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DISTRICT I

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

2012AP2282-CRNM State of Wisconsin v. Earl Richard Armistead (L.C. #2010CF5921)

Before Curley, P.J., Fine and Kessler, JJ.

Earl Richard Armistead appeals a judgment of conviction, entered on a jury's verdict, on one count of possession of a firearm by a felon as a repeat offender. Appellate counsel, Derek H. Goodman, Esq., filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Armistead was advised of his right to file a response, but has not responded. Upon this court's independent review of the Record, as mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Police investigating an armed robbery were pursuing multiple suspects.[1] Descriptions of the suspects were broadcast over the police radio. Officers Michael Hansen and William Baker were parked in a nearby alley and noticed someone matching one of the suspects' descriptions run by their squad car. Hansen exited the car and began pursuing the suspect, later identified as Armistead.

Armistead climbed over a five- to six-foot tall wooden fence and into a yard. Hansen followed. As Hansen reached the top of the fence, he saw Armistead point a gun at him. Hansen let go of the fence to lower himself as a target, but lost control and fell head-first to the ground, lacerating his forehead on the bricks below. As Hansen got up, Armistead crossed the yard to a chain-link fence and climbed over. Hansen attempted to follow and saw Armistead aim at him again. Hansen fired his weapon three times but, because of blood obscuring his vision and a sprained dominant wrist, his shots missed Armistead.

Meanwhile, Baker had followed in the squad and parked it nearby. He observed most of Hansen and Armistead's interaction from outside the first fence. Baker then climbed the wooden fence to stop Hansen from trying to pursue Armistead and to convince him to wait for medical assistance. Baker never saw a gun in Armistead's hands but, once Hansen left with a sergeant to go to the medical unit, Baker discovered a gun near the chain-link fence. Baker secured the weapon until it could be collected for processing.

[1] The jury was not informed that the police were searching for armed robbery suspects.

Hansen identified Armistead through a photo array shown to him by a detective. Armistead was charged with one count of endangering safety with a dangerous weapon, contrary to WIS. STAT. § 941.20(1m)(b), and one count of possession of a firearm by a felon, both as a repeater.[2] The case was tried to a jury, which convicted Armistead of only the possession charge. The trial court sentenced him to five years' initial confinement and five years' extended supervision. Additional facts will be discussed below as necessary.

Counsel identifies three potential issues for appeal, each of which he concludes lacks arguable merit. We *sua sponte* identify a fourth issue, though that issue lacks arguable merit as well.

The first issue counsel identifies is whether sufficient evidence exists to support the jury's verdict. Specifically, counsel examines whether Armistead was sufficiently identified prior to trial and whether sufficient evidence was "presented at trial so as to identify him as the defendant."

When reviewing sufficiency of the evidence, we view the evidence in the light most favorable to the verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752, 756 (1990). A jury's verdict "'will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value

[2] WISCONSIN STAT. § 941.20(1m)(b) provides: "Whoever intentionally points a firearm at or towards a law enforcement officer … who is acting in an official capacity and who the person knows or has reason to know is a law enforcement officer … is guilty of a Class H felony."

that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376–377, 318 N.W.2d 378, 382 (1982) (citation and emphasis omitted). The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Poellinger***, 153 Wis. 2d at 503, 451 N.W.2d at 756. The jury is the sole arbiter of witness credibility and it alone is charged with weighing the evidence. ***Id.***, 153 Wis. 2d at 506, 451 N.W.2d at 757. Further, the jury has the power to accept one portion of a witness's testimony while rejecting another portion. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152, 153 (Ct. App. 1988).

Sufficient evidence supports the verdict. To prove possession of a firearm by a felon, the State had to convince the jury that Armistead possessed a firearm and that he was previously convicted of a felony. *See* WIS JI—CRIMINAL 1343. Hansen testified that he saw Armistead holding a gun and pointing it at him. Hansen identified it as a chrome or silver semi-automatic weapon. The gun Baker discovered near the chain-link fence was partially silver and semi-automatic. Thus, Hansen provided direct evidence of Armistead's possession, while Baker provided circumstantial evidence. Further, Armistead stipulated to his prior felony conviction; the trial court read the stipulation to the jury.

There was also sufficient evidence to support the identification. Hansen identified Armistead from a photo array after the pursuit. The photographs used in that array were presented at trial, with testimony about how the photo array was created and presented. Hansen and Baker both testified that Armistead was within an arm's reach of Hansen at some point during the pursuit. Multiple witnesses testified that although it was dark outside, the yard was

well-lit by the resident's private yard light. Further, both Hansen and Baker identified Armistead in court. There is no arguable merit to a challenge to the sufficiency of the evidence.[3]

The second issue counsel addresses is whether the trial court erroneously exercised its discretion when it refused to admit photographs of Armistead taken some time after his arrest. The photographs in question show Armistead wearing a neck brace and with various facial injuries. Though it was undisputed that Armistead had an altercation with officers before being taken into custody, no one could identify the source of the injuries in the photographs. Armistead did not testify, and the officer who had scuffled with him did not recall those injuries being present at arrest.

It is true, as counsel notes, that the trial court is tasked with acting as a gatekeeper to prevent the admission of unduly prejudicial evidence. *See* WIS. STAT. § 904.03; *see also* ***State v. Linton***, 2010 WI App 129, ¶26, 329 Wis. 2d 687, 706, 791 N.W.2d 222, 231. To that end, we defer to the trial court's exercise of discretion. *See* ***Linton***, 2010 WI App 129, ¶¶25–26, 329 Wis. 2d at 705–707, 791 N.W.2d at 231–232.

Prejudice, however, is not the appropriate framework for review in this case: here, the trial court concluded that the photographs were irrelevant, making them inadmissible regardless of their prejudicial impact. "Evidence which is not relevant is not admissible." WIS. STAT.

[3] There is also no arguable merit to a claim that the verdicts are inconsistent. One of the elements of the endangering-safety charge required Armistead to intentionally point his firearm at Hansen. There was testimony, including from Hansen, that could cause the jury to have reasonable doubt about that particular element while simultaneously accepting that Armistead was in possession of a gun.

§ 904.02. "[W]hether a particular piece of evidence is relevant is committed to the sound discretion of the [trial] court." ***Weborg v. Jenny***, 2012 WI 67, ¶64, 341 Wis. 2d 668, 696, 816 N.W.2d 191, 205. The trial court noted that without explanation for the injuries, the photographs had no relevance to the charges at hand. We agree, so there is no arguable merit to a challenge to the trial court's discretionary decision to exclude the photographs.

The final issue counsel discusses is whether Armistead's trial attorney was ineffective for failing to object to certain testimony "that the State elicited, from the police officers, that they initiated pursuit of the defendant because he matched the description for a suspect involved in another incident." There are two elements to an ineffective-assistance claim: first, the defendant must demonstrate that counsel's performance was deficient, and second, the defendant must demonstrate that the deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 674, 734 N.W.2d 115, 130.

The testimony was not quite as counsel characterizes it. Rather, the exchange between the State and Hansen is as follows:

> Q At some point did you receive information or were you sent to a location in the 2200 block of South 17th Street?
>
> A Yes, I was.
>
> ….
>
> Q And, in fact, were you sent to that location in regards to a pursuit or a foot pursuit that was going on of some individuals?
>
> A Yes, I was.
>
> Q And did you notice anyone matching the general description of the individual or individuals that were being pursued in that area?

A Yes, I did.

….

Q What specifically did you notice about that person that drew your attention, if you recall?

A I observed he was running eastbound in the direction that was broadcast through yards across the street wearing the same general description, the clothing description.

Armistead is never expressly identified as a "suspect"—though that may be inferred—nor did the police ever mention the crime of which Armistead was suspected. More to the point, there can be no claim of ineffectiveness for failing to object to the testimony because trial counsel had stipulated to this line of questioning before trial. As characterized by the trial court:

> The parties describe that this incident arose from the police investigating a[n] armed robbery dispatch, *that the defense is stipulating that the State can lead its witnesses without advising and bringing out that they were investigating an armed robbery*, and that the defendant may or may not have been a suspect in that charge to bring out why it is that the officers engaged in the attempt to stop the defendant resulting in his fleeing and climbing over the fence, et cetera. Correct?
>
> [DEFENSE COUNSEL]: That's correct.

(Emphasis added.) In other words, counsel made a reasonable, strategic choice to avoid the admission of more damning evidence against Armistead, and we are highly deferential to an attorney's strategic decisions. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 289, 805 N.W.2d 364, 374. There is no arguable merit to an ineffective-assistance claim.

The final issue we address, and the one we raise of our own accord, is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment

and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557, 678 N.W.2d at 207. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is left to the trial court's discretion. *See* ***Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606, 712 N.W.2d at 82.

The trial court noted that everything about the events that night was aggravated. Armistead was fleeing, went into a private yard, and had a gun even if he did not point it at Hansen. The trial court stated that Armistead was lucky that Hansen had not been a better shot—if Hansen had been uninjured, the trial court was convinced Armistead would be dead. Armistead's behavior endangered not only himself but others who may have been nearby.

The trial court acknowledged the primary objectives and noted that it was important to send a message to Armistead that his actions had consequences, because he was clearly not learning that lesson. He had a substantial juvenile record and had been given deferred prosecution agreements and supervision terms to no avail. He had spent time at the Ethan Allen school with no improvement in his behavior. In addition, he had been on probation for his adult conviction when he committed the present offense. The trial court thus concluded that Armistead had rehabilitative needs that could not be fulfilled in the community, and that probation would unduly depreciate the seriousness of the offense.

The maximum possible sentence Armistead could have received was fourteen years' imprisonment. The sentence totaling ten years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456 and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

The trial court also ordered Armistead to "submit the mandatory DNA sample and surcharge, unless they've been submitted and paid for" previously. In this case, only the sample was mandatory. *See* WIS. STAT. § 973.047(1f). Under WIS. STAT. § 973.046(1g), the trial court *may* order a defendant convicted of a felony to pay a DNA surcharge. We held in ***State v. Cherry***, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 207, 752 N.W.2d 393, 395, that this statute "clearly contemplates the exercise of discretion by the trial court." ***Cherry*** also suggested possible factors the trial court could consider in the exercise of its discretion. ***Id.***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208–209, 752 N.W.2d at 396. Here, the trial court's extremely short explanation does not appear to reflect an appropriate exercise of discretion.

Nevertheless, we may search the record for reasons to support a trial court's discretionary decision. ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498, 503 (1983). We conclude the imposition of the surcharge is supported by the Record. When the gun in this case was recovered, an evidence technician "swabbed" it for possible DNA evidence, and a reference swab was collected from Armistead. A crime lab analyst then processed the swabs, though there was insufficient material on the gun from which a profile could be developed for comparison against Armistead's standard. "[W]hether the case involved any evidence that needed DNA analysis so as to have caused DNA cost" is one of the factors ***Cherry*** specifically suggested. ***Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d at 208, 752 N.W.2d at 396. Thus, because DNA

testing was attempted on evidence in this case, thereby generating a cost, the trial court could have properly imposed the surcharge as a means of recompensing that cost. There would be no arguable merit to a challenge to the imposition of the surcharge.[4]

Our independent review of the Record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Derek H. Goodman, Esq., is relieved of further representation of Armistead in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] According to the certified copy of the judgment of conviction from Armistead's prior felony case, which had been submitted to establish his repeater status, Armistead was previously ordered to pay the DNA surcharge. Thus, if the surcharge was paid in that case, and the Department of Corrections is consequently not collecting it in this case, then imposition of the surcharge here, even if it were an improper exercise of discretion, nevertheless constitutes harmless error.