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March 11, 2021

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

2018AP2277-CRNM State of Wisconsin v. Terence L. Jannke (L.C. # 2016CF216)

Before Fitzpatrick, P.J., Graham, and Nashold, 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).

Terrence Jannke appeals a judgment convicting him of three felonies, following a jury trial. Attorney Michael Covey has filed a no-merit report seeking to withdraw as appellate

counsel. *See* WIS. STAT. RULE 809.32 (2019-20);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). Jannke filed a response, and Attorney Covey filed a supplemental no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we conclude that there are no arguably meritorious appellate issues.

Jannke was charged with first degree reckless homicide, maintaining a drug trafficking place as a party to a crime as a second and subsequent offense, and possession of heroin with intent to deliver, also as a second and subsequent offense. A trial was held and the jury found Jannke guilty of all counts. The no-merit report, response, and supplemental no-merit report discuss whether the evidence was sufficient to support the jury's verdicts. When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Upon our independent review of the record, we conclude that there would be no arguable merit to challenging the sufficiency of the evidence on appeal.

In order to find Jannke guilty of first degree reckless homicide, the State needed to prove that Jannke delivered a substance, that the substance was heroin, that Jannke knew or believed

[1] All further references in this order to the Wisconsin Statutes are to the 2019-20 version, unless otherwise noted.

that the substance was heroin, and that the victim, H.N.,[2] used the substance and died as a result of that use. WIS JI—CRIMINAL 1021; *see also* WIS. STAT. § 940.02(2). Without attempting to recite the evidence in detail here, Jannke's conviction on this count is supported by the evidence that was presented at trial. Gabriel Brandl, who had been roommates with H.N., testified that he and H.N. drove to a park to purchase heroin from Jannke, and then went to the car to inject the drug. Brandl also gave detailed testimony regarding how he injected H.N. with some of the heroin provided by Jannke, how H.N. became unconscious, and how she stopped breathing and passed away several hours later in Brandl's car. Dodge County Medical Examiner Kristinza Giese testified that, based on her findings from the autopsy of H.N., the cause of death was acute heroin intoxication.

In his response to the no-merit report, Jannke disputes appellate counsel's assertion that multiple witnesses provided considerable evidence to show that Jannke dealt the heroin that caused H.N.'s death. Jannke asserts that no witness other than Brandl testified that Jannke sold anything to H.N. on the day she died. Jannke argues that Brandl's testimony is not credible because he was a codefendant trying to distance himself from H.N.'s death.

We reject Jannke's arguments. While Brandl was the only witness to testify that he personally observed Jannke supply the heroin to H.N., other witnesses provided testimony that, if believed by the jury, tended to support Brandl's testimony. Jannke's roommate, Jason Twaite, testified that he had overheard Jannke's voice from Jannke's room speaking "on the phone or to somebody how he had the good heroin that killed that girl[.]" In addition, police officer Michael

[2] Pursuant to WIS. STAT. RULE 809.86(4), we refer to the victim by the letters H.N. rather than by the victim's name.

Reissmann testified that, during a recorded interview of Heather Barnes, who purchased heroin from Jannke on a regular basis, Barnes told Reissmann that Jannke "had told her that he was the one that gave Gabriel Brandl the heroin … that Gabe gave to [H.N.]" At trial, Barnes denied making any such statement to Reissmann. However, it is the jury's responsibility to resolve conflicts and inconsistencies in the evidence and to judge the credibility of the evidence. ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). The jury may believe some testimony of one witness and some testimony of another, even though their testimony as a whole is inconsistent. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). "It is generally not the province of the reviewing court to determine issues of credibility." ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). We are satisfied that the evidence at trial was sufficient to support the jury's finding that Jannke was guilty of reckless homicide.

There also would be no arguable merit to challenging the sufficiency of the evidence to support Jannke's convictions for maintaining a drug trafficking place as a party to a crime and for possession of heroin with intent to deliver. *See* WIS. STAT. §§ 961.42, 961.41(1m)(d)1. These convictions were supported by the evidence adduced at trial. Jason Twaite testified that, on multiple occasions, he saw Jannke sell heroin to other individuals out of Jannke's room. Twaite and several other witnesses also testified that they personally purchased heroin from Jannke. In addition, police officer Kevin Day testified that, in connection with his investigation of this case, he executed a search warrant of a trailer. The search produced drug paraphernalia, as well as documents showing that Jannke resided at the searched trailer. Day also testified that, during the execution of the search warrant, a suspect vehicle pulled into the trailer park with three people inside the vehicle, including Jannke. Day and another officer conducted a traffic

stop of the vehicle. A search of the vehicle produced a sandwich baggie from the glove box, and the baggie contained a substance that Day testified appeared to be heroin. Laboratory testing showed the substance in the baggie to be heroin weighing 1.903 grams. The evidence was sufficient to support the convictions.

Jannke argues in his response to the no-merit report that the circuit court did not properly instruct the jury as to the causation element under WIS. STAT. § 940.02(2). Counsel asserts in the supplemental no-merit report that the court read the correct jury instructions, utilizing WIS JI—CRIMINAL 1021. The record supports counsel's assertion. The court read the instructions on the causation element of reckless homicide to the jury as follows, in relevant part:

> Element Number 4, [H.N.] used the substance alleged to have been delivered by the Defendant and died as a result of that use. This requires that the use of a controlled substance was a substantial factor in causing the death. There may be more than one cause of death.
>
> The influence of one person might produce it or the acts of two or more persons might jointly produce it.

Jannke concedes in the no-merit response that the substantial factor requirement is well-established in Wisconsin law. However, Jannke argues that the circuit court should have used the more stringent "but for" causation standard adopted in ***Burrage v. United States***, 571 U.S. 204, 205 (2014). We reject this argument because the ***Burrage*** case did not address Wisconsin law or Wisconsin pattern jury instructions. Rather, ***Burrage*** concerned the application of a penalty enhancement provision under the federal Controlled Substances Act. Jannke concedes in the no-merit report that ***Burrage*** is not binding on this court's construction of Wisconsin statutory law. Jannke's argument that the jury should have been instructed on "but for" causation is not supported by applicable precedent, and is therefore without merit.

A challenge to Jannke's sentence also would be without arguable merit. The court imposed a sentence of twenty years of initial confinement and ten years of extended supervision on Count One, the reckless homicide count, consecutive to any other sentence previously imposed.[3] On Count Two, maintaining a drug trafficking place as a second and subsequent offense, the court imposed one year of initial confinement and one year of extended supervision, to be served concurrent to Count One.[4] On Count Three, possession with intent to deliver heroin as a second and subsequent offense, the court imposed four years of initial confinement and four years of extended supervision.[5] The parties stipulated that Jannke had a prior drug conviction, such that he was subject to the penalty enhancer under WIS. STAT. § 961.48(1)(b) on Counts Two and Three. The sentences are within the legal maximums. The standards for the circuit court and this court on discretionary sentencing issues are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

[3] *See* WIS. STAT. § 940.02(2)(a) (classifying first-degree reckless homicide as a Class C felony); WIS. STAT. § 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony).

[4] *See* WIS. STAT. § 961.42 (classifying maintaining a drug trafficking place as a Class I felony); WIS. STAT. § 973.01(2)(b)9. and (d)6. (providing maximum terms of one and one-half years of initial confinement and two years of extended supervision for a Class I felony); WIS. STAT. § 961.48(1)(b) (increasing maximum penalty by four years for a second and subsequent offense).

[5] *See* WIS. STAT. § 961.41(1m)(d)1. (classifying possession with intent to deliver three grams or less of heroin as a Class F felony); WIS. STAT. § 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven and one-half years of initial confinement and five years of extended supervision for a Class F felony); WIS. STAT. § 961.48(1)(b) (increasing maximum penalty by four years for a second and subsequent offense).

Finally, the record discloses no arguable basis for challenging the effectiveness of Jannke's trial counsel. To establish ineffective assistance of counsel, Jannke must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's ineffective performance, the outcome of the trial would have been different. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In reviewing trial counsel's performance, "every effort is made to avoid determinations of ineffectiveness based on hindsight.… [T]he burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Therefore, this court judges "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" and applies an "objective standard of reasonableness." ***Strickland***, 466 U.S. at 688, 690. This court's review of the record and the no-merit report discloses no basis for challenging trial counsel's performance.

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

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Michael Covey is relieved of any further representation of Terrence Jannke in this matter pursuant to 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