COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0766-CRNM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARRELL D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. A jury found Darrell D. Johnson guilty of resisting or obstructing an officer, possession of burglarious tools, possession of a firearm by a convicted felon, burglary of a dwelling, and armed burglary of a dwelling while possessing a dangerous weapon in violation of §§ 946.41(1),

943.12, 941.29(1), 943.10(1)(a), and 943.10(1)(a) and (2)(b), STATS.[1] All counts were subject to enhancement because Johnson was a habitual offender. *See* § 939.62, STATS. The judgment of conviction shows that Johnson received consecutive prison sentences of five, fifteen, and twenty years, respectively, for the possession of a firearm, burglary, and armed burglary counts. An amended judgment of conviction shows that Johnson received imposed and stayed consecutive sentences of thirteen months for obstructing an officer and five years for possession of burglary tools and that probation was ordered of two years and three years, respectively, for these offenses. Imposed costs and surcharges totaled $370. The judgment of conviction also reflects a credit of 247 days for presentence incarceration.

The state public defender appointed William F. Mross to represent Johnson on appeal, and Mross filed a postconviction motion and a supplemental postconviction motion. Before the motions were heard, however, this court granted permission for Mross to withdraw as counsel. The state public defender appointed Attorney Arthur B. Nathan to represent Johnson. Nathan appeared at the hearing on the motions, and the trial court entered an order denying the motions. Nathan has now filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 738 (1967). Johnson received a copy of the no merit report, and he filed a response.

Officer Todd Johnson observed a man walking on New Year's Eve and carrying bags. The officer thought the situation was suspicious, and he asked

[1] The judgment of conviction shows that the armed burglary charge was enhanced under § 939.63, STATS. (use of a dangerous weapon). This sentence enhancement was not pled in the complaint or information and was not used to enhance the sentence. Upon remittitur, the circuit court should issue an amended judgment deleting the reference to § 939.63.

the man for identification. The man started to comply, but he ran when Officer Mark Trossen drove up. Officers Johnson and Trossen gave chase, but they lost sight of the man.

During the chase, the man abandoned the bags, and one bag was recovered by the officers. It contained items, including a firearm, that were taken from burglaries of two homes located about a mile from where the man was stopped. The bag also contained a screwdriver, nylon stockings, latex gloves and a flashlight.

An individual riding with Trossen observed the man after the officers lost sight of him. The individual believed the man entered one of two residences. Later the officers were contacted by a neighbor who had recorded a telephone call picked up by a radio scanner. Based on this additional information, the police located Johnson, and Officers Johnson and Trossen identified him as the man who had fled from them. Johnson claimed that he was already inside the residence at the time the officers were chasing the man.

The no merit report addresses whether Officer Johnson's attempted stop of the man was valid, whether there was sufficient evidence to support the verdicts, and whether the trial court erroneously exercised its discretion when imposing sentence. Nathan concludes that these possible issues have no arguable merit. Based upon our independent review of the record, we conclude that his analysis of the issues is correct.

Both the no merit report and Johnson raise the issue of whether the trial court erroneously admitted into evidence a recording of the telephone call. A voice on the recording said that he had contact with the police while "dirty" and that he ran from them. The analysis in the no merit report, concluding that the

recording was admissible, is correct. If the jury accepted the testimony identifying the voice as Johnson's, which it apparently did, the statement was not hearsay because it was an admission by him. *See* § 908.01(4)(b)1, STATS. If the jury rejected the testimony identifying the voice as Johnson's, the recording supported Johnson's claim that the man who ran was not him.

Johnson also contends that the recording was not admissible because it was not properly authenticated, and he cites to the criteria set out in ***United States v. McMillan***, 508 F.2d 101, 104 (8th Cir. 1974). The ***McMillan*** criteria apply to recordings made by the government or at the government's request and not to those made by private citizens. *See* ***United States v. O'Connell***, 841 F.2d 1408, 1420 (8th Cir. 1988). Here, the neighbor who made the tape testified, and he identified the tape. The defense waived further proof of authenticity when counsel declined the prosecutor's offer to play the tape so the neighbor could confirm that the recording of the conversation was accurate.

The no merit report and Johnson address the issue of whether counsel's failure to obtain an exemplar of his voice constituted ineffective assistance of counsel. Johnson does not explain the purpose of obtaining a voice exemplar, nor does he argue that a scientific test exists to conclusively determine if two recordings were made by the same person. Thus, Johnson has not explained why counsel's failure to obtain a voice exemplar was prejudicial. *See* ***State v. Brooks,*** 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985) (defendant

must show deficient performance and prejudice to establish claim of ineffective assistance of counsel).[2]

The no merit report and Johnson raise the issue of whether the prosecutor's closing argument impermissibly highlighted Johnson's decision not to testify. Johnson objects to the statement that no witness testified that the voice on the tape was not his and to comments regarding his admissions during custodial interrogation of ownership of keys and a jacket and of speaking on the telephone to "Floyd" prior to police entry into the residence.

Johnson relies on the Seventh Circuit's position that a prosecutor may not comment on the uncontradicted nature of the evidence when it is highly likely that only the defendant could contradict the testimony. *See* ***Freeman v. Lane***, 962 F.2d 1252, 1260 (7th Cir. 1992). The Seventh Circuit's interpretation is not binding on state courts, and such comments may be interpreted as merely commenting on the lack of evidence to show innocence. *See* ***id.*** at 1260-61. The comments are not the type targeted by the Seventh Circuit's interpretation. Johnson offered evidence that someone else owned the jacket and that someone other than "Floyd" called the residence before his arrest. Additionally, individuals who knew Johnson could provide testimony about whether the voice on the tape was his. Because the prosecutor did not impermissibly comment on Johnson's decision not to testify, counsel's failure to object was not deficient performance.

[2] Johnson's reliance on ***United States v. Baynes***, 687 F.2d 659 (3rd Cir. 1982), is misplaced because the case is factually distinct. In ***Baynes***, twelve words in a taped telephone conversation provided the only evidence against the defendant, and the government obtained a voice exemplar from the defendant, which it did not use at trial. *See* ***id.*** at 662. The court held that counsel was ineffective because he failed to investigate the exemplar evidence although the defendant steadfastly denied that the voice on the taped telephone conversation was his. *See* ***id.***

Johnson also contends that conviction for armed burglary requires proof that the weapon was used or intended to be used to facilitate the crime. He argues that because the weapon was merely the fruit of the crime, there was no nexus between the weapon and the crime. A similar argument was rejected in ***State v. Norris***, No. 96-2158, slip op. at 4 (Wis. Ct. App. Sept. 23, 1997, ordered published Nov. 20, 1997).

Additionally, Johnson contends that trial counsel was ineffective when she did not request an instruction for receiving stolen property as a lesser included offense of burglary. Burglary requires proof that a defendant, with intent to steal, entered a building without the consent of the owner, knowing that he or she did not have consent. *See* WIS J I—CRIMINAL 1421. There is no requirement that the defendant actually have stolen property. *See* ***id.*** To be convicted of receiving stolen property, the defendant must have intentionally received stolen property knowing that it was stolen. *See* WIS J I—CRIMINAL 1481. It does not require unauthorized entry into a building. Thus, each crime requires an element that is not required by the other. *See* ***State v. Carrington,*** 134 Wis.2d 260, 265, 397 N.W.2d 484, 486 (1986) (lesser included offense requires all elements of lesser offense to also be elements of greater crime and no additional element or fact is necessary to prove lesser offense).

Our independent review of the record did not disclose any additional potential issues for appeal that could be raised on Johnson's behalf. Therefore, any further proceedings by Johnson would be frivolous and without arguable merit within the meaning of ***Anders*** and RULE 809.32(1), STATS. Accordingly, the judgment of conviction is affirmed, and Nathan is relieved of any further representation of Johnson on this appeal.

By the Court.—Judgment affirmed.