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November 8, 2013

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

2013AP474-CRNM State of Wisconsin v. Bennitis Medina (L.C. #2011CF3574)
2013AP475-CRNM State of Wisconsin v. Bennitis Medina (L.C. #2011CM1619)

Before Curley, P.J., Fine and Kessler, JJ.

Bennitis Medina appeals two judgments of conviction entered upon a jury's verdicts. The Office of the State Public Defender appointed Attorney David J. Lang to represent Medina in postconviction and appellate proceedings. Attorney Lang filed a no-merit report and, at our request, he filed a supplemental no-merit report to address the DNA surcharge that the circuit court ordered Medina to pay if he had not previously paid such a surcharge. Medina did not file

a response to the no-merit reports, but he did write a letter to this court early in the appellate process describing issues that he wanted addressed in postconviction and appellate proceedings. Upon review of the no-merit reports, the record, and Medina's letter, we conclude that no arguably meritorious appellate issues exist, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2011-12).[1]

We review proceedings in two cases joined for trial in which the jury found Medina guilty of six crimes. In Milwaukee County case No. 2011CF3574, the jury found him guilty of the felony offenses of endangering safety by use of a firearm, possessing a firearm while a felon, and first-degree recklessly endangering safety by use of a dangerous weapon. *See* WIS. STAT. §§ 941.20(2)(a), 941.29(2), 941.30(1), 939.63(1)(b). The jury also found him guilty in that case of one count of misdemeanor bail jumping. *See* WIS. STAT. § 946.49(1)(a). In Milwaukee County case No. 2011CM1619, the jury found Medina guilty of the misdemeanor offenses of battery and disorderly conduct. *See* WIS. STAT. §§ 940.19(1), 947.01.

For the crimes of endangering safety by use of a firearm and possessing a firearm while a felon, the circuit court imposed concurrent ten-year terms of imprisonment, evenly bifurcated as five years each of initial confinement and extended supervision. The circuit court granted Medina 239 days of presentence incarceration credit towards the service of these sentences. For the crime of first-degree recklessly endangering safety by use of a dangerous weapon, the circuit court imposed a consecutive ten-year sentence, also evenly bifurcated as five years of initial

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

confinement and five years of extended supervision.[2] For the crimes of battery and disorderly conduct, the circuit court imposed jail sentences of nine months and three months, respectively, to be served concurrently with each other and with all other sentences.[3] Finally, for the crime of bail jumping, the circuit court imposed a time-served disposition of 239 days in jail.

We first consider whether sufficient evidence supports the jury's verdicts. When considering a challenge to the sufficiency of the evidence, we apply a highly deferential standard. We may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the convictions, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This court will uphold the verdicts if any possibility exists that the jury could have drawn the inference of guilt from the evidence. ***Id.*** When the record contains facts that support more than one inference, this court must accept the inference

[2] At the sentencing hearing, the circuit court imposed six years of extended supervision for the crime of first-degree recklessly endangering safety by use of a dangerous weapon. In response to an inquiry submitted by the Department of Corrections a few weeks after the hearing, the circuit court concluded that the six-year term of extended supervision exceeded the statutory maximum period of extended supervision allowed for the offense. *See* WIS. STAT. § 941.30(1) (classifying first-degree recklessly endangering safety as a Class F felony); WIS. STAT. § 973.01(2)(d)4. (providing that the term of extended supervision for a Class F felony may not exceed five years). The circuit court therefore reduced the term of extended supervision for the crime to five years and entered an amended judgment of conviction reflecting the corrected disposition. No further action is required. *See* WIS. STAT. § 973.13 (excess portion of sentence is void and stands commuted without further proceedings).

[3] The original judgment of conviction in case No. 2011CM1619 erroneously reflects a nine-month jail sentence for disorderly conduct. The circuit court did not pronounce that sentence, which would have exceeded the statutory maximum of ninety days of imprisonment allowed by WIS. STAT. § 939.51(3)(b) for a violation of WIS. STAT. § 947.01. Subsequently, the circuit court entered a second judgment of conviction in the case, but the "corrected" judgment is also in error and reflects a six-month jail sentence for disorderly conduct. "[A]n unambiguous oral pronouncement controls when a conflict exists between a court's oral pronouncement of sentence and a written judgment." ***State v. Prihoda***, 2000 WI 123, ¶24, 239 Wis. 2d 244, 618 N.W.2d 857. Upon remittitur, the circuit court shall direct the clerk of the circuit court to enter an amended judgment of conviction in case No. 2011CM1619 that reflects Medina's three-month concurrent jail sentence as orally pronounced by the sentencing court. *See* ***id.***, ¶5 (circuit court must correct clerical error in sentence portion of written judgment or direct clerk's office to make the correction).

drawn by the jury unless the evidence on which that inference is based is incredible as a matter of law. ***Id.*** at 506-07.

To prove battery, the State was required to show that Medina intentionally caused bodily harm to another person without the other person's consent and with knowledge that the other person did not consent to the harm. *See* WIS. STAT. § 940.19(1); WIS JI—CRIMINAL 1220. To prove disorderly conduct, the State was required to show that Medina engaged in violent, abusive, or otherwise disorderly conduct under circumstances that tended to cause a disturbance. *See* WIS. STAT. § 947.01(1); WIS JI—CRIMINAL 1900. The State presented the testimony of Erica Cervantes to prove these charges. She told the jury that, early on the morning of March 18, 2011, she and Medina, her boyfriend at that time, were in his car after a night of drinking. They quarreled, and he punched her. He then dragged her out of the car by her hair and left her in an alley. Cervantes identified photographs of herself with injuries on her head and body, and she explained that she received those injuries on March 18, 2011, when Medina hit her and dragged her from his car. This evidence supports the convictions for battery and disorderly conduct.

Cervantes next testified about facts and circumstances underlying the remaining charges. She said that, after police arrested Medina for the charges arising on March 18, 2011, she posted his bail. She also told the jury that she recognized Medina's signature acknowledging service, on April 5, 2011, of a court order that barred him from having any contact with her or with her residence as a condition of his release on bail.

Cervantes further testified that, in the late Spring of 2011, she ended her relationship with Medina and moved into the lower level of a duplex at 3734 West Miller Lane. She said that

sometime after midnight on July 25, 2011, Medina came to her home and knocked on her door and windows. Cervantes told the jury that Medina was wearing a red shirt that night, and that he called her name and asked her to open the door. She next heard Todd Hadley, who lived in the upper level of the duplex, go downstairs and argue with Medina. Cervantes testified that Medina then drove away, but immediately thereafter he telephoned her and asked why she had not let him into her home, so Cervantes left the duplex to avoid "problems." She later learned from police that shots had been fired into her home, and when she returned to her apartment the next day she saw bullet holes in the kitchen, hallway, and stairway. Finally, Cervantes testified that she viewed a surveillance video recorded by a neighbor's security cameras. She said that she recognized herself in the video leaving her home early in the morning of July 25, 2011, and that she recognized Medina as the person in a red shirt filmed outside of her home shortly thereafter.

Lisa Bielke testified that, on July 25, 2011, she lived across the street from Cervantes and she awoke early that morning to the sound of a disturbance. Bielke said that her home was protected at that time by a security system with two working cameras. Bielke then identified the video recording made by her security system on July 25, 2011, and she testified that the man in the red shirt seen on the video was the same man she saw that night wearing a red shirt, holding a gun, and firing at the duplex after he was out of the camera's range.

Bielke described calling 911 to report the shooting, and she agreed that the tape recording of her 911 call that the State played in the courtroom was true and correct. She explained that she placed the call immediately after the shooting began and that she heard one more shot while she was on the telephone. She added that, a few minutes after hearing the last shot, she spoke to Hadley as he emerged from the duplex. She said that he was "upset" and "agitated," and he told Bielke that he was in bed when he heard gunshots.

Andre Matthews testified that he is a City of Milwaukee police officer and that he interviewed Medina a few days after the shooting incident on West Miller Lane. Matthews told the jury that he advised Medina of his rights, and that Medina agreed to make a statement. Matthews told the jury that Medina admitted going to Cervantes's home on July 25, 2011, and Medina admitted that he was the person wearing a red shirt in Bielke's surveillance video, although he denied shooting at the home or hearing any shots fired that night.

The parties stipulated that Medina was convicted of a felony in 2002, and that his conviction had not been reversed as of July 25, 2011. The circuit court read the stipulation to the jury.

To prove bail jumping, the State was required to show that Medina was charged with a misdemeanor, that he was released from custody on bond, and that he intentionally failed to comply with the terms of the bond. *See* WIS JI—CRIMINAL 1795; WIS. STAT. § 946.49(1)(a). To prove that Medina possessed a firearm while a felon, the State was required to show that he possessed a firearm on July 25, 2011, and that he had been convicted of a felony before he possessed the firearm. *See* WIS JI—CRIMINAL 1343; WIS. STAT. § 941.29(2). To prove that Medina endangered safety by use of a dangerous weapon, the State was required to show that he discharged a firearm into a building, and that he discharged the firearm intentionally and under circumstances in which he should have realized that a human being might be present in the building. *See* WIS JI—CRIMINAL 1324; WIS. STAT. § 941.20(2)(a). Finally, to prove that Medina recklessly endangered safety while using a dangerous weapon, the State was required to show that Medina endangered Hadley's safety by criminally reckless conduct under circumstances that showed Medina's utter disregard for human life and that Medina engaged in the criminally reckless conduct while using a dangerous weapon. *See* WIS JI—CRIMINAL 1345, 990; WIS.

STAT. §§ 941.30(1), 939.63. From the evidence recited above, we are satisfied that no arguably meritorious basis exists for a challenge to the sufficiency of the evidence supporting Medina's convictions for the crimes arising on July 25, 2011.

Medina disagrees. In his letter to this court, he identifies what he views as deficiencies in the State's proof of his guilt in the matters arising on July 25, 2011. He notes, for example, that no fingerprints were found on the shell casings collected at the scene of the shooting, that he did not have a gun in his possession at the time of his arrest, and that the video made by Bielke's surveillance tape does not show anyone firing a gun. He also asserts that Bielke described the shooter during the 911 call as a "black male," but, he says, he is a "very light skin[n]ed male" who does not "look like an [A]frican-[A]merican." The jury, however, decides issues of credibility, weighs the evidence, and resolves conflicts in the testimony. *See* ***Poellinger***, 153 Wis. 2d at 506. We have recited the evidence in the light most favorable to the State, and we conclude that the evidence satisfies the elements of each crime.

We next consider whether Medina could raise an arguably meritorious multiplicity claim stemming from his convictions for both endangering safety by use of a dangerous weapon and first-degree recklessly endangering safety while armed. The double jeopardy clauses in the Fifth Amendment of the United States Constitution and art. I, sec. 8 of the Wisconsin Constitution protect against multiple punishments for the same offense. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). "We employ a two-prong test when analyzing a multiplicity challenge: (1) whether the charged offenses are identical in law and fact; and (2) whether the legislature intended multiple offenses to be charged as a single count." ***State v. Schaefer***, 2003 WI App 164, ¶44, 266 Wis. 2d 719, 668 N.W.2d 760. To determine whether offenses are identical in law and fact, we apply the test set forth in ***Blockburger v. United States***, 284 U.S.

299 (1932). ***State v. Davison***, 2003 WI 89, ¶43, 263 Wis. 2d 145, 666 N.W.2d 1. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." ***Blockburger***, 284 U.S. at 304.

The offense of endangering safety by use of a dangerous weapon under WIS. STAT. § 941.20(2)(a) requires proof that the defendant intentionally discharged a firearm into a building or vehicle; the crime of recklessly endangering safety while armed in violation of WIS. STAT. §§ 941.30(1) and 939.63 does not require any act targeting a building or vehicle. Conversely, the latter offense requires proof, pursuant to § 941.30(1), that the defendant acted under "circumstances which show utter disregard for human life," while the offense of endangering safety by use of a dangerous weapon in violation of § 941.20(2)(a) does not require such proof. Accordingly, each of these two offenses requires proof of a fact that the other does not.

Additionally, whether two offenses are identical in fact "involves a determination of whether the charged acts are 'separated in time or are of a significantly different nature.'" ***State v. Koller***, 2001 WI App 253, ¶31, 248 Wis. 2d 259, 635 N.W.2d 838 (citation omitted). When considering whether acts are separate in time, "even a brief time separating acts may be sufficient." ***Id.*** Here, Bielke's testimony and the surveillance video established that Medina fired a series of shots, and then, after a delay, fired again.

Because Medina's crimes are different in law and fact, we presume that the legislature intended multiple punishments. *See* ***Davison***, 263 Wis. 2d 145, ¶44. A defendant may overcome the presumption only by showing "'clear legislative intent to the contrary.'" ***Id.*** (citation omitted). Our review, however, discloses clear legislative intent to permit multiple

punishments. WISCONSIN STAT. § 939.65 provides, with an exception for a statute not implicated here, that "if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." We are satisfied that Medina cannot pursue an arguably meritorious claim that his prosecution violated his right to be free from double jeopardy.

We next consider whether Medina can pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The sentencing court must also "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court explained that the crimes were "very, very serious," describing the battery and disorderly conduct offenses as "ugly" and the offenses committed on July 25, 2011 as "aggravated," and "dangerous." The circuit court characterized Medina as intelligent and praised his solid work record, but the circuit court expressed concern that he did not appear remorseful and found that his failure to accept responsibility for the felony offenses placed him at risk of committing additional crimes. The circuit court also took into account Medina's substantial criminal history, which included four offenses as a juvenile and three prior criminal convictions as an adult. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal history is evidence of character). The circuit court considered the need to protect the public, pointing out that "people [were] put at great risk" by his behavior.

The circuit court indicated that protection of the community was the primary sentencing goal, emphasizing the fear and distress caused by Medina's behavior. In the circuit court's view, Medina acted with "no regard for the welfare or life of the people in th[at] house" when he fired a gun into the duplex on West Miller Lane; only "the luck of the draw" saved him from causing serious harm.

The circuit court concluded, as did the author of the presentence investigation report, that Medina is statutorily ineligible for the Challenge Incarceration Program and the Wisconsin Substance Abuse Program.[4] *See* WIS. STAT. §§ 302.045, 302.05. Pursuant to WIS. STAT.

[4] The Wisconsin Substance Abuse Program was formerly called the Wisconsin Earned Release Program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. Both names are used to refer to the program in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g). Although sentencing in this case occurred in 2012, the circuit court referred to the program by its former name during the proceeding. For the sake of clarity, we refer to the program by its current name.

§§ 973.01(3g)-(3m), a circuit court exercises its sentencing discretion to decide whether an imprisoned defendant may participate in these programs, but the circuit court exercises that discretion only "[w]hen imposing a bifurcated sentence ... on a person convicted of a crime other than a crime specified in [WIS. STAT.] ch. 940." Medina was convicted of a crime specified in § 940.19. Accordingly, the circuit court properly declined to consider him for these programs.

In his letter to this court, Medina complains that "the victim impact statement was never read in sentencing." A victim may, if he or she chooses to do so, provide such a statement for the sentencing court's consideration. *See* WIS. STAT. §§ 950.04(1v)(m), 972.14(3)(a). In this case, however, the State advised the circuit court near the outset of the sentencing proceedings that no such statement had been submitted. Medina therefore has no basis to challenge his sentences on the basis that the circuit court overlooked relevant sentencing materials.

Medina also contends that his sentences are unduly harsh. He asserts that he faced a maximum, aggregate sentence of thirty-two years of imprisonment and received a near-maximum aggregate sentence of thirty-one years of imprisonment. Medina misunderstands both the exposure that he faced and the sentences actually imposed. Medina faced an aggregate maximum sentence of thirty-nine years and six months of imprisonment and a fine of $96,000.[5] The circuit court, however, structured the penalties imposed in a way that required him to serve

[5] Following the misdemeanor convictions, Medina faced nine months in jail and a $10,000 fine for battery pursuant to WIS. STAT. §§ 940.19(1), 939.51(3)(a); three months in jail and a $1,000 fine for disorderly conduct pursuant to WIS. STAT. §§ 947.01, 939.51(3)(b); and nine months in jail and a $10,000 fine for bail jumping pursuant to WIS. STAT. §§ 946.49(1)(a), 939.51(3)(a). As to the felony convictions, Medina faced ten years of imprisonment and a $25,000 fine for endangering safety by use of a dangerous weapon pursuant to WIS. STAT. §§ 941.20(2)(a), 939.50(3)(g); ten years of imprisonment and a $25,000 fine for possessing a firearm while a felon pursuant to WIS. STAT. §§ 941.29(2), 939.50(3)(g); and seventeen years and six months of imprisonment and a $25,000 fine for recklessly endangering safety while armed pursuant to WIS. STAT. §§ 941.30(1), 939.63(1)(b), and 939.50(3)(f).

an aggregate term of twenty years of imprisonment, bifurcated as ten years of initial confinement and ten years of extended supervision.

A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). We presume that sentences within the statutory maximums are "not so disproportionate to the offense[s] committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***id.*** (citation omitted). The sentences before us do not exceed the maximum available penalties. We cannot say that the sentences are shocking or excessive in light of Medina's risky and dangerous conduct.

Medina next complains that he was "misrepresented by [his] public defender and [he] did not receive a fair trial." To prevail in a claim that trial counsel was ineffective, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions fell "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must show that the deficiency deprived the defendant of a fair trial and a reliable outcome. *See* ***id.*** at 687.

Our review of the trial proceedings reflects that trial counsel appropriately raised objections, cross-examined witnesses, and presented proper arguments to the jury about why it should find Medina not guilty. Although the jury ultimately convicted Medina of the charges he

faced, the convictions do not themselves signal that he received ineffective assistance of counsel. '"Effective representation is not to be equated, as some accused believe, with a not-guilty verdict.'" ***State v. Machner***, 92 Wis. 2d 797, 802, 285 N.W.2d 905 (Ct. App. 1979) (citation omitted).

We have additionally considered whether the record would support an arguably meritorious claim that trial counsel was ineffective for failing to seek suppression of Medina's custodial statement. At a suppression hearing, the State must show that the defendant received the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 479 (1966).[6] *See* ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. The State must then show that the defendant knowingly and intelligently waived the rights protected by the ***Miranda*** warnings, and that the defendant gave his custodial statements voluntarily. *See* ***Jiles***, 262 Wis. 2d 457, ¶¶25-26. In pretrial proceedings here, the State told the circuit court that the interrogating officer, Matthews, interviewed Medina only after giving him the warnings required by ***Miranda***. Medina did not dispute that contention nor did he dispute the State's pretrial assertion that he had received a copy of the recorded custodial interview. In his trial testimony, Matthews confirmed that he questioned Medina after advising him of his constitutional rights and that Medina said that he wanted to make a statement. The record thus offers no basis to suggest that trial counsel should have requested a hearing to challenge the admissibility of Medina's custodial statement.

Relatedly, we have considered whether Medina could raise an arguably meritorious claim that his trial counsel was ineffective for failing to request WIS JI—CRIMINAL 180, regarding

[6] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

confessions and admissions. The standard instruction directs the jury to determine whether the defendant actually made the statement attributed to him or her, whether the statement was accurately restated at trial, and whether the statement ought to be believed. *See* ***id.*** Although the circuit court did not give that specific instruction here, the circuit court thoroughly instructed the jury, pursuant to WIS JI—CRIMINAL 190, 195 and 300, regarding the duty to weigh the evidence and assess the credibility of witnesses. We are satisfied that Medina could not make an arguably meritorious argument that he suffered prejudice because the jury did not receive the similar guidance provided by the standard language in WIS JI—CRIMINAL 180.

We have further considered whether Medina could raise an arguably meritorious claim that his trial counsel was ineffective for failing to request the special instruction contained within WIS JI—CRIMINAL 180 applicable to assessing unrecorded custodial statements. Wisconsin has a policy of recording custodial interrogation. *See* WIS. STAT. § 968.073(2). Here, Matthews testified at trial that, although he recorded his interview with Medina, Matthews did not record Medina while he watched the videotape made by Bielke's surveillance cameras. Matthews explained that the interview room in the jail did not have the equipment necessary for watching a videotape, so Medina watched the video in a separate room "during a break that wasn't ... recorded."

Pursuant to WIS. STAT. § 972.115(2), a defendant may request a special jury instruction when a recording of an interrogation is unavailable.[7] *See* ***id.*** That instruction provides:

[7] WISCONSIN STAT. § 968.073(2) "does not require suppression of evidence obtained from an unrecorded interview of an adult." ***State v Townsend***, 2008 WI App 20, ¶1, 307 Wis. 2d 694, 746 N.W.2d 493.

> [i]t is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony. You may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in this case.

See WIS JI—CRIMINAL 180; *see also* § 972.115(2).

We are satisfied that Medina could not pursue an arguably meritorious claim of ineffective assistance of counsel based on counsel's failure to request the special instruction applicable to assessing an unrecorded custodial interrogation. The legislature defines a custodial interrogation as one "during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response." *See* WIS. STAT. § 968.073(1)(a). We are not satisfied that watching a video clearly fits within the statutory definition of a "custodial interrogation." A claim of ineffective assistance of counsel is '"limited to situations where the law or duty is clear[.]"' ***State v. Maloney***, 2005 WI 74, ¶29, 281 Wis. 2d 595, 698 N.W.2d 583 (citation omitted).

Moreover, even assuming that Medina was clearly participating in a custodial interrogation as defined in WIS. STAT. § 968.073 while watching the surveillance video, we are persuaded that he could not make an arguably meritorious showing that he suffered prejudice from his trial counsel's failure to request a special instruction. When we consider whether a defendant suffered prejudice from trial counsel's acts or omissions, we consider the alleged deficiency in light of the totality of the evidence presented at trial. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶26, 286 Wis. 2d 721, 703 N.W.2d 694. Here, the State presented overwhelming evidence that Medina was the gunman, even absent his custodial admission that he was the person in the red shirt seen on the surveillance tape. Cervantes, his former girlfriend, said that she recognized him as the person in the red shirt on the surveillance video. Bielke

testified that she saw the person in the red shirt fire a gun into the building at 3734 West Miller Lane on July 25, 2011. No reasonable probability exists that a supplemental jury instruction about Wisconsin's policy of recording custodial interviews would have affected the outcome of the trial in light of the totality of the trial evidence.

Finally, we note that the circuit court ordered Medina to pay a DNA surcharge "if [he] ha[d] not paid in the past." *See* WIS. STAT. § 973.046(1g) (permitting sentencing court to impose a $250 DNA surcharge when sentencing a defendant for a felony that does not involve certain sex crimes). The circuit court must exercise its discretion when imposing a surcharge under § 973.046(1g) and must set forth on the record the factors considered in making the decision. *See* ***State v. Cherry***, 2008 WI App 80, ¶9, 312 Wis. 2d 203, 752 N.W.2d 393. We need not consider here whether the circuit court properly exercised its discretion in requiring Medina to pay a DNA surcharge if he had not previously paid one. In a supplemental no-merit report, appellate counsel advises this court that Medina previously paid a DNA surcharge in an unrelated case. We conclude that proceedings to challenge the surcharge here would therefore lack arguable merit.[8]

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

[8] Although the circuit court ordered Medina to pay a DNA surcharge only if he had not previously paid one, the judgment of conviction in case No. 2011CF3574 reflects a $250 DNA analysis surcharge as a court-ordered obligation without indicating the conditional nature of the circuit court's order. Upon remittitur, the circuit court shall direct the clerk of the circuit court to enter an amended judgment of conviction in case No. 2011CF3574 correctly stating Medina's obligation, as orally ordered by the sentencing court. *See* ***Prihoda***, 239 Wis. 2d 244, ¶5.

IT IS ORDERED that the judgment of conviction in case No. 2011CM1619, modified as directed in footnote three, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the judgment of conviction in case No. 2011CF3574, modified as directed in footnote eight, is summarily affirmed. *See* ***id.***

IT IS FURTHER ORDERED that, effective on the date that the circuit court enters the amended judgments of conviction described in this opinion and order, Attorney David J. Lang is relieved of any further representation of Bennitis Medina on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals