OFFICE OF THE CLERK
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

June 1, 2022

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
Electronic Notice

Annice Kelly
Electronic Notice

Curtis Edward Moore Jr. 364413
Unit 38; Unit Agent 3 08 05
819 N. 6th Street
Milwaukee, WI 53203

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

2019AP857-CRNM State of Wisconsin v. Curtis Edward Moore, Jr.
(L.C. # 2017CF4078)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Curtis Edward Moore, Jr., appeals from a judgment, entered on a jury's verdicts, convicting him of one count of possession of a firearm by a felon and one count of felony bail jumping. Appellate counsel, Annice Kelly, 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] Moore was advised of his right to file a response, but he has not responded. Upon this court's independent review of

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

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

On August 30, 2017, Milwaukee police executed a no-knock search warrant at a home that had been under surveillance as a possible drug house. Moore was found in the residence with several other people. The police recovered a shotgun, a handgun, multiple types of ammunition, various drug paraphernalia, and multiple types of controlled substances from the residence. In a recorded interview with police, Moore said his girlfriend had kicked him out, so he was staying at the house, which was owned by his father. After the recorded interview concluded, the interrogating officers went back to Moore and asked if he would consent to giving his DNA for analysis; he agreed. As one of the officers collected the buccal swabs, Moore said that his DNA would be on the shotgun because he had moved it while cleaning.

On September 3, 2017, Moore was charged with one count of possession of a firearm by a felon and one count of felony bail jumping. Three other individuals—Levandior Conn, Moore's father Curtis Moore, and Major Watkins—were charged in the same complaint, although their cases were not resolved with Moore's. Sometime between April 11, 2018, and May 10, 2018, Moore's case was joined for trial with the cases of Cassanova Alexander and Keeon Harris, who had been charged separately but also a result of the August 30, 2017 search.[2] Following a jury trial, Moore, Alexander, and Harris were each convicted as charged. Moore was later given consecutive sentences totaling ten years' imprisonment. He appeals.

[2] Alexander was charged with possession of a firearm by a felon; Harris was charged with possession with intent to deliver between three and ten grams of amphetamine. It is unclear precisely how the charges were joined; there does not appear to have been a formal motion for joinder, and docket entries indicate only that Moore's case was to "track" with Alexander's and Harris's cases.

Counsel addresses two issues in the no-merit report: sufficiency of the evidence to support the jury verdict and whether the circuit court properly exercised its sentencing discretion. Before addressing those issues, however, we first discuss whether there is any arguable merit to challenging the joinder of Moore's case with two others, or to a related claim that trial counsel should have sought to sever the cases.

In general, the law permits joinder of multiple crimes in one complaint, or of charges against multiple defendants in the same complaint, if the crimes are "of the same or similar character" or if they arise from the same act. *See* WIS. STAT. § 971.12(1)-(2). Separate complaints may be tried together if the crimes and the defendants could have been joined in a single complaint. *See* § 971.12(4). The statute is broadly construed in favor of joinder. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). The circuit court also has discretion to sever joined charges if a defendant would be substantially prejudiced by a joint trial. *See* ***State v. Prescott***, 2012 WI App 136, ¶¶13-14, 345 Wis. 2d 313, 825 N.W.2d 515.

Here, the cases satisfy criteria for initial joinder. The charges all arose from the same incident—the execution of the search warrant. There was also overlapping evidence, as the testimony from officers regarding the actual execution of the warrant applied generally to Moore, Alexander, and Harris. *See* ***State v. King***, 120 Wis. 2d 285, 291, 354 N.W.2d 742 (Ct. App. 1984); ***State v. Shears***, 68 Wis. 2d 217, 234, 229 N.W.2d 103 (1975).

"If the offenses meet the criteria for joinder, it is presumed that the defendant will suffer no prejudice from a joint trial." *See* ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). "[T]o rebut that presumption, the defendant must show substantial prejudice to his defense; some prejudice is insufficient." *See* ***Prescott***, 345 Wis. 2d 313, ¶13. Here, there is no

indication that Moore faced substantial prejudice from the joinder. Moore, Alexander, and Harris did not offer statements against each other that would be used at trial. *See* ***State v. Avery***, 215 Wis. 2d 45, 51, 571 N.W.2d 907 (Ct. App. 1997) (explaining confrontation concerns). They did not have "conflicting or antagonistic defenses[.]" *See* ***Shears***, 68 Wis. 2d at 234 (citations omitted). And the jury was given an appropriate cautionary instruction, directing them to "look at each case separately, each charge separately, each defendant separately and decide what your verdicts should be." Accordingly, there is no arguably meritorious issue relating to the joinder of Moore's case with two others or to a claim that trial counsel should have sought severance.

The first issue appellate counsel addresses in the no-merit report is whether sufficient credible evidence supports the jury's verdicts. We view the evidence in the light most favorable to the verdict 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). A conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. ***Id.*** at 501-02. The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503.

As noted, Moore was charged with possession of a firearm by a felon and felony bail jumping. To prove that Moore was guilty of possession of a firearm by a felon, the State had to show that Moore: (1) possessed a firearm and (2) had been convicted of a felony prior to the date of offense. *See* WIS. STAT. § 941.29(1m); WIS JI—CRIMINAL 1343. To prove felony bail jumping, the State had to show that Moore: (1) was charged with a felony; (2) was released from custody on bond; and (3) intentionally failed to comply with the terms of the bond. *See* WIS. STAT. § 946.49(1); WIS JI—CRIMINAL 1795.

Moore stipulated that as of August 30, 2017, when the search warrant was executed, he had been convicted of a felony offense. He also stipulated that, at the time the warrant was executed, he had been charged with a new felony offense and released on bail, the conditions of which were in effect on August 30, 2017, and which included a condition that Moore not commit any new crimes. Thus, the key fact upon which both verdicts hinge is whether Moore possessed a firearm.[3]

The State's possession case was based solely on the testimony of Officers Eric Rom and Michael Braunreiter, who testified that while they were collecting Moore's DNA, he stated that his DNA would be on the shotgun because he had moved it while cleaning. Moore did not testify, but he pointed out to the jury that the interaction had not been recorded like the rest of the interview, although both officers also explained why the interaction was not recorded. The actual DNA test was inconclusive, as there was insufficient DNA collected from the shotgun to allow for comparison. However, if the jury believed the officers' testimony that Moore said he moved the gun while cleaning and that such statement was a confession, then that finding is sufficient to support the possession element for felon-in-possession: possession "means that the defendant knowingly had actual physical control of a firearm."[4] *See* WIS JI—CRIMINAL 1343. In turn, the finding that Moore committed a new crime sufficiently supports the finding that he

[3] There is no dispute that the weapon Moore allegedly possessed was a firearm.

[4] We observe that in her review of this issue, counsel relies on an unpublished, per curiam decision from this court, ***State v. Schmidt-Sharkey***, No. 2017AP1086-CR, unpublished slip op. (WI App July 24, 2018). We remind counsel that subject to a small number of exceptions, "[a]n unpublished opinion may not be cited in any court of this state as precedent or authority[.]" WIS. STAT. RULE 809.23(3)(a)-(b). In those situations where citation to an unpublished opinion is not inappropriate, then a copy of the opinion cited must be filed and served "with the brief or other paper in which the opinion is cited." *See* RULE 809.23(3)(c). No copy of ***Schmidt-Sharkey*** was provided.

intentionally failed to comply with terms of his bond. There is no arguable merit to a challenge to the sufficiency of the evidence to support the verdicts.

The other issue appellate counsel discusses is whether the circuit court erroneously 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 court appropriately considered relevant sentencing objectives and factors. The ten-year sentence imposed is well within the sixteen-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and 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). There would be no arguable merit to a challenge to the circuit court's sentencing discretion.

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 Annice Kelly is relieved of further representation of Moore 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