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DISTRICT I

July 2, 2024

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

2022AP1219-CRNM State of Wisconsin v. Fredrick Dion Rivera (L.C. # 2017CF4337)

Before White, C.J., Geenen and Colón, J.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).

Fredrick Dion Rivera appeals the judgment convicting him of first-degree recklessly endangering safety as a party to the crime and as a repeater. His appellate counsel, Jeremiah W.

Meyer-O'Day, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Rivera filed a response.[2] Upon consideration of the report, the response, and an independent review of the record as mandated by ***Anders***, this court summarily affirms the judgment because there is no arguable merit to any issue that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

The State charged Rivera with committing three felonies: two counts of first-degree recklessly endangering safety as a party to a crime with the use of a dangerous weapon and as a repeater; and one count of possessing a firearm as a felon. The State charged a co-defendant, Ahkeem Garrett, with identical counts. According to the complaint, shots were fired in two separate incidents approximately thirty minutes apart. The shots followed an altercation in a residential neighborhood. The complaint further alleged that Rivera was previously convicted of possessing a firearm as a felon.

The case proceeded to a jury trial. The jury found Rivera guilty of one count of first-degree recklessly endangering safety as a party to a crime and as a repeater. It found that he did not commit the crime while using a dangerous weapon and acquitted him of the other charges.

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

[2] This court rejected counsel's first no-merit report and dismissed this appeal but subsequently allowed counsel to file a replacement. Although he had the opportunity to do so, Rivera did not file a new response. We have considered his originally filed response in our resolution of this appeal.

The circuit court ordered Rivera to serve five years of initial confinement and four years of extended supervision.[3] This no-merit appeal follows.

Both the no-merit report and Rivera, in his response, discuss whether the verdicts were inconsistent so as to warrant a new trial. Unlike civil cases, however, there is no requirement that verdicts on multiple counts in a criminal case be consistent. ***State v. Thomas***, 2004 WI App 115, ¶¶41-43, 274 Wis. 2d 513, 683 N.W.2d 497. That is because "there is no way of knowing whether the inconsistency was the result of leniency, mistake, or compromise." ***Id.***, ¶42 (citation omitted). In any event, we see no inconsistency in the verdicts in light of the evidence presented. The jury appears to have concluded that the State had not met its burden of proof as to the first shooting incident but had proved that Rivera was guilty as a party to the crime with regard to the second shooting incident, which occurred approximately thirty minutes later.

The no-merit report and Rivera additionally address whether the evidence was sufficient to support his conviction. When reviewing the sufficiency of the evidence, we look at whether "the evidence, viewed most favorably to the [S]tate 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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted). "If any possibility exists that the trier of fact could have drawn

[3] The circuit court and the parties initially believed that a five-year mandatory minimum sentence applied to the charge, pursuant to WIS. STAT. § 973.123(2) and (3)(a) (2017-18). The State subsequently sought clarification as to whether the mandatory minimum applied. The circuit court ultimately concluded that the mandatory minimum did not apply but nevertheless adhered to the sentence it had initially arrived at, which was significantly less than the maximums allowed. *See* WIS. STAT. §§ 941.30(1), 939.50(3)(f), 939.62(1)(c) (2017-18).

the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn [the] verdict[.]" ***Id.*** (citation omitted).

The no-merit report details the evidence presented at trial, which included testimony from the two victims, F.J. and A.G., both of whom identified Rivera as being involved in the crimes. F.J. testified that he recognized Rivera from seeing him at his grandmother's house, which was next to F.J.'s residence. F.J. further testified that following an altercation that began outside of his home, he saw Rivera and another man near his driveway. F.J. testified that his fiancée, A.G., quickly shut the door to their residence, and F.J. subsequently heard two shots that hit the door. Afterward, F.J. testified that he looked out his window and saw Rivera and the other man drive away.

Shortly thereafter, F.J. testified that he saw Rivera and the other man pull up in front of his house. Rivera and the other man exited the vehicle they were in and stood at the end of the driveway, at which point the other man raised his hand and began firing a handgun. F.J. testified that "at first, [he] heard Rivera say some things like shoot his fucking ass, you know, to that effect." F.J. stated that the other man fired at least ten times, and that one bullet hit his Buick and two hit his work truck. After the bullets stopped, Rivera and the man with the gun ran back to the vehicle they arrived in and fled.

The testimony of A.G., the other victim in this matter, was very similar to that of F.J. A.G. testified that when Rivera and the other man returned, Rivera acted "like a cheerleader" and "was egging [the other man] on" as shots were fired in the second incident. A.G. testified that Rivera made statements like "get 'em, you know, things of that nature."

Rivera contends that the statements attributed to him by the victims were hearsay and were insufficient to show that he acted as a party to the crime. With party-to-a-crime liability, a person who is concerned in the commission of a crime may be convicted of the crime even though that person did not directly commit it. WIS JI—CRIMINAL 400. To intentionally aid and abet a crime, the defendant must know that another person is committing or intends to commit the crime and must have the purpose to assist the commission of that crime. ***Id.***

What Rivera describes as hearsay evidence—the statements attributed to him immediately prior to the second shooting—was evidence to which trial counsel did not object.[4] Even if we were to accept Rivera's premise that trial counsel was deficient for failing to object to this testimony, there is no prejudice from the lack of objection. To show prejudice, the defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305.

First, if the evidence did constitute hearsay, it would have qualified under an exception. *See, e.g.*, WIS. STAT. § 908.03(1) and (2) (detailing exceptions for present sense impression and excited utterance). Moreover, even without the purported hearsay evidence, there remained more than adequate evidence for the jury to conclude that Rivera either assisted or stood ready and willing to assist and the shooter knew of his willingness.

[4] This evidence was an admission by a party opponent under WIS. STAT. § 908.01(4)(b)1., which is not hearsay.

Both victims, who knew Rivera from the neighborhood, clearly identified him as being involved in the incident. They testified to Rivera leaving with another man after the initial altercation, then returning to the scene and standing at the end of the driveway with the man who was the shooter. Even if counsel can be said to have been deficient for failing to object, there is no prejudice from the failure given the other evidence of his guilt. The evidence was sufficient to support the jury's verdict, and based on the record before us, there would be no arguable merit to a claim of ineffective assistance of trial counsel.

The no-merit report goes on to discuss various sentencing issues. This court is satisfied that the sentencing issues are meritless and that there are 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 Rivera 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 Jeremiah W. Meyer-O'Day is relieved of further representation of Fredrick Dion Rivera 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