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**DISTRICT II**

September 27, 2023

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Gabino Dominguez Gonzalez, #657944  
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You are hereby notified that the Court has entered the following opinion and order:

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2020AP284-CRNM      State of Wisconsin v. Gabino Dominguez Gonzalez  
(L.C. #2016CF2)

Before Gundrum, P.J., Grogan and Lazar, JJ.

**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).**

Gabino Dominguez Gonzalez appeals from a judgment convicting him of attempted first-degree intentional homicide and aggravated battery with intent to cause great bodily harm. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). After some delay,<sup>2</sup> Gonzalez filed a response.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

<sup>2</sup> The delay was caused, in part, by appellate counsel's failure to provide the appellant with requested transcripts. This failure led this court to vacate a prior opinion and order in the case.

Counsel then filed a supplemental no-merit report, and Gonzalez filed an additional response. After reviewing the record, counsel's reports, and Gonzalez's responses, we conclude there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Gonzalez was convicted following a jury trial of attempted first-degree intentional homicide and aggravated battery with intent to cause great bodily harm. He was accused of severely beating his adult son with a baseball bat after an argument between the two at a strip club. The circuit court imposed an aggregate sentence of fifteen years of initial confinement and fifteen years of extended supervision.

The no-merit report addresses whether the evidence at Gonzalez's jury trial was sufficient to support his convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Gonzalez of his crimes. That evidence included testimony about the significant and life-threatening injuries the victim received,<sup>3</sup> the relative lack of injuries observed on Gonzalez who was claiming self-defense,<sup>4</sup> and discrepancies in Gonzalez's account of what happened. It also included testimony from the victim's mother who recalled Gonzalez

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<sup>3</sup> The victim suffered numerous injuries, including multiple facial fractures, intracranial bleeding, and permanent vision loss in one eye.

<sup>4</sup> Gonzalez had minor injuries to his hand and a bruise on his shoulder.

telling her on the phone shortly before the beating that he was “gonna teach [the victim] to respect his father.” Upon arriving at the scene and finding Gonzalez standing near the laid out victim with a bat in his hand, she heard Gonzalez say, “Let’s see if you learn to respect your father.”

The no-merit report addresses several other issues, including (1) whether the jury was selected in a lawful manner; (2) whether Gonzalez knowingly and voluntarily waived his right not to testify; (3) whether the circuit court properly responded to the jury’s questions during deliberations; and (4) whether the circuit court properly exercised its discretion at sentencing. We agree with counsel that these issues do not have arguable merit for appeal, and we will not discuss them further.

As noted, Gonzalez filed multiple responses to the no-merit reports. In them, he claims to have newly discovered evidence concerning the testimony of the victim. He also accuses his trial counsel of ineffective assistance in several respects. Additionally, Gonzalez suggests that his sentence should be modified based upon new information from the victim. We consider each argument in turn.

#### *Newly Discovered Evidence*

Gonzalez’s claim of newly discovered evidence is based upon purported statements the victim made to other family members after the conviction.<sup>5</sup> According to Gonzalez, the victim admitted to Gonzalez’s brother and niece that he had not testified truthfully at trial and wanted to

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<sup>5</sup> Gonzalez does not include any witness statements in his responses. Rather, he simply recounts what others allegedly told him.

explain what actually happened. The victim further admitted, among other things, that (1) at the time of the incident he was using drugs and feeling angry; (2) he made threats against Gonzalez; (3) he had access to several knives and was prepared to use them; (4) he, in fact, attacked Gonzalez; and (5) he was told by police that charges against him in a drug case would be dropped if he testified against Gonzalez.

When a claim of newly discovered evidence involves a witness's recantation, the defendant must also demonstrate that the recantation is corroborated by other newly discovered evidence. *State v. McCallum*, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997). Corroboration is necessary because “[r]ecantations are inherently unreliable.” *Id.* Here, Gonzalez presents no new evidence to corroborate the victim's purported recantation, which, in itself, is hearsay. Accordingly, we are not persuaded that Gonzalez's first argument presents an issue of arguable merit.

#### *Ineffective Assistance of Counsel*

Gonzalez next accuses his trial counsel of ineffective assistance in several respects. Specifically, he complains that his counsel (1) failed to investigate/call a neighbor witness about a threat the victim allegedly made in the months before the incident,<sup>6</sup> (2) failed to introduce information regarding an alleged promise made by the State to induce the victim's testimony; and (3) failed to request jury instructions/verdicts on lesser included offenses.

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<sup>6</sup> According to Gonzalez, the victim told the neighbor witness that the next time Gonzalez got on the victim for being violent and using drugs, the victim would “shank him.” This is not new evidence, as Gonzalez admits that he was aware of it before the conviction.

This court normally declines to address claims of ineffective assistance of counsel in the context of a no-merit review if the issue was not raised postconviction in the circuit court. However, because appellate counsel asks to be discharged from the duty of representation, we must determine whether Gonzalez's complaints have sufficient merit to require counsel to file a postconviction motion and request a hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). We conclude that they do not.

With respect to the neighbor witness, appellate counsel indicates that she has been unable to contact him with the address that Gonzalez provided. Thus, there is no direct evidence of the witness's statement. Even if there were such evidence, we are not persuaded that the statement's omission prejudiced Gonzalez. To begin, the statement is hearsay, so its admission was not guaranteed. Furthermore, the statement is cumulative to other evidence that Gonzalez introduced regarding the victim's history of violence and access to a knife.<sup>7</sup>

With respect to the alleged promise made by the State to induce the victim's testimony, again, there is no direct evidence to support this. In any event, the victim's testimony was not the primary reason Gonzalez was convicted; rather, it was the physical evidence and statements he made to others. Indeed, the victim could not remember much about what happened, including how he ended up in the hospital. This is not surprising as the victim had been drinking heavily—

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<sup>7</sup> At trial, Gonzalez testified that the victim had attacked and threatened to kill him on the night in question. In addition, the victim's stepsister testified that the victim had punched her in the face years earlier and had been criminally prosecuted for that. The victim also testified about an incident in which he had punched an unrelated person. Finally, the jury heard from one of the responding officers that a knife was found in the victim's pocket. Notwithstanding this discovery, Gonzalez denied to police that a knife had been used in the incident.

attaining a blood alcohol level of .24 at the time he was treated—and was repeatedly struck in the head with a bat.

Finally, with respect to the jury instructions/verdicts, the jury did have lesser included offenses to consider in its deliberations. On the first count, it could have convicted Gonzalez of attempted second-degree intentional homicide. On the second count, it could have convicted him of aggravated battery with intent to cause bodily harm. Ultimately, it did neither. Gonzalez suggests that trial counsel could have introduced additional lesser included offenses such as first-degree recklessly endangering safety or second-degree recklessly-endangering safety. However, counsel did not believe such charges fit the defense's theory of the case. This was a reasonable trial strategy and one that Gonzalez agreed to on the record. As a result, he cannot challenge it now. *See State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987).

#### *Sentence Modification*

Gonzalez's last argument is that his sentence should be modified based upon new information from the victim. This argument fares no better than the rest. Again, there is no direct evidence to demonstrate that Gonzalez was sentenced on inaccurate information. Moreover, the circuit court was aware that the victim was seeking leniency for Gonzalez. The victim asked the court to sentence Gonzalez to five years of initial confinement, and the court explained why a longer sentence was necessary. On this record and the parties' filings, we perceive no basis for sentence modification.

*Conclusion*

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit reports, affirms the judgment of conviction, and discharges appellate counsel of the obligation to represent Gonzalez further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michelle L. Velasquez is relieved of further representation of Gabino Dominguez Gonzalez in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*