COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2625-CRNM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY LACY,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. A jury found Johnny Lacy, Jr., guilty of the following crimes, all as an habitual offender, *see* WIS. STAT. § 939.62 (1997-98)[1]:

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

armed burglary (two counts), violations of WIS. STAT. § 943.10(2)(a); first-degree sexual assault while armed and concealing identity (two counts), violations of WIS. STAT. §§ 940.225(1)(b) and 939.641; armed robbery while concealing identity, a violation of WIS. STAT. §§ 943.32(2) and 939.641; armed robbery, a violation of 943.32(2); first-degree recklessly endangering safety, a violation of WIS. STAT. § 941.30(1); substantial battery while armed, a violation of WIS. STAT. §§ 940.19(2) and 939.63; burglary, a violation of WIS. STAT. § 943.10(1)(a); and theft, a violation of WIS. STAT. § 943.20(1)(a). The circuit court imposed consecutive maximum sentences on all counts for a total sentence of 360 years.

¶2 The state public defender appointed Attorney Donna L. Hintze to represent Lacy on appeal. Attorney Hintze has filed a no merit report with the court pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (1999-2000). Attorney Hintze provided Lacy with a copy of the report and Lacy has filed a lengthy response. The court has independently reviewed the entire record, and has reviewed the no merit report and Lacy's response. Based upon our review of these materials, the court concludes that there would be no arguable merit to any issue that could be raised on appeal.

¶3 We will summarize the basic facts underlying this complicated matter. On May 15, 1998, Chevonne P., nine-months pregnant, awoke to find a male intruder in the home she shared with her young daughter. She did not see the man because he first covered her eyes with his hands and then tied a scarf around her eyes. The man held a sharp object to her neck, which he said was a gun, and threatened to kill both Chevonne P. and her daughter. He then ordered her to "suck his dick." Later, he forced Chevonne P. to have penis-vagina intercourse, and then he ejaculated on her face. He wiped the ejaculate off Chevonne P.'s face with her T-shirt and then went to the kitchen and ate some food. He took money

and jewelry from Chevonne P. He left behind in the garbage a pair of latex gloves and an empty hot dog package. Chevonne P. told police that she thought her assailant had been a black male. After Lacy's arrest, police recovered hoop earrings from Lacy that Chevonne P. later identified as hers. A DNA expert testified at trial that the DNA pattern from the semen stains on Chevonne P.'s T-shirt "occurs roughly in about one in 5 billion people in the Hispanic population and one in 6 billion in the black and Caucasian populations." The expert testified that Lacy's DNA pattern was consistent with that found on the T-shirt.

¶4 The next night, Monica Emery stepped out of her shower to find a man in her kitchen. The man had a knife, but Emery tried to fight him off. He cut her on the neck and hit her on the chin, a blow that forced her head into the wall and dislocated her jaw. The man threatened her and her family and took the jewelry she was wearing. He told Emery that he was going to rape her and Emery feigned cooperation. When the man dropped his guard, she broke away and ran to her neighbor's home. The cut on Emery's neck required nine stitches, and Emery required extensive treatment for her jaw. She provided police with a description of her assailant, noting that he was a black male with a tattoo on his left bicep and a knot or wound on his stomach that she felt during the struggle. Police found latex gloves in Emery's kitchen, which were similar to those found in Chevonne P.'s kitchen. After Lacy's arrest, Emery viewed a lineup and identified Lacy as her assailant. Emery also identified Lacy at the jury trial. Police noted at the time of Lacy's arrest that he had a tattoo on his left bicep and a protruding hernia scar on his stomach.

¶5 The same night as the attack on Emery, Marcia Kryshak was awakened by a sound and saw a black male leaving her apartment through the door. She awakened her companion, Wayne Parsons, who dressed and went

outside. Kryshak looked out the apartment window and saw a man standing next to a green van holding what appeared to be her two purses. She testified that the man appeared to be the person she had seen leaving the apartment. Parsons saw the man drive off in the van, but was unable to follow because his car keys had been taken. Parsons subsequently discovered that his wallet was missing, and he testified that it contained about $250, a driver's license, and various identification cards. Kryshak testified that the man took her purses, which contained twenty-five to thirty dollars, and a watch. Parsons told the jury that the man he saw from a distance looked very much like Lacy. The police found Lacy's fingerprints on one of Kryshak's jewelry boxes.

¶6 Lacy was arrested in Madison the night following the Parsons/Kryshak incident.[2] That night, a woman was sexually assaulted in a manner similar to that described by Chevonne P. The assailant took jewelry and a cloth bracelet from the victim. Lacy was arrested when he was observed by police sleeping in an apartment that appeared to have been burglarized. The apartment was near the location of the earlier sexual assault. Lacy had in his possession a cloth bracelet that was identified by the Madison victim. Police found a palm print on a jewelry box owned by the Madison victim that matched Lacy's palm print. Based, in part, on the similarity of the various break-ins and the method of the sexual assaults, Milwaukee police sought and obtained a warrant to obtain a blood sample from Lacy. As noted, DNA analysis of various items left by Chevonne P.'s assailant were subsequently determined to be consistent with Lacy's DNA.

[2] We present information about the circumstances of Lacy's arrest for the sole purpose of analyzing issues raised by counsel and Lacy.

¶7 The no merit report first analyzes whether the circuit court should have suppressed the DNA evidence because the search warrant seeking a sample of Lacy's blood was unsupported by probable cause. In his response, Lacy suggests that the police officer who submitted the affidavit in support of the request for the warrant was lying, and the warrant should not have issued. This contention is without merit and counsel's analysis is correct. In analyzing the issuance of a search warrant, a reviewing court "must determine whether the commissioner who issued the warrant was 'apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" ***State v. Kerr***, 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994) (citation omitted). A reviewing court is to give great deference to the commissioner's decision, given that the commissioner's task "'is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit …, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" ***Id***. at 379 (citation omitted). As counsel notes, the similarity of the Milwaukee and Madison sexual assaults, the circumstances of the crimes against Emery, and the closeness in time for all the crimes, when coupled with recoverable DNA evidence from the first assault, all made it at least a "fair probability" that evidence of a crime would be recovered from Lacy's blood.

¶8 Next, the no merit report addresses whether there would be arguable merit to an appeal challenging the circuit court's decision to join all the charges arising from the Milwaukee crimes for trial. Lacy also addresses this issue, contending that he was unduly prejudiced by the circuit court's joinder decision.

We agree with counsel's analysis of this question. First, questions regarding joinder are addressed to the circuit court's discretion, and the circuit court must determine whether prejudice will result from joinder of the charges and weigh that potential prejudice against the interests of the public in trying the charges together. *See* ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). Usually, "when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant." ***Id***. Here, the crimes took place over a short period of time in a geographically-limited area and were evidenced by early-morning break-ins by a single black male to steal jewelry and, in two instances, to sexually assault solitary women. Under these circumstances, evidence of each of the crimes would have been admissible had there been separate trials.[3]

¶9 Next, the no merit report examines whether the circuit court erred when it denied Lacy's motion to suppress Emery's identification of him in the police lineup. Counsel examines whether Lacy was improperly denied counsel at the lineup. Lacy addresses this issue in his response, contending not only that the lineup was conducted improperly but also that it was impermissibly suggestive, although he offers no record support for the latter contention. Our independent review of the record satisfies us that counsel's analysis of this issue is correct. A suspect does not have the right to counsel at a lineup until after he or she is charged, but the State may not unreasonably delay filing charges just so it can hold

[3] As counsel notes, however, were we to conclude that joinder of the charges was erroneous, we would apply a harmless error analysis to that joinder. *See* ***State v. Leach***, 124 Wis. 2d 648, 672-674, 370 N.W.2d 240 (1985) (no prejudice from misjoinder when counts are so logically, factually and legally distinct that there is little danger of jury confusion; also misjoinder is harmless when evidence of guilt in each crime is overwhelming). In this matter, there was overwhelming proof of Lacy's guilt on all the charges and, in addition, each of the counts was sufficiently distinct to minimize the risk of prejudice from joinder of the charges.

a lineup outside the presence of counsel. *See* ***State v. Taylor***, 60 Wis. 2d 506, 522-24, 210 N.W.2d 873 (1973). The record demonstrates that at the time of the suppression hearing, there was no solid evidence to support criminal charges against Lacy for the Emery crimes. Although Lacy echoes in his response trial counsel's argument that the right to counsel should have attached because there was sufficient evidence for charges to issue on the Kryshak/Parsons crimes, appellate counsel correctly notes that the right to counsel is offense specific and attaches only to offenses that have been formally charged. *See* ***McNeil v. Wisconsin***, 501 U.S. 171, 175-76 (1991).

¶10 Both the no merit report and the response analyze whether the circuit court erroneously exercised discretion when it failed to *voir dire* a juror that defense counsel claimed was crying during the testimony of Chevonne P. and Emery. The juror indicated during jury selection that she had been the victim of a sexual assault, but was not removed from the panel for cause because she indicated that she could still serve as an impartial juror. Neither side used a peremptory challenge to strike the juror. Although Lacy contends that the fact the juror cried during some of the victim testimony indicates that she was biased against him, we agree with counsel's assessment that there would be no arguable merit to an appeal on this issue. Whether to discharge a juror for cause during trial is a question left to the circuit court's discretion. ***State v. Williams***, 220 Wis. 2d 458, 466, 538 N.W.2d 845 (Ct. App. 1998). The record demonstrates that the circuit court properly exercised discretion by considering the facts of record and reaching a reasonable decision under the circumstances. The circuit court noted that, even assuming the juror had been crying,[4] she had been forthcoming during

[4] The prosecutor stated that she had not seen the juror crying, and the circuit court indicated the same.

jury selection about her history, had indicated that she could be impartial, and neither side had exercised one of its peremptory strikes against her. It reasoned that jurors sometimes cry in difficult cases and the simple fact that this particular juror apparently cried during the victim testimony did not mean that she could not be impartial. This is a reasonable decision, which will not be reversed even if another judge might have reached a different decision. *See*, *e.g.*, ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶11 The no merit report next addresses whether the evidence presented at trial was sufficient to support Lacy's conviction on all counts. Lacy's response does not address this question directly. Our independent review of the record satisfies us that that counsel's assessment of this issue is fundamentally correct. Given the witness testimony and the scientific evidence, the State presented overwhelming evidence of Lacy's guilt on all counts. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (reviewing court must accept findings by trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force, that no reasonable trier of fact could have found guilt beyond a reasonable doubt).

¶12 On a related issue, however, Lacy contends that some of the charges against him were multiplicitous and that conviction and punishment on those charges is constitutionally impermissible. Specifically, Lacy appears to argue that the sexual assault of Chevonne P. was one continuous act. This argument is without merit. Under Wisconsin's statutory scheme, Lacy committed two separate assaults – the first, penis-to-mouth intercourse, and the second, penis-to-vagina intercourse. *See* ***State v. Wolske***, 143 Wis. 2d 175, 181-82, 420 N.W.2d 60 (Ct. App. 1988) (defendant may face multiple charges arising out of one criminal act if

each statutory crime requires proof of a fact for conviction that the others do not require).[5]

¶13 The no merit report also addresses whether the circuit court properly exercised discretion when it imposed maximum consecutive sentences on all the charges. Lacy does not take serious issue with counsel's analysis, and we agree that there would be no arguable merit to further appeal on this issue. The circuit court considered the appropriate sentencing factors, placing particular weight on the seriousness of the offenses, Lacy's lack of remorse, and the need for public protection, and imposed reasonable sentences given the extreme circumstances of this case. *See* ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987) (primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection).

[5] In the point heading to this argument, Lacy contends, without further development, that various counts relating to the other crimes are also multiplicitous. The court has nonetheless examined the record to determine if there would be any arguable merit to an appeal on this issue. We see none. Lacy appears to suggest, in regard to the Emery offenses, that the counts charging recklessly endangering safety and substantial battery while armed are multiplicitous, either to each other or to the armed burglary and armed robbery charges. Lacy is incorrect because the State was required to prove: for armed burglary—that Lacy entered Emery's residence, while armed, with intent to steal; for armed robbery with use of force—that Lacy took property directly from Emery through force or threat of force; for first-degree recklessly endangering safety—that Lacy, while aware of the risk, endangered the safety of another human being by means of criminally reckless conduct that created an unreasonable and substantial risk of death or great bodily harm and that showed utter disregard for human life; and, for substantial battery while armed, that Lacy, while armed with a knife and intending to cause bodily harm, caused substantial bodily harm to Emery.

Lacy's suggestion that the charges involving Kryshak and Parsons are multiplicitous is similarly without merit. In regard to the burglary charge, the State demonstrated that Lacy entered the Kryshak/Parsons residence without their consent and with intent to steal. On the theft charge, the State demonstrated that Lacy actually took moveable property away from both Kryshak and Parsons with the intent to permanently deprive them of their property.

¶14 Appellate counsel also examines the question of whether trial counsel was ineffective for failing to request substitution of the trial judge after the preliminary examination. Within the context of a sweeping claim of ineffective assistance by trial counsel, Lacy addresses the same question. Claims of ineffective assistance by trial counsel must first be raised in the circuit court, *see* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), and this court therefore normally declines to address such questions in the context of a no merit review if the issue was not raised postconviction in the circuit court.

¶15 Here, however, some basic analysis is necessary. In regard to the judicial substitution question, we agree with counsel that further postconviction or appellate proceedings would be meritless. The record demonstrates that counsel did inform the circuit court of Lacy's request for substitution, and the circuit court informed Lacy that the request was untimely. *See* WIS. STAT. § 971.20(4). Even if the circuit court had been wrong, however, our review of the record has satisfied us that the result of the trial was not rendered unreliable due to the failure of the substitution request. *See* ***State v. Damaske***, 212 Wis. 2d 169, 198-99, 567 N.W.2d 905 (Ct. App. 1997) (claim of ineffective counsel for failure to seek or obtain substitution of trial judge cannot succeed without some demonstration that trial judge was fundamentally unfair).

¶16 In his response, Lacy contends that trial counsel was an ineffective advocate. There is no indication in the record, however, that counsel failed to vigorously advocate for Lacy or was otherwise ineffective. Lacy's main claim appears to be that the DNA analysis was flawed and the expert's testimony incorrect because there are not six billion people in the world population and the probabilities cited by the expert were based on statistical samples, rather than on the entire world population. Lacy suggests that counsel was ineffective for failing

to challenge the expert testimony on these bases. Lacy's contention, however, bespeaks a fundamental misunderstanding of statistical probability and statistical sampling, both of which were explained to the jury at length on both direct *and* cross-examination. Lacy also appears to be suggesting that, by her testimony, the DNA expert impermissibly identified him as Chevonne P.'s assailant. He is incorrect: the expert testified that she could not exclude Lacy as the "donor" of the semen stains on the T-shirt. Lacy also claims that trial counsel was ineffective for failing to seek independent DNA testing, but again this claim appears to be based on a misunderstanding of statistical analysis. Even assuming, however, that counsel's performance was deficient for failing to request additional testing, Lacy has not pointed to anything to suggest that independent testing would have yielded a different result.[6] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (to establish ineffective assistance of counsel, defendant must establish that counsel's performance was deficient *and* the deficient performance prejudiced the defense).[7]

¶17 Finally, we turn to Lacy's claim that the circuit court lacked personal jurisdiction over him because there was an unreasonable delay between his warrantless arrest for the Madison break-in and the finding of probable cause. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991) (judicial determination of probable cause must be made within 48 hours of a warrantless arrest). Violation of that rule does not, however, deprive a circuit court of

[6] Lacy appears to suggest that testing of other evidence gathered at the crime scene would have excluded him. Even if true, Lacy could still not explain the match between his DNA and the DNA found in the semen stains on the T-shirt.

[7] Lacy also contends that trial counsel should have objected to comments the prosecutor made during opening statements, and the form of her questions at certain times. There would be no merit to a claim of ineffective counsel on the issues identified by Lacy. The prosecutor's comments were within the realm of propriety, and, while certain questions were leading, there is no possibility that Lacy was unduly prejudiced by trial counsel's failure to object.

personal jurisdiction over a defendant. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). Thus, even if there was a ***Riverside*** violation, it did not deprive the circuit court of jurisdiction and, therefore does not warrant reversal of the convictions and dismissal of the charges is not warranted. Similarly, to the extent that Lacy is claiming that trial counsel was ineffective for failing to raise this issue, there would be no merit to a challenge on this question: because violation of the ***Riverside*** rule would not have deprived the circuit court of jurisdiction over Lacy, trial counsel's failure to allege such a violation did not deprive Lacy of effective assistance of counsel because counsel's failure did not prejudice him. *See* ***Strickland***, 446 U.S. at 687.

¶18 Our independent review of the record reveals no other issues of potentially arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Hintze of further representation of Lacy in this matter.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).