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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

November 7, 2023

To:

Hon. David L. Borowski
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Urszula Tempska
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Robert Tongxia Phoneprasith 438569
Kettle Moraine Correctional Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2018AP513-CRNM State of Wisconsin v. Robert Tongxia Phoneprasith
(L.C. # 2008CF573)

Before Donald, P.J., Dugan and Geenen, 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).

Robert Tongxia Phoneprasith appeals his judgment of conviction, entered upon a jury's verdicts, for five felonies related to a shooting that occurred in September 2005. His appellate counsel, Urszula Tempska, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2021-22).[1] Phoneprasith has filed a response. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Phoneprasith's response, we conclude that there are no issues of arguable merit that could be

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

pursued on appeal. We, therefore, summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Phoneprasith was charged in February 2008 with three counts of first-degree recklessly endangering safety while armed and one count of being a felon in possession of a firearm, all with habitual criminality enhancers, in connection with a shooting in September 2005. The shooting occurred during an argument between two groups of people—those who were with Phoneprasith, and those who were purported "rivals" of Phoneprasith's group due to an ongoing dispute. One person from the rival group died as a result of the shooting, and several others, also from the rival group, were wounded.[2]

After several adjournments, including multiple requests for substitution of counsel by Phoneprasith, the matter proceeded to trial in May 2010. However, due to a hung jury, the trial court declared a mistrial.[3]

[2] In response to a pretrial defense motion asserting prosecutorial delay, a hearing was held during which one of the detectives who investigated the shooting testified. He explained that the victims claimed they were "ambushed" by Phoneprasith's group; the investigation involved determining whether this was actually a "shootout" between the two rival groups, and thus potentially a self-defense situation, before charging Phoneprasith. The trial court concluded that there was no intentional delay on the part of the police and the State in issuing charges; rather, the court found that the record was "replete with good police work" in their taking time to locate witnesses, perform ballistics tests on the evidence from the shooting scene, and "fully investigate" the matter.

We identify no other procedural issues that would give rise to arguably meritorious claims on appeal.

[3] The jury in the first trial found Phoneprasith guilty of the felon in possession of a firearm charge, but deadlocked on the remaining three charges. However, that conviction was subsequently vacated upon a postconviction motion filed by appellate counsel due to an error by the trial court in responding to a jury question related to this charge. The information was then amended to include the felon in possession of a firearm charge before the second trial.

(continued)

The State determined it would retry the case, adding a charge of first-degree intentional homicide with the use of a dangerous weapon. There were additional delays prior to the second trial, including several more requests for substitution of counsel by Phoneprasith, which eventually culminated in the trial court finding that Phoneprasith had forfeited his right to counsel. This determination was based on both his egregiously disruptive behavior in court and his unwillingness to work with six different attorneys. Phoneprasith proceeded *pro se* in the second trial, held in October 2012, with stand-by counsel appointed and present throughout the trial and sentencing.

The jury convicted Phoneprasith of three counts of first-degree recklessly endangering safety with use of a dangerous weapon, as a party to a crime; being a felon in possession of a firearm; and, rather than first-degree intentional homicide, the lesser-included crime of first-degree reckless homicide with use of a dangerous weapon, as a party to a crime, all with habitual criminality enhancers. The total sentence imposed was forty years of initial confinement, to be followed by sixteen years of extended supervision. Restitution for the funeral expenses for the deceased victim was also ordered. This no-merit appeal follows.

In the no-merit report, appellate counsel first addresses whether there would be arguable merit to a claim that Phoneprasith's right to counsel was violated during the second trial, when the trial court determined that he had forfeited this right. Phoneprasith stated in court, and maintains in his response to the no-merit report, that he did not wish to waive his right to counsel.

Phoneprasith's first trial was before the Honorable Jeffrey A. Conen. His second trial was before the Honorable David L. Borowski, who also imposed his sentence.

However, our supreme court has recognized that there are "unusual circumstances, 'most often involving a manipulative or disruptive defendant,'" that "permit a court to find that the defendant's voluntary and deliberate choice to proceed *pro se* has occurred by operation of law." ***State v. Cummings***, 199 Wis. 2d 721, 752, 546 N.W.2d 406 (1996) (citation omitted). According to the law in effect at that time, in making that determination, a trial court had to "conclude that the defendant's conduct [was] intended to frustrate the efficient progression of the case." ***State v. McMorris***, 2007 WI App 231, ¶21, 306 Wis. 2d 79, 742 N.W.2d 322.[4]

That was the finding by the trial court here—that Phoneprasith made voluntary and deliberate choices that frustrated the efficient progression of the case, which resulted in his forfeiture of his right to counsel. The court observed that Phoneprasith's outbursts and display of "generally belligerent behavior" in court were the "worst" that the court had seen up to that point in terms of behavior. The court also noted Phoneprasith's failure to cooperate with his six attorneys, which the court deemed to be "delay tactics." This included Phoneprasith's continuous filing of *pro se* motions and other documents with the trial court, in blatant disregard of counsels' advice.

The trial court, therefore, found that this manipulative and disruptive conduct demonstrated Phoneprasith's choice to proceed *pro se*. *See* ***Cummings***, 199 Wis. 2d at 752. The record supports this finding. As such, we agree with appellate counsel's assessment that there

[4] We note that our supreme court has since altered the standard for making the determination that a defendant has forfeited his right to counsel by rejecting the premise that the defendant's actions had to be "done with an *intent or purpose to delay*." *See* ***State v. Suriano***, 2017 WI 42, ¶32, 374 Wis. 2d 683, 893 N.W.2d 543 (emphasis added). However, Phoneprasith's second trial occurred prior to ***Suriano***, and thus the prior standard was the applicable law at the time the trial court made this determination.

would be no arguable merit in challenging the trial court's determination that Phoneprasith forfeited his right to counsel.

The other issue addressed by appellate counsel in the no-merit report is whether there would be any merit to a challenge of the trial court's discretion in imposing Phoneprasith's sentences. The record reflects that the court considered relevant sentencing objectives and factors. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In particular, the court noted that Phoneprasith was "a great and grave danger to the community" and that his risk of reoffending was "off the charts."

Furthermore, the sentences imposed are within the statutory maximums, which, with the penalty enhancers, totaled in excess of 100 years of confinement. *See* WIS. STAT. §§ 941.30(1); 941.29(2)(a); 940.02(1); 939.63(1)(b); 939.62(1)(c); 939.50(3)(b), (f), (g) (2005-06). Thus, the sentences cannot be deemed to be unduly harsh or unconscionable. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Therefore, we agree with appellate counsel's conclusion that there would be no arguable merit to a challenge of Phoneprasith's sentences.

Turning to the issues Phoneprasith raised in his response, he first asserts that double jeopardy prohibited his second trial. As reflected in the record, the trial court, as well as several of Phoneprasith's attorneys, informed Phoneprasith that this was not a viable claim. It is firmly established that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," because "a trial court's declaration of a mistrial following a hung jury is not an event that

terminates the original jeopardy to which [the defendant] was subjected." ***Richardson v. United States***, 468 U.S. 317, 324, 326 (1984).

Phoneprasith also contends it was a double jeopardy violation for the State to add the homicide charge for the second trial. The State explained that through Phoneprasith's testimony during his first trial, it determined that there was a basis for charging Phoneprasith with homicide. *See* ***Neely v. State***, 97 Wis. 2d 38, 50, 292 N.W.2d 859 (1980) ("[T]he general rule is that a defendant's testimony at another trial is admissible in evidence against him in later proceedings."). Therefore, we conclude that there would be no arguably meritorious claims relating to double jeopardy in this matter.

Finally, Phoneprasith alleges that the State "knowingly used perjured testimony" of the victims with regard to the nature of the confrontation between the two rival groups on the night of the shooting. Specifically, Phoneprasith argued at trial that the victims had sought a confrontation relating to their ongoing dispute, which he asserted was evident from their statements included in the complaint. However, at trial the victims testified that they had just left a tavern in the area that night and had stopped to talk to some females.

Here, the victims were subject to cross-examination by Phoneprasith regarding their earlier statements to police. Additionally, Phoneprasith called witnesses and testified in his own defense to present his version of events. "It is the jury's job to resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence[.]" ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. We ascertain no issue of arguable merit relating to the testimony of the victims.

Additionally, we note that the no-merit report did not specifically discuss whether there are any potentially meritorious claims relating to the sufficiency of the evidence to support the jury's verdicts, which we review in the interest of completeness. A jury's verdict will not be disturbed "unless the evidence, viewed most favorably to the [S]tate 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. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Having independently reviewed the record, we conclude that the evidence viewed most favorably to the State and the conviction is sufficient to support the convictions.

As part of this review, we also examined the jury instructions provided by the trial court, based on the offenses and the evidence presented. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (stating that in exercising its discretion regarding jury instructions, the trial court must "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence" (citation omitted)). We note that Phoneprasith advanced a theory of self-defense, and thus, the trial court gave a self-defense instruction in addition to instructions relating to the offenses.

To support his theory of self-defense, Phoneprasith argued that the victims had a history of being armed. He also elicited testimony from his witnesses that the victims were armed that night. In contrast, the victims testified they were unarmed. We note that Phoneprasith testified that he shot at the victims that night.

We conclude that, in finding Phoneprasith guilty of the charges, the jury rejected his theory of self-defense. Further, the record demonstrates that the evidence was sufficient to allow for the jury to reasonably find that the elements of each of the charges against Phoneprasith had

been met according to the instructions provided. We, therefore, conclude that there are no issues of arguable merit regarding the sufficiency of the evidence or the jury instructions provided.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Phoneprasith further in this appeal.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Urszula Tempska is relieved of further representation of Robert Tongxia Phoneprasith in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals