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

November 6, 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

Russell J. A. Jones
Jones Law Firm LLC
12557 W. Burleigh St., Ste. 8
Brookfield, WI 53005

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

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

Ronall Kyle 276720
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2016AP1738-CRNM State of Wisconsin v. Ronall Kyle (L.C. # 2014CM47)
2016AP1739-CRNM State of Wisconsin v. Ronall Kyle (L.C. # 2014CF1697)
2016AP1740-CRNM State of Wisconsin v. Ronall Kyle (L.C. # 2014CF2832)

Before Kessler, P.J., Brennan and Brash, 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).

Ronall Kyle pled guilty to the misdemeanor charge of disorderly conduct and to the felony charges of substantial battery and intimidation of a witness, all as acts of domestic abuse.

See WIS. STAT. §§ 947.01(1) (2013-14),[1] 940.19(2) (2013-14), 940.43(7) (2013-14), 968.075(1)(a) (2013-14). For the disorderly conduct conviction, the circuit court imposed ninety days in jail, and for the substantial battery conviction, the circuit court imposed a thirty-four-month term of imprisonment bifurcated as sixteen months of initial confinement and eighteen months of extended supervision. The circuit court ordered Kyle to serve each of those sentences concurrently with each other and with any previously imposed sentences. For intimidating a witness, the circuit court imposed a consecutive seven-year term of imprisonment bifurcated as four years of initial confinement and three years of extended supervision.[2] Kyle appeals.

Appellate counsel, Attorney Russell J.A. Jones, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Kyle filed a response, and Jones filed two supplemental no-merit reports. Based upon our review of the no-merit reports, Kyle's response, and the records, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

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

[2] The circuit court also imposed a mandatory DNA surcharge for each of the felonies. In light of those surcharges, we previously put these appeals on hold pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of the plea that he or she faced multiple mandatory DNA surcharges. The supreme court subsequently granted voluntary dismissal in ***Odom*** before oral argument. We then held these appeals pending a decision in ***State v. Freiboth***, 2018 WI App 46, 383 Wis. 2d 733, 916 N.W.2d 643. In ***Freiboth***, we determined that "plea hearing courts do not have a duty to inform defendants about the mandatory DNA surcharge." *See* ***id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges. We therefore lift the hold imposed in these matters and proceed to resolve the appeals.

According to the criminal complaint filed in Milwaukee County case No. 2014CM47, which underlies appeal No. 2016AP1738-CRNM, M.J. reported that on December 24, 2013, Kyle, who is the father of her children, poked her in the eye and engaged in other violent conduct in her home that left the residence in disarray. On January 6, 2014, the State charged Kyle with misdemeanor counts of disorderly conduct and battery as acts of domestic abuse, and a circuit court commissioner issued a warrant for his arrest.

On April 23, 2014, Kyle made an initial appearance in both case No. 2014CM47 and in a second matter, Milwaukee County case No. 2014CF1697. The criminal complaint in the latter case, which underlies appeal No. 2016AP1739-CRNM, alleged that on April 19, 2014, Kyle struck M.J. in the face multiple times, necessitating stitches to her lip and surgery to a broken orbital bone. Based on those allegations, the State charged Kyle with two counts of substantial battery as acts of domestic abuse.

On July 1, 2014, the State filed a criminal complaint in Milwaukee County case No. 2014CF2832, which underlies appeal No. 2016AP1740-CRNM. The State alleged that while Kyle was in custody unable to post bond in regard to the two cases described above, he took steps to dissuade M.J. from attending legal proceedings in connection with his pending felony charges. In the complaint, the State described several telephone calls that Kyle allegedly made to further his efforts to prevent M.J. from attending legal proceedings. The State charged Kyle with three counts of felony intimidation of a witness as an act of domestic abuse.

On July 20, 2015, the day set for trial, Kyle decided to resolve all of the charges pending against him with a plea bargain. The circuit court accepted his guilty pleas to three crimes and

scheduled the matters for sentencing. On August 25, 2015, the matters proceeded to sentencing in front of a successor circuit court.[3]

We first consider whether Kyle could pursue an arguably meritorious challenge to his guilty pleas. We conclude he could not.

At the outset of the plea hearing, the State described the parties' plea bargain. Under its terms, Kyle would plead guilty to one count of disorderly conduct in case No. 2014CM47, one count of substantial battery in case No. 2014CF1697, and one count of felonious intimidation of a witness in case No. 2014CF2832. The State would recommend a global disposition of not more than three and one-half years of initial confinement and four years of extended supervision, and the State would further move to dismiss and read in the remaining counts for sentencing purposes. Kyle said he understood the terms of the plea bargain. The circuit court clarified that each of the three crimes to which Kyle had agreed to plead guilty included an allegation that Kyle committed the crime as an act of domestic abuse. Kyle said he understood. He told the circuit court that he had not been promised anything outside the terms of the plea bargain to induce his guilty pleas and that he had not been threatened.

The circuit court explained to Kyle that the maximum penalties he faced for disorderly conduct were a $1000 fine and ninety days in jail. *See* WIS. STAT. §§ 947.01(1) (2013-14), 939.51(3)(b) (2013-14). Kyle said he understood. Next, the circuit court explained that upon

[3] The Honorable Mel Flanagan presided over the plea hearing and accepted Kyle's guilty pleas. The Honorable Jeffrey A. Wagner presided over the sentencing hearing and entered the judgments of conviction.

conviction for substantial battery, he faced maximum penalties of a $10,000 fine and a three and one-half-year term of imprisonment. *See* WIS. STAT. §§ 940.19(2) (2013-14), 939.50(3)(i) (2013-14). Kyle said he understood. The circuit court next explained that upon conviction for intimidation of a witness, Kyle faced maximum penalties of a $25,000 fine and a ten-year term of imprisonment. Kyle again said he understood. The circuit court advised Kyle that it was not bound by the plea bargain and could impose a sentence for each crime up to the maximum allowed by law. Kyle said he understood.

The consolidated records contain signed plea questionnaire and waiver of rights forms with attachments. Kyle confirmed that he reviewed the forms and attachments with his trial counsel and that he understood them. The plea questionnaires reflect that Kyle was thirty-five years old and had a high school education. The questionnaires further reflect his understanding of the charges he faced, the rights he waived by entering his pleas, and the penalties he faced upon conviction. A signed attached addendum reflects Kyle's acknowledgment that by entering guilty pleas he would give up his right to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of the evidence against him. The signed addendum is captioned only with the case numbers 2014CF1697 and 2014CF2832, but the circuit court advised Kyle that the provisions of the addendum applied to each of the charges to which he was pleading guilty, and Kyle said he understood.

The circuit court told Kyle that by entering guilty pleas he would give up the constitutional rights listed on the plea questionnaires, and the circuit court reviewed those rights on the record. Kyle said he understood his rights. The circuit court explained that if he was not a citizen, a plea other than not guilty exposed him to the risk of deportation, exclusion from

admission to this country, or denial of naturalization. *See* WIS. STAT. § 971.08(1)(c). Kyle said he understood.[4] The circuit court explained that by entering guilty pleas, he would give up the right to bring motions and to raise defenses. Kyle said he understood.

"[A] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may establish the defendant's requisite understanding in a variety of ways: "summarize the elements of the offenses on the record, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." *See* ***id.***, ¶56.

Kyle asserts in his response to the no-merit report that the plea colloquy was not sufficient to establish his understanding of the elements of intimidating a witness, but we cannot agree. The record reflects that Kyle initialed and filed a hand-written document that stated the elements of that crime. The document also provided: "I reviewed this with my attorney." The circuit court asked Kyle if his trial counsel had written the elements for him, and he confirmed that his trial counsel had done so. The circuit court asked Kyle if he understood the charge of intimidating a witness, and Kyle responded: "[y]es, your [h]onor." Additionally, Kyle filed

[4] The circuit court did not caution Kyle about the risks described in WIS. STAT. § 971.08(1)(c) using the precise words required by the statute, but minor deviations from the statutory language do not undermine the validity of a plea. *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173. Moreover, before a defendant may seek plea withdrawal based on failure to comply with § 971.08(1)(c), the defendant must show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Kyle could make such a showing.

preprinted documents describing the elements of disorderly conduct and substantial battery, and he acknowledged that he had initialed those documents. He told the circuit court that he had reviewed the elements with his trial counsel and that he understood the charges. Accordingly, the record does not reflect that Kyle could pursue an arguably meritorious claim that he entered a guilty plea to any of the offenses in this case without understanding the elements of the crime.

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Here, Kyle told the circuit court that the facts in the criminal complaints were true. Additionally, trial counsel stipulated to the facts in the criminal complaints. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (factual basis established when trial counsel stipulates on the record to the facts in the criminal complaint). The circuit court properly established a factual basis for Kyle's guilty pleas.

The record reflects that Kyle entered his guilty pleas knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the pleas.

Kyle asserts in his response to the no-merit report that he has grounds to withdraw his guilty pleas because his trial counsel was ineffective in connection with the plea proceeding. A defendant who alleges ineffective assistance of counsel must make a two-prong showing that

counsel performed deficiently and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Kyle says his trial counsel was ineffective for advising him that "it would be best to take the plea" because he was likely to lose if he proceeded to trial. The conduct he describes does not constitute deficient performance. "To the contrary, a lawyer has the right and duty to recommend a plea bargain if he or she feels it is in the best interests of the accused." ***State v. Provo***, 2004 WI App 97, ¶17, 272 Wis. 2d 837, 681 N.W.2d 272. Further pursuit of this issue would lack arguable merit.

Relatedly, Kyle asserts in his response that his trial counsel was ineffective because trial counsel led him to believe his aggregate sentence would be "capped at 3.5 years," that the sentences would be concurrent with a sentence after revocation he was serving for an unrelated crime, and that he would therefore remain in prison for no more than six months longer than required by his earlier-imposed sentence.[5] The record shows, however, that Kyle signed a guilty plea questionnaire stating his understanding that the *State's recommendation*—not the circuit court's sentence—would be capped at three and a half years of initial confinement. Moreover,

[5] The record reflects that when Kyle was sentenced in these matters in August 2015, the parties understood that he had a mandatory release date of March 26, 2018, in connection with the sentence after revocation that he was already serving.

the circuit court advised Kyle on the record during the plea colloquy that the circuit court was not bound by any sentencing recommendation and that the circuit court could impose a maximum sentence for each offense. The record therefore shows that Kyle in fact understood when he entered his guilty pleas that the circuit court could impose ten years of imprisonment for intimidating a witness, three and one-half years of imprisonment for substantial battery, and ninety days in jail for disorderly conduct. The information provided at the plea hearing overrides any erroneous assertion that Kyle's trial counsel may have made or any misunderstanding Kyle may have had before the hearing began. *See* ***State v. Bentley***, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996). Further pursuit of this issue would lack arguable merit.

We next address Kyle's assertion that the circuit court erred when it granted the State's pretrial motion to admit certain hearsay statements at trial. As a rule, a defendant who enters a valid guilty plea forfeits all nonjurisdictional defects and defenses to the criminal charge. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. We have concluded that Kyle entered valid guilty pleas and that he has not demonstrated an arguably meritorious basis for plea withdrawal. Accordingly, no arguably meritorious basis exists to pursue issues arising prior to his guilty pleas.

We next consider whether Kyle could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of

the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

We agree with appellate counsel's conclusion that the records here reflect an appropriate exercise of sentencing discretion. The circuit court indicated that punishment, deterrence, and rehabilitation were the primary sentencing objectives, and the circuit court discussed the factors it deemed relevant to those goals. The circuit court viewed the disorderly conduct and battery charges as serious and found that the crimes were aggravated by the gravity of the eye injuries Kyle inflicted on M.J. The circuit court concluded that Kyle then "ma[de] things worse" by trying to persuade M.J. not to attend court proceedings related to his crimes. In considering Kyle's character, the circuit court took into account his three prior felony convictions, *see* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (significant criminal record is indicative of character), and noted with particular concern that Kyle committed his offenses in

these cases while serving a term of extended supervision for an armed robbery. The circuit court discussed the need to protect the public, observing that he "pose[d] a risk to the community" by committing dangerous acts "even while on supervision."

The circuit court properly considered whether the sentencing goals could be met if Kyle remained in the community. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (circuit court should consider probation as the first sentencing alternative). The circuit court concluded, however, that Kyle required "close rehabilitative control" and that his treatment needs must be addressed in a confined setting.

The circuit court identified the factors that it considered in choosing sentences in this matter. The factors are proper and relevant. Moreover, the sentences are not unduly harsh. A sentence is unduly harsh "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Here, the circuit court imposed lawful sentences that were far less than the aggregate penalties Kyle faced upon conviction. We are satisfied that Kyle cannot pursue an arguably meritorious claim that his sentences shock public sentiment. *See* ***id.*** A challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

Kyle suggests that his trial counsel was ineffective at sentencing by failing to correct the prosecutor's allegations that he did not do well on extended supervision during the years immediately preceding the crimes in these cases. The record reflects that Kyle could not show

any deficiency in his trial counsel's performance. Although the State advised the circuit court that Kyle faced numerous allegations of wrong doing and therefore was placed on an extended supervision hold multiple times during the years from 2006 through 2011, the State acknowledged that the allegations did not lead to any criminal charges or convictions. Kyle's trial counsel then emphasized to the circuit court that "if the[] ... allegations ... had substance, they would have been cases." Further pursuit of this issue would lack arguable merit.

Finally, Kyle suggests that his trial counsel was ineffective by not seeking judicial substitution upon learning at the close of the plea hearing that a successor circuit court judge would preside at the sentencing hearing. According to Kyle, he told his trial counsel that he did not want to be sentenced by the successor judge, and he alleges that he suffered prejudice when trial counsel took no action because, he says, the sentencing judge has a reputation for "being harsh and unfair." The claim lacks arguable merit. A defendant alleging trial counsel's ineffectiveness for failing to pursue judicial substitution cannot establish prejudice within the meaning of ***Strickland*** merely by showing "'the idiosyncracies [sic] of the particular decisionmaker, such as unusual propensities toward harshness or leniency.... [E]vidence about ... a particular judge's sentencing practices[] should not be considered in the prejudice determination.'" *See* ***State v. Damaske***, 212 Wis.2d 169, 201, 567 N.W.2d 905 (Ct. App. 1997) (quoting ***Strickland***, 466 U.S. at 695). Rather, to show prejudice, the defendant must demonstrate that the proceedings before the assigned judge were fundamentally unfair. *See* ***Damaske***, 212 Wis. 2d at 199-200. We have already explained, however, that the sentencing judge properly exercised its discretion here and that the sentences were not unduly harsh or unconscionable. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Our independent review of the record does not disclose any other potential issues of arguable merit warranting discussion.[6] We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the hold previously imposed in these matters is lifted.

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

[6] At the conclusion of the sentencing proceedings, the circuit court ordered that Kyle receive 490 days of credit against his concurrent sentences for disorderly conduct and battery. The order was based on Kyle's request for credit for his time in custody in connection with both matters from April 21, 2014, until his sentencing on August 25, 2015. It is not clear from the record that the award of sentence credit was correct, because remarks during the sentencing proceeding suggest that Kyle spent the 490 days in prison serving a revocation sentence imposed in an unrelated matter. *Cf.* ***State v. Beets***, 124 Wis. 2d 372, 374-75, 379, 369 N.W.2d 382 (1985) (holding that when a defendant begins serving a sentence in one case, the defendant is no longer entitled to credit for time spent in custody awaiting resolution of another case). The sentence credit award benefits Kyle, however, and therefore we will not review it here. *See* WIS. STAT. RULE 809.10(4) (appeal places before this court rulings adverse to the appellant).

That said, we observe that the judgment of conviction in Milwaukee County case No. 2014CM47 reflects an award of ninety days of credit against Kyle's ninety-day sentence for disorderly conduct—resulting in a time served disposition—but the judgment of conviction in Milwaukee County case No. 2014CF1697 reflects an award of only 400 days of credit against Kyle's thirty-four-month sentence for battery. Based on the circuit court's oral pronouncement, the judgment of conviction in the latter case should reflect 490 days of sentence credit. *Cf.* ***State v Ward***, 153 Wis. 2d 743, 744, 452 N.W.2d 158 (Ct. App. 1989) (defendant entitled to have presentence credit applied to each of the defendant's concurrent sentences); WIS JI—CRIMINAL SM 34A at 16 (reflecting that a defendant who receives concurrent sentences in unrelated matters for which defendant was taken into custody on the same day should receive credit for both matters for each day spent in custody while both matters are unresolved). Accordingly, the judgment of conviction in case No. 2014CF1697 must be amended to reflect the circuit court's order. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (court may correct clerical error at any time). Upon remittitur, the circuit court shall oversee the entry of an amended judgment of conviction in case No. 2014CF1697 that reflects an order of 490 days of sentence credit. *See* ***Prihoda***, 239 Wis. 2d 244, ¶5 (circuit court may correct clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

IT IS FURTHER ORDERED that appellate counsel, Attorney Russell J.A. Jones, is relieved of any further representation of Ronall Kyle on appeal, effective on the date that an amended judgment of conviction as required by footnote six of this opinion and order is entered in Milwaukee County case No. 2014CF1697. *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