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April 13, 2021

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

2018AP982-CRNM State of Wisconsin v. Tyrone Stallings (L.C. #2014CF2164)

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).

Tyrone Stallings appeals from a judgment, entered upon a jury's verdicts, convicting him of three felony offenses. Appellate counsel, Megan Kaldunski, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Stallings has filed a response, a supplemental response, and a letter. Upon this court's

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

independent review of the record, as mandated by ***Anders***, counsel's report, and Stallings' submissions, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

On May 20, 2014, the Milwaukee Police Department, in conjunction with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), executed a no-knock search warrant at a house at 1134 South 19th Street in Milwaukee. The warrant had been obtained with information from a confidential informant. The informant reported that within the prior seven days, they had personally been inside the house and observed "Ty"—whom the informant later identified through a booking photo as Stallings—distributing cocaine from the residence.

In the master bedroom of the home, police recovered two plastic bags with over 112 grams of suspected marijuana, two glass jars with over 82 grams of suspected marijuana, and a plastic bag with approximately 35 suspected marijuana "cigarette ends," as well as mail sent to Stallings at that address. Alongside the clothes dryer in the basement, police recovered a duffle bag containing a sawed-off shotgun and shells.

Prior to execution of the search warrant, Milwaukee Police Detective Michael Caballero and ATF Special Agent John Adamson had been surveilling the residence. They observed Stallings leave the home and requested a uniformed police officer to conduct a traffic stop and

detain Stallings.[2] Officer Laura Captain performed the stop and later arrested and transported Stallings to a police precinct at Caballero's request.

Following his arrest, Stallings was interviewed by Caballero and Adamson. He admitted the marijuana was his, claiming he had been selling for only a month and a half, and identified the strains of marijuana as "blueberry" and "cheese." Stallings also told the investigators that he had found the gun, already in the duffel bag, the day before while collecting cans, so he brought it home with him and placed it near the dryer. When the investigators told Stallings they knew he had the gun for longer than a day, Stallings told them he had bought it for thirty dollars from some guy on the street to use for protection. He also said he had given the gun to someone else for safekeeping, but that he had gotten the gun back about three or four days prior.

Stallings was charged with possession of a firearm by a felon as a repeater, possession of a short-barreled shotgun as a repeater, and possession with intent to deliver less than 200 grams of tetrahydrocannabinols (THC) with use of a dangerous weapon as a second or subsequent offense. He filed a pretrial "motion to suppress physical evidence for an illegal search warrant," arguing that the affidavit supporting the warrant was insufficiently detailed to support a finding of probable cause. The trial court denied the motion. The trial court also conducted a hearing on the admissibility of Stallings's statements to police and ruled them admissible. The case was tried to a jury, which convicted Stallings as charged. The trial court imposed concurrent and consecutive sentences totaling thirteen years of initial confinement and seven years of extended supervision. Stallings appeals. Additional facts will be discussed herein.

[2] The license plates on Stallings' vehicle were suspended.

DISCUSSION

I. Motion to Suppress

The first issue appellate counsel discusses in the no-merit report is whether the trial court erred when it denied the "motion to suppress physical evidence for the illegal search warrant." The motion alleged that "if examined closely the affidavit [in support of the warrant] is insufficient to establish that contraband, particularly contraband of the named target (Tyrone Stallings) might be found in [the residence] when executed." In his response to the no-merit report, Stallings reiterates the lack of detail claim, pointing to the trial court's acknowledgement "that there are definitely places in the affidavit that are lacking in details."

A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We do not reverse the trial court's factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.*** "A search warrant may issue only upon probable cause." ***State v. Jones***, 2002 WI App 196, ¶10, 257 Wis. 2d 319, 651 N.W.2d 305. On review of a challenge to probable cause for issuance of a search warrant, we examine "'the totality of the circumstances presented to the warrant-issuing commissioner to determine whether the warrant-issuing commissioner had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing.'" ***State v. Silverstein***, 2017 WI App 64, ¶13, 378 Wis. 2d 42, 902 N.W.2d 550 (citation omitted). We accord great deference to the warrant-issuer's determination of probable cause. *See* ***State v. Kerr***, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994).

In denying Stallings' suppression motion, the trial court stated that although the affidavit supporting the warrant lacked detail in some parts, the totality of the affidavit provided sufficient information for the warrant-issuing commissioner to have found probable cause. Among other things, the affidavit noted that the particular informant in this case had worked with law enforcement in the past and had provided information leading to twenty search warrants, approximately half of which resulted in recovery of contraband. *See* ***Jones***, 257 Wis. 2d 319, ¶14. The informant reported that they personally saw Stallings distribute cocaine within the prior week. Further, the informant reported there was a gun belonging to Stallings in the residence and that the informant believed Stallings was a felon prohibited from possessing a firearm, and police were able to independently corroborate Stallings' felon status. *See* ***id.***, ¶15.

While Stallings' suppression motion asserted that the informant's information "does not establish the type of reliability that a court ought to have expected" for establishing probable cause, "[t]here are no longer specific prerequisites to a finding of confidential informant reliability. Rather, the current test simply requires courts to 'consider all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information.'" ***Id.***, ¶13 (citation omitted). Ultimately, the warrant issuer may draw reasonable inferences from the facts set forth in the affidavit, and the test is simply whether the inference drawn was reasonable, not whether it was the only reasonable inference. *See* ***id.***, ¶10.

A determination of probable cause "will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***Id.***, ¶11. Here, given the level of deference to the warrant issuer, the trial court appropriately concluded that the totality of the circumstances supports an implicit finding that the confidential informant provided reliable information and that such information, in conjunction with other facts, supplied probable cause.

We therefore agree with appellate counsel's conclusion that there is no arguable merit in challenging the trial court's denial of Stallings' motion to suppress based on an "illegal" warrant.

II. Due Process and the Right to Counsel

The other issue that appellate counsel discusses in the no-merit report is whether Stallings' due process rights were violated "by the State and police failing to preserve audio evidence and acting in bad faith." At the ***Miranda/Goodchild*** hearing,[3] Stallings testified that, while in the back of Captain's squad car, a dispatch "[c]ame over the radio about they found something in the house … I said I am going to need a lawyer[.]" Stallings also testified that he heard Captain tell Caballero and Adamson that he had requested an attorney.[4]

As part of the ***Miranda/Goodchild*** hearing, Captain testified that her squad car was equipped with a recording system that was activated "[w]hen you have somebody in the back." At the close of Captain's testimony, defense counsel stated that she wanted to obtain and review the recording before proceeding further. The State told the trial court that, having learned at the prior hearing about the possibility of some recording, it had inquired with Caballero and was told

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 262, 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* ***Goodchild***, 27 Wis. 2d at 264-65.

At the final pretrial hearing, the State informed the trial court that although no formal motion had been filed, defense counsel had told the prosecutor that "she feels it necessary to hold a ***Miranda-Goodchild*** [hearing] relative to the voluntariness." The trial court accommodated the request.

[4] If true, Stallings' statement to police would have been suppressible not because of ***Miranda*** or ***Goodchild*** violations but because of Stallings' right to counsel under ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981) ("[A]n accused … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him[.]").

that any such recordings were retained for 120 days and then disposed of.[5] Thus, appellate counsel and Stallings both discuss whether his due process rights were violated by police failing to keep the recording.

"Due process requires that the prosecution disclose material exculpatory evidence to the defense." ***State v. Weissinger***, 2014 WI App 73, ¶8, 355 Wis. 2d 546, 851 N.W.2d 780 (citing ***Brady v. Maryland***, 373 U.S. 83, 87 (1963)). "[A] defendant's due process rights as to the loss of evidence are violated if the police (1) fail to preserve evidence that is apparently exculpatory or (2) act in bad faith by failing to preserve evidence that is potentially exculpatory." ***Weissinger***, 355 Wis. 2d 546, ¶10. "Thus, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" ***Id.*** (quoting ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988)). "[B]ad faith can only be shown if: (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." ***State v Greenwold***, 189 Wis. 2d 59, 69, 525 N.W.2d 294 (Ct. App 1994). "We independently review whether a due process violation has occurred, but we accept the trial court's findings of historical fact unless clearly erroneous." ***State v. Lock***, 2012 WI App 99, ¶94, 344 Wis. 2d 166, 823 N.W.2d 378.

Captain had been called to testify by defense counsel and, on direct examination, stated she did not recall whether Stallings had asked for a lawyer. On cross-examination, however, she testified that if a person she is transporting were to request counsel, she would normally notify

[5] Stallings was arrested in May 2014; the ***Miranda/Goodchild*** hearing was held fifteen months later, in September 2015.

the investigating officer of the request. Caballero testified that Captain never told him Stallings wanted a lawyer and that he would have documented it in his report if she had. He further testified that such a request likely would have been addressed on the recording of the interview. Adamson testified that, during their interview of Stallings, he did not request an attorney until near the end.

The trial court ultimately found that Stallings "never told Officer Captain that he wanted an attorney or wanted to speak with an attorney…. [He] did not tell any law enforcement officer that he wanted an attorney or wanted to speak with an attorney before the interview started."[6] These findings, which are not clearly erroneous, are fatal to any ***Brady*** claim[7] because if Stallings did not invoke the right to counsel, then any recording from Captain's squad was, at best, potentially useful or potentially exculpatory evidence, not apparently exculpatory evidence. This means that Stallings had to show the police acted in bad faith when they destroyed the recording, but the only evidence of record is that the tape was destroyed in accordance with routine department policy.[8] *See, e.g.*, ***Weissinger***, 355 Wis. 2d 546, ¶13 n.4. Thus, there is no arguable merit to a ***Brady*** due process claim.

[6] The trial court also found that Stallings had been properly advised of his ***Miranda*** rights and voluntarily agreed to waive them.

[7] The trial court's factual findings are also fatal to any ***Edwards*** denial-of-counsel claim.

[8] In his response, Stallings claims the State had nothing linking him to the gun other than his own statements, which is why the State waited until the squad recording was destroyed before granting him a ***Miranda/Goodchild*** hearing. We interpret this to be an argument that the State, by the district attorney's office, acted in bad faith. We observe, however, that the State also had information from the confidential informant linking Stallings to the gun. In addition, the State is not responsible for granting evidentiary hearings to defendants.

III. Sufficiency of the Evidence

Although Stallings was convicted after a three-day jury trial, appellate counsel has not discussed whether sufficient evidence supports the jury's verdicts. We, however, have independently considered the issue.

On review of a jury's verdicts, we view the evidence in the light most favorable to the verdicts 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 had to prove that Stallings: (1) possessed a firearm, and (2) had been convicted of a felony before the date of the offense. *See* WIS JI—CRIMINAL 1343. Stallings stipulated to a prior felony conviction, and that stipulation was read to the jury. Adamson testified about Stallings's statement that he found the gun while collecting cans and his subsequent statement that he bought the gun, either of which is sufficient to demonstrate possession.

To prove possession of a short-barreled shotgun, that State had to prove that: (1) Stallings possessed a shotgun; and (2) the shotgun was short-barreled. *See* WIS JI—CRIMINAL 1342. The same testimony for the possession by a felon charge suffices for the possession element here. The gun itself was shown to the jury. Officer Juan Duran, who had

prepared the search warrant application, testified that the lawful dimensions for a shotgun require the weapon to be over eighteen inches from "breech to bolt" and twenty-six inches or more in total length. *See* WIS. STAT. § 941.28(1)(c). Duran also testified that the gun recovered from Stallings' basement was just under ten and one-quarter inches from breech to bolt, and twenty and one-quarter inches in total length, making it short-barreled.

To prove possession with intent to deliver less than 200 grams of THC, the State had to prove that: (1) Stallings possessed a substance; (2) the substance was THC; (3) Stallings knew or believed that the substance was THC; and (4) Stallings intended to deliver the THC. *See* WIS JI—CRIMINAL 6035. Officer Dean Newport, part of the team executing the search warrant, testified that the bags and jars of marijuana were found in the master bedroom, along with personal identifiers for Stallings bearing that address. The crime lab analyst testified about the tests she performed and the results showing the presence of THC. Adamson testified that, in Stallings' statement, he told investigators that he had been selling marijuana for a month and a half. Stallings testified that the jars of marijuana were his and that family and friends sometimes came over to the residence to share or buy marijuana.

Based on the foregoing, our review of the record satisfies us that sufficient evidence supported each verdict. There is no arguable merit to any appellate challenge in that regard.

IV. Multiplicity

In a separate letter submitted after his supplemental no-merit response, Stallings asks us to "look at his sentence under the Multiplicity of Actions and Double Jeopardy Clause." Specifically, he complains that police "found only one shotgun but charged him as if there were three separate guns."

The double jeopardy clauses of the United States and Wisconsin Constitutions "protect a person from being 'placed twice in jeopardy of punishment for the same offense.'" *See* ***State v. Trawitzki***, 2001 WI 77, ¶20, 244 Wis. 2d 523, 628 N.W.2d 801 (citation omitted). "Multiplicity occurs when the State charges more than one count for a single criminal offense." ***State v. Lock***, 2013 WI App 80, ¶32, 348 Wis. 2d 334, 833 N.W.2d 189.

We employ a two-part test for reviewing multiplicity challenges. *See* ***State v. Koller***, 2001 WI App 253, ¶29, 248 Wis. 2d 259, 635 N.W.2d 838. In step one, we determine whether the offenses are identical in law and fact. ***Id.*** If so, they are multiplicitous. In step two, which we only reach if the offenses are different in law and fact, we inquire into legislative intent. ***Id.*** If the offenses are indeed different in law or fact, there is a presumption that the legislature intended multiple punishments. *See* ***id.*** This presumption may be rebutted only by showing clear legislative intent to the contrary. ***Id.***

Where it is asserted that "'the same act or transaction constitutes a violation of [multiple] distinct statutory provisions, the test to be applied to determine whether there are [multiple] offenses or only one is whether each provision requires proof of an additional fact'" which the others do not. *See* ***State v. Derango***, 2000 WI 89, ¶29, 236 Wis. 2d 721, 613 N.W.2d 833 (quoting ***Blockburger v. United States***, 284 U.S. 299, 304 (1932)). Here, the statutory provisions with which Stallings was charged each clearly have elements the others do not: possession of a firearm by a felon requires proof that the defendant was previously convicted of a felony; possession of a short-barreled shotgun requires proof of certain dimensions of the gun; and the "use of a dangerous weapon" penalty enhancer requires proof that the defendant used or possessed a firearm in furtherance of an underlying offense.

The offenses with which Stallings was charged and convicted are, therefore, legally distinct, so we presume the legislature intended to allow cumulative punishments. *See* ***Derango***, 236 Wis. 2d 721, ¶34. "Nothing in the statutory language leads us to conclude that the legislature intended these … separate and distinct statutes to create the same offense and therefore a single punishment." ***Id.***, ¶35. "[T]he legislature is entitled to attack a discrete social problem by writing multiple statutes with subtle elemental differences in order to capture and criminalize the widest possible variety of conduct … [a]nd prosecutors are entitled to charge one act as more than one statutory offense, if the legislative intent to permit multiple punishment is apparent." ***Id.***, ¶36. We therefore conclude that there is no arguably meritorious multiplicity challenge.

V. Sentencing Discretion

Appellate counsel has also failed to discuss whether the trial court appropriately 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 other 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* ***id.***

Our review of the record confirms that the trial court appropriately considered relevant sentencing objectives and factors. Among other things, although Stallings did not have a lengthy record, his primary prior conviction, from 1996, was for conspiracy to commit first-degree murder as a party to a crime; the plan was to toss a Molotov cocktail into a police officer's home, then shoot people fleeing the blaze. Stallings was sentenced to twenty-five years' imprisonment and was on parole for that offense at the time of the offenses in this case.

The concurrent and consecutive sentences totaling twenty years' imprisonment in this matter are well within the thirty-five-and-one-half-year 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.

VI. Other Issues

Stallings raised additional issues in his responses, to which appellate counsel did not respond. We address each contention in turn.[9]

A. Problems with the Warrant Application

The affidavit supporting the warrant application stated that Duran had checked online circuit court records and ascertained that Stallings had been charged "with the felony offense of [First] Degree Intentional Homicide, a Class B felony, to which … [Stallings] did enter a guilty

[9] Any of Stallings' arguments not discussed with specificity are deemed to lack sufficient merit to warrant individual discussion. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

plea[.]" The affidavit further asserted that the felony conviction remained of record and unreversed, and that Stallings was "on parole supervision for [First] Degree Murder." Stallings complains that this was "false information" and argues that he "was never convicted of murder, nor [first] degree intentional homicide a class B felony. Nor was [he] on parole for [first] degree murder."

"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*." *See* ***State v. Kilgore***, 2016 WI App 47, ¶38 n.10, 370 Wis. 2d 198, 882 N.W.2d 493 (citing ***Franks v. Delaware***, 438 U.S. 154, 156 (1978)) (emphasis added).

As noted above, Stallings was charged with and convicted of conspiracy to commit first-degree intentional homicide as a party to a crime in 1996. Conspiracy, contrary to WIS. STAT. § 939.31 (1995-96), is an inchoate crime. It is committed by one who "with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime, if one or more of the parties to the conspiracy does an act to effect its object." WIS JI—CRIMINAL 570. That is, some other crime must be identified as the objective of the conspiracy. *See* ***id.*** Here, that crime was first-degree intentional homicide. Though the affidavit indicated that Stallings had been charged with a Class B felony, first-degree intentional homicide is actually a Class A felony; conspiracy to commit it, however, is a Class B felony. *See* § 939.31 (1995-96). In addition, first-degree intentional homicide is simply the more modern terminology for the equivalent charge of first-degree murder. *See* ***State v. Head***, 2002 WI 99, ¶60, 255 Wis. 2d 194, 648 N.W.2d 413. Thus, the warrant affidavit is not so much false as it is imprecise.

If we remove the imprecise charge descriptions, but keep the undisputed fact that Stallings was previously convicted of a felony, the degree of probable cause is unchanged. The nature of a prior felony conviction is irrelevant to the charge of possession of a firearm by a felon; a prior felony conviction of any kind suffices. *See* WIS. STAT. § 941.29(2)(a) (2013-14).

Citing ***State v. Tye***, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473, Stallings also complains that there was no sworn affidavit from the confidential informant attached to the warrant application. "[T]he total absence of any statement under oath to support a search warrant violates … both the federal and state constitutions …. [E]vidence seized pursuant to such a search warrant must be suppressed." ***Id.***, ¶3. However, the search warrant here was supported by Duran's affidavit; ***Tye*** does not require an affiant relying on information obtained from a confidential informant to include an affidavit from that specific informant. Thus, there is no arguable merit to a challenge to the warrant application and affidavit in support.

B. Evidence Tampering

Stallings next complains about discrepancies in the marijuana weight. The police reported seizing approximately 205 grams, the crime lab analyst reported weighing material totaling 188 grams, and the prosecutor told the jury in the opening statement that there were 118 grams. Stallings thus asserts that "at some point [in] time the [chain] of custody was broken and the evidence tampered with."

Newport testified about packing up the marijuana to send to the crime lab; the analyst testified about receiving the materials in sealed condition. Newport also explained that plants contain water and, as time goes on, the natural course of dehydration causes the plant material to lose water weight. Thus, it is common for the lab to report a different weight of material than

that reported by police. Finally, nothing in the record suggests that the prosecutor's statement, which is not evidence, was anything other than a slip of the tongue. There is no arguably meritorious claim of evidence tampering.

C. Someone Else's Drugs

In his supplemental response, Stallings complains that police "took THC out of 1130A [South] 19th Street…. My addres[s] is 1134 South 19th Street." He includes a portion of a police property control receipt showing that item 5 ("*14019357_5") was a container of THC recovered from the 1130A address. Stallings thus wonders whether police can "take drugs out of someone's home and put them in my house and charged me with them."

When Stallings was detained in the traffic stop, he had a passenger in his vehicle. That passenger was Stallings' neighbor, who lived at the 1130A address. Caballero testified that the neighbor gave police permission to search his apartment; it is therefore unsurprising to see any material recovered therein on a report for this incident as a whole. However, there is no indication that Stallings was charged for material recovered from his neighbor's apartment.

Moreover, the property receipt is incomplete; the copy Stallings provided lists eleven items, though Stallings acknowledges that there was at least an item 12, which was marijuana taken from his residence. The lowest level of THC possession encompasses less than two hundred grams, *see* WIS. STAT. § 961.41(1m)(h)1., so even if item 5 was incorrectly included in the total amount of drugs, item 12 alone supports both the charge and conviction. There is no arguable merit to a claim that Stallings was improperly charged for someone else's drugs.

D. "Planted" Evidence

Police recovered a fingerprint from one of the plastic bags of marijuana. A supplemental police report identified the fingerprint as belonging to someone other than Stallings. Stallings notes that the supplemental report states that "Police Officer Rodolfo Ayala was investigating this incident" and "Latent Print Examiner Andrew Smith verified the identifications" made by the computer system. Stallings complains that those officers "have nothing to do with the search of the master bedroom [where] the THC was found[.] The only persons [who] search[ed] that room was [Detective Dean] Newport and [ATF Agent] Adamson. So at some point and time someone put drugs in the master bedroom."

Newport testified that Ayala was part of the Milwaukee Police Department's investigatory team for this case and that Ayala was present for the execution of the search warrant. Fingerprint analysis—specifically, manual confirmation following computer identification—would not have been performed at the scene. There is no arguable merit to a claim that the marijuana was planted in Stallings' bedroom.

E. Impact of Medication

Stallings asserts that he had taken antihistamines and Seroquel, a medication for bipolar disorder, prior to being arrested and that, if he had not been under the influence of the medication, he never would have given a statement to police.[10] However, as a part of the ***Miranda/Goodchild*** hearing decision, the trial court made express findings that Stallings "did

[10] Stallings does not explain the exact nature of the medication's supposed influence.

not show any signs of physical illness, mental illness, physical impairment or mental impairment" during his interview with Caballero and Adamson. Accordingly, there is no arguable merit to a claim that Stallings' statement to police was involuntary due to medication.

F. Admission of the Warrant Application as an Exhibit

During cross-examination of the State's witness, Special Agent Bodo Gajevic, defense counsel asked, "And to your knowledge, did anyone see him with a gun, from the police reports that you've read?" Gajevic answered, "I believe so." Counsel then repeated, "You believe so? Says who?" At that point, the State injected, concerned that defense counsel was attempting to elicit the confidential informant's identity. A discussion ensued outside the jury's presence.

Stallings raises three issues based on this portion of Gajevic's testimony. First, he argues that "[t]he State witness [committed] perjury because the Confidential informant never said in their [statement] that he/she saw Mr. Stallings with a gun." However, Gajevic did not answer that the informant said Stallings had a gun; he simply said he believed that someone, in some police report, had mentioned it. Additionally, the trial court noted that while the warrant application did not expressly state that the informant reported seeing Stallings holding a gun—the affidavit said that the informant "observed a firearm belonging to Stallings"—such an inference could arguably be drawn from the application.

Next, the entirety of the search warrant and the affidavit had been introduced as an exhibit during Newport's testimony. Gajevic's testimony thus leads Stallings to argue that "[o]nce the State introduced the Confidential Informant statement [by way of the search warrant as an exhibit, his] Sixth Amendment right to confrontation and compulsory process [was implicated]." But the confrontation clause applies only to testimonial hearsay statements and is

not implicated if the statements are nontestimonial or are not hearsay. *See* ***State v. Nieves***, 2017 WI 69, ¶¶29, 36, 376 Wis. 2d 300, 897 N.W.2d 363; *see also* ***Crawford v. Washington***, 541 U.S. 36, 59 n.9 (2004).

Here, the confidential informant's statements were not hearsay because they were not offered for the truth of the matter—that is, they were not offered to prove that Stallings was a felon, or that he had possessed a short barreled shotgun, or that he had possessed marijuana. *See* WIS. STAT. § 908.01(3). The warrant materials were introduced only as proof police had entered the residence pursuant to a warrant. The State did not expressly reference the informant's statements within the affidavit, and the warrant materials were not published to the jury.

Finally, after the State's interjections, the trial court questioned defense counsel for his reasoning[11] behind asking Gajevic if anyone saw Stallings holding a gun because, the trial court noted, up to that point "the State [had] not presented any evidence that anyone, including a confidential informant, claimed to have seen Mr. Stallings in possession of a firearm[.]" Defense counsel explained that he expected Gajevic to answer the question with "the confidential informant," not necessarily the informant's name, which would allow defense counsel to inquire about whether the informant was a drug addict who might have been high when providing information to police. The trial court remained skeptical. Because of the late hour, defense counsel asked to review the matter overnight; the trial court agreed. The next morning, defense counsel abandoned the line of questioning and resumed cross-examining Gajevic. Stallings thus

[11] Stallings had changed attorneys by the time of trial.

complains that the trial court had "bias" against him and that, had the trial court not been so biased, he would not have taken the stand to testify about whom he believed the informant to be.

While we are not unconcerned about the trial court's prolonged discussion with trial counsel about the wisdom of his trial strategy, the trial court ultimately did not require defense counsel to, nor decide whether defense counsel should, discontinue the questioning; that decision was made by defense counsel. Accordingly, the record does not support a claim of judicial bias.

Moreover, a defendant cannot rely on a trial court's allegedly erroneous evidentiary rulings to complain that he was compelled to testified; the defendant always has the option of standing on the right not to testify and seeking appellate review of the erroneous rulings if convicted. *See* ***United States v. Caira***, 737 F.3d 455, 461 (7th Cir. 2013); ***United States v. Paladino***, 401 F.3d 471, 477 (7th Cir. 2005). Thus, there are no arguably meritorious appellate issues to pursue relating to admission of the search warrant and affidavit as a trial exhibit.

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

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 Megan Kaldunski is relieved of further representation of Stallings 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