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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

April 26, 2022

To:

Hon. Dennis R. Cimpl
Circuit Court Judge
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Hon. Jeffrey A. Wagner
Circuit Court Judge
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Clerk of Circuit Court
Milwaukee County
Electronic Notice

Winn S. Collins
Electronic Notice

George Tauscheck
Electronic Notice

Joel Anthony Miller 449920
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

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

2018AP1137-CRNM State of Wisconsin v. Joel Anthony Miller (L.C. # 2013CF3288)

Before Donald, P.J., Dugan and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joel Anthony Miller appeals from a judgment, entered on a jury's verdicts, convicting him of one count of armed robbery with the threat of force as a party to a crime and one count of possession of a firearm by a felon. Miller also appeals from the denial of a postconviction motion. Appellate counsel, George Tauscheck, 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] Miller has filed a

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

response, and appellate counsel has filed a supplemental report. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Miller's response, we conclude there are no arguably meritorious issues that could be pursued on appeal. We therefore summarily affirm the judgment and order.

BACKGROUND

According to the allegations in the criminal complaint, C.R. was at a club on the south side of Milwaukee on April 20, 2013. She stepped outside to return something to her car. As she closed the car door, two men approached her, one of whom pointed a gun in her face and said, "Give me everything you got." C.R. gave up the money in her pocket. The gunman told her to "[t]urn around and walk away." C.R. had started walking back to the club when she heard a gunshot. She turned around and saw the two men running away.

D.D. had been in a business across the street from the club. He went outside to smoke a cigarette. While lighting up, two men walked past and he said, "What's up?" One of the men hit D.D. in the head with the gun, which discharged. D.D. suffered a graze wound to his face and pain in his ear, and his eyeglasses were broken.

Several people, including C.R. and a security guard from the club, Roberto Camacho, gave chase to the suspects. Camacho was able to apprehend Miller. C.R. viewed Miller in Camacho's patrol car and told him she was 100% certain the person in custody was the gunman. When police traced the route Camacho had taken in pursuit of the suspects, they found a handgun loaded with .40 caliber ammunition, which matched a spent casing recovered on the sidewalk near the shooting. The handgun was fully loaded, minus one round. The gun was tested for DNA; Miller was identified as a possible contributor to the major component of the

recovered DNA, with a one in ten thousand probability of randomly selecting an unrelated individual with the same profile. C.R. also identified Miller in a lineup.

In July 2013, Miller was charged with one count of armed robbery with the threat of force and one count of second-degree recklessly endangering safety. In August 2015, over Miller's objection, the State amended the information to include a charge of possession of a firearm by a felon. A second amended information, filed just before trial in November 2015, dropped the recklessly endangering safety charge because D.D. moved out of state and had become unavailable as a witness.

During a jury instruction conference near the end of trial, the State moved to amend the information to include the "party to a crime" modifier on the armed robbery charge. Miller objected. After considering the matter overnight, the trial court granted the State's request. The jury convicted Miller of armed robbery with the threat of force as party to a crime and possession of a firearm by a felon. The trial court sentenced Miller to eighteen years' imprisonment for the armed robbery, consecutive to any other sentence, and six years' imprisonment for the felon in possession, concurrent to the armed robbery sentence. Miller was also ordered to pay two mandatory $250 DNA surcharges under WIS. STAT. § 973.046(1r)(a) (2015-16).

Miller appealed, and counsel filed a no-merit report to which Miller responded. However, the appeal was dismissed and the matter remanded in January 2018, based on the then-current case law regarding ex post facto violations and the mandatory DNA surcharge. *See* ***State v. Radaj***, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758. Miller filed a

postconviction motion to vacate one of the surcharges. The circuit court[2] held the postconviction motion in abeyance until the supreme court issued a decision in ***State v. Williams***, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373. The ***Williams*** court overruled ***Radaj*** and held that the imposition of DNA surcharges on a per-conviction basis was not punishment or unconstitutional. *See* ***Williams***, 381 Wis. 2d 661, ¶43. The circuit court then denied the postconviction motion. Miller appeals.

DISCUSSION

Issues Identified by Counsel

The first issue appellate counsel addresses in the no-merit report is whether sufficient evidence supports the jury's verdicts. On review of a jury's verdicts, we view the evidence in the light most favorable to the State and the verdicts. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of the credibility of witnesses, and it alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506. If more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***id.*** "'[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). The no-merit report sets forth the applicable standard of review and the evidence satisfying the elements of

[2] The Honorable Jeffrey A. Wagner presided over the relevant proceedings prior to the first appeal, including the trial and sentencing, and will be referred to as the trial court. The Honorable Dennis R. Cimpl denied the postconviction motion and will be referred to as the circuit court.

each crime. This court is satisfied that the no-merit report properly analyzes the issue as lacking arguable merit.

The next issue appellate counsel addresses is whether the trial court erred when it granted the State's oral motion to amend the information to include the party to a crime modifier on the armed robbery offense. The State requested the change because it thought "there [was] a possibility that a juror might decide that he, in fact, was the one behind the guy with the gun." At trial, "the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." WIS. STAT. § 971.29(2) (2015-16). "When an amendment to the charging document does not change the crime charged, and when the alleged offense is the same and results from the same transaction, there is no prejudice to the defendant." ***State v. DeRango***, 229 Wis. 2d 1, 26, 599 N.W.2d 27 (Ct. App. 1999) (citations omitted). Applying ***DeRango***, it is clear that there is no arguable merit to challenging the trial court's approval of the State's motion to amend the information.

The third issue appellate counsel addresses is whether the trial court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the record confirms that the trial court appropriately considered relevant sentencing objectives and factors. The concurrent sentences totaling eighteen years of imprisonment are well within the fifty-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). Thus, this court is satisfied that the no-merit report properly analyzes any sentencing claim as lacking arguable merit.

The fourth issue appellate counsel addresses is whether the circuit court erred when it denied the postconviction motion to vacate one of the two felony DNA surcharges. We agree with appellate counsel that, after ***Williams***, there is no arguable merit to a challenge to the multiple surcharges imposed in this case. *See* ***id.***, 381 Wis. 2d 661, ¶43.

Issues Identified by Miller

Counsel's fifth "issue" in the no-merit report is a discussion of the sixteen issues Miller raised in his no-merit response in the first appeal, No. 2017AP1585-CRNM.[3] Eight of those issues are specifically re-raised in the current no-merit response.

Miller asserts that trial counsel was ineffective for failing to subpoena security guard Camacho as a witness.[4] Appellate counsel states that "any testimony from Camacho … would not have been helpful." Miller counters that Camacho's testimony would have been helpful "due to his conflicting statements," which "would've showed the level of uncertainty[.]" The only "conflicting statements" that Miller identifies are Camacho's statements, given five days apart, describing the position in which Camacho was parked (facing southbound or facing eastbound) at the time of the robbery and from which direction he saw a muzzle flash (to the southeast or to the north). However, these discrepancies are minor; either statement puts him near the same intersection. Moreover, Camacho had far more damaging testimony against Miller than anything

[3] The court expresses its appreciation for appellate counsel's effort in addressing each issue Miller raised.

[4] Ordinarily, claims of ineffective trial counsel must be preserved in the circuit court by a postconviction motion, and appellate counsel is generally not ineffective for failing to raise unpreserved issues. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996); *but cf.* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶ 27, 314 Wis. 2d 112, 758 N.W.2d 806 (discussing the raising of unpreserved issues in context of no-merit appeal).

beneficial, including Camacho's pursuit and apprehension of Miller and C.R.'s identification of Miller to Camacho.[5] There is no arguable merit to a claim that trial counsel was ineffective for failing to subpoena Camacho.

Miller claims that trial counsel was ineffective for filing to subpoena a witness who, upon hearing a gunshot, exited the rear of a nearby bar and saw a male running down the alley. Miller claims this witness would have supported Miller's story that he himself was a robbery victim who fled down the alley after hearing the gunshot. However, there is no indication that this witness gave any physical description of the man, nor would he have any basis for knowing why the man was running in the alley. Accordingly, this testimony was not relevant or admissible, *see* WIS. STAT. § 906.02,[6] so there is no arguable merit to a claim that trial counsel was ineffective for failing to subpoena this witness.

Miller contends that trial counsel was ineffective for "failing to independently test the firearm for DNA evidence." The handle of the recovered gun was swabbed for DNA; upon analysis, the crime lab detected DNA from at least four people. Miller was identified as a possible contributor to that mix, and the analyst testified that she calculated a one in ten thousand probability of randomly selecting an unrelated individual with the same profile. According to appellate counsel, trial counsel consulted an independent DNA expert who confirmed that the State's testing seemed accurate. Miller disputes appellate counsel's representation of the expert's opinion, and says that the expert actually opined that the Crime Lab "did a pretty good

[5] This testimony may be why, even though he was not ultimately called at trial, Camacho was on the State's witness list.

[6] "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." WIS. STAT. § 906.02.

job given the complicated mixture of DNA" on the gun. Regardless of the expert's precise wording, it does not appear that he anticipated a different result from independent testing. Thus, the record before us does not support an arguably meritorious claim that trial counsel was ineffective for failing to seek independent DNA testing.

Miller takes issue with "inaccurate statements" from C.R. to a defense investigator. Specifically, Miller says C.R. told the investigator that "she picked someone out of a line-up but doesn't know if she picked out the right person." Miller appears to believe this reflects C.R. second-guessing her identification. However, as appellate counsel notes, the investigator's report actually states that C.R. "picked someone out but she doesn't know if she picked the right person *because they didn't tell her*." (Emphasis added.) That is, police did not confirm if C.R. had identified the target of their lineup. Miller also complains that C.R. told the investigator that one of the suspects took off in a car, despite telling police they both fled on foot. The investigator and C.R. both testified at trial; C.R. denied telling the investigator that one of the suspects left in a vehicle. It is ultimately the role of the jury to sort through conflicting testimony, and we defer to that role. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). There is no arguably meritorious issue arising from C.R.'s statements to the investigator.

Miller argues that the lineup in which he participated was improper because he was the only individual with tattoos on his face, so trial counsel should have filed a suppression motion. We agree with appellate counsel that the mere fact Miller was the only person with facial tattoos does not necessarily mean the lineup was impermissibly suggestive. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652-54, 307 N.W.2d 200 (1981); ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404. The individuals in the lineup were similarly clothed, with ball caps, black bandanas around their necks to obscure neck tattoos, and black wristbands to conceal

jail identification wristbands. The photos of the lineup participants were introduced at trial. We have reviewed the photos and are barely able to discern Miller's facial tattoos. Accordingly, we agree with appellate counsel's conclusion that there is no arguable merit to a claim that the lineup was unduly suggestive.

Relatedly, Miller appears to believe that C.R.'s out-of-court identification of him at the lineup would be inadmissible under ***Neil v. Biggers***, 409 U.S. 188, 199-200 (1972), and ***State v. Dubose***, 2005 WI 126, ¶37, 285 Wis. 2d 143, 699 N.W.2d 582, because she expressed uncertainty to the investigator when she said she did not know if she picked out the right person. ***Biggers*** and ***Dubose*** both specifically deal with showups, not lineups.[7] Further, ***Dubose*** was abrogated by ***State v. Roberson***, which returned "to 'reliability [a]s the linchpin in determining the admissibility of identification testimony.'" *See* ***id.***, 2019 WI 102, ¶81, 389 Wis. 2d 190, 935 N.W.2d 813 (citations omitted; brackets in ***Roberson***). This means that Miller has the initial burden of demonstrating the initial identification procedure was impermissibly suggestive. *See* ***id.***, ¶82; ***Mosley***, 102 Wis. 2d at 652. As noted above, however, there is no arguable merit to a claim that the lineup procedure was unduly suggestive. Thus, there is no arguable merit to arguing for suppression of C.R.'s out-of-court identification of Miller.

[7] Miller also alleges that C.R. identified him in a showup at the crime scene, tainting any further identification of him. There was no dispute that C.R. first identified Miller in what amounts to a showup with the club security guard. However, the guard is not an agent of the State. Further, there was no indication of any police showup in the discovery materials, and trial counsel could not have sought to suppress an identification she did not know occurred. Moreover, there no suggestions of a showup until C.R. testified at trial that, if she was "not mistaken," one of the detectives took her over to a police wagon where Miller was held and asked her if that was the person who had robbed her. The detective, however, denied conducting a showup, noting that one "would be highly suggestive" and thus "could jeopardize the investigation." Any conflicts in testimony were matters for the jury to resolve.

Miller alleges that the trial court erroneously exercised its discretion when, upon defense counsel's motion to dismiss at the close of the State's case, it said that it had to view the evidence in the light most favorable to the State. As appellate counsel notes, this is a correct statement of the law. *See* ***State v. Duda***, 60 Wis. 2d 431, 439, 210 N.W.2d 763 (1973); ***State v. Scott***, 2000 WI App 51, ¶12, 234 Wis. 2d 129, 608 N.W.2d 753. There is no arguably meritorious challenge to the trial court's denial of the motion to dismiss.

Miller has multiple complaints regarding the DNA evidence. He asserts that "there needs to be a 1 in 7 trillion ratio before they can say inclusion" on the DNA results. Thus, he also claims that the one in ten thousand statistical probability of matching some other random person, as testified to at trial, was insufficient for a conviction. These arguments suggest that Miller misunderstands the testimony regarding the DNA evidence. The Crime Lab analyst testified that Miller was "a possible contributor" to the mix of DNA on the gun handle. The analyst agreed with defense counsel that she did not "identify that as his DNA" because there was a mixture, and she testified that "[t]o be able to uniquely identify a person using a single source statistic … the random probability of selecting somebody in the population would be greater than one in seven trillion. But the single source statistics are calculated different than the mixture statistics." In other words, with a single source of DNA, the analyst might be able to identify the DNA so precisely as to calculate a one in seven trillion probability of matching an unrelated person, but the sample tested here was sufficient to calculate only a one in ten thousand probability. There is no particular probability threshold legally required for a conviction; the match probabilities are something for the jury to consider like any other evidence.

Miller also asserts that the State misrepresented the DNA results in closing argument and misled the jury. Miller says the State incorrectly argued "that there was a 'match on all 15

locations of the firearm, also that it was only male/a black male's DNA." The Crime Lab analyst testified that she used a short tandem repeat analysis, meaning she checked fifteen locations on the DNA for repeating sections, because "the number of repeats at each of those locations are what makes up your DNA type at that location." The analyst further testified that Miller's DNA types "are represented in the profile" extracted at all fifteen locations. However, she could only use nine of the fifteen locations for her probability calculation because only nine of those locations had DNA that was of a sufficient quality and quantity to be used. When defense counsel asked if the analyst "matched his DNA to nine locations," she answered, "Correct. However, I looked at all fifteen and I did not exclude them at the other six locations." In its rebuttal closing argument, the State told the jury:

> [Defense counsel] said they only found matches at nine [locations.] They did not find matches just at nine. They found matches in all 15. The DNA expert told you if there was not a match in all 15, he is automatically excluded. She did the statistical probability only based on the nine. … There was a match at 15. They did the statistics on nine.

This is not a misrepresentation of the evidence. There is no arguable merit to any of Miller's DNA-related issues.

Miller claims that the trial court allowed the State to amend the information while the jury was deliberating. Although the amended information was filed after the jury began deliberations, the trial court had granted the motion to amend prior to instructing the jury. The State had forgotten to provide a file copy of the amended information prior to deliberations, but the amendment had already been approved, and the jury was instructed on the party to a crime component in accordance with the amendment. There is no arguable merit to a claim that the trial court allowed an untimely amendment.

Miller contends there was bystander contamination of the crime scene. The manager of a nearby store had recovered the spent casing in the alley and turned it over to police. It is unclear, however, precisely what issue Miller thinks exists as a result. Allegations of contamination go the weight of particular evidence, not its admissibility. *See* ***State v. Buck***, 210 Wis. 2d 115, 127-28, 565 N.W.2d 168 (Ct. App. 1997). One of the responding police officers testified about receiving the casing from the civilian, and the jury was free to evaluate that evidence as it saw fit. While Miller complains that the casing could have had DNA or fingerprints on it, such evidence—even if it existed, which is unlikely—would not have been exculpatory because it only shows who handled the bullets, not who handled the gun.

Miller complains that "investigators" told C.R. that they had found the gun, money, and a jacket when they had only found the gun. Miller equates "investigators" with police and faults them for potentially misleading C.R. to identify him as the perpetrator because he was the person in custody. However, there is no support in the record that clearly identifies the police as having given C.R. this info; the defense investigator's post-trial report states only that "[t]he police or security guys found a gun, a jacket and some money in the area"; there is no attribution for the source of this material. There is also no evidence to suggest that this information influenced C.R.'s identification of the perpetrator.

Miller claims that he wanted to testify, but complains that trial counsel strongly advised against it. The ultimate decision about whether to testify belongs to the client alone. *See* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983). However, counsel offering advice on whether he or she believes the defendant should testify is well within "'the wide range of reasonably professional assistance.'" *See* ***State v. Breitzman***, 2017 WI 100, ¶38, 378 Wis. 2d 431, 904 N.W.2d 93 (citation omitted). The trial court conducted an appropriate colloquy with Miller regarding

whether he wanted to testify, *see* ***State v. Weed***, 2003 WI 85, ¶2, 263 Wis. 2d 434, 666 N.W.2d 485, and that colloquy reflects that Miller knowingly and voluntarily opted not to testify.

Finally, Miller asserts that he told trial counsel that he "ran across" fellow inmate Ken Thomas, who told Miller that "he and his guys robbed [Miller] before." Miller also claims that it was Thomas and his group who committed the armed robbery. Appellate counsel's analysis, as set forth in the no-merit report and supplement, properly analyzes this issue, and we agree with counsel's conclusion that it is not arguably meritorious.

Issue Identified by the Court

Neither appellate counsel nor Miller discusses whether there is any arguable merit to raising a speedy trial violation. WISCONSIN STAT. § 971.10(2)(a) states that a felony trial "shall commence within 90 days from the date trial is demanded by any party in writing or on the record." Miller filed a speedy trial demand on January 20, 2015, but trial did not start until November 2, 2015.

Trial in this case was adjourned twice. Continuances are permitted despite a speedy trial demand "if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial." WIS. STAT. § 971.10(3)(a). When a continuance is granted for this reason, the trial court must articulate its reasoning relating to that standard on the record. *See* ***id.*** The adjournments both occurred due to the health-related unavailability of a State witness, whom defense counsel also wanted to be able to examine. At the time of the first adjournment, the trial court simply found "good cause." Assuming without deciding that this was sufficient under § 971.10(3)(a), there was no similar finding for the second adjournment.

However, even assuming that a statutory violation has occurred, the remedy for a statutory violation simply requires a defendant to be released on bond, not dismissal of the charges. *See* WIS. STAT. § 971.10(4). Miller was being held on $50,000 cash bail in a case from another county, so even if the trial court had granted him release in this case, he would not have been able to actually leave confinement.

As for whether there was a constitutional violation of the right, we employ a four-part balancing test. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). We consider: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." ***Id.*** The first factor, delay, functions as a "triggering mechanism"; until there is a presumptively prejudicial delay, the other factors need not be examined. ***Id.*** at 510. When a delay approaches, and certainly when it exceeds, one year, it becomes presumptively prejudicial. ***Id.*** A ten-month delay is not presumptively prejudicial and, although a ten-month delay approaches the one-year mark, Miller acquiesced in the delay because he also wanted to interview the witness whose unavailability caused the delay. Accordingly, there is no arguable merit to raising a speedy trial violation.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney George Tauscheck is relieved of further representation of Miller 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