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DISTRICT II

March 20, 2013

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

2012AP1953-CRNM State of Wisconsin v. Michael T. Owens, Jr. (L.C. #2011CF135)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Michael T. Owens, Jr., appeals from a judgment convicting him after a jury trial of burglary, theft of a firearm and possession of a firearm by a felon. Owens' appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Owens received a copy of the report and has exercised his right to file a response. Upon consideration of the report, Owens' response, and our independent review of the

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

record as mandated by ***Anders***, we conclude that this appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgment of conviction and relieve Attorney Jeremy C. Perri of further representing Owens in this matter.

Scott Lallemont's parents discovered that his house was broken into while he was away; three guns and two computers were missing. Police found Owens' fingerprints on the exterior of windows. Owens stipulated to a previous felony conviction. The jury found him guilty of burglary, theft of a firearm and possession of a firearm by a felon. The trial court ordered five years' initial confinement and five years' extended supervision and found him eligible for the challenge incarceration and earned release programs. This no-merit appeal followed.

The no-merit report first considers whether the jury was properly selected and instructed. We are satisfied that no issue of merit could arise in either regard. A criminal defendant is guaranteed the right to a trial by an impartial jury by article I, section 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See* ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). Our independent review of the record reveals no potential issue regarding voir dire or jury selection. In addition, the jury was properly instructed and the transcript indicates that the jury instructions were sent to the jury room for the jury's consideration during deliberations. The jury is presumed to follow the court's instruction. ***State v. Deer***, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985).

The no-merit report next considers whether the evidence was sufficient to support the verdict. Our record review persuades us that no issue of arguable merit could arise from this point. In reviewing the sufficiency of evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact 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). The jury alone resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from basic facts to ultimate facts. ***Id.*** at 506. This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. ***Id.***

Lallemont testified that he locked his house before leaving on vacation and that he does not know Owens. His father testified that, while picking up his son's mail, he found screens pulled away from the windows, the house in disarray and the gun cabinet empty. A police evidence technician testified that fingerprints were lifted from exterior windows that were pushed open. A fingerprint examiner testified that she made identifications of prints from five of Owens' fingers, that she was confident in her analysis and that her analysis was peer reviewed. A detective testified that Owens was residing in an apartment located very near Lallemont's house at the time of the burglary, and that when he urged Owens to take responsibility for his actions because the fingerprint match made it "a solid, good case," Owens responded, "[I]t is what it is, man," and told him to "go ahead and charge me with the burglary, but not the firearms. I never touched a gun."

In instructing on the elements of theft, which involves taking and carrying away "moveable property," s*ee* WIS JI—CRIMINAL 1441, the trial court also told the jury:

> If you find the defendant guilty, you must then answer the following question. Was the property taken a firearm?... Before you may answer the question yes, you must be satisfied beyond a reasonable doubt that answer to the question is yes. If you are not so satisfied, you must answer the question no.

After deliberating just over two hours, the jury returned verdicts of guilty. Our independent review satisfies us that the evidence was sufficient to convict Owens.

The no-merit report also addresses the court's exercise of sentencing discretion. The sentence was a demonstrably proper exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. The record reveals that the trial court considered the primary sentencing factors, *see* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984), giving the most weight to the protection of the community because the guns never were located, *see* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977) (the weight to be given various factors is within trial court's wide discretion). Owens faced over twenty-eight years' imprisonment for his three crimes. We cannot conclude that the sentence imposed is "so excessive and unusual and so disproportionate to the offense committed as to 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).

In his response, Owens focuses on a note the jury sent out shortly after it retired to deliberate. The note read: "Can the property be divided i.e.—an accomplis [sic] took the firearms, the defendant took computors [sic]." The court responded, "You must decide the case on the evidence presented and the court's instruction." Owens describes the jury's note as "alleging" that an accomplice took the firearms, demonstrating that the jury was not satisfied beyond a reasonable doubt that he stole the guns. He argues that even if the jury believed he entered the house, since no fingerprints were found on the gun cabinet, "it would be reasonable to believe that he had stolen computers, not a gun." Owens contends that his counsel ineffectively failed to move for judgment notwithstanding the verdict given the jury's "obvious reasonable doubt."

Owens' points do not raise issues with arguable merit. First, as the jury was able to arrive at a unanimous verdict within two hours, the trial court evidently responded to the jury inquiry with sufficient specificity to clarify the problem. *See* ***State v. Anderson***, 2006 WI 77, ¶109, 291 Wis. 2d 673, 717 N.W.2d 74. Second, we presume the jury followed the court's instructions on circumstantial evidence and that it must be convinced beyond a reasonable doubt that the property taken was a firearm. *See* ***Deer***, 125 Wis. 2d at 364. Third, when facts of record support more than one inference, this court must accept and follow the inference drawn by the jury unless the evidence on which that inference is based is incredible as a matter of law. ***Poellinger***, 153 Wis. 2d at 506-07. Fourth, while review of an ineffective-assistance-of-counsel claim is limited without a ***Machner*** hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), we feel certain that a motion for judgment notwithstanding the verdict would not have been successful. Counsel is not ineffective for failing to raise meritless claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. Our review of the record discloses no other potential issues for appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Jeremy C. Perri is relieved from further representing Owens in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals