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April 15, 2015

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

2013AP625-CRNM State of Wisconsin v. Willie J. Lane (L.C. #2010CF765)

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

Willie J. Lane appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of battery to a law enforcement officer, one count of obstructing an officer, and one count of attempted disarming of a peace officer, all as a repeat offender. Appellate counsel, Christopher M. Glinski, 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] We also directed counsel to provide a

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

supplemental report. Lane was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's reports, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Background

Shortly after midnight on July 30, 2010, Kenosha County Deputy Sheriff David Gomez was dispatched to an address in response to a complaint regarding two suspicious vehicles that had been parked in a driveway for a long time and were unfamiliar to the area. When Gomez and his partner, Deputy Christopher Rydelski, arrived at the scene, they found a man and a woman attending to two cars. The car hoods were open and jumper cables connected the batteries. Rydelski approached the woman, who told Rydelski that her friend needed a jump, so she came over to help him out.

Gomez made contact with the man, later identified as Lane. Gomez requested identification but Lane was evasive. Gomez asked why there was a problem providing identification, Lane answered that he was nervous. When Gomez asked if Lane had "warrants or something," Lane responded affirmatively and took off running towards a heavily wooded area nearby. Gomez pursued Lane, telling him to stop and threatening to deploy his taser. When Gomez caught up to Lane, they engaged in a physical struggle, and Lane grabbed Gomez's gun in its holster and tried to remove it. Gomez deployed the taser, striking and shocking Lane. Lane ripped out the probe, grabbed Gomez by his shirt, and struck Gomez's right rib cage with his left knee, cracking one of the ribs.

As the two were "pretty much hands on at that time," Gomez used the taser to try to stun Lane. Lane fell backward onto the ground; Gomez, standing over him, told him to stay on the ground. Lane began crawling backwards. Gomez noticed something in Lane's left hand and directed Lane to show his hand, but Lane refused. As Gomez bent down to attempt to subdue Lane and retrieve the item, which Gomez had now determined to be a cell phone, a new struggle began, and Lane reached up and poked Gomez in the eye. Ultimately, Lane was restrained and taken into custody. He was initially charged with two counts of battery to a peace officer and one count of obstructing an officer, all as a repeat offender. Later, an information added a count of attempted disarming of a peace officer.

The case proceeded to a jury trial at which Gomez, Rydelski, and Lane testified. The jury acquitted Lane on one battery count but convicted him on the remaining three charges. Shortly thereafter, Lane moved for a new trial on the grounds that the State had failed to disclose Gomez's criminal record. The circuit court denied the motion. Subsequently, the circuit court sentenced Lane to two years' initial confinement and two years' extended supervision for the battery, one year of initial confinement and one year of extended supervision for the obstructing, and two years' initial confinement and two years' extended supervision for the attempted disarming, to be served consecutively and consecutive to any other sentence.

In his main report, counsel addresses two issues: sufficiency of the evidence and the circuit court's sentencing discretion. In the supplemental report, counsel addresses multiplicity, jury unanimity, and the misdemeanor sentence structure. We additionally address the circuit court's decision to deny the motion for a new trial.

Discussion

I. Multiplicity

Lane was charged in the criminal complaint with two counts of battery to a law enforcement officer;[2] count one for kneeing Gomez in the ribs, and count two for poking him in the eye. *See* WIS. STAT. § 940.20(2) (2009-10) ("Whoever intentionally causes bodily harm to a law enforcement officer … by an act done without the consent of the person so injured, is guilty of a Class H felony."). While the criminal complaint identifies the specifics of each charge, the charges set out in the information are identical, reciting only the legal elements of battery to a law enforcement officer. *See* ***State v. Robinson***, 2002 WI 9, ¶12, 249 Wis. 2d 553, 638 N.W.2d 564 (multiplicity violation where negotiated plea "contained two identical counts" for same conduct), *abrogated on other grounds by* ***State v. Kelty***, 2006 WI 101, ¶39, 294 Wis. 2d 62, 716 N.W.2d 886. Thus, the first issue we address is whether there is any arguable merit to claiming a multiplicity error.

The double jeopardy clauses of the United States and Wisconsin constitutions "protect a person from being 'placed twice in jeopardy of punishment for the same offense.'" *See* ***State v. Trawitzki***, 2001 WI 77, ¶20, 244 Wis. 2d 523, 628 N.W.2d 801 (citation omitted). "[B]ecause double jeopardy protection prohibits double punishment for the 'same offense,' the focus of [a multiplicity] inquiry is whether the 'same offense' is actually being punished twice[.]" ***State v.***

[2] The complaint and information title each charge as battery to a peace officer, but the proscribing statute, WIS. STAT. § 940.20(2) (2009-10), never uses the phrase "peace officer." The descriptions of each charge, however, appropriately cite to § 940.20(2) (2009-10); the descriptions identify Gomez as a "law enforcement officer," the correct terminology used in the statute; and the jury was properly instructed with WIS JI—CRIMINAL 1230, regarding battery to a law enforcement officer.

Derango, 2000 WI 89, ¶28, 236 Wis. 2d 721, 613 N.W.2d 833. Multiplicity challenges usually arise in one of two ways: when a single course of conduct is charged in multiple counts of the same statutory offense, also called "continuous offense" cases, or when a single criminal act encompasses the elements of more than one distinct statutory crime. *See* ***id.***, ¶27.

We employ a two-part test for reviewing multiplicity challenges: in step one, we determine whether the offenses are identical in law and fact, and in step two, which we reach only if the offenses are not identical in law and fact, we inquire into legislative intent. *See* ***State v. Koller***, 2001 WI App 253, ¶29, 248 Wis. 2d 259, 635 N.W.2d 838. If the offenses are different in law or fact, then there is a presumption that multiple punishments were intended. ***Id.*** This presumption may be rebutted only by showing clear legislative intent to the contrary. ***Id.***

This case presents a "continuous offense" challenge because Lane was charged with multiple violations of WIS. STAT. § 940.20(2) (2009-10). This means that the charges are identical in law. *See* ***State v. Davis***, 171 Wis. 2d 711, 716, 492 N.W.2d 174 (Ct. App. 1992). We therefore need only consider whether the charges are "identical in fact."[3] *See* ***Koller***, 248 Wis. 2d 259, ¶30. Counsel concludes that there is no multiplicity problem in Lane's case because the charges were not identical in fact—one was predicated on the injury to Gomez's ribs and one on the injury to his eye.

"The mere fact that factual elements are somewhat different does not, however, resolve the question or terminate our inquiry in determination of the question of multiplicity." ***State v.***

[3] We are unaware of anything, in this record or generally, that would rebut the presumption of multiple punishments in a case like this.

Eisch, 96 Wis. 2d 25, 32, 291 N.W.2d 800 (1980). "[T]he appropriate question is whether these acts … are so significantly different in fact that they may properly be denominated separate crimes although each would furnish a factual underpinning or a substitute legal element for the violation of the same statute." *See* ***id.*** at 34. Stated another way, this inquiry involves "a determination of whether the charged acts are 'separated in time or are of a significantly different nature.'" *See* ***Koller***, 248 Wis. 2d 259, ¶31 (citation omitted).

The same types of acts—*i.e.*, multiple batteries—are different in nature if each one requires "'a new volitional departure in the defendant's course of conduct.'" *See* ***id.***, ¶31 (citation omitted). Time is an important factor in this determination, but a brief time separating acts, even mere seconds, may suffice. ***Id.*** "The pertinent time question is whether the facts indicate the defendant had 'sufficient time for reflection between the assaultive acts to again commit himself.'" ***Id.*** (citations and one set of quotation marks omitted).

Here, there is no basis for a multiplicity challenge because the batteries were, in fact, different in nature, in part because they were injuries to different parts of Gomez's body, but more so because they are marked by separate "volitional departures." The first battery occurred after Gomez deployed the taser against Lane: Lane responded by ripping out the probe, grabbing the officer, and kneeing him in the ribs. After Gomez tased Lane a second time and Lane fell to the ground, Lane began crawling away, creating a break in the physical struggle. When Gomez attempted to subdue Lane and recover the cell phone, Lane opted not to submit to the officer's authority and instead reached up to poke Gomez in the eye. The events thus separated by time

and action, any multiplicity challenge would have failed.[4] *See also* ***State v. Lomagro***, 113 Wis. 2d 582, 597 n.6, 335 N.W.2d 583 (1983) (recognizing State's ability to choose between separate counts for separate acts or a single count for separate acts that are part of a continuing criminal episode).

II. Jury Unanimity

As noted, the jury convicted Lane of a single count of battery. Neither the information nor the jury instructions linked a specific charge to a specific injury, so it is not possible to be certain which event the jurors thought was the convictable offense, nor whether the jurors agreed on the underlying facts. The State attempted to present its evidence in a consistent fashion, always discussing the rib injury first and the eye injury second, which, coupled with the complaint, strongly suggests the conviction on the second count of battery might correlate to the eye injury. However, the State switched the order of discussion in its closing arguments, discussing the eye injury first. Defense counsel then potentially clouded the issue by claiming that Lane was charged with one count of battery for the eye injury and another count for scratches Gomez received. Thus, we consider whether there is any arguable merit to raising a jury unanimity challenge.

[4] Because multiplicity is a type of double jeopardy violation, *see* ***State v. Koller***, 2001 WI App 253, ¶30, 248 Wis. 2d 259, 635 N.W.2d 838, such a challenge can be forfeited without a timely assertion of the right, *see* ***Peretz v. United States***, 501 U.S. 923, 936-37 (1991). Thus, we have also considered whether there is any arguable merit to a claim of ineffective assistance of counsel for failure to raise a multiplicity challenge. However, because the multiplicity challenge would have failed, there is no arguable merit to a claim of ineffective assistance of counsel for failing to bring such a challenge. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

The right to a jury trial "includes the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence." ***State v. Dearborn***, 2008 WI App 131, ¶17, 313 Wis. 2d 767, 758 N.W.2d 463. The threshold question in a unanimity challenge is whether the statute creates multiple offenses or multiple methods of committing a single offense. *See* ***id.***, ¶19.

Lane's battery charges alleged that he acted contrary to WIS. STAT. § 940.20(2) (2009-10), which provides, in relevant part, that "[w]hoever intentionally causes bodily harm to a law enforcement officer … is guilty of a Class H felony." This is similar to the offense of simple battery as set out in WIS. STAT. § 940.19(1), which provides in relevant part that "[w]hoever causes bodily harm to another … is guilty of a Class A misdemeanor."

With respect to ordinary battery, the supreme court has held that "unanimity requires that the entire jury agree that the defendant intentionally committed *an act* which caused bodily harm. No agreement is required as to *which act* constituted battery [when] it was a continuous act." *See* ***State v. Giwosky***, 109 Wis. 2d 446, 451, 326 N.W.2d 232 (1982). Similarly, then, for a single count of battery to a law enforcement officer, it was not necessary for the jury to be unanimous as to which of Lane's actions caused Gomez bodily harm, only that an act by Lane caused Gomez bodily harm. Accordingly, there is no arguable merit to a jury unanimity challenge.

III. Sufficiency of the Evidence

We now address whether there is any arguable merit to a claim that the verdicts were not supported by sufficient evidence. We view the evidence in the light most favorable to the verdict, and if more than one 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 (1990). The

verdicts "'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, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

The jury is the sole arbiter of witness credibility and it alone is charged with the weighing of the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. The jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony while rejecting another—that is, a jury can find that a witness is partially truthful and partially untruthful. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). "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).

a. Battery

The State had to prove six elements to secure a conviction on battery to a law enforcement officer: Lane caused bodily harm to Gomez; Gomez was a law enforcement officer; Gomez was acting in an official capacity; Lane knew or had reason to know that Gomez was a law enforcement officer acting in an official capacity; Lane caused bodily harm to Gomez without the consent of Gomez; and Lane acted intentionally. *See* WIS JI—CRIMINAL 1230.

Our review of the record satisfies us that sufficient evidence supports the jury's conviction on the single count of battery. Gomez testified about his employment and his purpose in making contact with Lane, establishing that he was a law enforcement officer acting in an

official capacity with lawful authority. Gomez also testified that he was in uniform, so it can be fairly inferred that Lane knew Gomez was a law enforcement officer acting in an official capacity.

Though we do not know why the jury convicted Lane of only one battery, there is sufficient evidence to support the verdict whether the jurors had different theories of which bodily harm Lane caused or whether they agreed on a single theory. Gomez testified about how Lane kneed him in the ribs, cracking one of them, and about how Lane poked him in the eye, causing pain and impairing his vision. That testimony is sufficient to support at least a single battery conviction.[5]

b. Obstruction

Obstructing an officer has four elements: the defendant obstructed an officer; the officer was doing an act in an official capacity; the officer was acting with lawful authority; and the defendant knew that the officer was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would obstruct the officer. *See* WIS JI—CRIMINAL 1766. We have established that sufficient evidence shows Lane was acting in an official capacity with lawful authority and that it could be inferred that Lane knew this. When he testified, Lane admitted that he fled from Gomez because he "didn't want to be in this situation"

[5] At trial, Lane testified that he was on the ground and would not have been able to get into a position to knee Gomez. The jury could have accepted that testimony and rejected one of the battery charges, while still finding that Lane poked Gomez in the eye, as the eye injury was documented through photographic evidence.

and that it may have been on his mind that there could be a warrant out for him. Lane's testimony sufficiently establishes the additional elements of obstruction.

c. Attempted Disarming of a Peace Officer

Disarming a peace officer has five elements: Gomez was a peace officer; he was acting in an official capacity; Lane disarmed Gomez by taking a dangerous weapon from him; Gomez did not consent to the taking of the dangerous weapon; and Lane committed the act intentionally. *See* WIS JI—CRIMINAL 1328. Because the crime was charged as an attempt, the State also had to show that Lane intended to commit the main crime of disarming a peace officer and that Lane acted toward the commission of that crime, demonstrating unequivocally that, under all of the circumstances, Lane intended to and would have disarmed Gomez except for the intervention of another person or some other extraneous factor. *See* WIS JI—CRIMINAL 580.

Gomez testified about, and physically demonstrated, how Lane attempted to remove Gomez's gun by trying to rock it out of its holster. The extraneous factor stopping Lane can be inferred by the fact that Lane was unsuccessful in disarming Gomez. Gomez's testimony, plus other evidence already discussed, adequately supports the verdict convicting Lane of attempted disarming of a peace officer. There is no arguable merit to a challenge to the sufficiency of the evidence on any of the convictions.

IV. Sentencing Discretion

We next address 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 observed that Lane's criminal record dates back to 1993 and that he had a lot of resisting or obstructing issues. The circuit court explained that it viewed Lane's crimes as serious, with the attempt to take Gomez's gun crossing the line. The circuit court did give Lane credit for completing his GED and for having some employment history, but noted that Lane had issues with taking responsibility for his actions, observing that even when confronted with his prior convictions, Lane had no recollection of doing anything wrong. The circuit court expressed a strong goal of community protection, noting that Lane was on supervision at the time of these offenses. The circuit court also explained why it was imposing consecutive sentences and why it thought the maximum sentence for obstruction was appropriate.

The maximum possible sentence Lane could have received was twenty-two years' imprisonment. The sentences totaling ten 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.

We have also considered whether there was any arguable merit to a challenge to the sentence imposed for obstruction. That crime, a Class A misdemeanor, ordinarily carries a maximum sentence of nine months in jail but, because Lane was charged as a repeater, the sentence could be "increased to not more than 2 years." WIS. STAT. § 939.62(1)(a). The circuit court imposed this maximum as one year of initial confinement and one year of extended supervision. ***State v. Lasanske***, 2014 WI App 26, ¶¶8-12, 353 Wis. 2d 280, 844 N.W.2d 417, explains the propriety of such a sentence structure, so there is no arguable merit to a challenge to Lane's enhanced misdemeanor sentence structure.

V. Postconviction Motion for a New Trial

Finally, we consider whether the circuit court erred when it denied Lane's postconviction motion for a new trial. Lane alleged that the State had committed a discovery violation, *see* WIS. STAT. § 971.23(1)(f), because it failed to disclose that Gomez had a prior marijuana possession conviction. Lane asserted that he should thus receive a new trial in the interests of justice. The circuit court, after considering written submissions and supplemental argument, denied the motion.

The circuit court noted that it generally uses a ten-year limit on prior convictions for impeaching witnesses; Gomez's conviction, from 1987, was more than twenty years old at the time of the postconviction motion.[6] The circuit court was, therefore, confident that it would not

[6] Lane also challenged the State's "failure" to disclose other information regarding Gomez on an abstract obtained from LaSalle County, Illinois. The circuit court explained that the other events did not appear to indicate a conviction on any other charges and refused to consider anything but the possession conviction. We discern no erroneous exercise of discretion from this determination, as it is effectively a fact-finding decision of how to read the Illinois data.

have allowed the conviction to be used to impeach Gomez, not only because of its age but also because the possession conviction was not a conviction for anything having to do with dishonesty such that it would have impacted the issue of credibility. The circuit court also concluded that even if it had been admitted, information of the conviction would not have changed the results of the trial.

Decisions to admit or exclude evidence are discretionary. *See* ***State v. Head***, 2002 WI 99, ¶43, 255 Wis. 2d 194, 648 N.W.2d 413. Whether to grant a new trial in the interests of justice is also discretionary. *See* ***Markey v. Hauck***, 73 Wis. 2d 165, 171-72, 242 N.W.2d 914 (1976). We discern no erroneous exercise of discretion on either decision. There is no arguable merit to any challenge to the circuit court's denial of Lane's motion for a new trial.

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 Attorney Christopher M. Glinski is relieved of further representation of Lane in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals