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DISTRICT IV

October 28, 2013

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

2012AP562-CRNM State of Wisconsin v. Ralph H. Jurjens, III (L.C. #2010CF188)

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

Ralph Jurjens appeals a judgment that convicted him of child abuse by intentionally causing harm, criminal damage to property in a domestic abuse situation, intimidation of a victim in a domestic abuse situation by threat or use of force, burglary to commit battery, and intimidation of a witness—all as a repeat offender. Jurjens also appeals the denial of his postconviction motion for plea withdrawal. Attorney Roberta Heckes 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); ***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). Jurjens has filed a series of responses to counsel's no-merit report, in reply to which counsel has filed several supplements. Upon reviewing the entire record, as well as the no-merit report, responses and supplements, we conclude that there are no arguably meritorious appellate issues.

First, Jurjens entered his pleas pursuant to a negotiated agreement, and we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, 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 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to dismiss and read in five other charges as part of the plea agreement. The plea agreement reduced Jurjens' sentence exposure by fifty years. The circuit court conducted a standard plea colloquy, inquiring into Jurjens' ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his understanding of the nature of the 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,

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

317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure that Jurjens understood that the court would not be bound by any sentencing recommendations and could impose the maximum penalties. In addition, Jurjens submitted a signed plea questionnaire, and he does not claim to have misunderstood any information explained on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

As to the factual basis for the pleas, Jurjens acknowledged that the allegations set forth in the complaint were accurate. According to the initial complaint, Jurjens had broken a window to gain entry into the home of a woman with whom he had a prior relationship after she refused to communicate with him any longer that evening. Jurjens then beat and threatened to stab the woman in front of the woman's two children—one of whom was also his own—and also beat his teenaged niece and broke her cellphone when she attempted to call 911. According to an amended complaint, Jurjens subsequently sent a series of letters attempting to influence the woman's testimony. Jurjens also admitted to his status as a repeat offender in open court.

Jurjens filed a postconviction motion seeking to withdraw his pleas on the grounds that his first attorney had failed to convey an earlier plea offer to him. The original offer would have reduced Jurjens' sentence exposure by six fewer months than the offer Jurjens ultimately accepted. Jurjens claimed that, if he had been informed of the earlier, less advantageous offer when it was made, he would have attempted to make a counter-offer or gone to trial, but because the subsequent offer was made shortly before the trial date and he thought it was the only offer, he felt like it was take it or leave it.

In deciding whether to allow a defendant to withdraw a plea, the circuit court may assess the credibility of the proffered explanation for the plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). Here, the circuit court noted that: "This is a situation where [Jurjens] wants me to believe, because a worse plea offer was made earlier, that he would not have accepted a better plea offer later." We can infer that the court rejected Jurjens' claim that he would have gone to trial if he had known about the first offer based upon the court's additional comments that it believed Jurjens knew exactly what he was doing when he entered his pleas, and from its subsequent conclusion that Jurjens had failed to establish prejudice. Because the circuit court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the "ultimate arbiter" for credibility determinations when acting as a fact-finder, and we will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2).

Jurjens has not alleged any other facts that would give rise to a manifest injustice. Therefore, Jurjens' pleas were valid and operated to waive all nonjurisdictional defects and defenses up to that stage in the proceeding. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10). Accordingly, we do not address Jurjens' complaints about the preliminary hearing or his alternative request to proceed pro se after the court denied his motion for the appointment of a fourth attorney.

A challenge to Jurjens' sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to "show some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Jurjens was afforded an opportunity to comment on a revocation summary for a jointly handled case and a previously submitted PSI, to present letters from character witnesses, and to address the court both personally and through counsel.

The court proceeded to consider 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 court described Jurjens' conduct as having created "nothing less than a night of absolute terror" for the victim and her children, and noted that the psychological effects of the assault were likely to be long-lasting. With respect to Jurjens' character—which the court called "abysmal"—the court went through Jurjens' lengthy criminal record in detail, emphasizing the number of violent episodes and Jurjens' multiple failures to follow through on previously ordered treatment programs, and further noting that Jurjens was still attempting to blame others for his own conduct. The court then identified the two primary sentencing goals in this case as retribution and incapacitation, explaining that Jurjens' record demonstrated that neither rehabilitation nor deterrence were realistic expectations. The court concluded that Jurjens was one of the most dangerous individuals to come before it, and that the only way the court could ensure public safety would be to incarcerate him for a substantial length of time.

The court then sentenced Jurjens to consecutive terms of five years of initial confinement and three years of extended supervision on the child abuse count; seven years of initial confinement and five years of extended supervision on the victim intimidation count; ten years of initial confinement and five years of extended supervision on the burglary count; and five years of initial confinement and five years of extended supervision on the witness intimidation count; with a concurrent term of one year of initial confinement and one year of extended supervision on the property damage count. The court also imposed standard conditions of supervision and directed counsel to provide a calculation of any sentence credit. The written judgment of conviction also showed that Jurjens would not be eligible for the Challenge Incarceration Program, the Earned Release Program, or a risk reduction sentence.

The components of the bifurcated sentences imposed were within the applicable penalty ranges, and the total imprisonment period of forty-five years constituted less than the maximum exposure that Jurjens faced. *See* WIS. STAT. §§ 948.03(2)(b) (classifying child abuse—intentionally causing harm as a Class H felony); 943.01(1) (classifying criminal damage to property as a Class A misdemeanor); 940.45(1) (classifying intimidation of a victim by threat or use of force as a Class G felony); 943.10(2)(d) (classifying burglary—battery to a person as a Class E felony); 940.43(7) (classifying intimidation of a witness by a person charged with a felony as a Class G felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony); 939.62(1)(a) (increasing maximum term of imprisonment for offense otherwise punishable by less than one year to two years for habitual criminality); 939.62(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality); 939.62(1)(c) (increasing maximum term of imprisonment for offense otherwise punishable by more than ten years by six additional years for habitual criminality); 973.01(2)(c)1. (enlarging maximum initial incarceration period by the same amount as the total term of imprisonment based upon a penalty enhancer). Taking into account the amount of sentence exposure Jurjens avoided on the read-in offenses, the sentences imposed here 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 is 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 judgment 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 judgment of conviction is 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