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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

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To:

Hon. Paul R. Van Grunsven
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Donna Odrzywolski
6650 W. State St., Unit D, #234
Wauwatosa, WI 53213

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Terrell Omar Thomas
5033A W. 49th
Milwaukee, WI 53218

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

2011AP2454-CRNM State of Wisconsin v. Terrell Omar Thomas (L.C. #2010CF2878)

Before Fine, Kessler and Brennan, JJ.

Terrell Omar Thomas appeals from a judgment of conviction, entered upon a jury's verdict, on one count of manufacture or delivery of tetrahydrocannabinols (THC, the active ingredient in marijuana), contrary to WIS. STAT. § 961.41(1)(h)4. (2009-10).[1] Appellate counsel, Donna Odrzywolski, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12). Thomas was advised of his right to file a

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Thomas's response, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Police received a complaint about marijuana plants and responded to a residence. In fact, it was Thomas's father who had called to report plants in his son's bedroom. Thomas was not at the residence when police arrived, though he allegedly called the house while police were there and spoke briefly with one of the officers. Officers were shown to the rear bedroom where they recovered three containers with 120 plants from a closet. A field test on the plant material was positive for marijuana; the state crime lab later confirmed this. Two bags of seeds were recovered, one from the closet and one from the dresser in the room. Police also recovered two documents addressed to Thomas from the dresser. Following a jury trial, Thomas was convicted and sentenced to twenty-seven months' initial confinement and twenty-seven months' extended supervision. Additional facts will be discussed below as necessary.

Counsel raises three issues. The first two were identified as whether Thomas received effective assistance of trial counsel[2] and whether he received a fair trial, though the substantive discussion focuses on the sufficiency of the evidence and admission of certain testimony. The third issue counsel raises is whether the circuit court properly exercised its sentencing discretion. Thomas raises additional issues, most of which relate to sufficiency of the evidence. We

[2] In his response, Thomas denies any challenge to trial counsel's performance, saying "her performance was great."

conclude, however, that none of the issues raised in the report or the response are arguably meritorious.

I. Sufficiency of the Evidence

A. Quantity of Marijuana

A conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990). On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503. That is, in reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. ***Id.*** at 507. If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***Id.*** at 506-07.

One of Thomas's complaints in this case relates to the weight of the plants recovered. When police seized the plants, they recorded the weight as 25.59 grams for the plants, and 46.6 grams for the seeds. By the time the crime lab analyzed the plant material, it had disintegrated into a total of 3.3 grams.[3] Thomas contends that 3.3 grams is less than fifty plants.

[3] At trial, the State had the crime lab analyst explain how the degradation occurred. In short, the plants were wet when seized and sealed, leading to a breakdown of the plant material in the evidence bags.

The problem with Thomas's contention is that weight and quantity are two entirely different measures: the statute under which he was charged penalizes manufacture and delivery of "[m]ore than 2,500 grams but not more than 10,000 grams, *or* more than 50 plants containing tetrahydrocannabinols but not more than 200 plants containing tetrahydrocannabinols[.]" WIS. STAT. § 961.41(1)(h)4. (emphasis added). Even if police never had a sufficient *weight* of material to charge Thomas under this statutory subdivision, two officers testified that there was a *quantity* of 120 plants recovered from the containers, and the crime lab analyst later testified that she had confirmed the presence of THC in the plants. Thus, the number of plants is sufficient to sustain the verdict, even if the weight of those plants is not.

B. Possession of Plants

Thomas also complains that there was no direct evidence linking him to the plants. He points out that no witness ever testified that they observed him having anything to do with the plants. He also contends that they could have belonged to someone else in the home.

Thomas's probation officer[4] testified that the first time he was at Thomas's house, Thomas identified the rear bedroom as his. Police testified that they recovered two pieces of mail—a child support statement and a subpoena to appear as a witness—addressed to Thomas from that bedroom's dresser, the same dresser from which a bag of seeds had been recovered. Officer Michael Wawrzonek also testified about the phone call. While at Thomas's home, Thomas's father received a phone call and gave the phone to Wawrzonek. According to Wawrzonek, the caller identified himself as Thomas, so the officer told him what police were

[4] The jury was not informed that the witness was a probation agent.

doing at his home.[5] The caller, realizing he would be arrested if he came to the home, told police they would have to catch him first.

Trial counsel, to her credit, highlighted the fact that at least one other sibling lived with Thomas and his parents in the two-bedroom home, and the fact that the bedroom appeared to be a "junk room" where all sorts of miscellany were stored. She also elicited testimony that the child support statement was dated several months prior to the search, and the subpoena did not contain any acknowledgement, like Thomas's signature, that he had personally received it. However, we review the evidence in the light most favorable to the verdict. The jury could infer, from the probation officer's testimony, the proximity of Thomas's mail to the seeds and plants, and Thomas's purported conversation with Wawrzonek, that the plants in the bedroom were Thomas's. There is no arguable merit to a challenge to the sufficiency of the evidence to support the verdict.

[5] The transcript is not wholly clear on which officer testified. The testimony in question was originally attributed to Detective Warren Allen. We directed counsel to review the transcript and determine its accuracy because certain clues suggested it was not Allen who was testifying. Counsel contacted the court reporter, and then informed this court that a corrected transcript would be forthcoming.

The corrected transcript still attributes this testimony to Allen, though the transcript now indicates the testimony is part of a redirect examination by the State. However, while Allen testifies just prior to this "redirect examination," the transcript shows the State indicating it has *no* redirect examination by the State, and the circuit court appears to excuse him. Later, when the circuit court denied Thomas's motion to dismiss at the close of the State's case, it referred to the phone call testimony, identifying Wawrzonek as the source.

It appears to this court that, after Allen finished testifying, Wawrzonek was recalled to the stand. It is possible that the transcript does not so note because, after Allen's testimony, the circuit court briefly went off the record. We note this discrepancy only because it has complicated our factual recitations; the legal analysis is the same regardless of which officer testified. For purposes of this opinion, we attribute the testimony to Wawrzonek.

II. Admission of Evidence, Assistance of Counsel, and a Fair Trial

Thomas objects to two aspects of Wawrzonek's testimony.[6] Appellate counsel discusses these issues in the context of trial counsel's performance, as failure to make proper objections to prejudicial evidence can constitute ineffective assistance. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

A. The Phone Call as Hearsay

First, Thomas protests that admission of Wawrzonek's testimony about the phone call was improper, because Wawrzonek had never met Thomas and so the caller could have been anyone. The testimony in question is as follows:

> Q The person identified him as Terrell Thomas?
>
> A That's correct.
>
> Q What else did that person say?
>
> A I don't recall the exact words, the conference was, what are you guys doing there, meaning us police officers.
>
> And I said we're there because of the plant we found in your room, we need to talk to you about plants we found in your room, and he said, am I going to be under arrest if I come there? I said probably. And I said, but I need to talk to you first to get your side of the story, regarding what these plants are doing in your room.

[6] Thomas apparently complained to appellate counsel about his probation officer's testimony, calling it prejudicial. Appellate counsel does not know Thomas's theory of prejudice, and Thomas does not elaborate on this complaint in his response to the no-merit. Nearly all of the State's evidence against a criminal defendant is prejudicial in some way, but we do not exclude the evidence unless it is *unfairly* prejudicial. *See* ***State v. Alexander***, 214 Wis. 2d 628, 642, 571 N.W.2d 662 (1997). We discern no unfair prejudice here.

> And his -- we went back and forth, a couple sentences in that regard, and his final statement was well, I don't think I'm going to come over there.…
>
> …
>
> He said fuck you, you're going to have to catch me and he hung up the phone.

Appellate counsel, discussing whether this was objectionable hearsay, reasons that it was not because it was the statement of a party opponent—*i.e.*, it was Thomas's own testimony. We agree that if the caller was Thomas, then the testimony was admissible because Wawrzonek was relaying Thomas's own statement. *See* WIS. STAT. § 908.01(4)(b)1. (party's own statement offered against party is not hearsay).

Counsel does not respond to Thomas's contention that Wawrzonek "has no way of [knowing] for certain who he talked to." However, the caller identified himself, referred to the reason for the officers' presence, and inquired whether he would be arrested if he came to the house. It is unreasonable to infer that the caller was anyone other than Thomas, and Thomas does not point to anything in the record or in his response, other than unsupported speculation, to substantiate a claim that the caller was someone pretending to be him.

Accordingly, there was no basis on which trial counsel could challenge testimony about the phone call as hearsay,[7] so trial counsel was not ineffective for failing to do so. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). There is no arguable merit to a challenge to her performance.

[7] There was objectionable hearsay testimony earlier in this exchange, when Wawrzonek testified that Thomas's father told him it was Thomas calling. However, defense counsel objected to that testimony, and the trial court sustained the objection and instructed the jury to disregard it.

B. A Possible Confrontation Clause Violation

When Wawrzonek testified on redirect examination about speaking with Thomas on the phone, he said that he told Thomas, "I need to talk to you first to get your side of the story, regarding what these plants are doing in your room." On recross examination, he had the following exchange with defense counsel:

> Q You said his room. You're referring to the room yourself and your colleagues searched on the 8th of June, 2010?
>
> A That's correct.
>
> Q You couldn't be positive it was, in fact, his room, correct?
>
> A That was the room his father identified and told us was his room, and where he was staying. I was going off the information his father gave me, saying this is where Terrell stays.

In his response, Thomas contends this testimony violates his confrontation clause rights because his father was never called to testify, and he has a right to confront the witnesses against him.

The confrontation clause guarantees the right of the accused to cross-examine the witnesses against him. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 678 (1986). This includes witnesses who provide any testimonial statement intended to be used prosecutorially. *See* ***Crawford v. Washington***, 541 U.S. 36, 50-52, 68 (2004). However, the right to cross-examine, and thus the right to confrontation, is not absolute, and not every violation of the confrontation clause will result in reversal. *See* ***State v. Rhodes***, 2011 WI 73, ¶32, 336 Wis. 2d 64, 799 N.W.2d 850. Instead, we apply the harmless error test to confrontation clause violations. *See* ***id.***

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular

> case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

We will assume for argument's sake there was a violation of the confrontation clause because Thomas's father was never called to testify and, thus, never cross-examined on his statements to police. It is nevertheless obvious that any confrontation clause violation stemming from the failure to call Thomas's father to testify was harmless.

First, the State clearly did not need Thomas's father's testimony to persuade the jury. Second, Wawrzonek's testimony that the father told them the room was Thomas's is ultimately cumulative of the probation officer's testimony that Thomas himself identified the room as his. Third, the probation officer's testimony and the mail pieces found in the bedroom are corroborative.[8]

Most damning, though, is the fact that regardless of which side would have called Thomas's father to testify, his appearance would have permitted the admission of even more damaging testimony against Thomas than the State already had. His father would have been able to directly testify, for instance, that it was Thomas on the phone, providing a more solid

[8] We note that there is no valid hearsay challenge to be raised: though not entirely responsive to defense counsel's question, Wawrzonek was not testifying to prove the bedroom was Thomas's but, rather, to explain why that room was searched to the exclusion of others. Further, even if the testimony was meant to prove that the room was Thomas's, its admission is harmless because, as noted, there was already testimony that Thomas himself identified the room as his.

identification than Wawrzonek alone. He likely also would have testified why he believed the plants were Thomas's and why he considered the bedroom to be Thomas's, further strengthening the State's case. Even if his father denied making any of these statements, he would have been open to impeachment with them. Thus, because having Thomas's father testify was only likely to harm Thomas's case rather than benefit it, any confrontation clause violation in this case, assuming there was one, and any failure by counsel to raise the issue, was harmless.[9]

Accordingly, there is no meritorious basis to raise a confrontation clause challenge and, consequently, no arguably meritorious basis for a challenge to trial counsel's performance for failing to make it. *See* ***Harvey***, 139 Wis. 2d at 380. As there is no basis to challenge either aspect of Wawrzonek's testimony or trial counsel's performance, there is also no arguable merit to a claim that Thomas was deprived of a fair trial.[10]

III. Sentencing Discretion

The final issue counsel addresses is whether the circuit court erroneously exercised its sentencing discretion.[11] *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

[9] For the same reason, we could also say it was a reasonable strategy for trial counsel to avoid calling Thomas's father.

[10] Thomas complains that appellate counsel says he presented no defense and he asserts that, by making this statement, counsel has violated his right to remain silent. In fact, counsel actually said that Thomas presented "no defense case," which was simply her way of explaining, in the case's procedural history, that Thomas did not call any witnesses.

[11] Thomas, in his response, says he does not challenge the sentence imposed.

At sentencing, a circuit court must consider the principle objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. Thomas had a "litany" of juvenile and adult offenses. The circuit court perceived Thomas to have "attitudinal" issues that meant he did not seem to feel a need to follow society's rules. The circuit court concluded that it was necessary to fashion a sentence that would protect the public and send Thomas a message that his behavior would not be tolerated, especially when he was already on supervision for a prior drug conviction. The circuit court also intended the sentence to have a punishment aspect, imposing the DNA surcharge in this case "[a]s part of the punishment[.]" *See* ***State v. Ziller***, 2011 WI App 164, ¶¶10-11, 338 Wis. 2d 151, 807 N.W.2d 241.

The fifty-four month sentence imposed is well within the twelve-and-one-half-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is 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). There would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved of further representation of Thomas in this matter. *See* WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals