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July 12, 2022

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

2019AP1959-CRNM State of Wisconsin v. Vshaun L. Moore (L.C. # 2017CF3493)

Before Brash, C.J., Donald, P.J., and White, 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).

Vshaun L. Moore appeals a judgment of conviction entered after a jury found him guilty of two felonies. His appellate counsel, Attorney Angela Conrad Kachelski, filed a no-merit report, Moore filed a response and Attorney Kachelski filed a supplemental no-merit report in reply. This court has considered the no-merit reports and Moore's response, and we have independently reviewed the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967),

and WIS. STAT. RULE 809.32 (2019-20).[1] We conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21 (2019-20).

The State filed a felony warrant and criminal complaint on August 2, 2017. In count one of the complaint, the State charged Moore with attempted first-degree intentional homicide by use of a dangerous weapon and as a party to a crime. In count two, the State charged Moore with possessing a firearm while a felon as a party to a crime. Moore made an initial appearance on February 7, 2018, while serving a term of confinement following revocation of his extended supervision in an earlier case. Pursuant to WIS. STAT. § 971.11, Moore notified the Milwaukee County District Attorney's Office on February 20, 2018, that he requested a prompt disposition of the 2017 charges. Trial commenced on May 30, 2018. The jury found that Moore had not used a dangerous weapon to commit attempted homicide as a party to a crime and otherwise found him guilty as charged.

Moore faced a sixty-year term of imprisonment for attempted first-degree intentional homicide as a party to a crime. *See* WIS. STAT. §§ 940.01(1)(a), 939.50(3)(a)-(b), 939.32(1)(a), 939.05(1). The circuit court imposed an eleven-year term of imprisonment bifurcated as eight years of initial confinement and three years of extended supervision. Moore faced a ten-year term of imprisonment and a $25,000 fine for possessing a firearm while a felon. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g). The circuit court imposed an evenly bifurcated four-year term

[1] All subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

of imprisonment. The circuit court ordered Moore to serve the two sentences concurrently with each other but consecutive to the sentence that he was already serving for an earlier conviction.[2]

We first conclude that Moore could not mount an arguably meritorious challenge to the timeliness of his trial. When a defendant seeks prompt disposition of a felony charge under WIS. STAT. § 971.11(1), the State must bring the case on for trial within 120 days after receipt of the request. *See* § 971.11(2). Moore's trial began ninety-nine days after the State received his request, well within the statutory deadline.

We next consider whether Moore could challenge the sufficiency of the evidence presented at trial. Before the jury could find him guilty of attempted first-degree intentional homicide as a party to a crime, the State was required to prove beyond a reasonable doubt that Moore or the person he aided and abetted intended to kill the victim, and that Moore or the person he aided and abetted did acts towards the commission of first-degree intentional homicide that demonstrated unequivocally that Moore or the person he aided and abetted intended to kill and would have killed the victim but for the intervention of some extraneous factor. *See* WIS JI—CRIMINAL 1070, 400. To prove that Moore possessed a firearm while a felon, the State was required to prove that Moore possessed a firearm and that he was convicted of a felony before the date of the alleged possession. *See* WIS JI—CRIMINAL 1343 (June 2016).

[2] The circuit court at sentencing found Moore eligible to participate in the challenge incarceration program and the Wisconsin substance abuse program after serving five years of initial confinement. However, a person serving a sentence for a crime codified in WIS. STAT. ch. 940 is statutorily disqualified from participating in those program. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1. Moore's sentence for attempted first-degree intentional homicide thus disqualifies him from participation. The circuit court therefore entered a postconviction order amending the judgment of conviction to reflect Moore's statutory disqualification. In light of the statutory bar to Moore's program participation, a challenge to that postconviction order would lack arguable merit.

J.C. testified at trial that on May 3, 2017, he was at work as the manager of Uncle Joe's, a Milwaukee clothing store, when he saw a man produce a handgun and display it to three other patrons. J.C. said that he later heard a scuffle followed by gunshots but he did not see who was doing the shooting.

D.N. testified that on May 3, 2017, he was shopping at Uncle Joe's when his sunglasses were snatched from his face by a person subsequently identified as Deketrius Dotson. D.N. acknowledged that he immediately pulled out his firearm, a black, nine-millimeter handgun. Dotson responded by returning the sunglasses. D.N. then heard one of Dotson's two companions, a man in red pants who was subsequently identified as Moore, talking on his cellphone and saying "bring the bangers." D.N. testified that "banger" is a street term for a firearm. Moore left the store after his telephone conversation, then returned moments later and passed a handgun to Dotson, who approached D.N. Dotson and D.N. struggled over the handgun, and D.N. said he could hear Moore repeatedly saying "shoot him" during the struggle. The gun went off, and D.N. fled from the store with Dotson in pursuit firing shots. D.N. was shot nine times from behind, fell to the ground, and played dead. Dotson then approached D.N. and stole D.N.'s firearm from his pocket. Next, D.N. saw Moore toss Dotson a set of keys and saw Dotson drive away.

While D.N. was on the witness stand, the State showed the jury surveillance video of the May 3, 2017 incident. D.N. narrated the events on the video as they unfolded, and he identified Moore as the person who was wearing red pants in the video.

A detective testified in regard to the surveillance video of the incident. The detective said that he had studied a portion of the video where Moore appeared to pass an object to Dotson, and the detective concluded that the object was a semi-automatic handgun with a silver slide.

Moore stipulated that he was a convicted felon, and he also exercised his right to testify. He said that on May 3, 2017, he was shopping at Uncle Joe's with Dotson. Also with them was Dotson's friend, "Zell." Moore described Dotson snatching D.N.'s sunglasses, and Moore said that D.N. responded by producing and displaying a black gun. Moore acknowledged that he was the person wearing red pants who left the store a few minutes after Dotson's interaction with D.N., but Moore denied obtaining a gun for Dotson. Rather, Moore said, he left to smoke a cigarette, and when he returned, he bumped into Dotson while holding a cellphone. Moore said that some minutes later, he heard shooting and ran out of the store in a panic. When the shooting ended, Dotson called for his keys and Moore admitted that he was the person seen in the video tossing keys to Dotson. Moore said that he then fled on foot.

When this court considers the sufficiency of evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force 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). The finder of fact, not this court, considers the weight of the evidence and the credibility of the witnesses and resolves any conflicts in the testimony. *See* ***id.*** at 503-04.

The jury here had an opportunity to consider and evaluate evidence from both the State and from Moore in regard to whether the State proved the elements of the crimes at issue. In light of the evidence summarized above, we agree with appellate counsel that any challenge to the sufficiency of that evidence would be frivolous within the meaning of ***Anders***.

We also agree with appellate counsel that Moore could not pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that protection of the community and Moore's rehabilitation were the primary sentencing goals, and the circuit court discussed the sentencing factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The sentences imposed were well within the limits of the maximum sentences allowed by law and therefore were presumptively not unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

The record suggests that, in Moore's view, the circuit court erroneously exercised its discretion by ordering Moore to serve his sentences in the instant case consecutive to, rather than concurrently with, his previously imposed sentence for a prior offense.[3] The determination of whether a sentence should be consecutive or concurrent rests in the circuit court's discretion. *See* ***State v. Ramuta***, 2003 WI App 80, ¶24, 261 Wis. 2d 784, 661 N.W.2d 483. Because the circuit court found that the crimes in this case were unrelated to Moore's earlier convictions, the

[3] Moore filed a postconviction motion on his own behalf soon after his conviction asking the circuit court to order that he serve his sentences in this matter concurrently with his earlier-imposed sentence. The circuit court observed that Moore was represented by appointed postconviction counsel and properly declined to consider the request. *See* ***State v. Redmond***, 203 Wis. 2d 13, 21, 552 N.W.2d 115 (Ct. App. 1996) (providing that a defendant may proceed either with counsel or *pro se* but not both at the same time).

circuit court reasonably exercised its discretion by ordering Moore to serve his sentences consecutive to any previously imposed sentence. *See* ***State v. Matke***, 2005 WI App 4, ¶¶18-19, 278 Wis. 2d 403, 692 N.W.2d 265. Further pursuit of this issue would lack arguable merit.

In response to the no-merit report, Moore contends that he has an arguably meritorious claim that he is entitled to sentence credit for the days he spent in custody prior to sentencing in the instant case. Such a claim would lack arguable merit. Moore was in prison serving a sentence for an unrelated crime throughout the pendency of the instant case, and his sentences in this matter are consecutive to any earlier-imposed sentence. "Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Moore next suggests several reasons that he believes his trial counsel was ineffective. A defendant claiming ineffective assistance of counsel is required to show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If the defendant fails to satisfy one prong of the analysis, a reviewing court need not address the other. *See* ***id.*** at 697.

Moore first asserts that his trial counsel should have alleged that he was not competent to proceed. The record, however, does not suggest a reason to question Moore's competency. "[A]

defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. Here, Moore responded appropriately when the circuit court addressed him during pretrial and trial proceedings, and he testified clearly and articulately on his own behalf.

The materials from outside the record that Moore submitted with his response to the no-merit report also do not suggest that he lacked competency. Those materials include notes from clinical interviews conducted while he was in jail in 2017 in connection with revocation proceedings related to a prior criminal conviction. The clinical notes reflect that he was alert and oriented and that his speech, language, and eye contact were within normal limits. The materials also show that in 2014, Moore received treatment to achieve competency to proceed in a criminal case. His successful treatment to competency in 2014 does not demonstrate that he lacked competency in the instant case. Further, Moore advises that his mental health problems arose in the past when he was "released back into the public" and was "off his medication." Moore, however, was in prison throughout the pendency of the instant proceedings. Nothing before us suggests that the institution where he was confined failed to ensure that he received any mental health treatment that he required. In sum, the record does not show that trial counsel performed unreasonably by forgoing a challenge to Moore's competency. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Moore next alleges that his trial counsel failed to give him a copy of the discovery before trial. The materials before us, however, do not provide a basis on which Moore could pursue an arguably meritorious claim that he was prejudiced by trial counsel's alleged deficiency. Moore clearly received the discovery at some point because he has attached portions of the police

reports to his no-merit response. Nothing in that response suggests that his review of the discovery disclosed anything that would probably have led him to proceed differently. Accordingly, we conclude that there is no merit to further pursuit of this issue. *See* ***Strickland***, 466 U.S. at 693.

Moore next contends that his trial counsel was ineffective for failing to offer evidence that D.N. was shot with his own gun. In support, Moore includes police reports memorializing interviews with Tiana Chalmers, who was present at Uncle Joe's during the May 3, 2017 shooting incident. According to the reports, Chalmers told police that Dotson disarmed D.N. Chalmers, however, also told police that after D.N. and Dotson began to fight, "she was not completely certain what happened." Similarly, Attorney Kachelski sets forth in an affidavit that she spoke to Chalmers, who described the shooting but then stated that she "did not see any of the incident" because she was hiding. Attorney Kachelski further notes that Moore himself testified that D.N.'s gun was "all black" while the video recording of the incident shows that Dotson used a silver gun to shoot D.N. Trial counsel thus acted reasonably in forgoing efforts to marshal contradictory evidence to show that D.N. was shot with his own gun and instead focusing on a simpler claim, namely, that Moore did not provide the gun that Dotson used in the shooting. *See* ***Strickland***, 466 U.S. at 690-91 (explaining that counsel's strategic decisions are virtually unassailable). Further pursuit of this issue would therefore lack arguable merit.

Moore next contends that his trial counsel was ineffective for not seeking a mistrial after the jury submitted a note reflecting that, at the close of the previous day's deliberations, one of the jurors was approached by a member of the public who whispered, "say not guilty." Whether to grant a mistrial rests in the circuit court's discretion. *See* ***State v. Seefeldt***, 2003 WI 47, ¶13, 261 Wis. 2d 383, 661 N.W.2d 822. A mistrial is unwarranted, however, unless the grounds for a

mistrial are sufficiently prejudicial to warrant a new trial; "the law prefers less drastic alternatives, if available and practical." *See* ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998) (citation omitted).

In this case, the jury's note included statements that the juror did not feel threatened by the comment directed at him and that the comment would not affect the juror's decision-making. The circuit court asked the parties how they wished to proceed, and the lawyers for both sides stated a preference for additional jury instructions. The circuit court then elected to tell the jury that the court was taking additional steps to chaperone the jurors and to instruct them to alert court personnel about any further contact from third parties.

In light of the foregoing, no arguably meritorious basis exists to allege that Moore was prejudiced by trial counsel's actions. A defendant is not prejudiced by trial counsel's failure to seek a mistrial that would not have been granted. *See* ***id.*** Here, the circuit court considered its options and selected an alternative less drastic than a mistrial. No reasonable probability exists that the circuit court would have granted a mistrial if Moore's trial counsel had requested one. Moreover, the circuit court had previously instructed the jury to decide the case solely on the basis of the evidence presented, and the law presumes that jurors follow all of the instructions given. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Moore next suggests that he has newly discovered evidence, specifically, an affidavit from one Richard Lewis, who states that he rode with Moore and Dotson to Uncle Joe's clothing store on May 3, 2017, and was present during the shooting incident. Lewis further states that he did not see Moore holding or firing a gun. Because Moore necessarily knew about this witness

and his potential testimony before trial, Lewis's affidavit cannot constitute newly discovered evidence. *See* ***State v. Jackson***, 188 Wis. 2d 187, 201, 525 N.W.2d 739 (Ct. App. 1994).

Moore also suggests that his trial counsel was ineffective for failing to call Lewis to testify, but the materials do not reflect an arguably meritorious claim that Moore was prejudiced by the omission. J.C. testified that he saw only D.N. with a gun. Testimony from Lewis that he also did not see Moore with a gun would merely have been cumulative and would not have helped the jurors to determine whether the object they saw Moore holding in the surveillance video was a gun or a cellphone. As to Lewis's averment that he did not see Moore fire a gun, any such testimony would have been irrelevant. The State acknowledged that Dotson was the only shooter. Accordingly, any claim that trial counsel was ineffective for not calling Lewis to testify would be frivolous within the meaning of ***Anders***.[4]

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32 (2019-20).

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2019-20).

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski is relieved of any further representation of Vshaun L. Moore. *See* WIS. STAT. RULE 809.32(3) (2019-20).

[4] Neither Moore nor Lewis advises whether Lewis and "Zell" are the same person or whether Lewis spoke to trial counsel before the trial. The men also do not explain the circumstances that led Lewis to provide an affidavit to Moore. We observe that the same person who notarized Lewis's affidavit also notarized Moore's affidavit a week later, suggesting that the two men were in prison together at the time.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals