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DISTRICT II

August 20, 2025

To:

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Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
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Christopher L. Davis #721941
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You are hereby notified that the Court has entered the following opinion and order:

2024AP1468-CRNM State of Wisconsin v. Christopher L. Davis (L.C. #2022CF1196)

Before Neubauer, P.J., Gundrum, and Lazar, 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).

Christopher L. Davis appeals a judgment of conviction for taking and driving a vehicle without the owner's consent as a party to a crime. Davis's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2023-24)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Davis has filed a response asserting there are several issues of arguable merit, and counsel filed a supplemental no-merit report following this court's request for further

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

briefing. Upon consideration of the no-merit report, the response, and the supplemental no-merit report, and following an independent review of the Record as mandated by ***Anders*** and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal. We therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

Davis was charged with the crime of conviction after he was apprehended while driving the stolen vehicle in South Carolina. His girlfriend, Trisha Brown, was apprehended with him. She was the State's principal witness at Davis's trial. Brown confirmed that she and Davis had stolen the vehicle from a Kenosha gas station while the owner had left it running outside. Davis testified in his own defense and asserted that they had paid the victim for the use of the vehicle and were using it with his permission. The victim was recalled and testified that they had no such arrangement.

The jury convicted Davis. A presentence investigation report recommended probation. The defense joined in that recommendation, but the prosecutor recommended two years of initial confinement and two years of extended supervision. The circuit court adopted the prosecutor's recommendation. Davis was additionally ordered to pay restitution and extradition costs. He subsequently successfully sought additional sentence credit, but his pro se motion for sentence modification was denied.

The no-merit report addresses whether there would be any nonfrivolous basis to challenge the sufficiency of the evidence to support the conviction or the circuit court's exercise of its sentencing discretion. Our review of the appellate Record satisfies us that the no-merit report sufficiently analyzes these issues and properly concludes that any challenge based upon them would lack arguable merit.

The no-merit report does not address whether there would be any potentially meritorious issue based on the constitutional effectiveness of Davis's trial counsel. During the trial, Davis's defense attorney cross-examined Brown about her drug use and the couple's financial situation. The circuit court agreed with the prosecutor that these lines of questioning had opened the door to redirect questioning about Davis's drug use and his expenditures in that regard. Brown then testified that both she and Davis were drug addicts and that she had observed him spend money on drugs.

We conclude any argument would be frivolous regarding the constitutional effectiveness of Davis's trial counsel in opening the door to testimony regarding Davis's drug use. The jury was given a cautionary instruction regarding evidence of Davis's drug use. There was overwhelming evidence of Brown's guilt presented at trial. There is no nonfrivolous basis to argue that Davis was constitutionally prejudiced by any alleged ineffective assistance on the part of his trial counsel in this regard.

Davis's response suggests his trial counsel was constitutionally ineffective in addressing an inadvertent incident that occurred during the trial, when one juror, who was accompanied by the bailiff, saw Davis in a hallway being escorted by a sheriff's deputy. Davis's trial counsel suggested the judge speak to the juror on the record but outside the presence of the parties or their attorneys. During this questioning, the juror acknowledged seeing Davis and the deputy in the hallway, but she denied noticing anything about them and stated that as soon as she and the

bailiff saw them, she stepped back into the jury room.[2] The juror agreed not to discuss with the other jurors the fact that she saw Davis in the hallway.

There would be no arguable merit to any assertion that Davis's defense counsel was constitutionally ineffective in his handling of the juror situation. Davis's attorney placed on the record the reasoning for his "tactical decision" not to request a cautionary instruction. Defense counsel stated he worried a cautionary instruction would call undue attention to the situation, adding that the did not "see any tactical advantage to be gained by doing it." Counsel also stated he was "very satisfied" with that particular juror's answers during voir dire and he did not believe the law supported a request for a mistrial. The circuit court asked defense counsel to confer with Davis to ensure that Davis understood that it was counsel's "strategic decision" not to request further relief. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). Any assertion that counsel's handling of the situation was constitutionally ineffective would be frivolous.

[2] Presumably, this questioning was intended to elicit whether the juror had observed Davis in shackles. Much of Davis's response merely assumes that the juror did, in fact, observe him shackled. The trial record does not support such a conclusion.

Davis also asserts that under ***United States v. Bishawi***, 272 F.3d 458, 462 (7th Cir. 2001), it was necessary for him and his counsel to be present during the juror questioning. ***Bishawi*** specifically limited its requirement of an evidentiary hearing to situations where "the record is void of any specific information regarding the occurrence and nature of, as well as the circumstances surrounding the *ex parte* contacts, the impact thereof upon the jurors, and whether or not the juries were prejudiced." *See* ***id.*** Here, there was ample contextual information, and the *ex parte* meeting had been done at defense counsel's urging—which, again, bears all the indicia of a strategic maneuver on the part of defense counsel.

Davis also argues his trial counsel was constitutionally ineffective by failing to move for a mistrial based upon the prosecutor's "substantive use" of Davis's pre- and post-arrest silence.[3] By order dated July 9, 2025, we requested supplemental briefing from Davis's appointed appellate counsel regarding whether such an argument would be frivolous. We agree with counsel's conclusion that it would be.

Davis's response cites numerous pages of cross-examination testimony in support of his constitutional claim, including the following:

> Q: And isn't it true that when you were there with the police officers from South Carolina, you never once mentioned this story to them, did you?
>
> A: No, I did not.
>
> Q: So, you're sitting there on the side of the road, the police officers in South Carolina telling you that this vehicle is stolen as [you're] piloting, and you don't feel the need to tell them at that point that you … rented this vehicle for $600.00?
>
> A: I don't have an attorney with me and it's -- no, I did not mention it to them.
>
> Q: Okay.
>
> A: I can speculate why it all happened, but --
>
> Q: I don't want you to speculate … I just think it would make sense to me that if this happened as you are saying that it did, that you're innocent and you would tell a police officer at that stage that the vehicle -- that no, no, no, they got this story wrong, the vehicle is not stolen?

[3] Davis's trial counsel did not object to the challenged testimony. As a result, the alleged error has not been preserved. Moreover, this court requires the testimony of trial counsel to support an ineffective assistance of counsel claim challenging his or her conduct. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Without such testimony, Davis could not raise an ineffective assistance of counsel claim on appeal. However, for purposes of judicial efficiency, we elect to address the ineffective assistance claim Davis raises in his response.

> A: The police officers also said I was driving, but you heard the witness tell you that she was driving it, so they already got it wrong. So, I'm not going to incriminate myself by telling them something, you know.
>
> Q: Even if you're innocent?
>
> A: It's best sometimes just to let things work themselves out.

Davis's appointed appellate counsel concludes that any ineffective assistance of counsel claim based on trial counsel's failure to object to this questioning would be frivolous. Appellate counsel concedes that Davis's trial counsel arguably performed deficiently under ***State v. Fencl***, 109 Wis. 2d 224, 325 N.W.2d 703 (1982). However, in assessing prejudice, appellate counsel also concludes that the cross-examination was permissible under ***State v. Sorenson***, 143 Wis. 2d 226, 421 N.W.2d 77 (1988), which held that United States Supreme Court precedent "allow[s] probative comment on a defendant's pre-***Miranda*** silence when the defendant elects to testify on his or her own behalf."[4] ***Sorenson***, 143 Wis. 2d at 258. ***Sorenson*** explicitly limited ***Fencl***'s application "to those cases in which the defendant does not elect to take the stand and thereby waive the right to protect pre-***Miranda*** silence from comment." ***Sorenson***, 143 Wis. 2d at 259. We agree that ***Sorenson*** controls and establishes that trial counsel did not perform deficiently by failing to make a meritless objection.[5]

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[5] The primary aim of the cross-examination was to establish that Davis's claimed permissive use of the vehicle was false, the idea being that a person who was a truly permissive user of the vehicle would have said so immediately upon being stopped by the police. Thus, we treat the questioning as purely a matter of pre-***Miranda*** silence. However, to the extent any of the cross-examination can be read as commentary on Davis's post-***Miranda*** silence, we conclude any error in this regard was harmless, and therefore Davis was not prejudiced by trial counsel's failure to object. *See* ***State v. Brecht***, 143 Wis. 2d 297, 317, 421 N.W.2d 96 (1988).

We also agree with appellate counsel that the Record establishes Davis was not prejudiced by any arguable error by trial counsel in failing to object to the cross-examination. The evidence, including Brown's and the victim's testimony, overwhelmingly demonstrated that Davis had taken the truck without permission and driven it to South Carolina. When coupled with the complete lack of evidence substantiating Davis's claimed permissive use of the vehicle, we conclude that there is no reasonable probability of a different result even if Davis's trial counsel had interposed a successful objection to the cross-examination.

Our independent review of the Record reveals no other potentially meritorious issues for appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Annice Kelly is relieved from further representing Christopher L. Davis in this appeal. *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