

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 30, 1996**

**NOTICE**

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.

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

**No. 96-0642-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**EMMANUEL PAGE,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

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

PER CURIAM. Following a jury trial, Emmanuel Page was convicted of two counts of first-degree intentional homicide while armed, party to the crime, and one count of attempted armed robbery, party to the crime. The trial court sentenced Page to two consecutive life terms, with parole eligibility dates, respectively, of thirty and twenty years on the two homicide counts. The trial court then imposed and stayed a twenty-year term of imprisonment for the attempted armed robbery, consecutive to the second homicide count, and ordered Page placed on probation for ten years.

Page filed a postconviction motion for a new trial, alleging that the trial court erred when it failed to give lesser-included jury instructions of felony murder and first-degree reckless homicide as to counts one and two of the amended information. The trial court denied the motion.

On appeal, Page's counsel, Attorney Robert A. Kagen, has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Page filed a response to the no merit report and Attorney Kagen filed a reply.<sup>1</sup> Based upon our review of the no merit report, Page's response, Attorney Kagen's reply to the response, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised in this appeal. Therefore, we affirm the circuit court's judgment and order.

The no merit identifies three possible issues: (1) whether the trial court erred in refusing to give certain lesser-included jury instructions; (2) whether the evidence was sufficient to support Page's convictions; and (3) whether the trial court abused its discretion when sentencing Page. Page's response raises two additional potential issues: (1) whether the trial court properly instructed the jury on reasonable doubt; and (2) whether the trial court properly instructed the jury on intent.

#### 1. Propriety of denying lesser included offense instructions

The trial court conducted a jury instruction conference following the close of testimony in the case. At the hearing, the State requested instructions on lesser included offenses of felony murder and first-degree reckless homicide for each count of first-degree intentional homicide. Despite counsel's objections, Page argued against the trial court's giving any lesser included jury instructions. The trial court ultimately agreed with Page and denied the State's request.

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<sup>1</sup> The court concludes that Attorney Kagen has demonstrated adequate cause to grant his motion requesting permission to file a reply brief to Page's response.

Even if the trial court erred in denying the State's request for lesser included offense instructions, that error cannot form the basis of a successful appeal. That is because " a defendant cannot complain of the failure to instruct on an included offense unless he has asked for that instruction." *Green v. State*, 38 Wis.2d 361, 364, 156 N.W.2d 477, 479 (1968). Because Page did not preserve the alleged error for review by joining in the State's request, he was barred from raising the alleged error in his postconviction motion, and he is barred from raising it on appeal.

## 2. Sufficiency of the evidence

We will not reverse a conviction unless the evidence, viewed in the light most favorable to the State and jury's verdict, is so lacking in probative value and force that, as a matter of law, no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 503-504, 451 N.W.2d 752, 756 (1990).

The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.... The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding.

*Id.* (citation omitted).

Overwhelming evidence supports Page's convictions of the crimes charged. Page admitted in his confession to police that he and his companions, armed with handguns and an AK-47 rifle, went to an apartment they believed

was a drug house with the purpose of robbing its occupants. Shortly after their arrival, a struggle ensued between members of Page's group and certain occupants of the drug house. Page opened fire with his .38 caliber handgun. More gun fire erupted and two men were shot. One of the residents of the drug house, John Guirau, testified at trial. He described the botched robbery, the chaos during the gunfire and the subsequent deaths of his roommate Daniel Valentin and their acquaintance, Felix Rodriguez. Guirau identified Page as the assailant who had put a gun to his head during the altercation. We determine that this evidence, viewed in the light most favorable to the jury's verdict, is of sufficient probative value and force for a reasonable jury to find Page guilty as a party to the crime of two counts of first degree intentional homicide and attempted robbery, while armed.

### 3. Adequacy of reasonable doubt and intent jury instructions

Page claims that the trial court failed to instruct the jury on either reasonable doubt or intent in its final charge to the jury. The record belies these claims. The trial court read WIS J I—CRIMINAL 140, "Burden of Proof and Presumption of Innocence," to the jury. That instruction addresses the reasonable doubt. The trial court's instructions to the jury on intent were embodied in additional instructions it gave, including WIS J I—CRIMINAL 1010 on first degree intentional homicide, WIS J I—CRIMINAL 580 on attempt, WIS J I—CRIMINAL 1480 on armed robbery, and WIS J I—CRIMINAL 400 on parties to crime. We conclude that the record does not support Page's allegation on this matter.

#### 4. Sentencing

It is a well-settled that the trial court exercises discretion in sentencing, and on appeal, review is limited to determining if discretion was erroneously exercised. *State v. Larsen*, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors to be considered by the trial court are the gravity of the offense, the character and rehabilitative needs of the offender, and the need to protect the public. *State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). The court must also consider the defendant's criminal record and his attitude, including whether he shows remorse. *Id.* An erroneous exercise of discretion occurs if the trial court fails to state on the record the factors influencing the sentence or if too much weight is given to one factor in the face of contravening factors. *Larsen*, 141 Wis.2d at 428, 415 N.W.2d at 542. The weight to be given to each of the factors, however, is for the trial court to determine. *Id.*

Appellate review is tempered by a strong policy against interfering with the sentencing discretion of the trial court. *Id.* at 426, 415 N.W.2d at 541. The trial court is presumed to have acted reasonably, and the defendant bears the burden of showing from the record that the sentence was unreasonable. *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987).

Before imposing sentence in this case, the trial court reviewed Page's criminal history and prior convictions. The trial court noted that Page seemed to be "drifting through life," as he exhibited difficulty following the law, an inability to be productive, and the willingness to associate with criminals bent on violating the law. The trial court considered the gravity of the present crimes and Page's lack of appreciation of his role in the killings that occurred.

This record demonstrates that the trial court considered Page's character, the gravity of these offenses and the obvious need to protect the public from persons willing to engage in the conduct underlying these convictions. Accordingly, we conclude that the trial court considered the relevant factors and properly exercised its discretion in imposing sentence.

Based on the record before us, we conclude that any further appellate proceedings on behalf of Page would be frivolous and wholly without arguable merit within the meaning of *Anders* and RULE 809.32, STATS. Accordingly, we affirm the judgment of conviction. Attorney Kagen is relieved of any further representation of Page in this appeal.

*By the Court.* – Judgment and order affirmed.