COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3365-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN LEE GRIFFIN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. John Lee Griffin appeals from a judgment of conviction and an order denying his postconviction motion. The dispositive issues are whether he waived objections to the trial court's answers to jury questions during deliberation and whether his sentence is excessive. We affirm.

Griffin was charged with disorderly conduct and resisting, both as a habitual offender. The resisting charge arose from his conduct following the events that were alleged to be disorderly conduct. The jury acquitted Griffin on the first charge but convicted him of resisting. During deliberation, the jury sent out a note with two questions. The trial court discussed its proposed answers to those questions with counsel for both parties. Counsel stated they had no objections to the answers, both before and after the court gave them to the jury. Griffin now argues that the court's answers were improper.

We have previously held that failure to object to the court's answers to jury questions waives the issue. ***State v. Mann***, 135 Wis.2d 420, 427, 400 N.W.2d 489, 492 (Ct. App. 1986). Griffin's argument in response to ***Mann*** appears to proceed as follows. The circuit court's answers to the jury's questions in Griffin's case prevented the possibility of jury nullification and unfairly emphasized one element of the resisting charge. As a result, Griffin was essentially deprived of his constitutional right to a jury trial. We may not conclude that he waived his right to a jury trial because that right is one that cannot be waived by counsel, but only by the defendant personally, and no such waiver is of record here.

Griffin does not cite any case law adopting this novel theory. We reject it. Even if we were to accept that the court's answers to the jury questions were erroneous, this error did not deprive Griffin of his right to a jury trial. He received a jury trial. He did not complain then that the trial court's answers to the jury's questions were erroneous. No personal waiver was necessary.

Griffin also argues that the court's sentence of three years in prison, the maximum available, violated the Eighth Amendment's bar on cruel and unusual punishment. A sentence is excessive only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). Specifically, Griffin argues that the court failed to consider that Griffin was acquitted on the disorderly conduct charge. He argues that it shocks one's conscience to sentence him to three years for resisting arrest for an offense on which he was acquitted. We disagree. One resists an arrest at his or her peril. There is no inconsistency in being found not guilty of disorderly conduct but guilty of

resisting arrest. The place to challenge disorderly conduct is in the courts, not the streets. We also note that the court's sentence was not based solely on this offense, but also on Griffin's lengthy record as a repeater.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.