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

2019AP570-CRNM State of Wisconsin v. Kevin Omar Sims (L.C. # 2017CF5482)

Before Brash, P.J., Donald and White, 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).

Kevin Omar Sims pled guilty to possession of a firearm by a felon, attempted armed robbery, and attempted first-degree intentional homicide by use of a dangerous weapon, all as a habitual offender. During the course of his pleas, he admitted that he had prior convictions for armed robbery, a violent felony as defined in WIS. STAT. § 973.123 (2017-18).¹ For possession

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

of a firearm by a felon, he faced maximum penalties of a \$25,000 fine and a fourteen-year term of imprisonment. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g), 939.62(1)(b). For attempted armed robbery, he faced maximum penalties of a \$50,000 fine and a twenty-six-year term of imprisonment. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c), 939.32 (1g), 939.62(1)(c). For attempted first-degree intentional homicide while armed, he faced a potential maximum penalty of a seventy-one-year term of imprisonment with a mandatory minimum five-year term of initial confinement. *See* WIS. STAT. §§ 940.01(1)(a), 939.32(1)(a), 939.50(3)(b), 939.62(1)(c), 939.63(1)(b), 973.123(2), (3)(a). The circuit court ultimately imposed three consecutive evenly bifurcated ten-year terms of imprisonment. Sims appeals.

Appellate counsel, Attorney Christopher P. August, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Sims filed a response. Based upon our independent review of the no-merit report, Sims’s response, and the record, we conclude that no arguably meritorious issues exist for an appeal. We summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, police responded on November 4, 2017, to a report of a shooting at a tavern on West Capitol Drive in Milwaukee, Wisconsin. M.P., the tavern owner, told police that shortly after 9:00 p.m. that evening, a man entered the tavern carrying a semi-automatic handgun. The gunman, subsequently identified as Sims, pointed the gun at the tavern’s security guard, K.M., and announced: “this is a robbery, empty your pockets and give me your money.” M.P. said that he seized the handgun that he kept behind the bar and, upon hearing gunshots, fired a shot at Sims. K.M. told police that after the shooting stopped, he heard Sims’s gun “clicking as if it was empty.” K.M. then disarmed Sims and restrained him while M.P. called the police. A detective who also responded to the scene observed bullet strikes and

casings consistent with Sims having fired multiple shots towards the bar rail and with M.P. having fired a shot towards Sims. The complaint went on to allege that Sims was convicted in Milwaukee County on November 7, 2006, of two counts of armed robbery by threat of force and was serving a term of extended supervision for those crimes on November 4, 2017. The State charged Sims with one count of possessing a firearm while a felon, one count of attempted armed robbery, and one count of first-degree recklessly endangering safety while armed, all as a habitual offender.

Sims disputed the charges and demanded a jury trial. On the June 2018 trial date, the State filed an amended information. In that document, the State charged Sims, as a habitual offender, with possessing a firearm as a felon, attempted armed robbery, and attempted first-degree intentional homicide while armed. As to the latter charge, the State alleged that pursuant to WIS. STAT. § 973.123(1)-(3)(a), Sims faced a mandatory minimum five-year term of initial confinement. The trial was then adjourned to August 2018 to permit Sims additional time to prepare.

On the adjourned trial date, Sims advised that he had reached an agreement with the State. Pursuant to that agreement, Sims would plead guilty as charged in the amended information, the parties would jointly recommend a fifteen-year term of initial confinement, and the State would not make a recommendation as to the length of extended supervision. Both parties were free to argue regarding whether the sentences should be consecutive to or concurrent with the periods of postrevocation confinement that Sims was serving for the two 2006 armed robbery convictions. The circuit court accepted Sims's guilty pleas, and the matters proceeded immediately to sentencing.

We first consider whether Sims could pursue an arguably meritorious claim for plea withdrawal on the ground that his guilty pleas were not knowing, intelligent, and voluntary. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). We agree with appellate counsel that Sims could not do so. Sims completed a guilty plea questionnaire and waiver of rights form, and the circuit court found that he understood the contents of that document. *See State v. Pegeese*, 2019 WI 60, ¶37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Sims that complied with the circuit court’s obligations when accepting a plea other than not guilty. *See id.*, ¶23; *see also* WIS. STAT. § 971.08; *Bangert*, 131 Wis. 2d at 266-72.

Sims suggests that the plea colloquy was deficient because his “mental health was not fully vetted” and because the circuit court relied on information from trial counsel to conclude that Sims understood the plea proceedings. The transcript does not support these contentions. The circuit court questioned Sims about his allegation that he had been prescribed medication in the past for mental health conditions, and Sims confirmed that, notwithstanding that history, he understood the proceedings. The circuit court found that Sims had “answered everything appropriately” and that he was “following along just fine.” Our review of the proceedings confirms that assessment. Sims’s alleged history of mental illness does not provide a basis to doubt Sims’s competency to enter guilty pleas. *See State v. Smith*, 2016 WI 23, ¶38, 367 Wis. 2d 483, 878 N.W.2d 135 (“a competency determination is distinct from a defendant’s mental health history”); *see also State v. Weber*, 146 Wis. 2d 817, 827-28, 433 N.W.2d 583 (Ct. App. 1988) (explaining that, absent evidence of incompetence at the time of the court proceeding, prior mental illness alone does not give rise to a *bona fide* doubt as to competency).

There is no basis to challenge the validity of Sims's guilty pleas on the ground that he had a history of mental illness.

Sims also appears to challenge the validity of his plea to attempted first-degree intentional homicide on the ground that he did not successfully shoot anyone during the November 4, 2017 incident, and therefore "the State would have had a hard time proving first-degree intentional homicide." These contentions do not constitute an arguably meritorious reason to disturb Sims's guilty plea to the homicide charge. By pleading guilty, Sims admitted that "an inculpatory inference can be drawn from the complaint or facts admitted to This is the essence of what a defendant waives when he or she enters a guilty or no contest plea." *See State v. Black*, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363.

As a final basis for challenging his guilty pleas, Sims implies that they are invalid because the circuit court did not explain "exactly what the State would have to prove" to obtain convictions for the three crimes at issue. There is no arguable merit to this claim. While a circuit court must establish that a defendant understands the elements of the offenses to which he or she pleads guilty, the circuit court may fulfill that obligation in a variety of ways: "summarize the elements of the offenses on the record, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." *See State v. Brown*, 2006 WI 100, ¶¶56, 58, 293 Wis. 2d 594, 716 N.W.2d 906. Here, Sims initialed copies of the jury instructions describing the elements of each offense, and he filed those instructions with his guilty plea questionnaire and waiver of rights form. During the plea colloquy, the circuit court established that Sims understood each document that he filed with his plea questionnaire and waiver of rights form, and the circuit court also summarized the elements of each offense to

which Sims pled guilty. Further, Sims acknowledged his understanding that he was a habitual offender because in Milwaukee County Circuit Court case No. 2006CF4650, he was convicted of two counts of armed robbery by threat of force. Accordingly, no basis exists to suggest that the circuit court failed to establish Sims's understanding of the charges he faced.

In sum, the record demonstrates that Sims entered his guilty pleas knowingly, intelligently, and voluntarily. Further pursuit of this issue would be frivolous within the meaning of *Anders*.

We next conclude that Sims could not mount an arguably meritorious challenge to his sentences. A circuit court exercises its discretion at sentencing, and our review is limited to determining whether the circuit court erroneously exercised its discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Here, the circuit court identified deterrence and community protection as the goals of sentencing, *see id.*, ¶41, and the circuit court considered the gravity of the offenses, Sims's character, and the need to protect the public when fashioning sentences to achieve the identified goals, *see State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In assessing the gravity of the offenses, the circuit court described the crimes as "serious matters" that endangered the tavern's employees as well as Sims himself. Turning to Sims's character, the circuit court recognized that Sims had "gone past high school in [his] education" and was "obviously an intelligent person" but had "always given into the drugs ... [d]espite a number of opportunities to turn that around." As to the need to protect the public, the circuit court placed particular emphasis on Sim's twenty-one prior criminal convictions and found that his history of robbery and burglary required sentences that "keep people safe on the street."

Sims complains that the circuit court did not “look at treatment as an option,” but the circuit court explained that the significance of his need for treatment “frankly pales badly in comparison to [consideration of] the safety of others.” A circuit court has discretion to determine both the factors relevant to sentencing and the weight to assign to each relevant factor. *See State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Although the circuit court did not prioritize treatment in this case, that choice does not constitute an erroneous exercise of discretion. *See State v. Prineas*, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 (“our inquiry is whether discretion was exercised, not whether it could have been exercised differently”).

The record reflects that the circuit court considered appropriate and relevant sentencing factors. *See Gallion*, 270 Wis. 2d 535, ¶¶41-43. The sentences that the circuit court selected were well within the limits of the maximum sentences allowed by law and cannot be considered unduly harsh or unconscionable. *See State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. A challenge to the circuit court’s exercise of sentencing discretion would lack arguable merit.

Finally, Sims suggests that his trial counsel was ineffective in one or more ways. A defendant who claims that counsel was ineffective must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Our review of the record does not reveal an arguably meritorious basis to pursue a challenge to trial counsel’s effectiveness in this matter.

Sims claims that his trial counsel “failed to meet with [Sims],” but he then acknowledges that in fact he met with his trial counsel five times. There is no arguable merit to this claim.

Sims next asserts that his trial counsel did not adequately prepare for trial because trial counsel failed to interview witnesses “to show a different motive” and failed to seek additional “footage from the bar” to prove that Sims did “n[o]t sho[o]t first.” These allegations also fail to suggest an arguably meritorious basis for claiming that trial counsel was ineffective.

First, motive is not an element of any crime, and the State is therefore never required to prove motive in order to obtain a conviction. *See State v. Wilson*, 2015 WI 48, ¶63, 362 Wis. 2d 193, 864 N.W.2d 52. Exploration of motive thus would not have assisted Sims in developing a defense to the crimes in this case.

Second, the record is clear that an investigation into who fired the first shot in the tavern would not have affected either the charges against Sims or the length of his aggregate sentence. At sentencing, the State played the surveillance video recorded during the incident and pointed out that Sims “introduced a gun into the equation” when he walked into the tavern brandishing a handgun. The State also reminded the circuit court that K.M. described Sims saying “this is a robbery, give me your money.” The rule is long established that when “an armed gunman ... points his gun at an intended victim and announces, ‘[t]his is a stickup[]’ ... the right of self-defense is on the part of the intended victim at whom the holdup man’s gun is pointed, not on the side of the gunman commencing the stickup.” *See Ruff v. State*, 65 Wis. 2d 713, 726, 223 N.W.2d 446 (1974); *see also* WIS. STAT. § 939.48(1),(4) (providing that a person may use force in defense of self or others to prevent or terminate what the person reasonably believes to be an unlawful interference with the safety of the person or a third party). Further pursuit of this issue would lack arguable merit.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Christopher P. August is relieved of any further representation of Kevin Omar Sims. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals