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

2012AP1077-CRNM State of Wisconsin v. Stephan R. Cetnar (L.C. #2008CF240)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Stephan Cetnar appeals related judgments convicting him of strangulation and suffocation, intimidation of a victim by use of force, substantial battery, false imprisonment, two counts of disorderly conduct, criminal damage to property, and bail jumping. Attorney Jefren Olsen has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy***

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

v. Wisconsin Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the propriety of joinder and the amendment of the information; a conditional plea entered on the bail-jumping count; several evidentiary issues; the sufficiency of the evidence to support the verdicts on those charges that went to trial; a forfeiture of counsel at the sentencing hearing; and the validity of the sentences. Cetnar was sent a copy of the no-merit report, and has filed a response alleging that the district attorney suborned perjury by putting the victim on the stand despite being aware that she had made prior inconsistent statements to the police, and also failed to turn over all of the victim's inconsistent statements to the defense. Upon reviewing the entire record, as well as the no-merit report and Cetnar's response, we conclude that there are no arguably meritorious appellate issues.

Joinder And Amendment Of The Information

Two or more crimes may be jointly charged in a single complaint or information when they are of the same or similar character, or are based on the same act or transaction, or are based on multiple transactions that are connected together or constitute parts of a common scheme or plan. WIS. STAT. § 971.12(1). A circuit court has discretion to grant severance upon weighing the potential prejudice to the defendant from a joint trial against the public interest in judicial economy. WIS. STAT. § 971.12(3). The circuit court may also permit the amendment of an information within a reasonable time after arraignment so long as the defendant's rights to notice, a speedy trial, and opportunity to defend are not prejudiced. *See* WIS. STAT. § 971.29.

Here, the circuit court permitted charges of disorderly conduct, criminal damage to property, and bail jumping that stemmed from a bar fight to be joined with charges of strangulation, intimidation of a victim, battery, and disorderly conduct that stemmed from an

assault that occurred in the early morning hours following the bar fight. The State subsequently filed an amended information adding charges of false imprisonment and disorderly conduct that also stemmed from the assault. We are satisfied that joinder was proper because the victim of the second incident alleged that the reasons for Cetnar's assault on her related to the bar fight, and that the amendment was proper because the factual basis for the additional charges was alleged in the probable cause portion of the original complaint.

Discovery

The assault victim provided several statements to law enforcement, including one at the scene, one at the hospital where she was transported shortly after the assault, and one at her home a few weeks later to clarify some discrepancies in the statements that she had given in her initial statements. Cetnar alleges that the State failed to provide the defense with transcripts or police reports documenting the hospital interview and the follow-up interview, during which the assault victim made a number of conflicting statements. However, the record belies that assertion because the trial transcripts plainly show defense counsel questioning the assault victim and the investigating officer about specific statements the assault victim made in each of the three interviews. While it is possible that Cetnar did not himself see all of the discovery materials prior to trial, it is obvious that defense counsel did. Therefore, there is no basis for bringing a claim alleging that the prosecutor failed to disclose impeachment materials as required by ***Brady v. Maryland***, 373 U.S. 83, 87 (1963).

Plea On Bail-Jumping Charge

Cetnar entered a conditional plea acknowledging that he was out on bond for charges arising from the bar fight at the time of the subsequent assault, and that, if the jury found him

guilty of the assault-related charges, he would also be guilty of bail jumping. The record shows that the circuit court conducted a standard colloquy before accepting the conditional plea, and Cetnar does not allege that he was misinformed or misunderstood anything about the nature of the charge or his rights.

Evidentiary Issues

Most of the motions in limine filed by the State and the defense were standard and unopposed. However, over Cetnar's objection, the circuit court permitted the State to present testimony that the arresting officer saw a substance that "appeared to be blood" on Cetnar's pants following the assault that had not been observed on his pants after the bar fight. The circuit court reasoned that the evidence, although marginally relevant, had at least some limited probative value and that the defense could likewise limit any potential prejudice through impeachment since the police had failed to collect and test Cetnar's clothing. Defense counsel did in fact highlight the failure on cross-examination. We agree with counsel's assessment that any error in admitting the evidence would have been harmless given both its low probative and prejudicial value.

The defense entered into a factual stipulation with the State to inform the jury that the owner of the bar did not consent to the property damage. The stipulation was well within professional norms, and did not deprive Cetnar of his right to a jury trial on the property damage count because the element was also properly submitted to the jury. *See* ***State v. Benoit***, 229 Wis. 2d 630, 638, 600 N.W.2d 193 (Ct. App. 1999).

At trial, defense counsel objected to the arresting officer's testimony about what the victim said at the scene; to the testimony of another investigating officer about the content of

threatening phone calls and text messages the victim claimed were made by Cetnar; and to the testimony of Cetnar's probation agent that the phone number associated with the phone calls and texts to the victim matched the phone number Cetnar had provided to the agent. We agree with appellate counsel's assessment that none of these evidentiary issues provide grounds for an appeal. First, the victim's statement at the scene would not have been hearsay if offered to explain the officer's subsequent actions. Moreover, it would likely have qualified as an excited utterance even if it were hearsay, given that the victim was suffering from an untreated broken jaw at the time she spoke to the officer. Second, the threats attributed to Cetnar were not excludable hearsay because they were admissions offered to show consciousness of guilt. And third, even assuming that the probation agent's testimony about Cetnar's phone number should have been excluded on the grounds that Cetnar had been compelled to provide the number and thus incriminate himself, the error was harmless because the victim had already testified that she recognized the number.

Suborning Perjury

Cetnar contends that the prosecutor suborned perjury or presented false testimony by calling the assault victim as a witness despite being aware that she had made prior inconsistent statements. This contention fails to provide grounds for an appeal for at least two reasons. First, since the prosecutor was not present at the assault and had no other eyewitness accounts to rely on, he had no independent knowledge of which of the victim's accounts was the most accurate. Thus, even if the victim did lie on the stand, it does not follow that the prosecutor was knowingly presenting false testimony. Second, the prosecutor could reasonably have attributed the discrepancies in the victim's account to confusion rather than deliberate lies, given that the victim was highly intoxicated at the time of the assault and that she gave her first two statements

shortly after having been beaten and strangled to the point of unconsciousness, when she was first in serious pain and then highly medicated.

Sufficiency Of The Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

Here, the assault victim testified that she had met her boyfriend Cetnar after work at a bar where they played pool with three male bar patrons. Cetnar became angry and started "being real mouthy" with the other pool players, apparently due to the victim's interaction with one or more of them. The verbal altercation quickly escalated to a physical fight, during which both the bartender and the assault victim saw Cetnar throw one or more pool balls that broke some lights in the bar. Police responded to a call from the bartender and arrested Cetnar.

The assault victim stayed at the bar until nearly closing time, then went home to bed. She awoke when Cetnar came in the door to her apartment to pick up the keys to his truck after having been released from jail and dropped off at her apartment by his father. The victim described Cetnar as "[p]issed off" and said that he accused her of filing a police report against him for the bar fight. Cetnar threw the victim down on her bed and strangled her. The victim testified that she regained consciousness and attempted to get her cell phone from a table, but Cetnar grabbed the phone and told her she wasn't calling anybody. He again pinned her down on her bed, and then began punching her repeatedly in the face. The victim managed to get away

momentarily and ran to the kitchen area, but Cetnar grabbed her, pushed her against the wall, and knocked her out.

The jury was entitled to believe the victim's testimony, which was corroborated in multiple respects by the bartender and by the medical evidence of her broken jaw, bruising on her neck, and other contusions. We agree with counsel's analysis that the evidence satisfied all of the elements of each of the charges.

Forfeiture Of Counsel

The constitutional right to counsel may be relinquished either by an affirmatively made waiver by the defendant, or by operation of law resulting from the defendant's actions. *See* ***State v. Cummings***, 199 Wis. 2d 721, 752-53, 756-57, 546 N.W.2d 406 (1996). "The triggering event for forfeiture is when the court becomes convinced that the orderly and efficient progression of the case is being frustrated by the defendant's repeated dissatisfaction with his or her successive attorneys." ***State v. Coleman***, 2002 WI App 100, ¶17, 253 Wis. 2d 693, 644 N.W.2d 283 (citations, quoted source, and brackets omitted). To establish a valid forfeiture, a court should: (1) provide the defendant with an explicit warning that he will forfeit the right to counsel and have to represent himself if he persists in specific conduct; (2) engage in a colloquy to ensure that the defendant has been made aware of the difficulties and dangers of self-representation; (3) make a clear ruling when the court deems the right to counsel to have been forfeited; (4) make factual findings to support the ruling; and (5) further determine that the defendant is competent to proceed without counsel. *See* ***id.***, ¶¶22 and 34.

Here, the circuit court warned Cetnar of the possibility of forfeiture when his first and third attorneys were discharged, and again when the court learned that Cetnar was considering

discharging his fourth attorney. The court explained at length why it believed that Cetnar was attempting to manipulate the system by discharging lawyers to delay the proceedings. Although the court did not engage in a colloquy about the dangers of self-representation, it appointed Cetnar's fourth attorney as standby counsel for the sentencing hearing. The court could also reasonably have concluded that Cetnar was competent to represent himself at sentencing based upon Cetnar's numerous pro se submissions.

Sentences

A challenge to Cetnar's 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. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record shows that Cetnar was afforded an opportunity to comment on the department's PSI, to present his own alternate PSI, to present character testimony from his father and character letters from others, to personally address the court, and to have a separate hearing on restitution. 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 & nn.9-12, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court considered the charges involving the assault victim to be aggravated due to the severe injuries she suffered. With respect to Cetnar's character, the court acknowledged that Cetnar had participated in service organizations, but was disturbed that there was not a single incident in Cetnar's criminal history that he had ever taken responsibility for; he always lied about his own actions and blamed others. In addition, Cetnar had made comments about the victim revealing a mindset that devalued other human beings. The court concluded that Cetnar showed no remorse, that

rehabilitation in a community setting was unlikely to be successful, and that a prison term was necessary to protect the public from Cetnar's pattern of violent behavior.

The court then sentenced Cetnar to three years of initial confinement and three years of extended supervision on the strangulation and suffocation count; to four years of initial confinement and four years of extended supervision on the felony intimidation count; to one-and-a-half years of initial confinement and two years of extended supervision on the substantial battery count; to ninety days in jail on each of the disorderly conduct counts and the criminal damage to property count; to six months in jail on the bail-jumping count, and two years of initial confinement and two years of extended supervision on the false imprisonment count. The court made the sentences on counts five and six, which related to the bar fight, concurrent to one another but consecutive to all of the sentences relating to the assault, which were also concurrent to one another. The court also awarded 123 days of sentence credit as stipulated by the parties; determined that Cetnar lacked the ability to pay restitution; directed Cetnar to provide a DNA sample if he had not already provided one, but waived the fee; and determined that Cetnar was not eligible for the challenge incarceration program or the earned release program.

The jail terms and components of the bifurcated sentences imposed by the court were within the applicable penalty ranges. *See* WIS. STAT. §§ 940.235 (classifying strangulation and suffocation as a Class H felony); 940.45(1) (classifying intimidation of a witness in a felony case as a Class G felony); 940.19(2) (classifying substantial battery as a Class I felony); 947.01 (classifying disorderly conduct as a Class B misdemeanor); 943.01(1) (classifying criminal damage to property as a Class A misdemeanor); 946.49(1)(a) (classifying bail jumping from bond on a misdemeanor offense as a Class A misdemeanor); 940.30 (classifying false imprisonment as a Class H felony); 939.50(3)(g) (providing maximum imprisonment term of ten

years for a Class G felony); 939.50(3)(h) (providing maximum imprisonment term of six years for a Class H felony); 939.50(3)(i) (providing maximum imprisonment term of three years and six months for a Class I 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); 973.01(2)(b)9. and (d)6. (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony); 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor); and 939.51(3)(b) (providing maximum imprisonment of ninety days for a Class B misdemeanor) (all 2007-08 Stats.).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were certainly 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). That is particularly true since the court made all of the felony sentences concurrent to one another.

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 ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Attorney Jefren Olsen is relieved of any further representation of Stephan Cetnar in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals