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DISTRICT I

April 9, 2015

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

2014AP2071-CRNM State of Wisconsin v. Lamont D. Alexander (L.C. # 2013CF1291)

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

Lamont D. Alexander appeals from a judgment of conviction, entered upon a jury's verdict, on one count of possession with intent to deliver between ten and fifty grams of heroin as a party to a crime. Appellate counsel, Randall E. Paulson, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Alexander was advised of his right to file a response, and he has responded. Upon this court's

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

independent review of the record as mandated by ***Anders***, counsel's report, and Alexander's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Background

West Allis police, working with a confidential informant, set up a controlled drug buy of heroin. The drug was going to arrive at an address in Milwaukee in a black Nissan with Illinois license plates. Police set up a perimeter around the address and, when a black Nissan with Illinois plates arrived, they took the driver and passenger into custody. Alexander was the passenger; his cousin, Nathaniel Alexander ("Nathaniel"), was the driver.

Police did not recover any drugs from Alexander, who was wearing multiple layers of clothing, during their initial patdown search conducted at the scene. At trial, the officers who conducted the patdown testified that their main concern at that point was weapons, not contraband. Alexander was handcuffed and placed in the rear passenger-side seat of an unmarked police car. While in the back seat, he began to make various movements. One of the officers, who was standing outside the car to keep an eye on Alexander, described the movement. He said Alexander "turned and bladed his body towards me so his chest was facing out of the rear passenger door of the vehicle and facing my location where I had been standing[.]" Alexander then "rocked back and forth several times." When the officer asked Alexander what he was doing, Alexander told him that the handcuffs were too tight, although the officer checked the handcuffs and found that they were not.

Alexander was transported to the West Allis police station in the unmarked car, a red or maroon Buick. Because the car lacked a cage and other security features, an officer rode in the back driver-side seat next to Alexander. Alexander continued the "blading" behavior, turning his body to face the officer. At the police station, officers had Alexander remove the excess layers of clothing, but still did not recover any drugs from his person. One of the officers went back to the Buick and searched it. When the officer pulled up the lower part of the seat from the side of the vehicle where Alexander had been, the officer discovered a bag of heroin lodged up under the rear seat cushion. The bag was wrapped in paper towel that had smears of suspected human feces on it. The bag contained four smaller packages of heroin that totaled just under thirty grams.

Alexander was charged with one count of possession with intent to deliver between ten and fifty grams of heroin, as a party to a crime. A jury convicted him of that offense. The circuit court imposed a sentence of six years' initial confinement and six years' extended supervision.

Discussion

Counsel raises four potential issues, each of which he concludes lacks arguable merit. In his response, Alexander raises issues that correspond to three of the issues that counsel has identified.

I. Jury Selection and Instruction

A. Jury Selection

Counsel identifies as his first issue whether the jury was properly selected and instructed. Counsel provides a cursory discussion, two paragraphs long, in which he concludes that "[t]he

jury appears to have been selected in a lawful manner." In his response, Alexander contends that "the record demonstrates that all the jurors are [E]uropean and not of the appellant's peers and the selection of the venire violates the law to have a fair trial of his peers." Alexander cites to ***Batson v. Kentucky***, 476 U.S. 79, 103-05 (1986) (Marshall, J. concurring).

Batson forbids the State from striking jurors based solely on race. *See* ***State v. Lamon***, 2003 WI 78, ¶25, 262 Wis. 2d 747, 664 N.W.2d 607. We follow ***Batson***'s three-prong test for determining whether the State's strikes violate equal protection. *See* ***Lamon***, 262 Wis. 2d 747, ¶¶22, 27. First, the defendant must make a *prima facie* showing that he is a member of a cognizable group and the State has used its strikes to remove members of defendant's race from the venire, and that the circumstances give rise to an inference that the State used those strikes on account of the potential jurors' race. ***Id.***, ¶28. Second, if the *prima facie* case is made, the State has to provide a race-neutral explanation for the strike. ***Id.***, ¶29. Third, if the State provides a race-neutral explanation, the trial court must weigh credibility and determine whether purposeful discrimination has been established. ***Id.***, ¶32.

There is no arguable merit to a ***Batson*** challenge in this case. First, while the docket sheet identifies Alexander as African-American, the record does not indicate the race of any jurors. Second, the record does reveal the striking of several jurors for cause, and it appears that it is these jurors' removal that Alexander challenges as having racial undertones. However, ***Batson*** relates to the State's use of its *peremptory* challenges, *see* ***Lamon***, 262 Wis. 2d 747, ¶27, and the jurors we are discussing here were stricken for cause.

Further, even if Alexander fulfills part of the ***Batson*** test by showing that he is a member of a cognizable group and that the State used strikes to remove members of his race from the

venire, he would still have to show that circumstances give rise to an inference that the State made the strikes on account of the jurors' race. But of the jurors stricken for cause, the ones about whom Alexander appears most concerned were stricken because of their express bias against police. The parties attempted to rehabilitate those jurors but could not. The circuit court agreed with the State's strikes for cause.[2] In addition, the circuit court approved one of Alexander's motions to strike for cause a juror who expressed bias in favor of the police. Ultimately, the law guarantees only an impartial jury, not one of any particular racial composition. *See* ***State v. Horton***, 151 Wis. 2d 250, 257-60, 445 N.W.2d 46 (Ct. App. 1989). There is no arguable merit to a challenge to the jury selection process.

B. Jury Instructions

Counsel also addresses the jury instructions. We agree with his conclusion that the jury was given proper pattern instructions. But the jury also sent several questions to the trial court during deliberations. Counsel concludes that the trial court properly exercised its discretion when answering the jury.[3]

The jury sent five questions to the court: (1) "Can we ask questions about something not addressed during the trial?"; (2) "Can we see the evidence presented in court now?"; (3) "Was

[2] Alexander, through counsel, objected to striking one of the jurors, took no position on the second, and had no objection on the third.

[3] Alexander, in his response, asserts that he has "the right to charge the jury with any defense theory for which there is some foundation in proof." However, it is not clear on what "defense theory" Alexander thinks the jury should have been instructed. There is no instruction for a theory that police planted evidence, and no affirmative defense was raised. We therefore discern no issue of arguable merit with regard to the lack of any instruction on the defense theory.

the defendant seat belted into his seat?"; (4) "Was the K9 Unit dog[4] allowed to sniff the defendant or Nathaniel? Why/why not?"; and (5) "Whose DNA information is specifically in the state and local database; example, police? Drug enforcement squad?[5]"

"[H]ow a trial court responds to a jury's inquiry is committed to that court's discretion." ***State v. Lombard***, 2004 WI App 52, ¶11, 271 Wis. 2d 529, 678 N.W.2d 338. We affirm a trial court's discretionary decisions if it examined the relevant facts, applied the proper legal standard, and used a rational process to reach a reasonable result. ***Id.***

With respect to the second question, the circuit court responded by asking the jury whether it was asking to see the exhibits and, if so, which ones. Although it is not evident whether this was a response to the court's inquiry, the jury later asked to see the photographs that had been introduced at trial, and the parties agreed at that time to send those photographs to the jury room. There is no arguable merit to any challenge to this response.

With respect to the first question, the circuit court answered the jurors by telling them to consider only evidence received during the trial and the law as given by the jury instructions. With respect to the third, fourth, and fifth questions, the circuit court instructed jurors to decide

[4] A K9 unit from Milwaukee assisted with the takedown. The dog did not, however, examine the Nissan: officers had to break the car's windows to extract its occupants, leaving broken glass all over the ground around the car, and the K9 officer did not want the dog's feet to get cut.

[5] The heroin bags were swabbed for DNA. One sample, from the knot of the main bag, had at least two contributors: one major and one minor. Both Alexander and Nathaniel were excluded as the contributors of the major sample, and no match came back in the state databank. The minor sample was too small for technicians to develop a useable profile.

the case based upon the evidence presented at trial and to rely upon their collective memory of the evidence.[6]

When a jury poses a question regarding the testimony presented, the jury has a right to have that testimony read to it, subject to the discretion of the trial judge to limit the reading. *See* ***id.***, ¶26. However, the jury is not entitled to be instructed on something not presented during the evidentiary phase of the trial. *See* ***id.***, ¶28; *see also* ***id.***, ¶31 (Lundsten, J., concurring). As questions one, three, four, and five asked about evidence not offered, or testimony not given, the circuit court properly declined to give the jury additional details and properly redirected the jury to the standards to use in reaching a verdict.

Alexander counters that "[w]hen a jury makes explicit its difficulties, a judge should explain them away with concrete accuracy." *See* ***United States v. Frega***, 179 F.3d 793, 809 (9th Cir. 1999). This case is not like ***Frega***: there, a jury was considering both a substantive RICO (racketeering) charge against Frega and RICO conspiracy charges against Frega and others. *See* ***id.*** at 798-99. It had been instructed on predicate racketeering offenses for the substantive count, but not on any predicate offenses for the conspiracy charges. *See* ***id.*** at 808-09. The jury sent a question to the court asking if the predicate acts in the instruction for the substantive charge should be used in the consideration of the conspiracy charges. ***Id.*** at 808. However, the appellate court reversed because the district court gave a legally incorrect answer to the jury. *See* ***id.*** at 810.

[6] The circuit court did, however, note that it believed one of the photographs showed Alexander belted into the squad car.

Here, the jury expressed no such difficulties—it was not confused about the law it needed to apply. It simply appeared to want details regarding facts not in evidence. Because the evidentiary phase of trial was closed, it was not error for the circuit court to decline to fill in factual gaps for the jurors and to instruct them to rely on their memories. There is no arguable merit to a claim the circuit court improperly instructed the jury.

II. Evidentiary issues

Counsel next discusses whether "any evidence [was] erroneously allowed, or excluded, so as to arguably affect the verdict in any way." He notes that the parties' stipulation—that the substance police recovered was, in fact, heroin that totaled 29.4 grams—was knowing, intelligent and voluntary, and that Alexander knowingly, intelligently, and voluntarily waived his right to testify. We agree with counsel's assessment generally, that there is no arguable merit to challenge any of the evidentiary rulings that the trial court was called upon to make.

Alexander asserts that he was entitled to the confidential informant's name so that the informant could be cross-examined at trial. It was the confidential informant who set up the drug buy, and who relayed the information to police about the black Nissan from Illinois, although officers also testified that they personally viewed text messages received by the informant. When defense counsel made a motion to dismiss at the close of the State's case, he argued that the order to buy had been made by the informant, so all the testimony in that regard has been hearsay. The State pointed out that there had been no ***Outlaw***[7] motion. We therefore address

[7] *See* ***State v. Outlaw***, 108 Wis. 2d 112, 321 N.W.2d 145 (1982).

whether there is any arguable merit to a claim that trial counsel was ineffective for failing to seek disclosure of the confidential informant's identity.

Under WIS. STAT. § 905.10(1), the State "has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law[.]" This privilege is not absolute and must give way if nondisclosure will prevent the defendant from presenting a defense. *See* ***State v. Nellessen***, 2014 WI 84, ¶21, 849 N.W.2d 654.

There is a two-step process for disclosing the identity of a confidential informant: first, the defendant must make an initial showing that the informant "'may be able to give testimony necessary to a fair determination of the issue of guilt or innocence[.]'" *See* ***id.***, ¶16 (citing WIS. STAT. § 905.10(3)(b)). If the defendant satisfies that burden and the State continues to invoke the non-disclosure privilege, then the circuit court must conduct an *in camera* review to determine if the informant can, in fact, provide such testimony. *See* ***Nellessen***, 849 N.W.2d 654, ¶16. To meet the initial burden, a defendant "need only show that there is a reasonable possibility that a confidential informer may have information necessary to his or her theory of defense." *See* ***id.***, ¶25.

Alexander's theory of defense was, essentially, that police planted the heroin. Absolutely nothing suggests that the confidential informant would have given testimony relevant to that defense. As far as this record is concerned, the informant's knowledge would go at best to why West Allis police were looking for a particular vehicle at a particular address at a particular time. It is not even clear whether the informant knew either Alexander's real name, having been told only the street name of the person who would be coming to Wisconsin. There is no indication

that the informant had any information relevant "to a fair determination of the issue of guilt or innocence" in this case. Because nothing in this record indicates that Alexander could have satisfied the first step for seeking a confidential informant's identity, we cannot say that trial counsel was ineffective. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."). There is no arguable merit to a claim that trial counsel was ineffective for failing to seek that information.

III. Sufficiency of the Evidence

Counsel discusses whether there is any arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdict. Along those lines, Alexander asserts that simply being in a car with another person who set up a drug deal by phone does not make him guilty of possession with intent to deliver as party to a crime, especially when no drugs were found on his person.

Alexander's conviction is based largely on circumstantial evidence. In reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***Id.*** at 506-07.

A conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. ***Id.*** at

501-02. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503. An appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. ***Id.*** at 507-08.

To show Alexander was guilty of the charged offense, the State had to show: (1) the defendant or Nathaniel, because of the party-to-a-crime aspect, possessed a substance; (2) the substance was heroin; (3) the defendant or Nathaniel knew or believed that the substance was heroin, and (4) the defendant or Nathaniel intended to deliver heroin. *See* WIS JI—CRIMINAL 6035. The State also had to show the weight of the drugs. With party-to-a-crime liability, a person who is concerned in the commission of a crime may be convicted of the crime even though that person did not directly commit it. *See* WIS JI—CRIMINAL 400. Here, the State alleged that Alexander was concerned in the crime either because he directly committed it or because he intentionally aided and abetted the person who directly committed it. To intentionally aid and abet a crime, the defendant must know that another person is committing or intends to commit the crime, and must have the purpose to assist the commission of that crime. *See* ***id.*** A person does not aid and abet if he or she is only a bystander or spectator and does nothing to assist the commission of a crime. *See* ***id.***

The primary element that Alexander appears to have disputed was the possession element. He suggested to the jury that the heroin was planted in the Buick by the police, especially given that police did not find any drugs on him while doing their patdown search on the scene or their more thorough search at the police station. In his response to the no-merit, Alexander argues that his mere proximity to the drugs in the police car is insufficient to support his conviction. *See* ***United States v. Cervantes***, 219 F.3d 882, 893 (9th Cir. 2000) ("A 'defendant's mere proximity to [a] drug, her presentence on the property where it is located, and

her association with the person who controls it are insufficient to support a conviction for possession.'") (citation omitted; brackets in ***Cervantes***) (overruled in part on other grounds as stated in ***Brigham Cnty. v. Stuart***, 547 U.S. 398, 402 (2006), and ***United States v. Snipe***, 515 F.3d 947, 952 (9th Cir. 2008)).

However, the jury had more to go on than just Alexander's proximity to the drugs in the back seat of the police car. His repeated "blading" and fidgeting, coupled with the feces-smeared paper towel wrapped around the bag of heroin, could allow a jury to infer that the heroin had been stored rectally and that Alexander was attempting to remove it and dispose of it in the police car before arriving at the police station, where he would undergo a more thorough search.

As to the other elements, Alexander stipulated that the substance was heroin in an amount between ten and fifty grams. That stipulation was knowingly, intelligently, and voluntarily entered. Officers testified that Nathaniel, who was driving and whose phone was used to set up the deal with the informant, had attempted to leave the scene when police vehicles surrounded him, putting the car in reverse and hitting, albeit lightly, the bumper of the police vehicle behind him. From this, a jury could infer that at least one of the car's occupants knew the substance was heroin. One of the officers testified that, in his experience, the quantity and packaging of the drugs as four smaller bags packed into one large bag was indicative of intent to deliver.

Further, though Alexander at sentencing disavowed any knowledge of Nathaniel's plans—Alexander said he thought they were going to Gurnee Mills and he was asleep until police stopped them—the fact that the drugs were found in the police car with Alexander, rather than Nathaniel, suggests Alexander's willingness to aid Nathaniel's plan. There is sufficient evidence from which a jury could conclude beyond a reasonable doubt that Alexander was guilty

of possession with intent to deliver between ten and fifty grams of heroin; there is no arguable merit to a challenge to the sufficiency of the evidence.

IV. Sentencing

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. 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, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court commented that Alexander was taking absolutely no responsibility in this case—he insisted he was "railroaded" and that the officer who found the drugs in the police car was lying—even though the jury had found his guilt beyond a reasonable doubt. The trial court observed the seriousness of this crime based on the amount of heroin, and commented that Alexander had no ties to Wisconsin other than to bring in drugs. The trial court rejected probation, noting that Alexander had been on some form of probation or supervision in Illinois, but that had been unsuccessful. It is evident from the trial court's comments that it was concerned with at least protection of the community and deterring others.

The maximum possible sentence Alexander could have received was twenty-five years' imprisonment. The sentence totaling twelve years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, 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 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

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 Attorneys Randall E. Paulson and Hannah Schieber Jurss[8] are relieved of further representation of Alexander in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[8] Attorney Paulson submitted the no-merit report in this matter. However, he left the public defender's office in February 2015. Attorney Jurss was appointed as successor counsel for administrative purposes.