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

2017AP1934-CR State of Wisconsin v. Najee M. Harmon (L.C. # 2015CF2839)
2017AP1935-CR State of Wisconsin v. Najee M. Harmon (L.C. # 2015CF2871)

Before Kessler, P.J., Brash and Dugan, 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).

In these consolidated appeals, Najee M. Harmon appeals the judgments convicting him in Milwaukee County Case No. 2015CF2839 of armed robbery as a party to a crime, *see* WIS. STAT. §§ 943.32(2), 939.05 (2015-16),[1] and in Milwaukee County Case No. 2015CF2871 of one

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

count of first-degree reckless injury with use of a dangerous weapon, two counts of first-degree recklessly endangering safety with use of a dangerous weapon, and with one count of possession of a firearm by a felon as a repeater, *see* WIS. STAT. §§ 940.23(1)(a), 941.30(1), 941.29(2),[2] 939.63(1)(b), 939.62(1)(b). He also appeals the order denying the joint postconviction motion he filed in the two cases. Harmon argues that the evidence was insufficient to convict him of armed robbery, the State breached the plea agreement at sentencing, and the trial court erroneously exercised its sentencing discretion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the judgments and the order.

Background

Case No. 2015CF2839 ("the armed robbery case")

On June 16, 2015, police were dispatched to a check cashing store based on a report of an armed robbery. Harmon was ultimately charged with armed robbery as a party to a crime, and the case proceeded to a jury trial.

At trial, the victim testified that on the day of the crime, her brother went inside the check cashing store, and she waited for him in the front passenger seat of his car. As the victim was looking in the passenger seat's visor mirror, a stranger got into the back seat of the car and said, "This is a robbery." The victim ultimately gave the robber her wallet, and he jumped out of the car and into another car that quickly drove off.

[2] WISCONSIN STAT. § 941.29(2) was repealed by 2015 Wis. Act 109, § 8 (eff. Nov. 13, 2015). Harmon, however, was charged with violating § 941.29(2) prior to its repeal.

A police officer who was dispatched to the crime scene also testified at Harmon's trial. He explained that when he arrived, he spoke to the victim who was upset and "somewhat confused." He asked her to come to the police station to look at some pictures. The officer testified that the victim positively identified Harmon in a photo array as the man who had robbed her outside the check cashing store.

The jury found Harmon guilty of armed robbery as a party to a crime.

Case No. 2015CF2871 ("the first-degree reckless injury case")

Three days after the armed robbery, police officers were investigating a burglary when they saw a car that was reported stolen. As the officers watched, they saw a man get into the car's driver's seat. The police then drove toward the car, blocked it from moving, drew their weapons, and told the man to surrender. The man got out of the car and fled on foot.

As he ran, the man fired a gun at the police. The police returned fire. One of the man's gunshots hit an officer in the pelvic area causing significant injuries.

Police eventually identified Harmon as the shooter. The State charged him with three counts of attempted first-degree intentional homicide with use of a dangerous weapon as a repeater and possession of a firearm by a felon as a repeater. Harmon subsequently entered into a plea agreement with the State relative to this case. The agreement provided that he would plead to the reduced charges of first-degree reckless injury with use of a dangerous weapon, two counts of first-degree recklessly endangering safety with use of a dangerous weapon, and possession of a firearm by a felon as a repeater. In exchange, the State agreed to recommend prison time in an amount left to the trial court and would specifically stand "silent" regarding

whether Harmon's sentence should run concurrently or consecutively to any other sentence. The trial court accepted Harmon's guilty pleas.

Sentencing and Postconviction Proceedings

At the request of Harmon's trial attorney, the trial court sentenced Harmon on both cases at one hearing. In the armed robbery case, the State recommended eighteen years of initial confinement followed by fifteen years of extended supervision and asked that the sentence be ordered to run consecutively to Harmon's other sentences. As to the charges in the first-degree reckless injury case, the State stayed silent on whether the sentences should run concurrently or consecutively and recommended that the prison term be set "in an amount up to the [c]ourt."

After considering various sentencing factors, the trial court sentenced Harmon to a total term of fifty-four years of initial confinement and thirty-five years of extended supervision.

Harmon filed one postconviction motion seeking relief in both cases. He argued that the evidence was insufficient to convict him of armed robbery, the State breached the plea agreement at sentencing, and the total sentence was unduly harsh, unconscionable, and amounted to an excessive exercise of the trial court's discretion. The trial court denied relief. Harmon renews his postconviction arguments on appeal.

Discussion

A. Sufficiency of the Evidence

Harmon appeals, challenging the sufficiency of the evidence and the denial of his motion for a directed verdict. To avoid undue repetition, we consider these two related challenges together, analyzing the evidence in the State's case-in-chief. *See* ***Legue v. City of Racine***, 2014

WI 92, ¶137, 357 Wis. 2d 250, 849 N.W.2d 837 ("A motion for a directed verdict challenges the sufficiency of the evidence.").

"When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. Whether the evidence is direct or circumstantial, this court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," this court "may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *See* ***id.*** at 507.

Harmon does not dispute that the State proved the elements necessary to establish that an armed robbery occurred, only that there was insufficient evidence of his identification as the perpetrator. *See* WIS JI—CRIMINAL 1480. He claims that the victim's identification of him was incredible as a matter of law.

Specifically, Harmon argues that the victim never made an in-court identification of Harmon during trial. While he acknowledges the victim identified him in a photo array that she reviewed a few hours after the robbery, he argues that the photo of him was taken more than a year earlier and that when the victim first described the robber, she said he was 5'2" tall and was

twenty-three to twenty-four years old. Harmon submits that he was twenty-one years old, 5'7" tall, and weighed 129 pounds.

Harmon also argues "there were serious questions raised about [the victim's] physical and emotional state at the time of the identification," and he highlights that she was sixty-four years old and had just come from the dentist where she had a tooth pulled and had been placed under anesthesia. She had previously suffered a stroke and a heart attack and stated that at the time of the robbery, she felt terrible and was in a great deal of pain.

At trial, the victim testified that when the stranger jumped into the car, he sat in the back seat, right behind her. Initially the victim could not see the robber's face as she looked in the visor mirror. But, then he leaned over to her and said, "[D]o you know what this is?" At that point, the victim "looked back right in his face." The robber then said: "I will shoot you. I want all your money." The victim testified that she saw the robber's face when he said this, and she gave him her wallet containing $180. The victim knew that the robber had a gun and described for the jury how he pressed it against her head.

The evidence was sufficient for the jury to identify Harmon as the robber. It is the jury's function to decide the credibility of witnesses and it "alone is charged with the duty of weighing the evidence." ***State v. Below***, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95. Clearly, the jury found the witnesses credible. We will not overturn the jury's determination.

B. Breach of the Plea Agreement

A defendant has a constitutional right to enforce a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). "'[O]nce the defendant has given up his

[or her] bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled.'" ***Id.*** (citation omitted). A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. ***Id.*** at 272. To be actionable, however, a breach must not merely be technical, but rather must deprive the party of a substantial and material benefit for which he or she bargained. ***State v. Bangert***, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). Whether the State breached the plea agreement and, if so, whether the breach was substantial and material are questions of law that we review *de novo*. *See* ***State v. Quarzenski***, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844.

Harmon was convicted of armed robbery following a jury trial. Therefore, there was no plea agreement to breach in that case. At Harmon's request, the sentencing hearing in the armed robbery case was held in conjunction with the sentencing proceeding in the first-degree reckless injury case. As to the armed robbery case, the State argued that Harmon should serve eighteen years of initial confinement to run consecutively to Harmon's other sentences. As to the charges in the first-degree reckless injury case, in accordance with the plea agreement, the State did not recommend a specific term of imprisonment nor did it recommend whether the term should run either consecutively or concurrently to any other sentences.

Harmon submits that in recommending a consecutive sentence in the armed robbery case, the State "was trying to accomplish by indirect means what it had agreed it would not do" in the first-degree reckless injury case. We disagree.

Harmon seeks to use the combined sentencing hearing to his advantage in an attempt to create the illusion of an issue where one does not actually exist. Or, as the State sums it up,

Harmon "has tried to gain traction for his present claim by pointing to the plea agreement in the reckless injury case and grafting it onto the armed robbery case."

The trial court, in denying Harmon's postconviction motion, described the circumstances presented: "[T]he State made two separate and distinct sentencing recommendations via two different prosecutors in two different cases, one in which the defendant was found guilty by a jury and another which resolved by a plea." The former left the State free to argue as to the length of Harmon's sentence, and the latter limited the State pursuant to the plea agreement.

Harmon submits that if the cases had not been sentenced together, and if, instead, he was sentenced soon after his conviction in the robbery case but prior to entering his pleas in the first-degree reckless injury case, the State could have only recommended a certain sentence of prison time for the defendant. This statement amounts to unsupported speculation about what might have happened under a different set of circumstances. The circumstances here are that Harmon successfully sought to combine the sentencing hearings in his two cases. By doing so, the State was not constrained on how to argue during the sentencing for the armed robbery case that went to trial, and the State did not breach the plea agreement as to the first-degree reckless injury case.[3]

[3] Had we not resolved this issue on the merits, we would have also concluded that Harmon forfeited his challenge to the alleged breach of the plea agreement because he failed to object to the State's sentencing recommendation in the armed robbery case. *See* ***State v. Howard***, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. Harmon did not refute the State's argument in this regard and therefore conceded it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

C. Exercise of Sentencing Discretion

Lastly, Harmon argues he is entitled to sentence modification because the total sentence imposed was unduly harsh, unconscionable, and excessive such that it constituted cruel and unusual punishment. A defendant bears a "heavy burden" of establishing that a court erroneously exercised its sentencing discretion. ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. Here, the trial court considered the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

Regarding the severity of the offenses, the trial court commented on Harmon's decision to prey upon a vulnerable victim and considered the significant impact that the crime had on the victim. Then, three days later, he got into a shootout with police, which the trial court found "to be amongst the most serious type of offenses that we have…. When a person chooses to discharge a firearm not once, not twice, three, four, five times, that person demonstrates a total lack of regard for the safety of others." In arriving at its sentences, the trial court reflected on Harmon's criminal history: "[C]onviction upon conviction upon conviction with escalating violence at every turn in quick succession[.]" The trial court concluded that the seriousness of the offenses and the need for deterrence warranted a significant sentence. It then imposed a total term of fifty-four years of initial confinement and thirty-five years of extended supervision.

Under the circumstances, we are not persuaded that the sentences imposed reflect an erroneous exercise of the trial court's discretion.

Therefore,

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals