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

July 25, 2023

To:

Hon. Carolina Stark
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
Electronic Notice

John T. Wasielewski
Electronic Notice

Demonte K. Fischer-Hamilton 669562
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2022AP1143-CRNM State of Wisconsin v. Demonte K. Fischer-Hamilton
(L.C. # 2017CF5173)

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).

Demonte K. Fischer-Hamilton appeals a judgment of conviction, following a jury trial, of one count of first-degree reckless homicide, as a party to a crime, while armed. His appellate counsel, John T. Wasielewski, 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). Fischer-Hamilton received a copy of the report, was advised of his right to respond, and has responded. We have independently reviewed the record, the no-merit report, and the response as mandated by ***Anders***. We conclude

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

that there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm.

On November 9, 2017, the State charged Fischer-Hamilton with one count of first-degree reckless homicide, as a party to a crime, while armed. The State later amended the charge to first-degree intentional homicide, as a party to a crime, while armed. The charge stemmed from the shooting death of Jakeem Sims. According to the charging documents, Sims and three others used a social media account named "Tay Vs Biancaa" to arrange a marijuana transaction. Sims drove himself and the three others to a meeting point, where they met two buyers. One of the buyers stuck a gun through the window and demanded "everything." Sims drove away, multiple shots were fired, and one of the passengers observed blood coming from Sims's head. Sims crashed the car and all of the passengers emerged from the car, except Sims, who was later pronounced dead. Milwaukee police used the social media account to track Fischer-Hamilton to the transaction, who was subsequently arrested and charged.

The matter proceeded to trial where the jury heard from multiple witnesses and viewed surveillance video from a nearby school. The jury found Fischer-Hamilton guilty of the lesser-included offense of first-degree reckless homicide, as a party to a crime, while armed. The trial court sentenced Fischer-Hamilton to thirty-four years imprisonment consisting of twenty-two years initial confinement and twelve years extended supervision. Following a restitution hearing, the trial court ordered Fischer-Hamilton to pay $1497.18 to Sims' family to cover multiple expenses related to his funeral. This appeal follows.

Appellate counsel's no-merit report addresses the following: (1) the sufficiency of the evidence; (2) whether the trial court erred when it allowed the State to amend the charge against

Fischer-Hamilton; (3) multiple evidentiary issues; (4) whether the trial court erred in denying Fischer-Hamilton's motion to dismiss based on his allegation of a ***Brady***[2] violation; (5) whether the trial court erred in instructing the jury on lesser-included offenses; and (6) whether the trial court erroneously exercised its sentencing discretion.

With regard to the sufficiency of the evidence, 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). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506. Although the identity of the shooter was the primary issue, circumstantial evidence tied Fischer-Hamilton to the shooting and the standard of review is the same whether the conviction relies on direct or circumstantial evidence. *See* ***id.*** at 503. "[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). Here, the State introduced evidence connecting Fischer-Hamilton to the social media account used to arrange the drug transaction. Fischer-Hamilton also mentioned this account in a recorded jail call. Appellate counsel properly analyzes this issue in the no-merit report, and we agree with his conclusion that there is no arguable merit to challenging the sufficiency of the evidence supporting the verdicts.

---

[2] *See* ***Brady v. Maryland***, 373 U.S. 83 (1963).

Appellate counsel next addresses whether the trial court erred in allowing the State to amend the initial charge of first-degree reckless homicide to a charge of first-degree intentional homicide. Specifically, counsel notes that the amendment was made less than three weeks prior to the start of trial. The trial court overruled defense counsel's objection to the amendment after the State indicated that none of the discovery materials would be affected by the amendment. The trial court allowed the amendment, but extended the deadline for the parties to present a negotiated resolution. The trial court also stated that it would consider a motion to adjourn the trial if defense counsel found that the amendment prevented counsel from adequately preparing for trial. Moreover, due to an unrelated adjournment, the trial did not commence until two months after the amendment, mitigating the possibility that defense counsel could not adequately prepare for trial. Appellate counsel discusses the proper law and appropriately analyzes this issue in the no-merit report. We agree with his conclusion that there is no arguable merit to challenging an amendment to the charge.

Appellate counsel's no-merit report next addresses two specific evidentiary issues: whether the trial court erred in admitting recorded jail phone calls, and whether the trial court erred in admitting a still image from surveillance video possibly showing a muzzle flash. The decision whether to admit or exclude evidence at trial is within the trial court's discretion. ***State v. Richard G.B.***, 2003 WI App 13, ¶7, 259 Wis. 2d 730, 656 N.W.2d 469. With regard to the jail calls, defense counsel objected to their admission on the grounds that the State disclosed them late. The State explained its reasons for the belated disclosure. Defense counsel had an opportunity to review the calls and stated that the calls did not require further investigation. Based on these factors, along with the trial court's finding that the calls were short, the trial court did not erroneously exercise its discretion in admitting the jail recordings. As to the image of the

muzzle flash, when testifying about the surveillance video which depicts the car and actors involved in the shooting, a detective noted that he was able to isolate a still image from the video which the detective believed showed a muzzle flash. Defense counsel objected to the admission of the image asserting that a flash was not actually visible. The trial court overruled the objection, finding that the image was from a video viewed by defense counsel prior to trial and that the question of whether there was a flash was one for the jury. Accordingly, we agree with appellate counsel that the trial court did not erroneously exercise its discretion.

Appellate counsel next discusses whether the trial court erred in denying defense counsel's motion to dismiss based on counsel's assertion of a ***Brady*** violation. Counsel asserted that information regarding a possible alternative suspect—M.W.—was provided only on and after the January 30, 2018 pretrial. Following briefing, the trial court denied the motion to dismiss, stating that while the State's evidentiary disclosure was untimely, it was prior to trial and alternative remedies were available. Specifically, the trial court stated "another potential remedy might be if the defense needs additional time past Monday, March 26, to prepare for trial considering that, there's also a potential remedy of the Court advising the jury of the State's failure to timely disclose the information, that is one of the remedies allowed by statute."

We agree with appellate counsel that there is no arguable merit to challenging the trial court's decision because "***Brady*** does not require pretrial disclosure of exculpatory evidence. ***Brady*** instead requires that the prosecution disclose evidence to the defendant in time for its effective use." ***State v. Harris***, 2008 WI 15, ¶63, 307 Wis. 2d 555, 745 N.W.2d 397 (footnote omitted). The State actually violated WIS. STAT. § 971.23 and the trial court employed the remedies available under the statute. *See* § 971.23(7), (7m).

Appellate counsel's no-merit report next addresses whether the trial court erred in instructing the jury on lesser-included offenses. The State asked the trial court to instruct the jury on three lesser-included offenses: first-degree reckless homicide, second-degree reckless homicide, and felony murder. Defense counsel objected. The trial court acknowledged defense counsel's objection, but stated that it lacked the authority to deny the State's request. The trial court's statement was incorrect. *See* ***Hawthorne v. State***, 99 Wis. 2d 673, 684, 299 N.W.2d 866 (1981) (A court should grant a request for a lesser-included offense only upon a finding that the evidence shows a reasonable basis for acquittal on the greater offense and conviction on the lesser). However, the evidence, as discussed in appellate counsel's no-merit report, shows a reasonable basis including the lesser-included offenses. *See* WIS. STAT. § 939.66(2) (When first-degree intentional homicide is charged, all other homicide charges under subchapter I of WIS. STAT. ch. 940 are lesser-included offenses). Based upon our independent review of the record, we agree with appellate counsel's assessment of the evidence and conclude that the trial court did not err in instructing the jury on lesser-included offenses. There is no arguable merit to a challenge of this issue.

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 to the no-merit report, Fischer-Hamilton contends that the State committed a ***Brady*** violation; that the State's late disclosure of evidence prevented defense counsel from preparing an adequate defense, and that certain witnesses lacked credibility. We have already addressed the issue pertaining to the alleged ***Brady*** violation and decline to discuss it further. We also note that the record does not support Fischer-Hamilton's contention that defense counsel could not properly prepare for trial. As to the issue of witness credibility, it was for the jury to resolve any supposed discrepancies in witness testimony. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984).

Our independent review of the record prompts us to address one issue not addressed in the no-merit report. Following sentencing, the trial court held a restitution hearing where Sims's sister sought $3394.39 for various expenses related to Sims's funeral, travel expenses, and his death announcement. The trial court heard testimony from Sims's mother, who helped make the funeral arrangements. She also provided receipts of expenses related to the funeral and travel costs for her other children. After evaluating all of the documentation, the trial court ordered restitution in the amount of $1497.18. Restitution orders are within the trial court's discretion, and our standard of review is highly deferential. *See* ***State v. Fernandez***, 2009 WI 29, ¶8, 316 Wis. 2d 598, 764 N.W.2d 509. We search the record for reasons to sustain the trial court's exercise of discretion. *See* ***State v. Hershberger***, 2014 WI App 86, ¶43, 356 Wis. 2d 220, 853

N.W.2d 586. Our review of the record shows that the trial court's decision resulted from an evaluation of testimony and numerous receipts. The trial court properly exercised its discretion. Accordingly, there would be no arguable merit to a challenge of the trial court's restitution order.

To the extent Fischer-Hamilton raised issues not addressed in this decision, we conclude that 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 John T. Wasielewski is relieved of further representation of Fischer-Hamilton in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals