

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2940-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL W. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Michael Jones appeals his conviction for attempted armed robbery as a party to the crime, after a trial by jury. The jury also acquitted Jones of both robbery by threat of force as a party to the crime and of attempted first-degree intentional homicide as a party to the crime. James Creamer and Jones tried to rob Steven Henderson (Steven) and his cousin David Henderson

(David) in an apartment house parking lot near Steven's parked car. During the crime, Jones rifled through Steven's car, and Creamer wounded Steven with a handgun. Steven testified at both Creamer's and Jones's separate preliminary hearings. Before trial, however, someone shot Steven, causing his death. Later, the trial court admitted Steven's preliminary hearing testimony in evidence against Creamer and Jones at their joint trial. The trial court sentenced Jones to a ten-year prison term, consecutive to the sentence he was then serving. Jones's counsel has filed a no merit report under *Anders v. California*, 386 U.S. 738 (1967). Jones received a copy of the report and has filed a response.

Jones's counsel raises several arguments: (1) the prosecution did not prove Jones's guilt beyond a reasonable doubt; (2) the trial court wrongly tried Jones and Creamer in a joint trial; (3) the trial court should have admitted extrinsic evidence of Steven's misconduct for the purpose of impeaching Steven's preliminary hearing testimony; (4) trial counsel furnished Jones ineffective representation; and (5) the ten-year prison sentence was excessive. Jones raises four more arguments: (1) the prosecution and trial counsel overemphasized the Fifth Amendment during jury voir dire, poisoning the jury as a byproduct and laying the groundwork for the jury to punish Jones for his refusal to take the stand at trial on his own behalf; (2) the trial court made comments during its witness voir dire of David that violated Jones's Fifth Amendment rights; (3) David wrongly reviewed police reports and preliminary hearing transcripts before the trial and this procedure denied Jones his right to a fair trial; and (4) the trial court unlawfully tried Jones in prison garb. We conclude that none of the issues raised by counsel's no merit report or Jones's response have arguable merit. We therefore affirm Jones's conviction, and discharge Jones's appellate counsel of his obligation to represent Jones further in this appeal.

Jones's counsel argues that the trial court improperly barred Jones from impeaching Steven's credibility with extrinsic evidence of misconduct. Steven's alleged misconduct included cocaine dealing, false statements to police, liquor bottle theft, and cocaine theft at knife-point. The trial court applied the rule that litigants may impeach witnesses with misconduct only through cross-examination of the witnesses, not through extrinsic evidence. *See* § 906.08(2), STATS. Steven's death, however, made his cross-examination impossible.

The trial court made a discretionary decision, and we see no erroneous exercise of that discretion. *See State v. Larsen*, 165 Wis.2d 316, 319-20, 477 N.W.2d 87, 88 (Ct. App. 1991). The trial court examined the extrinsic evidence for its probative value relative to Steven's overall truthfulness. In the trial court's view, the extrinsic evidence would have had little probative value, confused the jury, and caused undue delay. We agree with the trial court. The incidents could have caused minitrials on side issues, resulting in a one-sided attack on a witness who could no longer defend himself and who had no evident motive to misidentify the assailants. Moreover, we see no prejudice from the trial court's ruling. Jones impeached Steven's credibility in another way that substantially preserved Jones's rights. Steven categorically denied drug use at the preliminary hearing, but an autopsy revealed both marijuana and cocaine use. This implied that Steven was capable of lying under oath and that his identification of Creamer and Jones needed added scrutiny.

Jones's counsel next argues that the evidence did not support Jones's conviction. The prosecution has an obligation to prove Jones guilty beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). The jury, not this appellate court, has the duty to judge the credibility of witnesses and the weight of their testimony. *See id.* at 506, 451

N.W.2d at 757. Here, the prosecution met its burden through the totality of the evidence. First, in both Creamer's and Jones's preliminary hearings, Steven identified Jones as an assailant. Second, the prosecution put in evidence of excited utterances that Steven made to police soon after the crime while suffering from the gunshot wound, which implicated Jones in the crime. Third, Steven identified Jones in an out-of-court photo array. Fourth, no evidence was presented to show Steven had a motive to falsely implicate Jones in the robbery and shooting. Taken in its totality, the prosecution's evidence would have allowed a reasonable jury to find beyond a reasonable doubt that Jones was guilty of attempted armed robbery as a party to the crime.

Jones's counsel next argues that the trial court should not have tried the two assailants in a joint trial. The criminal code permits joinder whenever two assailants have participated in the same act or transaction. *See* § 971.12(2), STATS. The trial court's joinder and severance decisions are discretionary. *See State v. Bettinger*, 100 Wis.2d 691, 696, 303 N.W.2d 585, 588 (1981). Courts look for common plans or schemes, proximity in time, identity of location, overlap in proof, and joint participation by the accuseds. *See State v. King*, 120 Wis.2d 285, 290-91, 354 N.W.2d 742, 744-45 (Ct. App. 1984). Joint trials also often have the effect of conserving public funds, conveniencing witnesses, and avoiding delays. *See State v. Avery*, 215 Wis.2d 45, 51, 571 N.W.2d 907, 910 (Ct. App. 1997). Here, the circumstances fully warranted Jones's and Creamer's joinder in a combined prosecution. The prosecution alleged that Jones and Creamer had jointly engaged in crimes at the same time and place. The evidence pertained to one incident and required the same principal witnesses. Under the circumstances, joinder was proper.

Jones's counsel next argues that trial counsel may have given Jones ineffective representation. We follow a two-pronged analysis for such claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether trial counsel's performance was deficient, and whether the performance prejudiced Jones's rights are the factors we consider. *Id.* Here, appellate counsel has provided no evidence of ineffective representation and we see none in our independent review of the record. Trial counsel put on a well-considered defense that raised serious issues for the trial court and the jury to address. Trial counsel extensively cross-examined the prosecution's witnesses and gave a vigorous closing argument to the jury, that pointed out flaws in the prosecution's case. We are satisfied that trial counsel made the jury aware of all matters favorable to Jones's defense.

As his final issue, Jones's counsel argues that his ten-year sentence was excessive. The trial court's sentencing decision was discretionary, dependent on the gravity of the offense, the protection of the public, the character of the defendant, and the interests of deterrence. *See State v. Sarabia*, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Here, we see no erroneous exercise of discretion. Jones had joined Creamer in a serious crime. Although the trial court did not hold Jones directly responsible for the gunshot wound, it expressed concern over how Jones had helped create the danger that caused the injury. The coassailants' combined conduct had, in the end, endangered both victims' lives. As a result of Jones's prior burglary and bail-jumping convictions, Jones faced a potential thirty-year sentence. The prosecution sought an eighteen- to twenty-year sentence, and Jones received only ten years. We are satisfied that Jones's sentence was proportionate to the seriousness of his crime, the public's need for protection, Jones's character defects, and the need to deter Jones and like-minded wrongdoers from such crimes.

We also reject Jones's *pro se* arguments that evidently rely on his constitutional right to a fair trial. See *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976). First, Jones claims that the prosecution and trial counsel overemphasized the coassailants' Fifth Amendment rights during jury voir dire and that this effectively biased the jury against someone like him who did not testify. We see no evidence of this. The prosecution and defense counsel addressed the Fifth Amendment in a practical, straightforward way, and we see nothing unfair or prejudicial. The trial court also gave standard jury instructions on the defendants' failure to testify that cured any potential prejudice. Second, Jones cites comments the trial court made that he claims breached his Fifth Amendment rights. We see nothing improper. The trial court made its comments during a witness voir dire of David conducted to preserve his Fifth Amendment rights. These comments were appropriate and took place outside the jury's presence. Third, Jones claims that David wrongly reviewed police reports and preliminary hearing transcripts before trial. However, David is not precluded from reading such material. Fourth, Jones claims that the trial court wrongly tried him in prison garb. The record contains no indication that Jones wore prison garb, and the trial court's comments during jury voir dire imply that he wore street clothes.

Last, Jones claims that important transcripts and motions are missing from the record, such as the transcripts of preliminary hearings and motions for discovery. Jones also claims that the record does not contain scientific reports, police reports, witnesses statements, and the criminal complaint. Jones's allegation is inaccurate. The record contains all motions and transcripts, including the transcripts of both Jones's and Creamer's preliminary hearings. As far as the scientific reports, police reports, and witness statements, these do not belong in the record unless the parties introduced them in the trial court proceedings. Our

review is limited to the material the parties furnished the trial court. *See Harvey v. Hartwig*, 264 Wis. 639, 641, 60 N.W.2d 377, 377 (1953); *see also Howard v. Duersten*, 81 Wis.2d 301, 307, 260 N.W.2d 274, 277 (1977). In short, Jones's challenges to the record have no basis, and his request to add documents to the record is denied. Accordingly, we discharge Jones's appellate counsel of his obligation to represent Jones further in this appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.

