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DISTRICT I

August 29, 2014

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

2013AP933-CRNM State of Wisconsin v. Tracey Rainer (L.C. #2011CF2565)

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

Tracey Rainer appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree reckless homicide while armed with a dangerous weapon, as party to a crime. Appellate counsel, Patrick Flanagan, Esq., has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Rainer was advised of his right to file a response, and he has responded. Upon this court's independent review of the Record as mandated by ***Anders***, counsel's report, and Rainer's response, we conclude there is no

issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On August 27, 2010, Milwaukee police were dispatched to investigate a shooting in the 4000 block of West Hampton Avenue. They found Alphoncy Dangerfield, dead in the street, with multiple gunshot wounds. Rainer was identified as the shooter by at least one witness. He was charged with one count of first-degree reckless homicide with a dangerous weapon as party to a crime. The matter was tried to a jury, which convicted Rainer as charged. The trial court sentenced him to thirty years' initial confinement and ten years' extended supervision. Additional facts will be discussed herein as necessary.

Appellate counsel discusses four potential issues, which he concludes lack arguable merit. These are: whether the trial court erred in denying Rainer's motion to suppress an out-of-court identification; whether sufficient evidence supported the jury's verdict; whether the trial court imposed an unduly harsh sentence; and whether Rainer received ineffective assistance of trial counsel. Rainer also identifies four issues.[1] These are: whether trial counsel was ineffective for failing to call an expert witness; whether trial counsel was ineffective for not objecting to in-court identifications of Rainer; whether trial counsel was ineffective for not

[1] To the extent that Rainer has raised issues other than the four we expressly identify, those issues are deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wisconsin v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424, 430 (1996).

seeking a mistrial because of the State's reference to Rainer's "other acts" of selling marijuana; and whether the real controversy of Rainer's identification as the shooter was not fully tried.[2]

I. Suppression/Identification Issues

A. The motion to suppress.

The first issue counsel raises is whether the trial court erred in denying Rainer's motion to suppress an out-of-court identification made by twelve-year-old witness K.S., who picked Rainer from a photo array. When viewing the array, K.S. first identified the individual in one of the filler photos as the shooter, before changing her mind and picking Rainer when she saw his photo.

A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 668, 762 N.W.2d 385, 388. We do not reverse the trial court's factual findings unless clearly erroneous, but application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.***, 2008 WI App 166, ¶9, 314 Wis. 2d at 668, 762 N.W.2d at 388–389.

In order to challenge the admission of the photo array identification, Rainer first had the burden to show the array was impermissibly suggestive. *See* ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 647, 740 N.W.2d 404, 407. We agree with appellate counsel's assessment that there is no evidence to suggest police used improper tactics that made the array

[2] Rainer additionally complains about appellate counsel's decision to file a no-merit report, especially because Rainer believes he has identified meritorious issues. The complaints about the no-merit report are rejected. The filing of a no-merit report is not, in and of itself, ineffective assistance of appellate counsel and, as we shall see, we discern no arguable merit in the issues Rainer has identified.

impermissibly suggestive. K.S.'s uncertainty in her identification of the shooter goes to the weight, not the admissibility, of her identification. There is no arguable merit to a claim the trial court erred in denying the suppression motion.

B. Failure to call an expert.

Rainer raises two issues somewhat related to the suppression motion. The first issue is whether trial counsel was ineffective when he failed to call an expert witness to testify with respect to both the suppression motion and the identification issue at trial. Trial counsel had initially indicated he would call Larry White, Ph.D., "regarding the general psychology of identification as well as, specifically, issues surrounding the identification(s) made in the instant matter." At a pre-trial conference, though, counsel indicated he would not be calling White.

"To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Brunette***, 220 Wis. 2d 431, 445, 583 N.W.2d 174, 180 (Ct. App. 1998). "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 126, 700 N.W.2d 62, 70. "To prove constitutional prejudice, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Ibid.*** (internal quotation marks and citations omitted). "It is within an attorney's discretion to call or not call a particular witness, if the circumstances of the case reasonably support such a decision." ***State v. Wood***, 2010 WI 17, ¶73, 323 Wis. 2d 321, 369, 780 N.W.2d 63, 86. "As a general policy, we do not second-guess an attorney's

discretionary decisions at trial, if those decisions were rational given the applicable law and the facts of the case." ***Ibid.***

Rainer contends that "trial counsel gave as reason to the defendant for not calling the expert to testify in either proceedings, a misstatement of the law, stating that Wisconsin law did not approve funds to pay for the expert's testimony[.]" Rainer claims that counsel made an error of law because, Rainer believes, funds to pay the expert would have been obtainable in his case under ***State ex rel. Dressler v. Circuit Court for Racine County***, 163 Wis. 2d 622, 472 N.W.2d 532 (Ct. App. 1991). Rainer further asserts that trial counsel's "incorrect view of the law" should be presumed prejudicial.

Dressler dealt with a defendant's petition to this court for a supervisory writ requiring the circuit court to "provide funds to retain expert witnesses to assist in Dressler's defense[.]" ***Id.***, 163 Wis. 2d at 628, 472 N.W.2d at 535. This court acknowledged that "[a]n indigent defendant does have a constitutional right to have the assistance of the trial court to compel the attendance of witnesses[.]" ***Id.***, 163 Wis. 2d at 638, 472 N.W.2d at 539. In Wisconsin, that process is statutorily codified in WIS. STAT. § 885.10, which provides in relevant part that "[u]pon satisfactory proof of the financial inability of the … defendant to procure the attendance of witnesses for his or her defense," the judge in any criminal proceeding "may direct the witnesses to be subpoenaed as he or she determines is proper and necessary[.]"

However, the right to compel witnesses "is not an unfettered right that requires the trial court to give an indigent defendant unlimited access to blank checks to hire all expert witnesses that he or she desires." ***Dressler***, 163 Wis. 2d at 639, 472 N.W.2d at 539. "In order to secure the assistance of the trial court, the defendant is required to make some plausible showing of how the

proposed expert witnesses will be both material and favorable to his or her defense." ***Ibid.*** In other words, "the federal and state constitutions and [WIS. STAT. § 885.10] do not create a clear legal duty that mandates the trial court to provide witness funds for indigent defendants upon a general request." ***Dressler***, 163 Wis. 2d at 640, 472 N.W.2d at 540.

Thus, to the extent that Rainer believes trial counsel performed deficiently because ***Dressler*** would have compelled the trial court to provide funds for White's testimony if only counsel had asked, it is Rainer who is mistaken. In the same vein, we do not perceive counsel's failure to make an application under ***Dressler*** or WIS. STAT. § 885.10 to rise to the level of constitutional ineffectiveness.[3] Nothing in this Record suggests that White's testimony would be "material and favorable" to Rainer's case and, even so, we have no reason to believe that the expert's testimony as described would have made a difference in the outcome of the case.

For one thing, the "psychology of identification" is immaterial to the issue of the *admissibility* of K.S.'s identification, as there is no evidence of improper police behavior. At best, then, the testimony might have informed on the accuracy of the witnesses' identifications of Rainer—and there were at least four individuals who identified him as the perpetrator. However, the only witness who expressed any uncertainty in her identification was K.S., who had initially identified a different person as the shooter when viewing the photo array. K.S.'s mistake, however, was pointed out to the jury, as was her reasoning for changing her mind and identifying Rainer. Thus, nothing in this Record suggests that an expert's testimony about the "psychology

[3] Rainer's trial counsel was appointed from the private bar by the Office of the State Public Defender. Under WIS. ADMIN. CODE § PD 2.12(2), the public defender may, but need not, approve retention of expert assistance.

of identification" would have altered the verdict. There is no arguable merit to a claim of ineffective assistance of trial counsel for failure to secure White's testimony.

C. In-court identifications.

Rainer's second claim relating to suppression is that trial counsel should have attempted to suppress his in-court identification by K.S. and another witness because that identification was not based on an "independent source." However, the independent-origin requirement for in-court identification is only necessary when a prior out-of-court identification violates a defendant's constitutional rights and is suppressed. *See* ***State v. McMorris***, 213 Wis. 2d 156, 166–167, 570 N.W.2d 384, 388 (1997). Here, there was no such infirmity to the out-of-court identifications made by the two witnesses. Thus, there was no basis on which trial counsel could seek suppression of the in-court identifications for want of an independent source. Accordingly, there is no arguable merit to a claim of ineffective assistance of counsel in this regard. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406, 416 n.10 (1996) ("[A]n attorney's failure to pursue a meritless motion does not constitute deficient performance.").

II. Evidentiary Issues

A. Sufficiency of the evidence to support the verdict.

The second issue counsel raises is whether sufficient evidence supports the jury's verdict. We view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752, 756 (1990). "'[T]he jury 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 that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376–377, 316 N.W.2d 378, 382 (1982) (emphasis and citation omitted).

The jury is the sole arbiter of the credibility of witnesses, and it alone is charged with the duty of weighing the evidence. *See* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810, 815 (Ct. App. 1995). The jury, as arbiter of credibility, 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. 1998). Further, a conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. ***Poellinger***, 153 Wis. 2d at 501, 451 N.W.2d at 755. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.***, 153 Wis. 2d at 503, 451 N.W.2d at 756.

The State is required to prove three elements in order to secure a conviction on first-degree reckless homicide: the defendant caused the death of the victim; the defendant caused the death by criminally reckless conduct; and the circumstances of the defendant's conduct showed utter disregard for human life. *See* WIS JI—CRIMINAL 1020; *see also* WIS. STAT. § 940.02(1). "Criminally reckless conduct" is conduct that creates an unreasonable and substantial risk, of which the defendant is aware, of death or great bodily harm to another person. *See* ***ibid.*** Factors relevant to whether the defendant showed utter disregard for human life including what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct. *See* ***ibid.***

We are satisfied that sufficient evidence for the conviction was presented to the jury. Witness Craig Crockett testified that he knew the victim, Dangerfield, by the nickname "Phoncy" and Rainer by the nickname "Peppie." Crockett testified that Phoncy came to his cousin's house near the site of the shooting on August 27, 2010, then went to the nearby gas station and returned with Juafonyay Monette (Juafonyay). When he returned, Phoncy told Crockett that he had an argument with Peppie at the gas station, and Phoncy and Juafonyay walked away. Crockett then saw Rainer walk past with a gun, which appeared to be a .40-caliber weapon, in his left hand, and Rainer told Crockett he was looking for Phoncy. Rainer then got into a black car driven by Marlo Triggs, and the car drove off in the same direction that Phoncy had already headed. Jocquitus Crockett also knew the victim by Phoncy and the defendant by Peppie. Jocquitus also noticed Rainer had a gun, and said Rainer asked him, "Where Phoncy at?" Both Crocketts heard gunshots shortly thereafter.

Lorene Monette, Juafonyay's mother, also lived near where police found Dangerfield. She testified that her son went with Dangerfield to the gas station and, when they returned, they went to the side of the house to smoke marijuana. She then saw a male with a red t-shirt and white shorts cross her lawn. The red t-shirt partially covered his face. This person went to the side of her house, and Monette then heard five or six gunshots.

Monette's daughter, Toni Spotsville, was on the porch of her mother's home and watched Juafonyay and Phoncy walk off to the gas station to buy marijuana. When they returned, Juafonyay and Phoncy went to the side of the house. Then, she saw an individual she knew as "Weed Boy" walking across the lawn. He was called Weed Boy because he had been selling marijuana at the gas station daily for several months. Weed Boy was wearing a red shirt and white shorts, with the red shirt over his head; Spotsville recognized him because he wore those

clothes daily while he hung out at the gas station. Spotsville saw that Weed Boy was armed with a gun as he ran towards the side of the house; she then heard gunshots. Spotsville identified Rainer to the jury as the person she knew as Weed Boy.

Marlo Triggs testified that he knows Rainer as Peppie and that he (Triggs) was driving a black car on August 27, 2010. Although he initially denied the details of a statement he gave to police, Milwaukee Police Detective Carlo Davila told the jury that Triggs told police he had picked up the defendant and given him a ride to an alley near the crime scene. When confronted with the recording of his statements, Triggs admitted telling police that Rainer had been wearing a red shirt. Triggs also admitted that Rainer told him that he had "aired a dude out," said "dude" being Phoncy, though Triggs told the jury that he thought Rainer just wanted to scare Phoncy.

K.S. testified she was looking out the window of Monette's house, towards an alley, when a black car pulled up. A male got out of the passenger seat and pulled a red shirt up over his face. K.S. thought the man was "up to something" and followed him by going to different windows in the house. She then saw the male shoot at someone.

In addition, Detective Steven Caballero testified about recovering evidence from the crime scene. Multiple .40-caliber cartridge casings were recovered. Caballero also noted that police had found a bullet, as well as a bullet strike about seventy inches above the ground on a tree.

The above evidence is not the complete recitation of the facts upon which the jury could have relied to reach its verdict. It is, however, sufficient for us to conclude that, based on the foregoing and the rest of the Record, there is no arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdict.

B. Other acts evidence.

Tangentially related to the sufficiency of the evidence issue are Rainer's two remaining issues, the first of which is that trial counsel should have sought a cautionary jury instruction and a mistrial after the State referred to Rainer's "other acts" of selling marijuana. Rainer claims, "The only possible use of such evidence in the State's case-in-chief was to unfairly prejudice the defendant's jury trial in the hopes of preventing an acquittal … by insinuating he had a bad or flawed character." Rainer does not specify the "evidence" about which he is complaining, but he is likely referencing Spotsville's testimony calling him Weed Boy and the State's reference to that testimony generally in its closing arguments.

Generally, "evidence of other crime, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2)(a). However, the statute "does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Ibid.*** To determine whether other acts evidence is admissible, we apply a three-prong test. *See* ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 585, 797 N.W.2d 399, 410. Other-acts evidence is properly admissible if: (1) it is offered for a permissible purpose under WIS. STAT. § 904.04(2)(a); (2) it is relevant under WIS. STAT. § 904.01 in that it relates to a fact of consequence to the determination of the action and has a tendency to make a consequential fact either more or less probable than without the evidence; and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. *See* ***Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d at 585, 797 N.W.2d at 410.

Here, it is evident that the evidence of Rainer's activities as Weed Boy was offered for the purpose of identification, an acceptable purpose under WIS. STAT. § 904.04(2)(a). The evidence is relevant, because it makes Spotsville's identification of Rainer more probable than if she had no way to explain how she recognized him. Finally, any danger of unfair prejudice is minimal: if the jury were to look down on Rainer for selling marijuana, it would have to also be critical of the victim and witnesses involved in this case for buying it and smoking it. The probative value of Rainer's drug-related activities as they relate to his identification is, by contrast, much higher. Thus, there is no arguable merit to a claim that trial counsel was not ineffective for seeking a mistrial based on the admission of Rainer's other acts, because the evidence was not improperly admitted.

In addition, while "cautionary jury instructions are preferred and should normally be provided when admitting other acts evidence, they are not required unless requested." ***State v. Payano***, 2009 WI 86, ¶100, 320 Wis. 2d 348, 411, 768 N.W.2d 832, 863 (footnote omitted). Thus, although trial counsel may have been deficient for not requesting cautionary instructions, we discern no prejudice. It is evident that the jury convicted Rainer because there is overwhelming evidence pointing to him as the shooter, not because he may have sold marijuana.[4]

Rainer additionally claims that he was deprived of the right to present a defense or testimony on his own behalf because he claims that trial counsel told him that he did not need to testify once the prosecutor improperly referenced other acts, thereby creating grounds for a new

[4] Counsel actually may not have been deficient: in some cases, the defendant or his counsel may not want the cautionary instruction "'because such instructions often just underscore the forbidden purpose' the defendant wishes to avoid." *See* ***State v. Payano***, 2009 WI 86, ¶100 n.22, 320 Wis. 2d 348, 411 n.22, 768 N.W.2d 832, 863 n.22 (citation omitted).

trial. However, the trial court conducted a colloquy with Rainer regarding his right to testify, and Rainer stated that no promises had been made to persuade him to waive his right to testify. There is nothing in this Record that undermines the trial court's determination that Rainer's waiver of his right to testify was knowing and voluntary.

C. Whether the real controversy was fully tried.

Rainer's second evidence-related claim of error is that the real controversy "of identification of the defendant as the perpetrator of the murder" was not fully tried because of the other acts evidence.

> [S]ituations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435, 439–440 (1996). Rainer evidently believes his case falls into the second category. However, there is no arguable merit to a claim that Rainer's other acts were improperly admitted, so ***Hicks*** is inapplicable. Beyond that, there is no arguable merit to a claim that the real controversy in this case was not fully tried.

III. Sentencing

The third issue counsel raises in the no-merit report 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 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 committed to the trial court's discretion. *See* ***Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606, 712 N.W.2d at 82.

Here, the trial court commented that there is no more serious a crime than homicide; however, it would not impose the maximum sentence because Rainer was young and had a limited prior record. Nevertheless, the trial court thought that the "insanity" of violent responses to arguments warranted a long imprisonment term, as did Rainer's utter lack of remorse for the victim. The trial court noted that, based on the presentence investigation report, Rainer cannot function in society, thus posing a "severe, severe risk" to the community.

The maximum possible sentence Rainer could have received was sixty-five years' imprisonment. The sentence totaling forty 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). Rainer additionally stipulated to the restitution amount. There would be no arguable merit to a challenge to the sentencing court's discretion.

IV. Ineffective Assistance of Counsel

The final issue counsel discusses is whether Rainer received ineffective assistance of trial counsel during his case. We, like counsel, discern no basis in the Record for any arguably meritorious claim that trial counsel was ineffective.

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 Patrick Flanagan, Esq., is relieved of further representation of Rainer in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals