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April 18, 2017

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

2014AP2013-CRNM State v. Todd M. McKenzie (L. C. No. 2013CF53)

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

Counsel for Todd McKenzie has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[1] concluding no grounds exist to challenge McKenzie's convictions for stalking and three counts of violating a domestic abuse injunction, all as a repeater. McKenzie

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

was informed of his right to file a response to the no-merit report and has not responded. 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 judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged McKenzie with one count of stalking and three counts of violating a domestic abuse injunction, all as a repeater, arising from allegations regarding his conduct on May 28, 2013. The circuit court granted the State's motions to admit other acts evidence and the matter proceeded to trial. A jury found McKenzie guilty of the crimes charged. Out of a maximum possible eleven and one-half year sentence, the court imposed consecutive and concurrent sentences totaling five and one-half years, consisting of three and one-half years' initial confinement followed by two years' extended supervision.

Any challenge to the jury's verdicts would 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, the jury was instructed that in order to find McKenzie guilty of stalking, the State had to prove beyond a reasonable doubt that: (1) McKenzie intentionally engaged in a course of conduct directed at S.F.; (2) the course of conduct would have caused a reasonable person to suffer serious emotional distress; (3) McKenzie's acts caused S.F. to suffer serious emotional distress; and (4) McKenzie knew or should have known that at least one of the acts constituting the course of conduct would cause S.F. to suffer serious emotional distress. *See* WIS. STAT. § 940.32(2); *see also* WIS JI—CRIMINAL 1284 (2011). With respect to the remaining three charges, the jury was instructed that in order to find McKenzie guilty of violating a domestic abuse injunction, the State had to prove beyond a reasonable doubt that: (1) an injunction was

issued against McKenzie in favor of S.F.; (2) McKenzie committed an act which violated the injunction; and (3) McKenzie knew the injunction had been issued and knew his acts violated the injunction's terms. *See* WIS. STAT. § 813.12(4); *see also* WIS JI—CRIMINAL 2040 (2011).

S.F. testified she and McKenzie were in a "dating relationship," McKenzie moved from Minnesota to live with S.F. in May 2010, and the relationship ended in January 2012. S.F. testified that in February 2012, while attempting to retrieve some personal belongings from the home she and McKenzie shared, McKenzie would not allow her to leave, blocking the door and grabbing her from behind to prevent her exit. After S.F. "kicked and got out the door," she reported the incident to police. According to S.F., she subsequently received phone calls and text messages from McKenzie urging her not to call the police and to come back to him. Some voicemails McKenzie left threatened that he was coming to kill S.F., that he knew where she lived and worked and she was "done," and that if he could not have her, he did not want anybody to have her. According to S.F., one message simply said "time to die."

S.F. eventually petitioned for a restraining order against McKenzie, and a domestic abuse injunction was entered on May 24, 2012, to remain in effect for four years. McKenzie was enjoined from contacting or causing another person to contact S.F. at home, work, school or public places, whether in person, by phone, in writing, by electronic device, or in any other manner. McKenzie was present in court when the injunction was granted, and he was also served with a copy of the injunction order. S.F. testified that thereafter, she neither initiated contact with McKenzie nor consented to his contact with her.

S.F. testified that at approximately 4:30 p.m. on May 28, 2013, she received a voicemail message from McKenzie asking if he could talk to S.F., apologizing for intruding on her time,

and ending with "I love you, and I'm sorry about everything, OK? Bye." The recorded message was played for the jury. At approximately 5:00 p.m. on the same day, McKenzie attempted to contact S.F. by calling and asking to speak with her at her workplace. When S.F. was summoned to the telephone and recognized McKenzie's voice, she responded that she could not talk and hung up. A few minutes later, McKenzie again called S.F.'s workplace, identified himself, and asked to speak with S.F., claiming it was a medical emergency. When S.F. was again summoned to the phone, she indicated she could not talk to McKenzie and hung up. During his trial testimony, S.F.'s supervisor confirmed answering these two calls from what caller ID indicated was the Medford Inn, where McKenzie resided.

S.F.'s father testified that on the same day, he received three phone calls from McKenzie. S.F.'s father did not answer the first call, made at 4:54 p.m., because caller ID showed it originated from the Medford Inn. During the second call, made at 5:28 p.m. from the same phone number, McKenzie began to leave an answering machine message, stating he wanted to apologize "for all the, uh, confusion, uh …." S.F.'s father then answered the phone, instructed McKenzie not to call anymore, and told him he was going to call the police. The third call, made at 5:45 p.m. from the same phone number, resulted in the following message that was played for the jury:

> Hi [S.F.'s mother and father], uh, this is Todd. Just calling to say that I've been the only man that has loved your daughter 100% and I'm sorry that stuff went down the way it went down. I love her and I love [S.F.'s child from a prior relationship], and I hope I can have another chance, and uh, no threats you know, nothing like that, but please, I love that woman and that child. Thank you. Bye.

S.F.'s mother testified she complained to police that McKenzie called her in early February 2013 and again on May 25, 2013 (three days before the calls forming the basis for the

present offenses). When an officer spoke with McKenzie following the first complaint, McKenzie claimed the call was accidental. When investigating the May 25 call, McKenzie told the officer he merely wished to speak to S.F.'s mother, not to S.F. The investigating officer testified he informed McKenzie that if he was calling S.F.'s parents in an effort to get information to S.F., he was violating the injunction and could be arrested. The jury also heard testimony that in August 2013,[2] McKenzie approached one of S.F.'s co-workers at Wal-Mart and asked her to relay a message to S.F. that one of her old friends was back in town and would like to talk to her.

S.F. testified she felt terrified and intimidated by McKenzie because of "everything that has happened the last few months, the way he can just find me, try to find me." S.F. expressed fear that her family might be harmed "because it's a way to get to me." While conceding that McKenzie had not directly threatened members of her family, S.F. indicated that she had nevertheless changed her cell phone number three times in the last two years and changed her daily routine, including having co-workers escort her to her car at night. S.F. also purchased a different car after noticing the spare keys to her old car were missing.

To the extent there was any conflicting testimony, 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

[2] Although S.F. testified this incident occurred in 2013, an incident report in the record indicates the incident likely occurred in August 2012.

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 McKenzie's convictions.

Any challenge to the circuit court's decisions to admit other acts evidence would lack arguable merit. The admissibility of evidence lies within the circuit court's sound discretion. *See* ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). The court must engage in a three-step analysis to determine the admissibility of other acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Sullivan***, 216 Wis. 2d at 772-73. Section 904.04(2) precludes proof of other crimes, acts, or wrongs for purposes of showing that a person acted in conformity with a particular disposition on the occasion in question. After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant and, finally, whether its probative value is substantially outweighed by the danger of unfair prejudice. ***State v. Johnson***, 184 Wis. 2d 324, 336-37, 516 N.W.2d 463 (Ct. App. 1994).

The State moved to admit evidence of the incidents in which McKenzie attempted to prevent S.F. from retrieving her property from their residence; left a voicemail stating it was "time to die"; attempted to relay a message to S.F. through her co-worker; and made calls to

S.F.'s parents.[3] The circuit court granted the motions to admit this evidence, concluding the evidence was offered for acceptable purposes—namely, to establish motive, intent and absence of mistake, as well as to demonstrate S.F.'s state of mind. Without the context provided by this evidence, the jury would have been left to evaluate in a vacuum why seemingly innocuous phone calls from McKenzie would be viewed by S.F. with alarm. Although context is not one of the permissible purposes listed in WIS. STAT. § 904.04(2)(a), it is well-settled that evidence may be admitted for this purpose. ***State v. Marinez***, 2011 WI 12, ¶¶26-27, 331 Wis. 2d 568, 797 N.W.2d 399. The court further determined that the evidence was relevant to the elements that the State had to prove, that it was highly probative, and that any prejudicial effect could be ameliorated by a curative instruction, which was given at trial. The record supports the circuit court's discretionary decisions to admit this evidence.

There is no arguable merit to a claim that the circuit court should have granted McKenzie's mistrial motion. Whether to grant a mistrial is within the circuit court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The circuit court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id.*** We will uphold the circuit court's discretionary decision if the court examined the relevant facts, applied a proper legal standard, and employed a rational decision-making process. *See* ***id.*** at 506-07. Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives to address the claimed error. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

[3] The State moved to introduce evidence of various other acts as well but ultimately did not elicit any evidence of these additional acts at trial.

Here, defense counsel moved for a mistrial after the victim's father testified:

> The first time I come in the house, the phone was ringing. I looked at the caller ID right away. It said Medford Inn, and I didn't answer it at all because I suspected it was [McKenzie] calling because previously the Medford police were good about informing us when he would get released and at that time I did not answer it.

Defense counsel argued this statement could only be interpreted as referring to McKenzie's release from jail, and it would "poison the jury to know that he was incarcerated at some point in time." The circuit court denied the mistrial motion, noting it did not think the challenged statement "rose to the sufficient level of unfair prejudice that would taint the jury such that this jury could not decide the case fairly and impartially." After some discussion regarding whether an instruction to disregard the statement would cure the potential harm or cause more harm by highlighting the statement, the decision whether to give the instruction was reserved for the jury instruction conference.

At the jury instruction conference, defense counsel indicated "[w]e are not interested in having the cautionary instruction any more." The circuit court observed that because the comment was "really kind of … an aside from the witness" and had not been drawn to the jury's attention, a cautionary instruction would serve only to unduly highlight the comment. In the context of the entire trial, the reference to McKenzie's "release" was trivial. Assuming the jury even recalled the isolated reference, it is unlikely the jury gave it much, if any, weight in reaching its verdicts. The drastic remedy of a mistrial was not necessary.

Any challenge to McKenzie's waiver of his right to testify would lack arguable merit. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court

must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the circuit court engaged McKenzie in an on-the-record colloquy, informing him of both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, McKenzie confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

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; McKenzie's character, including his criminal history; the need to protect the public; and the mitigating circumstances McKenzie raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court determined that "probation would unduly depreciate the nature of these acts." It cannot reasonably be argued that McKenzie'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). Further, there is no arguable merit to any claim that the conditions of extended supervision were not "reasonable and appropriate" under the circumstances of this case. *See* ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499.

There is likewise no arguable merit to challenge the circuit court's consideration of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment. The court properly utilized COMPAS consistent with our supreme court's decision in ***State v. Loomis***, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749. The record shows COMPAS was not "determinative" of the sentence imposed. It merely informed the circuit court's assessment of other, independent factors.

Any challenge to imposition of the $250 DNA surcharge would lack arguable merit. When McKenzie committed his crimes in May 2013, a DNA surcharge was discretionary with the court. *See* WIS. STAT. § 973.046(1g) (2011-12). In June 2013, the legislature made the DNA surcharge mandatory at sentencing following conviction for all felonies. *See* 2013 Wis. Act 20, §§ 2353-55. The change was effective for all sentences imposed, rather than crimes committed, after January 1, 2014. *See* ***id.***, § 9426(1)(am).

At the February 2014 sentencing hearing, the court stated McKenzie was required by statute to submit a DNA specimen and further stated he was "also required to pay the DNA surcharge." We have recognized the potential for ex post facto constitutional violations by the imposition of the mandatory surcharge on defendants who committed crimes prior to January 1, 2014. *See* ***State v. Radaj***, 2015 WI App 50, ¶12, 363 Wis. 2d 633, 866 N.W.2d 758 ("[A]n ex post facto violation occurs if a law inflicts a greater punishment than the law annexed to the crime at the time it was committed." (citation omitted)). However, our supreme court has held that the mandatory imposition of a single DNA surcharge, which was discretionary at the time the offense was committed, is not punitive in either intent or effect and, thus, does not violate the prohibition against ex post facto laws. ***State v. Scruggs***, 2017 WI 15, ¶3, __ Wis. 2d __, __ N.W.2d __. The sentencing court's imposition of a single DNA surcharge against McKenzie, though unsupported by any exercise of discretion, was not an unconstitutional ex post facto violation.

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

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorneys Steven D. Phillips and Megan Sanders-Drazen are relieved of further representing McKenzie in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals