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

2015AP690-CRNM State of Wisconsin v. William D. Wilcox (L.C. #2014CF2)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

William Wilcox appeals from a judgment convicting him of four counts of first-degree recklessly endangering safety while using a weapon contrary to WIS. STAT. § 941.30(1) (2013-14)[1] and one count of injury by negligent use of a weapon contrary to WIS. STAT. § 940.24(1).

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Pursuant to WIS. STAT. RULE 809.32 (2015-16) and ***Anders v. California***, 386 U.S. 738 (1967), Wilcox's appellate counsel filed a no-merit report, an amended no-merit report, and two supplemental no-merit reports. Wilcox has responded to counsel's filings.[2] Upon consideration of the reports, Wilcox's response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21 (2015-16).

Counsel's submissions and Wilcox's response address the following possible appellate issues: (1) whether there was sufficient evidence for the jury to convict Wilcox, (2) whether the real controversy was tried, (3) whether Wilcox was selectively prosecuted, (4) whether the State engaged in prosecutorial misconduct, (5) whether Wilcox received effective assistance from his trial counsel, (6) whether Wilcox should have been able to argue self-defense, (7) whether there was a failure to administer an oath or affirmation to witnesses during trial, (8) whether the State failed to disclose exculpatory evidence, (9) whether the first-degree recklessly endangering safety statute is void for vagueness, and (10) whether the circuit court misused its sentencing discretion or sentenced Wilcox on the basis of inaccurate information. We agree with appellate counsel that these issues do not have arguable merit for appeal.

The no-merit report considers the sufficiency of the evidence for each count. The charges arose out of a bar-time shooting in which a firearm with a laser sight was brandished and fired. One person was shot in the incident. Our standard of review is whether the evidence, viewed in the light most favorable to the State, is so insufficient in probative value and force that

[2] Wilcox declined to discharge appointed appellate counsel when given the opportunity to do so by this court.

as a matter of law no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The standard is the same whether the evidence is direct or circumstantial. *See* ***id.*** The no-merit report discusses and the record reveals that for each count at least one witness gave testimony to support each requisite element. Upon this record, we cannot say that the jury erred in finding guilt beyond a reasonable doubt. We conclude that no arguable merit could arise from a challenge to the sufficiency of the evidence.

In his response, Wilcox complains that certain evidence was not before the jury. Counsel's second supplemental no-merit report indicates that the evidence identified by Wilcox was before the jury. We conclude that the real controversy was tried.

In his response, Wilcox alleges selective prosecution. This claim is actually a challenge to the sufficiency of the evidence to convict him. We have concluded that the evidence was sufficient.

Wilcox alleges prosecutorial misconduct. This argument is also grounded in a challenge to the sufficiency of the evidence. Multiple witnesses testified about the events surrounding the shooting and those witnesses were cross-examined. That Wilcox believes other witnesses were more credible does not suggest prosecutorial misconduct. Credibility determinations were for the jury. ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

Wilcox's complaints about the assistance rendered by his trial counsel, including that certain information was not before the jury, must be addressed in the context of Wilcox's speedy trial demand and the circumstances surrounding the demand. On March 25, 2014, the State

Public Defender appointed new counsel for Wilcox.[3] At a hearing on April 17, 2014, Wilcox reiterated his speedy trial demand, counsel advised that she was recently appointed and stated that due to missing discovery and other materials and the shortness of time, she could not be ready for the scheduled June 2, 2014 trial. The court noted Wilcox's speedy trial demand and counsel reiterated she could not be ready for trial. Wilcox declined to withdraw his speedy trial demand. The circuit court advised Wilcox to be aware of the risk of proceeding to trial under the circumstances.

On the first day of the jury trial, trial counsel stated that she and Wilcox had not had sufficient time to interact and prepare for trial. Wilcox insisted that he wanted to go to trial. Counsel then advised the court that she had had inadequate time to prepare for trial, she had not obtained ballistics testing, her investigator was hamstrung, and she had not reviewed certain evidence with Wilcox (although Wilcox had seen all written material). Wilcox again insisted that trial proceed. The circuit court determined that Wilcox understood that his attorney had not had sufficient time to prepare, and the court mentioned the possibility of adjourning to September. Wilcox declined an adjournment and demanded that his trial start as scheduled. The jury convicted Wilcox of all counts.

The foregoing leads us to conclude that any deficiency Wilcox claims relating to counsel's alleged lack of trial preparation and the absence of evidence Wilcox claims should

[3] Prior counsel moved to withdraw under SCR 20:1.16(b)(1) and (4): "(1) withdrawal can be accomplished without material adverse effect on the interests of the client"; and "(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." The motion to withdraw stated that the State Public Defender would appoint successor counsel. The circuit court granted the motion and successor counsel was appointed. It was successor counsel who insisted she could not be ready for trial and later tried the case.

have been presented by the defense is attributable to Wilcox's decision to proceed on his speedy trial demand in the face of his counsel's expressed lack of preparation and the circuit court's admonishments. A party who consents to a particular procedure in the circuit court is judicially estopped from arguing on appeal that the procedure was deficient. *See* ***State v. Mendez***, 157 Wis. 2d 289, 294, 459 N.W.2d 578 (Ct. App. 1990). In other words, "[a] defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." ***State v. Gary M.B.***, 2004 WI 33, ¶11, 270 Wis. 2d 62, 676 N.W.2d 475 (citation omitted).

Wilcox complains that his trial counsel did not explore the character of the individuals whom Wilcox characterizes as the aggressors on the night of the shooting. The shooting incident involved a group of African-American individuals and a group of white individuals. Wilcox alleges that the white individuals were the aggressors. To the extent the defense was unable to raise the matters about which Wilcox claims on appeal, we note that Wilcox insisted on going to trial as scheduled. ***Id.***

Wilcox argues that his trial counsel was not prepared for trial and she did not provide him with case material to review. These matters were addressed by counsel, Wilcox, and the circuit court prior to trial. Wilcox chose to proceed to trial knowing that these issues were present. He cannot now complain about his decision. ***Id.*** This issue lacks arguable merit for appeal.

Wilcox argues that he should have been able to argue self-defense. A defendant may

> threaten or intentionally use force against another only if:
>
> - the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,

- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

WIS JI—CRIMINAL 800. In her closing argument, defense counsel explained the presence of Wilcox's DNA on the firearm by conceding that Wilcox might have touched the firearm at some point before the night of the shooting. However, counsel argued that on the night in question, Wilcox did not fire the weapon or wield the weapon to deter or threaten others. She further argued that the witnesses who claimed that Wilcox wielded and fired the weapon were not reliable. Having chosen a trial strategy in which he denied firing the weapon (a strategy that was inconsistent with self-defense) and considering counsel's warnings that she and Wilcox had insufficient time to prepare for trial, we conclude that this issue lacks arguable merit for appeal.[4]

Wilcox claims that three trial witnesses were not sworn. Wilcox identifies only one witness about whom he makes this claim, Detective Bobo. The record shows that the detective was sworn before he testified. The record does not support Wilcox's claim that any other witness was not sworn before testifying.

Wilcox alleges that the State did not disclose exculpatory evidence. He alleges that DNA evidence was taken from other persons on the night of the shooting, but that evidence was not tested. Detective Mikulec and the DNA evidence technician testified that the only DNA sample

[4] We note that the witnesses called by the defense were useful on the question of the identity of the shooter, but they did not offer any evidence suggesting self-defense. No other aspect of the trial proceedings suggested self-defense: Wilcox did not testify, two witnesses testified that they saw Wilcox holding the weapon, during the investigation Wilcox variously claimed to have touched and not touched the weapon, and Wilcox's DNA was found on the weapon's trigger.

collected in the investigation came from Wilcox.[5] Wilcox's sample linked him to the weapon used in the shooting. With regard to Wilcox's claim that the State should have tested him for gunshot residue, Detective Primising testified that this test is no longer performed because the test is not reliable. There is no arguable merit to Wilcox's claim that the State failed to disclose any evidence let alone any exculpatory evidence.

Wilcox argues that the first-degree recklessly endangering safety statute is void for vagueness because it is unclear what type of conduct would "evince a depraved mind." Conduct evincing a depraved mind relates to the third element of the crime: showing utter disregard for human life. ***State v. Blanco***, 125 Wis. 2d 276, 281-82, 371 406 (Ct. App. 1985). Wilcox's void for vagueness argument was rejected in ***Balistreri v. State***, 83 Wis. 2d 440, 445-51, 265 N.W.2d 290 (1978). This issue lacks arguable merit for appeal.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Wilcox to four concurrent fifteen-year terms for first-degree recklessly endangering safety and a three-and-one-half-year term for injury by negligent use of a weapon. In fashioning the sentences, the court considered the seriousness of the offenses, Wilcox's character, history of other offenses and his multiple versions of the events of the night of the

[5] Bobo testified that he collected and inventoried a buccal swab from Jesse Givens, who was also interviewed in relation to the shooting. The swab does not appear to have been submitted to the crime laboratory. Wilcox proceeded to trial even though he knew his counsel was not prepared for trial and had not reviewed certain evidence, and counsel's investigator had been hamstrung by the amount of time available for trial preparation. In light of the foregoing, we conclude that any issue relating to the allegedly untested Givens' buccal swab lacks arguable merit for appeal.

shooting, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court considered that even if Wilcox felt threatened, there was no reason to fire the weapon. The circuit court noted that Wilcox denied firing the weapon and denied that his DNA would be found on the weapon, yet Wilcox's DNA was the sole DNA found on the weapon's trigger. The court found that Wilcox was not truthful. The weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The felony sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We conclude that any challenge to the sentences would lack arguable merit for appeal.

Wilcox complains that at sentencing, the circuit court referred to a 2002 incident in which Wilcox and the victim disagreed about whether he brandished a weapon. It appears that Wilcox is referring to an incident in Georgia discussed by the circuit court at sentencing. The circuit court focused on a witness's claim that Wilcox threatened to kill the victim, which the court deemed "a serious, serious offense." The court did not focus on whether a weapon was involved in that incident. There is no indication that Wilcox was sentenced on the basis of inaccurate information. Wilcox also complains that the circuit court's reference to this incident has had consequences for his department of corrections status. This complaint is outside the scope of this appeal.

Finally, Wilcox complains about his appellate counsel, arguing that counsel did not communicate with him. Wilcox has presented his issues to this court along with his complaints about counsel. We have independently reviewed the record and located no issues with arguable merit for appeal. Challenges to appellate counsel's representation must proceed under ***State v. Knight***, 168 Wis. 2d 509, 520-22, 484 N.W.2d 540 (1992).

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Timothy O'Connell of further representation of Wilcox in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that Attorney Timothy O'Connell is relieved of further representation of William Wilcox in this matter.

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

Diane M. Fremgen
Clerk of Court of Appeals