



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

December 5, 2023

To:

Hon. David A. Feiss
Circuit Court Judge
Electronic Notice

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

Angela Dawn Chodak
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Ladarius Terrell Romero 663379
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

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

2022AP1285-CRNM State of Wisconsin v. Ladarius Terrell Romero
(L.C. # 2020CF4042)

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

Ladarius Terrell Romero appeals a judgment, entered on a jury's verdicts, convicting him of armed robbery with use of force as a party to a crime, first-degree reckless injury as a party to a crime, and possession of a firearm as a felon. All of the charges include the enhancers for habitual criminality and repeat firearm crimes. Romero's appellate counsel, Angela Dawn Chodak, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22) and *Anders v.*

California, 386 U.S. 738 (1967).¹ Romero filed a response and counsel filed a supplemental no-merit report. We have independently reviewed the record and the no-merit submissions as mandated by *Anders*, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The charges stem from an incident that occurred in November 2020. According to the complaint, Kyle² picked up four men from his neighborhood, one of whom he knew, and agreed to give them a ride in his car. During the drive, the individual seated behind Kyle struck him in the back of the head with a gun. The other three men pulled out guns and took Kyle's car key and money from Kyle's pockets. Kyle was able to get out of the car and run away. While he was running, one of the men shot him. The four subjects then fled on foot. Daquan Grandberry, a co-defendant in this matter, subsequently identified Romero as being involved. Additionally, a detective identified Romero through video surveillance. The complaint further alleged that Romero was previously convicted of a felony.

The State charged Romero, Grandberry, and another individual with a total of eight offenses, some of which stemmed from separate incidents with other victims. The three charges against Romero, all relating to the incident involving Kyle, were as follows: armed robbery with use of force as a party to a crime; first-degree reckless injury as a party to a crime; and possession of a firearm by a felon. Each count included penalty enhancers. The case proceeded

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

² We use the same pseudonym for the victim that counsel uses in her no-merit filings.

to a jury trial. Romero stipulated that, as a convicted felon, he was prohibited from possessing a firearm.

The jury convicted Romero of all of the charges. The circuit court ordered him to serve sentences totaling fifteen years of initial confinement followed by ten years of extended supervision, and declared Romero eligible for the Challenge Incarceration Program after serving twelve years.

The no-merit report discusses a number of issues: the circuit court's pretrial rulings; Romero's waiver of his right to testify at trial; the sufficiency of the evidence; the jury instructions; the circuit court's exercise of its sentencing discretion; and Grandberry's recantation. In his response, Romero argues that he has newly discovered evidence and that his trial counsel was ineffective. This court is satisfied that the no-merit report properly concludes that the issues it raises are meritless. We will, however, briefly address the issues raised by Romero.

First, Romero argues that a recantation by Grandberry is newly discovered evidence. Counsel relays that during her investigation of the case, she contacted Grandberry who provided a written statement indicating that he lied about Romero being involved in the underlying crimes.³

When a claim of newly discovered evidence involves a witness's recantation, the defendant must also demonstrate that the recantation is corroborated *by other newly discovered*

³ Neither counsel nor Romero included Grandberry's letter with the no-merit submissions.

evidence. *State v. McCallum*, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997). Corroboration is necessary because “[r]ecantations are inherently unreliable.” *Id.* The no-merit report concludes there is no arguable merit to this claim because the newly discovered evidence is not corroborated.

Romero disagrees. He argues that “the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation are sufficient to meet the corroboration requirement.” *Id.* at 477 (citation omitted). Romero contends that in the letter, Grandberry admitted to testifying falsely against Romero at trial because the day before Grandberry was arrested the two got into a fight. The two fought when Grandberry learned Romero had sex with Grandberry’s sister. Grandberry purportedly said that when he was questioned by the police, he was still mad at Romero and named him as the shooter. Romero additionally claims that in the recantation letter, Grandberry identified “Cory” as the person who actually shot Kyle.

Setting aside whether the requisite circumstantial guarantees of trustworthiness exist, Romero overlooks that the feasible motive on which he relies must be newly discovered. *See id.* at 478 (concluding that “[t]he newly discovered requirement is met inasmuch as the motives for [the sexual assault victim]’s initial accusation were unknown until she revealed them when she recanted”); *see also State v. McAlister*, 2018 WI 34, ¶58, 380 Wis. 2d 684, 911 N.W.2d 77 (“Corroboration requires *newly discovered evidence of both*: (1) a feasible motive for the initial false statement; and (2) circumstantial guarantees of the trustworthiness of the recantation.” (Emphasis added.)). The feasible motive Romero relies on is not newly discovered because Romero would have known about it at the time of trial. We are not persuaded that Romero’s first argument presents an issue of arguable merit.

Next, Romero claims that trial counsel was ineffective for failing to request either a mistrial or other remedies, such as requesting to re-cross-examine Kyle. This claim hinges on the fact that the State failed to turn over a supplemental report prepared by a detective who showed Kyle a photo array that included a photo of Romero. Kyle failed to identify Romero as one of the four men who robbed and eventually shot him. Romero claims trial counsel could not properly prepare a defense for him because she went into the trial with the mistaken belief that Kyle was not shown a photo array that included Romero. According to Romero, without this information, trial counsel could not have investigated his claims of innocence.⁴ Romero contends that if trial counsel had asked to re-cross-examine Kyle, counsel could have established that Kyle had face-to-face contact with the shooter, yet did not identify Romero when shown a photo array.

This court normally declines to address claims of ineffective assistance of counsel in the context of a no-merit review if the issue was not raised postconviction in the circuit court. However, because appellate counsel asks to be discharged from the duty of representation, we must determine whether Romero's claims have sufficient merit to require counsel to file a postconviction motion and request a hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). We conclude that they do not.

⁴ At trial, Romero presented an alibi defense that he was with his sister and girlfriend when the crimes occurred.

The supplemental no-merit report explains that Romero would not be able to show prejudice stemming from counsel’s deficient performance:

First, the jury heard testimony from the officer that the victim did not identify Mr. Romero in the photo lineup. This fact leads to the conclusion that there was no prejudice, because the exculpatory evidence in question was in fact presented to the jury at trial.

Second, defense counsel said receiving the evidence earlier would not have changed her approach because she had always known that no identification was made. Because earlier disclosure of the evidence would not have changed counsel’s approach, a mistrial would not have been appropriate and therefore would not have been granted.

Third, defense counsel was able to use the lack of identification in the photo array, as part of her closing argument, stating, “[Kyle] has not ever identified Mr. Romero. And we heard testimony that he was shown a photo array containing Mr. Romero’s photograph. He was asked if anyone in that photo array shot him, and he did not identify Ladarious Romero.” The late disclosure did not prevent counsel from using the evidence to her client’s advantage.

(Record citations omitted.) We agree that Romero would not be able to show prejudice on this basis. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (To demonstrate the requisite prejudice when trying to establish ineffective assistance of counsel, “[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

Romero also claims that the prosecutor engaged in misconduct during his closing argument when he misstated Grandberry’s testimony:

When Detective Castro arrived on scene, he found a spent—freshly spent—it wasn’t weathered, it wasn’t old—380 cartridge. What did Daquan Grandberry say? Ladarious Romero had a 380 gun on that day. There was only one bullet fired, and it

came from a 380. And Ladarius Romero was the only one with a 380.

Romero points to Grandberry’s testimony that Romero had a .380 Ruger and asserts that trial counsel had an opportunity to rebut the prosecutor’s misstatements conflating the .380 Ruger with the .380 *cartridge*, but failed to do so. He notes that trial counsel did not object or request a curative instruction. According to Romero, this left the jury to consider the fact that Kyle was shot with a 380 bullet and that Romero was the only one who purportedly possessed a .380 gun.

The supplemental no-merit report explains, and we agree, that a mistrial was unlikely to be granted under the circumstances presented where this misstatement represented a small portion of the trial and in light of the other evidence implicating Romero. *See State v. Doss*, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150 (explaining that when deciding a motion for a mistrial, the circuit court “must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial” (citation omitted)). The supplemental no-merit report additionally notes that trial counsel addressed the mischaracterization in her closing, using it in a strategic way against the State.

Trial counsel argued:

And what did Detective Castro tell you? He told you that 380 casing could have been shot out of multiple different firearms. It could have been a 380 firearm. It could have been a nine millimeter. He said with ammunition that’s that size it can come from lots of different places. So any of the guns in the car potentially could have shot that casing.

We agree with the supplemental no-merit report’s assessment that a claim that trial counsel was ineffective on this basis also lacks arguable merit.

A review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Romero 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 Dawn Chodak is relieved of further representation of Ladarious Terrell Romero 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