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DISTRICT III

March 6, 2018

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

2016AP1331-CRNM State of Wisconsin v. Daniel L. Nilsson (L. C. No. 2015CF158)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Counsel for Daniel Nilsson filed a no-merit report and two supplemental reports replying to Nilsson's responses. Because we conclude there is no arguable basis for Nilsson to withdraw his no-contest plea or to challenge the sentence imposed for attempted first-degree intentional homicide–domestic abuse, with use of a dangerous weapon, we summarily affirm the judgment of conviction.

According to the complaint, Nilsson repeatedly stabbed his former girlfriend, T.R. He also attacked C.G. with a knife when C.G. came to T.R.'s rescue. The complaint charged Nilsson with attempted first-degree intentional homicide–domestic abuse, with use of a dangerous weapon and as a repeater, and with first-degree recklessly endangering safety, with use of a dangerous weapon and as a repeater. The maximum penalties for these offenses totaled seventy-one years' initial confinement and twenty-three and one-half years' extended supervision. Pursuant to a plea agreement, Nilsson entered a no-contest plea to attempted first-degree intentional homicide–domestic abuse, with use of a dangerous weapon, and the State agreed to dismiss the repeater enhancer and to dismiss and read in the reckless endangerment charge. The State also agreed to recommend twelve years' initial confinement and ten years' extended supervision. The defense recommended ten years' initial confinement. The court imposed a sentence of eighteen years' initial confinement and ten years' extended supervision.

The no-merit report addresses whether the circuit court properly accepted Nilsson's no-contest plea and whether there was any basis for challenging the sentencing court's discretion. We agree with counsel's analysis of those issues.

Nilsson raises numerous issues in his responses to the no-merit report. First, he claims he was not aware that the district attorney could speak about the read-in offenses at the sentencing hearing, and he would not have agreed to the plea deal if he had known this. To establish a basis for withdrawing the no-contest plea, Nilsson must show a manifest injustice. *See* ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992). To establish a manifest injustice, he must show that any misapprehension about the plea agreement concerned substantial rights. ***Id.*** Nilsson does not claim he did not know how the court could use a read-in offense at sentencing, but only claims that he did not know the district attorney would speak

about the reckless endangerment charge. That alleged misunderstanding does not affect a substantial right and would not serve as the basis for finding a manifest injustice.

Nilsson next claims he was not charged as a repeater, but was convicted as a repeater. That is not the case. The complaint and the information both charged him as a repeater, but the repeater enhancers were dropped by the State and are not included in the judgment of conviction. The repeater penalty enhancer was neither available nor applied at his sentencing.

Nilsson claims his trial counsel was ineffective because she "broke the plea" by recommending ten years' initial confinement. He apparently believes counsel should have joined the State in recommending twelve years' initial confinement. To establish ineffective assistance of counsel, Nilsson would have to show both deficient performance and prejudice to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 678 (1984). Nilsson's counsel did not perform deficiently by recommending ten years' initial confinement as Nilsson was free to argue for the penalty to be imposed at sentencing. In addition, because the sentencing court is free to impose a longer sentence than the parties recommend, even if it is a joint recommendation, *see* ***Melby v. State***, 70 Wis. 2d 368, 385, 234 N.W.2d 634 (1975), Nilsson's counsel did not perform deficiently by recommending a lesser sentence, and Nilsson was not prejudiced by her argument.

Nilsson also contends the sentencing court violated the plea agreement by imposing eighteen years' initial confinement. At the plea hearing, the court informed Nilsson that that it was not bound by the plea agreement and could impose the maximum sentence. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. Therefore, the sentencing court's so-called "violation" of the plea agreement provides no basis for appeal.

Nilsson raises multiple issues based on the premise that attempted first-degree intentional homicide is a "non-existent crime." That argument is convoluted, incomprehensible and simply wrong.

Nilsson next argues that recklessly endangering safety is a lesser-included offense of attempted murder. Therefore, he argues, he was improperly charged and the lesser offense should not have been read in for sentencing purposes. Because the two offenses involved different victims, the offenses were properly charged and the lesser charge was properly considered at sentencing.

Finally, Nilsson faults his trial attorney for failing to have C.G.'s statements "thrown out" and to have C.G. "forbidden to be allowed to be a witness because of inconsistencies in his statements." When a witness gives inconsistent statements, the witness can be impeached regarding the inconsistencies. However, the statements are not "thrown out," as the witness is generally allowed to testify. Unless the witness's testimony is deemed incredible as a matter of law, the weight to be accorded the witness's testimony is for the jury to decide. ***Ianni v. Grain Dealers Mut. Ins. Co.***, 42 Wis. 2d 354, 360, 166 N.W.2d 148 (1969). Testimony is incredible as a matter of law only if it is in conflict with the uniform course of nature or with fully established or conceded facts. ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (1994).

The remainder of Nilsson's arguments allege ineffective assistance of his postconviction counsel. Because our review of the record confirms postconviction counsel's analysis, we conclude Nilsson has not established deficient performance or prejudice.

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

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that attorney Timothy O'Connell is relieved of his obligation to further represent Nilsson in this matter. WIS. STAT. RULE 809.32(3) (2015-16).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals