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DISTRICT I

May 7, 2014

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

2013AP801-CRNM State of Wisconsin v. David A. Helton (L.C. #2011CF2023)

Before Fine, Kessler and Brennan, JJ.

David A. Helton appeals a judgment convicting him of second-degree reckless homicide with use of a dangerous weapon. He also appeals an order denying his postconviction motion. Mark A. Schoenfeldt, Esq., filed a no-merit report seeking to withdraw as appointed appellate counsel. *See* WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738, 744 (1967). Helton filed a response. Schoenfeldt then filed a supplemental no-merit report addressing the issues Helton raised in the response. After considering the no-merit reports and the response, and after conducting an independent review of the Record, we agree with counsel's assessment

that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction and order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there is sufficient evidence to support the conviction. When reviewing the sufficiency of the evidence, we look at whether "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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 1018, 669 N.W.2d 762, 769 (quotation marks and citation omitted). We will not overturn the verdict "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." ***Ibid.*** (quotation marks and citation omitted). "The jury is the ultimate arbiter of a witness's credibility." *See* ***State v. Norman***, 2003 WI 72, ¶68, 262 Wis. 2d 506, 538, 664 N.W.2d 97, 112.

To convict Helton of second-degree reckless homicide, the State was required to show: (1) that Helton caused the death of the victim, sixteen-year-old Shelton Smith; and (2) that Helton caused the death by criminally reckless conduct. "Criminally reckless conduct" means "the conduct created a risk of death or great bodily harm to another person" and "the risk of death or great bodily harm was unreasonable and substantial" and "the defendant or a person with whom the defendant acted as a party to a crime was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm." WIS JI—CRIMINAL 1060.

At trial, Helton testified that he lived in a trailer at the scrap yard where Smith was killed. He heard noise by his trailer door sometime after 9 p.m. and thought someone was trying to break into his trailer. He retrieved his shotgun, grabbed some shells, loaded the gun and went

outside. After thoroughly checking the area around his trailer, he decided that an animal must have made the noise. Helton testified that he stopped to catch his breath, explaining that his emphysema often causes him shortness of breath and that he also experiences occasional chest pain. He testified that he then heard something to his left and saw someone near a warehouse door. At that point, he stumbled, causing the gun to fire. The shotgun was facing forward and slightly down as it fired, and the safety was not engaged. He testified that he went back to his trailer, grabbed both boxes of shells and the loose slugs in his drawer, and walked to the end of the lot, where he threw them over the fence. He testified he did this because he was disgusted with himself for firing the gun. He also testified that he thought someone had been shot, but he was having a hard time accepting it. Helton was taken to the hospital after the police arrived for chest pains and shortness of breath.

On cross-examination, Helton said that he did not feel threatened and was not trying to protect himself when the gun fired. He acknowledged that he had not engaged the safety even though he had decided there was no threat and his finger was on the trigger when he stumbled. Helton testified that he has taken his shotgun out before and fired it when people were stealing items from the scrap yard. Helton acknowledged that he lied to the police when they arrived, telling them that he had been inside his trailer when he heard the shot, and that he then went outside to see what was happening. Helton testified that he later admitted to the police when they interviewed him at the hospital that his gun had gone off when he stumbled and fell. He also told them that he ran to the edge of the scrap yard and tossed the gun over the fence immediately after the gun fired, but omitted that he had first gone back to his trailer to gather all of his ammunition, which he also tossed over the fence.

Ahkeem James testified that he went with Smith, who was his cousin, his brother Anthony James, and Wayne McGee, an uncle, to the scrap yard to steal scrap metal. He testified that he did not know that there was a trailer on the property and did not know that anyone was living there. He testified that he heard a shot and saw Smith fall. He testified that he yelled Smith's name and then jumped the fence to tell people in the tavern parking lot adjacent to the scrap yard that his friend had been shot.

Anthony James testified that he went to the scrap yard with his brother, Smith and McGee on the evening Smith was killed. They formed an assembly line and were passing scrap metal up and over the fence. He heard a gunshot and saw Smith fall. He testified that he ran to the bar next door to the scrap yard and told people to call the police and an ambulance. He then ran to his home, got his mother, and they went back to the scrap yard.

McGee, who was the only adult in the group, testified that he drove with Smith and the two James brothers to the scrap yard to steal scrap metal. He heard a shot, but could not see what had happened. He climbed over the fence and went to the tavern next to the scrap yard, where he met Anthony and Ahkeem James. McGee testified that he asked them where Smith was, and they told him that Smith had been shot. McGee testified that he then went to tell Smith's mother, who lived near the scrap yard.

Dr. Agnieszka Rogalska testified that she performed an autopsy on Smith for the Milwaukee Medical Examiner's Office. She said that Smith died from a gunshot wound to the neck.

The testimony at trial support the jury's conclusion that Helton caused Smith's death by actions that created an unreasonable risk of death or serious bodily harm. Helton killed Smith by

shooting him through the neck with his shotgun. Helton was carrying the loaded gun with his finger on the trigger when he testified that he stumbled, causing the gun to fire. Helton testified that he did not have the safety engaged, even though he had determined that there was no threat to him. Given these circumstances, there would be no arguable merit to a claim that there was insufficient evidence to support the verdict.

The no-merit report next addresses whether there would be arguable merit to a claim that the sentence imposed on Helton was excessive. The circuit court sentenced Helton to sixteen years of imprisonment, with twelve years of initial confinement and four years of extended supervision. In its very lengthy sentencing remarks, the circuit court explained that this case was a tragedy. Smith was a young person with a promising future who was killed because Helton chose to react to a sound he heard outside his trailer by bringing a loaded weapon out to investigate. The circuit court considered the seriousness of the crime, the need to protect the public and Helton's past conduct and character. The circuit court explained that while this was a very serious crime and no amount of punishment could compensate for Smith's life, it was unlikely that Helton would be a threat to the public in the future because Helton generally stayed to himself and did not cause trouble. The circuit court explained its application of the various sentencing considerations in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39–46, 270 Wis. 2d 535, 556–560, 678 N.W.2d 197, 207–208. There would be no arguable merit to a challenge to the sentence on appeal.

The no-merit reports and Helton's response address whether there is arguable merit to a claim that Helton's trial lawyers ineffectively represented him. Together, Helton's appellate lawyer and Helton in his response discuss over a half dozen potential grounds on which a claim of ineffectiveness could possibly be brought. To establish a claim of ineffective assistance of

counsel, a defendant must show both that his lawyer's performance was deficient and that his lawyer's deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In deciding whether a lawyer has performed deficiently, we look at "whether counsel's assistance was reasonable considering all the circumstances." ***Id.*** at 688. To determine whether a lawyer's deficient performance prejudiced the defense, we look at whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

The first potential basis for a claim of ineffective assistance of counsel is Helton's assertion that his trial lawyers should have argued that he acted in self-defense. The self-defense statute provides that a person may use deadly force only when the person reasonably believes that the use of deadly force is necessary to prevent imminent death or great bodily harm. *See* WIS. STAT. § 939.48(1). Based on Helton's own testimony, he was not facing a threat of death or great bodily harm when he killed Smith. Therefore, there would be no arguable merit to a claim that Helton's lawyers should have raised a claim of self-defense.

The second potential basis for a claim of ineffective assistance of counsel is Helton's assertion that his trial lawyers should have argued that he was acting in defense of his property under WIS. STAT. § 939.49(1). That statute provides:

> **Defense of property and protection against retail theft.** (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person's property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.

Helton testified that his gun discharged by accident; therefore, he cannot assert as a defense a claim that he was *intentionally* using force to protect his property. Moreover, the statute does not allow the use of deadly force. There would be no arguable merit to a claim that Helton's lawyers ineffectively represented him by failing to raise a defense based on § 939.49.

The third potential basis for a claim of ineffective assistance of counsel is Helton's assertion that his trial lawyers should have raised a claim under the newly enacted WIS. STAT. § 895.62. That statute provides immunity for *civil* liability for use of force in the protection of one's home. It does not provide immunity for criminal actions, like the charges against Helton for Smith's death. Moreover, the statute was not effective until December 21, 2011, seven months after Smith was killed. There would be no arguable merit to a claim that Helton's lawyers ineffectively represented him by failing to raise this issue.

The fourth potential basis for a claim of ineffective assistance of counsel is Helton's assertion that his trial lawyers should have argued that the common law doctrine of "homicide by misadventure" should apply to this case. We agree with the no-merit report's analysis of this issue and its conclusion that the doctrine does not apply to this case.

> Nor does the notion of homicide by misadventure apply in the defendant's case. As the Wisconsin Supreme Court noted in ***State v. Bond***, 41 Wis. 2d 219, 163 N.W.2d 601 (1969):
>
> > Misadventure is described as an excusable homicide such as when a person unfortunately kills another in doing a lawful act without any intent to kill and without criminal negligence. [Citations omitted.] The facts in this case, taken as they must be in the light most favorable to the verdict, show that the defendant negligently loaded a slug into the shotgun and went looking for an intruder, and that he deliberately failed to place the safety on the gun.
>
> There would be no arguable merit to a claim that Helton's lawyer ineffectively represented him by failing to raise this issue on appeal.

The fifth potential basis for a claim of ineffective assistance of counsel is Helton's assertion that his trial lawyers should have presented his medical records to show he suffered a minor cardiac event at the time of the shooting, causing him to stumble, and thus he did not act intentionally when he shot Smith. According to the trial transcripts, Helton's trial lawyers decided not to present his medical records at trial. We will not second-guess reasoned strategic decisions made by counsel. *See* ***Strickland***, 466 U.S. at 689. Moreover, Helton's argument that his lawyers were ineffective for failing to introduce his medical records would not have arguable merit because Helton was not charged with *intentional* homicide. The prosecutor never argued that Helton intentionally shot his weapon at Smith. We agree with the supplemental no-merit report's analysis on this point:

> What [Helton] fails to apprehend is that he was never charged with any species of intentional homicide. He was charged with one count of first degree *reckless* homicide while armed. Therefore, medical records that would have supported the defendant's claim that he did not act intentionally would have been, for all practical purposes, useless because there was no claim made at trial that he had acted intentionally. Moreover, no one disputed that the defendant was taken to the hospital after his arrest. The sole issue for trial was whether [Helton's] actions prior to and at the time that he lost control of his weapon and fired the shot that killed Shelton Smith met the degree of recklessness required by the Statute. The medical records had, and could have had, no bearing on that.

There would be no arguable merit to a claim of ineffective assistance of counsel premised on the decision of Helton's lawyers not to introduce medical records documenting his condition at trial.

The sixth potential basis for a claim of ineffective assistance of counsel is Helton's assertion that his trial lawyers failed to undertake the following actions: (1) offering a ballistics report; (2) creating an exhibit showing one of his lawyers standing on top of the air conditioner that Smith was standing on at the time he was shot; (3) creating an exhibit that more accurately recreated the scene of the shooting; and (4) challenging the fact that there was a discrepancy

between a police report and the trial testimony about the color of the shotgun rounds that were recovered. The actions Helton contends his lawyers should have undertaken would have either been cumulative of other evidence adduced at trial or not relevant to the central issue in this case, which was whether Helton acted recklessly or negligently in causing Smith's death. Therefore, there would be no arguable merit to a claim of ineffective assistance of trial counsel premised on these omissions by Helton's lawyers.

The no-merit report next addresses whether the circuit court misused its sentencing discretion because it incorrectly believed that the maximum sentence for the crime was sixty-five years of imprisonment, rather than thirty years of imprisonment. A defendant is entitled to resentencing if he shows that the circuit court had inaccurate information at sentencing and the circuit court actually relied on the information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7. During sentencing, the circuit court stated:

> The Smith family hasn't put a number on Mr. Smith's life. I appreciate that as well. Typically when a family comes to my courtroom in a homicide case, they ask for the maximum sentence every time, and I respect them if they didn't do that. I don't think that's a weakness, I don't think that's a sign that they were ashamed of Mr. Smith being caught in the middle of a theft. I think they are still struggling from being in this terrible tragedy. And maybe that's a sign of that struggle to find meaning, they can't even decide what the price is.
>
> I will say that this is a case where I could impose up to 65 years in prison. And some people might say he's a kid, his whole life is in front of him, isn't that worth at least 65 years, and I think the answer to that is, is that we don't put the same number of years on every defendant as if to say that every life was worth the same. That's not our judgment on the fact that different peoples lives are not worth the same. It's the fact that that judgment about how long a person should be imprisoned involved more than just an estimate of how much we love the person who we now miss. If all of the sentencings came down to how much do we miss the person that is dead, then in this case it would obviously be 65 years. I mean we miss Mr. Smith as much as we can. As we said, he had his whole life in front of him.

After the circuit court finished its remarks, the prosecutor, David Stingl, and the court had the following exchange:

> THE COURT: Mr. Stingl, is there anything else that we need to do?
>
> ATTORNEY STINGL: Judge, just to clarify, the reference to the 65 year sentence was to the – if it had been resolved as a first degree, the original charge.
>
> THE COURT: Yes, let's make that clear. Thank you.
>
> ATTORNEY STINGL: Thank you.
>
> THE COURT: Yes. The Complaint which is the document issued against Mr. Helton stated that charge of first degree intentional homicide?
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> ATTORNEY STINGL: First degree reckless homicide.
>
> THE COURT: First degree reckless while armed.
>
> ATTORNEY STINGL: While armed which is a 60 year felony with a 5 year penalty enhancer. The second degree reckless homicide with the penalty enhancer is a Class D which was 25 plus 5 or –
>
> THE COURT: Plus five.
>
> ATTORNEY STINGL: –20 and 10.
>
> THE COURT: Yes. I was trying to make the point about how – and I do want to make this clear for the Smith family. The fact that Mr. Helton doesn't serve as long in prison as somebody else who commits homicide is no slight against Mr. Smith. Mr. Smith's life is a huge loss, and every victim's life lost in this community through reckless use of force like this is a huge loss, but it's not the only factor to consider. That's a good clarification to make, Mr. Stingl. Anything else?

Helton filed a postconviction motion for relief on the basis of this mistake, which the circuit court denied. In its oral decision, the circuit court agreed that it incorrectly stated the maximum potential sentence, but noted that the prosecutor pointed out the error before the end of the sentencing hearing and, more importantly, explained that it had not relied on the information in deciding on the length of Helton's sentence:

> Mr. Helton argues that my mistake about the maximum could not have been immaterial because the length of his sentence was derived [as a percentage of] the maximum….
>
> But this claim finds no support in the record. In explaining my sentence calculus I made no mention of deriving the sentence from the maximum or of applying any kind of percentage or proportion. While it's conceivable that his sentence could have been determined that way, that wasn't the way I went. I laid out my thought process for Mr. Helton step by step, and what should have been clear to him was that the length of his sentence was driven by the length of sentences imposed in comparable cases, not the maximum.
>
> …..
>
> What the record also establishes is that my remark regarding the maximum sentence was not offered for Mr. Helton's sake, it was offered to Mr. Smith's family, so that they would understand that the length of Mr. Helton's sentence was not intended as the measure of their loss ("If all of the sentencings came down to how much do we miss the person that is dead, then in this case it would obviously be the maximum." Tr. 36) Mr. Helton is right to point out that I could have made my point "using the correct statutory maximums," … but the fact that I did not do so is immaterial to the length of his sentence because I wasn't offering that point to explain the length of his sentence [footnote and brackets omitted].

The record establishes that the trial court admitted the mistake as to the maximum possible sentence in the decision denying postconviction relief. The court explained how it came to make this mistake, but also noted that the mistake was not integral to its decision as to the length of the appropriate sentence in Helton's case. Helton is not entitled to relief because he cannot show that the circuit court relied on the inaccurate information in framing its sentence. There would be no arguable merit to an appellate argument that Helton is entitled to resentencing based on the circuit court's incorrect statement that the maximum sentence was sixty-five years of imprisonment.

Helton argues in his response that Smith was engaged in criminal activity at the time of his death, stealing from the scrap yard, and therefore he is solely responsible for everything that

happened to him. We agree with the supplemental no-merit report's analysis of this issue: "[Helton's] argument in this regard is not only unsupported by any citation to case or statute but would also negate the fact that [WIS. STAT.] § 939.49(1) expressly forbids the use of deadly force in the protection of property." There would be no arguable merit to raising this issue on appeal.

Our independent review of the Record reveals no other potential issues for appellate review. Therefore, we affirm the judgment of conviction and the order denying postconviction relief. We also relieve Mark A. Schoenfeldt, Esq., of further representation of Helton in this matter.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Mark A. Schoenfeldt, Esq., is relieved of any further representation of Helton in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals