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

2016AP294-CRNM State of Wisconsin v. Demetrius D. Martin (L.C. # 2014CF3129)

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

Demetrius D. Martin appeals a judgment convicting him of felony intimidation of a witness in furtherance of a conspiracy. Appellate counsel, Kiley B. Zellner, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Martin responded. Attorney Zellner then filed a supplemental no-merit report.

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

After reviewing the no-merit report, the response, the supplemental no-merit report and the record, we conclude that there are no issues of arguable merit that could be pursued on appeal. Therefore, we affirm.

Martin was charged with multiple crimes in three separate cases that stemmed from his brutal attack on C.M. on March 11, 2014, and his subsequent attempts to prevent her and others from testifying against him. The three cases were tried together. As pertains to this appeal, Martin was charged with felony intimidation of a witness in furtherance of a conspiracy, and felony intimidation of a victim, both as a repeater. The jury convicted Martin of felony intimidation of a witness in furtherance of a conspiracy and acquitted him of felony intimidation of a victim.[2]

The no-merit report first addresses whether there would be any arguable merit to a claim that the verdict was not supported by sufficient evidence. We view the evidence in the light most favorable to the verdict, and if more than one inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The verdict "'will be overturned only if, viewing the evidence most favorably to the

[2] Martin was convicted of strangulation and suffocation, battery, disorderly conduct, one count of conspiracy to intimidate a victim and two counts of intimidating a victim in Milwaukee County Circuit Court case No. 2014CF1155. He was also convicted of one count of conspiracy to intimidate a victim and two counts of intimidating a victim in Milwaukee County Circuit Court case No. 2014CF2251. At sentencing in all three cases, the circuit court struck the habitual repeater enhancers because it did not have the necessary documents to prove that Martin had been convicted of the predicate offenses in the last five years.

state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (italics and citation omitted).

To show that a defendant is guilty of felony intimidation of a witness in furtherance of a conspiracy, the State must prove beyond a reasonable doubt that the defendant knowingly and maliciously attempted to dissuade a witness from attending or giving testimony at any trial or proceeding authorized by law and the defendant's act was in furtherance of a conspiracy. *See* WIS JI-CRIMINAL 1292.

Officer Aja Chirpke testified that she was dispatched to C.M.'s home in response to a 911 call to investigate a domestic violence battery complaint on the evening of March 11, 2014. Chirpke found C.M. lying on the floor of her bedroom, taking loud deep breaths. She had red marks and scratches on both sides of her neck, and when she spoke her voice was hoarse. Chirpke testified that C.M. said Martin, who was her ex-boyfriend and the father of her child, had strangled and choked her. Chirpke testified that while she was interviewing C.M., J.B., who is C.M.'s mother, arrived.

Investigator Carl Buschmann testified that he works with the Milwaukee District Attorney's Office in the witness protection unit. He testified that he received a referral to investigate possible witness intimidation by Martin. He testified about multiple phone calls Martin made from the jail to C.M. and others in an attempt to influence C.M. and other witnesses not to testify against him. Buschmann played audio recordings of the phone calls for the jury and identified the male voice on the tape as Martin's voice.

As pertains to this appeal, Buschmann described for the jury a phone call made from the jail on May 24, 2014—the sole call in which Buschmann did not recognize Martin's voice. Buschmann testified that Jaquan Howard, an inmate in Martin's section of the jail, made the call to Martin's girlfriend, Demetrius Hurt. During the call, Howard told Hurt that Martin was in segregation and Howard had to do the talking for him. He told Hurt to call three phone numbers while he stayed on the line. The first number was listed to C.M., who did not answer. Howard next told Hurt to call T.G., who also did not answer. Howard then directed Hurt to call J.B., who answered the phone. The State played an audio recording of this phone call in which Howard told J.B.: "he said um, when you-when ya'll come, you tell the people that you don't know what happened." Buschmann testified that he knew the voice was Howard's because Howard's probation agent heard the recording and identified the voice as Howard's voice.

In sum, the jury heard testimony that J.B. was present at the scene of the crime, making her a potential witness. The jury heard testimony from which it could reasonably infer that Martin directed Howard to contact J.B. on his behalf to persuade her not to give any information about his case, an act that could be considered by the jury as an act in furtherance of a conspiracy. The audio recording of the phone call was played for the jury and the jury could determine based on that call that Martin attempted to dissuade J.B. from giving testimony at trial and that he acted knowingly and maliciously. Because this evidence was sufficient to support the jury's verdict of guilty on the charge of felony intimidation of a witness in furtherance of a conspiracy, there would be no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report next addresses whether there would be arguable merit to a claim that Martin's constitutional right to confront his accusers was violated when the circuit court allowed Chirpke to testify about what C.M. told her the night of the attack. C.M.'s statement to Chirpke

related to the circuit court case charging Martin with strangulation and suffocation, not to this case. There would be no arguable merit to raising this issue in the context of this appeal because it had no bearing on Martin's conviction of intimidation of a witness in furtherance of a conspiracy.

The no-merit report next addresses whether the circuit court misused its discretion when it directed T.G., who was subpoenaed by the State, to continue testifying. The right against self-incrimination is guaranteed by the Fifth Amendment. ***State v. Marks***, 194 Wis. 2d 79, 89, 533 N.W.2d 730 (1995). "The privilege may be invoked whenever 'a witness has a real and appreciable apprehension that the information requested could be used against [her] in a criminal proceeding.'" ***Id.*** (citation omitted). T.G. informed the circuit court that she wanted to invoke the Fifth Amendment and did not want to continue testifying because she was afraid of what would happen to her after she left the courtroom. The circuit court explained to T.G. that she could not avoid testifying by invoking the Fifth Amendment because she was not charged with a crime and was not in danger of being charged with a crime. The circuit court informed T.G. that she could be charged with contempt if she refused to continue testifying. Because the Fifth Amendment did not apply to T.G.'s testimony, there would be no arguable merit to this issue.

The no-merit report and Martin's response address whether there would be arguable merit to an appellate argument based on the fact that the circuit court allowed Deputy Sheriff Dennis O'Donnell to testify. O'Donnell testified for several minutes before Martin's counsel objected on the grounds that O'Donnell was not listed on the State's pretrial witness list. After the objection, the circuit court dismissed the jury and discussed the issue with the parties. The circuit court prohibited further testimony from O'Donnell because he had not been named as a witness, although the court allowed one brief follow-up question from the prosecutor. The

circuit court also decided not to strike the testimony O'Donnell had already given and decided not to give a curative instruction.

The circuit court's decision to prohibit further testimony from O'Donnell was in accord with WIS. STAT. § 971.23(7m) ("The court shall exclude any witness not listed [as] required by this section, unless good cause is shown for failure to comply."). The circuit court properly exercised its discretion in declining to give a curative instruction to the jury because it decided that doing so would draw more attention to O'Donnell's testimony. *See* ***State v. Harris***, 2008 WI 15, ¶96, 307 Wis. 2d 555, 745 N.W.2d 397 (whether to advise the jury about the party's failure to comply with discovery is committed to the circuit court's discretion). Moreover, the circuit court properly exercised its discretion in deciding not to strike the testimony O'Donnell gave prior to the objection because O'Donnell's explanation of how phone calls were made and charged to inmates in the jail caused no harm to Martin, and the circuit court reasoned that a number of other witnesses could have given the same testimony. *See* ***id.*** (the circuit court properly exercises its discretion when its decision reflects "reasoned application of the appropriate legal standard to the relevant facts of the case"). Therefore, there would be no arguable merit to an appellate challenge based on O'Donnell's testimony.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion when it imposed five years of imprisonment composed of three years of initial confinement and two years of extended supervision, to be served consecutively. "The principal objectives of a sentence include, but are not limited to, the protection of the community, the punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. "A sentencing court should indicate the general objectives of the greatest

importance and explain how, under the facts of the particular case, the sentence selected advances those objectives." ***Id.***

The circuit court stated that Martin's offense was aggravated by the fact that he had previously been convicted of charges involving intimidation and was on probation when he committed the acts which were the subject of the current pleadings. The circuit court characterized Martin as attempting to reach his hands from jail "across the telephone lines to keep controlling the woman that [he was] with." The circuit court said that Martin's actions were a textbook example of domestic violence because he "exhibited … brutal authority and will" on the victim by strangling her and then, after scaring and hurting her, he intimidated her into submission by calling her from jail. The circuit court considered positive aspects of Martin's character, including his work history and the fact that he obtained his HSED, but explained that prison was necessary to deter him and others from acting this way and to keep the victim safe while Martin learned to control his anger. Because the circuit court applied the facts of this case to the proper legal standards to reach a reasoned and reasonable determination, there would be no arguable merit to a challenge to the sentencing court's discretion.

In his response, Martin argues that trial counsel provided him constitutionally ineffective assistance for several reasons. "Whether a defendant received ineffective assistance of trial counsel is a two-part inquiry under ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Jenkins***, 2014 WI 59, ¶35, 355 Wis. 2d 180, 848 N.W.2d 786. "A defendant must show both (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced the defendant." ***Id.***

Martin contends that his counsel should have objected to Buschmann's testimony and Probation Agent Dawn Berger's testimony identifying Martin's voice on the audio recordings of the jail phone calls because they are not experts in voice identification. Neither Buschmann nor Berger testified as an expert in voice identification. Instead, they both testified that they recognized Martin's voice because it was distinct and they were familiar with it. "The requirements of authentication or identification … are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01. Because any objection by Martin's counsel would have been meritless, there would be no arguable merit to a claim that Martin received ineffective assistance of trial counsel.

Martin next argues in his response that the circuit court erred when it informed him that if he wanted to retain an expert on voice identification, he would have to waive his right to a speedy trial. The circuit court gave Martin the opportunity to postpone the trial to retain a voice expert but informed him that he would have to waive his right to a speedy trial because it was impossible to proceed within the speedy trial time limits if Martin needed to delay trial to retain a voice identification expert. Martin chose to proceed to trial instead. Because *Martin was given a choice* about how to proceed in light of the time constraints, there would be no arguable merit to an appellate challenge to the circuit court's ruling.

Martin further argues that his trial counsel ineffectively represented him by failing to object to Buschmann's hearsay testimony at the preliminary examination. Hearsay testimony is allowed at preliminary examinations. *See* WIS. STAT. § 970.038. There would be no arguable merit to this claim.

In his response, Martin argues that trial counsel was ineffective for failing to object to Agent Berger's review of her notes at trial to refresh her recollection. Under WIS. STAT. § 908.03(5), a witness may look at a writing to refresh the witness's memory and then testify, in which case the testimony and not the notes are admitted into evidence. Because Berger's actions were allowed under § 908.03(5), there would be no arguable merit to this claim.

Martin also contends that his trial counsel should have objected because the notes Berger reviewed at trial were not turned over to the defense before Berger's testimony. Martin's counsel *did* object. Berger informed the court that she created the notes the morning of trial. The circuit court remedied the problem by having the State provide a copy of the notes to the defense. Therefore, there would be no arguable merit to this claim.

Our independent review of the record reveals no other potential issues of arguable merit. Therefore, we affirm the judgment of conviction and relieve Attorney Kiley B. Zellner from further representation of Martin.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Kiley B. Zellner is relieved from further representation of Martin in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals