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December 15, 2016

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

2015AP1988-CRNM State of Wisconsin v. Manjit Singh (L.C. # 2013CF4499)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

A jury found Manjit Singh guilty of first-degree reckless injury, by use of a dangerous weapon. *See* WIS. STAT. §§ 940.23(1)(a) and 939.63(1)(b) (2013-14).[1] The circuit court sentenced Singh to six years of imprisonment, consisting of two years of initial confinement and

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

four years of extended supervision.[2] Appellate counsel, Urszula Tempska, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738, 744 (1967). Singh filed a response. Upon reviewing the entire record, counsel's report, and Singh's response, we conclude there are no arguably meritorious issues. Therefore, we summarily affirm.

Singh was a clerk at a gas station/convenience store when three youths entered the gas station. Singh believed the youths were about to shoplift. Singh retrieved the owner's firearm and left the secure employee area. As the youths ran out of the store, Singh fired a gunshot. M.W. was struck in the back. Further facts will be stated as necessary to address the potential issues.

M.W.'s Testimony

The first witness at trial was the victim, M.W. M.W., who was seventeen years old at the time of the shooting, testified that he entered the gas station "[t]o buy something." The prosecutor responded, "But we know that's not true, right? You weren't there to buy anything?" After repeating that he "went in the gas station" and identifying Singh as the person who shot him, M.W. admitted that he entered the gas station to steal snacks.

M.W. admitted being with some other people at the gas station, but he denied knowing who they were. M.W. testified "[o]nce [he] grabbed the stuff, [he] went towards the door." Two other people left the station first and he "was the last one out." After leaving the station, he

[2] The Honorable Jonathan D. Watts presided over this action through the entry of judgment. The Honorable Frederick C. Rosa presided over the postconviction proceedings.

"walked across the street … opened [his] jacket [and] panicked 'cause … blood was rushing from [his] chest, and [he] faint[ed] to the ground." M.W. heard the gunshot as he was going towards the door. M.W. testified that he saw Singh come from behind the counter with a gun and that his back was toward Singh when he heard the gunshot. M.W. was shot in the back, and was hospitalized for three weeks. On cross-examination, M.W. admitted that his cousin was one of the other youths, but denied that the group had planned anything in advance. M.W. testified that the plastic bag that he used to put the stolen snacks into was given to him at another store where he had bought something. M.W. admitted that he had entered into a deferred prosecution agreement in an unrelated felony case but stated that the agreement was unrelated to his testimony in this case.

Following M.W.'s testimony, Singh moved for a mistrial, arguing that M.W. had perjured himself when he testified that he went into the gas station to buy snacks and when he denied knowing the other youths who entered the gas station with him. Singh argued that the surveillance videos which had been viewed by the jury showed that M.W. had lied under oath. The circuit court denied Singh's motion.

Whether to grant a mistrial lies within the sound discretion of the circuit court. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). When determining whether to grant a mistrial, the question is whether, in light of the entire proceedings, the alleged error is sufficiently prejudicial to warrant a new trial. *See* ***id.***

In denying Singh's motion for a mistrial, the circuit court stated that "the patent nature of falsehood must be clearer than this record. There are interpretations that [M.W.'s] testimony could be both true and perhaps muddled, true based upon his best perception." The court then

proposed giving the "Falsus in Uno" jury instruction, WIS JI—CRIMINAL 305.[3] Singh accepted the court's proposal.

An appeal on this issue would lack arguable merit. Due process prevents the State from relying on testimony the district attorney knows to be false, or later learns to be false. ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987). A new trial must be granted if the prosecutor in fact used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury. ***Id.*** "The crux of a denial of due process is deliberate deception. The presentation of inconsistent testimony is not to be confused with presenting perjured testimony. It is the jury's role to resolve issues of credibility." ***State v. Whiting***, 136 Wis. 2d 400, 418, 402 N.W.2d 723 (Ct. App. 1987) (citations omitted).

We agree with the circuit court that M.W.'s testimony, while not forthcoming at times, particularly as to the names of the others, did not rise to the level of perjury. It is at least conceivable that M.W. did not know the names of all of the other youths and that the shoplifting spree was not a planned activity. It could have been a spur of the moment action taken by a group of youths not much familiar with each other. The bottom line is that M.W.'s testimony created a credibility question for the jury, and a reviewing court cannot disturb the jury's decision.

[3] WISCONSIN JI—CRIMINAL 305 states: "If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all the testimony of the witness which is not supported by other credible evidence in the case."

Sufficiency of the Evidence

This court may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *See* ***id.*** at 506. If more than one inference can be drawn from the evidence, the inference that supports the jury's finding must be followed unless the testimony was incredible as a matter of law. *See* ***State v. Witkowski***, 143 Wis. 2d 216, 223, 420 N.W.2d 420 (Ct. App. 1988).

In addition to M.W.'s testimony, summarized above, the owner of the gas station, Ajit Singh, testified. Ajit Singh described the bullet-proof, secured employee area. Ajit Singh kept a gun in the secured area but had not shown the gun to his employees. Employees are trained to not exit the secured area because of the danger and to electronically lock the station's outer door if they see someone stealing merchandise.

Michael Slomczewski, a Milwaukee police officer, testified that he encountered M.W. when he arrived on the scene. M.W. told him that the "gas station guy" had shot him. Slomczewski saw several bags of chips in a plastic bag on the ground near M.W. Several people who were standing near M.W. ran away when Slomczewski approached.

John Shipman, a Milwaukee police officer, testified that he talked with Singh when he arrived at the gas station. Singh told Shipman that the shooting took place outside the station.

After Shipman found a .45 caliber shell casing outside of the secured employee area, Shipman became concerned that Singh was not being truthful and Singh was detained in a squad car. Shipman located and secured the four video surveillance cameras. Shipman testified that he viewed the videos several times. Those videos showed two individuals enter the store and begin taking items. The person working behind the counter unlocked the security door when the individuals came in, an action Shipman described as "unusual." Singh went off camera into a storage area and when he returned, he was holding a black semi-automatic pistol. Singh then opened the security door, stepped out, extended the gun, and fired. Shipman testified that one of the cameras then showed Singh setting the gun down and spraying air freshener outside of the security door. Shipman testified that a discharged gun has a strong odor, and that people often use air freshener to try to mask the smell. The video also showed Singh selling cigarettes to another patron after the shooting.

Brian Stott, a Milwaukee police detective, testified that he recovered a gun from the gas station, behind the secured checkout area, in a stack of t-shirts. Stott also interviewed Singh after the shooting. A video recording of the interview was played for the jury. Stott testified that Singh told him that groups of youths had come into the store, grabbed chips, and ran out the three or four previous nights. Singh told Stott that he grabbed the gun to try to scare the youths. Singh also admitted that he did not call the police after the shooting.

Lastly, Singh testified. Singh testified that the lock on the security door to the employee work area did not work. Singh said he knew the youths were going to rob the store when they came in because they were wearing hoodies and were carrying plastic bags. Singh said that he "took the gun for my safety and yeah, I did, just to scare them. I took the gun out and I went out there." Singh said that as he told the youths to put the snacks back, one of them "took a bottle of

soda from his side which looked like, that he had pulled a gun." Singh responded by putting his finger on the trigger and the youth threw the bottle at Singh who then "pulled the trigger just to protect" himself. Singh testified that his eyes were closed and he did not know the bullet had struck someone. After the shooting, Singh sold some cigarettes to a customer and the station's owner happened to call to check in. Singh testified that when the police arrived, he did not fully understand what they were asking him because they were talking to him in English.[4] Singh testified that if he had not left the clerk's area, the youths would have kept on stealing.

Upon Singh's request, the circuit court gave the standard self-defense instruction. *See* WIS JI—CRIMINAL 801.

The State was obligated to prove that Singh caused great bodily harm to M.W. by criminally reckless conduct under circumstances showing Singh's utter disregard for human life. *See* WIS JI—CRIMINAL 1250. Singh could have responded to the youths' stealing by calling the police. Using a gun as he did created an unreasonable and substantial risk of death or bodily harm. The jury's rejection of Singh's claim of self-defense is supported by the evidence. An appellate challenge to the jury's verdict would lack arguable merit.[5]

[4] Singh is a native of India and speaks limited English. Punjabi translators were used during his post-shooting interview with Detective Stott and at trial.

[5] Singh's response recounts his version of the incident. The jury was not obligated to accept his position on the facts. Singh also states that he may be deported as a result of his conviction. The possibility of deportation does not create a meritorious appellate issue in an appeal from a jury verdict. *Cf.* ***State v. Ortiz-Mondragon***, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717 and ***State v. Shata***, 2015 WI 74, 364 Wis. 2d 63, 868 N.W.2d 93 (both addressing whether a guilty plea may be withdrawn for ineffective assistance of counsel for allegedly inadequate advice regarding the potential of deportation following a criminal conviction). Any federal deportation proceedings are wholly independent from this matter.

Sentence

This court next considers whether an appellate challenge to the sentence would have arguable merit. On appeal, this court's review of sentencing is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***Id.***, ¶18 (quoted source omitted). "Sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Id.*** (quoted source and brackets omitted). The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Id.***, ¶23 (quoted source omitted).

"Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant, and other aggravating or mitigating factors. ***Id.***, ¶40 n.10.

In this case, the circuit court considered the appropriate factors. The court discussed the gravity of the offense, noting the serious injuries suffered by M.W. The court reviewed the facts

of the shooting, noting Singh's "impulsive" decision and "poor judgment." The court described the offense as "extremely egregious" and observed that Singh was fortunate that M.W. had not been killed. The court stated that Singh "d[id] not have the right to act as the police, DA, judge or jury" and that he had "other alternatives" to choosing to confront and then shoot at the fleeing youths. The court described Singh's character as "very good," noting the lack of a prior criminal record and his history of hard work. The court noted that Singh had shown remorse for his conduct and had been cooperative throughout the proceeding. The court discussed the need to protect the public from the "tremendous amount of danger" created by Singh when he fired toward the fleeing youths. The court stated that the gravity of the offense precluded both probation and a term in the House of Correction. The court concluded that Singh's good character did not outweigh the danger created by his conduct.

The circuit court properly exercised sentencing discretion, and an appellate challenge to the sentence would lack arguable merit.[6]

DNA Surcharge

The circuit court ordered that Singh provide a DNA sample and pay the $250 surcharge. *See* WIS. STAT. §§ 973.046 and 973.047. Because Singh had not previously provided a DNA sample, the circuit court denied Singh's postconviction motion to vacate the surcharge. A further

[6] The circuit court's consideration of the COMPAS risk assessment tool was not error. A sentencing court may use a COMPAS risk assessment tool to "enhance [the] … evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate" for a defendant. ***State v. Loomis***, 2016 WI 68, ¶92, 371 Wis. 2d 235, 881 N.W.2d 749 (citation omitted). While considering the need to protect the public, the court remarked that both the pre-sentence investigation report and the COMPAS tool viewed Singh "as having relatively low potential future dangerousness" and that Singh scored low on both the violent and general recidivism risks. A challenge to the court's consideration of the COMPAS tool would lack arguable merit.

challenge to the imposition of the surcharge would lack arguable merit. *See* ***State v. Long***, 2011 WI App 146, ¶¶8-9, 337 Wis. 2d 648, 807 N.W.2d 12 (imposition of a surcharge for the first DNA sample is a reasonable discretionary decision).

Conclusion

Upon our independent review of the record, we have found no arguable basis for reversing the judgment of conviction or postconviction order. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32. Therefore,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Urszula Tempska is relieved of any further representation of Manjit Singh in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals