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April 9, 2014

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

2013AP1640-CRNM State of Wisconsin v. Carlos Flores (L.C. #2012CM171)

Before Gundrum, J.[1]

Carlos Flores appeals from a judgment convicting him of battery contrary to WIS. STAT. § 940.19(1) (2011-12) and disorderly conduct contrary to WIS. STAT. § 947.01(1) as acts of domestic abuse. Flores' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Flores received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we modify

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the judgment of conviction to correct an error in the description of the sentence, and as modified, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report fails to discuss the circuit court's exercise of sentencing discretion or address other issues that potentially arise from the record as required by WIS. STAT. RULE 809.32(1). Counsel was obligated to address possible appellate issues arising pretrial, at trial and at sentencing, and state why the issues do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the purpose of RULE 809.32.

There would be no arguable merit to a challenge to the sufficiency of the evidence. We review whether the evidence, "viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted). It was for the jury to weigh the evidence and resolve conflicts in the testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

At trial, the victim recanted her battery allegation and claimed that her injuries were sustained in a bicycle accident one week before the alleged battery. She also recanted other statements about Flores' violence toward her. Flores' mother, Dora Flores, testified that the victim contacted her on the day of the battery and told Dora that Flores had battered her. Dora saw the victim's injuries. Officer Havard testified that he responded to Dora's 911 call, and when he encountered the victim, she was frightened and injured, and she gave a statement that Flores battered her. Havard testified that he could distinguish between scrapes and bruises that were

fresh as opposed to a week old, and the victim's injuries appeared fresh. Viewed most favorably to the State and the conviction, the evidence was sufficient to convict Flores.

The no-merit report addresses whether the circuit court should have excluded Dora's testimony and should have barred Havard from testifying that he believed the injuries to the victim's face were fresh. Defense counsel objected in both instances. We agree with appellate counsel that these issues lack arguable merit for appeal.

The circuit court found good cause for the late inclusion of Dora as a witness at trial because the State belatedly discovered Dora's 911 call regarding the offenses in this case. Dora testified that the victim contacted her after the battery, and the victim told Dora that Flores had battered her. Dora's testimony was permissible impeachment of the victim with the victim's prior inconsistent statement to Dora that Flores had battered her. The requirements of WIS. STAT. § 906.13(2)(a) were satisfied: the victim was questioned about her statement to Dora and the victim was not excused from giving further testimony. ***State v. Smith***, 2002 WI App 118, ¶¶12-13, 254 Wis. 2d 654, 648 N.W.2d 15. The circuit court properly exercised its discretion in admitting Dora's testimony. ***State v. Mares***, 149 Wis. 2d 519, 525, 439 N.W.2d 146 (Ct. App. 1989). This issue lacks arguable merit for appeal.

Similarly, the circuit court properly exercised its discretion when it permitted Havard to testify that the victim told him that Flores had battered her. As with Dora's testimony, this was proper impeachment with a prior inconsistent statement.

We also conclude that the circuit court properly exercised its discretion when it permitted Havard to testify that, in his opinion, the injuries to the victim's face were fresh. ***Mares***, 149 Wis. 2d at 525. Havard's testimony was intended to counter the victim's testimony that her

injuries were a week old. The battery occurred in the early morning hours of February 28, 2012, and Havard encountered the victim in the early evening hours of February 28. Photographs of the victim's injuries were taken within thirty minutes of Havard's contact with the victim. The court determined that expert testimony was not needed, and Havard could offer an opinion, based on his training and experience with battered victims, whether the victim's injuries were fresh or a week old. Havard then testified that he could distinguish between scrapes and bruises that were fresh as opposed to a week old, and that the victim's injuries appeared fresh. The jury also viewed the photographs depicting the victim's injuries. We agree with appellate counsel that this evidentiary ruling lacks arguable merit for appeal because it was a proper exercise of discretion.

The no-merit report does not address whether there would be arguable merit to a challenge to the circuit court's refusal to declare a mistrial as a result of the victim's testimony that Flores was currently in custody. In response to a question about whether she and Flores were still in a dating relationship, the victim stated that she had not seen Flores very much because he was in jail. The State explained that it did not intend to elicit testimony that Flores was in custody. Rather, the State was merely trying to ascertain the status of the victim's relationship with Flores. The court declined to grant a mistrial because Flores appeared in street clothes and was unrestrained, i.e., Flores' appearance did not suggest that he was in custody. Trial counsel declined a cautionary instruction because counsel did not want to highlight Flores' custody status for the jury.

The circuit court properly exercised its discretion when it denied a mistrial because this record does not show the manifest necessity required for a mistrial. ***State v. Seefeldt***, 2002 WI App 149, ¶¶13-14, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822. This issue lacks arguable merit for appeal.

The no-merit report does not address whether there would be arguable merit to a challenge arising from Havard's testimony that when he was dispatched to locate Flores, he was aware that Flores had warrants for his arrest. Trial counsel did not object to the mention of the arrest warrants, and the circuit court did not consider whether a mistrial was appropriate. We conclude that the record does not show a manifest necessity for a mistrial arising from Havard's testimony. ***Seefeldt***, 256 Wis. 2d 410, ¶13. This issue lacks arguable merit for appeal.

We have reviewed the entire jury trial, including other testimony, evidentiary rulings, and the jury instructions, and we discern no issues with arguable merit for appeal.

The no-merit report does not address the sentences. With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court imposed two years of probation for the battery and stayed nine months of jail time. For the disorderly conduct, the court imposed ninety days as time served. The court adequately discussed the facts and factors relevant to sentencing Flores. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In fashioning the sentences, the court considered the seriousness of the offenses, Flores' character and history of other offenses, and the need to protect individuals from Flores' violent temper and alcohol use.

We turn to the error in the judgment of conviction. At sentencing, the circuit court imposed two years of probation for the battery, but the August 1, 2012 judgment of conviction shows only one year of probation. We directed appellate counsel to consult with Flores and investigate this apparent inconsistency between the judgment of conviction and the oral

pronouncement of sentence.[2] Counsel agrees that the judgment of conviction is wrong, but Flores benefits from the error.[3]

We are an error-correcting court. ***State v. Schumacher***, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988). "[W]here a conflict exists between a court's oral pronouncement of sentence and a written judgment, the oral pronouncement controls." ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). Accordingly, we modify the judgment of conviction to reflect that the circuit court imposed a two-year probation term.

The defect is in the form of the judgment of conviction, i.e., a clerical error, which may be corrected on remand in accordance with the actual determination by the circuit court. ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. On remand, "the circuit court may either correct the clerical error in the sentence portion of a written judgment of conviction or direct the clerk's office to make such a correction." ***Id.***, ¶27. An amended judgment of conviction showing two years of probation shall be entered.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, modify the August 1, 2012 judgment of conviction, and as modified, we affirm the judgment. We remand this matter to the circuit court for the entry of an amended judgment of conviction. Once the amended judgment of conviction

[2] Our December 11, 2013 order directing counsel to consult cited ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987), for the proposition that "where a conflict exists between a court's oral pronouncement of sentence and a written judgment, the oral pronouncement controls."

[3] An August 23, 2013 circuit court docket entry indicates that Flores was discharged from probation.

has been entered, Attorney Angela Dirden is relieved of further representation of Flores in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the August 1, 2012 judgment of conviction is modified and, as modified, is summarily affirmed pursuant to WIS. STAT. RULE 809. 21.

IT IS FURTHER ORDERED that an amended judgment of conviction shall be entered.

IT IS FURTHER ORDERED that once the amended judgment of conviction has been entered, Attorney Angela Dirden is relieved of further representation of Flores in this matter.

Diane M. Fremgen
Clerk of Court of Appeals