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June 24, 2013

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

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2012AP120-CRNM State of Wisconsin v. James Jermaine Davis
(L.C. # 2010CF1281)

Before Curley, P.J., Fine and Brennan, JJ.

James Jermaine Davis appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of attempted first-degree intentional homicide as party to a crime while armed with a dangerous weapon, one count of first-degree recklessly endangering safety while armed with a dangerous weapon, and one count of felony bail jumping. Appellate counsel, Paul G. Bonneson, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738

(1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Davis was advised of his right to file a response, and he has filed multiple responses. Counsel has provided two supplemental no-merit reports. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Davis's responses, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the police report, late in the evening of March 9, 2010, Jovan Washington was drinking at a bar, where he made the acquaintance of entertainer Patricia Wright. At closing time, the two decided to go out for breakfast. Washington followed Wright to her home, where she parked her car and got into Washington's vehicle, a Chevrolet Tahoe. As Wright got into the vehicle, she noticed a Pontiac Grand Prix on the same block. Wright later identified the driver as Davis, and there appeared to be a front-seat passenger.

Washington began driving, and the Grand Prix drove alongside the Tahoe. Washington asked Wright if this was the former boyfriend they had discussed earlier; she confirmed that it was. At a stoplight, the Grand Prix pulled up adjacent to the Tahoe. Washington rolled down his window. Davis called, "What's up, Trish?" Davis then told Washington that Wright had herpes and he should not be talking to her. Davis threatened to break all of Wright's car windows and drove away. Wright, concerned about her car, asked Washington to return to her home so she could move it. Once her car was relocated, they resumed their trip for breakfast.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Shortly thereafter, while stopped at an intersection, the Grand Prix reappeared, just slightly behind and to the right of the Tahoe.[2] No other vehicles or pedestrians were out at that time. Washington heard a single shot and realized he had been struck in the head. He accelerated and heard approximately six more shots. A detective found six spent 9mm brass "POM" casings in the street in the area of the shooting.[3] Officers began searching the area for the suspect Pontiac; a potential culprit was found within the hour. When the car was stopped, Davis was driving and he had a front-seat passenger. Lodged between the rear window gasket and the trunk lid was one 9mm brass "POM" casing, which was later forensically matched to the six other casings.

Davis was arrested and charged with attempted homicide relative to Washington, endangering safety relative to Wright, and bail jumping. The case was tried to a jury, which convicted him of all three counts. The circuit court imposed a sentence of sixteen years' initial confinement and ten years' extended supervision for the attempted homicide, a concurrent seven and one-half years' initial confinement and five years' extended supervision for the endangering safety, and a concurrent three years' initial confinement and three years' extended supervision for the bail jumping.

In the initial no-merit report, counsel addresses two potential issues, both of which he concludes lack arguable merit: sufficiency of the evidence to support the jury's verdict, and whether the circuit court properly exercised its sentencing discretion. Though Davis has filed

[2] Washington told the police that he observed the defendant driving the vehicle this second time, but at trial, he testified he did not see the driver.

[3] POM is apparently the designation for a specific manufacturer.

multiple responses, his complaints distill to three categories: a challenge to the sufficiency of the evidence, challenges to the effective assistance of trial counsel, and a claim that he was sentenced on inaccurate information.

**Sufficiency of the Evidence**

In reviewing the sufficiency of the evidence to support a conviction, 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. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Therefore, 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. A conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. ***Id.*** at 501-02. On appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 503. An appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict. ***Id.*** at 507-08.

To prove attempted first-degree intentional homicide as party to a crime with a dangerous weapon, the State had to show that Davis intended to kill and that Davis performed acts toward the commission of first-degree intentional homicide which demonstrate unequivocally and under all of the circumstances that Davis intended to kill and would have killed Washington except for the intervention of another person or some other extraneous factor. *See* WIS JI—CRIMINAL 1070. The State also had to show that Davis was concerned in the commission of the crime by either directly committing it or by intentionally aiding and abetting the person who directly committed it, *see*

WIS JI—CRIMINAL 400, and that Davis committed attempted first-degree intentional homicide while using a dangerous weapon, *see* WIS JI—CRIMINAL 990. To prove first-degree recklessly endangering safety, the State had to show that Davis endangered Wright's safety, by criminally reckless conduct under circumstances which showed utter disregard for human life. *See* WIS JI—CRIMINAL 1345. The party-to-a-crime and dangerous-weapon modifiers also applied to this count. To provide felony bail jumping, the State had to show Davis was arrested for or charged with a felony, was released from custody on bond, and intentionally failed to comply with the terms of the bond. WIS JI—CRIMINAL 1795.

The circuit court properly instructed the jury. Our review of the record satisfies us that sufficient evidence was adduced at trial to support the jury's verdicts. Detectives testified about the number and apparent angle of bullet holes, and about how the angle suggested the shots were fired from a lower vehicle, like a Grand Prix, into a higher vehicle, like a Tahoe. Circumstantial evidence, like the shell casing, linked Davis and the Grand Prix to the shooting. The direction of the bullets straight toward the driver suggested intent to kill, while the circumstances of shooting into a vehicle and possibly killing the driver suggested reckless endangerment of Wright. Evidence of the spent casings and testimony about hearing gunshots suggested a gun was used. A stipulation was read into the record regarding Davis's status on bond at the time of the altercation with Washington.

In his responses, Davis challenges the sufficiency of the evidence that he intentionally shot, or even possessed, a gun. Indeed, the theory of defense was that no one testified they saw Davis hold, much less shoot, the weapon. However, intent can be inferred from actions, so if the jury believed that Davis was the shooter, it could infer he intentionally fired the shots. Circumstantial evidence established Davis had the gun: testimony established that the shots

likely came from the driver of the smaller vehicle, and that Davis was driving a smaller vehicle both before and after the shooting. It is true that Washington testified that when he saw the Grand Prix the second time, before the shooting started, he could not see the driver, and he did not see Davis with a gun. Nevertheless, a jury could reasonably infer that the Grand Prix's driver did the shooting, that Davis was driving the Grand Prix, and that therefore Davis fired the shots. We do not disturb the jury's factual findings unless it relied on evidence that is inherently or patently incredible. *See* ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

Davis also raises multiple challenges to the party-to-a-crime aspect of the charges. He contends that there was no evidence of a "common design," that there was no proof of an accomplice whom he could have aided or abetted, and that, because he was charged as party-to-a-crime, the State had to prove more than just his direct involvement.

Common design is an element of conspiracy, *see* ***Bergeron v. State***, 85 Wis. 2d 595, 606-07, 271 N.W.2d 386 (1978), but conspiracy was not charged here. Davis was accused of either directly committing or intentional aiding and abetting the attempted homicide. Though there was not much evidence of an accomplice or an accomplice's role, there nevertheless was testimony that when the Grand Prix was stopped, there was a passenger in the vehicle. In any event, if the jury was persuaded that Davis had directly committed the crime, that was, in fact, all the State needed to show on the party-to-a-crime component. *See* ***State v. Brown***, 2012 WI App 139, ¶13, 345 Wis. 2d 333, 824 N.W.2d 916 (because defendant directly committed crime, he could be and was charged with party-to-a-crime liability). Ultimately, our review of the record satisfies us that sufficient evidence was adduced at trial to support the jury's verdict.

**Ineffective Assistance of Trial Counsel**

Davis also makes several arguments that can be reviewed as claims of ineffective trial counsel. There are two elements to claims of ineffective assistance: first, counsel must have performed deficiently, and second, the deficient performance must have been prejudicial. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "We give great deference to counsel's performance, and, therefore, a defendant must overcome 'a strong presumption that counsel acted reasonably within the professional norms.'" ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801 (citation omitted). We need not address both the performance and prejudice elements if the defendant cannot make a sufficient showing as to one or the other. ***State v. Tomlinson***, 2001 WI App 212, ¶40, 247 Wis. 2d 682, 635 N.W.2d 201, *aff'd* 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367.

First, Davis complains that trial counsel failed to interview Washington and Wright on the "inconsistency" of their statement and why they were "saying two [different] stories prior to the alleged shooting." We are unable to discern any deficient performance or prejudice from his record. Davis does not tell us the nature of the inconsistences, so we cannot evaluate whether counsel should have investigated further. Moreover, Wright did not testify at trial, so no inconsistencies were put before the jury and left unexplored, and counsel had a full opportunity to cross-examine Washington at trial.

Second, Davis complains that trial counsel improperly and prematurely invoked his speedy trial right without his consent and without completing an investigation. Here, we discern no prejudice. Davis specifically contends that expediting the trial prevented counsel from having time to interview Michael Mixon and Kamisha Amos, who ostensibly would have offered Davis

some form of alibi. However, the private investigator hired by original trial counsel spoke with Amos. In the investigator's report, Amos confirms Davis borrowed her Grand Prix and that he left her house alone. She believed he was going to meet up with Mixon. When Amos awoke at 3 a.m., she realized she had missed calls from both men. When she called Mixon, police answered his phone. We discern neither prejudice nor deficient performance: Davis does not specify what information Mixon had, *see* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994), and Amos had no exculpatory evidence to offer. If anything, Amos's information tends to support the allegations against Davis.

Third, Davis complains that trial counsel failed to interview "witness" Hasina Robinson, who claimed to have been woken up by gunshots and who heard arguing outside her apartment building. Again, we discern no deficiency—nothing indicates where Robinson lived relative to the crime scene. Moreover, police testified that they had received no other reports of gunshots that evening, and that they were confident the holes in the Tahoe were not the result of stray bullets fired by someone on the sidewalk.

Fourth, Davis complains that trial counsel refused to tell the jury that police must have planted the single casing on the Grand Prix's trunk. However, Davis notes that counsel explained to him that no jury would believe that defense. Instead, she explained, the better defense was to show the jury that no one could put a gun in Davis's hands. To the extent counsel made a strategic choice, that choice was reasonable, and we will not second-guess it. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325.

Fifth, Davis complains that trial counsel failed to pursue a suppression motion filed by her predecessor. However, there is no basis in this record on which a suppression motion would

have succeeded. Davis is referring to an attempt to suppress Washington's out-of-court identification of him in a photo array. To succeed, Davis must first show that the array was impermissibly suggestive. *See* ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404. The only aspect that Davis challenges is that Washington identified him as "light-complected" before seeing the array. The nature of this complaint is unclear: there is nothing unduly suggestive about Washington providing the information to police. To the extent that Davis may be claiming he is the only light-complected individual pictured in the array, we have reviewed the array and we simply do not agree. Thus, the suppression motion would not have succeeded, and counsel was not ineffective for failing to pursue a meritless issue. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

Sixth, Davis complains that reports of two officers were not disclosed. However, he does not indicate how he knows they exist or what information was in them. Accordingly, we can discern no prejudice from counsel's failure to pursue them as pretrial discovery. To the extent Davis may be attempting to make a claim for postconviction discovery, he must show that the non-disclosed reports actually contain beneficial information, not simply that they might contain such information. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999).

Seventh, Davis complains that trial counsel failed to object to Officer Luke O'Day's testimony regarding "trajectory science." O'Day gave testimony regarding the use of trajectory rods to evaluate the angle at which the bullets were fired into Washington's Tahoe, as well as to explain how a shell casing might end up on the Grand Prix's trunk lid. Davis specifically claims that O'Day should not have been allowed to give expert testimony.

It is not evident that O'Day's testimony was proffered as "expert" testimony.[4] However, it is well-settled that "[e]xperience is a proper basis for giving an expert opinion[.]" ***State v. Johnson***, 54 Wis. 2d 561, 565, 196 N.W.2d 717 (1972). A lay expert may provide testimony based on experience. When one party lays a sufficient foundation for a lay witness's expert opinion, the burden shifts to the adverse party to show insufficiency of the foundation. *See* ***State v. Whitaker***, 167 Wis. 2d 247, 257-58, 481 N.W.2d 649 (Ct. App. 1992). Here, defense counsel did attempt to challenge O'Day's foundation, asking, "If you are not trained in trajectory science, how did you just testify about everything you just testified about?" However, O'Day explained:

> As far as using trajectory rods, it's a simple procedure [that he had performed five to ten times previously] of sticking them through holes inside a vehicle. It's easy to follow because they travel in a straight line. As far as the casings and their trajectories, in 15 years, I've trained with my handgun in multiple scenarios, so I know where casings eject to.

We do not perceive a valid basis on which an objection to O'Day's testimony would have been sustained, so counsel was not ineffective. *See* ***Cummings***, 199 Wis. 2d at 747 n.10.

Eighth, Davis raises additional complaints about counsel regarding the party-to-a-crime aspect of the case. He contends that counsel should have objected to the party-to-a-crime jury instructions, that counsel should have objected to the State's party-to-a-crime arguments, and that trial counsel, by her closing, improperly invited the State to comment on party-to-a-crime liability. These arguments are premised on Davis's erroneous beliefs about the sufficiency of the evidence and the State's burden.

[4] The criminal complaint was filed on March 13, 2010, so recent revisions to WIS. STAT. ch. 907 are inapplicable. *See* 2011 Wis. Act 2, § 45 (revisions first apply to cases filed after February 1, 2011).

As we have explained, sufficient evidence supports the party-to-a-crime element, at least by direct commission if not the alternate aiding and abetting, so the instruction was warranted and there was no basis for counsel to object to the jury instructions. *See* ***Foss v. Town of Kronenwetter***, 87 Wis. 2d 91, 106, 273 N.W.2d 801 (Ct. App. 1978) ("An instruction must be warranted by the evidence and should not be given where the evidence does not support it."). Davis complains that trial counsel improperly opened the door for the State when she argued that no one saw a gun in Davis's hand, allowing the State to argue that even if the jury believed that the passenger, not Davis, was the shooter, the jury could still convict Davis if it believed he was driving to assist the passenger. However, it is not ineffective of counsel to have pursued that theory of defense and to have pointed out factual voids that might give rise to reasonable doubt. Further, while Davis complains the State's argument was improper because there was no evidence whatsoever of a passenger in the Grand Prix, there was, in fact, such evidence—police testified there was a passenger in the Grand Prix when it was stopped after the shooting. The State did not engage in misconduct by referencing the passenger, so trial counsel had no reason to object. Ultimately, the record reveals no arguably meritorious basis on which to claim ineffective assistance of trial counsel.

**Sentencing Discretion**

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal 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 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* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Here, the circuit court noted that Davis's offense required serious punishment to keep him off the street and protect the community. After the State went through a list of fourteen cases involving Davis, the circuit court observed that while some of those cases were dismissed when the witnesses failed to show up, there were too many incidents to ignore—rather, they suggested a pattern. In addition to what the State described, the circuit court noted that "there are restraining orders or petitions for domestic abuse injunctions that were sought against Mr. Davis as well and were not granted when petitioners did not show up." The circuit court noted that the facts before it seemed to suggest that Davis was prone to fits of jealousy or acting out against women.

The circuit court observed that Davis had appeared for sentencing in a red jumpsuit, which meant he was being disciplined by the jail for fighting. As such, the circuit court disagreed with Davis's assertion that he was not a menace. The circuit court explained that these were very serious offenses. It noted that Davis clearly intended to kill Washington, or he would not have aimed for his head and back. It commented that the seriousness was mitigated only by the fact that no one had died. In setting the length of Davis's sentence, the circuit court noted that he would be released from confinement at age forty, by which point, the circuit court hoped, Davis would have matured enough to not be such a threat to the community.

The maximum possible sentence Davis could have received was eighty-eight and one-half years' imprisonment. The concurrent sentences totaling twenty-six years' imprisonment are well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are 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 sentencing court's discretion in setting the sentence length.

Davis complains that he was sentenced on inaccurate information, noting that the State did not "mention or indicate about any restraining orders … or indicate any type of history of [j]ealousy or acting out against [women]." He also complains that there is "nothing on the record that Davis manipulated the [alleged] woman the sentencing judge" referenced.

It is not clear where the circuit court's information on the restraining orders came from—no presentence investigation report was prepared and, while the State recited fourteen different case numbers in which Davis was a defendant, none of those involved restraining orders. However, appellant counsel, in his supplemental report, includes copies of the electronic docket entries for some of the restraining order cases involving Davis.[5] Appellate counsel also included docket entries for three of the misdemeanor batteries, referenced by the State, that were dismissed when a witness failed to show. In all three of those cases, a no-contact order was entered, prohibiting Davis from contacting the same person—this person was also the petitioner in at least one of the restraining order cases.[6] As the circuit court noted, there is a pattern to

[5] Though Davis objects to these, appellate counsel is allowed to provide facts outside the record to refute Davis's claims. *See* WIS. STAT. RULE 809.32(1)(f).

[6] The second case does not include the petitioner's name.

these charges and dismissals. While Davis complains about the circuit court's reference to them because they were dismissed, the circuit court is still allowed to consider the unproven incidents. *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.

To obtain resentencing, Davis would have to show that the circuit court sentenced him on information that is actually incorrect. Counsel has demonstrated that the information regarding the restraining orders was not incorrect, so there is no arguable merit to a claim that Davis was sentenced on inaccurate information.

Our independent review of the record reveals no other potential issues of arguable merit.[7]

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 Paul G. Bonneson is relieved of further representation of Davis in this matter. *See* WIS. STAT. RULE 809.32(3).

*Diane M. Fremgen*
*Clerk of Court of Appeals*

[7] To the extent that Davis has raised other issues that we have not directly addressed, they can be deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).