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April 24, 2013

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

2011AP2480-CRNM State of Wisconsin v. Earnest Johnson, Jr. (L.C. #2010CF2451)

Before Curley, P.J., Fine and Brennan, JJ.

Earnest Johnson, Jr., appeals a judgment convicting him of one count of first-degree recklessly endangering safety. Appointed appellate counsel Scott D. Obernberger filed a no-merit report. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Johnson responded to the no-merit report. Attorney Obernberger then filed a supplemental no-merit report addressing the issues Johnson raised in his response. After

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

reviewing the no-merit report, the response, and the supplemental no-merit report, and after conducting an independent review of the record, we conclude that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment.

The no-merit report and Johnson's response address whether the circuit court properly denied Johnson's motion to suppress the statement he made to the police. "When the State seeks to admit into evidence an accused's custodial statement, both the United States and Wisconsin constitutional protections against compelled self-incrimination require that it make two showings." ***State v. Santiago***, 206 Wis. 2d 3, 18, 556 N.W.2d 687 (1996). "First, the State must prove that the accused was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them." ***Santiago***, 206 Wis. 2d at 18. "Second, the State must prove that the accused's statement was given voluntarily." ***Id.*** at 19. "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407.

The no-merit report accurately details the testimony from the hearing addressing the suppression motion. The detective who interviewed Johnson, Detective Carlos Rutherford, described the interrogation, which was also recorded, testifying that he first read Johnson his rights, that he made no promises to Johnson, that he did not threaten him, and that Johnson did not complain of being hungry, thirsty or in any physical discomfort. Johnson did not contradict Detective Rutherford's account, choosing not to testify. Based on the testimony, the circuit court found that Johnson had been informed of his ***Miranda*** rights, and had waived them. *See*

Miranda v. Arizona, 384 U.S. 436 (1966). The circuit court also found that Johnson made no complaints with respect to physical discomfort during the relatively brief interrogation, that he was able to track the conversation and that he provided rational responses to Detective Rutherford's questions, despite the fact that he had used cocaine earlier in the day. The trial court also found that there was no level of coercion or undue pressure placed on Johnson and that Detective Rutherford was very congenial and low key during the interview. Based on these facts, the circuit court properly concluded that Johnson's statements were voluntarily made under the totality of the circumstances. There would be no arguable merit to a claim that Johnson's confession was involuntary.

The no-merit report addresses whether there is sufficient evidence to support the verdict. When reviewing the sufficiency of the evidence, we look at whether "'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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

Brandon Smith, the victim, testified at trial that Johnson, who was his mother's boyfriend and lived with them, attacked him with a knife during an argument in which Smith accused Johnson of stealing Smith's mother's unemployment check. Smith testified that Johnson chased him around the house stabbing him with a knife, and that he attempted to flee, first out the front door, which Johnson blocked, and then out the back door. Smith further testified that as he was climbing over the back patio fence to get away, Johnson grabbed him by the leg and pulled him back to the patio, resuming his attack. Smith said that the attack was finally halted by people from the neighborhood who climbed over the patio fence to help him.

Detective Rutherford testified at trial that Johnson provided a statement to him after being given ***Miranda*** warnings in which he admitted that he stabbed Smith multiple times with a knife when they were having a fight because Smith was being disrespectful. The bent knife, Smith's bloody clothing and pictures of the scene were introduced into evidence. Johnson also testified at trial, admitting that he stabbed Smith, but claiming that he did it in self-defense because he thought Smith was looking for a gun hidden somewhere in the house in order to shoot him.

When "more than one inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law." ***State v. Alles***, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982) (citation and quotation marks omitted). The evidence presented was sufficient to support the jury's verdict finding Johnson was guilty of first-degree recklessly endangering safety. Therefore, we conclude that there is no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report next addresses whether Johnson received ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. The no-merit report and the response address whether Johnson's trial attorney provided ineffective assistance because he failed to fully investigate Smith's prior violent actions. In the no-merit report, appellate counsel states that he obtained dispatch records from the Milwaukee Police Department regarding all contacts with Smith and Johnson's address, and there were *no* prior violent incidents involving Smith. The only contact that potentially involved violence by Smith was a 911 call made two

months *after* Johnson attacked Smith, during which a person who identified herself as Smith's girlfriend said that Smith had beaten her and had shot a gun at her while she was on the phone. However, the 911 operator specifically indicated that no gunshot was heard on the line and that the caller then asked dispatch to "disregard" the call and hung up the phone.

Beyond the fact that appellate counsel could not find evidence to substantiate Johnson's claim of prior violent actions by Smith, we agree with the no-merit report's analysis that evidence of prior violent actions would not have altered the outcome of the trial, even if it had been introduced:

> Even if one could point to specific, cognizable, instances of prior violent actions on the part of the victim, it is impossible to demonstrate that it would have altered the outcome. Even under Mr. Johnson's version of what occurred, the victim never actually confronted him with a weapon, no weapon was found (other than the knife used by Mr. Johnson), and Mr. Smith made repeated efforts to leave the house, limiting the effectiveness of Mr. Johnson's claim that he needed to fear for his life. Additionally, Mr. Johnson was the first to get physical during the altercation, grabbing the knife from the kitchen, chasing the victim upstairs, and confronting the victim throughout the house.

Because evidence of prior violent actions by Smith would not have altered the outcome of the trial, we conclude that there would be no arguable merit to this claim.

The no-merit report and Johnson's response next address whether Johnson's trial lawyer performed ineffectively because he should have demanded that the jury be allowed to deliberate on whether Johnson was guilty of the charge of reckless injury. Against the advice of his attorney, Johnson asked the circuit court that the jury be prohibited from considering *any* lesser-included offenses. Johnson wanted the jury to be instructed on only attempted first-degree intentional homicide. Over Johnson's objection, the circuit court instructed the jury on the

lesser-included offenses of first-degree recklessly endangering safety and second-degree recklessly endangering safety. Johnson cannot now argue that his lawyer rendered ineffective assistance by failing to request an instruction on a *different* lesser-included offense when Johnson insisted that no lesser-included offense instructions be given. There is no arguable merit to this claim.

Johnson argues in his response that his trial lawyer, Andrew Sargent, fell asleep at trial. In the supplemental no-merit report, Johnson's appellate attorney states that Sargent disputes this accusation. After reviewing the transcripts, we see nothing that suggests that Attorney Sargent was anything less than engaged and attentive at trial. It seems highly unlikely that the trial judge and prosecutor would not have noticed if Sargent had been sleeping at trial. Johnson also argues in his response that his lawyer never made him aware of the possible penalties he was facing. The record belies this claim. Even assuming that Sargent never directly told Johnson the penalties he faced, Johnson was made aware of the potential penalties orally during the initial appearance and in written form in the complaint, which the record shows Johnson was given. We therefore conclude that there would be no arguable merit to a claim that Johnson received ineffective assistance of counsel on these grounds.

The no-merit report addresses whether the circuit court properly exercised its discretion in sentencing Johnson to ten years of imprisonment, with seven years of initial confinement and three years of extended supervision. In framing its sentence, the circuit court considered the gravity of the offense, Johnson's character, the need to protect the community and other standard sentencing factors. The circuit court reached a reasoned conclusion after applying the facts of this case to the appropriate law in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. In his response, Johnson contends that

there were errors in the pre-sentence investigation report. According to the sentencing transcript, however, Johnson's lawyer stated that he read the pre-sentence investigation report to Johnson and there were no additions and corrections. Johnson was present and made no assertions to the contrary. Therefore, we conclude that there is no arguable merit to a claim that the circuit court misused its sentencing discretion.

Finally, the no-merit report addresses whether there would be arguable merit to a claim that Johnson's sentence should be modified based on a new factor. Johnson's lawyer states that he has discovered no new factors that would warrant a modification of the sentence imposed on Johnson and Johnson had not provided him with any information that suggests a new factor exists. In his response, Johnson requests that his sentence be reduced because the verdict is not supported by the evidence. As we have previously explained, the verdict *is* supported by the evidence. Moreover, lack of sufficient evidence to support a verdict is not grounds for sentence reduction; it is grounds to set aside the conviction. There would be no arguable merit to an argument that Johnson is entitled to sentence modification.

Our independent review of the record reveals no potential claims of arguable merit. Therefore, we conclude that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32. We affirm the judgment of conviction and relieve Attorney Scott D. Obernberger of further representation of Johnson.

Upon the foregoing,

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

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

Diane M. Fremgen
Clerk of Court of Appeals