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DISTRICT I

June 14, 2022

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Electronic Notice

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

Dayone Lamonte Moffett 652278
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P.O. Box 351
Waupun, WI 53963-0351

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

2018AP1763-CRNM State of Wisconsin v. Dayone Lamonte Moffett
(L.C. # 2015CF5431)

Before Brash, C.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).

Dayone Lamonte Moffett appeals from a judgment, entered upon a jury's verdicts, convicting him of six felonies. Appellate counsel, Marcella De Peters, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Moffett has filed a response. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's report, and Moffett's response, we conclude there are no

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

arguably meritorious issues that could be pursued on appeal. We, therefore, summarily affirm the judgment.

BACKGROUND

A criminal complaint charged Moffett with three counts of armed robbery, one count of first-degree recklessly endangering safety with use of a dangerous weapon, and one count of first-degree reckless injury with use of a dangerous weapon. The complaint alleged that on December 4, 2015, Milwaukee police responded to a shooting report on North 7th Street. Upon arrival, they found a car that had crashed into a pole in the median; the car had at least five bullet strikes and one window had been shot out. There were seven fired cartridge casings in the street.

The car's driver, R.D.H. ("Holmes"),[2] was identified as a victim and interviewed. He told police that prior to the shooting, he was with D.J.M. ("Marks") and D.E.R. ("Rogers") at a house on Locust Street, gambling with others. A man Holmes knew as "Dayone" (Moffett) arrived, wearing a gray hoodie, gray jogging pants, and "flip flops that looked like jail flip flops." While Holmes and his friends were gambling, Moffett pointed a handgun at Holmes and demanded he empty his pockets. Holmes slapped away the gun, and Moffett turned his attention to Marks, pointing the gun at him and demanding money. Holmes believed Marks gave Moffett about eighty dollars. Moffett then took forty dollars from Holmes's hand before pointing the gun at Rogers. Rogers also slapped the gun away, but Moffett struck him twice in the face with the gun; Rogers surrendered ten dollars. Moffett then told them all to get out, and they left.

[2] Because the victims in this case have similar initials, we have assigned each a pseudonym, designated above, for ease of reading. *See* WIS. STAT. RULE 809.86(1), (4).

Holmes and Marks drove Rogers to the hospital for treatment and took him home. Holmes was then driving Marks home when he saw a white truck near 7th Street and Burleigh Street. Holmes could see the passenger was Moffett. They made eye contact, and Holmes saw Moffett bite his lip, raise an object in his right hand, point at Holmes's vehicle, and fire gunshots. When Holmes realized that both he and Marks had been shot, he "gunned" the engine, turned a corner, and struck the pole. Holmes suffered a graze wound to his back, as well as injuries to his lower lip and teeth from the crash. Marks sustained four gunshot wounds to his abdomen, chest, and thigh. Holmes later identified Moffett through a photo array as the person who robbed them at the dice game, but claimed he did not see who fired shots from the truck.

The next day, Moffett's cousin, Lonnie Moffett, was arrested. Police recovered a gun of the same caliber used in the shooting from Lonnie's car. It was later determined that the bullet casings recovered from the shooting had been fired from Lonnie's gun. After Lonnie's arrest, Moffett turned himself in. Moffett confirmed a relative lived at the gambling house on Locust Street, but denied any knowledge of what happened there. He admitted that on the date of the shooting, he had just been released from jail and was wearing jail clothes that evening. Eventually, a second amended information charged Moffett with three counts of armed robbery; two counts of attempted first-degree intentional homicide with use of a dangerous weapon; first-degree reckless injury with use of a dangerous weapon; and endangering safety by use of a dangerous weapon for shooting from one vehicle at another vehicle.

The case was tried to a jury, which convicted Moffett on six of the seven charges; the jury acquitted him of the armed robbery of Marks, who testified at trial that Moffett did not take any money from him. The trial court subsequently imposed consecutive and concurrent

sentences, totaling fifteen years of initial confinement and nine years of extended supervision. Moffett appeals.

DISCUSSION

I. Sufficiency of the Evidence

The first issue appellate counsel discusses in the no-merit report is whether sufficient evidence supports the six guilty verdicts.[3] Moffett also addresses this issue in his response, arguing "that the evidence did not prove him guilty of the shooting beyond a reasonable doubt."

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).

Counsel identifies the appropriate standard of review, but does not identify or discuss the elements of the offenses of conviction or correlate any of the evidence to each specific offense.

[3] The report also concludes that no procedural errors occurred with respect to the jury selection, admission of evidence, the colloquy concerning Moffett's waiver of his right to testify, jury instructions, arguments of counsel, and the handling of jury questions, including reinstruction when the jury signaled division on the non-robbery count. We agree with counsel's conclusions.

Nevertheless, we have reviewed the elements of each offense,[4] the complete trial record, and counsel's aggregation of the evidence in support of the convictions, and we agree with counsel's conclusion(s) that there is sufficient evidence to support all of the guilty verdicts.

Moffett's challenge to the sufficiency of the evidence in his response is based on his belief that there was no evidence he was the actual shooter; at trial, Holmes had significant memory failure and testified that he could not recall the events of the shooting that immediately preceded crashing his car. Marks never identified the shooter. Relatedly, Moffett also argues trial counsel was ineffective for "failure to request that the Attempted First Degree homicide charge[s] be dismissed for lack of evidence[.]"

Although trial counsel did not specifically move to dismiss the attempted homicide charges at the close of evidence, she did move for a directed verdict on those charges, arguing there was insufficient evidence for a different element as to each victim. The trial court denied the motion. There is no arguable merit to a claim that trial counsel performed deficiently by failing to seek resolution of the charges in Moffett's favor based on the strength of the evidence, because the record reflects that counsel did just that.

Moffett is also incorrect that there is no evidence he was the shooter. The trial court determined that Holmes's memory lapse on the stand was not in good faith. It thus allowed the State, who called Holmes, to cross-examine him with his prior statement to police. The trial

[4] *See* WIS JI—CRIMINAL 1480 (armed robbery with a dangerous weapon); WIS JI—CRIMINAL 1250 (first-degree reckless injury); WIS JI—CRIMINAL 990 (use or possession of dangerous weapon); WIS JI—CRIMINAL 1070 (attempted first-degree intentional homicide); WIS JI—CRIMINAL 1345 (first-degree reckless endangering safety, which was given as a lesser-included offense with respect to the attempted homicide of Holmes); WIS JI—CRIMINAL 1327 (endangering safety by intentionally discharging a firearm from a vehicle).

court also allowed the detective who first interviewed Holmes to testify about his statement.[5] That statement identified Moffett as the truck passenger, and Holmes said he saw Moffett raise something dark and point it towards him before hearing multiple gunshots. Moffett was also circumstantially linked to the gun used in the shooting via Lonnie. This is sufficient evidence that Moffett was the shooter, notwithstanding Holmes's lack of memory on the stand.

A jury, as ultimate arbiter of credibility, has the power to accept one portion of a witness's testimony and reject another portion; a jury can find that a witness is partially truthful and partially untruthful. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). "'If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court.'" ***United States v. Payne***, 492 F.2d 449, 454 (4th Cir. 1974) (citation omitted). As counsel has detailed in the no-merit report, there is sufficient evidence that a jury could accept to support the verdicts, including the attempted homicide verdicts. There is no arguable merit to a challenge to the sufficiency of the evidence.

[5] Appellate counsel appropriately identifies ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976), as the controlling authority, but does not discuss whether there is any arguable merit to challenge the court's ruling thereunder. "[W]here a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence." *See* ***id.*** Our review of the record satisfies us that the parties adequately argued this issue, that the trial court made appropriate factual findings and legal considerations, and that the trial court appropriately exercised its discretion to determine Holmes's prior statement to police was admissible.

