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DISTRICT II

Amended January 17, 2024, as to panel of judges
December 13, 2023

To:

Hon. J. Arthur Melvin III
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
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Prentiss T. Adams, #626190
New Lisbon Correctional Inst.
P.O. Box 2000
New Lisbon, WI 53950-2000

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

2022AP1878-CRNM State of Wisconsin v. Prentiss T. Adams (L.C. #2018CF572)

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).

Prentiss T. Adams appeals from a judgment, following a jury trial, convicting him of attempted first-degree intentional homicide with use of a dangerous weapon, burglary of a building or dwelling as party to a crime, armed robbery as party to a crime, two counts of theft as party to a crime, and possession of a firearm by an adjudicated delinquent. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*,

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

386 U.S. 738 (1967). Adams filed a thirty-three page response. After reviewing the Record, counsel's report, and Adams' response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

A criminal complaint alleged that, during the early morning hours of November 10, 2017, Adams, who was then fifteen years old, along with Armon Vaccaro, Lauren Lowrey, and a juvenile, Kate,² went on a crime spree using a stolen car and stolen firearms. In broad strokes, the complaint alleged the four stole property from a vehicle parked in a driveway and then from inside someone's house. Adams also fired a gun at a victim who inadvertently witnessed them rummaging through a third person's car. The group then went to another victim's house where Vaccaro and Adams broke into the garage, stole some pepper spray, and when confronted by the homeowner, one of them pointed a firearm at her. The State charged Adams with attempted first-degree intentional homicide with use of a dangerous weapon, burglary of a building or dwelling as party to a crime, armed robbery as party to a crime, two counts of theft as party to a crime, and possession of a firearm by an adjudicated delinquent.

Although Adams was fifteen at the time of the incidents, the attempted-first-degree-intentional-homicide charge gave original jurisdiction to the criminal court rather than the juvenile court. *See* WIS. STAT. §§ 970.032(1), 938.183(1)(am). Following a preliminary hearing, the circuit court found probable cause to believe that Adams committed attempted first-degree intentional homicide. After a two-day reverse waiver hearing, the circuit court retained jurisdiction.

² For ease of reading and to protect confidentiality, we use a pseudonym when referring to the juvenile in this case.

At trial, George³ testified that on November 10th in the Town of Brookfield, he contacted police to report that during the night someone had stolen a Garmin GPS and a makeup bag from a vehicle parked in his driveway. Joe testified that he contacted police to report that, at approximately 4:00 a.m., someone entered his house and took his car keys and \$150 from his wallet. At approximately 4:30 a.m., Sam called 911 to report that someone had shot at him. He advised that as he was leaving for work, he observed a car stopped in front of his house and two individuals in his neighbor's driveway—one was inside his neighbor's vehicle. As Sam started to walk toward his neighbor's driveway, a male's voice yelled for him to go back inside. Sam heard someone yell, "Don't[,]" and then saw a muzzle flash, heard glass break right next to his head, and ran inside to call police.

At approximately 5:30 a.m., in the City of Oconomowoc, Lynn called police to report a burglary. She heard a noise in her garage, and when she went to investigate, a male was standing next to her car. While she was screaming for the male to get out, another male came around the front of her car and pointed a gun at her. Lynn reported a can of pepper spray was missing from her vehicle.

At approximately 1:58 p.m., in the City of Wisconsin Dells, police found Vaccaro, Lowrey, and Kate sleeping inside the stolen vehicle with the stolen firearms. Police also found the makeup bag and the Garmin taken from George's vehicle along with multiple cell phones. Police determined Adams was also involved. The jury saw cell phone photographs that the four had taken of themselves with the guns that were timestamped 3:49 a.m. on November 10th. The

³ Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym when referring to the victims in this case ("George," "Joe," "Sam," and "Lynn").

stolen vehicle used in the crimes had a GPS tracking device installed. The GPS data from the vehicle, which was corroborated by the cell phone data, indicated that between 3:30 a.m. and 5:30 a.m., the vehicle was at George's house, Joe's house, Sam's house, and Lynn's house. Police had a surveillance photograph from a McDonald's in Madison at 10:49 a.m. on November 10th showing Adams and Vaccaro purchasing food. Vaccaro, Lowrey, and Kate all testified that Adams was the one who shot at Sam. Adams did not testify. His defense was that Vaccaro was the individual who had shot at Sam. The jury found Adams guilty of all counts. The circuit court sentenced Adams to a cumulative sentence of twenty-five years' initial confinement and twenty-years' extended supervision.⁴

The no-merit report addresses whether Adams' trial counsel was ineffective in her handling of third-party perpetrator evidence, whether the evidence was sufficient to support Adams' convictions, and whether the circuit court properly exercised its discretion at sentencing. Adams filed a response, asserting there is arguable merit to each of the issues discussed by counsel. Additionally, Adams also challenges: the State's refusal to provide discovery before his preliminary hearing; the circuit court's denial of Adams' selective prosecution dismissal motion; the circuit court's decision to deny the reverse waiver and retain jurisdiction; and the racial composition of the jury. We discuss each issue in turn.

⁴ The court sentenced Adams to twenty-five years' initial confinement and twenty years' extended supervision on the attempted-first-degree-intentional-homicide count, five years' initial confinement and five years' extended supervision on the adjudicated-delinquent-in-possession-of-a-firearm count, five years' initial confinement and five years' extended supervision on the burglary count, ten years' initial confinement and ten years' extended supervision on the armed robbery count, and nine months' jail on both misdemeanor theft counts. The sentences were concurrent to each other but consecutive to any other sentence.

Adams first asserts there is an issue of arguable merit regarding whether the State was required to provide Adams with discovery *before* his preliminary hearing. He emphasizes that at a preliminary hearing for a juvenile under original adult-court jurisdiction, a circuit court needs to determine whether there is probable cause to believe the juvenile committed the violation that gave the adult court original jurisdiction, which in this case would be attempted first-degree intentional homicide. *See* WIS. STAT. § 970.032(1); 938.183(1)(am). Adams argued that he needed the State’s discovery before the preliminary hearing in order to present mitigation evidence or offer an affirmative defense to that charge. Following briefing and argument, the circuit court denied his motion. The court reasoned that Adams had not provided the court with any legal authority that would permit the court to order discovery before a preliminary hearing simply because a criminal court had original jurisdiction over a juvenile.

“Historically, the right to discovery in criminal cases has been limited to that which is provided by statute.” *State v. O’Brien*, 223 Wis. 2d 303, 319, 588 N.W.2d 8 (1999). WISCONSIN STAT. § 971.31, titled “Motions before trial,” provides, in relevant part: “In felony actions, ... motions under s. 971.23 ... shall not be made at a preliminary examination and not until an information has been filed.” Sec. 971.31(5)(b). Under that statute, because Adams was charged with a felony, the State was not required to provide Adams with discovery until *after* his preliminary hearing. There is no arguable merit to a claim that the State was required to provide Adams with discovery before his preliminary hearing.

Adams next argues there is an issue of arguable merit regarding his claim of selective and discriminatory prosecution. Adams moved to dismiss the complaint on the grounds of selective or discriminatory prosecution. He emphasized that Lowrey and Vaccaro, who were adults, had been charged with first-degree recklessly endangering safety as party to a crime, while Adams

was charged with attempted first-degree intentional homicide. Adams argued that he and the co-actors were similarly situated, and he was only charged with attempted first-degree intentional homicide “for the sole purpose of having the matter tried in adult court[.]”

“A prosecutor has great discretion in deciding whether to prosecute in a particular case.” *State v. Kramer*, 2001 WI 132, ¶14, 248 Wis. 2d 1009, 637 N.W.2d 35 (quoted source omitted). “A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” *Id.*, ¶15 (quoted source omitted). “A defendant has the initial burden to present a prima facie showing of discriminatory prosecution before he or she is entitled to an evidentiary hearing on the claim.” *Id.* To make a prima facie showing, “a defendant must show that he ... has been singled out for prosecution while others similarly situated have not (discriminatory effect) and that the prosecutor’s discriminatory selection was based on an impermissible consideration such as race, religion or another arbitrary classification (discriminatory purpose).” *Id.*, ¶18. “[D]efendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making prosecutorial decisions with respect to them.” *Id.*, ¶20 (quoted source omitted).

In response to Adams’ motion, the State advised the court that on March 19, 2018, it had filed criminal complaints against Lowrey and Vaccaro and a delinquency petition against Kate, charging all of them with first-degree recklessly endangering safety as party to a crime. The State explained that it did not initially charge Adams because the investigation was ongoing, and at that point, the State was not sure whether Adams was present. However, as the investigation progressed, the State learned that Adams was both present and the individual who shot at Sam. The State explained that “when we learned what the other actors[’] reaction to [Adams’]

behavior was, [which is] also contained in [Adams'] complaint, we did not think that we would be able to prove beyond a reasonable doubt that any actor other than [Adams] would be responsible for [shooting at Sam]." On April 10th, the State moved to dismiss the first-degree-recklessly-endangering-safety counts against Lowrey, Vaccaro, and Kate. The next day, it filed a complaint against Adams, charging him, in part, with attempted first-degree intentional homicide. The State explained "the only reason that the State filed an attempted homicide against Mr. Adams is because we believe we can prove he fired the gun." The State also argued that the defendants were not similarly situated because "there is one person that fired the gun and ... [t]he State filed charges on the culpability that the individuals had." The circuit court denied the motion, reasoning Adams and the co-actors were not similarly situated.

Our review of the Record satisfies us that the circuit court properly denied Adams' motion. *See id.*, ¶17 ("We review the circuit court's decision on whether the defendant has established a prima facie case on selective prosecution under the clearly erroneous standard[.]"). The circuit court was unconvinced that Adams, who was the only actor who fired a weapon at Sam, was "similarly situated" to the other, nonshooting coactors such that they should have received the same charges. There is no arguable merit to a claim that the circuit court erred by denying Adams' motion.

Adams next argues there is an issue of arguable merit as to whether the circuit court erred by retaining jurisdiction. Reverse waiver is the procedure by which a criminal court transfers a case against a juvenile offender to juvenile court. *See State v. Toliver*, 2014 WI 85, ¶18 n.7, 356 Wis.2d 642, 851 N.W.2d 251. At a reverse waiver hearing, the criminal court retains jurisdiction unless the juvenile shows, by a preponderance of the evidence, that: (1) if convicted, the juvenile could not receive adequate treatment in the criminal justice system; (2) transferring

jurisdiction to the juvenile court would not depreciate the seriousness of the offense; and (3) retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused. *See* WIS. STAT. § 970.032(2)(a)-(c); *State v. Kleser*, 2010 WI 88, ¶7, 328 Wis. 2d 42, 786 N.W.2d 144. If the juvenile meets this burden, the decision whether to transfer the juvenile to juvenile court is a matter of circuit court discretion. *See Kleser*, 328 Wis. 2d 42, ¶37.

Our review of the Record satisfies us that the circuit court properly declined to grant reverse waiver. Following a two-day evidentiary hearing, the circuit court found that “all of the witnesses testified that Defendant Adams continued to escalate his delinquent tendencies and action. He only stopped violating the law when he was in custody.... And even in custody he acted out and was repeatedly sent to more and more restrictive facilities[.]” The court then made a detailed ruling, explaining how Adams had failed to meet his burden of proof on each of the elements outlined in WIS. STAT. § 970.032(2)(a)-(c). Because a juvenile must satisfactorily demonstrate all three prongs of § 970.032(2) to even be considered for reverse waiver, failure to meet the burden to any one of them requires the circuit court to retain jurisdiction. Here, there is no arguable merit to challenge the circuit court’s decision on reverse waiver.

Adams next asserts there is an issue of arguable merit regarding his third-party perpetrator evidence. Pursuant to *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (1984), a defendant may introduce third-party perpetrator evidence only if the defendant establishes that the third party had a motive to commit the crime, an opportunity to do so, and a direct connection to the crime. Here, Adams advised he was going to allege that Vaccaro, not Adams, was the individual who shot at Sam. Adams pointed out that Vaccaro was holding the guns in the

photographs taken approximately one hour before the shooting, and Vaccaro was arrested with the stolen guns.

Then, to bolster Adams’ theory that Vaccaro shot at Sam, Adams moved the circuit court for permission to introduce “other acts” evidence regarding Vaccaro. In particular, Adams wanted to introduce:

1. Cell phone video of Armon Vaccaro shooting a gun out of the window of a moving car that appears to be the car used in connection to the matter before this court[.⁵]
2. [Kate’s] statement that she has done things like this in the past with Vaccaro.
3. [Kate’s] statement that she has a charge in Dane County for shooting the gun out the window with [Vaccaro].
4. [Kate’s] statement that she and [Vaccaro] shot a gun right next to the police station in Dane County when he was in the Ford Fusion that was used in connection to this matter.
5. [Kate’s] statement that Armon Vaccaro shot at a moving car in Milwaukee.

Following a motion hearing, the circuit court granted in part and denied in part Adams’ “other acts” evidence regarding Vaccaro. The circuit court analyzed the proffered evidence under the three-prong *Sullivan* analysis.⁶ The court excluded the cell phone video but permitted Adams to ask both Vaccaro and Kate at trial: “(1) have you ever shot a gun? (2) have you ever

⁵ This cell phone video footage was taken on November 7, 2017—three days before the incident in this case.

⁶ Wisconsin courts use a three-step framework when determining the admissibility of other-acts evidence. See *State v. Sullivan*, 216 Wis. 2d 768, 771-72, 576 N.W.2d 30 (1998). First, the evidence must be offered for a permissible purpose under WIS. STAT. § 904.04(2). *Sullivan*, 216 Wis. 2d at 772. Second, the evidence must be relevant under WIS. STAT. § 904.01. *Sullivan*, 216 Wis. 2d at 772. Third, the evidence’s probative value must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 772-73; see WIS. STAT. § 904.03.

shot a gun out of a moving vehicle/car? (3) when did you shoot a gun and when did you shoot a gun from a moving vehicle/car? and (4) from which car did you shoot a gun?” The court stated that if a witness denied shooting a gun from a car, “well, then you’ve got an opportunity to use this as rebuttal evidence.”

We review a circuit court’s admission of other-acts evidence for an erroneous exercise of discretion. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Our review of the Record confirms there is no arguable merit to assert the circuit court erroneously exercised its discretion by partially granting and partially denying Adams’ requested other-acts evidence.

Adams, who is black, next contends there is an issue of arguable merit based on the fact that he had an all-white jury. The United States Supreme Court has stated that a defendant “has no right to a ‘petit jury composed in whole or in part of persons of [the defendant’s] own race[.]’” *Powers v. Ohio*, 499 U.S. 400, 404 (1991) (citation omitted). A defendant “does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.” *Id.* Here, however, there is nothing in the Record or in Adams’ response to support a claim that jurors were selected based on discriminatory criteria. Thus, there is no arguable merit to this issue.

As to whether the evidence was sufficient to support Adams’ convictions, when reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury “unless the evidence, viewed most favorably to the state and the conviction, is so lacking 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, 507, 451 N.W.2d 752 (1990). Our review of the trial transcript persuades us that the State produced ample evidence to convict

Adams of his crimes. As to the attempted first-degree intentional homicide charge specifically, which Adams asserts in his response establishes Vaccaro was the shooter, Adams offered his defense at trial. However, “[i]t is exclusively within the trier of fact’s province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence.” *State v. Below*, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95. Here, the jury chose to believe Vaccaro’s, Lowrey’s, and Kate’s testimony that Adams was the shooter. There is no arguable merit to a claim that the evidence supporting Adams’ convictions was insufficient.

In regard to the circuit court’s sentencing discretion, our review of the Record confirms that the court appropriately considered the relevant sentencing objectives and factors.⁷ See *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Additionally, and contrary to Adams’ assertion, the circuit court *did* consider adolescent brain development and the impact of adverse childhood experiences. The court, however, then reasoned that “[w]e’re not talking about just ... committing delinquent acts. We’re talking about a series of escalating violence and offenses that are not acceptable.” The court also did consider Adams’ treatment needs, reasoning that treatment needed to “be provided in a correctional setting, because every other time you’ve had treatment, you’ve tried to escape.” The resulting sentence was within the maximum authorized by law. See *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. The

⁷ At sentencing, the parties agreed that the State would move to dismiss and read in for sentencing purposes Waukesha County Circuit Court case No. 2018CF676. In that case, the State charged Adams with attempted burglary while armed with a dangerous weapon as party to a crime, burglary while armed with a dangerous weapon as party to a crime, and possession of a firearm by an adjudicated delinquent. For read-in purposes, the State explained that that case involved two gun-store burglaries that occurred on January 19, 2018. “One is Select Firearms in Waukesha. That’s an attempted gun-store burglary. The alarm appears to have scared [Adams] and four others off.... They go to the Freedom Firearms Unlimited in Oconomowoc, and they make off with many, many guns.”

sentence was 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). We conclude there would be no arguable merit to a challenge to the court's sentencing discretion.

Our independent review of the Record does not disclose any potentially meritorious issue for appeal.⁸ Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Hans P. Koesser of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hans P. Koesser is relieved of further representation of Prentiss T. Adams 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

⁸ To the extent Adams' response includes assertions not specifically addressed in this opinion, we have considered those assertions and conclude they would not support any issues of arguable merit.