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January 6, 2022

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

2019AP1177-CRNM State of Wisconsin v. Donald Davis, Jr. (L.C. # 2017CF1875)

Before Fitzpatrick, Graham, and Nashold, 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).

Attorney James Rebholz, appointed counsel for Donald Davis, Jr., has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20);¹ *Anders v. California*, 386 U.S. 738, 744 (1967). Davis was convicted of multiple offenses following a jury trial, including first-degree intentional homicide, and was sentenced to life in prison without the possibility of release to extended supervision. The no-merit report addresses

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

whether there would be arguable merit to a challenge to the sufficiency of the evidence to support the jury verdicts; the effectiveness of trial counsel's representation; the circuit court's evidentiary rulings; the prosecutor's decision to seek use immunity for Davis's co-actors for their testimony against Davis; or the sentence imposed by the circuit court. Davis was provided a copy of the report and has filed a response raising claims of ineffective assistance of counsel and prosecutorial misconduct. This court twice directed no-merit counsel to address potential claims of ineffective assistance of counsel, and no-merit counsel has filed supplemental no-merit reports concluding that any claim of ineffective assistance of counsel would lack arguable merit. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit reports, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Davis was charged with first-degree intentional homicide, first-degree reckless injury, and fleeing an officer. The homicide and reckless injury charges were based on a shooting outside of an apartment complex on July 28, 2017. Davis was convicted of all charges following a jury trial. The court sentenced Davis to life in prison without eligibility for release to extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the jury verdicts. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including testimony by Davis's co-actors

and the investigating officers, if deemed credible by the jury, was sufficient to support the verdicts.

The no-merit report also addresses whether there would be arguable merit to a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-94 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and also that the deficient performance prejudiced the defense). The no-merit report concludes that there would be no arguable merit to a claim of ineffective assistance of counsel based on counsel's performance during jury voir dire; cross-examination of witnesses; presentation of Davis's testimony; challenge to the introduction of evidence of Davis's drug dealing; failure to move to strike testimony by a co-actor related to an alleged theft from Davis's home that "drug dealers get robbed"; or failure to object to the State's request for use immunity for the testimony by Davis's three co-actors. We agree with counsel's assessment that there would be no arguable merit to a claim of ineffective assistance of counsel based on those issues.

Davis argues in his no-merit response that his trial counsel was ineffective by failing to locate and interview a woman Davis knew only as "Ashley" as a potential witness prior to trial. Davis asserts that "Ashley" would have provided an alibi for Davis as to a shooting that occurred on July 24, 2017, that the State introduced as other acts evidence against Davis at trial. Davis asserts that Ashley's phone number was contained within call logs from Davis's phone for the morning of July 24, 2017, in the discovery material. Davis asserts that he asked his trial counsel to subpoena phone records "in effort to find unknown witness before trial." Davis argues that counsel's failure to review available discovery resulted in counsel's failure to present Ashley's testimony as an alibi for Davis as to the July 24, 2017 shooting.

At trial, the court allowed the State to introduce other acts evidence in the form of testimony by one of Davis's co-actors that Davis possessed a gun that he fired in the parking lot of an EconoLodge motel on July 24, 2017. The State introduced evidence that bullets from the motel shooting matched the bullets recovered from the scene of the homicide and reckless injury charged in this case. Davis testified, however, that he was not at the EconoLodge motel with his co-actor on July 24, 2017, but rather that he was spending time with a woman named "Ashley" on that day. On cross-examination, the State asked Davis why Ashley did not appear to testify at trial, and Davis answered that he did not know that he would need to have her testify, and that otherwise he would have had her come to trial. In closing arguments, the State argued to the jury that Ashley had not testified to support Davis's claim as to his whereabouts on July 24, 2017.²

By prior order, this court directed no-merit counsel to address whether there would be arguable merit to a claim that trial counsel was ineffective by failing to investigate Ashley as a potential defense witness prior to trial. In response, counsel filed a supplemental no-merit report concluding that a claim of ineffective assistance of counsel on that basis would lack arguable merit. The supplemental no-merit report states that Davis raised this issue with no-merit counsel prior to counsel filing the no-merit report, and that no-merit counsel at that time discussed this potential issue with trial counsel. No-merit counsel asserts that trial counsel informed him that Davis did not provide trial counsel with any information about a woman named "Ashley" prior to Davis's trial testimony. No-merit counsel concludes that trial counsel could not have been ineffective by failing to investigate a potential witness when counsel was not provided any

² During juror deliberations, the jury sent the court a question asking why Ashley had not testified at trial. The court answered for the jury not to speculate as to matters that were not part of the trial record.

information about the witness prior to trial. *See Strickland*, 466 U.S. at 691. We agree with no-merit counsel that this issue lacks arguable merit for that reason.³

Davis also argues that his trial counsel was ineffective by failing to challenge admission of the other acts evidence of a July 4, 2017 and the July 24, 2017 shooting on the basis that there was a lack of evidence to establish that Davis committed those shootings. However, defense counsel cross-examined the State's witnesses as to the limitations of the evidence implicating Davis in those shootings, and Davis does not identify any evidence that his counsel failed to utilize that would have proven that Davis did not, or could not have, committed either shooting.

Additionally, Davis contends that the prosecutor committed prosecutorial misconduct in connection with seeking to introduce the other acts evidence because the prosecutor knew the evidence was false. However, nothing before us would provide a non-frivolous basis for Davis to pursue that argument. We discern no arguable merit to a claim of prosecutorial misconduct.

Davis also argues that his trial counsel was ineffective by failing to present call logs to show that he was not at home at the time of the alleged theft that the State argued at trial was Davis's motivation for the homicide. Davis argues that the call logs on the date of the alleged theft showed that he was not home from 2:08 p.m. until after 4:00 p.m., and asserts that the theft occurred between 2:00 p.m. and 3:00 p.m. Davis also argues that he did not send threatening messages based on the alleged theft minutes after it happened, but rather the following day. We discern no arguable merit to a claim counsel was ineffective by failing to try to establish that the

³ We do not find, in Davis's no-merit response, any assertion that Davis did in fact provide information regarding "Ashley" to his trial counsel before trial.

theft had occurred from Davis's home at a particular time while Davis was not home or the timing of Davis's threatening messages to the victim following the alleged theft. Davis testified in his own defense that he sent threatening messages to the homicide victim the day after the alleged theft occurred because he believed she was responsible for items being missing from his home. In light of Davis's admission that he believed the homicide victim was responsible for items being missing from his home, and his admission that he threatened the victim on the day following the alleged theft, we see no significance to evidence that Davis was not home when the property was taken or the timing of the threatening messages.

Davis also contends that his trial counsel was ineffective by failing to use call logs between Davis and his co-defendant on the night before the shootings to challenge the State's evidence that the two were together that night making drug runs. However, Davis does not explain how the call logs would have established that Davis and the co-defendant could not have been together on the night before the shootings. We discern no arguable merit to a claim of ineffective assistance of counsel on this basis.

Finally, Davis argues that his trial counsel was ineffective by failing to effectively voir dire and move to strike a juror who disclosed after trial started that he had prior knowledge of the homicide victim and her mother. However, after the juror disclosed prior knowledge of the victim and her mother, the court questioned the juror as to any possibility of bias based on his knowledge of the victim and her mother. The juror stated that he realized after trial started that he was aware of the victim and her mother from the neighborhood where he grew up; that he knew of the victim but did not really know her; and that he would be able to be fair and impartial despite remembering that he was previously aware of the victim and her mother. Neither party objected to the juror remaining on the panel, and the court determined that the juror would

remain. We discern no arguable merit to a claim that counsel was ineffective by failing to move to strike the juror.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's evidentiary rulings. The no-merit report concludes that the circuit court properly admitted limited evidence of Davis's drug dealing near in time to the shootings to provide context and to explain the relationship between Davis and his co-actors. The no-merit report also addresses the circuit court's finding that a co-actor's testimony in connection with the alleged theft from Davis's home that "if you are a drug dealer you get robbed" did not violate the court's ruling excluding general testimony that Davis was a drug dealer. The no-merit report concludes that the circuit court properly determined that the testimony was admissible to provide a possible motive for the shootings. We agree with counsel's assessment that further proceedings based on the circuit court's evidentiary rulings would be wholly frivolous.

Additionally, we have considered whether there would be arguable merit to a challenge to the circuit court's decision allowing the other acts evidence of Davis's involvement in two prior shooting events, over the defense's objection. The court determined that the other acts evidence was offered for the proper purpose of establishing identity, and that the evidence was relevant and its probative value was not substantially outweighed by the risk of unfair prejudice. *See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We conclude that a challenge to the circuit court decision would be wholly frivolous.

The no-merit report also addresses whether there would be arguable merit to a challenge to the prosecutor's decision to seek use immunity for Davis's co-actors for their testimony against Davis. Under WIS. STAT. §§ 972.08 and 972.085, a prosecutor may seek use immunity

for a witness to compel that witness to testify over a claim of the privilege against self-incrimination. Use immunity, once conferred, prohibits the imposition of criminal liability based on the testimony or evidence derived from it. *See State v. J.H.S.*, 90 Wis. 2d 613, 617, 280 N.W.2d 356 (Ct. App. 1979). A prosecutor's request for use immunity for a witness is reviewed for "a clear abuse of discretion violating the due process clause." *U.S. v. Frans*, 697 F.2d 188, 191 (7th Cir. 1983). We agree that a challenge to the prosecutor's decision to request use immunity for the testimony of the co-actors would lack arguable merit.

The no-merit report also concludes that Davis's due process rights were protected following the grant of use immunity because, the no-merit report asserts, Davis's trial counsel questioned the co-actors as to any concessions they had received or hoped to receive from the State in their own cases in exchange for their testimony against Davis. *See State v. Nerison*, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987) (when a co-actor testifies against a defendant, the defendant is entitled to due process safeguards, including full disclosure of the terms of the agreements struck with the witnesses; the opportunity for full cross-examination of those witnesses concerning the agreements; and instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of those witnesses).

By prior order, this court noted that, despite no-merit counsel's assertion that the co-actors were cross-examined as to any agreements with the State in exchange for their testimony, our review of the record indicated that none of the co-actors were cross-examined as to the use immunity they received for their testimony. We also noted that, while the co-actors were cross-examined as to any concessions or hope for leniency based on their testimony, they all testified that they had not received any concessions from the State in exchange for their testimony against Davis. We questioned whether there would be arguable merit to a claim that trial counsel was

ineffective by failing to question the co-actors as to the use immunity they received for their testimony.

No-merit counsel then filed a second supplemental no-merit report, explaining his conclusion that this issue would lack arguable merit. No-merit counsel argues that the grant of use immunity is not a “concession” to the witness but rather benefits only the State by requiring a witness to provide truthful testimony. No-merit counsel also concludes that it would be wholly frivolous to argue that there was a reasonable probability of a different outcome had trial counsel cross-examined the co-actors as to the use immunity they received for their testimony. *See Strickland*, 466 U.S. at 697. No-merit counsel asserts that trial counsel effectively challenged the co-actors’ credibility based on contradictory statements they had given law enforcement and their prior criminal records. *See State v. Tkacz*, 2002 WI App 281, ¶22, 258 Wis. 2d 611, 654 N.W.2d 37 (counsel’s failure to cross-examine as to exact number of witness’s prior convictions not prejudicial where witness’s credibility was otherwise attacked). He also asserts that cross-examination as to use immunity may have bolstered the co-actors’ credibility by establishing that they had promised to testify truthfully in exchange for use immunity.

A defendant has a right to cross-examine State witnesses who have been granted immunity or other concessions for their testimony implicating the defendant. *See State v. Lenarchick*, 74 Wis. 2d 425, 446-48, 247 N.W.2d 80 (1976) (“[A] defendant on cross-examination has the right to bring out the motives of state witnesses. This permits an avenue of questioning broader than whether the state has made specific promises.”). The right of confrontation includes the right to cross-examine a State witness as to use immunity received for testimony against the defendant. *See, e.g., U.S. v. Wellman*, 33 F.3d 944, 948 (8th Cir. 1994) (noting that it was undisputed that defendant had a constitutional right to cross-examine witness

against him on use immunity the witness received for his testimony). Additionally, if a witness is cross-examined regarding a grant of use immunity, the pattern jury instructions include an instruction that the jury should consider whether receiving use immunity affected the witness's testimony. *See* WIS JI-CRIMINAL 246.

Here, defense counsel did not cross-examine the co-actors as to the use immunity they received for their testimony, and the jury was not instructed to consider the use immunity those witnesses received. However, we conclude that, assuming that trial counsel performed deficiently by failing to cross-examine the co-actors as to the use immunity they received for their testimony against Davis, it would be wholly frivolous to argue that Davis was prejudiced by that deficient performance. Had trial counsel cross-examined on use immunity and requested the pattern use immunity jury instruction, the jury would have heard that a witness who testifies under a grant of use immunity, like any other witness, may be prosecuted for testifying falsely. *Id.* Additionally, the jury heard that each of the co-actors had been criminally charged in connection with the shootings, that two of the co-actors had prior criminal convictions, and that all three had initially lied to police in connection with this case. The lack of prejudice is further demonstrated by the fact that the co-actors provided inculpatory information to police implicating Davis, prior to Davis's trial, before they received use immunity. Any suggestion that the co-actors' testimony was influenced by the grant of use immunity would therefore have been critically undercut by their prior statements. Accordingly, we conclude that it would be wholly frivolous to argue that there is a reasonable probability that the jury would have acquitted him absent defense counsel's error, if any, by failing to cross-examine the co-actors as to the use immunity they received for their testimony.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. We conclude that this issue lacks arguable merit. This court’s review of a sentence determination begins “with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court imposed the mandatory life sentence under WIS. STAT. § 939.50(3)(a). The court then determined that Davis would not be eligible for release to extended supervision. *See* WIS. STAT. § 973.014(1g)(a). In reaching that decision, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the gravity of the offenses, Davis’s character and criminal history, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. Given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive “only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances” (citation omitted)). We discern no arguable merit to a challenge to the circuit court’s sentencing decision.

IT IS ORDERED that the judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney James Rebholz is relieved of any further representation of Donald Davis, Jr., 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