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P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
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DISTRICT I

June 9, 2020

To:

Hon. Frederick C. Rosa
Circuit Court Judge
901 N. 9th St., Rm. 632
Milwaukee, WI 53233

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

Hon. Jonathan D. Watts
Circuit Court Judge
821 W. State St.
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

Naythan Andrew Schwab
11040 W. Wildwood Ln., F218
West Allis, WI 53227

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

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

2016AP604-CRNM State of Wisconsin v. Naythan Andrew Schwab
(L.C. # 2012CF613)

Before Dugan, Donald and White, JJ.

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).

Naythan Andrew Schwab appeals from a judgment, entered upon a jury's verdicts, convicting him of five counts of possession of a firearm by a felon, one count of possession with

intent to deliver not more than 200 grams of tetrahydrocannabinols (THC)[1] as a party to the crime[2] as a second or subsequent offense, and one count of maintaining a drug trafficking place[3] as a second or subsequent offense. Schwab also appeals from an order denying his postconviction motion for a new trial. 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 (2017-18).[4] Schwab was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Schwab's response, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

BACKGROUND

Based on information from a confidential informant, Milwaukee police obtained and executed a no-knock search warrant at an apartment on Rogers Street. Six individuals were in the apartment's living room when police entered: Schwab, Caleb Jones (Jones), Rashaun McCain, Jones's brother Milagro Jones (Milagro), and two women. McCain had six corner cuts of marijuana in his pocket, along with four .38-caliber bullets. Schwab had no "items of interest" on him.

[1] THC is the active ingredient in marijuana. *See* ***State v. Buchanan***, 2011 WI 49, ¶6, 334 Wis. 2d 379, 799 N.W.2d 775.

[2] We observe that neither the original judgment of conviction nor any subsequently amended judgment reflects the party to a crime component in the possession offense description. Upon remittitur, the circuit court may wish to direct the clerk to revise the judgment accordingly. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

[3] The criminal complaint refers to this charge as "keeping a drug house."

[4] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

In the living room, police recovered four unspent .38-caliber rounds from a windowsill and observed multiple photos of Schwab, which appeared to be flyers for a rap group he was affiliated with, taped to the wall. In a closet near the living room, police discovered a black bag with four guns: two .22-caliber revolvers, a .32-caliber revolver, and a 9mm machine pistol. The bag also contained multiple boxes of ammunition and a blue "incarceration bracelet" with Schwab's name, date of birth, and recent photograph. In a kitchen drawer, police recovered a box of sandwich bags, two corner cuts of suspected marijuana, a digital scale, and a job application with Schwab's name. There was also a prescription pill bottle on the counter with Schwab's name.

The apartment had two bedrooms; the southeast bedroom belonged to Jones and the southwest bedroom belonged to Schwab. No contraband was recovered from Jones's room. In Schwab's room, police found: a glass jar with forty-four corner cuts of marijuana in a closet on top of a pile of men's clothes; fifteen corner cuts of marijuana on top of a nightstand; several prescription pill bottles with Schwab's name; a .38-caliber silver revolver in a dresser drawer; six .22-caliber rounds alongside men's jewelry in a jewelry box on top of the dresser; and a "multitude of paperwork, mail and identifiers listing to Schwab," including mail addressed to him at the Rogers Street address and a current college student identification card.

Schwab, Jones, and McCain were arrested. A criminal complaint charged Schwab with two counts of possession of a firearm by a felon, one count of possession with intent to deliver not more than 200 grams of THC as a second or subsequent offense, and one count of keeping a drug house as a second or subsequent offense. Jones was charged in the same complaint with one count of keeping a drug house. McCain was originally charged with misdemeanor possession of THC, but it was later determined that he had a greater role in the suspected

operation, so the State dismissed the misdemeanor charge and issued a new felony charge of possession with intent to deliver not more than 200 grams of THC. McCain's case was temporarily joined with Schwab's and Jones's cases until McCain resolved his case through a plea agreement.

Prior to trial, the State filed an amended information charging Schwab with five counts of possession of a firearm by a felon; one count of possession with intent to deliver not more than 200 grams of THC as a second or subsequent offense as party to the crime; and one count of keeping a drug house as a second or subsequent offense. Schwab and Jones were jointly tried in front of a jury. After a six-day trial, the jury convicted Schwab on all seven counts; Jones was acquitted. The trial court later sentenced Schwab to a combination of concurrent and consecutive sentences totaling five and one-half years of initial confinement and six years of extended supervision.[5]

With the assistance of counsel, Schwab filed a postconviction motion seeking a new trial in which he claimed he had received ineffective assistance from his trial attorney because that attorney had failed to call an essential witness at trial. Schwab had also sent the circuit court a handwritten letter in which he complained about trial counsel's failure to remove two jurors who Schwab asserted had disclosed conflicts during voir dire. After a hearing to address these issues, the circuit court denied the motion. Schwab appeals.

[5] The Honorable Jonathan D. Watts presided over the relevant pretrial, trial, and sentencing proceedings; we will refer to him as the trial court. The Honorable Frederick C. Rosa presided over the postconviction motion hearings; we will refer to him as the circuit court.

DISCUSSION

Appellate counsel discusses four potential issues in the no-merit report, and Schwab has responded to each issue. We address each issue in turn.

I. Whether the trial court erred in denying disclosure of the confidential informant.

The State is generally privileged to refuse to disclose the identity of a confidential informant. *See* WIS. STAT. § 905.10(1). The privilege is not absolute and must be balanced against the defendant's right to present a defense, *see* ***State v. Nellessen***, 2014 WI 84, ¶15, 360 Wis. 2d 493, 849 N.W.2d 654, and there are three statutory exceptions to the State's privilege, *see* § 905.10(3)(a)-(c).

There is a two-step process for disclosing a confidential informant's identity. *See* ***Nellessen***, 360 Wis. 2d 493, ¶16. In a case such as Schwab's, where a defendant asserts that the informant may have information regarding the merits of the case, "the defendant must make an initial showing that the 'informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence[.]'" *See* ***id.*** (citing WIS. STAT. § 905.10(3)(b)). "'Necessary' in this context means that the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt." ***State v. Vanmanivong***, 2003 WI 41, ¶24, 261 Wis. 2d 202, 661 N.W.2d 76. If the defendant satisfies this burden, the trial court must conduct an *in camera* review to determine whether the informant really can provide such testimony. *See* ***Nellessen***, 360 Wis. 2d 493, ¶16.

A trial court's ultimate decision on whether to order disclosure of a confidential informant is reviewed under an erroneous exercise of discretion standard. *See* ***Vanmanivong***,

261 Wis. 2d 202, ¶15. Whether the defendant satisfied his threshold burden to trigger an *in camera* review, however, is a question of law we review *de novo*. *See* ***Nellessen***, 360 Wis. 2d 493, ¶14.

In the motion to compel disclosure, Schwab noted that, according to the search warrant application, the informant had told police that a "black male … weighing 200 pounds … with a low hair cut and dark complexion" was selling marijuana from the apartment. The informant had also been in the apartment in the preceding twenty-four hours and observed multiple packages of marijuana in a bedroom. Schwab's motion also noted that, at the time of the search, the only male in the apartment fitting the informant's description was McCain: neither Jones nor his brother had a "low hair cut," and Schwab is white.

Schwab thus argued that the informant's identity should be disclosed because he or she could "[i]n short … provide testimony supporting [Schwab's] contention that he was not residing in that apartment on the day that the police executed a search warrant on those premises and that the defendant had no knowledge of either the guns or drugs that were allegedly found there." The State countered that Schwab's justifications for disclosure were irrelevant to his guilt or innocence, as they all describe observations of what occurred before the search.

After briefing and arguments, the trial court denied the motion to disclose, concluding that Schwab had not met the initial threshold burden to trigger an *in camera* review. The trial court correctly noted that the test for the informant's testimony is "whether or not it goes to guilt or innocence," not relevance, and explained that Schwab was "casting [his] … argument too broadly…. [W]hat the confidential informant's testimony needs to go to … to pierce this protection of nondisclosure is that it has to go to creating a reasonable doubt." The trial court

noted that, given Schwab's particular charges and the evidence the State planned to present, "it's hard to see how the confidential informant's observations a day earlier or even an hour earlier can subtract from the evidence of guilt" beyond a reasonable doubt as to the elements of each offense. While Schwab protested that the search warrant identified a target individual with an appearance that Schwab did not match, the trial court explained that though the informant might have admissible evidence under the relevance test, none of it rose to the level of "necessary" to Schwab's defense.

In the no-merit report, appellate counsel concludes that the trial court's analysis "was sound and based on a correct assessment of the law … [and] struck the right balance between the State's need to protect the anonymity of an informant with the defendant's right to a fair trial. Any argument to the contrary is without merit." In his response, Schwab asserts that the informant would have testified that he was not the 200-pound "black guy with a low hair cut that he described or that he had ever dealt with." Schwab also appears to be claiming a ***Franks*** violation, believing the search warrant application was based on "false testimony" from the informant, "causing all fruits to be of a poisonous tree." *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978).

"A search warrant is void … where there is a false statement in the affidavit supporting the search warrant, the statement was made knowingly and intentionally or with reckless disregard for the truth, and absent the challenged statement, the warrant is not supported by probable cause." ***State v. Kilgore***, 2016 WI App 47, ¶38 n.10, 370 Wis. 2d 198, 882 N.W.2d 493 (citing ***Franks***, 438 U.S. at 156). However, Schwab does not tell us what false information was in the warrant application, and the record does not support a claim of a ***Franks*** violation.

We agree with appellate counsel that the trial court properly concluded Schwab had not shown the confidential informant had any information necessary to Schwab's defense. There is no dispute that Schwab did not match the target identity described in the search warrant application. The jury heard as much, and evidence that is "merely cumulative" is insufficient to satisfy the necessity test. *See* ***Vanmanivong***, 261 Wis. 2d 202, ¶26 (citation omitted). Further, Schwab's motion "fails to articulate why or how the informer would have any knowledge" of Schwab's living arrangements or about what Schwab knew about the guns or drugs in the apartment. *See* ***Nellessen***, 360 Wis. 2d 493, ¶34. The trial court properly analyzed the requirements of WIS. STAT. § 905.10(3)(b) and reached a reasonable conclusion. *See* ***Nellessen***, 360 Wis. 2d 493, ¶34. There is no arguable merit to challenging the trial court's decision to deny disclosure of the confidential informant.

II. Whether sufficient credible evidence supports the jury's verdicts.

The next issue addressed in the no-merit report is whether sufficient credible 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). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506. The standard of review is the same whether the conviction relies on direct or circumstantial evidence. *See* ***id.*** at 503. "[T]he jury verdict will be overturned only if viewing the evidence most favorably to the [S]tate 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 and emphasis omitted).

Appellate counsel concludes, in a single paragraph of analysis, that the jury was properly instructed and that the "record stands as a sufficient level of credible evidence to meet the elements of the charged offenses and therefore adequately supports the verdicts of the jury." Although terse, we agree with counsel's conclusion that sufficient evidence supports the verdicts.

A. Possession of a firearm by a felon.

To prove possession of a firearm by a felon, the State had to show that Schwab possessed a firearm and had been convicted of a felony prior to the date of the offense. *See* WIS JI—CRIMINAL 1343. One of the firearms was found in Schwab's bedroom. One of the guns from the bag in the living room closet had DNA on it that neither included nor excluded Schwab,[6] a box of ammunition from the bag had Schwab's fingerprint on it, and Schwab's jail identification bracelet was found inside the bag. Schwab also stipulated to a prior felony conviction. *See* ***State v. Benoit***, 229 Wis. 2d 630, 637-38, 600 N.W.2d 193 (Ct. App. 1999). Thus, there is sufficient evidence from which a jury could reasonably infer that Schwab possessed the firearms, be it direct, constructive, or shared possession. *See* WIS JI—CRIMINAL 1343.

B. Possession with intent to deliver THC.

On the charge of possession with intent to deliver not more than 200 grams of THC as a party to a crime, the State asserted that Schwab had aided and abetted McCain by providing a location from which to operate. To satisfy the party to a crime component, the State had to show

[6] Useable DNA evidence was only recovered from one of the guns. The crime lab analyst testified that there was a DNA "mixture of at least four individuals," "the probability of randomly selecting unrelated individuals who could be a contributor is one in 441,000," and Schwab is "included in the population who could be a contributor" to the mix.

that Schwab knew another person was committing a crime and that Schwab had the purpose to assist the commission of that crime. *See* WIS JI—CRIMINAL 400. To prove possession with intent to deliver THC, the State had to show that Schwab or the principal possessed a substance, the substance was THC, Schwab or the principal knew the substance was THC, and Schwab or the principal intended to deliver the THC. *See* WIS JI—CRIMINAL 6035.[7]

It was stipulated that the substance recovered by police was, in fact, marijuana. Possession of marijuana, like possession of the guns, can be constructive or shared and can be inferred in this case from the fact that most of the marijuana was found in Schwab's bedroom. Intent to deliver can be inferred from the presence of the digital scale, sandwich bags, and the number of prepackaged corner cuts of marijuana; officers also testified that there was no drug paraphernalia for using marijuana found in the apartment, suggesting that the drugs were for sale and delivery rather than personal use by anyone in the apartment.

C. Maintaining a drug trafficking place.

Finally, with respect to "keeping a drug house,"[8] the State had to prove that Schwab kept or maintained a structure or place, which means to exercise management or control over the place; the place was used for keeping a controlled substance; and Schwab kept or maintained the

[7] The trial court had planned to give the lesser-included jury instruction for simple possession, rather than possession with intent to deliver, but Schwab objected. After a colloquy in which Schwab personally rejected the lesser-included instruction, the trial court eliminated the lesser-included instruction. Because the defense is allowed to make such a choice, *see, e.g.*, ***State v. Eckert***, 203 Wis. 2d 497, 509-11, 533 N.W.2d 539 (Ct. App. 1996), there is no arguable merit to a claim the trial court failed to give the lesser instruction or that trial counsel was ineffective for failing to request it.

[8] This charge and the possession with intent charge were alleged to be second or subsequent offenses for Schwab. However, this is a penalty enhancer, not an element of the crime, so it was not presented to the jury. *See* ***State v. Koeppen***, 195 Wis. 2d 117, 129-30, 536 N.W.2d 386 (Ct. App. 1995).

place knowingly, meaning Schwab knew that the place was used for the keeping of a controlled substance. *See* WIS JI—CRIMINAL 6037B.

Schwab disputed that he lived in the apartment—he claimed that his then-girlfriend, Milarix Malave, had signed the lease and that his felon status prevented him from being on the lease—and, thus, disputed that he had any control over it. However, the living room had flyers depicting Schwab on the walls, and multiple identifiers for Schwab were found throughout the apartment, including his student identification card, a W-2 form, a job application, prescription bottles, and several pieces of mail sent to the apartment. Jones's identifiers, which consisted of only mail pieces, were found only in his room. No identifiers were found for McCain or Malave in the apartment. Additionally, the landlord testified that it was Schwab who had personally delivered the rent to him each month. The quantity of marijuana and its packaging supports the keeping element, and the fact that the marijuana was throughout the apartment, including a significant quantity in Schwab's room, permits an inference that Schwab knowingly maintained the location.

Upon the foregoing, we conclude there is no arguably meritorious challenge to the sufficiency of the evidence to support the verdicts.

D. Schwab's response.

In the no-merit response, Schwab makes multiple challenges under a heading of sufficiency of the evidence, asserting that the evidence presented to the jury "was either partial, incorrect, or downright not credible." However, Schwab has not identified any arguably meritorious issues.

First, Schwab complains that Malave was not allowed to testify. However, neither party chose to call her, and we review sufficiency of the evidence questions based on the evidence that was presented to the jury, not based on evidence it did not hear.[9]

Second, Schwab complains that the gun with "his" DNA was found inside a sock in the black bag. He notes that the police department's forensic investigator testified that it was their policy to collect all firearms to be swabbed for DNA because any weapon not immediately linked to a crime is sent to the Property Control Division, where they are stacked with other guns, potentially contaminating any surface evidence not already collected. Schwab asserts this is "indisputable proof" that DNA can transfer "from a dirty sweaty sock to a firearm[.]"[10] However, no party disputed that DNA can transfer from one surface to the next, and the possibility of transfer does not disprove Schwab's possession—the jury clearly believed he possessed four other firearms without any DNA evidence.

Third, Schwab complains that Officer Daniel Robinson "lied to [the jury] without any reprimand" and gave false testimony in favor of the State. Schwab appears to also claim the State committed a ***Brady*** violation by not disclosing exculpatory evidence. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963).

[9] Schwab references the newly discovered evidence standard. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). However, Malave's testimony is not newly discovered—she was known to both parties and the trial court before trial. *See* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828.

[10] Transfer from the sock was not the theory at trial. Instead, Schwab testified that Malave hit him in the face with the gun during an argument.

During re-cross-examination, Robinson testified that there had been a controlled buy at the apartment prior to police obtaining the search warrant; however, no such buy had been disclosed in the search warrant application. Trial counsel inquired whether there was a police report from the buy; Robinson testified there would only have been an inventory report. Trial counsel asked whether that had been turned over to anyone, and Robinson said no. Trial counsel thus raised a possible discovery violation from the lack of disclosure.

The trial court resolved the matter outside the presence of the jury. Robinson was recalled and testified about what would have been in the inventory report. Both sides argued extensively. The trial court analyzed possible discovery violations under both constitutional and statutory rules. The trial court explained that there did not appear to be any exculpatory information omitted, so there was no constitutional due process violation. Further, the trial court stated that it was not convinced that any inventory report of the controlled buy was a required disclosure under any part of WIS. STAT. § 971.23(1)(a)-(h).[11] Our review of the record, including Robinson's testimony at trial and when recalled, the parties' arguments, and the trial court's decision satisfies us that the trial court appropriately resolved the issue.

Schwab next complains that he was convicted for "both the drugs in McCain's pocket … and in the jar" found in the bedroom and complains that the fingerprint results from the jar "were never revealed and the marijuana strands were not compared to each other." He asserts that this "secret evidence" would have shown he had no contact with the glass jar.

[11] Trial counsel, finding it difficult to believe that there was no paper trail for the controlled buy, at one point surmised that there had not actually been a controlled buy but, rather, that Robinson had misspoke and was reluctant to admit error.

Fingerprinting of the jar was mentioned only tangentially, to explain the presence of dust on the jar when it was produced as an exhibit. The record on appeal does not reveal the results of the testing but, in any event, the absence of Schwab's fingerprints on the jar does not prove he never handled the jar. It is also irrelevant whether the marijuana strains matched each other, as all are prohibited. Finally, there were fifteen corner cuts on top of the dresser in Schwab's room and two in the kitchen drawer with his job application. The jury had sufficient evidence on which to convict him of possession with intent to deliver marijuana, even if it believed Schwab had no control over the marijuana in McCain's pockets or in the jar.

Finally, Schwab complains that the State used his music against him "even though it is all make-believe and strictly entertainment." He also complains that the State "instructed the jury how easy it would be to find Mr. Schwab on the Internet before they dismissed for a three day weekend."

Officers had already testified about Schwab's rap flyers in the living room, and Schwab testified on direct examination that he performed at various nightclubs. Schwab also testified that he had never seen any drug dealing in the apartment, no one had ever come to the apartment to buy drugs, he had never seen marijuana in the apartment and that the only time he had seen ammunition around was when he spotted a box on top of the microwave, picked it up, and told whoever put it there to get rid of it so he would not get in trouble with his probation agent.

On cross-examination, the State began asking Schwab if he had music released on the internet as well as on CD, then asked whether some of his song lyrics were "all my drug dealers, all my killers." Trial counsel objected and a sidebar was held. The trial court allowed the question about lyrics, and Schwab testified he was unfamiliar with the song the State quoted.

When the trial court made a record of the sidebar, it explained that the State appeared to ask the question about the manner of music release as a foundation for asking about the lyrics, the subject matter of which "is relevant to the whole series of issues, his knowledge, his knowledge of drugs … it's tied in a dozen different ways as to what he may have said in the lyrics." The trial court also concluded that there was no harm, because Schwab had denied knowing the lyrics and the State had not introduced any evidence to the contrary.

The decision to admit or exclude evidence is a matter for trial court discretion. *See* ***State v. Jackson***, 2014 WI 4, ¶45, 352 Wis. 2d 249, 841 N.W.2d 791. The trial court's evidentiary ruling will be upheld "if it 'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.'" *See* ***State v. Dorsey***, 2018 WI 10, ¶37, 379 Wis. 2d 386, 906 N.W.2d 158. We discern no arguably meritorious claim that the trial court erroneously exercised its discretion.

With respect to Schwab's claim that the State "instructed" jurors on how to find him on the Internet, we note that the trial court instructed the jurors to refrain from doing their own research. "We presume that jurors follow the instructions given by the court." *See* ***id.***, ¶55 (citation omitted). There is nothing in the record to even arguably rebut that presumption.

III. Whether the trial court imposed an unduly harsh sentence.

Appellate counsel next discusses whether the trial court imposed an unduly harsh sentence; this requires us to consider whether the trial 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 additional factors. *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. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors, and we are satisfied that the no-merit report properly analyzes this issue.

In his response, Schwab complains that "[c]ases or charges cannot be used or read in that the defendant was never charged with" or cases for which he was "found not guilty[.]"[12] In Wisconsin, however, a sentencing court may consider not only "uncharged and unproven offenses," but also "facts related to offenses for which the defendant has been acquitted" when imposing a sentence. *See* ***State v. Sulla***, 2016 WI 46, ¶32, 369 Wis. 2d 225, 880 N.W.2d 659 (citation and quotation marks omitted). Thus, the trial court did not consider improper factors at sentencing.

The maximum possible sentence Schwab could have received was sixty-five years of imprisonment. The concurrent and consecutive sentences totaling eleven and one-half years of imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App

[12] In relating Schwab's criminal history to the court, the State had referenced a misdemeanor battery dismissed when the victim failed to appear for trial; a concealed-carry violation dismissed by a judge with a philosophical objection to that particular law; a restraining order violation dismissed when the victim failed to appear for trial; and a felony theft dismissed after evidence was suppressed.

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.

IV. Whether trial counsel was ineffective.

As the final issue in the no-merit report, appellate counsel discusses whether Schwab received ineffective assistance from trial counsel.[13] Stated another way, this is a consideration of whether the circuit court erred in denying Schwab's postconviction motion for a new trial.

To succeed on claims of ineffective assistance of counsel, a defendant must show both that counsel performed deficiently and that said deficiency was prejudicial. *See* ***State v. McDougle***, 2013 WI App 43, ¶43, 347 Wis. 2d 302, 830 N.W.2d 243. Whether a defendant was deprived of effective assistance of counsel is a mixed question of fact and law. *See* ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. The circuit court's factual findings are upheld unless clearly erroneous, but whether counsel's performance was deficient or prejudicial based on those facts is a question of law we review *de novo*. *See* ***id.***

Schwab's postconviction motion alleged that trial counsel was ineffective for failing to call Malave, who ostensibly would have testified that she lived in the apartment, she had kicked Schwab out the month prior to the search, all five firearms were hers, and Schwab had no

[13] Schwab's original trial attorney was permitted to withdraw after trial and prior to sentencing, so Schwab was represented by a different attorney at sentencing. Any discussion of ineffective trial counsel in this opinion relates to the first trial attorney's performance; the postconviction motion raised no claims against the sentencing attorney.

knowledge of them. The circuit court granted a hearing on the motion. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Schwab called Malave, who testified consistently with the allegations in the motion about what she would have told the jury. Schwab also called trial counsel. He testified that he had subpoenaed Malave but ultimately did not call her because "[s]he told me so many different stories that I'm not sure what she would have testified to." Trial counsel further related that his investigator called Malave from his (counsel's) office, and Malave "ranted for a while" and told the investigator that Schwab had stolen the weapons from her. Fifteen or twenty minutes later, trial counsel called Malave and identified himself as Schwab's attorney, at which point Malave told trial counsel that Schwab had not taken the guns and in fact had no knowledge of them. Trial counsel thus testified that he felt putting Malave on the stand would be suborning perjury.

The State called trial counsel's investigator, who confirmed that Malave claimed Schwab took the guns. The State next called a Milwaukee police detective, who interviewed Malave after Schwab's arrest. The detective said that Malave told him the guns had been stolen from under her bed in a different apartment; she had gone to look for them after hearing about Schwab's arrest and discovered they were missing. She then went to the jail to confront Schwab, who told her "his guys" took them. The State then called another Milwaukee police officer, who had also interviewed Malave. He testified that she reported confronting Schwab about the guns and that Schwab told her one of his friends had taken the guns, but that Malave did not believe this because only Schwab knew her alternate address from other court paperwork.

The circuit court recited the proper legal standard for reviewing an ineffective assistance claim, noting that counsel is presumed to have acted reasonably. *See* ***State v. Balliette***, 2011 WI

79, ¶25, 336 Wis. 2d 358, 805 N.W.2d 334 ("[C]ounsel is 'strongly presumed to have rendered' adequate assistance within the bounds of reasonable professional judgment[.]" (citation omitted)). The circuit court then summarized the hearing testimony before ultimately concluding that trial counsel had made a reasonable strategic decision against calling Malave. *See* ***id.***, ¶26. There is no arguable merit to a claim that the trial court erroneously denied Schwab's postconviction motion.

In his response, Schwab raises at least four additional claims of ineffective assistance of trial counsel. First, he claims that trial counsel was ineffective for failing to call Milagro or the two women in the apartment at the time of the search. He asserts they "would have had information to exonerate Mr. Schwab from the charges." However, Schwab does not tell us what that information is, and the record does not support a claim that these witnesses had exculpatory information.[14]

Schwab also complains that the search warrant "should have been challenged to see if the confidential informant was reliable" because the informant was never revealed or cross-examined. As noted above, the trial court rebuffed trial counsel's attempt to have the informant's identity disclosed. At that hearing, the trial court observed that according to the warrant application sworn by a Milwaukee police officer, the information had "previously provided credible information" and "[t]here is some language that the affiant knows that the informant's information is truthful and reliable. He's done investigation that's corroborated

[14] Schwab states that the women were friends of Malave's who did not know him, and Milagro was there from Michigan to visit his brother, Jones, and Jones admitted living in the apartment. However, none of these facts are exculpatory.

certain pieces of it." Thus, the record does not support any arguably meritorious challenge to the issuance of the search warrant in this matter.

To the extent that Schwab complains that trial counsel intended to, but did not, file a petition for an interlocutory appeal of the order denying the motion to disclose the informant's identity, there is no arguably meritorious claim of ineffective assistance. Assuming without deciding that it was deficient of trial counsel to decide against an interlocutory appeal, there is no prejudice because the confidential informant issue has been reviewed as part of this appeal.

Finally, Schwab complains that two jurors had a conflict of interest, so the trial court should have removed them *sua sponte* and, when it did not, trial counsel had a duty to make sure those two individuals were not on the jury. The two jurors in question were Juror 23, who claimed to know Schwab's probation agent, and Juror 10, who Schwab says disclosed that he "worked with … Schwab's mom, doing the same job, and they were not fond of each other."

Juror 23 indicated that she and the probation agent were "on the same pastoral roster of the church we attend." The circuit court had briefly inquired about the juror issue at the postconviction motion hearing, and trial counsel explained that at the time of voir dire, he had intended to call Schwab's probation agent and expected her to be a beneficial witness. As the trial progressed, counsel made the decision not to call the agent. Counsel's reasoning for not striking the juror is professionally reasonable and, in any event, the juror confirmed that she would weigh the agent's testimony objectively, as she would any other witness's.

According to the record, Juror 10 did not specifically say he knew Schwab's mother. He reported to the court that he knew someone in the lobby area. He stated he "couldn't even tell you her name" but he thought he had worked for the woman at one time. He did not express any

personal opinion about the woman, and the parties and the court determined that Juror 10 was not identifying anyone connected with this case. Thus, there is no arguable merit to a claim that trial counsel was ineffective for failing to strike Jurors 10 and 23 from the panel.

Our independent review of the record reveals no other potential issues of arguable merit.[15]

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Patrick Flanagan is relieved of further representation of Schwab in this matter. *See* 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

[15] To the extent that Schwab's no-merit response makes other arguments that are not discussed with specificity in this opinion, these arguments are deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).