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DISTRICT I

April 18, 2023

To:

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Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2021AP110-CRNM State of Wisconsin v. Xavier Octavius Brown
(L.C. # 2018CF4649)

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).

Xavier Octavius Brown appeals a judgment of conviction, following a jury trial, of one count of first-degree reckless injury as a party to a crime and one count of felony bail jumping. His appellate counsel, Angela C. Kachelski, has a filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Brown received a copy of the report, was advised of his right to respond, and has responded. Appellate counsel filed a supplemental no-merit report. We have independently reviewed the record, the no-merit

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

report, the response, and the supplemental no-merit report as mandated by ***Anders***. We conclude that there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm.

On September 29, 2018, the State charged Brown with of one count of first-degree reckless injury as a party to a crime and one count of felony bail jumping. The complaint alleged that Milwaukee police responded to the scene of a shooting, where they observed a red truck fleeing and striking several vehicles. The complaint further states that the victim of the shooting, R.F., told police that he was returning to his car in a gas station parking lot when he was shot in the chest. Surveillance video showed that the shooter was in the passenger seat of the red truck that fled the scene. The truck ultimately crashed. When police approached the crash scene, Brown was in the passenger seat of the red truck.

The matter proceeded to trial where Brown was tried jointly with his co-defendant, Draveon Bannister. Multiple witnesses, including law enforcement and the victim testified. The jury ultimately found Brown guilty as charged. The trial court sentenced Brown to twelve years of initial confinement and six years of extended supervision on the first-degree reckless injury charge, and one year of initial confinement and one year of extended supervision on the bail jumping charge, to run consecutive.

Appellate counsel's no-merit report first sets forth counsel's review of the pretrial hearings and issues, *voir dire*, opening statements, witness testimony, jury instructions, Brown's stipulation that he was released on bond at the time of the shooting, the defense's motion for a directed verdict, the trial court's colloquy with Brown when he elected not to testify, closing

arguments, and the jury verdict. We have independently reviewed the record and agree with counsel's description of each stage of the proceedings.

The no-merit report next addresses the sufficiency of the evidence. 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." *See* ***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.

We agree with appellate counsel's analysis as to the sufficiency of the evidence. Surveillance video of the shooting showed a person in the front passenger seat of a red truck point a gun out the window and shoot at R.F. Once enhanced, the video showed that the shooter was wearing a gray shirt. Following the crash, police body cam video showed three people exit the red truck. Both Bannister and Brown came out of the front seat. Brown was wearing a gray shirt. Moreover, the gun found in the vehicle matched the fired cartridge casings found at the scene. The jury concluded from this evidence that Brown was guilty as charged. This evidence is sufficient to sustain the conviction. We agree with appellate counsel's determination that there is no arguable merit to challenging the sufficiency of the evidence supporting the verdict.

Appellate counsel also addresses 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; ***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 thoroughly considered the relevant sentencing objectives and factors. The sentence the trial court imposed is within the 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 trial court's sentencing discretion.

In his response, Brown essentially maintains his innocence by challenging the sufficiency of the evidence. Although Brown correctly points out that none of the witnesses specifically identified him as the shooter, the evidence presented at trial was sufficient for the jury to draw an inference that Brown was the shooter. As noted, it is the jury's responsibility to weigh the credibility of the evidence and resolve any conflicts. See ***Poellinger***, 153 Wis. 2d at 503-04.

Brown also challenges the trial court's sentence, arguing that he was "oversentenced" as compared to other defendants who have committed similar crimes. Our independent review of the record confirms that the trial court thoughtfully considered the specific facts of Brown's case, Brown's specific background, and his individual character. The trial court properly exercised its discretion.

Brown also contends that he is entitled to sentence modification because the trial court told him that he "was eligible for ERP and boot camp which wasn't true." Presumably, Brown is arguing the existence of a new factor; however, this argument lacks arguable merit. "A circuit court has the inherent power to modify a sentence based upon a showing of a new factor." ***State v. Stenklyft***, 2005 WI 71, ¶60, 281 Wis. 2d 484, 697 N.W.2d 769. A new factor is "a fact

or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts satisfies this standard presents a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in its analysis. ***Id.***, ¶38.

Here, the trial stated, "we're gonna okay you for the challenge program. I don't know about ERP." Brown is statutorily ineligible for the challenge incarceration program because first-degree reckless injury is a violation of WIS. STAT. § 940.23. *See* WIS. STAT. §973.01(3g). As stated, the trial court's sentence was based on the proper factors. The trial court did not tie the length of Brown's confinement to his eligibility for the program or suggest in any way that his eligibility was "highly relevant to the imposition of sentence." ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). Brown cannot not show the existence of a new factor.

Brown also contends that he "didn't have my right to an individual trial" because he was tried jointly with his co-defendant, Bannister. Brown's counsel did not move to sever the trials. In her supplemental report, appellate counsel contends that Brown's argument is without arguable merit because Brown and Bannister were charged in the same complaint for engaging in the same series of events—Bannister as the driver of the red truck and Brown as the passenger. We agree.

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). Here, the cases

satisfy criteria for initial joinder. The charges all arose from the same incident and shared overlapping evidence to some degree. Accordingly, there is no arguably meritorious issue relating to the joinder of Brown's and Bannister's cases or to a claim that trial counsel should have sought severance.

Accordingly, this court accepts the no-merit report, affirms the convictions, and discharges appellate counsel of the obligation to represent Brown further in this appeal.

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 Angela C. Kachelski is relieved of further representation of Xavier Octavius Brown 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