



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 11, 2024

To:

Hon. Josann M. Reynolds
Circuit Court Judge
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Matthew Moeser
Electronic Notice

Dennis Schertz
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Kem L. Davis 626370
Dodge Correctional Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

2021AP1028-CRNM State of Wisconsin v. Kem L. Davis (L. C. # 2019CF815)

Before Kloppenburg, P.J., Nashold, and Taylor, 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).

Attorney Dennis Schertz, appointed counsel for Kem Davis, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Davis was sent a copy of the report and filed a response, counsel filed a supplemental no-merit report, and counsel then filed a second supplemental no-merit report at this court's request. Upon consideration of the report, the

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

response, the supplemental reports, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.²

Davis was charged with first-degree intentional homicide as party to a crime for his alleged involvement, with a co-actor, in a shooting death. His case proceeded to a jury trial, and the jury found him guilty. The circuit court sentenced him to life imprisonment, with eligibility for extended supervision after thirty-three years.³

The no-merit report addresses whether Davis could challenge the sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. An appellate court will not overturn a conviction “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting all of the evidence, we conclude that the evidence was sufficient.

Based on our independent review of the record, we agree with counsel that there are also no other issues of arguable merit relating to the trial. This includes potential issues relating to the circuit court’s pretrial rulings, jury selection, opening statements, evidentiary rulings during trial, Davis’s decision to testify, closing arguments, and jury instructions.

² Although we agree with counsel that the issues raised in Davis’s response lack arguable merit, we do not adopt all of counsel’s reasoning as to those issues. We rely instead on the reasoning set forth in this opinion, some of which differs from counsel’s reasoning.

³ First-degree intentional homicide as party to a crime is a class A felony that carries a term of life imprisonment, with the possibility of extended supervision after a minimum confinement of twenty years. *See* WIS. STAT. §§ 940.01(1)(a), 939.05(1), 939.50(1)(a) and (3)(a), 973.01(3), 973.014(1g)(a).

In his response to the no-merit report, Davis lists ten issues, some of which include one or more potential sub-issues. We now discuss each of these ten issues along with each of Davis's most prominent arguments. We conclude that each lacks arguable merit.⁴

The first issue is whether the circuit court committed reversible error when a witness during direct examination by the State stated that he wanted to “plead the Fifth” during the course of his testimony, and the court informed the witness in the presence of the jury that invoking his Fifth Amendment right would imply that he was involved in the homicide. The witness then finished his testimony.⁵

Davis argues that the circuit court's statement to the witness implied that Davis was guilty because the court made the statement shortly after Davis's co-actor, Kendal Harris, had invoked his right against self-incrimination. This argument lacks arguable merit because Harris invoked the right outside the jury's presence. Harris never appeared before the jury, and the jury was not told a reason for his absence.

We have considered whether the circuit court's statement to the witness could provide some other arguable grounds for appellate relief, and we conclude that the answer is no. Although the statement was potentially problematic in that it could imply that Davis may be guilty had he exercised his constitutional right not to testify, here Davis in fact exercised his right to testify. As a result, nothing about the court's statement to the other witness implied that Davis

⁴ We have considered whether Davis's response raises any issues of arguable merit beyond those we discuss, and we have concluded that it does not.

⁵ There is no indication that the witness was involved in the homicide, and the prosecutor stated that he had no knowledge of any basis for the witness to invoke the witness's right against self-incrimination.

was guilty. Finally, there is nothing in the record or in Davis's response to suggest that the court's statement influenced Davis's decision to testify.

Davis also argues that trial counsel was ineffective by failing to object to the circuit court's statement. To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Here, for the reasons already discussed, Davis could not establish that counsel's failure to object to the circuit court's statement to the other witness resulted in prejudice. Accordingly, Davis could not show that counsel was ineffective on this ground.

The second issue that Davis's response raises is whether trial counsel was ineffective by failing to object to the admission of incriminating statements that Harris made to witnesses we will refer to as witness A and witness B. Witness A testified that Harris told him that Harris and Davis were together at the time of the murder, that the victim was shot five times in the head (which was true), and that Davis was supposed to do the shooting but Harris ended up doing it instead. Witness B testified that he heard Harris talking about getting the victim "out of the way," which the witness understood to mean "kill him" even though Harris never used the word "kill."

Davis makes two main arguments relating to Harris's statements to these witnesses. He first argues that the statements are inadmissible hearsay. They are not. Based on Harris's invocation of his right against self-incrimination, the circuit court properly declared Harris unavailable to testify, and his statements fall within the hearsay exception for statements against interest by a declarant who is unavailable. *See* WIS. STAT. §§ 908.04(1)(a), 908.045(4).

Davis's second argument is that Harris's statements were admitted in violation of his right to confrontation because the statements are "testimonial." Statements are generally considered "testimonial" when "the circumstances objectively indicate ... that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Ohio v. Clark*, 576 U.S. 237, 244 (2015) (quoted source omitted). Davis argues that Harris's statements are "testimonial" because the witnesses to whom he made them obtained the statements at the behest of police.

As to Harris's statements that came in through witness A, we see no objective basis in the record or in Davis's response to conclude that witness A obtained the statements at the request of police. Accordingly, we also see no objective basis for Davis to claim that trial counsel performed deficiently by failing to object to the statements on confrontation grounds.

As to Harris's statements that came in through witness B, the record includes evidence that witness B cooperated with the police and in at least one instance agreed to wear a recording device. We will assume, without deciding, that Harris's statements that came in through witness B are testimonial. Even so, we conclude that Davis could not show that counsel was ineffective by failing to object to those statements. The statements introduced through witness B were no more incriminating than the statements introduced through witness A, and there was other

powerful evidence connecting Davis to the homicide. This included surveillance video footage, cell phone records, and the presence of Davis's DNA on a cigarillo butt found by the victim's body. Davis could not plausibly argue that there is a reasonable probability of a different verdict without Harris's statements to witness B.

The third issue that Davis's response raises is whether trial counsel was ineffective by failing to investigate multiple State witnesses, including witness A and witness B. Davis asserts that the testimony from these witnesses was the sole evidence implicating him in the homicide. He argues that a proper investigation of the witnesses would have allowed counsel to attack their credibility with evidence that they received leniency or other consideration for their cooperation and testimony.

We conclude that this third issue lacks arguable merit for two main reasons. First, contrary to what Davis asserts, the testimony from these witnesses was not the sole evidence, or even the primary evidence, linking him to the homicide. Second, Davis provides no objective basis to conclude that further investigation by counsel would have revealed any useful information about the witnesses that was not already disclosed.

The fourth issue that Davis's response raises is whether trial counsel was ineffective by failing to object, on constitutional grounds, to the admission of statements that he made to others, in particular witness B. Davis argues that his statements were obtained in violation of his Sixth Amendment right to counsel because the witnesses obtained the statements at the request of police after he was arrested and this right to counsel had attached. We conclude that there is no arguable merit to this issue because Davis could not plausibly argue that there is a reasonable probability of a different verdict without his statements.

The fifth issue that Davis's response raises is whether there was plain error based on prosecutor misconduct during closing arguments. Davis argues that the prosecutor (1) improperly commented on whether witnesses were telling the truth or lying, (2) misstated the legal standard for party to a crime, (3) attested to facts outside the record, and (4) shifted the burden of proof during closing arguments. None of these arguments is borne out by the record, particularly when the prosecutor's closing arguments are considered as a whole instead of as selectively quoted in Davis's response.⁶

The sixth issue that Davis's response raises is whether trial counsel was ineffective by failing to pursue an alibi defense through Harris's mother and by failing to call her to testify at trial. According to Davis, Harris's mother would have testified that Davis, Harris, and Harris's girlfriend were together at Harris's mother's house at the time of the murder, estimated to be around 3:15 or 3:20 a.m. There are at least two reasons why this sixth issue lacks arguable merit.

First, there is no objective basis to conclude that Harris's mother would have testified as Davis claims. In the supplemental no-merit report, appellate counsel states that he repeatedly communicated with Harris's mother and that she informed him that she could not recall what time Davis, Harris, and Harris's girlfriend were at her house that morning or how long they stayed at her house.

⁶ Although the prosecutor made repeated assertions relating to whether certain witnesses were being truthful or lying, these assertions were reasonable commentary based on the evidence in this case. See *State v. Cameron*, 2016 WI App 54, ¶¶18-19, 370 Wis. 2d 661, 885 N.W.2d 611 (“[A] prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented.” (quoted source omitted)).

Second, the alibi that Davis claims Harris's mother could have provided contradicts other alibis raised at trial. A woman who Davis was dating claimed that she and Davis were at her house or a hotel at the time of the murder. Harris's girlfriend claimed that she and Harris and Davis were driving around or at the hotel at that time. An inconsistent alibi from Harris's mother was not likely to bolster Davis's defense.

The seventh issue that Davis's response raises relates to cell phone data. At trial, the State introduced cell phone data and expert testimony to establish that Davis's approximate location and direction of travel were consistent with his alleged presence at the murder scene at the time of the murder. However, the State did not claim that the cell phone data was evidence of his exact location at any given time, and his trial counsel sought to capitalize on the lack of such evidence.

In his response, Davis now asserts that the "Location" feature on his phone was activated at the time of the murder and that data from his phone could have been used to determine his exact location at any given time. He asserts that this would have established that he was not at the murder scene at the time of the murder. He argues that trial counsel was ineffective by failing to use his cell phone data and an expert to establish his exact location. We conclude that there is no arguable merit to this issue because there is no objective basis to conclude that establishing Davis's exact location was likely to have been exculpatory. There is instead every reason to believe that it was likely to have been inculpatory. Accordingly, it was objectively reasonable for counsel not to pursue that line of investigation.

The eighth issue that Davis's response raises is whether trial counsel was ineffective by failing to adequately challenge the admissibility of evidence that he and Harris and the victim

were all involved in robbing someone inside a gas station convenience store on the day before the murder. Davis argues that this robbery evidence was highly prejudicial “other acts” evidence that should not have been admitted. We conclude that this issue lacks arguable merit for the reasons that follow.

Under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the circuit court has discretion to admit “other acts” evidence after considering: (1) whether the evidence is offered for an acceptable purpose such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.* at 772-73.

Here, the circuit court properly applied this three-part test under *Sullivan* and reasonably exercised its discretion to allow the robbery evidence as admissible “other acts.” The evidence was offered for an acceptable purpose and was highly relevant because it linked Davis and Harris to the victim and, along with other evidence, provided a possible motive for the murder: a dispute over whether the victim would share in the robbery’s proceeds, alleged to be thousands of dollars. The court reasonably concluded that the probative value of the evidence outweighed the danger of unfair prejudice.

Davis asserts that there was no evidence that he was involved in the robbery, which appeared to have been committed by Harris based on surveillance video from the gas station convenience store. However, the video also implicated Davis. It showed Davis speaking with Harris at the gas station just before the robbery, entering the convenience store around the same

time that Harris entered, appearing to signal to someone else outside, and rapidly departing the gas station immediately after Harris committed the robbery and ran out of the store. There was also other evidence implicating Davis in the robbery.

The ninth and tenth issues that Davis's response raises are catch-all issues in which he alleges that there were other evidentiary errors or instances in which trial counsel was ineffective. Having independently reviewed the record and compared the evidence to Davis's allegations, we conclude that it would be frivolous for him to pursue any of these alleged claims.

We turn finally to sentencing. We agree with counsel that there is no arguable basis upon which Davis could challenge his sentence. The circuit court followed the applicable statutes in imposing life imprisonment and making Davis eligible for extended supervision after thirty-three years. *See* WIS. STAT. §§ 940.01(1)(a), 939.05(1), 939.50(1)(a) and (3)(a), 973.01(3), 973.014(1g)(a). The court addressed the required sentencing factors along with other relevant factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not rely on any improper factors. Under the circumstances, Davis could not reasonably argue that his sentence was unduly harsh or so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other arguable basis on which he might challenge his sentence.

Our review of the record discloses no other issues with arguable merit.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Kem Davis in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals