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January 23, 2013

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

2011AP2717-CRNM State of Wisconsin v. Juan C. Whiteside (L.C. # 2008CF4687)

Before Higginbotham, Sherman and Blanchard, JJ.

Juan Whiteside appeals a judgment of conviction and sentence for first-degree recklessly endangering safety, attempted armed robbery with use of force, and bail jumping, following a jury trial, and orders denying his postconviction motions. Attorney Paul Bonneson has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2009-

10);[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) whether the evidence was sufficient to support the jury verdicts; (2) whether the circuit court erroneously exercised its sentencing discretion; (3) whether the circuit court erred by denying Whiteside's postconviction motion to correct the judgment of conviction to order Whiteside eligible for the Challenge Incarceration Program (CIP); and (4) whether the circuit court erred by denying Whiteside's postconviction motion to vacate the DNA surcharge. Whiteside was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

In September 2008, the State charged Whiteside with first-degree recklessly endangering safety as party to a crime, while armed; attempted armed robbery by use of force as party to a crime; and felony bail jumping. Following trial, the jury returned guilty verdicts on all counts. Whiteside, by counsel, filed two postconviction motions: one to correct the judgment of conviction and sentence to state that Whiteside is eligible for CIP, and one to vacate the DNA surcharge. The circuit court denied both motions.

First, we agree with counsel that there was sufficient evidence to support the jury's verdicts. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here.

The victim testified to the following: The victim was leaving his apartment when he was approached by three men outside the front door of the building, which was a duplex. He identified Whiteside as one of the three men who approached him, and identified the other two as Robert Lee and Derek Murray. Lee said to the victim, "do you know what time it is," which the victim understood to mean that the men intended to rob him. Lee and Murray had guns, but Whiteside did not.

All three of the men surrounded the victim and brought him up the stairs to the upper unit of the duplex, which was his apartment. There was a problem opening the apartment door, and Lee shot the victim in the arm. Lee, Murray, and Whiteside forced the door open and everyone went into the apartment. Lee asked the victim, "where is everything," and "where's the stuff," while Murray and Whiteside searched the apartment. When Murray and Whiteside were unable to locate anything, Lee shot the victim in the hip. Murray and Whiteside then continued to search the apartment. The victim tried to run out of the back door, and Murray and Whiteside pursued him, and Murray shot him in the chest.

The victim ran down the back stairs, and Whiteside held the victim up against the wall, saying things like "where you going," "where you think you going," and "where the shit at?" The victim and Whiteside wrestled until the victim broke free and both entered the downstairs duplex. The victim ran through the house and did not see Whiteside again. The victim had been involved in selling drugs, and the actions and statements by Lee, Murray, and Whiteside led him to believe they were attempting to find drugs in his apartment.

Whiteside testified in his defense as follows: Lee asked Whiteside to drive around and drink with him, and Whiteside agreed to go with him. Whiteside got into a car with Lee. Lee's girlfriend and Murray were also in the car. Whiteside had never met Murray before. They drove around for about an hour and a half, drinking and talking. Whiteside then told Lee he had to use the bathroom, and Lee told Whiteside he was about to pull over to "check" someone, meaning to "put him in his place." Whiteside asked to be taken home first, but Lee said no.

The car pulled into an alley, and Whiteside, Murray, and Lee exited the car. The three men walked around the corner to where the victim was exiting his apartment building. Lee and the victim argued over whether the victim had said something about Lee to someone else, and when a neighbor opened her door and looked at the group, Murray pointed a gun at her and said "you don't want nothing to do with this." Prior to that, the victim did not know if either Murray or Lee had a gun in their possession.

Murray then said "take this in the house," and the victim complied with entering the house because Murray had a gun. Whiteside did not leave because he did not know whether Murray would try to harm him if he did. While Lee tried to force the door open, Murray fired the gun at the victim. Murray kicked the door open and the whole group entered the apartment. Whiteside felt shocked, and didn't leave at that point for fear that Murray would shoot at him. Murray continued to point the gun at the victim, and said, "give me everything you got." The victim looked around and realized Lee was gone, and started to back slowly out of the apartment until he felt safe enough to turn and run. Whiteside heard gunshots, and ran out of the building and saw a man and woman on the street corner; the man was holding a butcher knife.

Whiteside ran back into the apartment building looking for Lee so that they could leave together, and the victim grabbed Whiteside, using him as a shield against Murray. Whiteside punched the victim to get away from him, and then ran out of the house into an alley. Murray ran behind him with the gun still out. Lee drove by and Whiteside and Murray got in the car with him. Whiteside was then dropped off at his mother's house.

The jury was entitled to weigh the testimony and determine the credibility of the witnesses. The victim's testimony supported the jury verdicts finding Whiteside guilty of first-degree recklessly endangering safety with use of a dangerous weapon as party to a crime and attempted armed robbery as party to a crime. *See* WIS. STAT. §§ 941.30(1) (defendant is guilty of first-degree recklessly endangering safety if he "recklessly endangers another's safety under circumstances which show utter disregard for human life"); 939.63 (providing for increased penalties "[i]f a person commits a crime while possessing, using or threatening to use a dangerous weapon"); 943.32(2) (defendant is guilty of armed robbery if, "with intent to steal, [he] takes property from the person or presence of the owner … by use or threat of use of a dangerous weapon"); 939.32(3) (describing attempt); 939.05 ("Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime …. A person is concerned in the commission of the crime if the person …[i]ntentionally aids and abets the commission of it …."). Additionally, Whiteside stipulated that he had been charged with a felony and released on bond which required that he not commit any new crimes; the jury's guilty verdicts on the first two counts, together with Whiteside's stipulation, was sufficient to support the jury verdict on the bail-jumping charge. *See* WIS. STAT. § 946.49(1) (defendant is guilty of bail-jumping if, "having been released from custody [on bond, he] intentionally fails to comply with the terms of his … bond").

Next, we agree with counsel that a challenge to Whiteside's sentence would lack arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record establishes that the defense was afforded the opportunity to comment on the presentence investigation report (PSI), and Whiteside and his mother were afforded the opportunity to address the court prior to sentencing. The State recommended the court impose a prison sentence more than the PSI author's recommendation of five to seven years of initial confinement and five to seven years of extended supervision, but less than the maximum. The defense recommended three to four years of initial confinement and three to five years of extended supervision.

The court explained that it considered the standard sentencing factors and objectives, including the severity of the offenses, Whiteside's character and rehabilitative needs, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court determined that a sentence of probation would unduly depreciate the seriousness of the offense, but that while prison was necessary, the maximum sentences were not warranted. The court sentenced Whiteside to a total of ten years of initial confinement and five years of extended supervision. The sentences were within the applicable penalty range. *See* WIS. STAT. §§ 941.30(1) (providing that first-degree recklessly endangering safety is a Class F felony); 939.50(3)(f) (providing that Class F felonies are punishable by up to twelve years and six months of imprisonment and $25,000 fine); 973.01(2)(b)6m. (under bifurcated sentence, maximum length of initial confinement for class F felonies is seven years and six months); 943.32(2) (providing that armed robbery is a Class C felony); 939.50(3)(c) (providing that Class

C felonies are punishable by up to forty years of imprisonment and a $100,000 fine); 973.01(2)(b)3. (under bifurcated sentence structure, maximum length of initial confinement for Class C felonies is twenty-five years); 946.49(1)(b) (providing that felony bail-jumping is a Class H felony); 939.50(3)(h) (providing that Class H felonies are punishable by up to six years of imprisonment and $10,000 fine); and 973.01(2)(b)8. (under bifurcated sentence, maximum length of initial confinement for Class H felonies is three years). The sentence was well within the maximum Whiteside faced, and therefore was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Whiteside 491 days of sentence credit, as recommended by counsel. We discern no erroneous exercise of the court's sentencing discretion.

Finally, we agree with counsel that there would be no arguable merit to a challenge to the circuit court's orders denying Whiteside's postconviction motions. The first postconviction motion sought to correct the judgment of conviction to state Whiteside's eligibility for CIP, based on the sentencing transcript's reflecting that the circuit court stated Whiteside was eligible. However, the court reporter then filed a corrected transcript reflecting that the circuit court had actually stated that Whiteside was *ineligible* for the program. Accordingly, we agree that there would be no arguable merit to an appeal on this issue.

The second postconviction motion sought to vacate the DNA surcharge imposed by the court. Whiteside argued that the circuit court erroneously exercised its discretion by ordering the DNA surcharge without sufficient explanation. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. The circuit court denied the motion, citing the sentencing court's language as an adequate explanation: "Next, you are required to provide a DNA sample. It

wouldn't appear that you would have provided one in the past, so I'm going to order that you pay the DNA surcharge since you will be providing the sample in connection with this case." The order denying the postconviction motion explains that the sentencing court's reasoning was sufficient because it relied on the cost of collecting the sample in this case as the reason to impose the surcharge. We agree with counsel that there would be no arguable merit to an appeal from the court's exercise of discretion in imposing the DNA surcharge.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction and orders are affirmed pursuant to WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals