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DISTRICT I

August 29, 2023

To:

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

2022AP1498-CRNM State of Wisconsin v. Clarence Paul Matthews, Jr.
(L.C. # 2020CF4233)

Before White, 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).

Clarence Paul Matthews, Jr., appeals a judgment of conviction entered after a jury found him guilty of first-degree reckless injury. His appellate counsel, Attorney David Malkus, filed a no-merit report. *See* WIS. STAT. RULE 809.32 (2021-22).[1] Matthews did not file a response. Upon consideration of the no-merit report and an independent review of the record as mandated

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm.

The State filed a criminal complaint reflecting that on November 25, 2020, police received a 911 call from a woman, E.C.A., and responded to the 4000 block of West Eggert Place in Milwaukee. Upon arrival, officers found C.B.J. He appeared to be in great pain, and police observed that he had a tire mark on the back of his jacket. C.B.J. told police that he had accompanied E.C.A. to her home and was helping her move her belongings when he saw her former boyfriend, Matthews, circling the block in a red car. Matthews drove towards C.B.J., threatened to run him over, and then accelerated. Matthews's car struck C.B.J., and he landed on the hood of the vehicle, which did not stop. C.B.J. said that after he fell off the hood and onto the ground, Matthews continued driving, ran over C.B.J., and then drove away. The complaint went on to state that C.B.J. was hospitalized with severe injuries, including multiple bone fractures.

The State charged Matthews with first-degree reckless injury. He pled not guilty, and the matter proceeded to a jury trial. C.B.J. and three law enforcement officers testified for the State. Matthews testified in his own defense. The jury found him guilty as charged.

At sentencing, Matthews faced a maximum penalty of twenty-five years of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 940.23(1)(a), 939.50(3)(d) (2019-20). The circuit court imposed an eighteen-year sentence bifurcated as thirteen years of initial confinement and five years of extended supervision. In postconviction proceedings, the circuit court awarded

Matthews 223 days of sentence credit for his time in custody from his arrest on November 27, 2020, until his sentencing on July 8, 2021.[2] Matthews appeals.

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdict. Appellate counsel's analysis includes the applicable standard of review and a description of the evidence that satisfied each element of first-degree reckless injury. The no-merit report also explains the bases for appellate counsel's conclusions that no procedural errors occurred with respect to the jury selection, the admission of evidence, or the jury instructions. Appellate counsel discusses the colloquy that the circuit court conducted with Matthews regarding his decision to testify, and counsel observes that, while a colloquy is not required, it is the preferred practice. *See* ***State v. Denson***, 2011 WI 70, ¶¶63, 67, 335 Wis. 2d 681, 799 N.W.2d 831. The no-merit report concludes with a discussion of whether Matthews's sentence was the result of an erroneous exercise of discretion or can be considered excessive. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit. We will not discuss any of those potential issues further.

Appellate counsel does not discuss the circuit court's decision to refer to the jurors by their juror numbers rather than by name. Restrictions on juror identification and information raise due process concerns about the right to an impartial jury and the presumption of innocence, but a circuit court has discretion to require references to jurors by number rather than by name if

[2] Matthews sought 222 days of sentence credit for the period from November 27, 2020, until the date of sentencing, which he alleged in his postconviction motion was July 7, 2021. Electronic docket entries showed that sentencing occurred on July 8, 2021, and the circuit court found that the docket accurately reflected the sentencing date. Accordingly, the circuit court awarded Matthews 223 days of presentence credit. Matthews was not aggrieved by the circuit court's finding and, therefore, could not challenge it on appeal. *See* WIS. STAT. RULE 809.10(4) (appeal brings before this court rulings adverse to the appellant).

the circuit court determines that the jurors are in need of protection and takes reasonable precautions to avoid prejudice to the defendant. *See* ***State v. Tucker***, 2003 WI 12, ¶¶10-11, 27, 259 Wis. 2d 484, 657 N.W.2d 374. The record does not support an arguably meritorious challenge to the circuit court's exercise of discretion here.

The circuit court explained to the parties and the prospective jurors that, due to the on-going COVID-19 pandemic, jury selection would occur in a courtroom that was closed to the public. The selection process, however, would be accessible to any interested viewer through a live stream available on the circuit court's website. The circuit court said that it would, therefore, use the jurors' numbers, thus limiting broad dissemination of the jurors' personal information. The circuit court's explanation ensured the jurors' understanding that use of juror numbers rather than names was not a reflection on Matthews's guilt or character but balanced the jurors' privacy interests against the need for a public trial during a health emergency. *See* ***id.***, ¶¶23-24. Moreover, the parties were permitted to question the jurors during *voir dire*, and the jury list is in the record. *See* ***id.***, ¶11. Accordingly, there is no arguable merit to a claim that the use of juror numbers rather than names prejudiced Matthews or jeopardized his rights to an impartial jury and a presumption of innocence. *See* ***id.***, ¶17.

We have also considered whether Matthews could mount an arguably meritorious claim that he was denied his due process right to be sentenced on the basis of accurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a denial of that right, the defendant must show that the circuit court actually relied on inaccurate information when imposing sentence. *See* ***id.***, ¶26. At sentencing here, the circuit court found that Matthews told the police he "would do it again," and Matthews immediately interrupted, saying that he "never told the police that [he] would do it again." The circuit court responded:

"I saw the trial.... It is not a mystery here anymore." The trial evidence supports the circuit court's finding.

A detective, Jose Flores, testified that he interviewed E.C.A. on November 25, 2020, following the 911 call. She was talking to someone on her cell phone at the start of the interview, and she activated the speakerphone. The caller's telephone number, which Flores could see displayed on E.C.A.'s phone, was the same telephone number that Matthews later reported as his when he was arrested. Flores's body camera recorded E.C.A.'s telephone conversation, and the State played a portion of the recording at trial. The recording captured the caller's statement: "I will run him over again." Flores then testified that Matthews was the caller and that Flores could identify Matthews's voice on the call because Flores had listened to several later telephone calls that Matthews made from jail after his arrest. Although Matthews testified at trial that he did not call E.C.A. on the day of the incident, questions of credibility at sentencing rest with the circuit court. *See* ***Anderson v. State***, 76 Wis. 2d 361, 369, 251 N.W.2d 768 (1977). The circuit court's determination that Matthews made the recorded statement is based on the evidence and is not clearly erroneous. *See* ***State v. Wiskerchen***, 2019 WI 1, ¶17, 385 Wis. 2d 120, 921 N.W.2d 730. Accordingly, Matthews cannot pursue an arguably meritorious claim that he was sentenced on the basis of inaccurate information.

Finally, we have considered whether Matthews could allege that his trial counsel was ineffective for failing to argue that Flores's testimony about Matthews's telephone calls from the jail improperly revealed to the jury that Matthews was in custody following his arrest. To prove a claim of ineffective assistance of counsel, a defendant must show both that counsel performed deficiently and that the deficient performance was prejudicial *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that

counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial[.]" ***Id.*** at 687. A reviewing court may reject the claim of ineffective assistance of counsel on either ground.

Here, Flores testified that he listened to several telephone calls that Matthews made while in custody. Some evidence of a defendant's pretrial custody is prohibited because it violates the defendant's rights to a fair trial and a presumption of innocence. *See* ***Estelle v. Williams***, 425 U.S. 501, 503-04 (1976) (barring the State from compelling a defendant to appear for trial in identifiable prison clothing). However, not all evidence of pretrial custody is prejudicial. We have held that there is little likelihood of prejudice when jurors see a defendant in restraints outside the courtroom even though the observation reveals the defendant's custodial status. *See* ***State v. Clifton***, 150 Wis. 2d 673, 683, 443 N.W.2d 26 (Ct. App. 1989) (citing ***State v. Cassel***, 48 Wis. 2d 619, 625, 180 N.W.2d 607 (1970)). In this case, the jury did not see Matthews in restraints or jail attire at all and merely heard that he was in custody for some period of time following his arrest. Moreover, the circuit court properly instructed the jurors about the presumption of innocence in both the preliminary and the final jury instructions, and we presume that jurors follow the jury instructions. *See* ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Accordingly, we see no basis to conclude that Matthews could pursue an arguably meritorious claim that he was prejudiced by trial counsel's failure to object to testimony that he spent time in pretrial custody. *Cf.* ***United States v. Bahena***, 71 F.4th 632, 638 (7th Cir. 2023) (stating that evidence of jail calls typically does not deprive a defendant of a fair trial and collecting cases so holding).

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 David Malkus is relieved of any further representation of Clarence Paul Matthews, Jr. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals