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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

November 14, 2023

To:

Hon. Mark A. Sanders
Circuit Court Judge
Electronic Notice

Lauren Jane Breckenfelder
Electronic Notice

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

Andre Olee Stewart 605562
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Jennifer L. Vandermeuse
Electronic Notice

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

2022AP752-CRNM State of Wisconsin v. Andre Olee Stewart (L.C. # 2020CF212)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Andre Olee Stewart appeals a judgment, entered on a jury's verdict, convicting him of robbing a financial institution as a party to the crime, fleeing or eluding an officer, and four counts of felony bail jumping. All of the charges include the habitual criminality penalty enhancer. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20) and *Anders v. California*, 386 U.S. 738 (1967).¹ Stewart received a

¹ The no-merit report was filed by Attorney Jay Pucek. On March 29, 2023, Attorney Lauren Jane Breckenfelder was substituted as counsel for Stewart and now represents Stewart in this appeal.

(continued)

copy of the report, was advised of his right to file a response, and did not do so. We have independently reviewed the record and the no-merit report as mandated by *Anders* and conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The charges against Stewart stem from a bank robbery. The criminal complaint alleged that police officers responded to a report of a bank robbery and interviewed N.M., who was employed as a teller. According to the complaint, N.M. told police that a woman handed him a note that said “words to the effect of: ‘give me all the money or I will start shooting.’” N.M. said he gave the note back to the woman and gave her all of the money that was in his drawer. The money included a tracking device. The woman picked up the money and left through the front doors.

The complaint further alleged that four minutes after the robbery, undercover police officers located a car that matched the tracking device’s location. A marked squad car got behind the car, and the officer activated his emergency lights and sirens. Upon doing so, the car with the tracking device sped up, reaching speeds in excess of seventy miles per hour. Eventually, the car pulled into an alley and came to a stop. An officer witnessed a woman, Marvella Smith, exit the rear of the car holding a handbag, which she threw at a garage. The officer saw money falling out of the bag. Shortly thereafter, Smith was taken into custody. Police recovered the handbag, which had approximately \$2,000 inside. Smith had a demand note in her pocket.

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

According to the complaint, police officers arrested Stewart after he got out of the driver's seat and attempted to walk away. Officers detained a third individual, J.J.D., who was in the front passenger's seat.

Smith admitted to committing the robbery and said that Stewart drove her from the scene. Smith said that she, J.J.D., and Stewart were going to split the money three ways. Stewart admitted to police that he was driving the car but denied knowing about the robbery.

To support the habitual criminality penalty enhancers, the complaint stated that Stewart was convicted of a felony within five years of the underlying events. Additionally, the complaint alleged that Stewart was released on bail in two separate felony cases at the time the charged offenses occurred.

The case proceeded to a jury trial where numerous witnesses testified for the State. Stewart did not testify or present any witnesses. In his closing argument, Stewart conceded that he was guilty of fleeing and two bail jumping charges, but argued that he did not aid or abet the robbery and therefore, was not guilty of the two remaining bail jumping charges. The theory of defense was that "[t]his [robbery] was a solo job by Ms. Smith."

The jury convicted Stewart of all charges. The circuit court ordered him to serve sentences totaling ten years of initial confinement and eight years of extended supervision.

The comprehensive no-merit report addresses a number of potential issues including the following: the sufficiency of the evidence; the circuit court's ruling related to the admission of a

jail call; Stewart’s demands for a speedy trial;² and the circuit court’s exercise of its sentencing discretion. This court is satisfied that the no-merit report properly concludes the issues it raises are meritless.

We will, however, briefly address the circuit court’s designation of an alternate juror. Over Stewart’s objection, the circuit court granted the State’s request to designate a juror who acknowledged nodding off during the trial as the alternate juror.³ After listening to the parties’ positions on the issue, the circuit court explained that it had concerns that the juror may have missed some of the evidence. The court stated:

The concern that I have is that [the juror]—we know that he was asleep for some part of the time because he tells us he nodded off. He says that it wasn’t very long, but I don’t know if one knows how long one nodded off when one is napping. Even when one isn’t immediately asleep, that drowsiness, that catching oneself when one nods off and then waking oneself up is distracting, and so even if he is correct in his assessment that he was [sic] only nodded off for a second or two on each occasion, he would have been distracted and not ... been able to fully follow the evidence for an additional period of time after that.

The court concluded that granting the State’s request to designate the juror as an alternate was appropriate.

A circuit court has discretion to determine how to proceed in the face of juror inattentiveness, and we will uphold the circuit court’s decision if the record shows that the circuit

² The circuit court granted a continuance of Stewart’s speedy trial demand several times due to the COVID-19 pandemic.

³ The circuit court brought the juror to the courtroom and conducted a brief inquiry as to whether he had fallen asleep, to which the juror responded that he “may have nodded off a few times,” but he said he did not think he missed anything.

court examined the facts, complied with the law, and reasoned its way to a conclusion that a reasonable judge could reach. *State v. Hampton*, 201 Wis. 2d 662, 670, 549 N.W.2d 756 (Ct. App. 1996). In light of the record before us and the standard of review, further proceedings to challenge the circuit court’s decision regarding the juror who nodded off during trial would lack arguable merit.

A review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Stewart further in this appeal.

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 Lauren Jane Breckenfelder is relieved of further representation of Andre Olee Stewart 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