OFFICE OF THE CLERK
**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 I**

July 2, 2018

*To*:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jeffrey W. Jensen
111 E. Wisconsin Ave., Ste. 1925
Milwaukee, WI 53202-4825

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Robert C. Brown 568998
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

---

2017AP238-CRNM State v. Robert C. Brown. (L.C. # 2014CF5590)
2017AP239-CRNM State v. Robert C. Brown (L.C. # 2015CF228)

Before Kessler, P.J., Brennan and Dugan, 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).**

In these consolidated matters, Robert C. Brown appeals from judgments convicting him of fifteen felonies following a jury trial. Appellate counsel, Jeffrey W. Jensen, 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] Brown responded and counsel filed a supplemental no-merit report. Upon this court's independent review of the record, counsel's reports, and Brown's response, we conclude that there is no issue of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

***Background***

In Milwaukee County Circuit Court Case No. 2014CF5590, Brown was charged with first-degree sexual assault by use of a dangerous weapon, kidnapping, and armed robbery, all as a repeater, stemming from an incident that occurred on September 1, 2014. The complaint alleged that Brown took H.B. by gunpoint to the back of a home where he sexually assaulted and robbed her. Brown's DNA was found inside a used condom at the scene; H.B.'s DNA was on the outside.

While Case No. 2014CF5590 was pending, the State filed a second complaint against Brown. The complaint in Milwaukee County Circuit Court Case No. 2015CF228 charged Brown as a repeater with twelve felonies: five counts of sexual assault (in varying degrees); four counts of kidnapping; and three counts of armed robbery (one was charged as attempted armed robbery).[2] Eleven of the twelve counts related to four incidents that took place between October 2014 and December 2014. In those eleven incidents, the complaint alleged that Brown approached four separate victims, A.B., N.S., D.J., and B.H.W., took them to secluded locations at gunpoint, and sexually assaulted and robbed or attempted to rob them.

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

[2] Another count of armed robbery was later amended to attempted armed robbery.

As to the remaining count, the complaint alleged Brown sexually assaulted B.B. in February 2012. This charge differed from the others both in terms of when and how it was committed. The complaint alleged that Brown and B.B. knew each other and that Brown took B.B. into a bedroom and sexually assaulted her.

Both B.B. and A.B. were under the age of sixteen when the assaults occurred.

The trial court granted the State's motion to consolidate the two cases for trial. Evaluations to determine whether Brown was competent or was not guilty by reason of mental disease or defect (NGI) followed. The parties ultimately stipulated to the examining doctor's conclusions that Brown was competent to proceed and that there was no support for an NGI plea. Brown's trial counsel informed the court that the defense expert who evaluated Brown arrived at the same conclusions.

The defense theory at trial was that the victims were mistaken about the identity of their attacker, and, as to B.B., that she made up the story that Brown sexually assaulted her to avoid getting into trouble for getting home late. Prior to returning its verdicts, the jury requested the DNA report for victim A.B. However, while the trial court was attempting to locate counsel, apparently to respond to the request, the jury arrived at its verdicts.

The jury found Brown guilty of each of the fifteen felonies. Cumulatively, the trial court imposed a 155-year period of initial confinement to be followed by a 75-year period of extended supervision.

In his no-merit report, appellate counsel addresses whether there would be any arguable merit to an appeal on four issues: (1) joinder; (2) sufficiency of the evidence; (3) ineffective

assistance of trial counsel; and (4) the trial court's exercise of its sentencing discretion. We will address these and issues raised by Brown in his response insofar as they overlap at times. We also discuss the trial court's imposition of DNA surcharges.

***Discussion***

Any challenge to the trial court's decision to grant the State's motion for joinder of the two cases would lack arguable merit. WISCONSIN STAT. § 971.12(4) permits crimes in two or more complaints to be joined for trial if the charged crimes could have been joined in a single complaint. Subsection 971.12(1) permits two or more crimes to be charged in a single complaint when the crimes charged "are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan."

Here, the trial court determined that the complaints should be consolidated for purposes of trial because the allegations were relatively close in time and involved similar fact patterns. Whether joinder is proper is a question of law. ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). WISCONSIN STAT. § 971.12 is to be broadly construed in favor of joinder, ***Hoffman***, 106 Wis. 2d at 208, in order to promote efficient, economical judicial administration and to avoid multiple trials, ***State v. Leach***, 124 Wis. 2d 648, 671, 370 N.W.2d 240 (1985).

The 2014 charges here have remarkably similar fact patterns—the victims were walking alone when a man with a gun forced them to a secluded place and sexually assaulted them. As to the allegations involving B.B., we recognize that crimes are not of the same or similar character merely because they are violations of the same statute. *See* ***Hoffman***, 106 Wis. 2d at 208. The

test is whether the crimes are the same type of offense, whether they occurred over a relatively short period of time, and whether the evidence as to each crime overlaps. ***Id.*** There is no per se rule concerning what is a relatively short period of time. ***State v. Hamm***, 146 Wis. 2d 130, 139-40, 430 N.W.2d 584 (Ct. App. 1988). The permissible time period is dependent upon the similarity of the offenses and the extent to which the evidence overlaps. ***Id.*** at 140 (crimes occurring in 1983 and 1985 were within a relatively short period of time under the circumstances of the case).

The facts of the allegations involving B.B. are similar as they involved Brown forcing B.B. to have sex with him, and the evidence of the crimes overlapped given that B.B. and other victims positively identified Brown in a line-up. We agree with appellate counsel that a challenge to the trial court's joinder decision would lack arguable merit.

Next, appellate counsel addresses whether the evidence at Brown's jury trial was sufficient to support his convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate and the conviction[s], is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to support the convictions. That evidence included testimony from all of the victims, who recounted their allegations against Brown. Additionally, each victim either identified Brown or there was DNA evidence connecting him to the crime, or both. With the exception of B.B., whose allegations did not involve kidnapping, the remaining five victims all testified that Brown, at gunpoint, moved them from one place to another and held them against their will in order to have sex with them. Additionally, with the exception of B.B.,

whose allegations did not involve armed robbery, the other victims testified that Brown either took property or tried to take property from them by using a gun. We agree with appellate counsel that any challenge to the sufficiency of the evidence would lack arguable merit.

Appellate counsel also analyzes whether Brown's trial counsel was ineffective and concludes that although the attorneys were deficient in several respects, the deficient performance was not prejudicial.[3] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (establishing ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and prejudicial). Appellate counsel contends that "[o]n occasions too numerous to set forth individually here, trial counsel failed to object to hearsay."

Appellate counsel submits that typically the hearsay testimony was presented when, after a victim testified, the State called a police detective to testify as to what the victim said during her interview with the detective. First, appellate counsel acknowledges that some of the hearsay testimony may fall under exceptions to the hearsay rule. Second, the detectives who testified did not establish any facts that were not already testified to by the victims; rather they generally corroborated the victims' trial testimony. In addition, the victims testified and were subject to cross-examination. Consequently, there is not a Confrontation Clause problem. *See* ***State v. Griep***, 2015 WI 40, ¶18, 361 Wis. 2d 657, 863 N.W.2d 567 (The right of an accused to confront the witnesses against him or her, set forth in the Sixth Amendment of the United States Constitution and known as the Confrontation Clause, is "a fundamental right.").

[3] Brown was represented by two trial attorneys.

Appellate counsel also points to instances where a sexual assault nurse examiner (SANE) was permitted, without objection by Brown's trial counsel, to testify to statements made by a victim, and, in other instances, the SANE nurse was permitted to testify to the results of an examination performed by another nurse. The transcripts reveal that trial counsel highlighted for the jury the fact that the testifying SANE nurse did not actually perform the examination. To the extent this was a trial tactic or strategy, it is virtually unchallengeable. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. Again, the theory of defense was one of misidentification; it was not that the rapes did not occur.[4]

As appellate counsel acknowledges, "[e]ven without the disputed hearsay evidence, the totality of the remaining evidence is overwhelming as to Brown's guilt; it is practically inconceivable that all of these women could conspire to falsely accuse Brown of sexual assault, even by mistake, and, in the process, to plant DNA evidence." We agree. If there was a basis to exclude some of the testimony appellate counsel highlights, Brown was not prejudiced by the lack of an objection. To show prejudice, the defendant must show a reasonable probability that, but for trial counsel's deficient performance, the result of the trial would have been different. *See* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. Based on the record before us, there would be no arguable merit to pursuing a claim that Brown's trial attorneys were ineffective.

[4] During closing, Brown's trial counsel distinguished the charges involving B.B. from the others. As to the other five victims, trial counsel stated: "But for the other five young women that came in here and got on that stand, there's no doubt in my mind that they had sex and that it was against their will and that somebody violated them. There is just no doubt in my mind that that happened. And they need and deserve both compassion and closure."

While this no-merit appeal was pending, we received an affidavit from Rayshawn Higgins. Higgins averred that he was with Brown on December 11, 2014. This was the night of the crimes involving the victim B.H.W. However, as set forth in the affidavit, Higgins was *not* with Brown that night between the hours of "[a]t or about" 8:10 p.m. and midnight. B.H.W. testified that she was walking home that night at "around" 7:30 p.m. Consequently, there was less than one hour between the approximate time B.H.W. was walking home and the period of time when Higgins was not with Brown. Given that the evidence of Brown's involvement in the crimes was overwhelming, this court is not persuaded that the introduction of this purported alibi testimony would have changed the result of the trial as to the charges involving B.H.W. *See* ***id.*** B.H.W. identified Brown in a line-up and in court. A detective investigating the crimes involving B.H.W. testified that he found a used condom near the location where B.H.W. was assaulted, a gym pass from school with B.H.W.'s name on it, and tissue with what appeared to be blood on it.[5] Additional trial testimony revealed that Brown was the source of the DNA found on the inside of the condom and B.H.W. was the source of DNA found on the outside. There would be no arguable merit to pursuing a claim that Brown's trial attorneys were ineffective for not pursuing this alibi witness.[6]

[5] B.H.W. testified that she was menstruating at the time of the assault.

[6] As noted, Brown filed a response to counsel's no-merit report. In it, he reiterates, at times quoting verbatim, appellate counsel's discussion of ineffective assistance of trial counsel relating to hearsay evidence. We have already concluded that this issue lacks arguable merit. Brown also asserts that his trial counsel was ineffective for failing to investigate his alibi witnesses and for failing to pursue and investigate a witness who he claims has "certain information" about the B.B. case. Appellate counsel analyzed whether Brown's trial counsel was ineffective for failing to investigate Brown's alibi witnesses. We agree with appellate counsel's conclusion that this does not present an issue of arguable merit and will not discuss it further.

The last issue appellate counsel addresses is whether the trial court erroneously exercised its sentencing discretion. The record reveals that the court's sentencing decision had a "'rational and explainable basis.'" *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offenses and emphasized that the objectives of its sentence were punishment, deterrence, and Brown's rehabilitation. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court described Brown as "a menace to society" and "every woman's nightmare." Under the circumstances of the case, which involved multiple victims who endured kidnappings, sexual assaults, and armed robberies, the 155 years of initial confinement does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper[.]" *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with appellate counsel that a challenge to the trial court's decision at sentencing would lack arguable merit.

For the fifteen felonies of which he was convicted, the trial court ordered Brown to pay $3750 in DNA surcharges (fifteen felonies x $250). It appears the trial court believed all of the surcharges were mandatory under WIS. STAT. § 973.046(1r)(a), following a revision that became effective on January 1, 2014. We note, however, that at the time Brown committed the 2012 offense against B.B., a $250 DNA surcharge was already mandatory as to that charge given the nature of the crime. *See* Sec. 973.046(1r) (2011-12) ("[I]f a court imposes a sentence ... for a violation of ... [WIS. STAT. § ] 948.02 (1) or (2) ... the court shall impose a deoxyribonucleic acid analysis surcharge of $250."). Additionally, even though the record indicates that Brown was previously ordered to provide a sample and pay the DNA surcharge, based on the Wisconsin Supreme Court's decision in ***State v. Williams***, 2018 WI 59, ___ Wis. 2d ___, 912 N.W.2d 373,

there is no issue of arguable merit to challenge the trial court's imposition of the DNA surcharges in these cases.

No other issues warrant discussion. To the extent that Brown's response raises additional issues, we have considered his assertions and concluded that the allegations he makes do not suggest arguably meritorious grounds for further postconviction or appellate proceedings. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (explaining that the court of appeals is not required to explicitly identify and reject the nearly infinite meritless issues present in any trial transcript). Based on our independent review of the record, we conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Jensen is relieved of further representation of Robert C. Brown in these matters. *See* WIS. STAT. RULE 809.32(3).

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

---

*Sheila T. Reiff*
*Clerk of Court of Appeals*