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 I

May 8, 2015

To:

Hon. David L. Borowski
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Mark A. Schoenfeldt
Attorney at Law
135 W. Wells St., Ste. 604
Milwaukee, WI 53203

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

Leon Earl Carpenter 252242
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2014AP995-CRNM State of Wisconsin v. Leon Earl Carpenter (L.C. #2012CF4926)
2014AP996-CRNM State of Wisconsin v. Leon Earl Carpenter (L.C. #2013CF1800)

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

Leon Earl Carpenter appeals from judgments of conviction, entered upon a jury's verdicts, on two counts of second-degree sexual assault, one count of false imprisonment, one count of substantial battery, and six counts of felony intimidation of a witness. Appellate counsel, Mark A. Schoenfeldt, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Carpenter was advised of his right to

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

file a response, and has responded. Counsel then filed a supplemental no-merit report.[2] Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Carpenter's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

Background

Carpenter went to ex-girlfriend B.F.'s house to ask for a ride to his cousin's home. B.F. agreed. They stopped at a gas station to get gas and B.F. went inside to pay. When she returned, Carpenter was in the driver's seat. He told her they were no longer going to his cousin's house—he had other plans for B.F.—and confronted her about whether she was having sex with another man. When B.F. tried to unlock her door and get out of the car, Carpenter told her to put her seatbelt back on or he would poke her eye out with his hair pick.

Carpenter drove B.F. to a house and dragged her by her hair out of the car and into a garage. There, he punched her in the head and, when she fell to the ground, began kicking her in the ribs and the rest of her body. He kicked her in the head, then hit her with something else. B.F. believed she lost consciousness because when she came to, she heard Carpenter yelling at her to stop playing dead.

[2] Carpenter objects to the supplemental no-merit report because it does not contain facts outside the record, only legal arguments addressing the issues Carpenter raised in his response. *See* WIS. STAT. RULE 809.32(1)(f) ("If the attorney is aware of facts outside the record that rebut allegations made in the person's response, the attorney may file … a supplemental no-merit report[.]"). However, even if the supplemental report filed in this case is not specifically the type permitted by RULE 809.32(1)(f), neither is it prohibited, and we accept the supplement in our exercise of discretion.

When Carpenter was done in the garage, he told B.F. to go in the house. She said she wanted to go home; he said he was afraid she would call the police if he let her leave. Carpenter further complained about injuries to his hand, blaming B.F. for them. Carpenter told B.F. to go clean herself up. In the bathroom, B.F. noticed she was urinating blood. Carpenter wanted to watch a football game; B.F. sat on a nearby speaker. At trial, B.F. testified that she was having trouble breathing and walking, so she did not think she could get away.

After the football game, Carpenter made B.F. go to the basement, where he demanded sex. B.F., who could barely move and was afraid Carpenter would beat her again if she refused, did not actively resist. Carpenter had penis-to-vagina intercourse with B.F.

The next day, Carpenter took B.F. to a different residence. He made her sit in the bathroom while he showered so she would not escape. When he got out of the shower, he demanded B.F. perform fellatio on him. However, because of injuries to her jaw, B.F. was unable to make Carpenter ejaculate, so he demanded penis-to-anus intercourse. Again, B.F. could not actively resist. Carpenter took off her pants, bent her over the back of the couch, and proceeded to have anal intercourse with her.

Carpenter eventually let B.F. go. She called her mother, who took her to the hospital. The hospital called police. B.F. initially declined to press charges but later decided to go ahead. An arrest warrant for Carpenter was issued. He was ultimately arrested and charged with two counts of second-degree sexual assault by threat of violence, one count of false imprisonment, and one count of substantial battery. While he was in jail, Carpenter repeatedly called B.F., trying to talk her into recanting or dropping the charges. This led the State to charge six counts of felony intimidation of a witness.

The matters were joined for a jury trial. The jury retuned guilty verdicts on all of the counts as charged. The trial court imposed sentences that total twenty years of initial confinement and ten years of extended supervision.

Discussion

I. Sufficiency of the evidence

The first issue counsel raises is whether sufficient evidence supports the jury's verdicts. We view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). "'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted). The jury is the sole arbiter of credibility of witnesses, and it alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506.

A. Second-degree sexual assault

With respect to second-degree sexual assault, the State had to show that: Carpenter had sexual intercourse with B.F.; B.F. did not consent to the sexual intercourse; and Carpenter had sexual intercourse with B.F. by the use or threat of force or violence. *See* WIS JI—CRIMINAL 1208. Sexual intercourse includes "fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal

opening" by the defendant. *See* WIS. STAT. § 940.225(5)(c). B.F. testified about the sexual intercourse Carpenter had with her and that she did not consent.

In his response to the no-merit report, Carpenter says there is insufficient evidence to support convictions on these charges because B.F. "confessed that she never once said no to the appellant['s] advances sexually towards her" and he implies that their intercourse was "make-up sex." However, the third element of second-degree sexual assault is the use or threat of violence. This use or threat of violence may occur before the sexual intercourse. *See* WIS JI—CRIMINAL 1208. The use or threat of violence at one time can carry over to an alleged assault at a later time if the use or threat of violence continued to weigh on the victim and caused her to cooperate out of fear for her safety. *See **id.***; *see also **State v. Jaworski***, 135 Wis. 2d 235, 240, 400 N.W.2d 29 (Ct. App. 1986). The "did not consent" element does not require the victim to offer physical resistance. *See* WIS JI—CRIMINAL 1208. B.F. testified, repeatedly, about how she was unable to escape on her own and feared further violence against her if she did not cooperate. Based on B.F.'s testimony, then, there was sufficient evidence supporting the convictions on second-degree sexual assault.

B. False Imprisonment.

On the false imprisonment charge, the State had to show: Carpenter intentionally confined or restrained B.F.; B.F. was confined or restrained without her consent; Carpenter had no lawful authority to confine or restrain B.F.; and Carpenter knew that B.F. did not consent and knew that he did not have lawful authority to confine or restrain her. *See* WIS JI—CRIMINAL 1275. Confinement does not require something like a prison cell; rather, if the defendant deprives the victim of freedom of movement, or compels the victim to remain where the victim

did not wish to remain, then the victim was confined or restrained. *See* ***id.*** The use of physical force is not required; one may be confined by acts or words or both. *See* ***id.***

B.F. testified to multiple instances of restraint: in the car, where Carpenter threatened to poke her eye out with his hair pick if she tried to leave; the first house, where he sent her to clean up instead of letting her go home when she asked; at that same house, where she sat on the speaker while Carpenter watched football; and the bathroom at the second house, where Carpenter made her sit so she would not escape. Her testimony also supports the lack of consent element, as well as the requirement that Carpenter knew she did not consent. The jury could also make a proper inference from its life experience and common sense that Carpenter had no lawful authority to confine B.F.

Carpenter asserts in the no-merit response that B.F. "could have avoided any preceived [sic] restraint … by simply taking advantage of the multiple opportunities she had to take reason[a]ble action[.]" Here, Carpenter seems to be modeling his argument after optional language in the jury instructions, which states, "A person is not confined or restrained if (he) (she) knew (he) (she) could have avoided it by taking reasonable action." *See* ***id.*** Aside from the fact that Carpenter does not tell us what reasonable action he thinks B.F. should have taken, "[a] reasonable opportunity to escape does not change confinement or restraint that has occurred." *See* ***id.*** B.F. did initially attempt to escape from her car, but Carpenter threatened her, confining her with words. B.F. explained that after she was assaulted in the garage, she was having difficulty breathing and standing, and she did not believe that she would have been able to run away from Carpenter. It is not reasonable to expect a seriously injured victim, who is having difficulty breathing and fears for her safety should she be disobedient, to attempt to flee her captor. There was sufficient evidence to support the false imprisonment conviction.

C. Substantial Battery

To prove substantial battery, the State had to show that Carpenter caused substantial bodily harm to B.F. and that Carpenter intended to cause bodily harm to her. *See* WIS JI—CRIMINAL 1222. "Substantial bodily harm" is bodily injury that causes, among other things, any fracture of a bone or a temporary loss of consciousness. *See* WIS. STAT. § 939.22(38). "Bodily harm" means physical pain or injury, illness, or any impairment of a physical condition. *See* WIS. STAT. § 939.22(4).

B.F. testified that she had lost consciousness and that she had broken ribs as a result of Carpenter's assault. She further testified about the pain she was in. Further, while Carpenter's intent was easily inferable from his actions, B.F. also testified that Carpenter told her that he was taking her to the place where he had beaten a prior girlfriend.

Carpenter complains in his response that the State "was allowed to present an unreliable, unclear medical report" read by a nurse who was not attesting to its findings. Carpenter is referring to B.F.'s medical record from Froedtert Hospital. When the sexual assault nurse examiner testified, she read the diagnosis presented on the form: "clinical rib fractures and head injury." But even if the medical record were inadmissible, B.F. was competent to testify about her own injuries, and testimony about her loss of consciousness alone was sufficient to support the conviction. Thus, there was sufficient evidence to support the substantial battery conviction.

D. Intimidation of a Witness

To secure convictions on the intimidating-a-witness charges, the State had to show that B.F. was a witness, that Carpenter attempted to prevent her from attending or giving testimony at

a proceeding authorized by law, and that Carpenter acted knowingly and maliciously. *See* WIS JI—CRIMINAL 1292.

The State played the recordings of Carpenter's calls to B.F. B.F. identified her voice and Carpenter's. In the first phone call, Carpenter told B.F., "I need you to just go to my lawyer['s] office and write an affidavit telling them that, deny it happened…. Otherwise they gonna try to hit me with all these other charges[.]"

In the second call, he told her, "I was trying to find out the easiest way to do it by just writing an affidavit and pleading the fifth that way you don't have to come to court…. [J]ust not say anything else right after: that way they can't charge you with nothing."

In the third call, he said, "But I'm hoping you go and see that fucking DA cause one of us gotta be out of jail…. [W]ithout you being there I don't know what they going to do because even when you was there they still held, bound me over for that bullshit. So when you ain't there I don't know what they going to do."

In the fourth call, Carpenter asked, "Why don't you want to do the affidavit for me? Do you want me to do the time for the battery or some shit? … You can make a signed statement and have it notarized and you plead the fifth after that and they can't make you come to court or make you say anything else."

In the fifth call, Carpenter told B.F., "My lawyer said … you will have to go to the DA and stop all proceedings, and even then it's up to the DA…. Can you just go to the DA and get me out of here[?] … [P]lease talk to the DA and just, just stop all proceeding, please?"

In the sixth call, Carpenter said, "[Y]ou're gonna have to dodge Justice 2000, so that mean you're gonna lose the apartment.… The only thing you have to do is go to the District Attorney's Office and tell him that you don't want to proceed with any more charges."

In his response, Carpenter asserts that the law only prohibits dissuasion, "not who ever begs and plead with his significant other[.]" However, the law provides that "whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law," "[w]here the act is committed by a person who is charged with a felony in connection with a trial, proceeding, or inquiry for that felony," is guilty of a Class G felony. *See* WIS. STAT. §§ 940.42 & 940.43(7). As the jury was instructed, this means that Carpenter had to intend to prevent B.F. from attending some authorized proceeding. *See also* WIS. STAT. § 940.41(1r) (defining "malice" or "maliciously" as "an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice").

It is clear from Carpenter's phone calls that he was attempting to interfere with the orderly administration of justice by preventing B.F., through his begging and pleading, from attending any legal proceedings regarding her assaults and from giving testimony against him. Sufficient evidence supports the intimidation convictions.

Upon the foregoing, then, there is no arguable merit to a challenge to the sufficiency of the evidence for any of the convictions.

II. Exclusion of Evidence

Counsel discusses whether there is any arguable merit to a challenge to the trial court's decision to exclude certain evidence that the defendant attempted to present. All relevant evidence is admissible, except as otherwise provided by law. *See* WIS. STAT. § 904.02. Evidence which is not relevant is not admissible. ***Id.***

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" WIS. STAT. § 904.03. The test under § 904.03 "is not whether evidence is prejudicial but whether it is *unfairly* prejudicial." *See* ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). "Unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Id.*** "Stated more concisely, unfair prejudice means a tendency to influence the outcome by *improper* means." ***Id.***

The decision to admit or exclude evidence is committed to the trial court's discretion. *See* ***State v. Smith***, 2002 WI App 118, ¶7, 254 Wis. 2d 654, 648 N.W.2d 15. "As long as the trial court demonstrates a reasonable basis for its determination, this court must defer to the trial court's ruling." ***State v. Denton***, 2009 WI App 78, ¶11, 319 Wis. 2d 718, 768 N.W.2d 250.

Defense counsel attempted to ask B.F. about her last instance of consensual sex. The trial court excluded this evidence, properly, under the rape shield law. *See* WIS. STAT. § 972.11(2)(b) ("[A]ny evidence concerning the complaining witness's prior sexual conduct … shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such

conduct be made in the presence of the jury[.]”). Defense counsel was, however, allowed to inquire about B.F.’s last consensual sex with Carpenter, an exception to the rape shield law. *See* WIS. STAT. § 972.11(2)(b)1.

The trial court refused to allow Carpenter to elicit testimony to show B.F. had become pregnant from Carpenter’s assault, or testimony that B.F. had terminated the pregnancy. The trial court explained that aside from being prejudicial—mentioning an abortion might inflame the jury and beyond that, it would amount to a concession by Carpenter that intercourse had occurred—the pregnancy was wholly irrelevant.

The trial court also would not allow the defendant to ask B.F. if she had been using heroin at the time without an offer of proof, but did allow Carpenter to inquire more generally if B.F. was under the influence of an intoxicant at the time of her assault. The question about heroin, the trial court explained, was simply an improper attempt at character assassination.

Finally, the trial court excluded as irrelevant any evidence, including witness testimony, that B.F. had put money into Carpenter’s jail account.

We discern no error to the evidentiary rulings.[3] There is no arguable merit to a challenge to the trial court’s exercise of discretion in excluding the above evidence.

---

[3] Relatedly, Carpenter claims in his response that the trial court erred in allowing exhibit 13, B.F.’s medical record, “when the only person who could have testified to [its] accuracy and authenticity was not present at trial to do so.” In other words, Carpenter believes that the doctor who wrote the record entry needed to present it at trial. However, WIS. STAT. § 908.03(6m)(b) expressly indicates that an authenticating witness is not needed for the introduction of patient health care records if proper notice was given. Here, the record indicates that the State properly complied with that notice requirement. Thus, there is no arguable merit to a claim that exhibit 13 was erroneously admitted.

III. Sentencing

Another issue counsel raises is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The trial court explained that the primary focus of its sentence would be punishing Carpenter and protecting B.F. and the community. With respect to the intimidation charges and Carpenter's attempts to get the charges against him dropped, the trial court told Carpenter that manipulation of the system would not be tolerated. Though Carpenter had a limited prior record, the trial court noted that anything less than prison in this case "would make a mockery of the system, and not only unduly depreciate the seriousness of these offenses but they would pretty much eliminate the seriousness of these offenses."

Noting that Carpenter had treated B.F. like chattel, the trial court deemed Carpenter a vicious, "uncaring, violent, lying bully" who "cares not one iota about" the victim and acted like he was the injured party. Because Carpenter was in his early forties, the trial court observed that

his age was not serving as a deterrent. The trial court thought that it was possible that Carpenter might be beyond rehabilitation but, whatever treatment was available, Carpenter would need a lot of it.

The maximum possible sentence Carpenter could have received was almost 150 years' imprisonment. The sentence totaling thirty years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

IV. Ineffective Assistance of Counsel

The final issue counsel raises is whether there is any arguable merit to a claim of ineffective assistance of trial counsel. The constitution guarantees the effective assistance of counsel. *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. There are two elements to every claim of ineffectiveness: deficient performance and prejudice from that performance. *See* ***id.*** "We give 'great deference to counsel's performance, and, therefore, a defendant must overcome a strong presumption that counsel acted reasonably within the professional norms.'" *See* ***id.*** (citation omitted).

In a single paragraph, appellate counsel determined that this issue would be frivolous. We observe, however, that there was a brief but express discussion on the record regarding whether trial counsel was ineffective for failing to bring a pretrial motion to admit details of B.F. and Carpenter's sexual relationship. *See* WIS. STAT. § 971.31(11) (requiring pretrial motion for evidence sought to be admitted under the WIS. STAT. § 972.11(2)(b)1. exception to the rape

shield law). But given that the trial court ultimately admitted the evidence that was the subject of the ineffective-assistance discussion, there is no prejudice from trial counsel's failure to bring a pretrial motion, even if trial counsel's performance in that regard might have been deficient.

Our review of the record satisfies us that there is no other basis in the record on which to raise a claim of ineffective assistance of counsel. We therefore agree with appellate counsel's assessment there is no arguable merit to claiming ineffective assistance of trial counsel.

Our independent review of the record reveals no other potential issues of arguable merit.[4]

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved of further representation of Carpenter in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] In his response, Carpenter complains it was error for the trial court to admonish the jury that they only had until 4:45 p.m. to reach a verdict. Our review of the transcript satisfies us there is no issue of arguable merit: the jury had already been excused to resume deliberating when the trial court reminded the parties that it could only allow jurors to deliberate until 4:45 p.m. because the courthouse closed at 5 p.m.