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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

August 19, 2015

To:

Hon. Rebecca F. Dallet
Circuit Court Judge
Branch 40
821 W State St
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Patrick Flanagan
Flanagan Law Office, LLC
759 N. Milwaukee St., #215
Milwaukee, WI 53202-3714

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jorge Michael Martinez 417501
Green Bay Correctional Institution
P.O. Box 19033
Green, Bay, WI 54307-9033

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

2013AP1876-CRNM State of Wisconsin v. Jorge Michael Martinez (L.C. #2011CF6146)

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

Jorge Michael Martinez appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of first-degree reckless homicide while armed with a dangerous weapon and one count of armed burglary, both as a party to a crime. Appellate counsel, Patrick Flanagan, 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] Martinez was advised of his right to file a response, and he

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

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

BACKGROUND

On December 5, 2011, Milwaukee police officer Raynaldo Roman responded to a shots-fired call. When he arrived on scene, he found Andrew Tyler dead from a gunshot wound. The apartment appeared ransacked, and some electronic items had been gathered in a plastic storage bin. A fingerprint was obtained from one of the discs in the bin; the print was matched to Martinez.

The State initially charged Martinez with felony murder as party to a crime. After he declined to resolve the case through a plea agreement, the State revised the charge to first-degree reckless homicide, while armed with a dangerous weapon, as party to a crime, and armed burglary as party to a crime. A jury convicted Martinez of the two charges. The trial court imposed a sentence of thirty-five years' initial confinement and fifteen years' extended supervision on the homicide and a concurrent sentence of five years' initial confinement and seven years' extended supervision on the burglary; these sentences were consecutive to any other sentences. Additional facts will be discussed herein.

DISCUSSION

Counsel raises three potential issues, each of which he concludes lacks arguable merit: sufficiency of the evidence, sentencing discretion, and ineffective assistance of counsel.

Martinez raises approximately seven issues, three of which overlap with the issues raised by counsel.

A. Prosecutorial Misconduct or Vindictiveness

The first issue Martinez raises is whether it was proper for the State to increase his charge from felony murder when he declined to enter a plea agreement. Martinez claims prosecutorial vindictiveness or misconduct because he views the State as punishing him for exercising his constitutional right to a jury trial.

"[I]t is a violation of due process when the state retaliates against a person 'for exercising a protected statutory or constitutional right.'" *See* ***State v. Johnson***, 2000 WI 12, ¶20, 232 Wis. 2d 679, 605 N.W.2d 846 (citation omitted). Thus, a presumption of vindictiveness applies when a court imposes a greater sentence after a successful appeal, or when a prosecutor increases the charges after a defendant secures a new trial. *See* ***id.***, ¶¶21-22. However, a similar presumption does not apply to a pre-trial filing of increased charges. *See* ***id.***, ¶¶24-32; *see also* ***Bordenkircher v. Hayes***, 434 U.S. 357, 358-59 (1978). Martinez alleges no other facts to suggest misconduct or vindictiveness, and we discern none from the record. There is no arguable merit to a claim of prosecutorial misconduct.

B. ***Riverside***

The second issue that Martinez raises is a potential violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991), which held that there must be a probable cause determination made within forty-eight hours of a warrantless arrests. *See* ***State v. Koch***, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (1993) (adopting ***Riverside*** in Wisconsin). Martinez claims

he was arrested without a warrant for this case on December 23, 2011, but that the criminal complaint was not filed until December 30, 2011, and the initial appearance was not held until December 31, 2011.

A ***Riverside*** violation is not a jurisdictional defect. *See* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). The remedy for a ***Riverside*** violation may be suppression of the evidence obtained as a result of the violation—that is, evidence obtained after the point at which the delay in determining probable cause became unreasonable. *See* ***Golden***, 185 Wis. 2d at 769. Several of Martinez's statements from police interviews were introduced at trial, but the State did not use any statements obtained after the forty-eight hour deadline.[2]

Dismissal of charges for a ***Riverside*** violation is not required unless the State intentionally delays and hampers the defendant's ability to prepare a defense. *See* ***Golden***, 185 Wis. 2d at 769. Nothing in this record suggests intentional delay by the State or any adverse impact on Martinez's ability to prepare a defense. Thus, even if there were a ***Riverside*** violation, the record reveals no injury requiring a remedy. There is no arguable merit to claiming a ***Riverside*** issue.

C. Confrontation

Martinez next complains that his confrontation rights were violated at the preliminary hearing when Detective Shelondia Tarver was allowed to testify about statements given by Martinez's co-actor, Rowlando Davis. The State explained, and the court commissioner agreed,

[2] Martinez was also subject to a violation-of-parole hold at some point; if it was imposed during the forty-eight hour initial holding period, then any violation of ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991), becomes moot, as we can then attribute custody to the hold, not the warrantless arrest.

that Davis's statements, that he drove Martinez to Tyler's apartment and that he was present while Martinez ransacked it, should be admissible as co-conspirator-type statements; such statements are not hearsay. *See* WIS. STAT. § 908.01(4)(b)5. However, we need not discuss whether this assessment was accurate because there is simply no right to confrontation during preliminary hearings. *See* ***State v. O'Brien***, 2014 WI 54, ¶30, 354 Wis. 2d 753, 850 N.W.2d 8. Thus, there is no arguable merit to a claim that Martinez's confrontation clause rights were violated at the preliminary hearing.

D. Sufficiency of the Evidence

An issue that both Martinez and counsel address is whether sufficient evidence supports the jury's verdicts. 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 (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, 376-77, 316 N.W.2d 378 (1982) (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* ***Poellinger***, 153 Wis. 2d at 506. A jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony and reject another portion; 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). We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give

weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). "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).

To convince the jury that Martinez was guilty of first-degree reckless homicide while armed with a dangerous weapon, the State had to show that Martinez caused Tyler's death by criminally reckless conduct, which requires the conduct created an unreasonable and substantial risk of death or great bodily harm to another person; that Martinez was aware of that risk; that the circumstances of Martinez's conduct showed utter disregard for human life; and that Martinez committed the homicide while using a dangerous weapon, which by definition includes a firearm. *See* WIS JI—CRIMINAL 1022 & 990.

To obtain a guilty verdict on armed burglary, the State had to convince the jury that Martinez intentionally entered a building, knowing that the entry was without the consent of the person in lawful possession; that Martinez entered the building with intent to steal; and that Martinez committed the burglary while armed with a dangerous weapon. *See* WIS JI—CRIMINAL 1421 & 1425A.

The State also alleged that Martinez was concerned in the commission of those two crimes by either directly committing them or by intentionally aiding and abetting the person who directly committed them. To satisfy this party-to-a-crime allegation for each offense, the State had to show that Martinez either directly committed the crimes or that he intentionally aided and abetted the main actor. *See* WIS JI—CRIMINAL 400. A defendant aids and abets when, "with

knowledge or belief that another person is committing or intends to commit a crime," the defendant "knowingly either assists the person who commits the crime; or is ready and willing to assist and the person who commits the crime knows of the willingness to assist." *See* ***id.*** (some punctuation omitted). The jury does not have to agree on whether the defendant directly committed the crime or whether he aided and abetted its commission. *See* ***id.***

There is sufficient evidence from which the jury could convict Martinez as charged. Co-actor Davis testified that Martinez called him and asked for a ride "to a friend's house to pick up some money and some things." He took Martinez to what turned out to be Tyler's apartment and went in with Martinez, waiting as Martinez loaded electronic items into an emptied clothing bin. Davis also testified that when Tyler entered, Martinez pulled out a handgun, demanded money, and shot Tyler.

R.S. testified that she was Tyler's girlfriend, and she stopped at his apartment to pick him up to go get carryout food. When they returned, Tyler went into the apartment first so he could turn on the Christmas tree lights for R.S. before she came in. R.S. followed him into the apartment but stopped in the kitchen. She watched Tyler go into the living room, then back up towards her with his hands raised. R.S. fled the residence, hearing gunshots as she left.

Milwaukee police detective Matthew Goldberg testified that emergency personnel pronounced Tyler dead at the scene. The medical examiner later testified that the cause of death was a gunshot wound. Goldberg told the jury that he saw a gunshot wound to Tyler's left flank, that the apartment appeared ransacked, and that there was a plastic tub in the living room filled with video game controllers, a laptop, DVDs, and video games. There was also a pillowcase

stuffed with items that included blank CDs. Goldberg also told the jury that these electronic items were taken into inventory to be checked for fingerprint and DNA evidence.

Matthew Maudlin, a fingerprint examiner from the Milwaukee Police Department, testified that another investigator recovered a fingerprint from one of the CDs. Maudlin, who evaluated the recovered print, also testified that, in his opinion, the fingerprint matched Martinez's right thumbprint.

Detective Tarver testified that she interviewed Martinez on December 23, 2011. She said that Martinez admitted he had met Tyler, but only once when he purchased a CD of music from Tyler. Detective Mark Peters testified that Martinez told him he knew Tyler from meeting him at Midtown Mall to buy a music CD from him.

Detective James Hutchinson testified that Martinez told him he met Tyler at Midtown Mall on December 4, 2011, to purchase a CD of "music beats." Hutchinson also testified that Martinez told him he had spent the entire day of the murder with his girlfriend, shopping and watching movies at her parents' house. Hutchinson further testified that Martinez admitted he left Milwaukee on December 6, 2011, on a Greyhound bus bound for Fort Lauderdale with a ticket purchased under the name James Clark.

Detective Goldberg returned to the stand and told the jury that Martinez admitted being at Tyler's residence. Martinez claimed that someone named Jeremy or Jamal came out, armed, from the back of the apartment, walked to the kitchen, and fired three shots.

The above testimony is sufficient evidence from which the jury could find guilt on both offenses. Though Martinez presented alibi witnesses, the jury was not obligated to accept their testimony.

With respect to the sufficiency issue, Martinez complains that the State's evidence "should be called into question because the State failed to disclose certain portions of the evidence and other evidence established based [upon] mendacious information received from the alleged potential witness," co-actor Davis. However, the weight and credibility of evidence presented to the jury in this record is not impugned by this vague allegation of a possible discovery violation. On this record, there is no arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdicts.

E. Other Evidentiary Issues

Though Martinez's vague allegation of evidentiary non-disclosure is insufficient to undermine the jury's verdicts, it does require that we address certain other evidentiary issues. During trial, the jury asked one of the detectives whether cell phone records proved Davis's assertion that Martinez had called him. The detective answered that she had not reviewed or subpoenaed any records. But this led the parties to a more in-depth discussion outside the jury's presence.

Though there were no cell phone records in the discovery materials provided to defense counsel, police evidently had obtained such records as early as December 19, 2011—before Martinez was even arrested. The district attorney, however, told the trial court that because of some error, those records were not transferred correctly to become part of the discovery materials, and the district attorney did not know they existed until, prompted by the jury's

questions, he asked the detectives if any of them had obtained the records. Once the district attorney was aware of the records, he provided a copy to defense counsel.

In recognition of the late turnover, the State indicated that it had no plans to use any cell phone records as evidence, unless necessary as rebuttal. This led Martinez to object, asserting that the testimony about the records would require expert testimony under ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993). Martinez further objected when the trial court refused to grant an adjournment so that Martinez could obtain his own expert.

1. ***Brady*** issue.

Martinez contends in his response that, because the police had the cell phone records but they were not timely turned over, there is discovery violation contrary to ***Brady v. Maryland***, 373 U.S. 83 (1963). A district attorney is required to disclose any exculpatory evidence to a defendant. *See* WIS. STAT. § 971.23(1)(h). Suppression by the State of evidence favorable to the accused, where the evidence is material to guilt or punishment, violates due process regardless of good faith or bad faith by the prosecution. *See* ***Brady***, 373 U.S. at 87. To establish a ***Brady*** violation, though, a defendant must establish that the withheld evidence is material and favorable. *See* ***State v. Harris***, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. Ultimately, the cell phone records in this case were *not* favorable, tending to place Martinez near the location of the homicide at the time of the homicide. There is, therefore, no arguable merit to claiming a ***Brady*** violation.

2. Timely Disclosure of Witness

Lack of a ***Brady*** violation, however, does not end our discovery inquiry. WISCONSIN STAT. § 971.23(1)(d) also requires the State to timely disclose all the witnesses it intends to call at trial. Thus, when the question of cell records came up, so too did the question of whether the State had timely disclosed the witness it would call relative to the cell phone records.

However, the State indicated, and the trial court found, that any cell phone evidence would be used as rebuttal evidence in the event that Martinez tried to show that he was not near the homicide scene—which he did when he presented his alibi witnesses. The State is not obligated to disclose rebuttal evidence, even when it anticipates using the rebuttal evidence before the defense puts on its case. *See* ***State v. Sandoval***, 2009 WI App 61, ¶¶30-31, 318 Wis. 2d 126, 767 N.W.2d 291. Thus, there is no issue with "late" disclosure of a witness; the State did not have to disclose the witness at all.

3. Expert Testimony

There was also a question relating to whether expert testimony was necessary for introducing the cell phone records and conclusions drawn therefrom. Wisconsin adopted the ***Daubert*** standard by enacting WIS. STAT. § 907.02, which says that an expert witness is necessary if "scientific, technical, or other specialized knowledge" will aid the trier of fact. *See* WIS. STAT. § 907.02(1).

The State's expert, a police detective assigned to the "Intelligence Fusion Center," created maps based on data from the cell phone company showing which cell towers Martinez's phone contacted for any given call. The trial court concluded that expert testimony was not

required to present this type of evidence from the cell phone records, noting the wide acceptance of cell phone technology in the federal circuits and explaining that everyone "kind of" understands how cell phones and cell towers work. Indeed, the federal courts appear to consider map plotting of cell records to fall within the realm of lay, rather than expert, testimony. *See* ***United States v. Evans***, 892 F. Supp. 2d 949, 953 (N.D. Ill. 2012). The trial court also concluded, however, that if an expert was required, the State's witness was sufficiently qualified to be so deemed.

Whether a witness is qualified to testify as an expert is left to the trial court's discretion. *See* ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶89, 245 Wis. 2d 772, 629 N.W.2d 727. There is no basis for claiming the trial court erroneously exercised its discretion in its determination that the State's witness was an expert, so there is no basis for raising a ***Daubert*** challenge.

4. Adjournment

Martinez also complains that the trial was not adjourned so he could obtain his own expert to rebut the State's witness regarding the cell phone records. Whether to grant an adjournment is within the discretion of the trial court. *See* ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496. The State was not required to disclose its rebuttal evidence, and there is no provision that requires the trial court to allow rebuttal to the rebuttal. The trial court fully explained why it was not going to grant an adjournment, and there is no arguable merit to challenging that exercise of discretion.

F. Sentencing

Appellate counsel addresses whether the trial court imposed an unduly harsh sentence, while Martinez complains that his sentence was disproportionate and not adequately explained by the trial court. Sentencing is committed to the trial court's 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 trial court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. Our review is limited to whether the trial court properly exercised its discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶17.

The trial court determined that there was a great need for punishment in this case. It observed that Martinez had told his girlfriend he was leaving town for better opportunities; meanwhile, the other people in this case had to go to a funeral. It noted that Martinez posed a danger to the community, because he was willing to take other people's property and had no regard for other people's lives, so there was a serious need to keep him away from the public for a long time. While Martinez attempted to explain that he felt cheated by his music purchase from Tyler, the trial court stated that a twenty-seven-year-old should know that stealing is not the answer. The trial court also noted an element of planning to Martinez's escapades, because he

had the foresight to call for a ride. It rejected Martinez's assertion that Davis was the main actor, stating that it made no sense.

The maximum possible sentence Martinez could have received was eighty years' imprisonment. The sentence totaling fifty 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). This means the sentence was not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

Martinez complains the trial court did not adequately explain his sentence and that it was disproportionate. The amount of necessary explanation varies from case to case. ***Gallion***, 270 Wis. 2d 535, ¶39. In addition, sentences are decided individually on the facts of each case, not by comparison to other defendants. *See* ***id.***, ¶48 (individualized sentencing is a cornerstone of Wisconsin criminal jurisprudence). No two cases and no two defendants present identical factors; our concern is only whether, in the exercise of proper discretion, the sentence imposed can be sustained. *See* ***State v. Lechner***, 217 Wis. 2d 392, 419, 427, 576 N.W.2d 912 (1998). Our review of the record satisfies us that the trial court properly exercised its discretion in determining and explaining Martinez's sentence. There is no arguable merit to a challenge to the trial court's sentencing discretion.

G. Ineffective Assistance of Trial Counsel

In two paragraphs, appellate counsel concludes that the record does not support a claim of ineffective assistance of trial counsel. In his response, Martinez asserts that trial counsel was ineffective for failing to pursue the cell phone records in support of his alibi defense.

There are two parts to an ineffective-assistance claim: deficient performance by counsel and prejudice resulting from that performance. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. We need not address both elements if the defendant fails to make an adequate showing on one of them. *See* ***id.*** To prove constitutional prejudice, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62.

As the cell phone records in this case were not exculpatory, there is no reasonable probability of a different result had defense counsel obtained them before trial. *See* ***State v. Mayo***, 2007 WI 78, ¶59, 301 Wis. 2d 642, 734 N.W.2d 115. Thus, there is no arguable merit to a claim of ineffective assistance of trial counsel.

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

Diane M. Fremgen
Clerk of Court of Appeals