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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 IV

February 29, 2016

To:

Hon. C. William Foust
Circuit Court Judge
215 South Hamilton, Br 14, Rm 7109
Madison, WI 53703

Hon. Maryann Sumi
Circuit Court Judge
Dane County Courthouse
215 South Hamilton, Br 2, Rm 7105
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Mary Ellen Karst
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Kathleen A. Lindgren
Lakeland Law Firm LLC
N27 W23957 Paul Rd., Ste. 206
Pewaukee, WI 53072

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

James Stewart Jr. 153280
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2013AP327-CRNM State of Wisconsin v. James Stewart, Jr. (L.C. # 2010CF609)

Before Lundsten, Higginbotham and Sherman, JJ.

James Stewart, Jr. appeals two related judgments convicting him, following a jury trial, of operating a motor vehicle without the owner's consent; operating a motor vehicle to elude an officer; three counts of second-degree reckless endangerment; two counts of criminal damage to property; misdemeanor retail theft; and misdemeanor bail jumping. Attorney Kathleen Lindgren

has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses a suppression ruling, the impartiality of the jury, the sufficiency of the evidence, and the validity of the sentences. Stewart was sent a copy of the report and filed a response identifying twenty-five potential issues, which we will outline below. Counsel then filed a supplemental no-merit report addressing the potential issues identified by Stewart. Upon reviewing the entire record, as well as the no-merit report, response and supplement, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

We begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places many of the other issues in context, and because a successful claim on that issue with respect to any of the counts would result in a vacation of the conviction and directed verdict for acquittal on that specific count. The test we apply is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt" on each of the elements of the charges.[2] ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762

[1] All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

[2] In order to obtain a guilty verdict for operating a motor vehicle without the owner's consent, the State needed to prove: (1) that Stewart intentionally drove the vehicle, meaning that he exercised physical control over the speed and direction of the vehicle while it was in motion; (2) that D.S. did not consent; and (3) that it could be inferred from Stewart's acts, words, and statements and all of the (continued)

surrounding facts and circumstances that Stewart knew that D.S. did not consent to Stewart driving the vehicle. *See* WIS. STAT. § 943.23(3); WIS JI—CRIMINAL 1464.

In order to obtain a guilty verdict for operating a motor vehicle to elude an officer, the State needed to prove: (1) that Stewart operated a motor vehicle on a public way or thoroughfare after receiving a visual or audible signal from a marked police vehicle; and (2) it could be inferred from Stewart's acts, words, and statements and all of the surrounding facts and circumstances that Stewart knowingly fled and attempted to elude a traffic officer by willful disregard of the visual or audible signal so as to interfere with other vehicles. *See* WIS. STAT. § 346.04(3); WIS JI—CRIMINAL 2630. Because Stewart raised a defense of coercion, the State further needed to prove that Stewart did not act as he did as the result of a threat from another person that caused him to reasonably believe that his act was the only means of preventing imminent death or great bodily harm to himself.

In order to obtain guilty verdicts on three counts of second-degree reckless endangerment, the State needed to prove: (1) Stewart endangered the safety of B.J., C.P., and S.D.; and (2) Stewart was aware that his conduct created an unreasonable and substantial risk of death or great bodily harm to others. Because Stewart raised a defense of coercion, the State further needed to prove that Stewart did not act as he did as the result of a threat from another person that caused him to reasonably believe that his act was the only means of preventing imminent death or great bodily harm to himself.

In order to obtain guilty verdicts on two counts of criminal damage to property, the State needed to prove: (1) that Stewart caused damage to property—meaning anything from defacement to total destruction; (2) Stewart had the mental purpose to damage the property or was aware that his conduct was practically certain to cause the result; (3) the property belonged to B.J. and C.P.; (4) B.J. and C.P. did not consent to the damage; and (5) it could be inferred from Stewart's acts, words, and statements and all of the surrounding facts and circumstances that Stewart knew the property belonged to other people who did not consent to the damage. *See* WIS. STAT. § 943.01; WIS JI—CRIMINAL 1400. Because Stewart raised a defense of coercion, the State further needed to prove that Stewart did not act as he did as the result of a threat from another person that caused him to reasonably believe that his act was the only means of preventing imminent death or great bodily harm to himself.

In order to obtain a guilty verdict of a Class A misdemeanor retail theft, the State needed to prove: (1) that the merchant JC Penney possessed certain jewelry valued at less than $2500 as merchandise held for resale; (2) that Stewart knew the jewelry was merchandise held for resale by a merchant; (3) that Stewart intentionally took and carried away the jewelry; (4) that JC Penney did not consent to Stewart taking and carrying away the jewelry; (5) that it could be inferred from Stewart's acts, words, and statements and all of the surrounding facts and circumstances that Stewart knew that JC Penney did not consent; and (6) that Stewart intended to permanently deprive JC Penney of possession of the jewelry. *See* WIS. STAT. § 943.50(1m)(b); WIS JI—CRIMINAL 1498.

In order to obtain a guilty verdict on misdemeanor bail jumping, the State needed to prove: (1) that Stewart was charged with a crime punishable by imprisonment in the county jail—namely, the unlawful use of a telephone; (2) that Stewart was released from custody on bond; (3) that Stewart intentionally failed to comply with the terms of his bond—namely, that he commit no crime while on bond, meaning that he knew both what the terms of the bond were and that his actions did not comply with them. *See* WIS. STAT. § 946.49(1); WIS JI—CRIMINAL 1795.

(quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1).

All of the charges stemmed from a series of related events that occurred on a single day. In a nutshell, the State alleged that—while out on bail for another case—Stewart used the threat of a gun to steal an SUV owned by D.S. that also contained her purse and cell phone; used the SUV as a getaway car driven by codefendant Garvin Harley after a security guard confronted him about stealing some jewelry from JC Penney; and subsequently drove the car himself, leading police on a vehicular chase during which he struck three other vehicles before he crashed the SUV into a building and fled. Harley surrendered. Stewart's defense was that Harley was the one who stole the SUV, and that Harley subsequently coerced Stewart at gunpoint into driving the SUV away from police.

Stewart testified that he went into JC Penney with the intention to steal; that he grabbed a few pairs of earrings; and that he exited the store without paying for them, disregarding the request of security personnel that he stop. Stewart's testimony alone was sufficient to support his conviction on the retail theft charge and the bail jumping, and he does not contest those convictions.

Stewart also admitted on the stand that he drove the SUV after he and Harley stopped at a gas station convenience store; that he noticed the police were behind him with lights activated, but kept driving, making a series of turns and "bump[ing]" several vehicles until he finally crashed into a building; and that he then exited the vehicle and ran away from police. However, Stewart denied being the one who stole the car and claimed that he did not know he lacked the owner's consent to drive the SUV, because he thought it was Harley's nephew's car. Stewart

further claims he was attempting to elude police only under coercion, because Harley was high and pulled a gun out when they saw the police behind them, and that he ran after crashing the car only because he was afraid of Harley. Each of these contentions, however, is based solely upon his own testimony. The jury was not required to believe Stewart's self-serving assertions, and we will not set aside such credibility determinations.

D.S., the SUV owner, testified that a man came up behind her as she was closing her garage door, pushed something hard into her back, told her he was going to kill her, and asked where her money was. When D.S. told the assailant the money was in her car, he pushed her aside, got in the car and drove off. During the incident, D.S. was able to look back and see her assailant for a few seconds, and she noticed that he had a crooked tooth on the left side. On the stand, D.S. identified Stewart as the man who had taken her car.

Harley testified that he had dropped off Stewart at a gas station on Rimrock Road early that morning so he could meet someone. When Harley met up with Stewart again later in the morning, Stewart had some credit cards with him. The two men tried using the credit cards at a series of gas stations, but they wouldn't work. Later in the day, Stewart told Harley that he had a SUV, and Harley accompanied Stewart on several errands in the vehicle, including a stop where Stewart dumped the license plates, until they finally arrived at JC Penney, with the intention of stealing something. Harley switched over to the driver's seat and waited by the store entrance until Stewart ran out with two ladies chasing him. Harley said Stewart got in the passenger side of the car, but switched back to being the driver at the end of the mall parking lot. The two men then made a couple more stops before the police spotted them near a gas station where they had stopped to get some beers. Harley denied having stolen the car or having a gun, and claimed that

Stewart was the one who initiated the high speed chase because he did not want to go back to prison. Harley gave himself up after the crash, but admitted that he gave police a false name.

In sum, if the jury believed the testimony of D.S. and Harley—as it was entitled to do—there was more than sufficient evidence to support each of the counts of conviction.

Suppression Ruling

Shortly before trial, the State provided Stewart with audio discs containing recordings of approximately 14,000 phone calls Stewart had made from the Dane County Jail while awaiting trial. The State informed the court and the defense that it only intended to use a few of the calls, in cross-examination or rebuttal, and that it would provide transcripts of those calls. Stewart moved to suppress the transcripts, arguing that counsel would not have sufficient time to adequately review all of the calls before trial to determine if there were any contradictory statements in them. The trial court found that there was no bad faith on the State's part, and that Stewart could not "really claim to be surprised by his own words." The court therefore deemed suppression too harsh a remedy, and noted that it would grant a continuance, but for Stewart's speedy trial demand. Because Stewart was offered the option of delaying trial to have more time to review the records, but declined, he has waived any objection that he was unprepared to deal with the calls at trial.

Potential Issues Identified by Stewart

We next turn to the twenty-five potential issues that Stewart identified in his response to the no-merit report. Many of these issues overlap and could perhaps be more logically addressed if reordered or reframed in the context of ineffective assistance of counsel, as counsel has done

in her supplemental no-merit report. However, for clarity, we will number and address each potential issue in the order that Stewart has presented it and will preface our discussion of each issue with the label Stewart gave it in his table of contents and/or argument section headings. To the extent that Stewart's potential issues also overlap with counsel's discussion of the impartiality of the jury, we will also address that potential issue identified by counsel in the framework set forth by Stewart.

(1) "**Recorded Statement (audio) / Crux Of My Defense**." Stewart asserts that trial counsel should have introduced the entire audio recording of the statement Garvin Harley made to police, so that the jurors could hear for themselves what a sophisticated liar he was when he claimed to be Kendrick Daniels. Stewart contends that showing Harley to be a manipulative liar was crucial to his defense that it was actually Harley who stole the SUV. However, because Harley's statement to police was hearsay, and only certain portions of it may have qualified as admissible under exceptions to the hearsay rule, we see no grounds for raising an ineffective assistance claim based on counsel's failure to introduce Harley's statement in its entirety. The jury was properly made aware by Harley's in-court testimony that he had lied to the police, and that he had done it well enough to evade detection for several months after that. In any event, Stewart's claim that Harley coerced him at gunpoint into leading police on a high speed chase was undermined by the fact that police apprehended Harley at the car, and did not find a gun on him.

(2) "**Judicial Misconduct and Overreaching**." Stewart asserts that the circuit court was biased against him because it "**told the jurors on several occasions to not take what I was saying to be the truth**." However, in each of the four instances that Stewart cites, the circuit court was actually *ruling in Stewart's favor* on hearsay objections made by the State. That is, the

circuit court allowed Stewart to testify about statements made by an another person out of court—that would otherwise be excluded as hearsay—on the grounds that Stewart was not offering the statements for the truth of the matters asserted by the other person, but merely to explain Stewart's own subsequent actions.

Stewart also contends that the circuit court's answers to questions from the jury show bias against him. In particular, he complains about the court's answer to the following jury question: "Regarding Count 2 and the meaning of the word 'took' in the statement 'Stewart intentionally took and drove the vehicle without [D.S.]'s consent…'; does the word 'took' imply that he took the car from [D.S.]?" The court answered, "Yes." However, the court answered the jury's question, "Could we please know which individual is associated with each count of first degree reckless endangering safety?" with the response, "Names are in verdict forms." Stewart argues that the court should have directed the jury to the verdict forms in response to the question about the meaning of "took" as well. We disagree. The court's responses to the jury were both accurate statements of law, and it was within the court's discretion as to how to convey that information to the jury.

(3) "**Juror Braun**." During voir dire, one of the panel members who eventually was seated on the jury disclosed that his brother-in-law was a bailiff. After the trial began, the court learned that the juror's brother-in-law was actually assigned as one of the courtroom bailiffs for this case. The court struck the juror at that point, allowing the case to proceed with an alternate, and the juror did not participate in deliberations.

Stewart contends that the court should have dismissed the juror earlier, because he could have contaminated the jury pool. He does not, however, point to any actual discussions that the

dismissed juror had with the remaining jurors, or to any plausible impact that the dismissed juror's connection with the bailiff could have had upon the remaining jurors' view of the case. In particular, there is no information that the bailiff had any negative information about Stewart that he could have conveyed to his brother-in-law. For this reason, we agree with counsel's assessment that there would be no basis to challenge the impartiality of the jury.

(4) "**Identify Co-defendant**." Stewart complains that the police failed to follow proper procedures in attempting to identify the carjacker, because they included a picture of Kendrick Daniels—the man whose name Harley falsely gave to police—in the photo array that they showed to D.S., rather than a picture of Harley. Stewart argues that D.S. may have identified Harley as the one who had stolen her SUV if she had been shown his picture, and that police would have focused more of their investigative attention on Harley's role in the events of the day if they had identified him sooner. This argument ignores D.S.'s testimony that she identified Stewart based upon his crooked tooth. In any event, D.S.'s identification became moot when the jury acquitted Stewart of armed robbery and taking a vehicle without the owner's consent.

(5) "**Subpoenaed Witness Totally Ignored**." Stewart asserts that his subpoena for Kendrick Daniels should have been enforced, and Daniels presented to the jury to show the lack of resemblance between Daniels and Harley, and thus undermine the reliability of the police investigation. Daniels, however, would have had no relevant testimony to offer since he was not actually involved in the incident. Since the jury was fully informed that Harley had given the police a false name, and that the police failed to discover the deception, additional evidence relating to the deception would merely have been cumulative.

(6) "**Untimely [P]rel[iminary] Hearing and [I]nsufficient [P]reliminary [E]xamination**." Stewart alleges that the preliminary hearing was untimely due to a series of adjournments. He further asserts that he was prejudiced by being held without bond for a prolonged period because if he had not been held on bond, he could have participated in his own defense by secretly recording his codefendant bragging about having played the cops, or located other witnesses who did not want to be involved. In addition, he argues that the evidence presented at the preliminary hearing was insufficient for bindover because the victim of the armed robbery charge was initially unable to identify him and there was no DNA evidence linking him to that crime. As to each of these alleged errors, we note that a valid conviction cures any defects relating to bindover unless they were preserved by an interlocutory appeal. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991); *see also* ***State v. Wolverton***, 193 Wis. 2d 234, 254, 533 N.W.2d 167 (1995). We have already explained that the evidence at trial was sufficient to support the conviction, which cures any gaps in the evidence presented at the preliminary hearing.

(7) "**Armed Robbery**." Stewart argues that the armed robbery charge against him should have been dismissed because D.S. could not initially identify him. This issue is moot because Stewart was acquitted on the armed robbery charge.

(8) "**Defective Complaint**." The charges filed against Stewart were based in substantial part upon information provided to the police by Stewart's co-defendant, Garvin Harley. However, the initial complaint erroneously identified the source of information as Kendrick Daniels. The State did not discover that Harley had given them a false name until they subpoenaed Daniels for the preliminary hearing and realized that he was not the individual who

they had previously apprehended and interrogated. At that point, the circuit court permitted the State to amend the name of the co-defendant in the complaint from Daniels to Harley.

Stewart contends that the misinformation contained in the initial complaint deprived the court of jurisdiction, and further argues that the amendment of the complaint was prejudicial to him. As counsel correctly notes, however, motions to challenge the sufficiency of the complaint in a felony case must be raised prior to the preliminary examination, or they are waived. WIS. STAT. § 971.31(5)(c). Furthermore, the circuit court may permit the amendment of a complaint so long as the defendant's rights to notice, a speedy trial, and opportunity to defend are not prejudiced. WIS. STAT. § 971.29, *see also* ***Whitaker v. State***, 83 Wis. 2d 368, 374, 265 N.W.2d 575 (1978). Stewart was not prejudiced here because, unlike the State, he knew Harley's true identity from the beginning, and nothing about Harley's name changed the allegations in the complaint about Stewart's own actions, or affected his ability to defend against the charges.

(9) "**Discovery and Inspection**." Stewart seeks postconviction discovery of a recording of a 911 call made by D.S. after her car was stolen. He contends that the recording would show that D.S.'s initial description of the perpetrator was a better match to Harley than to him. However, the State has already advised Stewart that the recording was discarded because there was no request for it made within 90 days. This court cannot order production of a recording that no longer exists.

Stewart also requests postconviction testing of Harley's DNA. Harley's DNA would not be material, however, because the lab analyst testified that there was insufficient trace material recovered from the victim's coat to compare to any other sample, and Harley admitted that he

had driven the car in the JC Penny parking lot, so there would be no surprise if his DNA were found on the steering shaft or steering wheel.

(10) "**Phone Records**." Stewart contends that phone records admitted as Exhibits #27 and #28 prove that Harley was not at home at the time D.S.'s car was stolen, and that counsel should have obtained an expert on cell towers to confirm that the phone Harley was using was in the vicinity of the car robbery, while the phone D.S. had been using was not. In any event, because the jury acquitted on the charges of armed robbery and taking a vehicle without the owner's consent, it is irrelevant where anyone's phone was at the time of the carjacking.

(11) "**Verdicts Not Supporting Guilt**." Stewart contends that the evidence was insufficient to support his conviction on the count of operating the SUV without the owner's permission because it was reasonable to rely on Harley having given him permission to drive the vehicle that had been shown to be in Harley's control on the JC Penney surveillance video. Again, however, it was for the jury to determine which—if either—of the two codefendants was telling the truth, or what parts of their testimony were more credible than others. If the jury believed Harley's testimony that Stewart had shown up with the car and had ditched the license plates, as well as D.S.'s identification of the perpetrator, there was more than enough evidence to support that conviction.

(12) "**Substitution of Judge**." Judge Sumi was originally assigned as the trial judge for the case and presided over the arraignment and two status hearings. However, due to a scheduling conflict between multiple cases with speedy trial demands on Judge Sumi's docket, she arranged to have Judge Foust cover for her. Stewart promptly filed a request for substitution of judge, but orally rescinded it when given the choice of a continuance of the trial with Judge

Sumi, or proceeding with the scheduled trial date before Judge Foust. In addition, the parties filed an agreement under WIS. STAT. § 971.20(11), thereby rescinding the request for substitution of judge and returning the trial to Judge Foust. After trial, Stewart asked to have Judge Sumi preside over sentencing, which she did.

Stewart now contends that Judge Foust lacked competency to preside over his trial because he had been substituted out, and that Judge Sumi lacked competency to preside over sentencing, because there was no written agreement to return the case to Judge Sumi. We agree with counsel, however, that the parties plainly followed the statutory mechanism to return the case to Judge Foust, and that no written agreement needed to be filed to return the case to Judge Sumi, because Stewart had never filed a written substitution request against her.

Stewart now contends that, not only Judge Sumi, but all of the Dane county judges had an inherent conflict of interest because the victim worked in the sheriff's department, and that counsel should have advised him that he could have sought a change of venue. However, Judge Sumi noted at the sentencing hearing that she did not know until she read the PSI that D.S. worked at the sheriff's department, and stated that it did not influence the sentencing decision in any way.

(13) "**Sentencing Issues**." Stewart asserts that Judge Sumi did not review the entire record before sentencing him, because the transcripts had not yet been prepared; Harley's statement to police was never introduced at trial; and the judge did not watch the dashcam video of the case. However, the court's statements show that it was familiar with the evidence produced at trial.

Stewart also suggests that it was improper for the court to rely on facts adduced at a restitution hearing without having more information from the trial itself. This goes nowhere because evidence relating to damages was not presented at trial.

(14) "**Ineffective Assistance of Counsel**." Stewart asserts that he asked his attorney to sever the theft and bail jumping charges, because he admitted to the theft. Stewart further argues that he was prejudiced because the jury was confused as to why he did not escape or get help while alone in the store if he was being coerced. However, the course of conduct underlying all of the charges was plainly transactionally related, and therefore evidence of the retail theft would have been admissible at a trial on the other charges, even if Stewart had pled guilty to the theft, or counsel had moved to sever the charges.

Next, Stewart faults counsel for failing to obtain expert witnesses on his behalf. He does not, however, provide an affidavit from a proposed witness that would have qualified as an expert who would have been willing to testify on his behalf, much less give any plausible explanation of how expert testimony would have affected the outcome of the case. Stewart similarly asserts that counsel should have investigated the case more thoroughly, filed a motion to dismiss the case, and advanced several lines of defense that Stewart wished to pursue. However, nothing in Stewart's materials persuades this court that counsel performed deficiently by exercising his own professional judgment about the best way to present the defense.

Stewart also complains that his attorney had a conflict of interest because he knew the victim, and that counsel behaved unprofessionally in numerous respects. However, Stewart was aware before trial that counsel knew the victim, and did not move to disqualify counsel on that account. Stewart also provides no reason, supported by legal authority, that required counsel to

self-disqualify on that ground. Claims that counsel may have violated the rules of professional conduct are handled through disciplinary actions, not by appeal.

Finally, Stewart notes that counsel did not object when the State dismissed the only black juror from the jury pool. Again, however, Stewart has not alleged any facts that would establish that the juror was struck for discriminatory reasons.

(15) "**The Order Denying Postconviction Motion**." Stewart asserts that the circuit court should have granted him a hearing on several of his claims of ineffective assistance of counsel—namely not having his subpoenaed witness present; breaking the agreement they had concerning expert witnesses; counsel's failure to withdraw due to conflict of interest in knowing the victim; failure to obtain severance; failure to obtain a change of venue; and failure to obtain dismissal of the charge of operating a motor vehicle without the owner's consent. Having reviewed each of these claims, we see no basis to conclude that any of the actions Stewart believes counsel should have taken would have altered the outcome of the case.

(16) "**Conflict of Interest**." In this section of his response to the no-merit report, Stewart first attempts to tie together his previously asserted claims of Attorney Schulenburg's failure to follow Stewart's directions as to how to conduct the case with his allegation that counsel had a conflict of interest because he knew the victim. We have already rejected both contentions.

Stewart then expands his conflict-of-interest argument to the police—claiming that the investigation against him was overly zealous because the victim worked for the sheriff's department. Stewart does not, however, identify any legal basis to exclude evidence obtained by the police and presented against Steward at trial. It was for the jury to determine whether any

mistakes the police made during the investigation—including any failure to consider alternate suspects—undermined the case the State ultimately presented against Stewart.

(17) "**Earned Release Program**." Stewart complains that the court found him eligible for the earned release program—which is now called the substance abuse program—but did not set an eligibility date for him. Stewart misunderstands the applicable statute, which allows the court to *delay* a defendant's participation in the program by setting an eligibility date before which the DOC *cannot* place the defendant in the program. Because the court chose not to set an eligibility date, as far as we can tell there is no legal impediment to the DOC placing Stewart in the program when it deems it appropriate to do so, given the resources available and the structure of Stewart's sentences.

(18) "**Review of Judgment**." Stewart asks for a "total review of this judgment from Dane County in the interest of [j]ustice." A no-merit review consists of an independent review of the entire record, as well as the materials submitted by the parties. We have found no meritorious grounds for appeal.

(19) "**Forensic**." Stewart asserts that it was "forensic misconduct" by the State, defense counsel and the judge not to order DNA testing of Garvin Harley, and that the jury should have heard that Harley's DNA was not tested. However, the state crime lab employee testified that the trace evidence recovered from the carjacking victim's coat was insufficiently large to obtain a DNA profile, and there was no dispute at trial that Harley drove the car at some point. Moreover, as we have already noted, Stewart was acquitted of the armed robbery of D.S.'s car. Therefore, there would be no purpose to obtain or test Harley's DNA.

(20) "**Denial to Act as Co-counsel**." Stewart complains that Judge Foust denied his motion to represent himself as co-counsel. However, the statutory procedure for appeals in this state "requires that a defendant make an election to proceed with a state public defender, retain counsel or undertake the appeal pro se." ***State v. Redmond***, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996). While courts have discretion whether to allow someone to represent himself with the assistance of standby counsel, *see* ***State v. Cummings***, 199 Wis. 2d 721, 754, 546 N.W.2d 406 (1996), there is no constitutional right to hybrid representation (meaning by both counsel and the appellant pro se). ***State v. Debra A.E.***, 188 Wis. 2d 111, 138, 523 N.W.2d 727 (1994).

(21) "**Failure to Disclose Exculpatory Evidence**." In addition to seeking postconviction discovery of the 911 call and Harley's DNA in Issue (9), Stewart alleges that the State's failure to turn the materials over prior to trial deprived him of exculpatory evidence. We have already explained why Harley's DNA was irrelevant, and would not have been exculpatory. As to the 911 call, Stewart was free to cross-examine the carjacking victim about what she told police on the call.

(22) "[***Machner***] **Hearing**." Stewart asserts that he sent letters to Judge Sumi, Judge Foust, and the district attorney asking for a postconviction hearing. We have already concluded that none of the alleged omissions by counsel would warrant relief. Therefore, the circuit court was not required to grant Stewart a hearing.

(23) "**Verdict of Operating Without Owners Consent**." Stewart asserts that the State failed to prove that he knew he lacked the owner's consent to drive the SUV, because he could reasonably have thought it was sufficient that he had the permission of Harley, who was the one

in possession and control of the vehicle at JC Penney before Stewart took over driving. This argument essentially asks this court to set aside the jury's implicit acceptance of the testimony of the carjacking victim and Harley over that of Stewart. Such credibility determinations are exclusively within the province of the jury, and do not provide grounds for an appeal.

(24) "**Statement Given as Kendrick Daniels**." In this section of his response to the no-merit report, Stewart argues that, not only did the jury not see or hear Daniels's recorded statement to police as set forth in Issue (1), but that Stewart did not even know until working on this appeal that Harley's written statement was never submitted into evidence, even though Judge Foust said the jury would be able to review it. Again, however, we note that Harley testified and was subject to vigorous cross-examination, during which he was forthcoming about having given a false identity to police. The jury had ample opportunity to evaluate Harley's credibility without having to review his statement to police.

(25) "**Restitution**." After the State submitted a written restitution request for $21,000, the court held a hearing at which Stewart challenged his ability to pay, but not the amount of the victim's damages. The hearing was adjourned to give notice to the victims, but none of them chose to appear. The court determined that Stewart would have the ability to work after being released on extended supervision, and found no basis to deny the requested amount. Stewart wishes to renew his challenge to his ability to pay on appeal, and further argues that there was insufficient evidence to support the restitution claims without any testimony from the victims. However, the written materials submitted by the State with its initial restitution request were sufficient to support the amount of the award, and the transcript plainly shows that the court considered Stewart's ability to pay—it merely did not agree with his position.

Sentence

A challenge to the defendant's sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that the defendant was afforded an opportunity to comment on the PSI, to present an alternate sentencing memorandum and testimony from his brother, and to address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court emphasized that there were multiple victims, and even if Stewart had not been the one to take the SUV from D.S., his conduct during the chase and hitting other vehicles in a highly populated area was extremely dangerous, and impacted those drivers' feelings of security going forward. With respect to the defendant's character, the court noted that Stewart had a thirty-five year criminal history, and that his multiple past contacts with the criminal justice system had not corrected his behavior, making probation inappropriate. The court also noted that Stewart was more than $100,000 in arrears on child support, and that he had committed the current offenses while on bond, indicating a lack of respect for the rule of law. The court concluded that a prison term was necessary to protect the public, which was the dominant factor.

The court then sentenced Stewart to one year of initial confinement and one year of extended supervision on the count of driving a vehicle without the owner's consent; a consecutive year of incarceration and one year of extended supervision on the count of eluding an officer; two consecutive years of initial confinement and one year of extended supervision on

each of the reckless endangerment counts; one year of initial incarceration and one year of extended supervision on each of the counts of criminal damage to property, to be served concurrently with all other counts; and nine months on the retail theft and bail jumping charges, concurrent to the charge of operating a vehicle without the owner's consent. The court also awarded 363 days of sentence credit, ordered restitution in the amount of $21,000 as discussed above; imposed standard conditions of supervision, but waived all non-mandatory costs to maximize the amount of restitution Stewart could pay; and determined that the defendant was eligible for the earned release program (now called the substance abuse program), but not for the challenge incarceration or a risk reduction sentence.

The sentences imposed were all within the applicable penalty ranges and the total confinement period constituted less than half of the maximum exposure Stewart faced. *See* WIS. STAT. §§ 943.23(3) (classifying operating a vehicle without the owner's consent as a Class I felony); 346.04(3) (classifying operating a vehicle to elude police as a Class I felony); 941.30(2) (classifying second-degree reckless endangerment as a Class G felony); 943.01(2) (classifying criminal damage to property as a Class I felony); 943.50(1m)(b) (classifying retail theft of less than $2500 as a Class A misdemeanor); 946.49(1)(a) (classifying bail jumping on a misdemeanor charge as a Class A misdemeanor); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony); and 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here were not "so excessive and unusual and so

disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting another source).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals