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

2015AP334-CRNM State of Wisconsin v. Teara Stewart
(L.C. #2013CF1159)

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

Teara Stewart appeals from convictions for five felonies, including child neglect and child abuse. Stewart's postconviction/appellate counsel, Gina Frances Bosben, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14), as well as a supplemental no-merit report.[1] Stewart has not filed a response. We have independently reviewed the record, the no-merit report, and the supplemental no-merit

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

report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The criminal complaint charged Stewart with eight felonies related to the physical abuse of her child, including nutritional neglect, medical neglect, and intentional physical abuse. The complaint alleged that Stewart and the child's father intentionally abused the child and denied the child medical care. The complaint said that Stewart told the police she was aware the child was being abused by the child's father, and that she was also abused but stayed in the home because she had no other place to live. Stewart "denied ever shaking … or abusing" the child, but a witness told the police that he heard Stewart beating the child.

Stewart did not file any pretrial motions. She waived the preliminary hearing and later reached a plea agreement with the State. Pursuant to that agreement, the State moved to dismiss and read in two counts, dismiss another count outright, and amend another count. Thus, the five counts that Stewart would plead guilty to were: (1) neglecting a child where the consequence is great bodily harm, as a party to a crime (nutritional neglect); (2) neglecting a child where the consequence is great bodily harm, as a party to a crime (medical neglect); (3) physical abuse of a child with a high probability of great bodily harm; (4) child abuse (failing to prevent great bodily harm by not preventing the child's father from causing head trauma); and (5) child abuse (failing to prevent bodily harm by not preventing the child's father from hitting the child with a belt). *See* WIS. STAT. §§ 948.21(1)(c), 939.05, 948.03(2)(c), 948.03(4)(a), and 948.03(4)(b). The plea agreement further provided that both sides were free to argue for an appropriate sentence.

The trial court conducted a plea colloquy with Stewart, accepted Stewart's guilty pleas, and found her guilty. At sentencing, the trial court imposed five consecutive sentences that

totaled thirteen years of initial confinement and nine years of extended supervision. The trial court ordered Stewart to provide a DNA sample but waived the DNA surcharge.

Postconviction/appellate counsel filed a no-merit report that analyzed three issues: (1) whether Stewart's guilty pleas were knowingly, voluntarily, and intelligently entered; (2) whether the trial court erroneously exercised its sentencing discretion; and (3) whether trial counsel performed ineffectively. This court agrees with postconviction/appellate counsel's conclusion that there would be no arguable merit to pursue those issues.

We begin with Stewart's guilty pleas. There is no arguable basis to allege that Stewart's guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. She completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the printed jury instructions for the crimes. The trial court conducted a plea colloquy that addressed Stewart's understanding of the plea agreement and the charges to which she was pleading guilty, the penalties she faced, and the constitutional rights she was waiving by entering her plea. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court referenced the guilty plea questionnaire that Stewart completed with her trial counsel, and the trial court summarized the elements of the crimes for Stewart. The trial court reiterated the maximum sentences and fines that could be imposed. The trial court also discussed with Stewart the constitutional rights Stewart was waiving, such as her right to a jury trial and her right to call witnesses in her defense.

This court has identified one deficiency in the trial court's plea colloquy with Stewart. The trial court did not advise her that it was not bound by the plea agreement, even though it was required to do so. *See* ***Hampton***, 274 Wis. 2d 379, ¶32 ("If the [trial] court discovers that 'the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecution attorney are not binding on the court.'") (citation and emphasis omitted). While the parties' plea agreement did not include sentence concessions, the plea agreement did include charge concessions: the State agreed to move to amend one of the felonies so that it did not include the previously charged dangerous weapon enhancer, to dismiss another count outright, and to dismiss and read in two other counts.

We brought this issue to the attention of postconviction/appellate counsel and asked her to file a supplemental no-merit report addressing the issue. In that report, counsel asserted that there was no basis to move to withdraw Stewart's pleas based on the trial court's colloquy because the trial court "accepted the pleas as recommended and dismissed the remainder counts as recommended." Counsel concluded that the trial court's error was harmless and urged this court to conclude that there would be no arguable merit to pursue an appeal based on that issue.

We conclude that there would be no arguable merit to pursuing a postconviction motion or appeal, but we base that conclusion on different legal authority than counsel cited. "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Johnson***, 2012 WI App 21, ¶8, 339 Wis. 2d 421, 811 N.W.2d 441 (one set of quotation marks and citation omitted); *see also* ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482 ("[A] plea will not be disturbed unless the defendant establishes by clear

and convincing evidence that failure to withdraw the guilty or no contest plea will result in a manifest injustice."). Applying that standard, we held in ***Johnson*** that the defendant was not affected by the defect in his plea colloquy where the trial court followed the plea agreement and, accordingly, he could not demonstrate a manifest injustice. *See* ***id.***, 339 Wis. 2d 421, ¶12. Here, where the plea agreement did not include a specific sentencing recommendation (both sides were free to argue) and where the trial court accepted the charge concessions that were part of the plea agreement and amended and dismissed several charges accordingly, Stewart cannot make the requisite showing of a manifest injustice. In this case, there would be no arguable merit to pursuing a postconviction motion or appeal based on the fact that the trial court did not notify Stewart that it was not bound by the plea agreement.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form and attached jury instructions, Stewart's conversations with her trial counsel, and the trial court's colloquy appropriately advised Stewart of the elements of the crimes and the potential penalties she faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Stewart's guilty pleas.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that 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, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial 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 it may consider several subfactors. ***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* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the severity of the abuse the child suffered, the child's continuing medical needs, and Stewart's role in harming the child. The trial court acknowledged that Stewart did not have a prior criminal history, had successfully graduated from high school, and had a supportive family. The trial court said that despite the fact Stewart did not have a criminal history, the seriousness of the case and the need "to send a message of deterrence" to her and the community required the imposition of a "significant" sentence.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenging the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court could have imposed a total of thirty-three years of initial confinement and twenty-three years of extended supervision. Its imposition of a total of thirteen years of initial confinement and nine years of extended supervision was well within the maximum sentence and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95,

622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

The final issue addressed in the no-merit report is whether trial counsel provided ineffective assistance. Postconviction/appellate counsel concludes that trial counsel did not perform deficiently, noting that trial counsel negotiated a plea deal that limited Stewart's exposure and "argued zealously at sentencing for a shorter prison sentence." We have examined the entire record and we have not identified any potential issues of merit with respect to trial counsel's performance.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gina Frances Bosben is relieved of further representation of Stewart in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals