OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 11, 2014

To:

Hon. Wayne J. Marik
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Michael J. Backes
Law Offices of Michael J. Backes
P.O. Box 11048
Shorewood, WI 53211

W. Richard Chiapete
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Marlon D. Duffie, #596414
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2013AP2546-CRNM State of Wisconsin v. Marlon D. Duffie (L.C. #2011CF717)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Marlon D. Duffie appeals a judgment convicting him of second-degree reckless injury, first-degree recklessly endangering safety, and substantial battery with intent to cause bodily harm, contrary to WIS. STAT. §§ 940.23(2)(a), 941.30(1), and 940.19(2) (2011-12).[1] Duffie's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Duffie received a copy of the report and filed a

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

response. Counsel filed a supplemental report, to which Duffie filed a second response. Upon consideration of the no-merit reports, the responses, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We therefore affirm the judgment, accept the no-merit report, and relieve Attorney Michael J. Backes of further representing Duffie in this matter.

In a grocery store parking lot, Duffie pulled his wife from their car and, in front of their two young children, savagely beat her and stomped on her face. The children were spattered with their mother's blood as they tried to stop Duffie. He continued the attack after shaking off passersby who tried to intervene. He claimed to be so drunk he could not recall the event.

Duffie was charged with attempted first-degree intentional homicide and two counts of causing mental harm to a child; the information later was amended to add one count of aggravated battery. Duffie demanded a speedy trial. Twice his trial date was set beyond the speedy trial date for good cause at the instance of Duffie's counsel. The trial court later granted the State's motion to dismiss the two counts of causing mental harm to a child to spare the children from having to testify.

When the trial did commence, jury selection could not be finished the first day and was set over for the next. By the next morning, the parties had negotiated an agreement by which the attempted first-degree intentional homicide would be amended to second-degree reckless injury; aggravated battery would be amended to first-degree recklessly endangering safety; a new charge, substantial battery with intent to cause bodily harm, would be added; and the previously dismissed charges would not be reissued. The plea agreement reduced his prison exposure by

nearly two-thirds: from seventy-five years down to twenty-eight and a half. Duffie entered no-contest pleas to the three felonies. Shortly thereafter, Duffie moved unsuccessfully to withdraw his pleas. The court imposed the maximum prison term. This no-merit appeal followed.

The no-merit report first considers whether the trial court erred in denying Duffie's presentence motion to withdraw his guilty plea. A defendant should be allowed to withdraw his or her plea before sentencing "for any fair and just reason, unless the prosecution would be substantially prejudiced." ***State v. Jenkins***, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24 (citation omitted). The court must find the reason credible and it must be something other than the desire to have a trial or belated misgivings about the plea. ***Id.***, ¶¶32, 43. The defendant must prove the reason by a preponderance of the evidence. ***Id.***, ¶32. Whether the reason given for the change of heart is adequate lies within the discretion of the court. ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999).

Duffie alleged that his then counsel had misinformed and lied to him, making him confused about his rights to call and cross-examine witnesses, including his wife. He also alleged that his pleas were coerced because three potential jurors were subjectively and/or objectively biased because they had heard or read about the case. Prior counsel testified at the hearing on the motion, and the court reviewed the transcripts of the plea colloquy and voir dire. The court found Duffie's explanation for his change of heart inadequate. It concluded that counsel gave "very valid strategic reasons" for his advice and that during the plea colloquy Duffie indicated a "complete understanding" of his rights, such that his claim of confusion "rings absolutely hollow." A challenge to the court's exercise of discretion would lack arguable merit.

Our independent review of the record satisfies us that Duffie's guilty plea was knowing, intelligent, and voluntary. The trial court conducted an extensive, careful colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1) and ***State v. Bangert,*** 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), repeatedly verifying Duffie's understanding. Besides the substantive colloquy, the court also looked to Duffie's signed plea questionnaire. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. We discern nothing regarding the plea taking that would establish a "manifest injustice" warranting plea withdrawal post-sentencing. *See* ***State v. Rock***, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). No issue of arguable merit could arise in regard to his pleas.

The no-merit report also considers whether Duffie's sentence is unduly harsh and unreasonable and the product of an erroneous exercise of the court's sentencing discretion. We agree with appellate counsel that no issue of arguable merit exists on this point.

The trial court painstakingly discussed the sentencing factors and objectives. *See* ***State v. Gallion***, 2004 WI 42, ¶¶41-43 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court observed that it would be "hard to exaggerate the gravity and the seriousness" of Duffie's "vicious, violent, savage behavior." It explained why Duffie's chronic alcohol abuse was an aggravating, not mitigating, factor and why it deemed the maximum prison term to be the minimum amount of confinement that is consistent with the primary sentencing factors and objectives. *See* ***State v. Brown***, 2006 WI 131, ¶7, 298 Wis. 2d 37, 725 N.W.2d 262. When measured against the horrific nature of the crime, Duffie's sentence—although the maximum—cannot be said to be "so excessive and unusual … as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Because its discretionary decision had a "rational

and explainable basis," ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76 (citation omitted), there would be no arguable merit to a challenge to the sentence. We also conclude that nothing points to the existence of a new factor that would implicate sentence modification. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

The no-merit report also addresses whether Duffie could claim a violation of his right to a speedy trial. The remedy for a violation of a defendant's right to a speedy trial under WIS. STAT. § 971.10(2)(a) is release from custody or from the obligations of bond pending trial. Sec. 971.10(4); ***State ex rel. Rabe v. Ferris***, 97 Wis. 2d 63, 67, 293 N.W.2d 151 (1980). The issue in that regard thus is moot. Beyond that, the court granted the continuances after making findings of good cause on the record—specifically that the failure to grant a continuance likely would result in a miscarriage of justice, such that the ends of justice served by granting the continuance outweighed the public's and the defendant's best interests in a speedy trial or the motion of any party. *See* § 971.10(3)(a), (b)1. The court also noted that if the defense had not moved for a continuance, it would have done so on its own motion. *See* § 971.10(3)(a).

A claim that his constitutional right to a speedy trial was violated also would be without merit. Just ten months elapsed between when Duffie was charged and when trial commenced; the defense initiated the adjournments due to counsel's illness and delays in receiving the victim's considerable medical records; and Duffie identifies no prejudice. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). Moreover, Duffie's knowing and voluntary no-contest plea waived all nonjurisdictional defects and defenses including claims of a pre-plea constitutional right violation. *See* ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980).

Duffie raises one claim in his responses. He contends that first-degree recklessly endangering safety, WIS. STAT. § 941.30(1), "by law" is a lesser-included offense of second-degree reckless injury, WIS. STAT. § 940.23(2), so that he was placed in double jeopardy and punished twice for the same crime. In support of his position, Duffie mainly relies on the dissent in an unpublished decision citing cases that address §§ 940.23 and 941.30 before their 1988 revisions.

A person "may be convicted of either the crime charged or an included crime, but not both." WIS. STAT. § 939.66. We presume the legislature intended to permit cumulative punishments for each offense if each charged offense is not a lesser-included offense of the other. ***State v. Kuntz***, 160 Wis. 2d 722, 755, 467 N.W.2d 531 (1991). An offense is lesser-included only if all of its statutory elements can be shown without proof of any fact or element in addition to those which must be proved for the "greater" offense. ***State v. Carrington***, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986); *see also* § 939.66(1). "[A]n offense is not a lesser-included one if it contains an additional statutory element." ***Carrington***, 134 Wis. 2d at 265 (citation omitted).

The elements of first-degree recklessly endangering safety are: (1) the defendant endangered the safety of another human being, (2) the defendant endangered the safety of another by criminally reckless conduct, and (3) the circumstances of the defendant's conduct showed utter disregard for human life. WIS JI—CRIMINAL 1345. The elements of second-degree reckless injury are: (1) the defendant caused great bodily harm to the victim, and (2) the defendant caused great bodily harm by criminally reckless conduct. WIS JI—CRIMINAL 1252. First-degree recklessly endangering safety is not a lesser-included offense of second-degree reckless injury because it contains an additional statutory element—that the circumstances of the

defendant's conduct showed utter disregard for human life. That element cannot be subsumed in "caused great bodily harm by criminally reckless conduct"; that already is an element of first-degree recklessly endangering safety. Indeed, WIS. STAT. § 940.23(1), first-degree reckless injury, with which Duffie was not charged, provides: "Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony." Duffie's reading would render § 940.23(1) a nullity.

In any event, Duffie is judicially estopped from raising a double jeopardy claim. Judicial estoppel prevents litigants from "playing fast and loose with the courts" by taking one position in a legal proceeding then later asserting a "clearly inconsistent" one. *See* ***State v. Johnson***, 2001 WI App 105, ¶¶9-10, 244 Wis. 2d 164, 628 N.W.2d 431 (citation omitted). Acknowledging his guilt by pleading to both first-degree recklessly endangering safety and second-degree reckless injury greatly reduced Duffie's penalty. He is estopped from trying to benefit further by arguing the reverse of the position he took below. *See* ***id.***, ¶21. Our review of the record discloses no other potential issues for appeal. Therefore,

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 Michael J. Backes is relieved of further representing Marlon D. Duffie in this matter.

Diane M. Fremgen
Clerk of Court of Appeals