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DISTRICT I

June 5, 2013

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

2012AP1999-CRNM State of Wisconsin v. Charles Grayson Madison
(L.C. #2010CF5788)

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

Charles Grayson Madison appeals from a judgment of conviction, entered upon a jury's verdict, on one count of armed robbery as party to a crime and one count of second-degree recklessly endangering safety while using a dangerous weapon. Appellate counsel, Mark S. Rosen, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Madison was advised of his right to file a response, but has

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

not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Brendon Smith was on a bus, on the way to cash his social security checks, when his ex-girlfriend Dontania Petrie called. She offered to come pick him up and take him to the bank. Smith got off the bus. Petrie picked him up in a vehicle owned by Angela Thomas, who was the front seat passenger. Smith got in the back seat of the car.

After Smith cashed his checks, Petrie drove to a new location, where Smith thought they would be purchasing marijuana. He observed two men on the street corner where Petrie pulled up, and Smith assumed they were the dealers. One of the men blocked the rear driver's door while the other got in the back seat and held a gun to Smith's chest, demanding that Smith turn over "everything you've got" or he would get shot. When Smith did not immediately comply, the man at the door suggested the other man shoot Smith in the leg. The man in the car then shot Smith in the foot. Smith turned over approximately $800 in cash. Both women fled the car as did the robbers. Smith said that he thought he saw one of the men hand money to Petrie. Smith retrieved Petrie's cell phone from inside the car, got out, and called 911. Smith was transported to the hospital and treated for a through-and-through gunshot wound and a fractured foot.

Petrie later admitted setting Smith up, evidently in retaliation for Smith opening credit card accounts in Petrie's name. Petrie said she had asked her friend "Fly" for his help. Fly said he would call "C-Bow," who Petrie later identified as Madison. Smith also identified Madison from a photo array.

Madison was originally charged with one count of armed robbery as party to a crime. Later, an amended information added a count of second-degree recklessly endangering safety with a dangerous weapon. The matter was tried to a jury, which convicted Madison on both counts. At sentencing, Madison discharged his attorney and proceeded *pro se*. The circuit court sentenced him to seven years' initial confinement and five years' extended supervision for the robbery and a concurrent two years' initial confinement and two years' extended supervision for endangering safety.

Appellate counsel identifies three potential issues, each of which he concludes lacks arguable merit: whether sufficient evidence supports the jury's verdict, whether the circuit court properly allowed Madison to proceed *pro se* at sentencing, and whether the circuit court properly exercised its sentencing discretion. We agree with counsel's assessment that these issues lack arguable merit. Before we address those issues, though, we address a fourth issue that we have independently identified: whether Madison was competent to proceed to trial.

Madison had sent several *pro se* letters to the circuit court, even after the circuit court cautioned him that it would not act on those letters because Madison had counsel. Madison had also filed a petition for a writ of *habeas corpus* with the circuit court, claiming unlawful imprisonment because, he insisted, he was not "C-Bow." The circuit court explained that probable cause had been found following the preliminary examination, and the trial was the method by which Madison could challenge the State's accusations.

At a pretrial conference in June 2011, Madison's attorney moved to withdraw. When Madison once again asserted that there was no basis on which to hold him, the circuit court asked counsel whether Madison "ha[d] any competency issues you are concerned about at all?"

Counsel responded that he had been thinking about it for the last week or so, and did perhaps have some concern about competency, noting that Madison "hasn't been making much sense in what he has been saying." The circuit court stated that it would make a note and let successor counsel decide whether to raise a competency issue. Counsel was allowed to withdraw and a successor was appointed. The case also rotated to a new circuit court judge. Competency was not revisited prior to sentencing.

WISCONSIN STAT. § 971.13(1) prohibits the trial of incompetent defendants. A defendant is competent to be tried if he "possesses sufficient present ability to consult with … [counsel] with a reasonable degree of rational understanding" and "possesses a rational as well as factual understanding of a proceeding against him[.]" ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). Counsel has a duty to raise the issue of competency if he or she has a reason to doubt the defendant's competency. *See* ***State v. Meeks***, 2003 WI 104, ¶44, 263 Wis. 2d 794, 666 N.W.2d 859.

There is no arguable merit to a challenge to Madison's competency. Successor counsel evidently did not believe competency was an issue, as she never raised it. Further, the record would not support any claim of incompetency. As we will discuss below, the circuit court engaged Madison in a colloquy before allowing him to proceed *pro se* at sentencing. Madison testified at the sentencing colloquy that he had no mental health conditions, no mental health issues, and had never been medicated for mental health issues. After the colloquy, the circuit court determined that Madison was competent to proceed *pro se* at sentencing, and the standard for determining whether a defendant can represent himself is *higher* than the standard for competency to stand trial. *See* ***State v. Marquardt***, 2005 WI 157, ¶58, 286 Wis. 2d 204, 705 N.W.2d 878. Indeed, many of Madison's actions that seemed to give the original circuit court

and counsel pause appear on this record to stem not from a lack of competency or sufficient understanding but, rather, from Madison's protestations of innocence. There is no arguable merit to a claim that Madison was incompetent to proceed to trial.

We now turn to the first issue counsel raises: whether sufficient evidence supports the jury's verdict. 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, 506-07, 451 N.W.2d 752 (1990). "'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state 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 omitted). The jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

To prove armed robbery, the State had to show that: (1) Smith was the owner of property; (2) Madison took and carried away property from the person or from the presence of Smith; (3) Madison took the property with the intent to steal, which means that Madison had the mental purpose to take and carry away Smith's property without consent and that Madison intended to permanently deprive Smith of possession of the property; (4) Madison acted forcibly, meaning he threatened the imminent use of force against Smith with the intent to compel Smith to submit to the taking or carrying away of the property; and (5) at the time of the taking or

carrying away, Madison used or threatened to use a dangerous weapon, which includes any firearm. WIS JI—CRIMINAL 1480. Because the armed robbery was charged as party to a crime, the State also had to show that Madison directly committed the armed robbery or intentionally aided and abetted the commission of that crime. WIS JI—CRIMINAL 400.

To prove second-degree recklessly endangering safety, the State had to prove that Madison endangered the safety of another human being by criminally reckless conduct, which is conduct creating a unreasonable and substantial risk of death or great bodily harm to another person, and that Madison was aware that his conduct created such a risk. WIS JI—CRIMINAL 1347. Because of the dangerous-weapon enhancer, the State also had to prove that Madison committed his crime while using a dangerous weapon, which, as noted above, includes any firearm. WIS JI—CRIMINAL 990.

Our independent review of the record satisfies us that sufficient evidence supports the jury's verdicts. Smith testified about cashing his checks and surrendering the cash he received to the robbers. He testified about the use of a gun, about a suggestion made by the man blocking the rear driver's door to shoot Smith when he did not immediately surrender his money, and about the shooting itself. Smith identified Madison in a photo array, and testified in court that he was one hundred percent certain that Madison was the person who shot him. An individual named Khalil Muhammad testified that Madison confessed to robbing someone and shooting him after a female set up the robbery. Petrie testified about the set-up and how "C-Bow" got involved. Detective Richard Wroblewski testified that he got the name "Charles Madison" from Muhammad, that he found three individuals with that name and showed photos of the three to Petrie, and that Petrie identified this Madison from the three. Detective Warren Allen testified about showing Smith a photo array in which Smith identified Madison as his assailant. Officer

Michael Walker testified about responding to the scene and observing Smith's injury. Based on the trial testimony as a whole, there is sufficient evidence from which the jury could conclude Madison was guilty beyond reasonable doubt.

We note that in one of his *pro se* letters to the circuit court, Madison complained that there was no firearm recovered, no DNA evidence, no fingerprint evidence, and no other physical evidence. The absence of these types of evidence, however, does not undermine the verdict or the sufficiency of the evidence that was presented. There is no arguable merit to a challenge to the sufficiency of the evidence.

The next issue counsel raises is whether the circuit court properly allowed Madison to proceed *pro se* for sentencing. A defendant has a constitutional right to self-representation. *See* ***Marquardt***, 286 Wis. 2d 204, ¶56. "When a defendant seeks to proceed pro se, the circuit court undertakes a two-part inquiry, ensuring that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." ***Id.*** Ensuring the waiver is knowing, intelligent, and voluntary requires the circuit court to engage the defendant in a colloquy to ensure that the defendant: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." ***State v. McMorris***, 2007 WI App 231, ¶22, 306 Wis. 2d 79, 742 N.W.2d 322 (citing ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997)).

Before allowing Madison to discharge counsel at sentencing, the circuit court engaged him in a colloquy. In particular, we note that the circuit court expressed its concern that Madison

did not wholly understand the legal complexities that might arise. Madison responded that he "ha[d] no concerns about that" and that he "would just like to … act on my own legal interests." In any event, "technical legal knowledge" is not a prerequisite to self-representation. *See* ***Marquardt***, 286 Wis. 2d 204, ¶60. The circuit court also asked questions designed to satisfy itself of Madison's competency to proceed *pro se*. Based on our review of the record, we are satisfied that the colloquy was sufficient under ***McMorris*** and ***Klessig*** to sustain the circuit court's discretionary decision to permit Madison to discharge his attorney and proceed *pro se* at sentencing. There is no arguable merit to a claim the circuit court should have done otherwise.

The final issue counsel raises is 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. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court determined its sentence was necessary to protect the public. It noted that Madison had a lengthy record and, though the record was not violent, the serious violent nature of the current crime meant violence was a concern going forward. The circuit court noted that Madison's prior periods of incarceration had not seemed to have made an impact on his

behavior, so it concluded that significant incarceration would be necessary here. Indeed, the circuit court noted that Madison had to be transferred to the Wisconsin Secure Prison Facility for a time as a result of his behavior while incarcerated.

The maximum possible sentence Madison could have received was fifty-five years' imprisonment. The concurrent sentences totaling twelve years' imprisonment are well 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 are 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 sentencing court's discretion.

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 Mark S. Rosen is relieved of further representation of Madison in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals