OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

September 11, 2013

To:

Hon. Dennis R. Cimpl
Circuit Court Judge
Children's Court Center
10201 W. Watertown Plank Rd.
Wauwatosa, WI 53226

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jon Alfonso LaMendola
LaMendola Law Office
375 E. Arbor Circle W.
Oak Creek, WI 53154

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mario Pineda-Gaeta 567228
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2012AP705-CRNM State v. Mario Pineda-Gaeta (L.C. #2010CF3237)
2012AP706-CRNM State v. Mario Pineda-Gaeta (L.C. #2010CF4868)

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

Mario Pineda-Gaeta appeals two judgments convicting him of third-degree sexual assault, second-degree recklessly endangering safety, and second-degree reckless homicide. Attorney Jon LaMendola has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967);

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 97-98, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the joinder of the two cases, the entry of Pineda-Gaeta's pleas, and the sentences. Pineda-Gaeta was sent a copy of the report, and filed a response asserting that he now wants to go to trial to tell the jury about what the detective did to him and his family. Counsel filed a supplemental no-merit report clarifying that Pineda-Gaeta's reference to what the detective did relates to the immigration issues discussed in the initial no-merit report. Upon reviewing the entire record, as well as counsel's no-merit report, Pineda-Gaeta's response and a supplemental no-merit report by counsel, we conclude that there are no arguably meritorious appellate issues.

First, joinder of charges is proper when they "are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." WIS. STAT. § 971.12(1) and (4). Here, the court observed that the major similarity between the cases was that both the assault victim and the homicide victim were alleged to have been manually strangled from the front. The assault victim claimed to have lost consciousness, and then acquiesced to Pineda-Gaeta's demands for sex to avoid being killed. The homicide victim had Pineda-Gaeta's semen on her, strongly suggesting that the purpose of her strangulation was also sexual in nature. In addition, the offenses were committed less than a month apart and within a third of a mile of one another. The circuit court acknowledged that there were also some dissimilarities, in that the assault victim knew Pineda-Gaeta and was attacked inside a house, whereas the homicide victim was attacked outside and it was unclear if or how she knew Pineda-Gaeta. On balance, however, the court was satisfied that the evidence of each crime would be admissible at the trial of the other to show a common scheme or plan to use strangulation to obtain compliance for sex. The court's

discussion plainly demonstrates a reasonable exercise of discretion, applying the proper standard of law to the facts of record.

Next, the convictions were based upon the entry of no-contest pleas, and we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must, at a minimum, either show that the plea colloquy was defective, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 266-74, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991).

The State agreed to reduce the sexual assault charge from second to third degree, to amend a strangulation charge to reckless endangerment, to reduce the reckless homicide charge from first to second degree, and to recommend a combined twenty-five years of initial incarceration and ten years of extended supervision in exchange for the pleas, and the State followed through on that agreement. The circuit court conducted a plea colloquy exploring Pineda-Gaeta's understanding of the nature of the amended charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. In addition, the record includes signed plea questionnaires in both English and Spanish with attached jury instructions for each case. Pineda-Gaeta indicated to the court that he understood the information explained on those forms, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The court also inquired into Pineda-Gaeta's ability to understand the proceedings and the voluntariness of his plea decision, after Pineda-Gaeta made an initial comment that the only reason he was accepting the plea was because the detective was threatening him. Counsel clarified for the court that the threats Pineda-Gaeta was referring to were alleged statements and actions by police regarding the immigration status of family members and witnesses, which were purportedly made in order to get Pineda-Gaeta to give a statement, not to enter a plea. Both defense attorneys had explained to Pineda-Gaeta that they could file a motion to suppress Pineda-Gaeta's statement to police based on the alleged threats if he wanted them to do so, but he had agreed to waive the right to file any suppression motion. The court then asked Pineda-Gaeta directly whether he was entering his plea because of a threat of deportation to his family, and he answered no. The court further inquired whether Pineda-Gaeta understood that if he entered no-contest pleas, he would be giving up the right to raise any issue regarding threats, and he answered yes.

Pineda-Gaeta's assertion that he now wants to tell a jury about the alleged immigration threats made against his family does not provide grounds for plea withdrawal because, even if the pleas were withdrawn and Pineda-Gaeta were allowed to file a suppression motion, the issue would be tried to the court, not a jury. Moreover, because counsel pointed out at the plea hearing that there was nothing particularly inculpatory in Pineda-Gaeta's statement to police, Pineda-Gaeta has not provided any adequate explanation for how a favorable suppression ruling would have impacted his decision to enter pleas.

Pineda-Gaeta agreed that the facts set forth in the complaints—namely, one woman's allegations that Pineda-Gaeta had strangled and raped her and Pineda-Gaeta's semen found on the body of another woman who had been strangled to death—would be accepted by the court as

true and provided a sufficient factual basis for the pleas. Pineda-Gaeta indicated satisfaction with his attorneys, and there is nothing in the record to suggest that their performance was in any way deficient. Therefore, Pineda-Gaeta's pleas were valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Pineda-Gaeta's sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and, to overturn the sentence, it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Pineda-Gaeta was afforded an opportunity to comment on the presentence investigation report and to address the court. The court proceeded to consider the standard sentencing factors and goals 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 court observed that strangulation involves the exercise of absolute control over another human being, and that Pineda-Gaeta had done it not once, but twice, and that the children of the homicide victim were now orphaned and split up. With respect to Pineda-Gaeta's character, the court noted that he continued to minimize not only his offenses but also his drug and alcohol problems. The court concluded that a prison term, including the maximum available amount of initial confinement, was necessary as punishment since Pineda-Gaeta had already received a substantial advantage by the reduction in charges.

The court then sentenced Pineda-Gaeta to consecutive terms of five years of initial confinement and five years of extended supervision on the sexual assault and strangulation

counts and fifteen years of initial confinement and ten years of extended supervision on the homicide count. It also awarded 365 days of sentence credit, ordered restitution, and imposed standard costs and conditions of supervision, including sex offender and AODA evaluations and any recommended treatment.

The components of the bifurcated sentences imposed did not exceed the applicable penalty ranges. *See* WIS. STAT. §§ 940.06(1) (classifying second-degree reckless homicide as a Class D felony); 973.01(2)(b)4. and (d)3. (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for Class D felonies); 940.225(3) (classifying third-degree sexual assault as a Class G felony); 941.30(2) (classifying second-degree reckless endangerment as a Class G felony); and 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for Class G felonies). The sentences were not "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what it right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting another source).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of WIS. STAT. RULE 809.32 and ***Anders***.

Accordingly,

IT IS ORDERED that the judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals