not addressed in this decision, we conclude that our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Andrew Walter is relieved of further representation of Hardy in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals