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September 22, 2020

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

2020AP354-CRNM State of Wisconsin v. Gary Dewayne Owens
(L.C. # 2017CF5839)

Before Brash, P.J., Dugan and White, 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).

Gary Dewayne Owens appeals from a judgment of conviction for resisting an officer, causing a soft tissue injury, and from an order denying his postconviction motion for a new jury

trial.[1] His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[2] and ***Anders v. California***, 386 U.S. 738 (1967). Owens received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, as mandated by ***Anders***, the judgment and order are summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Police officers responded to a house where Owens' estranged wife, B.S.S., reported that Owens had caused a disturbance and punched her in the face after arriving unannounced to see their child. B.S.S. reported that Owens left, but threated to return and shoot up the house. While the officers were talking to B.S.S., Owens called her and the phone call was placed on speaker. The officers heard Owens threaten the use of a gun. The officers went looking for Owens at his known residence. Owens' sister answered the door and acknowledged that Owens was home. As Owens exited the home and approached the officers, he did not obey their command that he get on the ground. Officers attempted to handcuff Owens, and he pulled away. After a scuffle, Owens ended up on top of one officer and punched the officer on the back of the head six times. Owens was charged with resisting an officer, causing a soft tissue injury, and for Owens' conduct at B.S.S.'s house, he was charged with misdemeanor battery and disorderly conduct as domestic abuse.

[1] Judge Jeffrey A. Kremers presided over a jury trial. Judge Jean M. Kies ruled on the postconviction motion.

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

A jury trial was held. The domestic abuse related charges were dismissed at the start of the trial because B.S.S. was not available to testify. The prosecution sought permission to ask the officers about the B.S.S.'s statement in order to demonstrate the officers' frame of mind as they made contact with Owens, specifically that Owens had made a threat involving a gun. Owens asked that the officers not be allowed to go into detail about the dismissed battery charge. The trial court indicated that the prosecutor should not go into other details of the dismissed allegations. The prosecutor represented that, "I'll advise them … that the officers will not be asked and should not give any answers about any battery" to B.S.S. The trial court indicated it was all right to talk about it "being a domestic violence call or something like that, a general description." Then the prosecutor secured the trial court's permission to introduce the CAD[3] report, which contained an allegation of battery as the nature of the call the police were responding to. The trial court admonished, "Don't go into details, just the nature of the call. That's fine."

The two officers who had attempted to arrest and handcuff Owens testified. They both indicated that they were contacting Owens after responding to a call for a battery and domestic violence incident. One officer indicated that B.S.S. told him that Owens had "battered her, came to the residence uninvited, pulled her out of the residence and that she had sustained several injuries."[4] The officers testified that they overheard Owens on the phone threaten to shoot up

[3] CAD stands for communicated aided dispatch.

[4] Owens' objection to this testimony was overruled. At the conclusion of the evidence, defense counsel raised the objection again. The trial court ruled:

> It was very marginally over the scope. It wasn't—it pales in comparison to what your client decided to give, by way of details of what happened. And, you know, I don't—I think the jury already knew they were there for a domestic violence call. I think all he said was a battery. He didn't go beyond that. So I don't think that really violated the scope of the [c]ourt's order.

B.S.S.'s home. The officer who had first contact with Owens indicated that Owens came out of the residence with his hands in the pockets of his hoodie and that Owens did not comply with a command that he get to his knees and face away from the officer. Both officers described how Owens struggled as they attempted to handcuff him. The body camera videos of both officers were played for the jury.

Owens testified that he had gone to his B.S.S.'s home in response to a text message he received from her about a problem with their child and that, when he arrived, she questioned why he was there, became angry, and punched him twice in the face. He also testified that when he exited his residence to meet with the officers, he exited with his hands up. The jury returned a guilty verdict.

Owens was sentenced to serve 300 days in the House of Corrections. He filed a postconviction motion for a new trial.[5] He sought a new trial in the interests of justice asserting that the jury heard, no less than five times, that the police call involved a battery and because the trial court had prevented the defense from mentioning in closing argument evidence of something the injured officer said following the resisting incident.[6] Owens pointed out that when the violation

[5] Owens' postconviction motion argued that the prosecution's burden of proof was unconstitutionally reduced by the giving of jury instruction WIS JI—CRIMINAL 140. Postconviction proceedings were stayed pending the Wisconsin Supreme Court's consideration of that very issue in ***State v. Trammell***, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2 564. The supreme court held "that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." ***Trammell***, 387 Wis. 2d 156, ¶67. No issue of arguable merit exists as to instructing the jury with WIS JI—CRIMINAL 140.

[6] Over the prosecution's objection, the tail end of the video from the injured officer's body camera was played for the jury and the officer was heard to say that he "should've killed the motherfucker." At the close of the evidence, the prosecutor sought to revisit the ruling on the objection. The trial court indicated that in hindsight the evidence was not relevant because it came after the resisting incident. The trial court advised the defense that it was not appropriate to argue that evidence during the defense's closing argument because it had nothing to do with what Owens did or did not do.

of the court order not to give details of the dismissed battery charge was revisited at the conclusion of the evidence, the trial court did not accurately recall what the officer had said and was in error in thinking that the officer had only said the call was about a "battery." The postconviction motion was denied. The postconviction court concluded that the trial court had not ruled that the word "battery" could not be uttered as part of the officer's description of the nature of the call and that the "essence of the court's order was not violated." It also concluded that the trial court had correctly excluded the officer's post-incident remark as irrelevant, and even if that evidentiary ruling was wrong, it was harmless error.

The no-merit report first addresses whether there is arguable merit to claims that the trial court erroneously exercised its discretion in allowing one officer to testify about more than just a general description of the battery call and in precluding the defense from arguing evidence about the officer's post-incident remark. The no-merit report correctly recites that evidentiary rulings are reviewed for an erroneous exercise of discretion. The report also concludes that having reviewed the State's brief in response to the postconviction motion, undersigned counsel believes that the officer's testimony about the battery involving injuries did not violate the trial court's order, and even if it did, the court was within its authority to allow the testimony to stand. The report further concludes that the trial court was well within its authority to prohibit the defense from arguing the evidence about the officer's post-incident remark.

As to the trial court's ruling that the officer's post-incident remark was irrelevant, we agree that the ruling was a proper exercise of discretion and that the trial court properly prohibited the defense from raising the officer's remark in its closing argument. As to the violation of the trial court's order that only a general description of the police call be used, we agree that there was no violation when the officers mentioned, more than once, that they were responding to a "battery"

call. The trial court did not explicitly foreclose the use of that descriptor. However, as to the one officer's testimony that the alleged victim reported she had been pulled from the house and sustained several injuries, there exists a question about whether the trial court failed to recall that the jury heard those details of the battery. Yet, even if the trial court erred in its recollection that some detail of the battery had been revealed, the small detail that the jury heard was not of sufficient significance to justify a new trial.

A new trial may be granted in the interest of justice when the real controversy has not been fully tried or when there has been a miscarriage of justice. ***State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). A new trial may be justified if the party shows "that certain evidence which was improperly received 'clouded a crucial issue' in the case" such that it may be fairly said that the real controversy was not fully tried. ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). To establish a miscarriage of justice, there must be a "substantial degree of probability that a new trial would produce a different result." ***Id.*** (citation omitted).

There is no arguable merit to a claim that Owens could satisfy either standard to garner a new trial in the interests of justice. The details of the battery the jury heard were very minor and did not directly impact a crucial issue in the case—that being whether Owens resisted the lawful authority of the police officers. Additionally, in light of the body cam videos which were direct evidence of Owens' conduct, there is no probability of a different result in a new trial in which the only change would be the exclusion of the minor details of the battery. Therefore, we agree with appointed counsel's conclusion that the evidentiary rulings and the denial of Owens' postconviction motion do not present any issues of arguable merit.

The no-merit report addresses additional potential issues regarding the sufficiency of the evidence, whether there were defects in the composition of the jury or jury instructions, and whether the sentence was the result of an erroneous exercise of discretion or otherwise harsh or excessive. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit, and this court will not discuss them further.

We have specifically considered whether any issues of arguable merit arise from other rulings made on evidentiary objections during the trial and from the colloquy that established the knowing and voluntariness of Owens' election to testify. We have also considered whether any improper argument was made, and we conclude that no arguable issues exist from these parts of the trial.

Our review of the record discloses no other potential meritorious issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and order denying the postconviction motion, and discharges appellate counsel of the obligation to represent Owens further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Sarah Zwach is relieved from further representing Gary Dewayne Owens in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals