COURT OF APPEALS
DECISION
DATED AND RELEASED

August 14, 1997

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.

NOTICE

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No. 97-1059-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN SUCHON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Kevin Suchon appeals from a judgment of conviction following a jury trial, in which the jury found him guilty of armed robbery, as a party to the crime, contrary to §§ 939.05 and 943.32(2), STATS., as well as aggravated battery, also as a party to the crime, while armed with a dangerous weapon, contrary to §§ 939.05, 940.19(5), 939.63(1)(a)2 and 939.63(2), STATS. The

charges carried the criminal gang enhancer under § 939.625(1)(a), STATS. Barbara A. Cadwell was appointed by the state public defender to represent Suchon on appeal. Attorney Cadwell filed a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32, STATS., and reported that a copy has been sent to Suchon. In compliance with ***Anders***, both Attorney Cadwell and this court informed Suchon that he could respond to the report, but he has not done so. After an independent review of the record as mandated by ***Anders***, we conclude that any further proceedings in this matter would be wholly frivolous and without arguable merit.

Suchon was found to have participated with others in a gang-related beating and robbery of a pizza delivery man, who was left at the scene, severely injured, on a cold winter night. At trial, several other co-defendants[1] testified that Suchon participated, and several citizen and police witnesses offered corroborating evidence. After trial, the circuit court sentenced Suchon to up to fifteen years[2] in the Wisconsin State Prison System. Among factors considered by the court in determining the sentencing period was the fact that Suchon displayed violent tendencies in a series of school-room encounters with fellow high school students. The court also recognized that Suchon was less culpable than other co-defendants, who received longer sentences.

The no merit report addresses the question of whether the circuit court erred in permitting amendment of the information to include an enhancement charge

[1] Suchon's case was severed, and he was tried individually.

[2] The court imposed an indeterminate sentence not to exceed ten years on the armed robbery count and an indeterminate sentence not to exceed five years on the aggravated battery count. The terms are to be served consecutively.

of concealed identity; whether the circuit court erred in ruling evidence admissible; whether trial counsel was ineffective; and whether the evidence was sufficient to support the verdict. We examine each issue below, and agree with counsel that there is no merit to any argument based on these issues.

There would be no merit to an argument that the circuit court erred in permitting amendment. Over Suchon's timeliness objection, the circuit court permitted the State to file an amended information charging Suchon with committing the crimes while concealing his identity. However, although the charge was permitted, the jury found that Suchon's identity had not been concealed. Therefore, any possible error was harmless, and we do not consider it further.

There would be no merit to an argument that the circuit court erred in its evidentiary rulings. Having carefully considered the record, we agree with counsel that the most significant evidentiary ruling was to permit evidence from a co-defendant's sister's probation officer, concerning what the co-defendant told his sister, and what the sister told the probation officer. On the record, the circuit court worked through every layer of this multiple hearsay, and found that each layer was admissible.[3] We find no error with this or any other evidentiary ruling.

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[3] The court's full ruling is as follows:

> Well, whenever you have multiple hearsay problems, you have to go through each layer of it and find either an exception or a non-hearsay in order to admit it, so it becomes quite a task.
>
> The original discussion is a Jones/Brown discussion, Robert Brown and Mr. Jones. The statement that they're talking about, there was a statement in furtherance of the conspiracy between those two. They clearly were co-conspirators in the robbery. So you have that.

(continued)

There would be no merit to a claim of ineffective assistance of counsel. Counsel argued vigorously on Suchon's behalf, and succeeded in convincing the jury that Suchon had not concealed his identity, thus reducing one of the charges. The transcript reveals that counsel thoroughly prepared the case, researching both the facts and the law.

> That's not a statement after the fact. So the first statement between Jones and Brown, admissible.
>
> Next statement, Robert Brown to his sister. I don't think that that's a statement in furtherance of a conspiracy. That's a statement made later. That's a statement made not to do anything abut the conspiracy, but rather telling somebody about what happened and how it happened. Does that implicate Robert Brown? Yes. It's therefore a statement. You don't have to get to the conspiracy aspect of it. It's a statement against his own penal interests, so that portion of it is admissible.
>
> All right. Now, now, we get to the next part of it. The person who's relating, the declarant of this statement now, is Robin Brown. That's the statement that this witness is talking about. The declarant is Robin Brown.
>
> Is there another exception there? This witness is relating a statement made by Robin Brown, who's already testified and denied certain things. It's not in furtherance of a conspiracy. I then thought, is it – does it have other indices of reliability, and my first reaction was yes, because she's telling her probation agent, but then she admitted on the stand that she lied to her probation agent, so perhaps there's no indices of reliability.
>
> Is it a statement against her interests? Well, to the extent that being on probation is – one could be violated when one is on violation, that is suffer a violation of probation for violating rules. This agent was questioning Ms. Brown about her trip to Stevens Point, and then according to this statement, Ms. Brown tells the agent that she later – that she was with him, she was with her brother when she went – when they went to Stevens Point, and now she knows that one of the procedures that they were involved in was the robbery of a pizza man, even though there's no evidence that she knew it at the time.
>
> That probably is a statement against her own interests.
>
> So in rethinking this, as you have to do that, I think it is admissible hearsay after rethinking this process, so I am going to allow it in.

We also conclude that the evidence was sufficient to support the conviction. As stated previously, others directly involved in the commission of the crime testified that Suchon participated in the commission of the crime. Their evidence was corroborated by, among others, a witness who saw Suchon's truck near the scene, the witness who found the injured victim, a police officer who examined and measured the scene, and a witness who overheard Suchon boasting of the crime.

Our independent review of the record reveals no other potential issues for appeal. Therefore, we conclude that any further appellate proceedings would be without arguable merit, and would be wholly frivolous, within the meaning of ***Anders***, as well as RULE 809.32, STATS. Accordingly, Suchon's conviction is affirmed, and we grant Attorney Cadwell's motion to withdraw from further representation before this court.

By the Court.—Judgment affirmed.