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

2014AP1290-CRNM State of Wisconsin v. Joshua Delee Jordan (L.C. #2012CF96)
2014AP1291-CRNM State of Wisconsin v. Joshua Delee Jordan (L.C. #2012CF5628)

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

A jury found Joshua Delee Jordan guilty of one count of possessing a firearm while a felon, one count of felony bail jumping, and one count of possessing tetrahydrocannabinols (THC). Before sentencing, Jordan admitted, and the circuit court found, that he committed the crime of felony bail jumping as a repeat offender and that he possessed the THC as a second or subsequent offense. For possessing a firearm while a felon, the circuit court imposed a five-year term of imprisonment, evenly bifurcated between initial confinement and extended supervision. For felony bail jumping, the circuit court imposed a concurrent, evenly-bifurcated two-year term

of imprisonment. For possessing THC as a second or subsequent offense, the circuit court imposed a consecutive sentence of six months in the House of Corrections. Jordan appeals.

The state public defender appointed Attorney Cheryl A. Ward to represent Jordan in postconviction and appellate proceedings. Appellate counsel filed and served a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Jordan responded and Ward filed a supplemental no-merit report in reply. This court has considered the no-merit reports and Jordan's response, and we have independently reviewed the consolidated records. We conclude that no arguably meritorious issues exist for appeal, and we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

In case No. 2012CF96, the State filed a criminal complaint alleging that, on January 4, 2012, Jordan possessed THC as a second or subsequent offense and that he possessed a firearm while a felon. *See* WIS. STAT. §§ 961.41(3g)(e), 941.29(2) (2011-12). Jordan posted bail and was released from jail with various conditions, including that he appear at all subsequent court dates. While the case was pending, the circuit court issued a bench warrant for his arrest following a finding that he failed to appear in court on October 17, 2013, as ordered. The State thereafter filed a criminal complaint in case No. 2012CF5628, alleging that Jordan failed to appear for a scheduling conference in case No. 2012CF96 and charging him with felony bail jumping as a repeat offender. *See* WIS. STAT. §§ 946.49(1)(b), 939.62(1)(b) (2011-12). In due

[1] All subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

course, police arrested Jordan and he made his initial appearance in case No. 2012CF5628 on December 29, 2012. All three charges proceeded to jury trial on May 13, 2013.

We first consider whether the evidence was sufficient to sustain Jordan's convictions for the three offenses. Before the jury could convict Jordan of possessing a firearm while a felon, the State was required to prove beyond a reasonable doubt that he possessed a firearm and that he previously had been convicted of a felony. *See* WIS JI—CRIMINAL 1343. Before the jury could convict Jordan of possessing marijuana, the State was required to prove beyond a reasonable doubt that Jordan possessed a substance that he knew or believed was marijuana. *See* WIS JI—CRIMINAL 6030. Before the jury could convict Jordan of felony bail jumping, the State was required to prove that the State charged Jordan with a felony, that he was released from custody on bond, and that he "intentionally failed to comply with the terms of the bond." *See* WIS JI—CRIMINAL 1795. The State presented sufficient evidence to satisfy its burden of proof as to each offense.[2]

Milwaukee police officer David Sturma testified that, on the night of January 4, 2012, he and his partner, Officer Eric Dillman, went to 2136 North 36th Street, a duplex in Milwaukee, Wisconsin, to execute an arrest warrant for Duane Nunely. While on the porch of the duplex, Sturma could see inside the residence through the gaps and cracks in the window blinds. Sturma

[2] The State charged Jordan with possessing marijuana as a second or subsequent offense involving controlled substances, and the State charged him with felony bail jumping as a repeat offender. *See* WIS. STAT. §§ 961.41(3g)(e), 946.49(1)(b), 939.62(1)(b) (2011-12). The State was not required, however, to prove his prior narcotics conviction or his repeater status at trial. *See* ***State v. Miles***, 221 Wis. 2d 56, 68, 584 N.W.2d 703 (Ct. App. 1998). "'[A] repeater allegation which increases the penalty for a particular crime, but does not change the nature of the crime, is not an essential element of the substantive offense charged ... but rather [is a] penalty enhancer[] which [does] not require jury determination.'" ***Id.*** at 63 (citation omitted, one set of brackets added, ellipsis in ***Miles***).

observed a person, later identified as Jordan, handling a green substance that appeared to be marijuana and apportioning it into small plastic baggies. After a few minutes, Jordan put on a jacket and walked outside onto the porch. The two officers seized him based on their observations of his activity in the home.

Sturma testified that Jordan struggled with the officers and, during the struggle, Sturma saw that Jordan had a handgun that he then tossed over his shoulder into the residence. Sturma said that he heard two thumps from inside the house, and he believed that the sounds were made by the gun bouncing off an object and then landing.

Sturma testified that after he and Dillman subdued and handcuffed Jordan, Sturma went inside the residence and found a handgun. Sturma described the layout of the entrance area of the home and explained that the gun was lying on the floor beyond a partition wall approximately one or two feet wide that stood between the front door and the family room.

Dillman also testified. He described watching Jordan handle marijuana in the house and put a baggie in his jacket pocket. Dillman went on to describe assisting Sturma in seizing Jordan as he stepped onto the porch, and Dillman testified that he found a baggie of suspected marijuana in Jordan's pocket after the arrest.

A forensic investigator for the City of Milwaukee Police Department testified that fingerprints are rarely recovered from firearms. The investigator said that he examined the gun found at 2136 North 36th Street and that he was unable to lift any prints from the gun.

In addition to testimony, the State supported its allegations with a variety of stipulations. Jordan stipulated that the substance found in his pocket was marijuana. He stipulated that he had

a prior felony conviction that had not been reversed as of January 4, 2012. He stipulated that, as of October 17, 2012, he had been charged with a felony in case No. 2012CF96 and released on bond with a condition that he appear at all future court dates. Finally, he stipulated to the admission of a certified copy of the judgment roll in case No. 2012CF96 showing that, on October 17, 2012, "defense counsel was present but needed to leave. Defendant failing to appear, Court ordered a bench warrant to be issued."

After the State rested, Jordan presented testimony from the lawyer who had represented him at the time of the October 17, 2012 court appearance, Attorney Nathan Opland-Dobs.[3] Attorney Opland-Dobs testified that Jordan was in the courtroom at some point during the morning of October 17, 2012, but Attorney Opland-Dobs acknowledged that at no time that day did Jordan make an appearance before the court with counsel. Attorney Opland-Dobs went on to explain that he left the courtroom to attend to something else and when he telephoned the court at the end of the day, he learned that Jordan had not appeared.[4] Jordan's fiancée offered related testimony, telling the jury that she and Jordan were at the courthouse on October 17, 2012, but left because she was scheduled to work that afternoon.

[3] The State moved to strike the testimony of Attorney Opland-Dobs after he invoked attorney-client privilege during his cross-examination. The circuit court both denied the motion to strike and permitted invocation of the attorney-client privilege to limit cross-examination. Because these rulings were favorable to Jordan, they do not provide any basis for further postconviction or appellate proceedings. An appellant cannot seek review of a favorable ruling. *See* WIS. STAT. RULE 809.10(4).

[4] The transcript of proceedings held on October 17, 2012, reflects some differences between the events in the courtroom and Attorney Opland-Dobs's recollection of those events. The testimony of Attorney Opland-Dobs and the transcript of October 17, 2012, both reflect, however, that Jordan was present in the courtroom at some point on October 17, 2012, and that Jordan was not present when the court called the case.

Jordan additionally presented testimony from Cleotha Trotter, who testified that she and her six-year-old child were the only people who lived at 2136 N. 36th Street on January 4, 2012. She identified a picture of her home showing the partition wall that extends past the vertical side of the door frame that opens into the house. She said that she does not know Jordan personally, that he does not live at her residence, and that he had been there only once before January 4, 2012, accompanying a third party.

Jordan decided not to testify. The circuit court conducted a colloquy with him and accepted his decision.

When this court reviews the sufficiency of the evidence on appeal, we apply a highly deferential standard. We may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate 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. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.***

In his response to the no-merit report, Jordan contends that the evidence is insufficient to prove that he possessed a firearm, and he emphasizes that the State failed to show that his fingerprints were on the gun. The jury, however, heard expert testimony that subjects do not always leave fingerprints on guns, and the jury was free to credit that testimony. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). Next, Jordan suggests that the evidence was insufficient because Sturma did not testify credibly in describing the struggle that took place when the officers seized Jordan or his actions in throwing a gun during that struggle. The

credibility of a witness, however, is peculiarly a matter for the trier of fact. ***State ex rel. N.A.C. v. W.T.D.***, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). We are satisfied that, in light of our deferential standard of review, an appellate challenge to the sufficiency of the evidence supporting any of the three convictions would lack arguable merit.

We consider next whether Jordan could mount an arguably meritorious challenge to his waiver of the right to testify. The colloquy satisfied the requirements for a valid waiver described in ***State v. Weed***, 2003 WI 85, ¶¶43-44, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court established that Jordan understood his right to testify on his own behalf, that he had discussed that right with his trial counsel, and that he knowingly and voluntarily chose not to testify. Further appellate proceedings to pursue this issue would be frivolous within the meaning of ***Anders***.

We next consider Jordan's complaints that his trial counsel was ineffective. To prevail in a claim of ineffective representation, a defendant must prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must identify "specific acts or omissions by the lawyer that are 'outside the wide range of professionally competent assistance.'" ***State v. Ellington***, 2005 WI App 243, ¶15, 288 Wis. 2d 264, 707 N.W.2d 907 (citation omitted). To demonstrate prejudice, a "'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.*** (citation omitted). If a defendant fails to satisfy one prong of the analysis, the court need not address the other. ***Strickland***, 466 U.S. at 697.

Jordan first asserts that his trial counsel was ineffective for failing to move to suppress the evidence found in the residence at 2136 N. 36th Street. Jordan shows no deficiency. The evidence at trial established that Jordan did not live in the house or stay there even on a temporary basis. Indeed, Jordan himself tells us in his response to the no-merit report: "[t]his was my first time over this [sic] house. I came there with [a third party] this is her auntie['s] house, I bought the marijuana that I got arrested with from this house." A person who is merely visiting a home for a brief time in order to conduct a business transaction does not have standing to challenge a search of that home. ***State v. Fox***, 2008 WI App 136, ¶¶20-21, 314 Wis. 2d 84, 758 N.W.2d 790. Moreover, the officers did not need a warrant to arrest Jordan when he emerged from the house because their observations gave the officers probable cause to believe that Jordan had committed a crime, namely, possession of marijuana. *See* ***State v. Robinson***, 2010 WI 80, ¶33, 327 Wis. 2d 302, 786 N.W.2d 463. Further, the officers lawfully searched him incident to that arrest. *See* ***id.*** Accordingly, trial counsel did not perform deficiently by failing to file a suppression motion. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (no attorney is ineffective for foregoing a meritless motion).

Next, Jordan asserts that he asked his trial counsel to seek a speedy trial. As appellate counsel points out, trial counsel did request a speedy trial. Counsel filed the request on February 22, 2013, and the matter was tried on May 13, 2013, well within the statutory ninety-day period required upon filing such a request. *See* WIS. STAT. § 971.10(2)(a). We add that the record does not support a suggestion that Jordan sought a speedy trial before February 22, 2013. To the contrary, the circuit court scheduled the earlier-arising case, No. 2012CF96, for trial on September 19, 2012, but, on that date, Jordan—who was not then incarcerated—personally told the circuit court that he had no objection to rescheduling the matter for another date in light of

the circuit court's congested calendar. A claim that Jordan was deprived of his right to a speedy trial under these circumstances would be frivolous within the meaning of ***Anders***.

We next consider a potential claim of counsel's ineffectiveness that neither Jordan nor his appellate counsel discusses, namely, whether Jordan could challenge his trial counsel's closing argument that counsel would "not ... argue that [Jordan] didn't possess marijuana" and counsel's request to the jury that it return not guilty verdicts only on the other two charges. We are satisfied that an arguably meritorious challenge cannot be made. Counsel's concession of defendant's guilt on a lesser count in a multiple-count case, in light of overwhelming evidence on that count and offered to gain credibility and win acquittal on the other charges, is a reasonable strategy that does not render counsel constitutionally ineffective. ***State v. Gordon***, 2003 WI 69, ¶¶28, 30, 262 Wis. 2d 380, 663 N.W.2d 765.[5]

We next consider whether Jordan could challenge the circuit court's conclusions that he faced penalty enhancers because he possessed THC as a second or subsequent offense and because he committed bail jumping as a repeat offender. A person may be convicted of possessing THC as a second or subsequent offense if, before conviction, the person "has at any time been convicted of any felony or misdemeanor ... relating to controlled substances." *See* WIS. STAT. § 961.41(3g)(e). A person may be sentenced for a crime as a repeat offender if, as relevant here, during the five years before conviction of that crime, the person committed a

[5] Our discussion of trial counsel's actions in regard to the charge that Jordan possessed marijuana presumes that counsel lacked Jordan's consent to forego seeking an acquittal on that charge. We note for the sake of completeness that the record suggests otherwise. At sentencing, Jordan disputed that he possessed a firearm but he stated: "I possessed the marijuana. It never was a problem.... While [I] was over there [at 2136 N. 36th Street] I purchased the marijuana I had." Moreover, in the response to the no-merit report, Jordan states: "I admit I possessed the marijuana" and again affirms that he "bought the marijuana that [he] got arrested with."

felony. *See* WIS. STAT. § 939.62(2). "To prove the repeater status, the defendant must personally admit to a qualifying prior conviction, or the State must prove the existence of the qualifying prior conviction beyond a reasonable doubt." ***State v. Kashney***, 2008 WI App 164, ¶8, 314 Wis. 2d 623, 761 N.W.2d 672. The State must present its evidence to the judge at any time after the verdict but "'before actual sentencing.'" ***Id.***, ¶10 (citation omitted) (discussing proof of repeater status under § 939.62); *see also* ***State v. Miles***, 221 Wis. 2d 56, 57, 67-69, 584 N.W.2d 703 (Ct. App. 1998) (where proof of prior drug conviction is required to support enhanced penalty for subsequent drug conviction, State may submit its proof at sentencing).

Here, Jordan personally admitted to the circuit court at the outset of the sentencing hearing that he was previously convicted of qualifying offenses, specifically, that he was convicted of possessing marijuana with intent to deliver on May 8, 2006, and, as a second matter, that he was convicted of feloniously possessing marijuana on February 14, 2012. Additionally, the State filed certified copies of the judgments reflecting Jordan's convictions for those offenses. There is no arguable merit to further pursuit of this issue.

Last, we consider whether Jordan could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, 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 court may also consider a wide range of other

factors concerning the defendant, the offense, and the community. *See* ***id.*** The court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16. The sentencing court must also "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court found that all three charges were for "very serious crimes with serious penalties." The circuit court determined, however, that possessing a firearm as a felon was the most serious of the three offenses because a firearm in the community "creates ... danger and certainly a lot of potential danger." The circuit court discussed Jordan's character, observing that he had a prior criminal record "that really goes on and on." The circuit court particularly highlighted Jordan's three prior felony drug convictions and his prior convictions for battery and for resisting or obstructing an officer. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The circuit court considered the need to protect the public, observing that Jordan's criminal record indicated that his behavior was "getting worse" and presented a "high risk of committing crimes in the future."

The circuit court indicated that community safety was the primary sentencing goal, explaining that Jordan "need[s] to be taken out of circulation and out of our community ... to have [his] needs met in the prison context." Additionally, the circuit court opined that Jordan required both punishment and rehabilitation. The circuit court appropriately considered probation as the first sentencing alternative. *See* ***Gallion***, 270 Wis. 2d 535, ¶44. In the circuit

court's view, however, Jordan's criminal history and risk of reoffending required that he receive correctional treatment in prison.

The circuit court identified the factors that it considered in fashioning the sentence. The factors are proper and relevant. Moreover, the sentences were not unduly harsh or excessive. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Jordan faced ten years of imprisonment and a $25,000 fine upon his conviction for possessing a firearm while a felon. *See* WIS. STAT. §§ 941.29(2), 939.50(3)(g). He faced three years and six months of imprisonment and a $10,000 fine upon his conviction for possessing THC as a second or subsequent offense. *See* WIS. STAT. §§ 961.41(1)(3g)(e); 939.50(3)(i). He faced an additional ten years of imprisonment and a $10,000 fine upon his conviction for bail jumping as a repeat offender. *See* WIS. STAT. §§ 946.49(1)(b), 939.50(3)(h), 939.62(1)(b). The aggregate five years and six months of imprisonment imposed is far less than the law allowed. "'[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Grindemann***, 255 Wis. 2d 632, ¶31 (citation omitted). Accordingly, the sentence here is not unduly harsh or excessive. We conclude that a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Cheryl A. Ward is relieved of any further representation of Joshua Delee Jordan on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals