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September 22, 2020

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

2017AP672-CRNM State of Wisconsin v. Andreco Jaiquin Threatt
(L.C. # 2016CF1125)

Before Brash, P.J., Dugan and Donald, 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).

Andreco Jaiquin Threatt appeals from a judgment, entered upon a jury's verdicts, convicting him on one count of possession of a firearm by a felon and one count of obstructing an officer. Threatt also appeals from an order denying his postconviction motion. Appellate

counsel, Eileen T. Evans, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Threatt was advised of his right to file a response, and he has responded. Appellate counsel has also submitted a supplemental no-merit report. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Threatt'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

On March 14, 2016, Milwaukee Police Officers Ryan DeWitt and Markel McKinley, in full uniform and driving a marked squad car, were on routine patrol in the 2600 block of North 34th Street. They observed a group of people, some in the street and some on the sidewalk, gathered around a parked car. One of these people, later identified as Threatt, was standing in the street, leaning into the driver's window. At trial, DeWitt testified that such a grouping is often indicative of a hand-to-hand drug transaction, so he and McKinley were going to investigate. Upon noticing the squad car, Threatt stood up and "indexed" his right front waistband.[2] Threatt then walked around the parked car and "took off running."

DeWitt chased after Threatt, issuing instructions to stop. Threatt ignored the officer and produced a handgun while running. Threatt fell on a garage slab, losing his hat and the gun, but regained his footing and continued running. Threatt turned a corner from North 35th Street,

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

[2] DeWitt described "indexing" as "along the lines of checking for your cell phone and keys when you stand up." He explained that "when somebody's carrying a firearm, especially not in a holster, movements such as standing up quickly, things like that, that firearm can become loose or shift."

heading westbound on West Center Street. When DeWitt rounded the corner, he saw Threatt standing next to a light pole, "trying to blend in[.]" Threatt was taken into custody and charged with one count of possession of a firearm by a felon and one count of obstructing an officer. A jury convicted Threatt as charged, and the trial court sentenced him to four years of initial confinement and four years of extended supervision for the firearm conviction and a concurrent nine months in jail for the obstructing conviction.

Threatt filed a postconviction motion in which he alleged that his trial attorney was ineffective for failing to investigate and call alibi witnesses. The trial court denied the motion without a hearing, deeming it conclusory. Threatt appeals.

Discussion

Appellate counsel discusses four potential issues in the no-merit report: sufficiency of the evidence; sufficiency of Threatt's waiver of his right to testify; sentencing discretion; and denial of the postconviction motion. We have identified six issues raised in Threatt's response: ineffective assistance of trial counsel, with multiple subparts; sufficiency of the evidence; sufficiency of his waiver of his right to testify; a violation of WIS. CONST. art. I, § 7; a violation of WIS. STAT. § 972.10(1)(a)2.; and a violation of WIS. STAT. § 971.23(1)(a), (bm), and (e).

I. Sufficiency of the Evidence

The first issue appellate counsel discusses is whether sufficient evidence supports the jury's verdicts. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). 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. "[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).

To prove possession of a firearm by a felon, the State was required to prove two things: (1) that Threatt possessed a firearm and (2) that he had been convicted of a felony before the date of the offense. *See* WIS JI—CRIMINAL 1343. Threatt stipulated to a prior felony conviction. DeWitt testified about observing Threatt check his waistband, in a manner commonly indicative of someone carrying a firearm, before fleeing; seeing Threatt produce a gun during the chase; seeing Threatt fall and drop the gun; and apprehending Threatt. There was also testimony about recovering the gun from where it was dropped.

While Threatt's theory of defense was essentially one of mistaken identity—that Threatt was not the individual who produced the gun—DeWitt testified that he was "[o]ne hundred percent" certain that Threatt was the person he was pursuing. At trial, the State also introduced phone calls placed by Threatt from the jail, attempting to secure bail funds, wherein he told the other party to the call that he was "done with the guns."

To prove obstruction of an officer, the State had to show that: (1) Threatt obstructed an officer, which means that Threatt's conduct "prevent[ed] or ma[de] more difficult the performance of the officer's duties"; (2) the officer was doing an act in an official capacity; (3) the officer was acting with lawful authority; and (4) Threatt knew that the officer was acting in an official capacity and with lawful authority and that Threatt knew his conduct would

obstruct the officer. *See* WIS JI—CRIMINAL 1766. DeWitt testified that he and McKinley had been instructed to patrol along Center Street. DeWitt also testified that he and McKinley were in full uniform and that the squad car they were in was marked, and that Threatt running away from him made his job more difficult. Threatt's knowledge about the officers and his own conduct can be inferred from his flight upon simply seeing the squad car.

In his no-merit response, Threatt asserts that there is insufficient evidence to support the verdicts because there is "no physical or other evidence" or any witness who "directly "connected [him] to the crime." While it is true that neither DNA nor fingerprint evidence was found in this case,[3] neither is a prerequisite for a conviction. A conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. ***Poellinger***, 153 Wis. 2d 501-02. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503. An appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. ***Id.*** at 507-08.

Based on the foregoing, we are satisfied that the record contains sufficient evidence from which the jury could convict Threatt of both offenses. We agree with appellate counsel that there is no arguable merit to a claim that insufficient evidence underlies the jury's verdicts.

[3] The State presented testimony to explain why such evidence might not be found.

II. Waiver of the Right to Testify

The second issue appellate counsel discusses is whether Threatt's waiver of his right to testify was sufficient. In his response, Threatt asserts only that his waiver "was insufficient."

"[A] criminal defendant's right to testify is a fundamental right[.]" ***State v. Weed***, 2003 WI 85, ¶40, 263 Wis. 2d 434, 666 N.W.2d 485. Thus, the circuit court should conduct a colloquy with the defendant to ensure that he or she is "knowingly and voluntarily" waiving the right to testify. *See* ***id.*** "The colloquy should consist of a basic inquiry to ensure that (1) the defendant is aware of [the] right to testify and (2) the defendant has discussed this right with his or her counsel." ***Id.***, ¶43.

Our review of the record satisfies us that the trial court conducted such a colloquy with Threatt. The trial court informed Threatt that he had a right to testify, Threatt's trial attorney confirmed that he had "gone over the pros and cons of [Threatt] testifying," and Threatt indicated that he had decided not to testify based on counsel's advice. There is no arguable merit to a claim that Threatt's waiver of his right to testify was inadequate.

III. Sentencing Discretion

The third issue that appellate counsel discusses is 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. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. *See* ***id.***, ¶41; *see also* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The concurrent sentences totaling eight years of imprisonment are within the ten-

year and nine-month range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are 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 is no arguable merit to a challenge to the court's sentencing discretion.

IV. Denial of the Postconviction Motion

The final issue appellate counsel discusses is whether the trial court erred when it denied Threatt's postconviction motion. In the motion, Threatt alleged that trial counsel "provided ineffective assistance for his failure to subpoena and call witnesses for the defense at trial." Specifically, Threatt claimed that trial counsel failed to call "two witnesses provided to him by Mr. Threatt prior to trial who were at the scene and were to provide an alibi for the defendant." Threatt also argued that, because of trial counsel's failure to call these witnesses, the real controversy had not been fully tried. The trial court denied the motion "as conclusory in all respects. Neither the names of the witnesses or what they would have said have been set forth in the motion, nor have affidavits from those witnesses been attached in the support of the motion."

"There are two elements that underlie every claim of ineffective assistance of counsel: first, the person making the claim must demonstrate that his or her counsel's performance was deficient; and second, he or she must demonstrate that this deficient performance was prejudicial." ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. Failure to call a potential witness may constitute deficient performance. *See* ***State v. Jenkins***, 2014 WI 59, ¶41, 355 Wis. 2d 180, 848 N.W.2d 786.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106,

¶14, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a postconviction claim that faults trial counsel for failing to call certain witnesses, a defendant must identify the witnesses whom counsel failed to call and must show, with specificity, what their testimony would have been. *See* ***State v. Leighton***, 2000 WI App 156, ¶42, 237 Wis. 2d 709, 616 N.W.2d 26. Thus, we have also independently considered whether there is any arguable merit to a claim that postconviction counsel was ineffective for failing to adequately plead the ineffective assistance claim. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶27, 314 Wis. 2d 112, 758 N.W.2d 806.

In the supplemental no-merit report, appellate counsel—who was also postconviction counsel—explains that Threatt provided her with the names and phone numbers of the two potential alibi witnesses, Alexis Bush and Jessica Oliver. Appellate counsel made multiple attempts to contact these individuals, but they never answered their phones, their voicemail systems were not set up with names or identifying numbers, and the numbers occasionally were not in service. Prior to her filing the postconviction motion, Threatt's brother contacted appellate counsel and assured her that he would have the witnesses contact her, but neither did. Appellate counsel also notes that during sentencing, the State referenced a phone call Threatt made from the jail, wherein he appears to be instructing someone named Jessica on how to set up a fake robbery to come up with bail money for him. Appellate counsel thus explains her conclusion that, given the information she received, the lack of cooperation by the supposed alibi witnesses, and the jail recording of Threatt attempting to influence Jessica, "it would be difficult, if not impossible to prove the ineffectiveness of trial counsel or even simply obtain a hearing from the trial court."

We agree with appellate counsel that there is no arguably meritorious issue, in any context, regarding the supposed alibi witnesses. Postconviction counsel made reasonable efforts

to obtain the crucial information needed for a satisfactory postconviction motion but, without the cooperation of the witnesses to confirm the substance of their testimony and their willingness to testify, postconviction counsel did not have the sufficient material facts needed to adequately support a claim for relief. Counsel is not deficient for pleading only the known facts.

Further, because there is no indication of what either witness would say, the record does not support a claim of prejudice, even if both attorneys were deficient, because a reasonable probability of a different result cannot be shown. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Therefore, we also agree with appellate counsel that there is no arguable merit to a claim that the trial court improperly denied Threatt's postconviction motion.

V. Ineffective Assistance of Trial Counsel

A. Failure of Trial Counsel to Make Specific Arguments

We turn now to the remaining issues in Threatt's no-merit response. Threatt complains that trial counsel was ineffective for failing to tell the jury during closing arguments that when DeWitt apprehended him, Threatt "was standing on the corner across the street from his house, waiting for the intersection light to turn red so he can go home." The record, however, does not support such an argument: there was no testimony about Threatt's address, his address relative to where he was arrested, or his reason for being in the area.

Threatt also complains that trial counsel was ineffective for failing "to argue the fact that there was no bus stop on the corner." This complaint appears to relate to DeWitt's testimony that when he rounded the corner onto West Center Street, he found Threatt "trying to blend in and look like somebody waiting for a bus."

On cross-examination, trial counsel asked the officer, "And so then you later saw him at a bus stop?" DeWitt answered:

> No. I pursued him across 35th Street. He turned north in the alley, then cut back east in the upper T of that alley, then went northeast, went around a building, and then tried, I guess, to look like he was at a bus stop. But there wasn't a bus stop on that corner anyway.

There is no arguable merit to a claim that trial counsel was ineffective for failing to argue in agreement with the State's witness.

B. Failure to Pursue DNA Testing

Threatt next complains that trial counsel failed to "have the hat that fell off the suspect['s] head, tested for DNA." Assuming without deciding that this was deficient performance, the record does not support a claim of prejudice. It is speculative to assume that any testable DNA would have been found on the hat, and speculation does not suffice for a postconviction motion. *See* ***Allen***, 274 Wis. 2d 568, ¶¶15, 23-24. Moreover, even finding someone else's DNA on the hat is not fully exculpatory; it shows only that some other person wore the hat at some point in time. It does not prove that Threatt was not wearing it when it fell off the suspect.

C. Failure to Interview Neighbors

Threatt complains that trial counsel "was ineffective for not making [an] effort to interview neighbors to determine if they had seen what went on, on the day of the crime." However, DeWitt gave testimony from which it could be inferred that at least some of the nearby properties were vacant, and there is nothing in the record to support a claim that there were any neighbors to be interviewed, much less neighbors who saw anything relevant.

D. Failure to Strike "Expert" Testimony

Threatt complains that trial counsel "failed to take measure to exclude or strike the testimony of an expert witness." Threatt is referring to Detective Warren Spottek, who testified about pulling Threatt's outgoing jail call recordings and creating a compact disc with the recordings for trial.

Spottek was not called as an expert; he was called as the person who created the disc played at the trial. Further, it is unclear on what basis Threatt believes trial counsel could have sought suppression of Spottek's testimony. While Spottek testified on cross-examination that he did not know what Threatt's voice sounded like, Spottek was not asked to identify the voice on the recordings.[4] To the extent that this is the basis on which Threatt relies, Spottek's inability to identify the speaker on the recordings would go merely to the weight of any testimony about the speaker's identity, not its admissibility. There is no arguable merit to any of the foregoing ineffective assistance claims.

VI. Wisconsin Constitution, Article 1, § 7

Threatt next claims that "[his] Wis. Const. Art 1, § 7 was violated." This section of the Wisconsin Constitution lays out the "rights of the accused" in a criminal prosecution. These include the rights of the accused to:

> be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in

[4] Officer McKinley testified for that purpose.

> his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury[.]

Threatt does not identify which right or rights he believes to have been violated, or how, and we have not independently identified a violation of any of these rights in our review of the record. There is no arguably meritorious claim of a constitutional violation.

VII. Violation of WIS. STAT. § 972.10(1)(a)2.

After a jury is selected, the trial court shall decide if jurors will be allowed to take notes and, if not, "shall state the reasons for the determination on the record." WIS. STAT. § 972.10(1)(a)2. The trial court determined that the jury would not be permitted to take notes, but did not specifically articulate a reason on the record for that decision. Threatt contends that if the court would have authorized note-taking, jurors would have taken down the testimony of the DNA analyst who, when asked whether a firearm falling on a concrete slab would affect DNA recovery, answered that it would "depend upon how it would fall and what it would fall in. If it were, say, a puddle of water, then the DNA could be rinsed off or—but just the falling of it would not necessarily knock the DNA off." Then, Threatt suggests, this "could have been compared to" DeWitt's "statement at trial."

It is speculative to claim that any jurors would have taken notes on the analyst's testimony. Further, it is speculative to claim that the jury did not consider the analyst's testimony during its deliberation. Additionally, it is not clear which of DeWitt's statements the analyst's testimony should be compared to, nor what the comparison would show.

In any event, the decision whether to permit a jury to take notes is a matter for the circuit court's discretion. *See* ***Fischer v. Fischer***, 31 Wis. 2d 293, 304, 142 N.W.2d 857 (1966),

overruled on other grounds by ***Stromsted v. St. Michael Hosp. of Franciscan Sisters***, 99 Wis. 2d 136, 144, 299 N.W.2d 226 (1980). We are obligated on appeal to search the record for reasons to sustain the court's exercise of discretion. *See* ***Dumas v. Koebel***, 2013 WI App 152, ¶13, 352 Wis. 2d 13, 841 N.W.2d 319. Here, the record reflects that the parties expected a short trial without a great deal of specialized or highly technical evidence that sometimes underlies the need for notetaking. Accordingly, we conclude that there is no arguably meritorious challenge to the trial court's failure to articulate its reasoning for not allowing jurors to take notes.

VIII. Discovery Violations under WIS. STAT. § 971.23

Finally, Threatt contends that the State violated WIS. STAT. § 971.23(1)(a), (bm), and (e). This statute requires the State to disclose, "within a reasonable time before trial," any written or recorded statement concerning the alleged crime made by the defendant; evidence obtained by electronic surveillance under WIS. STAT. § 968.31(2)(b); and any relevant written or recorded statements of a witness named on the witness list. In his no-merit response, Threatt complains that the district attorney "presented evidence" at the final pretrial and jury trial in violation of these rules and the court "should have never allowed it." This appears to relate to the recordings of Threatt's jail phone calls, some of which were not disclosed to defense counsel until the Friday before trial.

The State addressed the timing of the calls' disclosure before trial. The State explained to the trial court that the calls continued up through the Thursday before trial. The next morning—the Friday before trial—the State was advised of the newest calls and informed defense counsel. Because the calls did not exist until shortly before the trial, the trial court's implicit conclusion that the State had disclosed the calls within as reasonable a time as possible is not clearly

erroneous, and its decision to allow the State to use the calls was not an erroneous exercise of discretion. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). There is no arguable merit to claiming a discovery violation for untimely disclosure.

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

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 Eileen T. Evans is relieved of further representation of Threatt 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