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DISTRICT III

March 15, 2018

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

2016AP2130-CRNM State v. Napoleon J. Pickett (L. C. No. 2014CF812)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Counsel for Napoleon Pickett has filed a no-merit report concluding there is no arguable basis to challenge Pickett's conviction, entered upon a jury verdict, for substantial battery, domestic abuse, as a repeater; intimidation of a victim, domestic abuse, as a repeater; and disorderly conduct, domestic abuse, as a repeater. Pickett has responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

According to the criminal complaint, police met with the mother of four of Pickett's children, who reported that Pickett had battered her at her residence two and one-half weeks earlier. The victim indicated she had not reported the incident to police at the time it was committed because she was scared. She told police that Pickett became upset upon seeing another male's clothing in the home. An argument ensued when the victim told Pickett their relationship was over and she was seeing someone else. The victim decided to leave the residence and walked to the gas station to purchase cigarettes, but while en route she noticed Pickett coming up from behind her. She told police Pickett punched her in the face, rendering her unconscious for an undetermined period. When the victim came to, she tried to scream for help, but Pickett said, "Bitch you are not leaving me." Pickett then stated that if she contacted the police "her family would be in trouble." The victim went to the emergency room and was informed she had suffered a fractured jaw and two broken teeth. She told medical personnel that she had been in a fight with a female and that she was scared to report what had taken place.

At the initial appearance, the victim told the court she had been "jumped" by "two black dudes." At the scheduled trial date, the State moved for an adjournment because a necessary witness - namely, an officer who took the victim's statement - was hospitalized the night before when his heart apparently needed to be "defibrillated in order to get his heart back into rhythm." Defense counsel did not object to the adjournment, as long as the trial could be rescheduled within the remaining speedy trial limits. The trial judge informed the parties she did not have availability on her calendar within the time limits, but that she spoke with another judge who agreed to preside over the trial, and it was scheduled for the following week. Several pretrial issues were finalized, however, including an other acts motion involving Pickett's domestic

violence convictions in three prior Outagamie County cases. The defense also stipulated to Pickett's prior convictions regarding the enhancer allegations.

At a subsequent final pretrial conference, the circuit court questioned whether Pickett wished to proceed under the time limits imposed under his speedy trial demand, or have the case remain with the previous judge. Pickett insisted on his speedy trial demand time limits. On the first day of trial, more discussions ensued about going forward with the trial, or withdrawing the speedy trial demand and having the case returned to the prior judge. Pickett again confirmed, "I want my trial today." The State also indicated that it had subpoenaed information from Pickett's probation officer in Chicago, and it had received a written response from the Cook County adult probation department, regarding Pickett's alibi claim that he was in Chicago on the date of the incident in this case. The State's information verified Pickett had appeared in Chicago one time the day prior to the incident.

Testimony at trial established the medical injuries, including the victim's fractured jaw. A witness from the county's department of health and human services testified she had met the victim and observed "bruising to her jaw line under her chin ... as well as a lip busted open." She also testified the victim told her the injuries were caused by being "jumped" by a woman. On redirect examination, the witness further testified the victim later admitted lying and that Pickett had "jumped her and punched her in the face."

The victim testified at trial that when she met with police, she told them "Napoleon broke my jaw." Although she had essentially recanted that statement, she admitted she gave the statement to police, which led to the charges against Pickett.

The victim also testified regarding prior domestic abuse incidents with Pickett. Regarding a 2006 incident while she was six months pregnant, the victim testified Pickett was “slapping me” and “grabbed me by the throat and pushed me in our bedroom in the trailer.” Pickett also struck her in the face two times. In a 2010 incident, the victim testified Pickett hit her “on the basement stairs, punched me in my head while my son is screaming ‘don’t hit my mommy, don’t hit my mommy.’” Pickett then said to her, “[I]f I go to jail tonight, I will green light everybody.” The victim understood this statement to mean “to kill my whole family, my niece and nephews and my sisters.” She testified that she did not report the incident to police because she was “afraid of retaliation from Napoleon or his family.” Regarding a 2011 incident, the victim stated Pickett came into her room following an argument, “put his hands around my throat ... I remember him choking me ... I remember closing my eyes because I couldn’t ... breathe. I thought I was dying, so I closed my eyes and thought it was over.” She also told police Pickett pushed her face into a wall. She further testified, “I did get punched in my face and I was bleeding.” Pickett told her that she “gave my life to him the day that I gave birth to his kids.” Pickett also stated “it won’t be good if I go to the law.” After that incident, she told police that she would not fill out a written statement and would not testify against Pickett.

Pickett testified in his own defense. The jury found him guilty, and the circuit court imposed sentences consisting of one year and eight months’ initial confinement and two years’ extended supervision on the substantial battery charge; three years’ probation on the intimidation of a victim charge, to be served consecutively; and ninety days’ jail on the disorderly conduct charge, concurrent to the other sentences.

The no-merit report addresses whether: (1) sufficient evidence supported the jury verdicts; (2) defense counsel was ineffective because the first trial date was adjourned when the

necessary witness was hospitalized the prior night for heart trouble; (3) defense counsel was ineffective for not investigating alibi witnesses; (4) the sentence was harsh or excessive; (5) the other acts evidence concerning the prior domestic violence incidents with the victim was properly admitted; (6) the conditions of extended supervision and probation were appropriate; and (7) a clerical error existed concerning the one year and eight months' initial incarceration portion of the sentence. Our independent review of the record confirms counsel's analysis that none of those issues present a meritorious basis for relief.

Pickett raises numerous issues in his response to the no-merit report. Pickett contends his defense counsel was ineffective because "I requested that my cellphone be retrieved ... whereas it could prove flat out from cellphone towers of my location not being in Wisconsin at the alleged time in questioned [sic]" However, as mentioned above, we agree with the analysis in the no-merit report concerning defense counsel's investigation of alleged alibi witnesses. Complaints of uncalled witnesses are disfavored because such allegations are speculative. *See State v. Street*, 202 Wis. 2d 533, 549, 551 N.W.2d 830 (Ct. App. 1996). Similarly, the mere possibility that unidentified cell phone records "could prove" Pickett's alibi defense is speculative.

Pickett also claims that he "asked for the jury to be interviewed about the reasoning in their ruling," and that he "requested for video footage of all proceedings another no." Pickett fails to provide a legal basis to poll the jury about the rationale for their verdict, or show that such polling or video footage would raise a reasonable probability that the results of the proceeding would have been different.

Pickett argues he asked for “proof of medical records at the time from the arresting officer proving his heart attack” However, a heart attack was never alleged by the State as justification for the trial adjournment, and Pickett has failed to indicate how a week adjournment prejudiced him in any event. Pickett also insists, “I asked for the same judge who granted a major motion to oversee the trial and was denied that right if I wanted a speedy trial which is not the way the courts are intended to work.” However, Pickett chose to proceed to trial within the speedy trial limits knowing the original circuit court judge would not preside. Pickett cannot now complain about that decision. *See, e.g., State v. Oswald*, 2000 WI App 3, ¶50, 232 Wis. 2d 103, 606 N.W.2d 238.

Pickett also alleges ineffective assistance of counsel for failing to demand “appropriate jury instructions including ‘eyewitness credibility.’” He also challenges the alleged “[f]ailure to inform the jury the witnesses were ‘hostile’ as per WIS. STAT. § 972.06 [sic] and have the appropriate J.I. read in.” Pickett also claims counsel failed to “meaningfully challenge” inconsistent testimony. However, our independent review of the record shows the jury instructions given by the circuit court adequately and properly covered the law in the present case. *See Fischer v. Ganju*, 168 Wis. 2d 834, 849-50, 485 N.W.2d 10 (1992). Moreover, the record fails to show deficient performance by defense counsel concerning counsel’s examination of witnesses.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that attorney William J. Donarski is relieved of further representing Pickett in this matter. WIS. STAT. RULE 809.32(3) (2015-16).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals