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DISTRICT I

March 14, 2023

To:

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Circuit Court Judge
Electronic Notice

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Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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John D. Flynn
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Christopher D. Sobiech
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1316-CRNM State of Wisconsin v. Montrell Donell Hardy
(L.C. # 2018CF3492)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Montrell D. Hardy appeals from a judgment of conviction, following a jury trial, of one count of cocaine possession as a second or subsequent offense, and three counts of being a felon in possession of a firearm. His appellate counsel, Mitchell Barrock, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),¹ and *Anders v. California*, 386 U.S. 738 (1967). Hardy received a copy of the report and was advised of his right to respond. Hardy has filed

¹ The no-merit report was filed by Attorney Mitchell Barrock, who has been replaced by Attorney Christopher Sobiech as Hardy's appellate counsel.

multiple responses. We have independently reviewed the record, the no-merit report, and Hardy's responses, as mandated by *Anders*. We conclude that there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm.

In 2019, the State charged Hardy with one count of possession of cocaine (between five and fifteen grams) with the intent to deliver, and three counts of being a felon in possession of a firearm. According to the charging documents, on July 20, 2018, Hardy drove his vehicle to a house located at 4856 North 36th Street in Milwaukee. The house was under surveillance as police believed the house to be a drug house. Police executed a search warrant, arrested Hardy and the other occupants, and found drugs and multiple firearms in the one of the bedrooms. Police also found several items identifying Hardy as the occupant of the bedroom, including pictures of Hardy, his vehicle registration, his driver's license, paystubs, and an empty medication bottle with Hardy's name.

The matter proceeded to trial where multiple witnesses, including law enforcement and Hardy, testified. Hardy maintained his innocence, telling the jury that the actual occupant of the house was a mechanic and that Hardy drove his vehicle to the house for repair. The jury found Hardy guilty as charged.

The matter proceeded to sentencing, where the State informed the trial court that the verdict form failed to state the weight of cocaine associated with the charge, thus the jury did not decide guilt based upon the weight of the cocaine. The State moved to amend the charge down to the lowest possible level of possession, a Class G felony. The sentencing court sentenced Hardy to three years of initial confinement and five years of extended supervision on the cocaine possession charge, and two years of initial confinement and two years of extended supervision

on each of the felon in possession charges, to run concurrent to one another and consecutive to the cocaine possession charge. This no-merit report follows.

Appellate counsel’s no-merit report addresses whether the evidence presented at trial was sufficient to convict Hardy. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. See *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighting the evidence. See *id.* at 506. Although the evidence presented at Hardy’s trial was circumstantial, the standard of review is the same whether the conviction relies on direct or circumstantial evidence. See *id.* at 503. “[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.” *State v. Alles*, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). Here, the State presented evidence of several identifiers tying Hardy to the room containing drugs and multiple firearms. The jury also did not find Hardy’s testimony credible. Appellate counsel properly analyzes this issue in the no-merit report, and we agree with his conclusion that there is no arguable merit to challenging the sufficiency of the evidence supporting the verdicts.

Appellate counsel also addresses whether the trial court erroneously exercised its sentencing discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the record confirms that the trial court thoroughly considered the relevant sentencing objectives and factors. The sentence the trial court imposed is 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 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 trial court's sentencing discretion.

Hardy filed multiple responses, all of which challenge the sufficiency of the evidence and allege ineffective assistance of counsel for trial counsel's alleged failure to call certain witnesses. Hardy argues that the witnesses would have testified that Hardy did not occupy the room in which police found the drugs and firearms. Specifically, Hardy contends that the additional witnesses would have supported Hardy's defense that he was simply getting his car fixed. In evaluating Hardy's responses, we conclude that there is no arguable merit to his contentions.

As stated, the evidence was sufficient for the jury to find guilt. As to Hardy's ineffective assistance of counsel claim, the record does not support his contention. To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that trial counsel's representation was deficient and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). In assessing prejudice, we consider the totality of the circumstances before the trier of fact. *See Sanchez*, 201 Wis. 2d at 236. Hardy testified that he

did not occupy the room and was getting his car repaired. Another witness, Gregory Walker, testified that he lived in the house and had no knowledge of Hardy living there or putting any items in the bedroom. The jury clearly did not find the testimony credible. Hardy cannot establish that he was prejudiced by the lack of additional witnesses essentially offering the same testimony. Moreover, the State presented evidence of several items tying Hardy to the room in which the relevant items were found. Hardy does not show that the additional testimony would have undermined the evidence presented at trial.

To the extent Hardy raised issues not addressed in this decision, we conclude that 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.

IT IS FURTHER ORDERED that Attorney Christopher Sobic is relieved of further representation of Hardy in this matter. *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