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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 IV

February 26, 2016

To:

Hon. Elliott M. Levine
Circuit Court Judge
La Crosse County Courthouse
333 Vine Street
La Crosse, WI 54601

Pamela Radtke
Clerk of Circuit Court
La Crosse County Courthouse
333 Vine Street, Room 1200
La Crosse, WI 54601

Brian K. Barton
Asst. District Attorney
333 Vine Street, Rm 1100
La Crosse, WI 54601

Anthony J. Jurek
6907 University Ave., Ste. 191
Middleton, WI 53562-2767

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Samuel R. Wing 522814
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2014AP101-CRNM State of Wisconsin v. Samuel R. Wing (L.C. # 2010CF433)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

Samuel Wing appeals a judgment convicting him, following a jury trial, of armed robbery by use of force. Attorney Anthony Jurek has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);¹ *Anders v. California*, 386 U.S. 738, 744 (1967); and *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the evidence and whether the sentence was unduly harsh. Wing was sent a copy of the report, and has filed a response arguing that the sentence was unduly harsh in comparison to that of a co-defendant, and that counsel provided ineffective assistance by failing to file a suppression motion. Counsel then filed a supplemental no-merit report addressing the suppression issue. Upon reviewing the entire record, as well as the no-merit report, response, and supplement, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

We begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places many of the other potential issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal, rather than a retrial.

The general test for sufficiency of the evidence is whether the evidence is “so lacking 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. 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)). More specifically, with respect to the armed robbery charge in this case, the elements the State needed to prove were that: (1) JM was the owner of property—meaning that she had actual or constructive possession of it, including as an employee of a restaurant; (2) Wing took and carried away property from the presence of JM; (3) Wing took the property with the intent to steal—that is, having the mental purpose to permanently deprive the owner of possession of the property; (4) Wing acted forcibly—that is, he used force against JM with the intent of overcoming or preventing physical resistance to his taking or carrying away the

property; and (5) at the time of taking or carrying away the property, Wing used or threatened to use a dangerous weapon—which would include a firearm, whether loaded or not. *See* WIS. STAT. § 943.32(2).

JM testified that she was working as a shift manager at a Burger King when the doorbell for the back door rang. JM opened the door, thinking that it was a co-worker, but instead found herself facing two people with their faces covered, the taller one of whom had a silver gun with a black handle and wore black loafers and the shorter one of whom had a crowbar. The next thing JM recalled was regaining consciousness on the floor, because a gun was fired right next to her head, with numerous injuries to her head and back. She heard the robbers talking, and noted that their voices were masculine, and that the taller man's voice sounded familiar, although she could not place it. The taller man then took her into the office, made her open the safe at gunpoint, placed money from the safe into a yellow bag, directed her to stay on the ground, and then left with the shorter man.

At Wing's trial, Jordan Lass identified himself as the shorter man with the crowbar and Wing as the taller man with the gun who had robbed the Burger King, while Lass' girlfriend, April Betts, waited in Lass' car and Wing's girlfriend, Amber Radde, waited in her own car. Lass explained that Wing had selected the Burger King as a target because he had previously worked there, and knew that typically a single person would be working alone in the morning. Lass stated that he pushed into the restaurant when JM opened the door, and immediately struck her on the head with the crowbar, knocking her down. Lass then hit JM on the head about six more times while she was down, both with the crowbar and his hands, because JM at first refused to open the safe, until Wing finally convinced her to do so by firing the gun about two

inches from her head. Lass said that, after collecting the money, he, Wing, Betts, and Radde all drove away in Radde's car.

The testimony from JM and Lass was sufficient in and of itself to establish each of the elements of armed robbery by use of force. Additionally, as we will discuss below, the testimony was supported by several items of physical evidence, which Wing contends counsel should have moved to suppress.

Assistance of Counsel

Wing argues that counsel provided ineffective assistance by failing to move to suppress: a gun that was matched to the bullet that was fired in the Burger King; a magazine for the gun; an ejected bullet; and \$144, a pair of loafers, Wing's billfold wallet, two white t-shirts, and a black hoodie—all of which were recovered from Radde's car on the day of the robbery. Wing provides two points of challenge: first, that police lacked reasonable suspicion to stop Radde's car for involvement in the robbery, and second, that they lacked authority to search the car.

It is true that the police stopped Radde's car with regard to a separate incident before they were aware that the car might be tied to the armed robbery. The test, however, is whether the police had reason to suspect any criminal activity at the time of the stop. The officer who stopped Radde's car had been dispatched to investigate a "trouble with party" call at a campground. En route to the campground, the officer was further advised that there were several cars exiting the campground carrying occupants who may have been involved in the incident. That was sufficient information to allow the officer to stop Radde's car.

As to searching the car, counsel has provided this court with a copy of a consent-to-search form signed by Radde at the scene of the stop. Radde's written consent provided sufficient authority for the police to search her car.

Sentence

A challenge to Wing's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Wing was afforded an opportunity to comment on the PSI, to present an alternative sentencing report and letters written on his behalf, and to address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court emphasized the emotional impact upon the victim of firing a gun near her head, noting that the fear of death still haunted her. With respect to Wing's character, the court acknowledged that Wing might have a problem with impulse control as the result of using drugs and alcohol at a young age, but concluded that had little to do with the present offense because the robbery had been planned hours in advance, and was not merely an impulse or reaction to circumstances. The court further reasoned that, although Wing's criminal history was minimal, it did involve some violence and Wing did not do well on supervision. The court concluded that the primary sentencing factors in this case were protection of the community and punishment, with rehabilitation and general deterrence being secondary factors.

The court then sentenced Wing to twelve years of initial confinement and six years of extended supervision. It also awarded 695 days of sentence credit; ordered restitution to an insurer in the amount of \$11,707.05, plus the ten percent crime victim surcharge; imposed standard costs and conditions of supervision; directed Wing to provide a DNA sample but did not impose a surcharge for that; and determined that Wing was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The components of the bifurcated sentence were within the applicable penalty ranges and the total confinement period constituted 45% of the maximum exposure Wing faced without even taking into account a repeater allegation. *See* WIS. STAT. §§ 943.32(2) (classifying armed robbery with use of force as a Class C felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony). There is a presumption that a sentence “well within the limits of the maximum sentence” is not unduly harsh, and the sentence imposed here was not “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 State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

Wing complains that it was unfair to impose a longer sentence on him than on Lass, and that the court had essentially prejudged his case when it determined during Lass’ sentencing that Wing had greater culpability for the crime. However, the court went to great lengths to explain why it was imposing a greater sentence on Wing: because Wing’s knowledge of Burger King procedures had been instrumental in planning the crime; because firing a gun right near the victim’s head was tantamount to torture, and could have psychological effects that outlasted the

physical injuries caused by Lass; and most importantly, because Lass eventually accepted responsibility for his involvement and testified against Wing. Contrary to Wing's assertions, the court was not increasing Wing's sentence to punish him for going to trial, but rather reducing Lass' sentence to reward him for his cooperation. There was nothing improper about the court's evaluation of the relative culpability of Wing and Lass.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. See *State v. Allen*, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals