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November 9, 2018

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

2016AP1867-CRNM State v. Ryan Jeffrey Pruitt (L.C. # 2014CF003832)
2016AP1868-CRNM

Before Kessler, P.J., Brash 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, Ryan Jeffrey Pruitt appeals from a judgment convicting him of second-degree sexual assault with use of force and first-degree recklessly endangering safety with use of a dangerous weapon in Milwaukee County case No. 2014CF3832 and from a judgment convicting him of two counts of first-degree sexual assault with use of a dangerous weapon and armed robbery with use of force in Milwaukee County case No. 2014CF5364. *See*

WIS. STAT. §§ 940.225(1)(b) & (2)(a), 941.30(1), 939.63(1)(b), 943.32(2) (2013-14).[1] He also appeals the order denying his postconviction motion. Pruitt's appellate counsel, Mark A. Schoenfeldt, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Pruitt responded, appellate counsel filed a supplemental no-merit report, and Pruitt filed a supplemental response. Upon this court's independent review of the records, appellate counsel's reports, and Pruitt's submissions,[2] we conclude that there is no issue of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgments and order. *See* WIS. STAT. RULE 809.21.

Background

According to the criminal complaint in case No. 2014CF3832, in August 2014, police were dispatched to investigate a shooting. Upon arrival, they found H.P. on the sidewalk with gunshot wounds to both of her legs. At the hospital, H.P. told police that on the night she was shot, Pruitt forced her into a garage and sexually assaulted her. H.P. then tried to escape underneath the garage door, which was open approximately three feet. She told police that in response, Pruitt shot at her. Police showed H.P. a photo array, and she positively identified Pruitt as the person who shot and sexually assaulted her. H.P. told police she knew Pruitt from prior encounters.

DNA evidence collected in case No. 2014CF3832 led to charges against Pruitt in case No. 2014CF5364. According to the criminal complaint in that case, in July 2013, a police officer

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

[2] Pruitt additionally filed an "Application for Judicial Notice to be Taken of New Case Law." (Some uppercasing omitted.) The court has reviewed all of Pruitt's filings.

spoke with M.N. who said that she was sexually assaulted in a garage. M.N. reported that she went for a walk around 10:00 p.m., and as she stopped to call her sister on her cell phone, she saw a man pass by her. M.N. reported that a short time later, the same man came up to her and took her cell phone from her hand. At that point, M.N. saw that he had a gun. While pointing the gun at her, the man told her to walk and remain quiet. The man then led her to a garage where he sexually assaulted her twice. After the assaults, he blindfolded M.N. and walked her out of the garage while holding the gun. The man then tried to force her into a van. M.N. resisted, and the man hit her in the face with the gun. M.N. made her way to a nearby home and reported what had happened.

The DNA evidence collected in case No. 2014CF3832 was compared to the DNA evidence collected from M.N. Pruitt was identified as the source of the sperm fractions on the swabs obtained from M.N.

The cases were joined and proceeded to a jury trial where both victims testified. Police officers, sexual assault nurse examiners, and forensic analysts also testified for the State. Pruitt testified on his own behalf.

As to M.N., Pruitt testified that the two had consensual sex. He told the jury that afterward he "snatched her phone," and when M.N. tried to take it back, he punched her in the head and ran off.

With regard to H.P., Pruitt told the jury that he sold H.P. cocaine, and in exchange, H.P. agreed to have sex with him. Afterward, Pruitt testified that he and H.P. were approached in the alley and someone attempted to rob him because he "was the neighborhood drug dealer." In response, Pruitt "smacked him with a gun" and took off running. When Pruitt was asked if he

knew what happened to H.P., he testified: "I don't know. But when I smacked the gun down, it went off. So I didn't look back. To be honest, I didn't care. I was just trying to get away." Pruitt said that he heard two gunshots. Pruitt admitted he initially lied to police when he said that he did not know H.P. during questioning. He also never told the investigating detective that he sold drugs.

A jury found Pruitt guilty of the lesser-included offense of second-degree sexual assault with use of force and first-degree recklessly endangering safety with use of a dangerous weapon in the case involving H.P. The jury also found him guilty of two counts of first-degree sexual assault with use of a dangerous weapon and armed robbery with use of force in the case involving M.N.

Despite the State's recommendation of a global sentence totaling forty years of initial confinement and twenty years of extended supervision, the trial court determined that a global sentence of sixty years of initial confinement and thirty years of extended supervision was necessary under the circumstances.

Pruitt subsequently filed a postconviction motion arguing that the trial court erroneously exercised its discretion by improperly relying on a COMPAS assessment and that the imposition of the DNA surcharges constituted an *ex post facto* violation. The trial court granted Pruitt's motion as to the DNA surcharges, in part, and held its decision on the sentencing issue in abeyance pending the Wisconsin Supreme Court's decision in ***State v. Loomis***, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749. The trial court ultimately denied the motion after concluding that the COMPAS report was only one of the factors it considered in support of its sentencing decision.

Appellate counsel concludes in his no-merit report and supplemental no-merit report that there would be no arguable merit to pursing the following issues: (1) sufficiency of the evidence; (2) ineffective assistance of trial counsel; (3) the trial court's decision to permit evidence of Pruitt's prior arrests for carrying a concealed weapon (CCW); and (4) the trial court's exercise of its sentencing discretion. We agree and briefly discuss these and other issues raised by Pruitt in his submissions insofar as they overlap at times.

Discussion

(1) ***Sufficiency of the Evidence***

First, appellate counsel addresses whether the evidence at Pruitt'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 the victims, the police officers, and the experts who analyzed the DNA evidence that connected Pruitt to the crimes.

At trial, Pruitt acknowledged that he had sex with both H.P. and M.N. and claimed it was consensual. The jury did not believe him. Instead, the jury believed H.P.'s and M.N.'s

testimony as it related to the circumstances surrounding three separate sexual assaults.[3] M.N. also testified to the details of the armed robbery where Pruitt took her cell phone out of her hand and grabbed her while holding a gun. H.P. detailed the injuries she suffered from Pruitt shooting her in both legs, which supported the charge of first-degree recklessly endangering safety.

The jury, which is the sole judge of credibility, was entitled to accept the State's evidence supporting the charges against Pruitt—and it did. *See* ***State v. Burgess***, 2002 WI App 264, ¶23, 258 Wis. 2d 548, 654 N.W.2d 81, *aff'd*, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124 ("[T]he jury is sole judge of credibility; it weighs the evidence and resolves any conflicts."). There would be no arguable merit to challenging the sufficiency of the evidence on appeal.

(2) ***Ineffective Assistance of Trial Counsel***

In his submissions, Pruitt asserts that his trial counsel was ineffective in a variety of ways. Claims of ineffective assistance of trial counsel must first be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court normally

[3] One of the counts of first-degree sexual assault involving M.N. related to her allegation that Pruitt forced her to perform oral sex on him. In his response, Pruitt suggests that no DNA was found in M.N.'s mouth to specifically prove that the oral sex occurred and claims there was no testimony on the alleged act of oral sex. Pruitt is incorrect. M.N. specifically testified that the man who took her into the garage forced her to perform oral sex on him. While there may not have been testimony as to DNA found in M.N.'s mouth, there was testimony that DNA on other swabs taken from her matched Pruitt's. Moreover, as appellate counsel points out, DNA evidence was not required to prove that the assaults occurred.

In his response to appellate counsel's supplemental report, Pruitt writes: "Please provide me with the statements on record and findings of which beyond testimony proved me guilty of mouth to vagina intercourse." The charges against Pruitt did not, however, involve mouth to vagina intercourse.

Additionally, Pruitt contends: "There is no factual evidence on any of these accusations only testimony of the alleged victims in both cases." First, there was factual evidence beyond the victims' testimony. Second, the testimony of the alleged victims *is* evidence.

declines to address such questions in the context of a no-merit review if the issue was not first raised in a postconviction motion in the circuit court. However, because appellate counsel asks to be discharged from the duty of representation, we must determine whether an ineffective assistance of counsel claim has sufficient merit to require appellate counsel to file a postconviction motion and request a ***Machner*** hearing.

A claim of ineffective assistance of counsel has two parts: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "The ultimate determination[s] of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

In determining whether appointed counsel is obligated to pursue a postconviction claim of ineffective assistance of trial counsel, we consider whether sufficient facts can be alleged to support a motion for a ***Machner*** hearing. *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (explaining that to be entitled to a hearing, the defendant's motion must provide sufficient material facts—e.g., who, what, where, when, why, and how—that, if true, would entitle the defendant to relief). We also consider whether the defendant can establish prejudice from trial counsel's alleged deficient performance. If the defendant could not have been prejudiced by trial counsel's performance, whether such performance was deficient need not be addressed. *See* ***State v. Kuhn***, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993). Prejudice exists if there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***Allen***, 274 Wis. 2d 568, ¶26 (citation omitted). "A

reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted).

Pruitt claims his trial counsel failed to adequately investigate his cases. Specifically, he claims that H.P. told the police that a man and woman found her on the ground and that those individuals called for help. Despite not knowing what these witnesses would offer in terms of testimony, Pruitt asserts that he is confident they would have undermined H.P.'s testimony and "corroborated [his] truth." Pruitt contends that what the two witnesses saw while they were walking and upon making contact with H.P. was not available for the jury to consider and their testimony would have "shed light on the truth of this entire ordeal." However, as appellate counsel points out in his no-merit report, Pruitt does not offer any indication as to how the testimony of witnesses who found H.P. after the assault and shooting occurred would have bearing on his guilt or innocence with regard to the crimes. Pruitt speculates that these individuals knew who "really shot" H.P. Speculation falls short of demonstrating that a claim of ineffective assistance of counsel on this basis has arguable merit.

Additionally, Pruitt claims that his trial counsel never challenged the jury instructions. As to the jury instructions, he submits they are "not even in my transcripts." Our review of the records reveal that the trial court read the instructions to the jury during the end of the morning session and into the afternoon on April 15, 2015, as set forth in those transcripts. The jury instructions properly state the law; therefore, trial counsel was not ineffective for not challenging them.

Having reviewed the entire record, we are not persuaded that there is an arguably meritorious claim based on the ineffective assistance of trial counsel.[4]

(3) ***Evidence of Pruitt's Prior Arrests***

We have also considered whether the trial court erroneously exercised its discretion in allowing the State to introduce evidence of Pruitt's prior CCW arrests. During cross-examination, Pruitt was asked:

> Q. Wouldn't you find that pretty strange and unique and distinct that both of these women who never met one another both say that the person who had a gun was you?
>
> A. I don't carry guns.
>
> Q. Oh you don't carry guns?
>
> A. No, I do not, sir.

After this testimony, there was a sidebar during which the trial court was informed that Pruitt had two pending CCW cases.

Pruitt's trial counsel objected to the use of this other acts evidence. After analyzing the issue and concluding that the pending CCW cases were relevant to Pruitt's credibility, the trial court allowed the State to cross-examine Pruitt about those matters.

[4] Insofar as Pruitt simultaneously argues that his appellate counsel, who submitted the no-merit report and supplemental report, ineffectively represented him, his argument is premature because this appeal is still pending. Among other things, Pruitt submits that his appellate counsel ignored his meritorious issues, failed to investigate, "never reviewed [his] complaints and transcripts thoroughly," and "lied saying a ***Sullivan*** analysis was performed to allow the D.A. to [i]mpeach me with my CCW charges." As detailed in this opinion, we conclude that no such meritorious issues exist based on the records before us. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

When cross-examination resumed, the State asked Pruitt about the allegations, one of which involved him being stopped by the police with a gun in his possession. Pruitt agreed that in the other matter, he admitted to police that he was carrying a gun.

The trial court later gave the jury a cautionary instruction that the information as to whether Pruitt was arrested on two prior occasions for having a gun was only allowed for the purposes of challenging his credibility and the truthfulness of his testimony. The trial court explained to the jury that it was not to consider the evidence to conclude that Pruitt was a bad person or that he necessarily committed the crimes charged.

Any challenge to the trial court's decisions to admit other acts evidence would lack arguable merit. The admissibility of evidence lies within the trial court's sound discretion. *See* ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. The trial court must engage in a three-step analysis to determine the admissibility of other acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 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 the second step of whether the other acts evidence is relevant and, finally, the third step of 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).

Pruitt's prior acts were admitted for a proper purpose—to rebut his blanket statement that he did not carry guns. Credibility is a proper purpose under WIS. STAT. § 904.04(2). *See* ***State v. Marinez***, 2011 WI 12, ¶27, 331 Wis. 2d 568, 797 N.W.2d 399 (explaining that context, credibility, and background are permissible purposes for other acts evidence). As directed by ***Sullivan***, the trial court analyzed whether the evidence was offered for a proper purpose, was relevant, and whether its probative value was outweighed by the danger of unfair prejudice. There would be no arguable merit to challenging the admission of this evidence.

(4) ***Exercise of Sentencing Discretion***

The last issue appellate counsel addresses is whether the trial court erroneously exercised its sentencing discretion. The record reveals that the trial 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 trial court considered the seriousness of the offenses and emphasized that the objectives of its sentence were punishment and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court described Pruitt's trial testimony as "testimony that was certainly not credible" and took into account that the sexual assaults "were certainly horrific in nature, done by a very, very violent person." The trial court explained that the "victims of these offenses will have to live with [the] pain and anger and emotional trauma for the rest of their lives because of what you did."

Under the circumstances of the case, the global sentence of sixty years of initial confinement and thirty years of extended supervision for five serious felonies 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.[5]

No other issues warrant discussion. To the extent that Pruitt's responses raise additional issues, even if we have not explicitly addressed each and every one of them separately, 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 and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[5] In his response, Pruitt claims he never saw the presentence investigation (PSI) report and "was not offered a chance to speak" at his sentencing hearing. The sentencing hearing transcript belies both of these claims. At the hearing, the trial court specifically asked Pruitt's trial counsel if he went over the PSI with Pruitt and if there were any additions or corrections. Pruitt's trial counsel stated that he had reviewed it with Pruitt and there were no changes they wished to make to it. When asked by the trial court if this was correct, Pruitt answered affirmatively. Additionally, after Pruitt's trial counsel made his sentencing remarks, he informed the trial court that Pruitt did not wish to make a statement. When the trial court inquired if that was correct, Pruitt again answered affirmatively.

We note in passing that based on some information in the PSI report, Pruitt's trial counsel raised concerns about Pruitt's competency. The trial court ordered that he be evaluated prior to sentencing, and Pruitt subsequently was deemed competent.

IT IS FURTHER ORDERED that Attorney Schoenfeldt is relieved of further representation of Ryan Jeffrey Pruitt 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