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DISTRICT II

August 2, 2023

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

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

2021AP1730-CR State of Wisconsin v. Jacob J. Gallegos (L.C. #2016CF313)
2021AP1731-CR State of Wisconsin v. Jacob J. Gallegos (L.C. #2017CF254)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Jacob J. Gallegos appeals judgments of conviction for three counts of first-degree recklessly endangering safety with use of a dangerous weapon, one count of second-degree recklessly endangering safety with use of a dangerous weapon, and thirteen counts of witness intimidation, all as party to a crime. He also appeals orders denying postconviction relief. On appeal, Gallegos argues the circuit court erred by denying him an evidentiary hearing on his ineffective-assistance-of-counsel allegation. He also argues he is entitled to resentencing because the sentencing court relied on an improper factor. Based upon our review of the briefs

and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm.

Following a jury trial, Gallegos was convicted in connection with a gang-related shooting that injured a seventeen-year-old bystander and his subsequent intimidation of witnesses to that incident. He filed a postconviction motion, arguing counsel was ineffective for failing to call a witness he claimed would have refuted testimony from the eyewitnesses who identified him as the shooter. According to police reports, this witness told police that at about 2:00 a.m., she was standing on her upper balcony, which was one and one-half blocks away from the shooting, and saw two males run through her backyard "wearing hooded sweatshirts with the hoods covering their faces." Gallegos argued this testimony would have proven the shooters were "unidentifiable" and refuted the testimony of the three witnesses who testified at trial that Gallegos was the person who shot at them from close range. The circuit court denied Gallegos's ineffective-assistance-of-counsel claim without a hearing.

"A defendant is entitled to a ***Machner***[2] hearing if his postconviction motion sufficiently alleges ineffective assistance of counsel and the record fails to conclusively demonstrate that he is not entitled to relief." ***State v. Jackson***, 2023 WI 3, ¶1, 405 Wis. 2d 458, 983 N.W.2d 608 (footnote omitted). "If the motion does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the

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

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***State v. Ruffin***, 2022 WI 34, ¶28, 401 Wis. 2d 619, 974 N.W.2d 432.

To prove ineffective assistance of counsel, Gallegos must show that his trial counsel's performance was deficient and that he was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To be entitled to a ***Machner*** hearing, Gallegos must first allege facts that, if true, satisfy both the deficient performance and prejudice prongs of ***Strickland***. *See* ***Jackson***, 405 Wis. 2d 458, ¶11.

In evaluating Gallegos's postconviction motion, we assume the balcony witness would have testified consistently with her statement in the police report. We, however, disagree with Gallegos's assertion that the balcony witness's testimony would have undercut the other eyewitnesses' testimony or proven that the shooters were "unidentifiable[.]" The police reports indicate the balcony witness was at a different vantage point and almost two blocks away from the three witnesses situated directly in the alley who all testified Gallegos shot at them. Moreover, the balcony witness did not tell police that the circumstances were such that no one could have seen the two perpetrators' faces—she just told police that from where she was situated she could not see their faces because they were "wearing hooded sweatshirts with the hoods covering their faces." Gallegos's motion failed to establish his trial counsel was deficient for failing to call the balcony witness or that he was prejudiced by counsel's purported failure to call this witness. He was not entitled to an evidentiary hearing. *See* ***Jackson***, 405 Wis. 2d 458, ¶11.

Next, Gallegos argues he was entitled to resentencing on the ground that the sentencing court relied on an improper factor when it made comments about the justice systems of

Milwaukee and Chicago. A sentencing court erroneously exercises its discretion if it "imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors." ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409.

At sentencing, the circuit court focused on the great risks Gallegos's reckless shooting created. The court noted that it was the kind of dangerous behavior common in much larger cities: "It happens in Milwaukee and it happens in Chicago all the time[.]" The court continued, "We read on a monthly basis in the Chicago papers … and it happens all the time in Milwaukee -- children who are killed sitting in their grandfather's lap or children who are killed lying in a bathtub …, and they are hit by stray bullets from this gangland shooting." The court stated that it needed "to make the message loud and clear" that the community would not tolerate such behavior:

> Shooting a human being in the chest where the physician testified that life was in the balance[3] …; shooting a firearm and having a bullet pass within about a foot of a sleeping child,[4] you have to pay for that not because we want to get even with you, although there is a place for that, but again to make a message clear to you and to everybody else that Kenosha is not going to tolerate this.
>
> Too much has been tolerated elsewhere. It's not going to be tolerated here. What goes on in Chicago in the cesspool of plea bargaining or people who intimidate witnesses and keep them from testifying, we don't want that, so the people who testified against you need to know that they'll be protected.

[3] The seventeen-year-old shooting victim in this case was shot in the chest.

[4] During the shooting investigation, law enforcement found five bullet casings close to a camper parked nearby and found that a bullet had pierced the camper's wall, continued through a mattress where a woman was sleeping with her five-year-old daughter, and gone out the other side. The bullet's trajectory put it about twelve inches from the child's head.

The court continued, "I hope you … change the way you are living and spread the word that we want a safe community and that you [will] be … one of the people in that community who can enjoy the freedom of living in a place where you can safely walk … and not be afraid[.]"

We conclude that, in context, it is clear the sentencing court did not rely on an improper sentencing factor when it made comments about Milwaukee and Chicago. The court's comments reflected the facts of the case, which involved a short-range shooting in a residential area and witness intimidation. The court's comments were focused on the gravity of the offenses and the protection of the community. *See* ***State v. Williams***, 2018 WI 59, ¶46, 381 Wis. 2d 661, 912 N.W.2d 373 (The primary sentencing factors are: "(1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public."). The sentencing court did not consider an improper factor at sentencing. *See* ***Elias v. State***, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980) (An improper sentencing factor is one that is "totally irrelevant or immaterial to the type of decision to be made.").

IT IS ORDERED that the judgments and orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals