



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

August 6, 2024

To:

Hon. Jean M. Kies
Circuit Court Judge
Electronic Notice

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

Michael Griesbach
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Donald D. Moore 709634
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

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

2023AP967-CRNM State of Wisconsin v. Donald D. Moore (L.C. # 2021CF847)

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).

Donald D. Moore appeals a judgment, entered upon a jury's verdict, convicting him of first-degree reckless homicide while armed with a dangerous weapon as a party to the crime and as a repeater. His appellate counsel, Michael Griesbach, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32¹ and *Anders v. California*, 386 U.S. 738 (1967). Moore filed two responses and counsel filed a supplemental no-merit report. We have independently reviewed

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

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.

In 2021, Moore was charged with first-degree reckless homicide in connection with the shooting death of the owner of a grocery store in the city of Milwaukee eight years earlier. The charge stemmed from a local television station’s focus on Milwaukee’s “cold case” homicides, and its airing of surveillance video from inside the store, which led to new evidence implicating Moore. A jury convicted Moore following a four-day trial. The circuit court sentenced him to thirty-eight years in prison, comprised of twenty-three years of initial confinement and fifteen years of extended supervision.

The comprehensive no-merit report discusses a number of issues including whether Moore could challenge the sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. An appellate court will not overturn a conviction “unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The evidence at trial, which included testimony from eye witnesses and Moore’s co-actor, was sufficient to support the verdict.

Based on our independent review of the record, we agree with counsel that there are no other issues of arguable merit relating to the trial. This includes potential issues relating to the circuit court’s pretrial rulings, jury selection, opening statements, closing arguments, and jury instructions. We further conclude that there is no issue of arguable merit stemming from the circuit court’s exercise of its sentencing discretion.

Turning to the issues raised by Moore’s responses, he contends that his trial counsel was ineffective for failing to investigate witnesses who would have provided exculpatory evidence, including an alibi. To show ineffective assistance of counsel, a defendant must establish both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To establish prejudice, “[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.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Moore claims he told trial counsel that his alibi witness, Dynasty Perry, the mother of his child, was willing to testify on Moore’s behalf. However, he alleges that trial counsel never spoke to her. Moore also asserts that he told trial counsel about Wendy Davenport, a citizen witness, who purportedly had information that her nephews—not Moore—were responsible for the crime. According to Moore, trial counsel never investigated this information or the information he provided as to motives that other individuals had to testify against him.

We first consider Moore’s claim relating to Perry. During the trial, Rayshawn Williams testified against Moore. Williams testified that Moore is his half-brother and the two were together before and after the shooting occurred. Williams testified that Moore sent Perry to the store to “go map the scene out.”² According to Williams, Moore wanted to rob the store because

² Williams additionally testified that Perry is his cousin and he was reluctant to identify her as being involved in mapping out the store.

he thought it was “sweet,” meaning that the store owner was alone and did not have a gun. Williams testified that Moore later returned to the house where Williams was and said he shot the store owner because “[the store owner] was reaching for a gun.”

Appellate counsel explains that calling Perry as a witness would have been particularly risky in light of Williams’s testimony that she had mapped out the store. Additionally, it appears that counsel did investigate whether Perry might help his case, given that the record suggests he subpoenaed her for trial.³ Appellate counsel further notes that the alibi statement Moore made to the police, which a detective testified to at trial, “was not overly compelling.” In the statement, Moore admitted he was high on drugs the day the shooting occurred and moved from one location to another.

The trial transcripts reflect that after the State rested and the jury left the court room, the circuit court gave trial counsel an opportunity to discuss the case with Moore. When the parties returned, the following exchange occurred:

THE COURT: You spoke to your client about his right to testify or not testify?

[TRIAL COUNSEL]: I did speak to my client about that, as well as other witnesses that I had subpoenaed to come to court. I will make the following record. I would [have] needed probably a 45 minute adjournment. I thought we weren’t going to be needed until about 10:30, but my belief is the Court would have granted me that if I needed that.

THE COURT: That’s correct.

[TRIAL COUNSEL]: So none of the reasons logistically are the reasons we are not calling witnesses, they are for strategic

³ Trial counsel filed a Notice of Alibi identifying Perry and Perry’s mother as alibi witnesses.

reasons. Then, in my discussions with my client, it is my anticipation he will elect not to testify.

THE COURT: Do you agree with everything that your lawyer just said, sir?

[MOORE]: Yes, sir.

Appellate counsel contends that the decision not to call Moore's witnesses amounts to a strategic decision and asserts that trial counsel effectively brought out shortcomings of the identifications made by eyewitnesses and attacked the credibility of the State's witnesses, two of whom were in prison at the time, during his cross-examinations and closing argument. The fact that a strategy fails does not make trial counsel's representation deficient. *See State v. Koller*, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). Moreover, as evidenced by the record excerpt, Moore agreed with trial counsel's decision to proceed in this fashion.⁴ There is no arguable merit to a claim that trial counsel was ineffective for failing to call Moore's various witnesses.

In his submissions, Moore claims he asked appellate counsel for his discovery materials and trial transcripts, but counsel did not provide these items. Appellate counsel represents in his supplemental no-merit report that he served Moore with transcripts of all the proceedings in this case. *See* WIS. STAT. RULE 809.32(1)(d). The rules of appellate procedure do not require appellate counsel in a no-merit proceeding to provide discovery to the appellant. *See id.*

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 Moore further in this appeal.

⁴ The record belies Moore's claim that he was simply agreeing with counsel's strategy that he would not testify at trial.

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 Michael Griesbach is relieved of further representation of Donald D. Moore 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