II. Newly Discovered Evidence

Related to his sufficiency of the evidence claim, Moffett claims he has newly discovered evidence in the form of recantations from Holmes and Rogers, given to appellate counsel's investigator. A defendant seeking a new trial based on newly discovered evidence must establish "by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). If the defendant satisfies those four factors by clear and convincing evidence, the circuit court must then determine whether a reasonable probability exists that a different result would be reached in a trial. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

"In the usual presentation, a recantation occurs when a witness formally or publicly withdraws or renounces prior statements or testimony." *See* ***State v. McAlister***, 2018 WI 34, ¶53, 380 Wis. 2d 684, 911 N.W.2d 77. When newly discovered evidence is a newly discovered recantation, it must be corroborated by other newly discovered evidence. *See* ***State v. Mayo***, 217 Wis. 2d 217, 226, 579 N.W.2d 768 (Ct. App. 1998). Corroboration is required because "[r]ecantations are inherently unreliable." ***McCallum***, 208 Wis. 2d at 476. The corroboration requirement is satisfied if "there is a feasible motive for the initial false statement" and "there are circumstantial guarantees of the trustworthiness of the recantation." *See* ***id.*** at 477-78. "The correct legal standard when applying the 'reasonable probability of a different outcome' criteria is whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." ***Id.*** at 474.

The documents Moffett provides are not recantations. First, they are not the witnesses' statements; they are investigator reports about the witnesses' statements, and Moffett has provided only the first page of each report. Second, neither Holmes nor Rogers appears to have specifically renounced any of their prior statements or testimony. Rogers' statement to the investigator was that he saw Moffett at the house and that an unidentified person had robbed him. However, there is no indication that Rogers ever identified Moffett in this case—he was not asked to identify anyone at trial, and he had been unable to identify a suspect in a photo lineup. Holmes's statement to the investigator was that he does not know who shot at him. Though this contradicts his post-incident identification of Moffett, it is consistent with his trial testimony that he could not recognize who was in the white truck's passenger seat.[6] To the extent the "recantations" are repetitions of the witnesses' trial testimony, they are not newly discovered. Finally, Moffett identifies no newly discovered evidence to corroborate either supposed recantation. Accordingly, we conclude there is no arguable merit to asserting a claim for a new trial based on newly discovered recantations.

III. Ineffective Assistance of Trial Counsel

Moffett also asserts that trial counsel was ineffective for failing to produce alibi witnesses and for failing to file certain pretrial motions. In order to support a claim of ineffective assistance of trial counsel for failure to call certain witnesses, Moffett must identify *who* the witnesses were, and to *what* they would have testified. *See* ***State v. Leighton***, 2000 WI App 156,

[6] Holmes's "recantation" statement is also internally inconsistent. According to the investigator, Holmes said he thought Moffett should serve time for robbing him and his friends but not for the shooting because Holmes did not know who shot him. Later in his statement to the investigator, Holmes also attributes the robbery to four black males, whom he said he could not identify or describe beyond saying they were four black males.

¶42, 237 Wis. 2d 709, 616 N.W.2d 126. Moffett names two witnesses, but does not tell us what they would have said. Further, the record reflects that trial counsel attempted to contact at least one of the two witnesses, but she was not cooperative in returning counsel's call. Accordingly, there is no arguable merit to a claim that trial counsel was ineffective for failing to call the alleged alibi witnesses.

Moffett likewise fails to identify what sort of pretrial motions he thinks trial counsel should have filed. The most likely option seems to be a motion to suppress Moffett's statements to police. However, he surrendered himself after Lonnie's arrest, and the criminal complaint indicates that Moffett gave a statement after being read his rights. Our review of the record reveals no evidence to the contrary. Thus, there is no arguably meritorious basis for a pretrial suppression or other motion, and there can be no arguable merit to a claim that trial counsel was ineffective for failing to pursue a meritless issue.[7] *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

IV. Sentencing Discretion

The only other issue counsel discusses in the no-merit report is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. Moffett faced over 252 years of

[7] 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 ("[U]nlike the direct appeal situation … a no-merit proceeding also afford[s] appellate counsel the opportunity to explain why certain issues would lack arguable merit because they have been waived.").

imprisonment; the twenty-four-year sentence imposed is well within that maximum, *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). We, therefore, agree with counsel's analysis and conclusion that there would be no arguable merit to a challenge to the court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.[8]

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 Marcella De Peters is relieved of further representation of Moffett 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

[8] To the extent that the no-merit response makes other arguments that are not discussed with specificity in this opinion, these arguments are deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).