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March 30, 2021

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

2015AP2027-CRNM State of Wisconsin v. Wilfredo Diaz (L.C. # 2001CF2231)

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).

Wilfredo Diaz appeals from a judgment, entered upon a jury's verdict, convicting him of one count of first-degree intentional homicide while using a dangerous weapon. Diaz also appeals from an order denying his motion for postconviction relief. Appellate counsel, Marcella De Peters, 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] as well as a supplemental report pursuant to this court's order. Diaz has filed responses to both reports. We have independently reviewed the record, as mandated by ***Anders***, counsel's reports, and Diaz's responses. We conclude that there are no issues of arguable merit that could be pursued on appeal, so we summarily affirm the judgment and order.

BACKGROUND

According to the criminal complaint, in April 2001, Milwaukee police were dispatched to a duplex on West Forest Home Avenue. Resident Nicholas McIntyre was found dead in the stairwell to his upper unit with a gunshot wound to his back. Michael Popp, who was with McIntyre when he was shot, told police that Ronald Rykowski had brought someone, identified later by Rykowski as Diaz, to McIntyre's residence to purchase marijuana. When Rykowski and Diaz arrived, Popp watched McIntyre open the exterior door to let the two in the building. McIntyre, Rykowski, and Diaz were standing at the bottom of the stairs, and McIntyre displayed a small bag of marijuana. Popp reported that Diaz demanded the marijuana, pulled out a handgun, and pointed it at McIntyre. McIntyre turned to run up the stairs, Diaz fired one shot, and McIntyre fell face down. Diaz fled. Rykowski identified Diaz as the shooter in a lineup, and Popp tentatively identified Diaz. The medical examiner testified that McIntyre died from a perforation of the heart resulting from the gunshot wound to his back.

Diaz was charged with one count of first-degree reckless homicide with use of a dangerous weapon. An amended information later increased the base charge to first-degree

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

intentional homicide. The matter was tried to a jury, which was instructed on first-degree intentional homicide as well as the lesser-included offenses of first-degree reckless homicide and second-degree reckless homicide, all with use of a dangerous weapon. The jury convicted Diaz of first-degree intentional homicide with use of a dangerous weapon. The trial court sentenced Diaz to life imprisonment with eligibility for extended supervision after fifty years.

Diaz filed a timely notice of intent to pursue postconviction relief; however, for reasons unclear from the record, postconviction counsel was not appointed for him. In 2008, Diaz pursued a postconviction motion under WIS. STAT. § 974.06 with the assistance of a retained attorney. The circuit court granted a hearing on part of the motion, though it ultimately denied the motion in its entirety.[2] In 2014, we granted Diaz's motion, filed with the assistance of another privately retained attorney, to extend the time for filing a postconviction motion or notice of appeal, effectively resetting Diaz's direct appeal rights under WIS. STAT. RULE 809.30.[3] Attorney De Peters was appointed to represent Diaz, and she eventually commenced this no-merit appeal of both the judgment of the conviction and the order denying the postconviction motion. *See* WIS. STAT. RULE 809.32. Additional facts will be discussed herein.

[2] The Honorable Jacqueline D. Schellinger presided at trial and sentencing and will be referred to as the trial court. The Honorable Jeffrey A. Wagner denied the 2008 postconviction motion and will be referred to as the circuit court.

[3] This is not the typical method for reinstating appellate rights under WIS. STAT. RULE 809.30, but Diaz's case was particularly unusual. Among other things, the attorney who filed the 2008 motion was disbarred in 2013 for dishonesty, fraud, and failure to competently represent multiple defendants, including Diaz. Our 2014 order details the unique facts and procedural posture of this case, but those details are not relevant to the substance of this appeal.

DISCUSSION

I. Diaz's Statements to Law Enforcement

Diaz gave at least three statements to police, which were memorialized in writing. The docket entries for this case reflect that the trial court conducted a ***Miranda/Goodchild*** hearing on the statements' admissibility as part of motions *in limine*. *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965). A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***id.***, 27 Wis. 2d at 264-65.

The docket reflects that the trial court deemed Diaz's statements admissible, finding that "the defendant's ***Miranda*** warnings were given timely and properly; and no Goodchild violations were made." Because the no-merit report made no mention of the hearing, we directed appellate counsel to file a supplemental report addressing whether Diaz could pursue "any arguably meritorious issue with respect to any pretrial motion."

Appellate counsel notes that there is no transcript of the motion hearing in the record.[4] Nevertheless, she concludes that there is no arguably meritorious ***Miranda/Goodchild*** issue to be pursued. Although there is no transcript of the hearing, the exhibits from the hearing are in the

[4] Appellate counsel explains that she attempted to obtain the transcript from the court reporter. However, the reporter informed counsel that the transcript could not be prepared; the notes of the hearing no longer existed because the ten-year retention period had lapsed before appellate counsel was appointed. *See* SCR 72.01(47).

record. These exhibits include a card read by police to inform a defendant of his or her constitutional rights and Diaz's three statements, as written out by detectives. Each of the written statements begins with an acknowledgement, signed by Diaz, that he had been informed of and was choosing to waive his ***Miranda*** right to remain silent. Further, nothing in the record suggests that any coercive police tactics, which are a prerequisite to a finding of involuntariness, had been employed. *See* ***State v. Ward***, 2009 WI 60, ¶33, 318 Wis. 2d 301, 767 N.W.2d 236.

Additionally, appellate counsel notes that the State did not use any of Diaz's statements against him in its case-in-chief, only as part of its rebuttal case. Evidence that is not admissible in the State's main case because of constitutional violations is nevertheless admissible in rebuttal to impeach the defendant's credibility. *See* ***State v. Felix***, 2012 WI 36, ¶16 & n.15, 339 Wis. 2d 670, 811 N.W.2d 775. We therefore agree with appellate counsel that there is no arguable merit to challenging the admissibility of Diaz's statements or the results of the ***Miranda/Goodchild*** hearing.

Relatedly, we have independently considered whether there is any arguably meritorious postconviction claim to be made based on the unavailability of the motion hearing transcript. *See* ***State v. Pope***, 2019 WI 106, ¶23, 389 Wis. 2d 390, 936 N.W.2d 606 ("[A] transcript is crucial to the right to an appeal[.]"); *see also* ***State v. Raflik***, 2001 WI 129, ¶32, 248 Wis. 2d 593, 636 N.W.2d 690. However, to be entitled to relief because of a missing record portion, the defendant must, as a threshold matter, show that some reviewable error has occurred relative to that missing portion. *See* ***Pope***, 389 Wis. 2d 390, ¶¶2, 26; ***State v. DeLeon***, 127 Wis. 2d 74, 80-83, 377 N.W.2d 635 (Ct. App. 1985). As noted above, the record does not support any arguably meritorious claim that error occurred at the ***Miranda/Goodchild*** hearing. Thus, we also

conclude that there is no arguably meritorious basis for seeking record reconstruction, a new trial, or other relief based on the unavailability of the ***Miranda/Goodchild*** hearing transcript.

II. Sufficiency of the Evidence

The first issue appellate counsel discusses in the no-merit report is whether sufficient evidence supports the jury's guilty verdict on first-degree intentional homicide with a dangerous weapon. 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.

A conviction may be supported solely by circumstantial evidence. *See* ***id.***, 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 with use of a dangerous weapon, the State had to prove beyond a reasonable doubt that Diaz both caused the death of McIntyre while using a dangerous weapon[5] and acted with the intent to kill McIntyre.

[5] A "dangerous weapon" includes "any firearm, whether loaded or unloaded." WIS JI—CRIMINAL 910. The evidence more than adequately supports this element, so we do not discuss it further.

See WIS JI—CRIMINAL 1010. As relevant to the charge of first-degree intentional homicide, the following evidence was presented at trial.[6]

Rykowski testified that, at Diaz's request to purchase some marijuana, he made arrangements for McIntyre to sell a pound of the drug to Diaz for $750. Rykowski met Diaz at a gas station, Diaz got into Rykowski's car, and Rykowski drove them to McIntyre's home. Rykowski asked Diaz to count out his money, and he watched Diaz count out approximately $800. Rykowski told Diaz that when they arrived, Diaz could wait in the car; Rykowski would take the money and return with the marijuana. Diaz insisted on going in with Rykowski.

Rykowski further testified that McIntyre let the two men inside and asked Diaz to show the money. Diaz complied. McIntyre went into his unit and returned with the marijuana. Popp was with McIntyre, but stayed near the top of the stairs. Diaz asked to see the marijuana, and McIntyre opened the bag. Diaz smelled the marijuana and commented that it "look[ed] like some good shit." Then, Diaz "pulled it away and said give me your shit" while trying to run out the door. McIntyre "grabbed on [Diaz], pulled him back, pulled the marijuana out of his hand, started walking up the stairs. I was probably on, I'd say the eighth stair, a couple of stairs away from [Diaz], the defendant pulled out a gun pointed it at him and shot him." Rykowski also testified that he believed McIntyre's back was turned when Diaz fired. Diaz fled the building. Rykowski ran upstairs and pounded on the unit door, then went back to McIntyre, who was "moving and shaking." When the door to McIntyre's unit opened, Rykowski picked up the marijuana and told the person who opened the door to do something with it.

[6] The evidence discussed herein does not represent the totality of the evidence against Diaz.

Sixteen-year-old N.L. testified that he was at the residence, playing cards with McIntyre, Popp, and Popp's sixteen-year-old girlfriend L.G. There was a knock at the door, and McIntyre and Popp left the room. A couple of minutes later, N.L. heard a gunshot. N.L. also testified that Rykowski came in with the marijuana and he (N.L.) threw the bag in the backyard. L.G. testified that she was at the house, and that Popp and McIntyre left after a knock on the door. "They went down there and I heard somebody say give me it or something. I don't know what they were talking about, and then I heard a gunshot[.]"

Popp testified that he knew McIntyre had arranged for "some kind of deal" to happen. McIntyre wanted Popp to come with him because McIntyre felt nervous. Popp testified about what he observed after McIntyre let Diaz and Rykowski into the hall/stairwell.

> [Popp]: [H]e just said like it smells good, and then he was showing, I don't know—
>
> Q: Who was showing what?
>
> A: [McIntyre] was showing the weed. To the … guy sitting over there[, Diaz].
>
> Q: Then what—what did you see next?
>
> A: I seen the guy over there reach for the bag and say give me that shit.
>
> Q: Now, after you saw the defendant reach for that bag and say give me that shit, what happened next?
>
> A: [McIntyre] snatched the bag back.
>
> Q: And then what happened after [McIntyre] snatched the bag back?
>
> A: He stepped back a little and that's when the guy over there pulled out a gun.

Popp also testified that McIntyre started running up the stairs and that Popp saw Diaz shoot McIntyre. McIntyre fell next to Popp, who ran inside and called 911.

Rafael Rodriguez, who grew up with Diaz, testified that he received a call from Diaz the night of the homicide around 10:45 p.m., asking to be picked up. Rodriguez and his girlfriend, Elizabeth Blas, went to get Diaz, who asked to be taken to Rodriguez's house. Diaz told Rodriguez and Blas that he wanted to talk to this mother because he had shot someone. Blas, who also testified, went to get Diaz's mother. Later, Diaz asked Rodriguez for a ride back to where he had been picked up, so that he could retrieve the expensive coat he expected people would be looking for. Rodriguez also testified that they drove to the Sixth Street Viaduct, where Diaz handed him a revolver and asked him to throw it in the river. Blas's testimony largely corroborated Rodriguez's, though she said she remembered Diaz saying there had been a struggle in the hallway and that he pulled out a gun because he thought someone else was pulling one out because "someone was reaching in their pockets."

The medical examiner testified that there was a gunshot entrance wound on McIntyre's lower left back. The bullet "had a course that went up from his back to the front, and went from below to up" at about a forty-five degree angle. The bullet went through the left ventricle of McIntyre's heart but did not go all the way through. It remained inside the pericardial sac, causing the sac to fill with blood. Once the sac was full, McIntyre's heart could no longer beat, causing his death. The medical examiner further testified that there was no evidence of stipple or soot near the entrance wound and "if we see [stippling] ... it means it's a one, two, three foot range." Thus, the lack of stippling indicated the gun was fired from more than three feet away.

A firearms examiner from the State Crime Laboratory testified that there was no gunpowder residue on McIntyre's shirt and that lack of such residue would indicate that the muzzle of the gun was more than three feet away when fired. The firearms examiner opined that the bullet likely came from a revolver and that "in order for the cartridge to fire, it's either

cocked and the trigger is pulled, or the trigger is pulled until such time as the hammer falls…. [Y]ou can't just strike the hammer without pulling the trigger." In other words, the gun would only fire if the trigger were pulled; it could not accidentally discharge.

Diaz also testified in his own defense. He said he obtained a gun, "for protection," from an associate named Michael Higgins before going to purchase the marijuana. Diaz said he told Higgins that he did not want any bullets, but Higgins gave him one anyway, so Diaz asked Higgins to set the gun "for nothing to fire."

Diaz testified that an unidentified person opened the door at McIntyre's residence, and that person signaled Popp at the top of the stairs. McIntyre came down and asked Diaz to show him the money. After Diaz counted out his money in the stairwell, Rykowski shoved him into McIntyre, who grabbed Diaz with both hands and started patting him down as if trying to find the money. Diaz said that McIntyre grabbed the gun in Diaz's waistband, "grab[bing] the part of which holds the trigger, the handle and the cylinder part." Diaz said McIntyre pulled the trigger once, which advanced the cylinder to where the bullet was. McIntyre tried to remove the gun from Diaz's pants and Diaz grabbed McIntyre's hands. They struggled, which Diaz demonstrated for the jury. At some point, McIntyre succeeded in freeing the gun from Diaz's waistband, but they were both still holding the gun. Diaz said they had the gun in both their hands, pointed upwards. McIntyre turned to his right, exposing the left side of his back, and "when [McIntyre's] pulling, the gun went off."

Diaz testified that Popp then pointed a gun at him from the top of the stairs, so he fled and thought he heard a gunshot behind him. He called Rodriguez and "I pretty much inform[ed] him of everything in detail that happened." He testified that he asked Rodriguez, "What should I

do with the gun?" Rodriguez told Diaz to give him the gun and he would "take care of it." Rodriguez tossed the gun into the river, which upset Diaz because he wanted to return the gun to Higgins. Diaz testified that he asked Rodriguez to take him "home," to his (Diaz's) aunt's house. There, Diaz changed clothes, in part because his mother "doesn't want [him] to wear" the expensive coat for causal occasions. After Diaz changed, Rodriguez drove them to Rodriguez's house. Diaz denied that Blas went to pick up his mother, denied that he spoke to his mother that night, denied telling Rodriguez he had shot someone, and denied that he had grabbed the marijuana. Diaz acknowledged, however, that he originally told police he had no involvement in McIntyre's death and had never been to that address.

There is sufficient evidence to support the conviction. Multiple witnesses testified that Diaz was attempting to take the marijuana from McIntyre just before McIntyre was shot. Multiple witnesses saw or heard a single gunshot. Only Diaz testified that there was a struggle for his gun. The firearms examiner testified that a revolver could only be fired by pulling the trigger. The medical examiner testified about the angle of the wound, which suggests that McIntyre was shot from below and behind, and about how the wound caused McIntyre's death.

While there is testimony that could support Diaz's claim that he struggled with McIntyre for the gun, the jury was not required to believe that testimony. The jury is the sole arbiter of witness credibility, and it alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d 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).

The only evidence to suggest McIntyre's death was anything other than an intentional homicide came from Diaz himself, and the jury clearly rejected that testimony.[7] Nothing in Diaz's testimony plausibly explained how McIntyre was shot in the back as they struggled for the gun. The jury heard evidence regarding Diaz disposing of the gun, his concern over his distinctive coat, and lying to police about his involvement in the shooting. The jury also heard how Diaz, who was on probation for a possession with intent to deliver conviction, manipulated things so that his supervising agent's calls would be forwarded from Diaz's home—where he was supposed to be confined—to his mother's cell phone, which he had with him, so he could take the agent's check-in calls and avoid being found in violation of probation.

Once the jury rejected Diaz's testimony, the remaining evidence was more than adequate to support the conviction on first-degree intentional homicide while armed with a dangerous weapon. We thus conclude that there is no arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdict.

III. Diaz's No-Merit Response

Diaz's response to the no-merit report is generally dedicated to the propositions that: (1) trial counsel should have sought jury instructions for, and argued to the jury about, lesser-

[7] At sentencing, the trial court commented, "[Y]ou were convicted because you told the most ridiculous story I think I've ever heard in a homicide trial. You told a story that was inconsistent with physical facts…. Your story was more bizarre than anything I have ever heard in someone trying to describe an accident happen."

included offenses including first-degree reckless homicide, second-degree reckless homicide, felony murder, and homicide by negligent handling of a firearm, and (2) trial counsel should have pursued the defenses of, and jury instructions for, perfect self-defense, imperfect self-defense, and accident. These are both variants of an ineffective assistance of counsel claim.

"There are two elements that underlie every claim of ineffective assistance of counsel[.]" ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. "[F]irst, the person making the claim must demonstrate that his or her counsel's performance was deficient[.]" ***Id.*** To demonstrate deficient performance, the person must show that counsel's representation fell below objective standards of reasonableness. *See* ***State v. McDougle***, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. Second, the person "must demonstrate that this deficient performance was prejudicial." ***Mayo***, 301 Wis. 2d 642, ¶60. To prove prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***McDougle***, 347 Wis. 2d 302, ¶13 (citation omitted). We need not address both elements if the defendant cannot make a sufficient showing as to one or the other. ***Mayo***, 301 Wis. 2d 642, ¶61.

A. Lesser-Included Offenses

A lesser-included offense instruction is required only when there are reasonable grounds in the evidence for both acquittal on the greater charge and conviction on the lesser. *See* ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995). "Whether the evidence supports the submission of a lesser-included offense is a question of law" that we review *de novo*. ***State v. Fitzgerald***, 2000 WI App 55, ¶7, 233 Wis. 2d 584, 608 N.W.2d 391. As part of this review, the

evidence should be viewed in the light most favorable to the defendant. *See* ***State v. Johnson***, 2020 WI App 50, ¶33, 393 Wis. 2d 688, 948 N.W.2d 377.

When first-degree intentional homicide is charged, all other homicide charges under subchapter I of WIS. STAT. ch. 940 are lesser-included offenses. *See* WIS. STAT. § 939.66(2); ***Johnson***, 393 Wis. 2d 688, ¶31. Diaz's trial counsel specifically stated he would not be seeking any lesser-included instructions, which is consistent with what appears to have been an "all or nothing" strategy—that is, if the State failed to prove Diaz intended to kill McIntyre, then a jury that had to choose between first-degree intentional homicide and acquittal would have to acquit. Counsel's failure to request a lesser-included instruction when the defense strategy is that the defendant has a better chance of acquittal without lesser-included instructions is not ineffective assistance. *See* ***State v. Eckert***, 203 Wis. 2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996).

However, even if we assume that trial counsel was deficient for not requesting any lesser-included instructions, the record does not reveal any prejudice. There is no prejudice from the failure to request the instructions for first-degree and second-degree reckless homicide because the jury was instructed on those offenses at the State's request. There is also no prejudice from failure to seek the instruction for homicide by negligent handling of a firearm. The jury convicted Diaz of the greater intentional homicide offense despite being instructed on lesser reckless homicide offenses and, as the jury never moved to considering the reckless offenses, it also would not have moved on to the lesser-still negligent homicide offense. Finally, there is no prejudice from failure to request a felony murder instruction because, while it was the State's theory that Diaz was attempting an armed robbery of McIntyre, Diaz denied any such plan as part of his overall denial of any intent to kill McIntyre. Counsel is not effective for failing to request lesser-included instructions that are inconsistent with or harmful to a general theory of

defense. *See* ***id.*** We thus conclude that there is no arguably meritorious claim of ineffective assistance of counsel for failure to request lesser-included jury instructions.

B. Defenses

Diaz also contends that trial counsel was ineffective for failing to pursue perfect self-defense, imperfect self-defense, and the accident defense and associated jury instructions. We directed appellate counsel to address these arguments in the supplemental no-merit report.

Self-defense, perfect or imperfect, is an affirmative defense.[8] *See* ***State v. Head***, 2002 WI 99, ¶¶64, 89, 255 Wis. 2d 194, 648 N.W.2d 413. A defendant who seeks to have the jury instructed on perfect self-defense to a charge of first-degree intentional homicide "must satisfy an objective threshold showing that she *reasonably* believed that she was preventing or terminating an unlawful interference with her person and *reasonably* believed that the force she used was necessary to prevent imminent death or great bodily harm." ***Id.***, ¶4. A defendant who seeks to have the jury instructed on unnecessary defensive force (imperfect self-defense) to a charge of first-degree intentional homicide "must show some evidence that she *actually* believed that she was in imminent danger of death or great bodily harm and *actually* believed that the force she used was necessary to defend herself." ***Id.***, ¶5. Diaz believes he would have been entitled to either self-defense instruction because "he subjectively believed (and feared for his life) in the interference" of McIntyre trying to take the money and grab the gun from him.

[8] The primary difference between perfect and imperfect self-defense is the reasonableness of the defendant's beliefs regarding the need for force. *See* ***State v. Head***, 2002 WI 99, ¶¶66-69, 255 Wis. 2d 194, 648 N.W.2d 413. Further, perfect self-defense is a complete defense, while imperfect self-defense simply mitigates first-degree intentional homicide to second-degree intentional homicide. *See* ***id.*** For purposes of this appeal, however, it is not necessary to further distinguish between the two defenses.

A self-defense instruction is required only when a reasonable construction of the evidence, viewed in the light most favorable to the defendant, would allow the jury to conclude the defendant had acted in self-defense. *See* ***State v. Jones***, 147 Wis. 2d 806, 816, 434 N.W.2d 380 (1989). The record does not support either self-defense instruction.

"One exercising the privilege of self-defense must *intend* to use some force or to threaten force against another for the purpose of self-defense." ***Cleghorn v. State***, 55 Wis. 2d 466, 469, 198 N.W.2d 577 (1972) (emphasis added); *see also* WIS. STAT. § 939.48(1) ("A person is privileged to … intentionally use force against another" to prevent or terminate an unlawful interference.); ***Head***, 255 Wis. 2d 194, ¶69 ("Unnecessary defensive force … is the current equivalent of imperfect self-defense … [and] applies to situations in which a person intentionally caused a death[.]"). Here, the only evidence to even hint at a possible need for self-defense was Diaz's description of a struggle with McIntyre. However, Diaz himself disavowed any intentional use of force, testifying at least three times that he had no control over the gun when McIntyre was shot. Thus, Diaz's own version of events fails to support a claim of self-defense. Accordingly, the trial court would not have given either self-defense instruction, even if one had been requested, so there was no prejudice from counsel's failure to request them. *See* ***State v. Giminski***, 2001 WI App 211, ¶10, 247 Wis. 2d 750, 634 N.W.2d 604.

"Accident" is not a true affirmative defense. *See* ***State v. Watkins***, 2002 WI 101, ¶39, 255 Wis. 2d 265, 647 N.W.2d 244. Rather, it is a defense that negates intent. *See* ***id.***, ¶41. "The accident defense prevails in a homicide case only in situations in which "a person unfortunately kills another in doing a lawful act *without any intent to kill* and without criminal negligence." *See* ***id.***, ¶43 (citation omitted, emphasis in ***Watkins***). While not an affirmative defense, the State

must still disprove accident beyond a reasonable doubt when a defendant raises it as a defense. *See* ***id.***

"Because evidence tending to show accident is significant only to the extent that it negates an element of the crime, it can be argued that a special jury instruction is not necessary." *See* WIS JI—CRIMINAL 772 (cmt). Nevertheless, our jury instructions committee has crafted an instruction on accident. ***Id.*** If the format suggested by the pattern instruction had been used, it would have read as follows:

> The defendant contends that he did not act with the intent to kill, but rather that what happened was an accident.
>
> If the defendant did not act with the intent required for a crime, the defendant is not guilty of that crime.
>
> Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant acted with the intent to kill.

However, pattern jury instructions are persuasive, not precedential. *See* ***State v. Harvey***, 2006 WI App 26, ¶13, 289 Wis. 2d 222, 710 N.W.2d 482. While the trial court did not include the specific accident instruction, it did instruct the jury that it "must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to kill," which is both substantively similar to the accident instruction and a proper statement of the law. *See* ***Weborg v. Jenny***, 2012 WI 67, ¶42, 341 Wis. 2d 668, 816 N.W.2d 191 ("A circuit court appropriately exercises its discretion in administering a jury instruction so long as the instruction as a whole correctly states the law and comports with the facts of the case."). Further, by successfully proving first-degree intentional homicide to the jury's satisfaction, the State necessarily disproved accident. *See* ***Watkins***, 255 Wis. 2d 265, ¶43. Accordingly, the record

does not establish prejudice, so we conclude there is no arguably meritorious claim that trial counsel was ineffective for failing to request the accident instruction.

IV. Sentencing Discretion

The second issue appellate counsel addresses in the no-merit report 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. 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 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***id.***

Our review of the record confirms that the trial court appropriately considered relevant sentencing objectives and factors. Diaz faced a maximum possible sentence of life imprisonment without eligibility for extended supervision, plus an additional five years. *See* WIS. STAT. §§ 939.50(3)(a), 939.63(1)(b), 973.014(1g)(a)3. (2001-02). The sentence of life imprisonment with eligibility for extended supervision after fifty years is within the range authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Under the circumstances, it 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). In addition, this court will sustain a trial court's

exercise of discretion if the conclusion reached by the trial court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion. *See* ***Odom***, 294 Wis. 2d 844, ¶8. Accordingly, we conclude there is no arguable merit to a challenge to the trial court's sentencing discretion.

V. Postconviction Motion

The final issue appellate counsel addresses in the no-merit report is whether the circuit court erred in denying Diaz's postconviction motion. In this motion, Diaz alleged that trial counsel failed to conduct a pretrial investigation of many witnesses who "would have discredited the main witnesses for the prosecution." One of these witnesses was Andy Torke, who Diaz claimed said that Rykowski admitted that he and another person planned to steal Diaz's money. Other witnesses were Diaz's mother and his aunt, who would have "testified that the testimony offered by Rafael Rodriguez … was false." Diaz also claimed that trial counsel was ineffective for "failing to advise [Diaz] to enter into the [S]tate's proposed plea agreement" in which the State would agree to recommend twenty to twenty-five years of initial confinement.

The circuit court denied without a hearing the part of the motion relating to the uncalled witnesses. It noted that there was no affidavit from Torke or anything else to support Diaz's "conclusory and self-serving assertions" that Torke would have testified as Diaz claimed. Further, the State noted that Torke could not be located at the time of trial to even be interviewed, and Diaz offered nothing to rebut this claim. The circuit court also stated that there was no reasonable probability that testimony from Diaz's mother or aunt "would have altered the outcome one iota" in light of the evidence adduced at trial.

The circuit court did, however, hold a hearing on the claim that trial counsel had not properly advised Diaz regarding a plea agreement. Diaz's postconviction motion had alleged more specifically that trial counsel had not explained what he would be pleading to, if he would be "pleading to lesser charges or first-degree murder," if the agreement carried any probation, or if the sentence would be consecutive.[9] Diaz also claimed that if trial counsel had "provided advice about [his] lack of preparation for trial," he would have entered a guilty plea. Diaz and his attorney testified at the hearing, after which the circuit court concluded that trial counsel was the more credible witness and that Diaz had been properly counseled regarding any plea offers.

An evidentiary hearing on a postconviction motion is required only if the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. When reviewing an ineffective assistance of counsel claim, the circuit court's determination of what counsel did or did not do are factual determinations and will be upheld unless clearly erroneous. *See* ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). If an evidentiary hearing is held, the circuit court is the ultimate arbiter of witness credibility. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980).

[9] Diaz's postconviction motion never does allege what the precise terms of the plea agreement were, although based on this record it appears likely that he would have been asked to plead guilty to first-degree reckless homicide in exchange for the State's recommendation of twenty to twenty-five years of initial confinement. We note that trial counsel could not have told Diaz with any certainty whether he would receive a probationary or prison sentence, how long any sentence would be, or whether the sentence would be concurrent or consecutive to other sentences; the ultimate sentencing decision is committed to the trial court's discretion, and the court is not bound by the parties' agreement.

We also note that "first-degree murder" has not been an offense in this state since approximately 1987. *Compare* WIS. STAT. § 940.01 (1985-86) ("First-degree murder.") *with* WIS. STAT. § 940.01 (1987-88) ("First-degree intentional homicide.").

We ultimately agree with the circuit court's conclusions on both aspects of Diaz's motion. Torke was on the defense's witness list, which suggests that trial counsel was aware of his existence. However, if Torke could not be found, trial counsel could not have been ineffective for failing to call him, and Diaz offered nothing to demonstrate that Torke was available had trial counsel investigated further. While Diaz's mother allegedly would have testified that she never left her house that night, thereby calling into question testimony from Rodriguez and Blas that Blas had gone to get her, she would have been open for impeachment with evidence that she was complicit in Diaz's scheme to deceive his probation agent. Diaz's aunt supposedly would have testified that Diaz kept some things, including clothes, at her house; Diaz testified as much, but that specific fact was not really in dispute and has no particular relevance to the charge. We therefore agree that testimony from either of Diaz's relatives would not have had any conceivable effect on the verdict. In short, Rodriguez's postconviction motion failed to allege sufficient material facts regarding the uncalled witnesses to entitle him to a hearing, and there is no arguable merit to further challenging the denial.

At the postconviction hearing regarding the plea agreement, trial counsel testified that he did not specifically recall Diaz's case, but it would have been typical to receive a plea offer on the day of trial, and he was certain that the trial court had given him an opportunity to speak with Diaz. He testified that he would have advised Diaz of the "up side, down side to accepting" the State's offer and explored the strengths and weaknesses of the State's evidence with Diaz, but "I don't decide whether an individual shouldn't or should try the case." In sum, trial counsel testified that he would have taken as much time as necessary "such that I was satisfied emerging from our conversation that if indeed he opted to try this case to jury his decision to do that was a

product of reason and thinking on his part as well as whatever information and analysis he needed from me." Trial counsel denied telling Diaz he had a "good chance" of acquittal.

Diaz recalled going into the back to talk to trial counsel at the start of the trial. Diaz testified that counsel did not explain what he would be pleading guilty to or how much time he would serve if he pled; Diaz said he was only told that the district attorney offered a plea. He claimed that trial counsel told him the "possibilities are in my favor" at trial and then started explaining to Diaz what would happen at trial.

The circuit court found that it was "not credible and unlikely" that Diaz did not understand the parameters of the State's offer and concluded that he had been properly advised of the State's offer. Consequently, the circuit court denied Diaz's motion.

The circuit court's findings of fact and credibility are not clearly erroneous. *See* ***Johnson***, 133 Wis. 2d at 216; ***Merta***, 95 Wis. 2d at 152. Based on those determinations, Diaz simply failed to demonstrate that trial counsel performed deficiently in advising Diaz about the plea agreement. Thus, the circuit court did not err in denying postconviction relief, and there is no arguable merit to challenging the circuit court's denial of Diaz's postconviction motion.

Our independent review of the record reveals no other potential issues of arguable merit.[10]

Upon the foregoing, therefore,

[10] To the extent that the 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).

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of further representation of Diaz 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