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March 13, 2019

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

2017AP760-CRNM State of Wisconsin v. Derrick D. Davis (L.C. #2015CF2823)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Derrick D. Davis appeals from a judgment of conviction entered upon his guilty plea to first-degree recklessly endangering safety by use of a dangerous weapon. Davis's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v.*

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

California, 386 U.S. 738 (1967). Davis filed a response and appellate counsel filed a supplemental no-merit report addressing the response. Upon consideration of the original and supplemental no-merit reports, Davis's response, and our independent review of the record,² we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

During a road-rage incident involving several people, Davis shot the victim in the leg. The State filed a criminal complaint charging Davis with one count of attempted first-degree intentional homicide by use of a dangerous weapon and one count of armed robbery as a party to the crime. Davis moved to suppress the victim's out-of-court identification selecting Davis from a photo array. Following an evidentiary hearing, the circuit court denied the motion. Davis then filed a motion to dismiss the charges due to the destruction of evidence, namely, the recording of an emergency call to law enforcement. The court heard the motion on the morning of Davis's scheduled jury trial and declined to dismiss the charges, determining that the appropriate remedy would be a curative jury instruction. Rather than proceed to trial, Davis pled guilty to an amended charge of first-degree recklessly endangering safety by use of a dangerous weapon. Count two was dismissed outright. The circuit court imposed a bifurcated sentence totaling twelve and one-half years, with seven and one-half years of initial confinement followed by five years of extended supervision. Davis appeals.

² On December 13, 2018, we ordered the record supplemented with two transcripts and any exhibits or papers considered at an unrecorded restitution hearing. The supplemental record has now been filed.

Appellate counsel's no-merit report addresses the potential issues of whether the circuit court properly denied Davis's motions to suppress evidence and to dismiss the charges, whether there was a violation of Davis's right to a speedy trial, whether Davis's plea was freely, voluntarily, and knowingly entered, whether the circuit court properly exercised its discretion at sentencing, and whether trial counsel provided ineffective assistance. Our review of the record persuades us that no issue of arguable merit arises from these points.

Trial counsel filed a motion to exclude from evidence "the identification of Mr. Derrick Davis made by [the victim] and any subsequent or anticipated in-court identification of" Davis. The motion alleged that the out-of-court identification process was impermissibly suggestive and unreliable and that it would taint any future in-court identification.

It is undisputed that the victim identified Davis from a photo array administered by law enforcement two days after the shooting and that the victim was shown six individual photos of six different men. At an evidentiary hearing, the victim testified in detail about the circumstances of the charged offense, including his opportunity to view the shooter, and about the subsequent identification procedure. The officer who administered the photo array also testified about the identification process. He read into the record the instructions and advisements provided to the victim, including that the shooter "may or may not be in the photos," that the victim should keep in mind that things like hairstyles can easily change while "complexion colors may look slightly different in photographs," that the victim should not feel he had to make an identification, and that the photos would be shown one at a time in an order unknown to the officer.

We agree with appellate counsel's conclusion that no arguably meritorious issue arises from the circuit court's decision declining to exclude the victim's identification of Davis. A defendant seeking to exclude a victim's out-of-court identification has the burden to show that the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Powell v. State*, 86 Wis. 2d 51, 64, 271 N.W.2d 610 (1978) (citation omitted). If the court determines that the identification was impermissibly or unnecessarily suggestive, the burden shifts to the State to show that the out-of-court identification was nonetheless reliable. *Id.* at 65-66.

Here, the circuit court made findings of fact that were not clearly erroneous and applied the proper legal standard to the facts of record. After looking at the photographs' features and the manner in which they were presented to the victim, the court determined that the identification procedure was not suggestive, "let alone impermissibly" suggestive. Aware of "the temptation when we're dealing with human beings for people to second guess me," the circuit court went on to determine that even if the procedure was somehow suggestive, it was still reliable under the totality of the circumstances. On this second prong, the court found the victim's account to be credible and considered relevant factors bearing on reliability, including the victim's opportunity to view the shooter, his level of certainty at the identification, and the short lapse between the offense and the photo array.

Davis also filed a pretrial motion to dismiss the charges on the ground that a recording of an emergency call to law enforcement was no longer available. The motion relied on a police report indicating that the "caller states subject said something about subject gun being taken as well." The caller was an independent witness with the initials E.S., and the "subject" apparently referred to the victim. Nobody requested a recording of the call, and it was not preserved.

Davis's motion asserted that the failure to preserve the recording constituted a due process violation requiring dismissal of the charges, or, in the alternative, a curative jury instruction. The circuit court determined that a limiting instruction was the appropriate remedy.

We agree with appellate counsel's conclusion that no arguably meritorious issue arises from the denial of Davis's motion to dismiss. A defendant's due process rights may be violated if police (1) failed to preserve evidence that is apparently exculpatory or (2) acted in bad faith by failing to preserve potentially exculpatory evidence. *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). There is no suggestion that the police acted in bad faith, and the recording is not apparently exculpatory. *Id.* at 68 (evidence is "apparently exculpatory" if its materiality rises above being potentially useful to clearly exculpatory). Davis asserted an alibi defense and did not timely request preservation of the recorded call. His motion to dismiss conceded that the caller's comment was "vague." Further, E.S. was under subpoena and available to testify at trial. Even if Davis intended to claim self-defense, a recording of the initial call was not necessary to the presentation of a meaningful defense. *See id.* at 67 (to rise to the level of a due process violation, the evidence "must ... be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (citation omitted)). Additionally, any remedy is within the circuit court's discretion. *See State v. Hahn*, 132 Wis. 2d 351, 361-63, 392 N.W.2d 464 (Ct. App. 1986). The court's decision to provide a limiting instruction was reasonable and explainable.

Appellate counsel's no-merit report addresses whether Davis's guilty plea was knowingly, intelligently, and voluntarily entered. The record shows that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986),

and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon Davis’s signed plea questionnaire. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with appointed counsel that a challenge to the entry of Davis’s guilty plea would lack arguable merit.

Appellate counsel’s no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court’s sentencing decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The circuit court’s sentencing remarks show that it considered the seriousness of the offense, Davis’s character, and the need to protect the public. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances, it cannot reasonably be argued that Davis’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). Including the dangerous weapon enhancer, Davis faced a maximum term of initial confinement not to exceed twelve and one-half years. He received the unenhanced maximum. We agree with appellate counsel that a challenge to Davis’s sentence would lack arguable merit.

In his response, Davis asks whether the circuit court erroneously exercised its sentencing discretion by factoring in “the amendment down to a Class F felony plus the [weapon] enhancer.” It did not. The circuit court permissibly considered the underlying facts alleged in the complaint when calculating offense severity, determining that this was an “incredibly violent and aggravated crime.” See *State v. Kaczynski*, 2002 WI App 276, ¶13, 258 Wis. 2d 653, 654 N.W.2d 300 (where defendant received the benefit of a substantial charging concession, the trial court’s imposition of the maximum sentence did not shock “the community’s sense of justice”). As pointed out in counsel’s supplemental no-merit report, the sentencing court may permissibly

consider uncharged and unproven offenses as well as conduct for which a defendant has been acquitted. *See State v. Salas Gayton*, 2016 WI 58, ¶23, 370 Wis. 2d 264, 882 N.W.2d 459.

Davis's response also suggests that the circuit court erroneously exercised its sentencing discretion by failing to adequately consider mitigating circumstances and Davis's rehabilitative needs. On review, we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination. *Gallion*, 270 Wis. 2d 535, ¶18. We will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a different conclusion. *State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Though Davis disagrees with the circuit court's assessment of the relevant sentencing factors, we agree with the analysis in appellate counsel's supplemental no-merit report highlighting that the weight afforded each factor is committed to the sentencing court's wide discretion. *See Ziegler*, 289 Wis. 2d 594, ¶23. To the extent Davis suggests that the court improperly "grouped [him] in" with other offenders engaged in gun violence, the record belies his assertion. The circuit court stated it would "look at this particular individual in this particular offense in light of the general sentencing objectives," and its sentencing remarks demonstrate an examination of circumstances specific to Davis and the offense at hand. The court's statement about wanting to send a message that gun violence will not be tolerated relates to its objectives of deterrence and public protection.

Having reviewed the original and supplemental no-merit reports in light of the record, we agree with appellate counsel's analysis concluding that there is no arguable merit to a challenge premised on Davis's speedy trial rights or on trial counsel's performance. We will not discuss these potential claims further. Our review of the record discloses no other potential issues for

appeal.³ Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to further represent Davis on appeal. Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Chris A. Gramstrup is relieved from further representing Derrick D. Davis in this appeal. WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

³ At sentencing, based on Davis's agreement, the court ordered \$2680.04 in restitution, payable to the victim, and scheduled a restitution hearing. The transcript of the postsentencing restitution hearing reflects that Davis agreed to pay an additional \$40,000.00 in restitution to the "Wisconsin Crime Victim Compensation" fund, joint and several with two codefendants.