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

2013AP1970-CRNM State of Wisconsin v. Joseph Pittman
2013AP1971-CRNM (L. C. Nos. 2011CF1569 and 2011CF5597)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Joseph Pittman has filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge Pittman's convictions for child abuse (intentionally causing great bodily harm); child abuse (intentionally causing harm); domestic abuse battery; disorderly conduct with use of a dangerous weapon; felony intimidation of a witness in furtherance of a conspiracy; two counts of felony intimidation of a witness by a person

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

charged with a felony; and three counts of felony bail jumping. Pittman has filed responses claiming that he was denied the effective assistance of trial counsel and that the evidence was insufficient to support his convictions. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

In Milwaukee County case No. 2011CF1569, the State charged Pittman with physical abuse of a child (intentionally causing great bodily harm); physical abuse of a child (intentionally causing bodily harm); domestic abuse battery; and disorderly conduct with use of a dangerous weapon. The charges arose from allegations that Pittman caused injuries, including a right-hand fracture, facial bruising, and both retinal and subdural hemorrhages, to two-month-old J.P. The complaint further alleged that during the same time period, Pittman battered J.P.'s mother, A.W., and used a spray bottle and lighter to direct a stream of fire toward A.W.'s body while saying, "I am going to light you on fire."

At his initial appearance, the circuit court informed Pittman that he was subject to a no contact order, preventing any contact with J.P., A.W. or A.W.'s mother, L.W. The court warned Pittman that violation of the order by any method, including through a third party, would result in a felony bail jumping charge. Based, in part, on Pittman's alleged violations of the no contact order, additional charges followed in Milwaukee County case No. 2011CF5597. There, the State charged Pittman with one count of felony intimidation of a witness in furtherance of a conspiracy; two counts of felony intimidation of a witness by a person charged with a felony; and three counts of felony bail jumping—two counts for violating the no contact order as to A.W. and L.W., and one count for violating a restraining order that A.W. also had against

Pittman. The complaint claimed that Pittman, either personally or through his mother, attempted to dissuade A.W. and L.W. from participating in or appearing for court in case No. 2011CF1569.

The two cases were joined for trial over defense counsel's objection, and a jury found Pittman guilty of the crimes charged. Out of a maximum possible sentence of ninety-five and one-half years, the court imposed consecutive and concurrent sentences totaling thirty and one-half years, consisting of seventeen and one-half years' initial confinement and thirteen years' extended supervision. Pittman filed a motion for postconviction relief, alleging his trial counsel was ineffective by failing to advise Pittman of plea offers. The motion was denied after a ***Machner***[2] hearing and these no-merit appeals follow.

There is no arguable merit to challenge the joinder of these cases for trial. This court independently examines the propriety of the initial joinder determination as a matter of law. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). The joinder statute, WIS. STAT. § 971.12, "is to be construed broadly in favor of initial joinder." ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Joinder of crimes in the same complaint, information or indictment may be obtained when two or more crimes are "acts or transactions connected together or constituting parts of a common scheme or plan." WIS. STAT. § 971.12(1). Relevant to these matters, two or more complaints, informations or indictments may be tried together if the crimes could have been joined in a single complaint, information or indictment. WIS. STAT. § 971.12(4).

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Here, the charges arising from both cases are intertwined, as the witness intimidation and bail jumping charges flowed from the earlier alleged crimes. In ***State v. Bettinger***, 100 Wis. 2d 691, 303 N.W.2d 585 (1981), our supreme court found joinder appropriate when a defendant sexually assaulted the victim and then tried to bribe her to drop the charges. The ***Bettinger*** court determined "[t]here can be no dispute" that joinder of the sexual assault and bribery charges was authorized by WIS. STAT. § 971.12(1) as two acts that are "connected together." ***Id.*** at 694. The court also acknowledged that "when evidence of both counts would be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant." ***Id.*** at 697. The ***Bettinger*** court recognized "that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge." ***Id.*** at 698. Because the evidence of one crime was probative on the question of the commission of the other crime, the court held that Bettinger was not prejudiced by joinder of the charges. ***Id.*** at 699.

Joinder was similarly appropriate in the instant cases, where Pittman committed crimes and then directed A.W. to recant her allegations and told both A.W. and L.W. to end any cooperation with authorities and avoid appearing for court. Consistent with ***Bettinger***, the witness intimidation evidence was admissible and relevant to prove consciousness of guilt on the underlying charges.

Any challenge to the jury's verdict would also lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, A.W. testified that sometime between March 21 and March 30, 2011, she witnessed Pittman slap the couple's infant son in the face as he sat in his car seat, though she indicated on

cross-examination that she only saw Pittman's hand move as if he slapped J.P., while not actually witnessing contact or hearing the slap. According to A.W., Pittman was angry because the child would not stop crying. A.W. further testified that sometime around March 26, Pittman watched J.P. for "a couple hours" while A.W. napped. Upon waking from her nap, A.W. noticed bruising under J.P.'s eyes and on the left side of his face, as well as little red spots within J.P.'s left eye. A.W. testified that when she asked Pittman about the injuries, Pittman said he had been pushing the bassinet when the wheels locked and J.P. fell out.

A.W. further testified that she wanted to take J.P. to the hospital immediately, but Pittman "refused." A.W. ultimately took J.P. to the hospital "four or five days" later because he had stopped taking his bottle, he was crying more often and he had diarrhea. When A.W. called Pittman from the hospital, he called her a "stupid bitch," asked why she took J.P. to the hospital and threatened to kill her if the child was taken away. A.W. testified that based on Pittman's threat, she initially told police at the hospital that the baby fell out of his car seat and hit his head while in her care. A.W. later told J.P.'s doctor that he fell out of the bassinet and that she never saw Pittman hit J.P. On cross-examination, A.W. agreed that she accused Pittman after a police detective suggested Pittman was responsible for the child's injuries. A.W. also agreed that the detective said "if you don't tell us what Mr. Pittman did, we're gonna arrest you and take your kids away."

A.W. testified that during a subsequent interview with police, she showed the officer bruises on her body and indicated Pittman had thrice hit her with a leather belt while "cussing" at her. She said Pittman had also attempted to set her on fire by using a spray bottle and lighter to direct flames at her. The jury saw photos of A.W.'s injuries.

A.W. stated that she sought and obtained a restraining order against Pittman and she was also aware of the no contact order imposed by the trial court. A.W. testified that despite both orders, Pittman made two three-way phone calls to her through his mother, in which Pittman instructed A.W. "not to come to court." The jury heard a recording of the three-way phone calls. A.W. further testified that Pittman later called her directly and told her not to show up for trial. Pittman also directed A.W. to write a recantation letter that she sent to Pittman's defense attorney. A.W. testified that Pittman instructed her to make him sound innocent in the letter and to blame a police detective for suggesting Pittman was responsible for J.P.'s injuries.

In turn, L.W. testified that despite the no contact order, Pittman called her home at least five times looking for A.W. and also told L.W. "not to talk to the lawyer" or show up for court in case No. 2011CF1569.

Doctor Alice Swenson, a pediatrician with a sub-specialty in child abuse pediatrics, testified she was called by the hospital emergency department to consult on J.P.'s case. Doctor Swenson testified that J.P. had a fractured right hand; bilateral subdural bleeding; a subconjunctival hemorrhage in his left eye; and facial bruising "on multiple planes of the face, under both eyes and on the forehead," which would suggest more than one impact. Doctor Swenson noted that a two-month-old infant is not independently mobile and often cannot roll over.

Doctor Swenson opined that bleeding on both sides of the brain "implies a more global force, so rather than a direct impact necessarily, it would require an acceleration and deceleration event, so back and forth, with enough force to tear the bridging veins that go between the brain and the covering of the brain." Based on her view of the CT scan, Dr. Swenson opined that

J.P.'s subdural hemorrhage was several days old. Doctor Swenson also opined that J.P.'s retinal hemorrhages were "strongly associated with a very violent acceleration and deceleration event." Based on the injuries, Dr. Swenson opined, to a reasonable degree of medical certainty that J.P. was the victim of child physical abuse, including abusive head trauma consistent with a "violent shaking of a child" or a "violent slamming of a child down" or a combination of both. Significantly, Dr. Swenson opined that J.P.'s injuries were not consistent with a short fall from either a bassinet or a car seat.

Pittman contends there is no direct evidence that he physically abused J.P. It is well established, however, "that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). To the extent Pittman intimates that A.W.'s testimony was incredible in light of what he characterizes as her "false" and "coerced" statement to investigators, the jury was aware A.W. told different accounts of how J.P. was injured and had, at one point, recanted her allegations. Ultimately, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Pittman's convictions.

Any claim that Pittman was denied the effective assistance of trial counsel would lack arguable merit. To succeed on an ineffective assistance of counsel claim, Pittman must show

both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. Prejudice is established where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If a defendant fails to establish one prong, we need not address the other. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

In his responses to the no-merit report, Pittman raises several challenges to the effectiveness of his trial counsel. First, Pittman contends his counsel was ineffective by agreeing to the State's request for a trial adjournment despite Pittman's speedy trial demand. The State moved to adjourn the trial because its expert witness, Dr. Swenson, was subpoenaed for two other trials that same day. The court granted the adjournment and the trial was rescheduled for approximately six weeks later. The remedy for violation of a defendant's speedy trial demand is discharge from custody. WIS. STAT. § 971.10(4). Here, Pittman was immediately released on his own recognizance. Therefore, any claim that Pittman was prejudiced by this alleged deficiency on the part of trial counsel would lack arguable merit.

Next, Pittman renews the argument made in his postconviction motion—that trial counsel was ineffective by failing to inform him of plea offers. At the ***Machner*** hearing, trial counsel testified that he presented Pittman with an offer and modified offer made by the State. The State wanted Pittman to plead guilty or no contest to physical abuse of a child and recklessly causing

great bodily harm. Counsel testified that when presented with the offers, Pittman did not want to admit anything. Pittman wanted a trial. Pittman testified that counsel never discussed any plea negotiations with him, but added that if the amended plea offer required him to admit to shaking his child and causing a brain injury, he never would have admitted that.

The trial court, as the factfinder of the ***Machner*** hearing, found trial counsel's testimony to be more credible. Issues such as inconsistencies in the testimony or contradictory evidence are for the trier of fact to resolve. *See* ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. The trial court was in the best position to determine the credibility of the witnesses, and its finding is not clearly erroneous from this record. Any claim that counsel was ineffective on this ground therefore lacks arguable merit.

Pittman also claims counsel was ineffective by failing to call his mother, Jimmie Clark, to testify at trial. Pittman intimates Clark could have provided context to the three-way calls made to A.W. when Pittman was in jail. During recorded calls with Clark, which were played for the jury, the following exchange occurred.

> Pittman: Listen, listen ma. I have two calls left. I have two calls left ma. And I need, I need to, you know what I am talking about, right. I need to, ma. Please ma.
>
> Clark: You want me to call her?
>
> Pittman: I am sittin' in here on the lot ma and that person knows it. And, I need that person to clear this up. So, Ma can you do that for me?
>
> ….
>
> Clark: What's the number baby?
>
> Pittman: You should know it ma. I can't, that's what, I can't speak about it on this phone no more, I found out about something.

Clark then calls A.W. from a second phone:

> Clark: Hello may I speak to [A.W.]? [A.W.], how you doin'? This [is Pittman]'s mother. Can you talk to me? … I got [Pittman] on the other line baby.
>
> Pittman: Tell her … ma, ma.
>
> Clark: He said his life is hanging in your hands.
>
> Pittman: Tell her, ma, tell her don't … tell her they goin to railroad both of us. Tell her please listen.

During a subsequent phone call the same day, the following exchange occurred:

> Pittman: If it go to court, if it go to trial, ma. If it go to trial. That's why I just, I, I mean it would have been cooler if, if old girl didn't, you know what I'm saying come, that's why I, I just want to be put in that person's head. Don't, don't come. That's that's it. That's it. Don't come. That's all. Tell her I don't want nothing to do with that person. Just don't come.
>
> Clark: Yeah.
>
> Pittman: So please ma, deliver that.
>
> Clark: Okay baby.
>
> Pittman: Just tell dude, don't come. Find a way to not come and everything's goin' to be alright. Tell her she can have my baby and … I don't want nothing to do with that person. Tell them just don't come. Just don't come. Tell her leave me alone. She been left alone. Just don't come to court on me because I, I want her to get my baby back ma.
>
> Clark: Okay.
>
> Pittman: That's it. Tell her she ain't got nothing to worry about me coming messing with her or tryin' to call her. I just don't want nothing to happen to her or me. You feel me ma. Cause of this lie.

The calls speak for themselves. Therefore, any claim that Pittman was prejudiced by counsel's failure to call Clark to provide context to the calls would lack arguable merit.

Pittman also intimates his counsel was ineffective by suggesting to Pittman that he had "no reason to testify." Pittman, however, confirmed during an on-the-record colloquy with the trial court that nobody had pressured, promised or threatened him, and he was waiving his right to testify of his "own free will."

To the extent Pittman contends trial counsel was ineffective by failing to impeach A.W.'s credibility at trial, the record belies this claim. Trial counsel attempted to cast doubt on those parts of A.W.'s testimony accusing Pittman of causing J.P.'s injuries, mainly by contending the police suggested Pittman's involvement to her and then pressured her into accusing him. The fact that a strategy fails does not make the attorney's representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Pittman's character, including his criminal history; the need to protect the public; and the mitigating circumstances Pittman raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Pittman's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Mark S. Rosen is relieved of further representing Pittman in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals