COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 1, 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

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No. 96-0005-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTOR YANCEY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Victor Yancey has appealed from a judgment convicting him, following a jury trial, of the armed robbery of Titus Ricks, in violation of § 943.32(1)(b) and (2), STATS. He was sentenced to eight years in prison. He was acquitted by the jury of the armed robbery of Titus's mother, Bankie Ricks.

Appellate counsel for Yancey has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967). Yancey was served with a copy of the report and has filed a response. Based upon an independent review of the record and response as required by ***Anders*** and RULE 809.32, we conclude that no issue of arguable merit could be raised on appeal. The judgment of conviction therefore is affirmed.

Counsel's no merit report discusses eight issues: (1) whether the trial court erred in determining that statements made by Yancey's father to a police detective were admissible under hearsay rules; (2) whether the trial court erroneously exercised its discretion when it permitted a photograph of Yancey, described by counsel as a "mug shot," to be introduced as an exhibit at trial; (3) whether the trial court erroneously exercised its discretion when it permitted the photograph to be reviewed by the jury during its deliberations; (4) whether the evidence was sufficient to support the verdict; (5) whether trial counsel rendered ineffective assistance when he failed to request an instruction on attempted armed robbery or to object to the prior statement of Yancey's father on confrontation grounds; (6) whether the State was improperly permitted to amend the information before trial to add the charge of armed robbery of Titus Ricks to the charge of armed robbery of Bankie Ricks; (7) whether a new trial was warranted on the ground that Titus Ricks was coerced into testifying against Yancey; and (8) whether the trial court properly exercised its discretion when it sentenced Yancey to eight years in prison.

Counsel's analysis of issues two through eight and her determination that they lack arguable merit are correct. In regard to the first issue dealing with the statement given by Yancey's father to a police detective, counsel applied a harmless error analysis, contending that even if the trial court arguably erred in determining that the statement made by Yancey's father was a prior inconsistent statement, its admission was harmless.

We need not resolve counsel's harmless error argument because we conclude that the prior statement was properly admitted by the trial court. At trial, Yancey's father testified that he did not remember telling a police detective that Yancey told him about the robbery and that it occurred because of a drug deal, and did not remember telling the detective that he gave his son $70 to return to the Ricks' family. Counsel points out in her no merit report that when a witness states that he does not remember making a statement, it is not

the same as denying making the statement. However, the testimony of Yancey's father went further. When asked if he could have made such a statement to the detective, Yancey's father stated: "No. If I did, I would have remembered it, so I didn't."

Because Yancey's father expressly denied making a statement to the detective indicating that Yancey had implicated himself in the robbery, the statement to the detective constituted a prior inconsistent statement and was not hearsay. *See* § 908.01(4)(a)1, STATS. Moreover, while the statement made by Yancey's father to the detective related statements made by Yancey, these circumstances did not render it inadmissible because statements by a party are not hearsay. *See* § 908.01(4)(b)1, STATS.

In his response, Yancey raises several issues and contends that the judgment of conviction must be reversed or the matter remanded for further proceedings. Initially, he contends that he was denied his right to effective assistance of counsel and to select his own defense because, rather than arguing mistaken identity and that Yancey did not commit the crime, Yancey's trial counsel chose to argue that only one robbery had occurred, rather than two. However, a review of the record reveals that the primary focus of trial counsel's defense was that Yancey did not commit the crime. In both opening and closing argument, the testimony of the defense witnesses, and the cross-examination of the State's witnesses, trial counsel's defense was that Yancey did not commit the robberies and that the Ricks family was mistaken in identifying him. Trial counsel's closing argument merely added that, if the jury found that Yancey was the perpetrator of the offense, they could find him guilty only of robbing Titus Ricks, and not of robbing Bankie. The record thus gives rise to no arguable basis for concluding that Yancey's rights were violated by defense counsel's actions, particularly since they apparently led to Yancey's acquittal on one of the counts.

Yancey also argues that he did not know who or where he was when he was arrested, and that he was taking different medications and could not "think straight" at the time of the trial. Since nothing in the record supports these allegations, or provides any arguable basis to conclude that Yancey's ability to understand the proceedings against him or to participate in his defense were impaired, these contentions provide no basis for relief.

Yancey also objects that he was provided with a preliminary hearing only on the charge that he robbed Bankie Ricks, and did not have a preliminary hearing on the charge that he committed an armed robbery of Titus Ricks. He also objects to the amendment of the information on the day of trial to include the charge of armed robbery of Titus Ricks.

Counsel correctly analyzed this issue in her no merit report when she pointed out that the inclusion of the new charge in an information was proper because the testimony of Bankie Ricks at the preliminary hearing established probable cause to believe that Yancey had committed two armed robberies by taking property from both Bankie and Titus. Inclusion of the additional armed robbery charge in the information was proper because a prosecutor may file any charge in an information as long as it is transactionally related to a count on which bindover was ordered. *See* ***State v. Akins,*** 198 Wis.2d 495, 499, 544 N.W.2d 392, 393 (1996).

The fact that the information was amended to include the second count on the day of trial does not render it invalid. Amendments to an information may be permitted with leave of the trial court and within a reasonable time after arraignment, provided the defendant's rights are not prejudiced. ***Whitaker v. State***, 83 Wis.2d 368, 374, 265 N.W.2d 575, 579 (1978). In this case, no basis exists to conclude that Yancey was prejudiced because the second charge arose out of the same incident and evidence as the first, Yancey's misidentification and alibi defense were the same for both charges, and the witnesses for both the State and the defense were the same for both charges. Moreover, at a scheduling conference held in the trial court on December 20, 1994, which was eight days after the preliminary hearing and more than two months before trial, defense counsel and the prosecutor discussed the fact that, before the case went to trial, an amended information including the count related to the robbery of Titus Ricks would be forthcoming. No arguable basis therefore exists to conclude that Yancey was surprised or prejudiced by the amendment.

Yancey also objects that he was never identified in a lineup, and that the photograph used in the pretrial identification photo array should not have been admitted into evidence at trial because it was a mug shot and implied to the jury that he had a criminal record. Both of these arguments are without arguable merit. The law does not require a lineup. *See* ***State v. Isham***, 70

Wis.2d 718, 724-25, 235 N.W.2d 506, 510 (1975). Moreover, the admission or exclusion of evidence lies within the discretion of the trial court and will not be disturbed absent an erroneous exercise of discretion. ***State v. Mordica***, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992).[1] Relevant evidence generally is admissible, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* ***id.*** at 604, 484 N.W.2d at 356.

Yancey's primary defense at trial was that the Ricks family misidentified him as the perpetrator of the robbery. The photo of Yancey used in the array was relevant to establish the credibility of members of the Ricks family, who told police immediately after the robbery that Yancey was the person who robbed them. Their credibility was enhanced by evidence that, after telling police that they knew the perpetrator was Victor Yancey, they were able to select his photograph from a photo array.

The trial court acted within the scope of its discretion in determining that any danger that the jury would infer from the photo that Yancey had a criminal record could be ameliorated by a limiting instruction. The trial court gave such an instruction here, instructing the jurors that there are many reasons why a photograph like this might exist, and that they must not draw any negative inference about the defendant based upon it. Because jurors are presumed to follow a proper admonitory instruction, no arguable basis exists to conclude that the trial court erroneously exercised its discretion by admitting the photograph into evidence. *See* ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987).

Yancey next argues that the police never obtained a search warrant to search his house, and that this proves that he was not the person who committed the crime. This argument provides no basis for relief because no physical evidence was ever offered or introduced into evidence at trial. In fact, at trial, testimony indicated that no physical evidence connecting Yancey to the crime was ever found. Since no evidence therefore existed which could

[1] The term "erroneous exercise of discretion" is synonymous with "abuse of discretion." ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis.2d 400, 423, 491 N.W.2d 484, 493 (1992).

have been the subject of a motion to suppress, and since evidence was placed before the jury indicating that the police were unable to find physical evidence connecting Yancey to the crime, Yancey's allegations concerning a search warrant provide no arguable basis for challenging his conviction.

Yancey also raises arguments concerning the sufficiency of the evidence to support his conviction. He argues that no physical evidence connected him to the crime, that inconsistencies existed in the testimony of members of the Ricks family, and that some of the Ricks testified that they saw Yancey in the summer of 1994, which he alleges was impossible because he was incarcerated. He also objects that all witnesses to the crime did not testify, and that the mother of his alibi witness was not called to testify.

Absent a showing that the additional witnesses referred to by Yancey would have added any material testimony to the record, their absence gives rise to no arguable basis for relief on appeal. In addition, in arguing that Yancey was misidentified, defense counsel pointed out to the jury that no physical evidence connected Yancey to the crime, that inconsistencies existed in the testimony of the prosecution's witnesses, and that their description of their assailant was inconsistent with evidence indicating that Yancey was limping because of an injured leg on October 19, 1994, the day the crime occurred. Defense counsel also presented evidence that Yancey was not in Milwaukee during the summer of 1994, when some of the Ricks claimed to have seen him. However, the weighing of the evidence and resolution of conflicts in the testimony was for the jury. ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). Because credible evidence supports the jury's verdict, it cannot be disturbed by this court. *See* ***id.*** at 507, 451 N.W.2d at 757-58.

Yancey's remaining argument is that the trial court asked him whether he wanted a mistrial when jurors saw him "locked up" during deliberations, but that his trial counsel preferred that he not take it. He also contends that his brother has delivered him a message indicating that Titus Ricks told him that he was not certain of his identification when he identified Yancey in court. He further represents that Titus Ricks "is willing to talk to somebody. He stated he saw the person who did it."

Neither of these issues provides a basis for relief. Nothing in the record indicates that the jurors observed Yancey restrained in any way, or what actions were taken in response to such an observation if it occurred. In addition, the allegations regarding Titus Ricks are second-hand, unclear and unsubstantiated. No arguable basis exists to order further proceedings or disturb the judgment of conviction based on such unsupported and vague allegations.

This court's independent review of the record discloses no other potential issues for review. The judgment of conviction therefore is affirmed and Attorney Ellen Henak is relieved of any further representation of Yancey on appeal.

By the Court.—Judgment affirmed.