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November 11, 2014

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

2012AP1731-CRNM State of Wisconsin v. Leonard R. Chosa (L. C. #2010CF131)

Before Hoover, Stark and Hruz, JJ.

Counsel for Leonard Chosa has filed a no-merit report concluding there is no basis to challenge Chosa's convictions upon a jury verdict for one count of armed robbery; one count of substantial battery with use of a dangerous weapon; two counts of attempted armed robbery, all as party to a crime; and possession of a firearm by a felon. Chosa has responded and also filed a supplemental response. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

This case arises out of events occurring in the Town of Lac Du Flambeau on October 7, 2010. Scott LaPlante, Michelle James and Matthew Kwietnewski arranged to meet Clyde Martin to buy three Percocet pills.[1] The group met Martin in the garage at his grandmother's home where Martin resided. The group entered the garage and Martin closed the door. Chosa came out of the house with a black semi-automatic handgun and pistol-whipped Kwietnewski in the upper lip. The group was ordered to empty their pockets. James and LaPlante had nothing of value but Kwietnewski's gold necklace, cash and bank ATM card were taken. Chosa then struck Kwietnewski a second time with the pistol in the back of the head. Another individual, Victor Reyes, entered the garage and told Chosa and Martin to let them go, and the group was allowed to leave. They subsequently called 911.

Chosa's trial was held over four days on September 20-23, 2011. Numerous witnesses testified, and Chosa testified in his own defense. Chosa claimed he was sitting around a table with Martin and several others when Martin received a phone call that made him upset. Martin told Chosa three people were coming over and one of them was known to be violent and carry guns, and he wanted Chosa to help him if a fight broke out. Chosa claimed he later heard Martin call his name from the garage as if in distress, and Chosa immediately ran to the garage and noticed a male reaching behind his back with both hands. Chosa insists he ran up to him and punched him in the face "as hard as I could." Chosa claimed he was wearing a ring on his left hand when he struck the individual in the face, causing the injury to Kwietnewski's upper lip. Chosa also asserted the punch caused the person to fall back and hit the back of his head on the

[1] James, LaPlante and Kwietnewski initially told police they went to collect a debt owed to Kwietnewski, but later admitted they went to buy Percocet pills.

garage door, causing the injury to the back of the head. Chosa insisted he did not have a gun. Chosa also contended he saw the individual throw his wallet on the floor, but Chosa contended he had no prior indication that a robbery was to occur. Chosa testified he had been previously convicted of fourteen crimes.

The jury convicted Chosa on all charges. The circuit court imposed sentences consisting of twelve years' initial confinement and eight years' extended supervision on the armed robbery count; two years' initial confinement and eighteen months' extended supervision on the substantial battery count, consecutive to count one; two years' initial confinement and two years' extended supervision on the attempted armed robbery counts, concurrent to each other and concurrent to count one; and one year initial confinement and two years' extended supervision on count five, consecutive to counts one and two.

Any challenge to the sufficiency of the evidence would lack arguable merit. This court must view the evidence in the light most favorable to the State and must sustain the verdicts unless no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 497, 451 N.W.2d 752 (1990). The jury is the arbiter of witness credibility and this court will not overturn the jury's credibility assessments unless they are inherently or patently incredible or in conflict with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

At trial, numerous witnesses testified. Kwietnewski testified he knew Martin about four years prior to the date of the incident, but did not know Chosa and had no "axe to grind against him[.]" On the date in question, he was with LaPlante at James' residence. James phoned Martin to purchase Percocet pills. He rode along with James and LaPlante, and when they

arrived at Martin's grandmother's residence, James parked the vehicle in the driveway. James and LaPlante went into the garage to see Martin, who was accompanied by a female. Martin and James then waived Kwietnewski into the garage, and he was under the impression they would be smoking marijuana. However, Martin confronted him, words were exchanged, and Martin shut the garage door. Chosa then "just runs out of the door from the house … runs right up to me, and hit me in the face with the gun."

Kwietnewski described the gun as "a black pistol, a semi-automatic, Taurus, I believe, I have one almost like it." The strike was to his upper lip and the impact "just about took that entire piece of my skin out of my face … [i]t was hanging on by, oh, maybe a quarter inch of skin." Kwietnewski testified "I had to have stitches, to have it put back in, or sewed back on. There was a gigantic gaping hole under my nostril. I could have shoved my tongue through it. There was blood and everything all over the floor."

Chosa then said, "Give us your wallet and your chain," and Martin added, "[G]ive us all your money." Ultimately, Kwietnewski got his wallet back but it was missing $160 to $180 and his bank debit card. He was then struck again with the pistol by Chosa in the back of the head. Martin picked up a sledgehammer from underneath a vehicle and held it "as if to, you know, get ready to strike me with it." Reyes at this point "was telling them to open the garage door and let me out."

Reyes testified he was living with Chosa, who was his "little brother's father." On the date in question, Reyes heard Chosa say, "I feel like robbing this mother fucker[,]" but Reyes did not think he was serious. Later, in the garage, he heard Martin and Kwietnewski arguing about $90, "that had to do with … getting some pills or something." Reyes also observed Martin with

three pills in a plastic baggie. Martin said to Kwietnewski, "I am going to rip you off, you ain't getting shit." Chosa then hit Kwietnewski in the face "right underneath his nose[]" with the pistol. Chosa told Kwietnewski, "Empty your fucking pockets[,]" and instructed him to put his money and chain on the floor. Chosa then struck Kwietnewski a second time in the back of the head with the pistol. Reyes further testified Martin then "tried to, like, pick up this pipe underneath this car, and he was – he was going to, like, continue hitting this guy with it." At this point, Reyes got in the middle of everyone and told Chosa and Martin to stop, "you already got his money and everything, you know, just let these fucking guys go, just let them go, you know." Reyes testified that later that same day, Martin "stopped at the house and grabbed some stuff and took off running."

James testified Martin texted her regarding Percocet pills and she went to meet Martin, along with Kwietnewski and her boyfriend LaPlante. She went into the garage where Martin was with two girls. James handed Martin $90 for the three pills, but Martin did not provide her the pills, stating he wanted to smoke marijuana first. Martin instructed her to ask LaPlante and Kwietnewski to come into the garage. When the group entered the garage, Martin confronted Kwietnewski and said something like, "I heard you were talking shit about me." Shortly thereafter the garage door closed and Chosa entered carrying a black gun. Martin said that everyone needed to empty their pockets and Chosa then struck Kwietnewski in the lip with the barrel of the gun. Kwietnewski's lip "started bleeding all over the garage floor." Martin said, "Everybody empty your pockets[,]" and "we didn't know who we were messing with." James took out her lighter and LaPlante took out his cell phone. Kwietnewski dropped his wallet and necklace. Chosa hit Kwietnewski again with the pistol on the back of the head. James noticed

Martin with a sledgehammer, and then Reyes entered the garage and tried to open the garage door so they could leave.

LaPlante testified the group was going to meet Martin in Lac Du Flambeau "[t]o get Percocets." They intended to purchase three pills for $90. Upon arrival, Martin motioned for Kwietnewski and himself to come into the garage. They began to discuss smoking marijuana, when Martin and Kwietnewski began arguing. Shortly thereafter the garage door closed, Chosa walked out of the house with a black gun, and Martin told everyone to empty their pockets. LaPlante took his cell phone out of his pocket and James put her hands up. Kwietnewski put his valuables on the floor as instructed by Martin. Chosa struck Kwietnewski in the face with the barrel of the gun. LaPlante was six feet away and testified the pistol "looked like a 9 millimeter." Chosa struck Kwietnewski a second time in the back of the head with the gun. LaPlante also testified Martin "[grabbed a] sledgehammer" and Reyes was trying to open the garage door. As the group was walking out, Martin said, "You guys are lucky." Martin then called James back and handed her one Percocet.

Martin's cousin, Michael Martin, testified he was also living at Martin's grandmother's house on October 7, 2010. Later that day, Chosa, Martin and Chosa's girlfriend Penny Chapman asked him where the bleach was. They took the bleach into the garage, and Chapman was "pouring the bleach where – where there was blood spots, and she was scrubbing it with a push broom." Chosa was telling everyone what to do in the garage and seemed to be "directing the traffic, so to speak …."

Chapman testified she, Chosa and others were eating at Martin's grandmother's house when Martin became involved in a phone conversation. Martin said some people were coming

over for drugs. Chosa said they were going to "rob the fuckers" and that Martin was "all for this." Chosa subsequently took Chapman's van to his residence and returned with a black gun in his belt, and with Reyes. Chosa and Martin again discussed robbery.

When the three victims arrived, Martin told James to ask the other two to come into the garage so they could "fire up with them." At that point, Chapman went back into the residence. Ten minutes later, an individual named Wenonah Soulier came running into the residence in a panic and flagged Chapman into the bathroom. Soulier told her "there's blood everywhere[.]" Soulier said Martin and Kwietnewski had gotten into a verbal argument and then Chosa hit Kwietnewski with a gun. Chapman and Soulier then went back to the garage but the victims had already left. Everyone was in a panic. Martin came out of the house with some bleach and "put it on the floor, so I grabbed, like a scrub brush type of thing and I started scrubbing it off the ground. And [Martin] had a hose and he started hosing, spraying the blood off the ground." When Michael Martin came out, Chosa and Martin told him "if the cops come tell them that, you know, you washed the car." Martin also stated, "we wouldn't be charged because the victims weren't going to show up to the preliminary hearing." She noticed Martin carrying a sledgehammer "back into the house." When they were cleaning up the garage, Martin had a gold chain and Chosa said he wanted to see it so Martin handed it to Chosa. Chosa said "it was too light to be worth anything." Chosa also had $60 of blood stained money, and Chapman overheard them say they got a credit card, or a debit card.

That night, Chapman and Chosa "slept in the woods behind his house." They got camping equipment from Chosa's house, and when they were both in his room with the door shut, Chosa went over to the window where there was a vent. "[Chosa] said he would get rid of

the gun, and he pulled it out of his waist and he threw it down the vent, and said that no one was ever going to find it."

Chapman also testified that Chosa later brought up the subject about "what to say." She admitted writing an untrue letter under Chosa's direction, stating she witnessed two unknown males injuring Martin in the garage, and that Chosa came to the rescue to defend Martin. Chosa's cousin, Vincent Diver, subsequently forwarded a letter from Chosa to Chapman telling her to re-write what he directed as to what had happened. She further testified that Chosa directed his sister to give Chapman a ring. Chapman testified on rebuttal that in the month she had dated Chosa, she saw him wear his wedding ring, but she never saw him wear a ring on his left hand other than his wedding ring. The ring introduced at trial as the ring Chosa allegedly wore on his left hand on the date in question was not his wedding ring, and she never saw that ring before.

Martin testified that on the day in question Chosa and several others were with him at his grandmother's residence to eat. Martin made arrangements to sell Percocet pills to James. Chosa suggested they should "rob the fuckers" when they came over to purchase the drugs, but Martin did not think he was serious. Chosa left and returned with a black gun, and with Reyes. Chosa told Martin to get everyone in the garage and he would enter when the garage door was closed. When the victims arrived, James entered the garage to purchase the Percocet, but Martin told her to ask the other two to come into the garage. Once they entered, Martin closed the garage door. After receiving the money for the pills from James, Martin informed her he was not going to give her the pills. Chosa then entered the garage. Martin and Kwietnewski had a verbal dispute, and Chosa hit Kwietnewski in the upper lip with the barrel of the gun. Martin then "armed myself with a sledgehammer." Martin and Chosa told the group to empty their pockets,

but James and LaPlante had nothing of value to take. Chosa then hit Kwietnewski in the back of the head with the gun. Reyes said, "Stop it you guys," Martin opened the garage door, and the victims left. Chosa wanted to clean the blood off the floor, so Martin obtained the bleach. Chosa and Martin told Michael Martin if the cops come, tell them you were washing the car. Chosa later told Martin he only obtained $60 from the incident. Chosa subsequently "brought some notebooks and some pens to write statements." False statements were later written at Chosa's direction.

Wenonah Soulier testified she was at Martin's grandmother's residence to eat. Martin was on the phone and informed those eating that someone would be coming over to buy some pills, and he was going to rip them off. Chosa also said he "wanted to rob them." Chosa then left the residence and returned with Soulier's cousin, Victor Reyes. A female entered the garage and Martin asked her if they "wanted to smoke." Two males then entered the garage. The female handed Martin money but he did not give her anything. Martin "shut the big garage door, and they started arguing." Chosa then entered the garage and hit one of the guys with the barrel of a gun in the face, and in the back of the head. Martin told them to empty their pockets. Chosa told Kwietnewski, "Put it on the floor." Chosa also told him to "take off the chain." Soulier picked up the wallet, money and necklace because Chosa told her to. Chosa "grabbed it out of my hands" and put it in his pocket. Several minutes after Chosa struck Kwietnewski with the gun a second time, Soulier ran into the bathroom in the house to tell Chapman what happened and wash off blood. Later, Soulier heard Martin tell Michael Martin, "if the cops came to tell them that we weren't here and that he was washing the cars off."

Lola Barrs testified that on October 8, 2010, she received a phone call from Chosa saying "he had hit somebody" with a gun over $160, and that he "wanted to get out of town."

Maria Romanenko, a physician at Howard Young Medical Center, testified she treated Kwietnewski during the early morning hours of October 8, 2010. Based on her observations, the injuries were consistent with being struck by "one round cylinder, with a considerable amount of force."

William Newhouse, a Wisconsin Department of Justice Crime Laboratory forensic scientist, testified the injuries to Kwietnewski were consistent with a pattern injury that could be caused by a handgun that is between 9 millimeters and 13 millimeters. He also testified the ring Chosa claimed was used could not have caused the injury because the ring was not circular.

In short, the evidence of Chosa's guilt was overwhelming. The jury had the right to disbelieve Chosa's story. As the circuit court noted at sentencing, "We have the testimony of everybody, everybody except you, that there was a firearm … [b]ut the [d]efense was, it was a ring. I didn't have any gun at all. … It didn't play." There is no arguable issue regarding the sufficiency of the evidence.

There is also no arguable issue concerning whether a new trial is warranted because the circuit court denied Chosa's motion to strike a juror for cause. A potential juror indicated in voir dire that he previously worked as an administrator in law enforcement and Chosa's name came up on occasion. However, the potential juror stated he was absolutely confident he could deliberate fairly. In any event, he was struck as a juror through the use of a peremptory challenge. Any circuit court error that could somehow be assumed in this case was fully corrected. *See* ***State v. Lindell***, 2001 WI 108, ¶¶111-13, 245 Wis. 2d 689, 629 N.W.2d 223.

There is also no basis to challenge the circuit court's denial of a motion for a new trial because the defense was unable to question witnesses as to their drug use, and other drug

transactions. The court concluded the issue was not relevant and collateral. Moreover, the court stated,

> I think the jury has a fine sense, at this point, of the basic nature and character of all the witnesses who have testified in this matter in that regard. And I think the flavor of the case certainly is such that it's unnecessary to inquire as to particular instances of drug use that are unrelated to the night in question.

Nothing in the record demonstrates the court erroneously exercised its discretion in determining particular instances of drug use did not have a tendency to make any fact of consequence to this action more or less probable and, even if relevant, that its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or waste of time. *See* WIS. STAT. §§ 904.01, 904.03.[2]

There is also no arguable issue concerning the circuit court's denial of a motion to exclude the letter Chapman testified Chosa wrote, and instructed her to re-write as if she authored it. The court was satisfied a proper foundation was established to identify Chosa as the author of the letter. Chapman testified she was familiar with Chosa's handwriting, having received about twenty-five letters from him in the past, and having known him since she was fourteen or fifteen years old. She was also familiar with the initials N.B.C., utilized in the letter, as referring to Chosa's nickname, "Nunia" B. Chosa. The record sufficiently supports the court's finding that the document was what it was purported to be. *See* WIS. STAT. § 909.01.

In his response to the no-merit report, Chosa argues his trial counsel was ineffective. He contends counsel should have "rais[ed] an objection to the use of the stunbelt," which Chosa was

[2] All references to the Wisconsin Statutes are to the 2011-12 version.

purportedly forced to wear under his clothing during trial, and also for not "requesting that the court make an individualized determination on the specific threat that the defendant posed." However, Chosa concedes "there is nothing in the transcripts documenting the fact that the defendant was restrained during trial."

Chosa also requests a hearing "to see if the jury observed the device …." Chosa's argument is speculative. Chosa further argues that even if the jury did not see a restraint, "a new trial is still warranted based on the obvious [e]ffect the device had on the defendant when he testified." Chosa claims he was "so nervous he almost made himself sick just at the thought of going up on the stand, which was obvious enough for the court to have a garbage can placed at the defendant's feet." Chosa suggests the court gave the jury "the excuse that he had the stomach flu, an excuse that was transparent once the jury was able to observe the defendant for a matter of minutes and clearly see that he did not have a fever or any of the other signs of stomach flu …." This contention is belied by Chosa's own sworn testimony.

When Chosa took the stand the following testimony occurred:

> Q: And I understand that today you're conflicting with some kind of stomach flu?
>
> A: I didn't - Yes.
>
> Q: And that's the reason for the basket being there?
>
> A: Yes, sir.

Given Chosa's sworn testimony in open court, his current contention that he did not have the flu, but rather was nervous to the point of being sick is disingenuous.

Chosa also claims his trial counsel gave him "erroneous advice." He contends that he told his first appointed counsel that he never had a firearm and "the weapon he used to defend others was a BB gun." According to Chosa, when counsel heard this, he told Chosa "a BB gun was not a good defense," and suggested "that it could have been a ring which caused the injury to the victim." Chosa claims counsel "had to withdraw in order to avoid suborning perjury should Chosa take the stand." Chosa claims it was "utterly ridiculous to take the position that it was a ring," when everyone testified he had a gun. Chosa contends counsel "failed to proceed with the BB gun defense, which would have enabled him to obtain a more favorable plea bargain …."

Again, Chosa's sworn trial testimony belies his current argument. Under oath, Chosa testified in open court that he was not armed, did not have a gun, and was wearing a ring on his left hand that caused the injuries. It is more than disingenuous to suggest that "providing evidence that it was a BB gun would have given [Chosa] some credibility in arguing a defense of others strategy."

Chosa also insists trial counsel was ineffective because he "should have challenged" the crime lab witness. Chosa claims the expert "is not qualified to give an opinion as to what caused a blunt force injury to the very elastic upper lip of a person. He has no medical training on identifying or treating injuries or forensic pathology." This argument goes to the weight of the testimony. Furthermore, the witness's qualifications are amply supported by the record, and he testified he considered other evidence including the emergency room physician's report concluding the injuries were consistent with being struck by one round cylinder. In addition, the witness was adequately challenged by means of cross-examination.

Chosa also contends trial counsel was ineffective for relaying a plea offer "before he could have possibly been in a position to intelligently discuss the necessary facts." According to Chosa, his counsel "obtained a refusal of a plea offer before he had been on the case for 3 weeks and before he had received the case files [from prior counsel]." Chosa insists, "Had counsel given the defendant a sober accounting of the evidence against him, including every single person involved or at the scene, and a letter, written by the defendant which was extremely damning to his character and any defense, he would have accepted the plea offer in question."

However, Chosa has failed to demonstrate that he was not sufficiently aware of the State's case prior to his rejection of the offer. Among other things, extensive police reports were attached to the complaint, including the detailed statements of James, LaPlante, Kwietnewski, Martin, Soulier, and Chapman, each stating Chosa used a handgun during the course of the robbery and beating. The complaint also indicates Chapman "had a letter in her possession at the time of her arrest." Chosa fails to demonstrate an arguable issue concerning his considerable burden to show that absent "a sober accounting of the evidence against him" there is a reasonable probability that he would have accepted the plea offer. *See* ***Lafler v. Cooper***, 132 S. Ct. 1376, 1385 (2012).

In his supplemental response to the no-merit report, Chosa also argues that his initial counsel was ineffective for failing to challenge the sufficiency of the criminal complaint. Chosa contends, "The point being here is that the complaint incorporated non-eyewitness reports which presents/recounts unsworn declarations of 3rd parties of compromised reliability." Chosa also argues the complaint "simply attaches some reports." However, a criminal complaint is legally sufficient if it contains facts that would lead a reasonable person to conclude a crime probably occurred and the defendant named in the complaint probably was responsible. The test is one of

"minimal adequacy," calling for a commonsense, not hypertechnical, evaluation. *See* ***State v. Smaxwell***, 2000 WI App 112, ¶5, 235 Wis. 2d 230, 612 N.W.2d 756. Here, the police reports were incorporated by reference into the complaint, and there is no arguable issue regarding reliability or adequacy.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered the proper factors, including Chosa's character, the seriousness of the offenses and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The sentences were authorized by law and not unduly harsh or excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERD that the judgments are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Timothy O'Connell is relieved of further representing Chosa in this matter.

Diane M. Fremgen
Clerk of Court of Appeals