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November 20, 2013

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

2013AP1273-CRNM State of Wisconsin v. Craig Alan Fulsom (L.C. #2010CF5679)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Craig Alan Fulsom appeals from a judgment convicting him of four counts of felony witness intimidation. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Fulsom received a copy of the report and has filed a response raising a host of issues. Upon consideration of the

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

report, the response, and our independent review of the record as mandated by ***Anders***, we conclude that there is no arguable merit to any issue that could be raised on appeal. The judgment thus may be summarily affirmed. *See* WIS. STAT. RULE 809.21. We affirm the judgment and relieve Attorney Dustin C. Haskell of further representing Fulsom in this matter.

Fulsom engaged in two domestic abuse incidents against his girlfriend, Lorraine S., while a temporary restraining order (TRO) was in place. Fulsom communicated with Lorraine from jail by letter and telephone to get her to recant and to dissuade her from appearing in court. Fulsom gave Lorraine specific directions: she should avoid the subpoena by not answering the door and pretending to be someone else on the phone, should check herself in at the hospital for her terminal illness to provide a reason for her absence from court, and should destroy his letters.

Lorraine died soon thereafter. Her family found the letters from Fulsom in her home and gave them to the district attorney. Fulsom was charged with three counts of violating a domestic abuse TRO and four counts of felony witness intimidation, because the underlying counts were felonies. Pursuant to a plea agreement, Fulsom entered guilty pleas to the four counts of felony witness intimidation and the State moved to dismiss the TRO violations and recommended consecutive sentences of two years in confinement, followed by two years of extended supervision on each count. The presentence investigation author recommended a total of "two years in, two years out." The defense asked for probation. Rejecting all of those recommendations, the circuit court sentenced Fulsom to four consecutive sentences of three years in confinement, followed by two years of extended supervision.

The no-merit report addresses whether Fulsom's guilty plea was knowingly, voluntarily, and intelligently entered. The record confirms that the court's colloquy with Fulsom satisfied the

requirements of WIS. STAT. § 971.08(1) as set forth in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. In conjunction with the substantive colloquy, the court properly used Fulsom's signed plea questionnaire to ascertain that he understood the ramifications of entering a plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. We agree with counsel's conclusion that no issue of merit could arise from the plea taking.

The no-merit report also considers whether the sentence represented a proper exercise of discretion. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court must provide a "rational and explainable basis" for the sentence it imposes to allow this court to ensure that discretion in fact was exercised. ***Id.***, ¶¶39, 76 (citation omitted). In determining an appropriate sentence, the court must consider three primary factors: the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The weight to be given the various factors is within the court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

We agree with appellate counsel that no basis exists to disturb the sentence. The court deemed Fulsom's offenses serious because they showed him to be a "consummate manipulator" who refused to accept responsibility. In assessing his character, the court considered that Fulsom failed many times on probation. It also properly considered the "extreme[] serious[ness]" of the underlying domestic abuse—Fulsom twice tried to suffocate and strangle Lorraine, once with an electrical cord. *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. The order that he provide and pay the surcharge for a DNA sample, regardless if previously

submitted and paid for, "to contribute to his ultimate rehabilitation" was based on a pertinent consideration. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393.[2]

Finally, the court noted that its significant sentence was rooted in general and specific deterrence because both would help protect the public. Fulsom faced ten years' imprisonment and a $25,000 fine on each of the four counts. A sentence less than the maximum presumptively is not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App. 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. The court advised Fulsom at the plea hearing that it was free to impose the maximum penalties. The court fully explained that it intended the sentence to convey to Fulsom and to others who engage in or are victims of domestic violence that such behavior will not be tolerated. We cannot say that the sentence imposed is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other issues with arguable appellate merit, including the many Fulsom raises in his response. He first launches a two-fold attack against the consecutive sentences. He asserts that the court failed to explain why it ordered consecutive rather than concurrent. In fact, the court thoroughly explained the sentence's underpinnings. It did not have to provide a separate rationale for why it chose consecutive rather than concurrent sentences. *See* ***State v. Berggren***, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W.2d 110. He also complains that the consecutive sentences amount to his being repeatedly punished for the

[2] Postsentencing, Fulsom filed a pro se motion to vacate the DNA surcharge, alleging that the court gave an insufficient reason for assessing the surcharge. The court denied the motion on the basis that he was represented by counsel and pro se filings could jeopardize his appellate rights. It advised him to address any concerns with counsel.

same course of conduct. Fulsom contacted Lorraine multiple times from jail. The four counts represented the same type of crime but not the same single act.

Next, Fulsom asserts "double jeopardy." He provides the definition but no argument. If he refers to consecutive sentencing, it has no merit. If it stands on its own, it is too undeveloped to address. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Third, Fulsom asserts he was "under duress" because Lorraine was dying and he could not get out of jail to care for her and because he has "an imbalance" or "disorder" that causes him to make poor decisions with severe consequences. Fulsom leaves us to guess at the legal issue and the remedy he seeks. We cannot make his arguments for him. *See* ***id.***

Fulsom also asserts that the circuit court exhibited "bias and prejudice," such that the judge should have recused herself, because the court considered at sentencing the dismissed underlying domestic abuse conduct. He contends charges not proved beyond a reasonable doubt cannot factor into the sentence. He is wrong. A court is obliged to acquire a full picture of a defendant's character and pattern of behavior, and so may consider uncharged and unproven crimes. *See* ***Leitner***, 253 Wis. 2d 449, ¶45. Nothing in the record reflects bias or prejudice.

Next, Fulsom alleges that, under the "rule of completeness," the State should have entered into the record the full letters or conversation transcripts, not just the inculpatory portions. He contends Lorraine's statements that she had to comply with a subpoena and would be at court would have shown that she was not intimidated. Fulsom expressly admitted his guilt to the charges, however. His guilty plea waived all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea. ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994). Furthermore, one who knowingly and

maliciously *attempts* to prevent or dissuade a witness from attending a court proceeding or giving testimony is guilty of felony witness intimidation. *See* WIS. STAT. §§ 940.42, 940.43.

Fulsom also asserts that he "think[s]" letters he sent to Lorraine should have been suppressed but alleges prosecutorial misconduct because he believes the State suppressed Lorraine's letters to him stating that "no matter what she was coming to court." He does not flesh out these contentions in any way. In any event, his failure to move to suppress or to object to the alleged suppression would have waived the issue, if there were one.

Fulsom next alleges prosecutorial vindictiveness based on a comment defense counsel made at the initial appearance. Counsel "guess[ed]" that the prosecutor's "frustration" with the progress of the case once Lorraine died "was taken to a high degree here in what is being charged." Defense counsel's comments simply were the argument of an advocate. They come nowhere near showing either actual vindictiveness—"'objective evidence that a prosecutor acted in order to punish the defendant for standing on his [or her] legal rights'"—or a realistic likelihood of it. *See* ***State v. Williams***, 2004 WI App 56, ¶43, 270 Wis. 2d 761, 677 N.W.2d 691 (citation omitted). Further, Fulsom's guilty plea waived any claim that he was overcharged.

Next, in a claim entitled "Sentencing," Fulsom asserts that the counts against him "should have been grouped together for sentencing purposes" because his case "involved the same victim and the same act or transaction." The sole case he cites involved a woman who died while being raped. *See* ***United States v. Chischilly***, 30 F.3d 1144 (9th Cir. 1994). The issue was whether, under the federal sentencing guidelines, the counts should be grouped together for sentencing purposes. ***Id.*** at 1160. This is not a federal sentencing guidelines case. Also, Fulsom tried on numerous occasions to dissuade Lorraine from appearing in court. His argument is baseless.

Next, Fulsom posits that mitigating circumstances made his crime "less reprehensible," warranting that it be "reduce[d] to a lesser offense" and giving "ample reason for [him] to get out of jail." The circumstances he cites are that he and Lorraine both had terminal cirrhosis of the liver and wanted to be together in case one of them died. These circumstances, well in place before Fulsom committed his crimes, do not provide a legal basis for judicial mercy toward him.

Finally, Fulsom says he "think[s]" his trial and appellate counsels were ineffective "for not bringing up any type of defense to help [his] case." We presume he means the "defenses" he raised here. None have merit. Counsel is not ineffective for not raising meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Also, we cannot evaluate trial counsel's performance without an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). As to both counsels, Fulton's single-sentence, conclusory allegation does not raise facts sufficient to entitle him to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of further representing Fulsom in this matter.

Diane M. Fremgen
Clerk of Court of Appeals