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February 23, 2021

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

2017AP770-CRNM State of Wisconsin v. Leequane Anthony McGowan
(L.C. # 2014CF5604)

Before Brash, P.J., Dugan 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).

Leequane Anthony McGowan appeals from a judgment, entered upon a jury's verdicts, convicting him on one count of first-degree intentional homicide with a dangerous weapon and one count of possession of a firearm by a felon. Appellate counsel filed a no-merit report and a

supplemental no-merit report.[1] *See* ***Anders v. California***, 386 U.S. 738 (1967); WIS. STAT. RULE 809.32 (2017-18).[2] McGowan was notified of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, the no-merit reports, and McGowan's response, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

On October 27, 2014, Milwaukee police responded to a ShotSpotter[3] dispatch near the intersection of North 12th Street and West Locust Street. Officers found Zachary Rainer face down on the curb in front of 2869 North 12th Street; at trial, this address was identified as the house on the southwest corner of the intersection. The officers attempted lifesaving measures until the Milwaukee Fire Department arrived and took over, but Rainer was pronounced dead at the scene. The medical examiner concluded that Rainer died as a result of multiple gunshot wounds and that the manner of death was homicide. Investigations led police to McGowan, who was initially charged with one count of first-degree reckless homicide with a dangerous weapon and one count of possession of a firearm by a felon.

The State made a plea offer to McGowan. In exchange for his guilty plea to first-degree reckless homicide, the State would drop the dangerous weapon enhancer and dismiss the felon-

[1] The no-merit report was filed by Attorney Robert E. Haney. The supplemental report was filed by Attorney Andrea Taylor Cornwall, who has replaced Attorney Haney as counsel of record.

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

[3] Milwaukee Police Officer Christopher Ottaway explained at trial that ShotSpotter is "a system when a gunshot has been fired from a gun, three towers that are closest to that sound will triangulate that noise and give us an address of where those shots were being fired."

in-possession charge. McGowan rejected the offer. The State, as it had cautioned in a separate letter, then filed an amended information that renewed the felon-in-possession charge and increased the homicide charge to first-degree intentional homicide with a dangerous weapon. At trial, the jury was instructed on both first-degree intentional homicide as well as first-degree reckless homicide as a lesser-included offense. The jury convicted McGowan of first-degree intentional homicide with a dangerous weapon and possession of a firearm by a felon. The trial court later sentenced McGowan to life imprisonment for the homicide, setting his extended supervision eligibility date as July 1, 2065, plus a consecutive ten years' imprisonment for the firearm charge. McGowan appeals; additional facts will be discussed herein.

DISCUSSION

I. Jurisdiction

The first issue discussed in the no-merit report is whether there is any arguable merit to challenging the trial court's jurisdiction. The report discusses both personal and subject matter jurisdiction.

"Personal jurisdiction in a criminal case attaches by an accused's physical presence before the court pursuant to a properly issued warrant, a lawful arrest or a voluntary appearance, and continues throughout the final disposition of the case." ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991) (citation omitted). The running of the statute of limitations will deprive the trial court of personal jurisdiction. *See* ***Skindzelewski v. Smith***, 2020 WI 57, ¶20, 392 Wis. 2d 117, 944 N.W.2d 575. A trial court's subject matter jurisdiction "attaches when the complaint is filed." *See* ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d

302 (Ct. App. 1994). "The [trial] court lacks criminal subject-matter jurisdiction only where the complaint does not charge an offense known to law." ***Id.***

There is no basis in the record for challenging McGowan's physical presence before the court. The applicable statutes of limitations, *see* WIS. STAT. § 939.74(1), (2)(a), were not implicated in this case, as McGowan was charged only two months after the alleged offenses occurred. Further, the complaint clearly charges offenses known to law. Thus, there is no arguably meritorious challenge to the trial court's personal or subject matter jurisdiction.

II. Sufficiency of the Evidence

The second issue discussed in the no-merit report is whether sufficient evidence supports the jury's verdicts. McGowan also dedicated much of his response to disputing the evidence used to convict him.

In reviewing the sufficiency of the evidence to support a conviction, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990); *see also* ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982). If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. *See* ***Poellinger***, 153 Wis. 2d at 506-07.

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. A jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony and reject another portion; a jury can find that a

witness is partially truthful and partially untruthful. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). We defer to the jury's function of weighing and sifting conflicting testimony, in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

A conviction may be supported solely by circumstantial evidence. *See* ***Poellinger***, 153 Wis. 2d at 501-02. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. *See* ***id.*** at 503. An appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. *See* ***id.*** at 507-08.

To secure a conviction on a charge of first-degree intentional homicide, the State had to prove beyond a reasonable doubt that McGowan caused the death of Rainer and that McGowan acted with the intent to kill Rainer. *See* WIS JI—CRIMINAL 1010. The following evidence was offered in support of that charge.

Leroy C. Williams, Jr., testified that he lived near 12th and Locust Streets. He knew Rainer because Rainer lived in the same nearby apartment building as one of Williams' friends. Williams and Rainer would exchange pleasantries if they passed in the apartment building hall, and Williams "used to always see" Rainer go into the apartment to the left of the building entrance. Williams testified that he was also familiar with McGowan from the area. The day before Rainer was killed, Williams encountered McGowan in the apartment building. They "[said] what's up to each other," and McGowan "got to telling [Williams] about he had some beef with some cats in the building." Williams said he advised McGowan to "leave them little cats alone" and in response, McGowan pulled a gun out of his pocket, pointed it at Rainer's apartment door, and said "I'm going to get that n-----. I'm going to kill a n-----."

Emma Leflore testified that she was driving through the vicinity and had stopped for a traffic light at the intersection of 12th and Locust. She heard a popping sound and looked around; to her right, she saw two men. She heard a second shot and saw one man fall. She also observed the other man pointing a black handgun at the victim. Leflore was unable to positively identify a suspect from a photo array, though the detective who conducted the array later testified that Leflore hesitated on McGowan's picture both times that she viewed the array.

Janice Lathan testified that she overheard a speakerphone conversation between Tarnesha Brown, the niece with whom Lathan was staying, and McGowan, Brown's ex-boyfriend. Lathan testified that she was familiar with McGowan's voice and that she heard him tell Brown that he had "iced somebody on Locust." After Lathan heard this, she turned on the television and saw a news report about the shooting. Brown testified that the phone call Lathan described never happened; however, Brown testified that she had a phone conversation with McGowan in which she asked if he had been involved in the Locust Street incident, and he answered that he "did it for self-defense."

The medical examiner testified that Rainer suffered three gunshot wounds. One bullet entered through the chest and penetrated the heart, the diaphragm, and the liver before stopping in the large intestine; one bullet entered through the thigh, traveled up into the abdominal cavity and passed through the abdominal part of the aorta, then came to rest in the left thoracic vertebra; and one bullet entered through the back, went through the spinal column, two ribs, and a lung, before stopping in the soft tissue of the chest. The medical examiner testified that all three bullets caused fatal injuries and, though he could not tell which wound caused the death, "[i]t, in most likelihood, was all three of them."

Darius Reaves testified that he was in the area to cut his cousin Cornelius Scott's hair and to attempt to film a music video. Reaves drove over in his red Ford Mustang and parked in front of a friend's house, "[f]our or five houses from the corner" of 12th and Locust. Reaves knew McGowan because, he said, he had cut McGowan's hair three or four times. Reaves acknowledged he was near where the shots were fired but testified that, at the time, he was busy "coming from and going to" the car. Reaves testified that he did not see anyone shoot Rainer, but he saw McGowan, with his hands in his pockets, "running away, coming away from where the body actually in turn was kind of up laying."

The above is sufficient evidence from which a reasonable jury could conclude that McGowan caused Rainer's death with intent to kill him.[4] Testimony from Williams and Leflore is sufficient to establish intent; Williams, Lathan, Brown, and Reaves provided circumstantial evidence that McGowan was the shooter; and the medical examiner's testimony established that the shooting caused Rainer's death.

In his no-merit response, McGowan lodges several evidentiary complaints, essentially pointing out various inconsistencies that he believes should exonerate him. First, McGowan argues that he "was never seen in footage" of the incident, obtained from the video surveillance system of a store on the northeast corner of 12th and Locust. The video was played for the jury. Detective David Dalland testified that the video was "quite grainy" and that while shapes of

[4] The evidence is therefore also clearly sufficient to support the dangerous weapon modifier and the "possession" part of the felon-in-possession charge. Further, McGowan stipulated to the fact of a prior out-of-state conviction that, in this state, would be a felony, and that stipulation was read to the jury.

people could be seen, the detective "could not identify anybody from that video." Though this is not a positive identification of McGowan, neither does it exculpate him as the shooter.

Second, McGowan asserts that Leflore "stated in [the] police report [and] at trial that [McGowan] was not the person she seen shooting at the victim [and] she did not point [him] out in a lineup." This mischaracterizes the evidence. Leflore testified that after she heard shots and looked over, she saw one man pointing a gun at the other. While Leflore testified she was unable to positively identify a suspect when she viewed the photo array, she also estimated that she was forty to fifty feet from the incident and said she "could not get a view of" the shooter. She did not, however, state that McGowan was not the person that she saw. Additionally, Detective Rosemarie Gallindo, who conducted the photo array, testified that Leflore set aside photo number four—McGowan's—during the first viewing of the array, and set aside photos four and six during the second viewing. Gallindo also testified that although unable to make a positive identification, Leflore had stated she thought photo four looked the most like the shooter. Further, Leflore did not identify McGowan in a live lineup because she did not actually view one; Detective Matthew Goldberg testified that the lineup had to be canceled after McGowan threw himself on the ground, refused to stand, and threatened to spit on officers.

Third, McGowan complains that Williams and Brown had motives for making statements against him. Those motives were explored at trial. Williams acknowledged that he had been arrested on a material witness warrant and did not want to testify, but stated that the conversation with McGowan did, in fact, happen. While McGowan suggests that Brown testified against him to gain favor from the State with her own pending criminal charges, Brown disavowed such a motive when asked if that was her reason for testifying.

Fourth, McGowan complains that the State knowingly allowed Lathan to commit perjury. However, the mere fact that McGowan contends her testimony was false does not make it so. In any event, it was the jury's role to assess the believability of the witnesses' testimony and to reconcile any inconsistencies.

Fifth, McGowan complains that Reaves also had a reason to testify against him—namely, that Reaves was the shooter. McGowan and his trial attorney based this theory on testimony from Christopher Cantania, a private detective who also conducts store reviews for the United States Department of Agriculture regarding the stores' authorization to accept food stamps. As a part of this process, Cantania sometimes takes photos of the stores. On the day Rainer was shot, Cantania was reviewing the store on the corner and had his camera with him. When he heard the shots, he went outside. He testified that he saw a puff of smoke in the area and "saw a gentleman walking from another gentleman laying on the floor, [past] a large dumpster, and he got into the driver's side vehicle [sic] of a red Mustang." Cantania took photos of the vehicle, which he thought looked suspicious; the vehicle eventually led police to Reaves.[5] However, Cantania also said that he did not see anyone with a gun, nor was he certain that the Mustang was involved, and the Mustang drove away at a normal speed. When Reaves testified, he specifically denied having a gun and denied shooting Rainer.

Finally, McGowan complains that there was "absolutely no physical evidence" linking him to the crime. The State offered testimony about attempts to collect DNA and fingerprint

[5] McGowan additionally notes that the evidence shows that Scott, whom Cantania observed getting into the passenger seat of the Mustang, had been apprehended with a gun of the caliber that killed Rainer. In support, McGowan has provided a portion of a police report. However, this partial report appears to indicate that one of Scott's brothers, not Scott, had the weapon and that the gun, which belonged to the brother's girlfriend, was pink, rather than black.

evidence from shell casings and an unspent cartridge found at the crime scene. Those attempts were unsuccessful, but expert witnesses explained why such evidence might not be found. As noted above, though, a conviction may be supported by circumstantial evidence; direct physical evidence is not a requirement for a conviction.

Ultimately, although there are multiple reasonable inferences that could be drawn from the evidence, we are required to uphold the one drawn by the jury unless it is patently incredible. The inference that McGowan killed Rainer is not so incredible, so there is no arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdict.[6]

III. Ineffective Assistance of Counsel

A. Failure to Call Alibi Witnesses

In his no-merit response, McGowan asserts that trial counsel was ineffective for failing to call alibi witnesses on his behalf. McGowan says that he informed trial counsel of two alibi witnesses, "asking [counsel] to interview them, investigate his story that he was not present at the shooting, but were in fact, somewhere all together."

"To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (citations

[6] McGowan additionally complains that there was insufficient evidence he was aiding and abetting. However, "aiding and abetting" is not an element of first-degree intentional homicide or possession of a firearm by a felon. It becomes an issue under the party-to-a-crime statute, *see* WIS. STAT. § 939.05(2)(b), but McGowan was not charged as a party to a crime.

omitted). We need not address both elements if the defendant cannot make a sufficient showing on one or the other. *See* ***State v. Mayo***, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115.

"To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statement or actions." ***Strickland v. Washington***, 466 U.S. 668, 691 (1984). "This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel." ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325.

In the supplemental no-merit report, successor appellate counsel describes trial counsel's notes, which reflect that McGowan initially told trial counsel that he could not remember where he was on the date of the shooting and that there were no witnesses for trial counsel to interview. Less than three weeks before trial, McGowan told trial counsel about one potential alibi witness. When trial counsel explained that thirty days' notice to the State was required for an alibi defense[7] and that trial counsel would need time to investigate the alibi, McGowan opted to waive the alibi defense to avoid adjourning the upcoming trial date. Included with the supplemental no-merit report is a letter of understanding from trial counsel to McGowan, signed by McGowan, memorializing that decision. Thus, there is no arguable merit to a claim that trial counsel was ineffective for failing to investigate or call McGowan's supposed alibi witness.

[7] "If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 30 days before trial[.]" WIS. STAT. § 971.23(8)(a). Such notice must also "stat[e] particularly the place where the defendant claims to have been when the crime is alleged to have been committed" and include the names and addresses of witnesses to the alibi, if known. *See* ***id.***

B. Failure to Adequately Explain the Plea Offer

McGowan also contends that trial counsel was ineffective because he "misadvised" McGowan to reject the State's plea, with a maximum exposure of sixty years' imprisonment, and instead "encouraged" McGowan to go to trial on first-degree intentional homicide, where McGowan "would automatically be exposed to an axiomatic 'Life' sentence." McGowan asserts that had he "been fully aware of the significant consequence to forego, [sic] the State's offer to plead to the lesser charge … instead of listening to counsel's advice and went to trial facing an automatic life sentence, he would have insisted that trial counsel accept the State's offer" and would not have gone to trial. However, this claim is refuted by the record.

McGowan's original homicide charge was first-degree reckless homicide; the sixty-year maximum penalty for that offense was listed in the complaint and the original information. McGowan was also advised of that potential penalty by the court at his initial appearance. In an offer letter dated January 21, 2015, the State advised that if McGowan pled guilty to the reckless homicide, the State would, among other things, make a sentence recommendation of either imprisonment with the length left up to the trial court, or thirty years' initial confinement and ten years' extended supervision.

At the final pretrial conference on April 15, 2015, the State advised the trial court of the terms of the January 21 offer. It also told the court that it had alerted defense counsel that if McGowan rejected the offer in favor of trial, the State would file an amended information with

the increased homicide charge.[8] Trial counsel advised the court that he had given McGowan a copy of the State's offer letter and told him that the State intended to file an amended information, but McGowan rejected the offer. The letter of understanding between trial counsel and McGowan also reflects McGowan's understanding of the State's offer and its intent to increase the charge, as well as McGowan's decision to reject the offer. Accordingly, there is no arguable merit to a claim that trial counsel was ineffective for not adequately advising McGowan relative to the State's plea offer.

IV. Sentencing Discretion

The final issue discussed in the no-merit report is whether the circuit court erroneously exercised its sentencing discretion by imposing an excessive sentence. *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 several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294

[8] This is a permissible tactic. *See* ***Bordenkircher v. Hayes***, 434 U.S. 357, 364-65 (1978); ***State v. Cameron***, 2012 WI App 93, ¶17, 344 Wis. 2d 101, 820 N.W.2d 433; ***State v. Williams***, 2004 WI App 56, ¶48, 270 Wis. 2d 761, 677 N.W.2d 691.

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* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The sentences imposed are within the range authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Further, the sentences are not so excessive under the circumstances so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, there is no arguable merit to a challenge to the court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.[9]

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrea Taylor Cornwall is relieved of further representation of McGowan 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

[9] To the extent that there are other arguments in the no-merit response, including claims that trial counsel did not adequately cross-examine witnesses or prevent the admission of certain testimony, those that are not discussed with specificity in this opinion 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).