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DISTRICT III

October 21, 2016

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

2014AP2456-CRNM State of Wisconsin v. Corey James Foster
2014AP2457-CRNM (L. C. Nos. 2012CF204, 2012CF212)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Corey Foster has filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge Foster's convictions for delivering Schedule II narcotics; possession of methamphetamine; possession with intent to deliver less than or equal to 200 grams of tetrahydrocannabinols (THC); two counts of delivering less than or equal to 200 grams of THC; and six counts of felony bail jumping, all counts as a repeater.

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

Foster was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Foster with delivering Schedule II narcotics; possession with the intent to deliver methamphetamine; possession with intent to deliver less than or equal to 200 grams of THC; two counts of delivering less than or equal to 200 grams of THC; and six counts of felony bail jumping, all eleven counts as a repeater. The charges for the two cases arose from two controlled drug buys. The State alleged that at the first buy, the confidential informant purchased 10.4 grams of THC and two pills later identified as Schedule II narcotics from Foster. At the second buy, the same confidential informant purchased 12.65 grams of THC. During a subsequent search of the home in which the second buy occurred, police found marijuana and methamphetamine in a basement laundry room.

Foster's motions to suppress statements and evidence were denied. The circuit court also denied Foster's motion for additional discovery regarding the confidential informant. The cases were joined and the matter proceeded to trial. With respect to the charge of possession with intent to deliver methamphetamine, the jury found Foster guilty of the lesser-included offense of possession of methamphetamine. The jury found Foster guilty of the other offenses as charged. A postverdict mistrial motion was denied. Out of a maximum possible sentence of 111 years, the court imposed consecutive and concurrent sentences resulting in a total of seven years' initial confinement followed by eight years' extended supervision and a consecutive two-year probation term.

Any challenge to the circuit court's decision to grant the State's motion for joinder of the two cases would lack arguable merit. WISCONSIN STAT. § 971.12(4) permits crimes in two or more complaints to be joined for trial if the charged crimes could have been joined in a single complaint. In turn, WIS. STAT. § 971.12(1) permits two or more crimes to be charged in a single complaint when the crimes charged "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." Here, the controlled buys from Foster occurred one week apart and utilized the same confidential informant. The same investigators were also present at both buys. The circuit court properly determined both transactions were similar in nature and tended to indicate the charges flowed from a common scheme or plan.

There is no arguable merit to a claim that the circuit court erred by denying Foster's motion for additional discovery regarding the confidential informant. 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 to a law enforcement officer[.]" WIS. STAT. § 905.10. In order to compel discovery, a defendant has the initial, although minimal, burden of justifying further inquiry into whether disclosure should be compelled. ***State v. Hargrove***, 159 Wis. 2d 69, 75, 469 N.W.2d 181 (Ct. App. 1990). If the defendant, through evidence or other showing, has made it reasonably probable that the informant could give relevant testimony, the burden shifts to the prosecution to overcome this inference. ***State v. Outlaw***, 108 Wis. 2d 112, 126-27, 321 N.W.2d 145 (1982). Here, the State provided Foster with the name and criminal history of the confidential informant, as well as taped recordings of some conversations with the confidential informant. The record does not support any claim that Foster was entitled to more than what was provided.

The record discloses no arguable basis for challenging the denial of Foster's motions to suppress statements and evidence. First, Foster sought to suppress statements made to police by Stephanie Fleischhacker, Foster's ex-girlfriend. A defendant may seek suppression of a third party's statements upon a showing that the police coerced the statements by egregious misconduct. *See* ***State v. Samuel***, 2002 WI 34, ¶46, 252 Wis. 2d 26, 643 N.W.2d 423. In his motion, Foster emphasized that during Fleischhacker's police interview, investigators told her that if she cooperated she could walk out of the jail. The investigators also allegedly told Fleischhacker that she was in trouble and Foster was going to turn on her and "rat [her] ass out."

The circuit court acknowledged that the following factors from the ***Samuel*** case are to be considered when determining if the statements were coerced by egregious misconduct:

> (1) whether a witness was coached on what to say; (2) whether investigating authorities asked questions blatantly tailored to extract a particular answer; (3) whether the authorities made a threat with consequences that would be unlawful if carried out; (4) whether the witness was given an express and unlawful quid pro quo; (5) whether the State had a separate legitimate purpose for its conduct; and (6) whether the witness was represented by an attorney at the time of the coercion or statement.

Id., ¶31 (internal citations omitted.) The circuit court recounted that during the interview with Fleischhacker, an adult with a high school diploma, there was "no evidence that [Fleischhacker] was particularly susceptible to police pressure, there were no illicit promises made, and no extreme police tactics or measures used to elicit her statement." The circuit court denied the motion to suppress Fleischhacker's statements, concluding Foster had failed to show egregious misconduct. Based on our review of the record, any challenge to the denial of this suppression motion would lack arguable merit.

Foster also sought to suppress the fruits of any information obtained from the confidential informant, claiming the informant was not trustworthy and there was a lack of adequate corroboration. Trustworthiness, or credibility, however, goes to the weight of evidence, not its admissibility. *See* ***State v. DeSantis***, 151 Wis. 2d 504, 511, 445 N.W.2d 331 (Ct. App. 1989) (that witness testimony may be false does not go to its admissibility), *rev'd on other grounds*, 155 Wis. 2d 774, 456 N.W.2d 600 (1990). Further, the circuit court determined that audio recordings, video tapes and other witnesses provided corroboration for information from the informant. Any challenge to the circuit court's denial of this suppression motion would lack arguable merit.

Alleging the officers lacked probable cause to arrest him, Foster also sought to suppress any evidence flowing from his arrest. Whether the facts of a given case establish probable cause to arrest is a question of law we decide independently. *See* ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). The circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not. *See* ***id.***

At the suppression hearing, investigators testified that with the help of a confidential informant, they surveilled the first controlled buy with Foster in a gas station parking lot, utilizing a body wire and hidden video camera. The confidential informant, whose vehicle and person were searched for contraband before the buy, returned with THC and what was later identified as two pills containing oxycodone, a Schedule II controlled substance. Investigators

identified Foster as the individual who met with the confidential informant for that buy. The confidential informant met with Foster one week later for a second controlled buy—this time at a residence in Somerset. Upon receiving confirmation that a controlled buy had been completed, police entered the residence to preserve any evidence. The officers conducted a safety sweep of the home and either removed or detained everyone found therein. Foster and Fleischhacker were found in the basement and were both arrested. The circuit court determined that probable cause to arrest Foster existed based on the investigators' review of the audio and video recordings from the first buy, along with an officer's personal recognition of Foster from the video and the confidential informant's purchase of THC and the Schedule II controlled substance from Foster. Any claim that evidence should have been suppressed as fruit of an illegal arrest would lack arguable merit.

Foster also sought to suppress evidence recovered as a result of the warrantless entry and warrantless search of the home. Any challenge to the denial of these motions would lack arguable merit. With respect to law enforcement's entry into the home, investigators testified they entered the home to secure the residence and prevent destruction of evidence, including controlled substances and pre-recorded currency used by the confidential informant during the buy. The circuit court determined this entry was lawful for the purpose of preventing loss of evidence while obtaining either a search warrant or permission to search. *See* ***State v. Ferguson***, 2009 WI 50, ¶20, 317 Wis. 2d 586, 767 N.W.2d 187 (recognizing risk that evidence will be destroyed is exigent circumstance justifying warrantless home entry).

Regarding the warrantless search of the residence, warrantless searches are "per se" unreasonable and are subject to only a few limited exceptions, one of which is valid third-party consent. ***State v. Kieffer***, 217 Wis. 2d 531, ¶17, 577 N.W.2d 352 (1998). Third-party consent

may be obtained from a person who possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." ***United States v. Matlock***, 415 U.S. 164, 171 (1974).

> [C]ommon authority rests on the mutual use of the property by persons generally having joint access or control for most purposes and that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

State v. Tomlinson, 2002 WI 91, ¶29, 254 Wis. 2d 502, 648 N.W.2d 367 (internal quotations omitted).

Here, Foster and Fleischhacker were overnight guests in the basement of a home leased by Shannon Mull and Laura Lind. Mull and Lind gave the officers consent to search the basement. The evidence showed that the basement was accessed by an unlocked door in the kitchen and no portion of the basement, other than exterior doors, was locked. Mull testified he could have accessed Foster's things at any time and the basement was used to store items, including winter clothing. Because the record supports the conclusion that Mull and Lind had authority to consent to the search of the basement, including the common laundry room where the drugs were found, any challenge to the circuit court's denial of this suppression motion would lack arguable merit.

There is no arguable merit to a claim that Foster was denied either his constitutional or statutory right to a speedy trial. Under both the state and federal constitutions, the court must consider four factors in determining whether a defendant has been denied a speedy trial: (1) the length of the delay; (2) the reason for the delay, i.e., whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted the right to a speedy trial; and

(4) whether the delay was prejudicial. ***State v. Leighton***, 2000 WI App 156, ¶6, 237 Wis. 2d 709, 616 N.W.2d 126. The length of the delay is a threshold consideration, and must be presumptively prejudicial before inquiry into the remaining three factors occurs. ***Id.***, ¶7. The Supreme Court has generally recognized that post-accusation delay is "presumptively prejudicial" as it approaches one year. ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992). In Wisconsin, twelve months between arrest and trial is the bare minimum for a finding of prejudicial delay. ***State v. Borhegyi***, 222 Wis. 2d 506, 518, 588 N.W.2d 89 (Ct. App. 1998). Here, the eight-month period between Foster's arrest and his trial does not meet the "presumptively prejudicial" threshold for establishing a violation of Foster's constitutional speedy trial right.

In turn, WIS. STAT. § 971.10(2) provides that "[t]he trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded[.]" Here, Foster made a speedy trial demand and his trial was scheduled to commence within 90 days. At the final pretrial, days before the scheduled trial, Foster discharged his appointed counsel. The circuit court consequently continued the scheduled trial to permit newly appointed counsel to become familiar with the case. Approximately five weeks before the second scheduled trial date, Foster withdrew his speedy trial demand and filed several suppression motions, along with a motion for a continuance. The trial was consequently rescheduled to accommodate a testimonial hearing necessitated by the defense motions. Any delay in holding the trial was, therefore, attributable to Foster. Moreover, the remedy for a violation of § 971.10(2) is release from custody with continued obligations of the bond. *See* WIS. STAT. § 971.10(4). It is not dismissal of the charges. Foster has now been convicted and is in custody because of the prison sentences. Any

pre-conviction right to release from custody is moot; therefore, any claimed violation of § 971.10(2) does not present an issue of arguable merit.

Any claim that the circuit court erred by admitting portions of the audio and video recordings of the controlled buys would lack arguable merit. The decision whether to admit or exclude evidence at trial is within the circuit court's discretion. ***State v. Richard G.B.***, 2003 WI App 13, ¶7, 259 Wis. 2d 730, 656 N.W.2d 469. With respect to Foster's own statements on the recordings, the circuit court properly determined these were admissible non-hearsay under WIS. STAT. § 908.01(4)(b).[2] Although the confidential informant was not available to testify at trial, the informant's recorded statements were properly admitted not for the truth of the matter but, rather, merely to provide context to Foster's statements. *See* ***United States v. Foster***, 701 F.3d 1142, 1150 (7th Cir. 2012) (admission of recorded conversations between defendant and non-testifying informant is permissible where informant's statements provide context for defendant's own admissions). Further, the circuit court instructed the jury that the confidential informant's recorded statements were not to be considered for their truth but only for context. We presume the jury followed the instructions given. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Any challenge to the admissibility of the recordings would lack arguable merit.

Any challenge to the jury's verdicts would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993).

[2] The statute provides, in relevant part: "A statement is not hearsay if … [t]he statement is offered against a party and is … [t]he party's own statement." WIS. STAT. § 908.01(4)(b)1.

At trial, sheriff's investigator Jim Mikla described the use of confidential informants for controlled buys, noting that in exchange for their help, the informants often get gas money and cigarettes along with consideration for pending cases. Investigators testified that before both of the controlled buys, the confidential informant was provided with a body wire, a hidden camera and pre-recorded currency. The informant's vehicle and person were searched to ensure the informant did not possess any contraband, and investigators followed the informant to the buy sites.

Mikla testified that at the first buy, which occurred in a gas station parking lot, he saw the confidential informant exit his vehicle and enter another vehicle parked in the lot. There were four people, including the informant, seated in the vehicle. Investigators recognized Foster's voice on the audio recording and the jury heard that part of the recording in which Foster stated, "Know anybody who wants to buy some percs?" and noted "7.5s" were $6 per pill. Mikla further testified that at a predetermined location, the confidential informant turned over what was confirmed to be marijuana and two orange oval pills, containing oxycodone, along with what was left of the pre-recorded money. Before the second buy, the confidential informant was given pre-recorded currency that included a $50 dollar bill. At the second buy, Mikla recognized Foster's voice on the body wire. When Mikla met with the confidential informant following the second buy, the informant turned over what a state crime lab analyst determined was marijuana.

Sheriff's investigator James Haefner testified that after the second buy, he was involved in securing the residence where the buy had occurred. Haefner testified that after clearing the upper level of the home, Haefner and another investigator, Shawn Demulling, proceeded to the basement and encountered Foster exiting what was later determined to be the laundry room. Foster and Fleischhacker, who was also in the basement, were taken into custody and moved

outside. With Fleishhacker's consent, Haefner searched her purse and found the pre-recorded $50 dollar bill. Investigator Dean Fayerweather testified that he photographed evidence, consisting of a purple bag containing what the state crime lab analyst later determined to be methamphetamine and marijuana, where it was found under a jacket in the laundry room. Fleischhacker testified that before law enforcement entered the home, Foster told Fleischhacker "the cops" were there and placed the $50 dollar bill in her purse. The jury also heard evidence that Foster was on bond at the time of the alleged crimes.

To the extent there was conflicting testimony, it was the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Foster's convictions.

There is no arguable merit to a claim that the circuit court erroneously exercised its discretion by denying Foster's mid-trial motion to call witnesses who were in violation of a sequestration order that Foster had requested. Following Fleischhacker's testimony on the second day of trial, Foster sought to introduce two impeachment witnesses who each had personal experience with Fleischhacker stating that because investigators told Fleischhacker she could be charged as an accomplice, she would say whatever she could to get out of the situation. Neither witness was noticed to the State or included on the defendant's witness list and both of the potential witnesses had been watching the trial and talking to Foster during the trial.

When a witness violates a sequestration order, the decision whether to permit that witness's testimony is left to the circuit court's discretion. ***State v. Bembenek***, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983). The prosecutor argued the State would be prejudiced by the admission of testimony from these witnesses, stating: "They should be noticed to me. I'm entitled to discovery. I'm entitled to know what they're saying, when it took place, what the allegations are, and this is now, apparently, brought forward only after these persons have sat through a day-and-a-half of the trial." Further, because Fleischhacker had been released from her subpoena, the State questioned whether it would be able to call her for rebuttal. In denying Foster's request to call these witnesses, the circuit court indicated it would not allow people to testify who had "been sitting in the courtroom during the trial" and "had information that could easily have been learned prior to today." The court further noted that the allegations "there was some type of fear on [Fleischhacker's] part as to why she testified" were not new and arguably cumulative to her trial testimony.[3] Because the circuit court's discretionary decision is supported by the record, any challenge to the exclusion of this witness testimony would lack arguable merit.

[3] On cross-examination, Fleischhacker, who admittedly had no previous "dealings with police," testified that officers told her if she did not want to cooperate, they were going to transport her to jail. Fleischhacker conceded that during her initial contact with police, she stated the $50 dollar bill had been in her purse since her "last check." Fleischhacker further conceded that once at the jail, officers indicated they could get her out immediately if she cooperated. Fleischhacker then told police Foster placed the $50 dollar bill in her purse.

Any challenge to Foster's waiver of his right to testify would lack arguable merit. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Foster in an on-the-record colloquy, informing him of both his right to testify and his right not to testify. After indicating that he had sufficient time to discuss his rights with counsel, Foster confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

There is no arguable merit to a claim that the circuit court erred by denying Foster's postverdict mistrial motion. During the State's closing argument, defense counsel objected to three slides that were inadvertently shown to the jury. One slide stated "Defendant was charged with a felony." Foster, however, had stipulated he was on felony bonds so evidence that the bail jumping charges arose from felonies would not come before the jury. A second slide indicated that "Inv. Demulling" saw Foster "coming out of the laundry room," and a third slide again referenced "Inv. Demulling" and stated "Stephanie [Fleischhacker] was freaking out because the cops were there." Defense counsel argued Foster was prejudiced by the "felony" slide given his pretrial stipulation, and, because Demulling did not testify at trial, the jury was exposed to facts not in evidence.

Although defense counsel objected during the State's closing argument, counsel did not move for a mistrial until after the jury rendered its verdicts. This court has held that while alleged errors during closing argument may be preserved by timely objection and postverdict motion, this does not necessarily provide a basis for reversal. ***Dostal v. Millers Nat'l Ins. Co.***,

137 Wis. 2d 242, 259, 404 N.W.2d 90 (Ct. App. 1987). "In such situations, the failure to move for a mistrial is generally considered an election to take one's chances on a favorable verdict and a waiver of any right to assert prejudice at a later time." ***Id.*** "[C]ounsel cannot simply interpose an objection, then remain silent and be heard to complain only after an adverse verdict has been returned." ***Leibl v. St. Mary's Hosp. of Milwaukee***, 57 Wis. 2d 227, 231, 203 N.W.2d 715 (1973).

The circuit court nevertheless addressed Foster's motion on its merits. Whether to grant a mistrial is within the circuit court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The circuit court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id.*** We will uphold the circuit court's discretionary decision if the court examined the relevant facts, applied a proper legal standard and employed a rational decision-making process. *See* ***id.*** at 506-07. Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives to address the claimed error. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

In denying the mistrial motion, the circuit court noted the jury saw the word "felony," the name "Inv. Demulling," and a sentence not in the testimony of a witness for only a handful of seconds. Nothing was said about these slides to draw their attention to the jury, and no oral statement was made regarding Foster's underlying felonies. Although Demulling did not testify at trial, investigators had referenced him in passing during their testimony. The court ultimately found only "minimal prejudice, if any, resulted from the jury having possibly read these statements" and a mistrial was not warranted. Moreover, the jury had been instructed that the closing arguments are not evidence. Again, we presume the jury followed the instructions given.

Truax, 151 Wis. 2d at 362. The record supports the circuit court's conclusion that the drastic remedy of a mistrial on these grounds was not necessary.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Foster's character, including his criminal history; the need to protect the public; and the mitigating circumstances defense counsel raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Foster's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of further representing Foster in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals