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

2013AP446-CRNM State of Wisconsin v. Dwayne Philip Thomas (L.C. #2010CF2467)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Dwayne Philip Thomas appeals from a judgment of conviction entered after a jury found him guilty of first-degree recklessly endangering safety by use of a dangerous weapon and of possessing a firearm as a convicted felon. Thomas's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Thomas received a copy of the report, was advised of his right to file a response, and has elected

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

not to do so. Upon consideration of the no-merit report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

On May 16, 2010, police received a 911 call reporting that shots had been fired at 2900 W. Highland Boulevard. According to the complaint, a male witness reported that an individual began firing shots in his direction and that though the suspect appeared to be firing at another person, "the bullets passed closely by him." A female witness told police that she saw an individual fire a gun and leave in a car. She provided the car's license plate number to police. Minutes later, officers located the car. The driver, Shelvin Willis, immediately told police that Thomas was the shooter, he had just dropped Thomas off at a duplex on West McKinley Boulevard, and that he thought Thomas would likely hide the gun in the basement. Officers located Thomas in the upper flat of the McKinley duplex and he was arrested.[2] Police discovered a gun magazine in a garbage can near Thomas, and a .22 caliber Ruger semi-automatic pistol in the rafters of the basement shared by both duplex units.

Both Willis and Thomas were charged as parties to the crime of first-degree recklessly endangering safety while armed with a dangerous weapon. In addition, Thomas was charged with possessing a firearm as a felon, and Willis was charged with possession of cocaine.[3] As to

[2] The evidence at trial was that Thomas's aunt lived in the McKinley duplex's upper flat and Willis lived in the lower flat.

[3] During the traffic stop executed in connection with this offense, police discovered ten bags of crack cocaine in Willis's trunk.

both counts, Thomas was charged as a repeater. The trial court ordered a competency evaluation, and after the evaluator filed a report determining that Thomas was competent, Thomas informed the court he would not challenge the competency finding.[4]

Early on, it became clear that the State's strategy was to proceed with the two charges against Thomas and to strike an agreement with Willis requiring him to testify for the State at Thomas's trial.[5] Willis testified that he received a call from Thomas asking for a ride to his aunt's house and that Willis drove to West Highland Boulevard to retrieve Thomas.[6] Willis testified that upon his arrival, a young male and a young female jumped into the back seat. Thomas opened the front passenger door and pulled out a gun from his waist. Willis testified that Thomas fired about five shots, got into the car, and told Willis to drive away. According to Willis, Thomas told him he was trying to shoot a "dude" who had been calling his girlfriend, the young female who entered the car. Willis drove Thomas and the young male and female to the

[4] The evaluator noted that Thomas had twice challenged competency during the pendency of a prior felony case. In the prior and present evaluations, examiners concluded that Thomas had "sub-average intellectual and substandard academic functioning as well as a history of psychiatric treatment for Attention Deficit Hyperactivity Disorder and a mood disorder." The evaluator reconfirmed that Thomas had "Borderline Intellectual Functioning" and advised that given his history of depression and emotional disturbance, court officers "should remain sensitive to any apparent decline in his mental status as that change may also reflect a deterioration of his competency."

[5] At trial, the undisputed evidence was that in exchange for his testimony against Thomas and upon Willis's plea to one count of disorderly conduct, the State would drop the reckless endangerment and cocaine possession charges against Willis. The written cooperation agreement between Willis and the State was admitted into evidence at Thomas's trial.

[6] Cell phone records confirmed that Thomas called Willis just before the shooting incident.

duplex and told Thomas he was going back to Highland Boulevard and that "if the police pull me over before I get there, I am telling them exactly where your ass is at."[7]

Officers testified that they made contact with Willis about nine minutes after the shots were reported. They testified that Willis was crying and immediately told them Thomas had fired the shots and that he had just dropped Thomas and the gun off at a duplex on McKinley. Officers took Willis back to the Highland Boulevard scene and began to look for evidence based on his description of the incident. Officers recovered empty casings, spent casings, unspent rounds, and a bullet and bullet fragments.[8] They discovered that an apartment had been struck several times and that one of the bullets had travelled through two panes of glass and hit a bedroom wall. The apartment was occupied at the time of the bullet's entry. A firearms expert from the state crime laboratory testified that the casings, partially unspent rounds, and the bullet recovered from the apartment wall were all fired from the .22 caliber Ruger semi-automatic pistol found in the McKinley duplex basement. The parties stipulated that Thomas had a prior felony conviction which prohibited him from possessing a firearm. The jury found Thomas guilty of both counts. At sentencing, on count one, first-degree recklessly endangering safety as a repeater, the trial court imposed a twenty-year bifurcated sentence with fifteen years of initial confinement and five years of extended supervision. On count two, possessing a firearm as a felon, the trial court imposed an eight-year bifurcated sentence with three years of initial confinement and five years of extended supervision. The sentences were ordered to run

[7] Along with Thomas, the young male and female were taken into custody from the duplex. Neither the male nor the female testified at trial. The record establishes that the State attempted, but was unable, to secure their appearance.

[8] Officers testified that the location of the casings was consistent with Willis's version of events.

concurrent with each other, but consecutive to any other sentence. The trial court determined that Thomas would be eligible for the challenge incarceration program after he had served all but the last two years of his initial confinement.

The no-merit report addresses whether there was sufficient credible evidence to support the jury's verdicts[9] and if the trial court properly exercised its discretion at sentencing. Based on our independent review of the record, we agree with counsel's conclusion that these issues lack arguable merit.

The jury trial and the sufficiency of the evidence

In addressing the sufficiency of the evidence,

> an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so [insufficient] in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Hayes, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (citation omitted). The no-merit report discusses the evidence in relation to the essential elements of the crimes of first-degree recklessly endangering safety while possessing a dangerous weapon and possessing a firearm as a felon. We have reviewed the trial transcripts and determine that the testimony of Willis, the police officers, and the crime laboratory technicians sufficiently established each element of both offenses. Willis testified that Thomas fired about five shots and that at the time, there were a lot of people on the street: "It was a lot of kids and a lot of women and a couple of

[9] The no-merit report separately discusses two additional issues: (1) whether the State was required to produce the intended victim as a witness and (2) whether the jury was informed that the codefendant's statement could be disregarded. We consider these as part of the overarching question concerning the sufficiency of the evidence.

guys drinking on their porches." Officers testified that they recovered a number of casings, bullets, and fragments and that a bullet struck the interior wall of an occupied apartment. Analysts testified that the casings and bullet were fired from the gun found in the McKinley duplex basement. Willis testified that he drove Thomas to the duplex and that Thomas brought the gun inside. From this evidence, a reasonable juror could have found Thomas guilty of both offenses beyond a reasonable doubt.[10]

We acknowledge that Thomas presented a different version of events[11] and that Willis was charged as a coconspirator. Thomas's theory of defense was that Willis was involved in the shooting and was shifting the blame onto Thomas. The jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). In this case, Willis's testimony was corroborated by other evidence, the substance of his agreement with the State was presented to the jury, and along with the standard

[10] At trial, Thomas moved to dismiss count one on the ground that the person at whom he allegedly aimed his shots did not testify. We agree with appointed counsel's conclusion in the no-merit report that the State was not required to produce the intended victim in order to satisfy the elements of recklessly endangering safety. As stated by the trial court in response to Thomas's motion, "this is not attempted homicide or even attempted injury, it's reckless conduct, and the question is was someone in danger of suffering great bodily harm by the reckless behavior in utter disregard for human life."

[11] Thomas testified that other people dropped him off at the McKinley duplex shortly before the shooting and that he called Willis to apprise him of his location so they could meet to settle a dispute. Thomas testified that he was not present at the scene of the shooting, had never before seen the .22 caliber Ruger pistol and was not inside Willis's car that day.

instruction on the credibility of witness, WIS JI—CRIMINAL 300, the jury was instructed as follows:

> You have heard the testimony from Shelvin Willis who stated he was charged with the same crime as charged against the defendant, Mr. Thomas. You should consider the testimony of this witness with caution and care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon this testimony alone unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant, Mr. Thomas, is guilty.

See WIS JI—CRIMINAL 245. We agree with appointed counsel's conclusion that regardless of Willis's status as a coconspirator, there is no arguably meritorious challenge to the sufficiency of the evidence supporting the jury's verdicts.

Though not discussed in the no-merit report, we have independently reviewed the trial record, including the jury selection, admission of evidence, colloquy concerning Thomas's decision to testify at trial, closing arguments of counsel, and jury instructions. We have discovered no arguably meritorious issues arising from any of these procedures.

Sentencing

We also agree with appointed counsel's conclusion that the trial court properly exercised its discretion at sentencing. Thomas's sentences were statutorily permissible. On count one, he was convicted of a Class F felony and the jury found that at the time, Thomas possessed a dangerous weapon, thereby increasing the maximum term of confinement by five years. *See* WIS. STAT. § 939.63(1)(b). On both counts, Thomas was properly sentenced as a repeater under

§ 939.62(1)(c).[12] Thomas's repeater status added six years to the confinement time available on count one and four years to count two. Therefore, on count one, Thomas was subject to a bifurcated sentence of twenty-three and one-half years, consisting of eighteen and one-half years of initial confinement and five years of extended supervision. On count two, he faced a maximum bifurcated sentence of fourteen years, with nine years of initial confinement and five years of extended supervision.

Further, in fashioning its sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court also discussed the relevant sentencing factors under ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court determined that the crime was extremely aggravated in that at least three people were directly endangered.[13] The trial court rejected Thomas's argument that the offense was mitigated because no one was actually injured, reasoning that the nature of the charge already took this into account. The trial court considered that Thomas had two prior battery convictions and that his violence had now escalated to gun use. The trial court's primary objective was protecting the community, and it explained that given Thomas's history on supervision and in corrections, a lengthy period of incarceration was necessary to achieve its

[12] The presentence investigation report, which contained specific relevant details, including the date of the prior conviction and the sentence imposed, constitutes an "official report" sufficient to prove the repeater allegation under WIS. STAT. § 973.12(1). *See*, *e.g.*, ***State v. Caldwell***, 154 Wis. 2d 683, 693-95, 454 N.W.2d 13 (Ct. App. 1990).

[13] The court was referring to the woman inside the bullet-stricken apartment, the intended victim, and the male witness mentioned in the criminal complaint. The male witness spoke to the PSI writer and confirmed that there were several children outside when Thomas fired the gun, and that though he was not the intended target, the bullets were "near misses."

goal. Finally, Thomas's twenty-year sentence is not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975), and is well below the thirty-seven and one-half-year maximum. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (citations omitted) (there is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh). There is no arguably meritorious challenge to the trial court's sentencing decision.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Carl W. Chessir is relieved from further representing Dwayne Philip Thomas in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals