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February 22, 2017

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

2015AP2338-CRNM State of Wisconsin v. Rickey D. Howard (L.C. # 2014CF64)

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

Rickey D. Howard appeals from a judgment of conviction for two counts of strangulation, two counts of misdemeanor battery, two counts of third-degree sexual assault, and criminal trespass. A no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),¹ and

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Anders v. California, 386 U.S. 738 (1967), was filed.² Howard filed a response to the report. RULE 809.32(1)(e). Upon consideration of the report, response, and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

A jury trial was held. Howard's former girlfriend testified that a couple of months into her relationship with Howard, he began to physically abuse her by hitting her in the face, punching her head or choking her. She indicated that on November 5, 2013, Howard pinned her against a kitchen cupboard and choked her with both his hands so she could not breathe. Two days later, Howard took her by the hair to the basement of her residence and made her stand against the wall with her hands over her head. He punched her in the ribs and then beat her lower back, buttocks, and upper legs with a fiberglass rod. After a break from that beating, Howard took her to the basement again and continued to strike her with the fiberglass rod. The next day, after the victim had gotten showered and dressed to go to a job interview, Howard exposed his penis and told her to perform oral sex. The victim indicated she was afraid of Howard and did as he commanded to avoid a further beating. Howard then put the victim face down on the bed and forced his penis into her anus until he ejaculated. The victim was allowed to leave the house for the job interview. She contacted her sister and later that day, through a women's advocacy program, went to the hospital for a SANE³ examination. The victim did not return to her residence for nearly two weeks. She returned home and changed the locks. On

² The no-merit report was filed by Attorney Andrew Rider. Rider was allowed to withdraw as counsel and Attorney Marcella De Peters was appointed. De Peters was given an opportunity to review the record and indicate whether the appeal should proceed on the no-merit report filed by Rider. On January 3, 2017, De Peters indicated that the case should proceed on the no-merit report.

November 26, 2013, Howard came to the residence. When the victim would not allow him inside, he broke in the back door and began to punch and choke her. After feeling like a prisoner in her own home for the next several days, the victim managed to get away from Howard and reported the assaults to the police.

The evidence at trial also included the photographs taken of the victim's injuries after the November 5th and 7th assaults, photographs of damage done to the backdoor of the residence, report of the SANE examiner, and testimony of the State Crime Lab Analyst. Although semen was found in the swab of the victim's anus, there was not sufficient material to develop a DNA profile. The jury found Howard guilty on all the charged crimes.

At Howard's request, a new attorney was appointed to represent Howard at sentencing. Howard was sentenced to consecutive terms on the four felonies totaling fifteen years' initial confinement and ten years' extended supervision. Concurrent nine-month jail terms were imposed on the three misdemeanor convictions. Monetary obligations included restitution and a \$250 DNA surcharge which was mandatory for the crime of third-degree sexual assault under WIS. STAT. § 940.225. *See* WIS. STAT. § 973.046(1r) (2011-12).

The no-merit report first addresses whether Howard's constitutional right to a speedy trial was violated. Howard devotes a portion of his response to this issue and claims that his trial counsel was ineffective for seeking an adjournment when the prosecutor also sought an adjournment. Four factors are used to determine whether a defendant has been denied his right to a speedy trial: (1) the length of the delay; (2) the cause of the delay; (3) the defendant's

³ SANE is an acronym for Sexual Assault Nurse Examiner.

assertion of his right to a speedy trial; and (4) the prejudice, if any, resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Howard made his speedy trial demand on July 3, 2014. Howard's jury trial commenced January 6, 2015. The trials scheduled for September and November 2014 were adjourned for good cause—the unavailability of a prosecution witness, defense counsel needing more time to complete investigation, defense counsel's unexpected illness, and the need for the substitution of defense counsel. Between the time of his speedy trial demand and October 14, 2014, Howard was confined and awaiting trial and sentencing in Milwaukee County and not prejudiced by delay in this case. The trial court was aware of Howard's desire for a speedy trial as he asserted it in several pro se filings and his defense counsel explained that Howard objected to the prosecution's request for an adjournment of the September 30, 2014 trial date. The no-merit report makes a proper analysis and correctly concludes that the trial court properly weighed the factors in determining whether to adjourn the trial dates. We agree that under the totality of the circumstances, there is no arguable merit to a claim that Howard's constitutional right to a speedy trial was violated. We reject Howard's suggestion that his trial counsel was ineffective for also needing an adjournment to adequately prepare for trial.

The no-merit report next addresses the trial court's decision to grant the prosecution's motion to admit other acts evidence. The evidence consisted of the victim's testimony that prior to the crimes charged, Howard hit her in the face, punched her head and choked her. We review the trial court's determination under a discretionary standard. *See State v. Veach*, 2002 WI 110, ¶55, 225 Wis. 2d 390, 648 N.W.2d 447. The trial court utilized the required three-step other acts analysis. *See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The no-merit

report properly concludes that the trial court properly exercised its discretion in admitting the evidence.

Before addressing the next issue discussed in the no-merit report—whether there was sufficient credible evidence to support the guilty verdicts—we note that the no-merit report does not discuss other components of the jury trial which must be examined for the existence of potential appellate issues, e.g., jury selection, evidentiary objections during trial, confirmation that the defendant’s election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. Our review of the trial record discloses no issues of arguable merit from the trial procedure.⁴ The jury voir dire was more than adequate. The trial court conducted a proper colloquy with Howard about his waiver of the right to testify. The jury instructions properly stated the law. No improper arguments were made to the jury during closing argument. When the jury returned its verdicts, the jury was polled and it was confirmed that the verdicts were unanimous.

In discussing the sufficiency of the evidence to support the guilty verdicts, the no-merit report sets forth the proper standard of review and the evidence supporting the verdicts. We agree that there is no arguable merit to a challenge to the sufficiency of the evidence. The no-merit report also adequately discusses whether there could be a challenge to the sentence as either an erroneous exercise of discretion or excessive. There is no merit to challenging the

⁴ In his response Howard contends the prosecutor used leading questions during the examination of witnesses. No improper form of questioning occurred.

sentence. Although the sentencing court mentioned that it considered some of the COMPAS⁵ risk assessments, it did so recognizing that the COMPAS evaluation is primarily a tool that identifies Howard's rehabilitative needs. The court did not use the COMPAS in a "determinative" fashion and its use was within the bounds recognized by *State v. Loomis*, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749 (holding that "a sentencing court may consider a COMPAS risk assessment at sentencing," as long as it abides by several limitations).

The no-merit report concludes with a discussion of whether Howard was denied the effective assistance of trial counsel. While we normally decline to address claims of ineffective assistance of trial counsel for the first time on appeal, *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), appointed counsel's no-merit report seeks counsel's discharge from the duty of representation. Therefore, we must independently determine whether ineffective assistance claims have sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing. In considering whether a meritorious ineffective assistance of counsel claim could be brought, we consider whether counsel's performance was deficient and prejudicial. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. We presume that counsel's performance was satisfactory; "[w]e do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." See *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994).

The no-merit report examines trial counsel's objection to the prosecution's other acts motion, the reasons defense counsel gave for not calling witnesses Howard wanted to call, defense

⁵ "'COMPAS' stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" *State v. Loomis*, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

counsel's cross-examination of witnesses, and the development of a reasonable theory of defense. It also observes that for sentencing, counsel reviewed the presentence investigation report (PSI) with Howard, made corrections to the PSI in court, and argued mitigating circumstances at sentencing. We agree with the report that as to performance it addresses, a claim of ineffective assistance of counsel is without merit.

In his response Howard contends his trial counsel was ineffective. He claims counsel was ineffective for not cross-examining the victim about a prior domestic abuse conviction she may have had in order to cast doubt on her credibility. Defense counsel was precluded from going into the nature of the victim's prior convictions after she correctly answered the question that she had four prior convictions. *See State v. Smith*, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996). Next, Howard contends his attorney should have called as a witness the nurse who did the SANE examination.⁶ He ties the absence of that witness to the lack of DNA evidence. However, calling the nurse examiner would not have changed the evidence that there was insufficient material available to make a DNA profile or to permit DNA analysis. The jury heard testimony that there was no DNA analysis and the reasons why. Counsel was not ineffective for not calling the nurse examiner.

⁶ The SANE report was discussed and admitted during the testimony of the SANE nurse's supervisor. We note that although the SANE report was admitted as an exhibit, it did not go back to the jury room. We make that known because the SANE report did include the victim's statement that she knew Howard had previously gone to prison for a lengthy period of time. That was not information the jury received.

Howard also claims his trial counsel was ineffective for not requesting an in camera review of the victim's mental health records. To be entitled to an in camera inspection of privileged records before and during trial, the defendant must make a preliminary showing that there is a "reasonable likelihood" that the sought after records will be necessary to a determination of guilt or innocence. *State v. Green*, 2002 WI 68, ¶32, 253 Wis. 2d 356, 646 N.W.2d 298.

In particular, a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense.... Further, a defendant must undertake a reasonable investigation into the victim's background and counseling through other means first before the records will be made available. From this investigation, the defendant, when seeking an in camera review, must then make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records. In addition, the evidence sought from the records must not be merely cumulative to evidence already available to the defendant. A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense.

Id. at ¶33 (citations omitted).

Howard points out that the SANE report includes the victim's statement that she was diagnosed "with bi-polar and schizoaffective disorder but stopped taking her medications about five months ago." The mere fact that a person has a mental health disorder is not alone sufficient proof to garner an in camera review of mental health records. Nothing in the record suggests that counsel could have made the requisite showing. Trial counsel was not ineffective for not pursuing the victim's mental health records.

On the same theme, Howard believes trial counsel should have obtained the victim's medical records that would have perhaps showed that she suffered from a sexually transmitted

disease (STD) when Howard did not. Evidence of a STD is commonly associated with prior sexual conduct. *State v. Gavigan*, 111 Wis. 2d 150, 165, 330 N.W.2d 571 (1983). Under WIS. STAT. § 972.11(2)(b), evidence of prior sexual conduct is limited to evidence which goes to the degree of sexual assault. Because the presence of a STD was of no use in determining the degree of sexual assault in this matter, such evidence was inadmissible for any other purpose, such as challenging the victim's credibility. We recognize that evidence barred under § 972.11, may nevertheless be admissible if "in the circumstances of a particular case evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected." *State v. Pulizzano*, 155 Wis. 2d 633, 647, 456 N.W.2d 325 (1990). This is not such a case in which relevancy and probative value overcomes the statutory proscription against evidence of prior sexual conduct of a victim. Even if the victim had a STD and Howard did not, it is not probative of whether Howard had sexual contact with the victim. Because the evidence would not have been admitted, trial counsel was not ineffective for not pursuing medical records regarding the presence or absence of a STD.

Howard believes that the victim was not going to testify until charges were brought against her and that the prosecutor made a deal to forgo prosecution of the victim on new charges in exchange for her testimony. The record establishes that prior to the January 6, 2015 jury trial, defense counsel informed the trial court that the victim had picked up three pending misdemeanor charges and had appeared in court on those charges on December 26, 2014. Although defense counsel properly conceded that the victim did not have to count the new charges in answering the question about the number of her prior convictions, defense counsel argued that the new charges supported the position that the victim should have to count some older convictions in giving her answer. There is no suggestion in the record that the victim was

uncooperative in the prosecution, that the charges were trumped up, or that a deal was made with the victim to garner her appearance at trial. Howard's belief of a deal is speculative.

Even if a deal existed, a prosecutor does not violate his or her constitutional duty of disclosure unless the "omission is of sufficient significance to result in a denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). "[I]n no event will the failure to disclose, whether on demand or not, result in a new trial unless, in light of the entire record, the omitted evidence creates a reasonable doubt that did not otherwise exist." *Ruiz v. State*, 75 Wis. 2d 230, 241, 249 N.W.2d 277 (1977). Although a deal which incentivizes a witness to testify might be useful in undermining the credibility of the witness, in this case it does not create a reasonable doubt as to guilt. *See id.* at 239 ("it seems clear that the most defense counsel could have accomplished was a muddying of [the witness's] motives in testifying, but no evidence would have come in thereby 'giving rise to a legitimate doubt on the issue of guilt'"). The victim's new charges postdated her report of the crime to the SANE examiner and police. The crime was documented well before any alleged deal was made. Moreover, the victim's trial testimony was consistent with her reports. For the same reason, trial counsel would not be ineffective for not cross-examining the victim about a deal compelling her appearance in court. Howard would be unable to establish prejudice. There is no arguable merit to any claim that could be brought if in fact the prosecution had a deal with the victim to forgo the prosecution on the new charges.

Finally, Howard claims that the trial court denied him his constitutional right to self-representation. He contends that four times at the November 5, 2014 status hearing he requested to proceed without a lawyer and that he filed a motion about being denied pro se status at the November 11, 2014 status hearing. Howard believes that at the mere mention that he wanted to

proceed pro se, the trial court had a duty to engage in a colloquy about his competency to proceed pro se.

Discussion at the November 5, 2014 status hearing concerned the availability of defense counsel due to illness for the approaching trial on November 11, 2014. Howard expressed his dissatisfaction with again adjourning the trial. He asserted that the state public defender who made a special appearance on his behalf at the hearing for the purpose of reporting defense counsel's unavailability "should stand as counsel with pro se" and that the trial should move forward without further delay. The trial court then discussed its concerns about having Howard proceeding without an attorney given the nature of the charges, the complexity of the case, and Howard's incomprehensible pro se filings. The court indicated it was confused as to how Howard wanted to proceed. Howard declared he wanted to move forward with his speedy trial demand "with counsel." When the court indicated that counsel was not available and good cause existed to adjourn the trial, Howard said "then I'll just go pro se." But then Howard indicated that he needed time to look into legal resources. In the end, because the court was concerned that Howard was making an ill-advised decision on the fly, the court indicated that if Howard truly wanted to proceed pro se, he should file a written motion to that effect. The court required the motion to be filed before the next status hearing on November 11, 2014.

At the November 11, 2014 hearing, the trial court indicated that no motion to proceed pro se had been filed by Howard in advance of the hearing.⁷ Howard asserted he had “filed a motion in limine” and he handed a copy to the court declaring it to be “a copy of one of my original motions.” The court noted that it “has not addressed the issue of Mr. Howard proceeding without counsel or in any other fashion here because Mr. Howard indicated to me when we had our status that he wished to be represented by counsel. And that’s how the case has been proceeding here now in the absence of a motion indicating Mr. Howard wishes to proceed otherwise.” The court then reviewed the filing Howard presented in court and found it only raised matters as to speedy trial, bail, and evidentiary issues. Next, Howard indicated that he was asking the state public defender for different counsel and named the person he wanted appointed on his behalf. Discussion ensued about Howard’s right to counsel of his choosing and the matter was set over to November 18, 2014 to resolve the issue of appointed counsel.⁸

On January 5, 2015, at the final hearing before the jury trial, Howard’s attorney indicated to the trial court that Howard had spoken about proceeding pro se. The court asked Howard whether he was asking the court to allow him to proceed without an attorney. Howard answered no.

⁷ Howard concedes in his response that he did not file a motion before the November 11, 2014 hearing. He asserts he was denied access to the court because he was in “mental solitary confinement” and he had no writing material. He further states, “I did not explain this to the judge at the hearing because he did not ask[] me and I was not given a chance to explain.” Howard was given the opportunity to address the court at the November 11, 2014 hearing and never raised his inability to file a motion to proceed pro se. Further, his subsequent conduct at the hearing was inconsistent with the contention that he wanted to proceed pro se.

⁸ Subsequently, new counsel was appointed for Howard because his first attorney remained unavailable for the January 2015 trial date.

The record establishes that at no point did Howard unequivocally request to go pro se. Thus, the trial court was under no obligation to conduct a colloquy about Howard's competency to proceed pro se. We need not consider Howard's argument in his response that because he was competent to stand trial he automatically was competent to represent himself. There is no arguable merit to a claim that Howard's right to self-representation was violated.

Our review of the record discloses no potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Howard further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved from further representing Rickey D. Howard in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals