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October 23, 2019

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

2017AP927-CRNM State v. Logan J. Baker (L.C. #2015CF1416)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Logan J. Baker appeals from a judgment of conviction entered after a jury found him guilty of two counts of disorderly conduct, one count of misdemeanor bail jumping, and one count of intimidating a victim by threat of force. Baker's appellate counsel has filed a no-merit

report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Baker received a copy of the report and has not filed a response.[2] Upon consideration of the no-merit report and our independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Baker went to trial on an information charging the following seven counts stemming from two incidents:[3] (1) disorderly conduct, (2) battery, (3) intimidating a victim with the threat of force, (4) battery, (5) disorderly conduct, (6) bail jumping, and (7) negligent operation of a motor vehicle. The first two counts arose from a July 14, 2015 incident wherein victim S.T. told police that she arrived home at night to see a car with its brake lights on parked next to the garage. S.T. lives in a private, rural home owned by her boyfriend, M.L. Baker exited the car. He was alone. S.T. did not know Baker, but testified that the day before, he had driven up to her house with three passengers, politely asked if an unknown person lived there, and left without incident. In contrast, S.T. testified that during the July 14 encounter, Baker told her he knew she was home alone and "walked towards me, speaking to me slowly, rudely, sexually, asking to come into my big, beautiful home many times." S.T. said that Baker grabbed her and used his

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Our review of this case was delayed after we held this appeal in abeyance pending the Wisconsin Supreme Court's consideration of an appeal concerning jury instruction WIS JI—CRIMINAL 140, which was used at Baker's trial. Based on the Wisconsin Supreme Court's resolution of that appeal, there exists no arguably meritorious challenge to the use of WIS JI—CRIMINAL 140 in Baker's case. *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

[3] The seven counts were originally charged in two separate circuit court cases. Without objection, the cases were joined for trial. A third misdemeanor case was dismissed and read in at sentencing.

fingers to push her against her Jeep. She was able to push him away, get into her car, leave the area, and call 911. Officers met her at a nearby church. Meanwhile, one of M.L.'s sons heard about the incident and drove to his father's house. Baker was still there. Police arrived and Baker was arrested and released on bond with a condition that he have no contact with S.T.

The second incident occurred on October 7, 2015. S.T., M.L. and M.L.'s two sons were at home when Baker drove up to the house and exited his car. S.T went outside and a disturbance between Baker and the family ensued. At trial, S.T. testified that Baker grabbed her by the hair and threatened to kill her if she did not drop the "rape charges" from the July incident. M.L. testified that one of his sons left the house and argued with Baker. M.L. went outside. Baker got into and started the car with the driver's side door open. M.L. tried to reach in and grab the keys and ended up being dragged by the car door as Baker backed up. M.L.'s sons, a sheriff's deputy, and an employee of the circuit court clerk's office also testified for the State.

Baker testified for the defense. He acknowledged driving onto M.L.'s property all three times but said he was there because a man named "John" had contacted him through Craigslist about installing cabinets in a new home located at M.L.'s address. Baker disputed making threatening comments or gestures to S.T. on July 14, 2015. He admitted that he went back to the property on October 7, 2015 hoping to talk to S.T. and resolve the July case because the State's plea offer included jail time. He testified that he knew he was not supposed to be on the property. The jury acquitted Baker of both batteries and of negligently operating a motor vehicle, but found him guilty of the other four counts. At sentencing, the court imposed three years of initial confinement followed by three years of extended supervision on the sole felony,

intimidating a victim by threat of force, and imposed concurrent jail sentences on the three misdemeanors. This no-merit appeal follows.

Appellate counsel's no-merit report first addresses whether there exists an arguably meritorious challenge to Baker's convictions based on the sufficiency of the evidence. We must affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that as a matter of law no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence is for the jury. ***Id.*** at 504. The no-merit report sets forth the essential elements of the offenses and explains how the evidence at trial satisfied each element. We agree with counsel's analysis and conclusion that a challenge to the sufficiency of the evidence would lack arguable merit and we will not discuss this point further.

The only other potential issue discussed in counsel's no-merit report is Baker's sentence. We agree that any challenge to the circuit court's exercise of its sentencing discretion would be without arguable merit. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (it is well-settled that sentencing is committed to the circuit court's discretion and our review is limited to determining whether the court erroneously exercised that discretion). The court considered the nature of the offense, Baker's character, 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 court stated that

Baker's educational background, work history, and minimal prior criminal record were mitigating factors. Highlighting the severity of the offense, the mysterious and as-yet unexplained circumstances surrounding Baker's presence on M.L.'s private property, and Baker's willingness to disregard his bond conditions, the circuit court determined that its sentence was necessary for punishment and to protect the public. These are proper sentencing objectives. Further, we cannot conclude that the six-year sentence when measured against the possible maximum sentence of eleven years and ninety days is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We consider the no-merit report incomplete. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial rulings, jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. The no-merit report fails to give any indication that appointed counsel considered whether these parts of the process give rise to potential appellate issues.[4] Nevertheless, as part of our independent review, we have specifically considered each of these areas and determine that none gives rise to an arguably meritorious challenge. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (difficult to

[4] Counsel has a duty to review the entire record for potential appellate issues. A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See* ***McCoy v. Court of Appeals of Wis.***, 486 U.S. 429, 438 (1988). Appointed counsel is reminded that a no-merit report must satisfy the discussion rule which requires a statement of reasons why the appeal lacks merit by a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel that same result. ***Id.*** at 440.

know the nature and extent of the court of appeals' examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion).

During jury selection, the circuit court excused several prospective jurors for cause without objection; one was excused at the defendant's request. The circuit court properly exercised its discretion in ruling on evidentiary objections made during trial and conducted a proper colloquy with Baker about his decision to testify. The record reveals no impropriety in the parties' opening statements or closing arguments. The circuit court's decisions concerning how to instruct the jury constituted proper exercises of discretion. Following the guilty verdicts, the jurors were individually polled. The circuit court awarded the amount of sentence credit requested by Baker and ordered only the restitution he agreed to pay.[5]

Appellate counsel's no-merit report does not address Baker's requests at trial for a new attorney. After the jury was selected and sworn, Baker expressed his displeasure with the voir dire process and asked for "another public defender." Trial counsel was already Baker's third attorney. When asked for further information, Baker said that he and trial counsel "hadn't even talked about the case really at all." Trial counsel disputed Baker's account of their discussions and said he was ready to try the case. Counsel opined that Baker's complaints stemmed from a lack of knowledge about or familiarity with the voir dire process. The circuit court denied

[5] At a separate restitution hearing following sentencing, the court determined that Baker did not owe restitution to M.L., who had previously requested over $19,000. Baker did not object to the $1809 in restitution requested by S.T.

Though the circuit court did not make a determination of Baker's eligibility for the Challenge Incarceration Program or the Earned Release Program, Baker's conviction for a WIS. STAT. ch. 940 offense renders him ineligible for both programs. *See* WIS. STAT. § 973.01(3g) and (3m). The presentence investigation presented to the sentencing court reflected Baker's program ineligibility.

Baker's request, determining that no reason to discharge counsel had been set forth and finding that "particularly at this late time, I think it's an attempt to delay the process." The circuit court then told Baker he had a constitutional right to represent himself and asked Baker if he was requesting permission to proceed pro se. Baker said no, "given that I don't know the laws in general, I would rather have [trial counsel] do it."

Later on, in the midst of trial, counsel requested a hearing outside the jury's presence and informed the court that Baker was "expressing displeasure with how I am proceeding on his behalf." Baker complained that counsel was "missing quite a few points to the discovery" and said he "would rather have a day or two to get my own arguments and proceed" on his own. After further inquiry, the circuit court declined to appoint substitute counsel for Baker, finding that the request was "nothing more than an attempt to delay the trial."

We conclude that no issue of arguable merit arises from the circuit court's discretionary decision not to appoint substitute counsel for Baker. *See* ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988) (circuit court exercises its discretion in determining whether to appoint new counsel to represent defendant in a criminal case). In evaluating whether a circuit court's denial of a motion for substitution of counsel is an erroneous exercise of discretion, we consider a number of factors including: "(1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." ***Id.*** Here, the court inquired into the reasons for Baker's request and determined that they were not based on

trial counsel's ineffectiveness or any "problems in representation." Rather, Baker disagreed with trial counsel's strategy. Given the nature of Baker's complaints and that he had discharged two prior attorneys, it was unlikely "that anything would change" with the appointment of new counsel. Further, the jury had been sworn, trial was "midstream," and the circuit court found that Baker was attempting to delay the trial. The circuit court applied the correct legal standard to the facts and reached a reasonable decision.

Next, the circuit court turned to the question of whether Baker wanted to waive his right to counsel and represent himself:

> The Court: The only question I have, though, however, is whether you want to proceed for the rest of this trial representing yourself. If you do, we're going to talk a little bit more about that. If you don't, I'm going to bring the jury back in. Would you like to try this case on your own from here on today?
>
> [Baker]: I would on one condition: If I was able to get maybe a half hour just to gain some questions for—I don't know, are we allowed to bring [S.T.] back up to the stand? [M.L.'s son]? And then I will take it on myself, yes.
>
> The Court: Okay.… We will take a break for a half hour and then we will come back and have a conversation about it. In the meantime, I will take under advisement your request to represent yourself.

The circuit court asked Baker several questions about his understanding of self-representation and then granted a recess for Baker to consider his options and, if he wanted to represent himself, to prepare.

After the recess, the circuit court asked Baker "what's your position regarding [trial counsel] representing you versus representing yourself?" Baker responded:

> Well, as far as that, I would rather—I don't know if I could just explain to you and maybe just work this deal out so we can get this

> over with. I don't want anybody representing me. I can't seem to get anywhere with the discovery. Is there any way we can—I mean, I'd cross-examine. Can [trial counsel] sit off to the side as I speak with the witnesses?…

The circuit court answered:

> Sure. What I would do, if you want to represent yourself, it's my intent to have [trial counsel] represent you as stand-by, not represent you, to be available as stand-by counsel, so that if you have questions, you can ask him, but you'll be trying this case, not him. You will be giving the closing argument, not him. You will be representing yourself. Or you can have him represent you. But that's kind of where we're at.

Baker asked "what's the difference" and the circuit court continued to explain the role of standby counsel, including that Baker would be asking the questions and making objections and that he could "certainly consult with" trial counsel, but counsel "won't be trying this case." Baker continued to ask questions that made it apparent Baker wanted both himself and trial counsel to question the witnesses and argue the case. The court explained that trial counsel would not be serving as Baker's co-counsel: "He's either on the case or he's off the case. If he's off the case, I can have him sit on that bench right there as stand-by counsel if you have questions for him while you try the case, but you and he are not going to try this case as co-lawyers."

The court continued to answer Baker's questions and ask him if he wanted to proceed pro se. Baker resisted giving an answer, stating that he wanted to "be able to use" trial counsel and insisting that by law, he and trial counsel were allowed to try the case together. Baker said he had "watched cases all over TV where the lawyer and the defendant both ask" questions, and then asked the court, "Judge, are you lying to me? Do we need to get a different judge on the case?" The circuit court patiently told Baker it was not lying to him and reiterated his options for representation. Baker continued suggesting that the circuit court judge was lying. When the

circuit court judge told Baker he could appeal the issue if he was ultimately convicted, Baker insisted that he be allowed to switch circuit court judges immediately. The court denied the request as untimely.

Baker continued to argue with the circuit court judge about whether the judge could remain on the case and about whether Baker was entitled to hybrid representation. The circuit court eventually cut off the discussion and denied Baker's construed request to proceed pro se, ruling as follows:

> I'm going to find, after having this conversation with Mr. Baker, I had a conversation [or] colloquy with him before we went off the record, after this colloquy, I'm not satisfied that he is capable of representing himself. He seems to not understand what I am telling him. He seems to be listening, but he doesn't seem to understand, which causes me concern about his ability to proceed representing himself, asking questions.

The court revisited the issue later on, when Baker again asked why he could not substitute the circuit court judge and asked several unusual questions. The circuit court made a further record on its decision not to discharge counsel:

> And I do want to say, we're having this conversation again, and I want to make a further record on the attorney issue because I want to be satisfied that record is complete. I know Mr. Baker has requested a couple of times here to have [trial counsel] discharged from the case as well as potentially representing himself. I gave that considerable thought….

The court stated it considered that Baker was articulate, fluent in the English language, and had an understanding of what attorneys do. However:

> I'm not satisfied that he is aware of the difficulties of self-representation. In fact, I'm absolutely convinced that he doesn't. And the conversation that I had with him demonstrates that. I'm also observing his demeanor when he communicates with me and how he communicates things, and I'm satisfied in this case

> allowing him to proceed pro se would be inappropriate, that's why, you know, in addition to the record I've already made. And then, of course, we're discussing here on the record about the timeliness of substitution, and I tried to explain what it means to be timely, and he's inquiring of me whether we don't have time to do it. It's clear there's a disconnect in the way information is getting communicated and his receipt of that information, and that, too, indicates to me that there would be a problem with self-representation.

We conclude there is no arguable merit to a potential claim that Baker was deprived of his right to represent himself at trial. A defendant has the constitutional right to counsel and also the constitutional right to waive counsel and represent himself or herself. A defendant does not have a constitutional right "to be actively represented in the courtroom by both counsel and by himself." ***State v. Campbell***, 2006 WI 99, ¶74, 294 Wis. 2d 100, 718 N.W.2d 649 (citation omitted); *see also* ***State v. Darby***, 2009 WI App 50, ¶20, 317 Wis. 2d 478, 766 N.W.2d 770 (recognizing the mutual exclusivity of the rights to counsel and self-representation). A defendant "must clearly and unequivocally declare a desire to represent himself or herself in order to invoke that right." ***Darby***, 317 Wis. 2d 478, ¶1. If a defendant declares the desire to proceed pro se, the circuit court engages in a colloquy to determine if the defendant's waiver of the right to counsel is knowing and voluntary, and that the defendant is competent to represent himself or herself. ***State v. Klessig,*** 211 Wis. 2d 194, 203-04, 212, 564 N.W.2d 716 (1997). The competency to represent oneself requires a higher standard than mere competency to stand trial. ***State v. Ruszkiewicz***, 2000 WI App 125, ¶34, 237 Wis. 2d 441, 613 N.W.2d 893. A circuit court's "competency determination will be upheld 'unless totally unsupported by the facts apparent in the record.'" ***Id.***, ¶38 (citation omitted).

In this case, Baker never clearly and ambiguously declared his desire to represent himself. Each request to proceed pro se was preceded by a complaint that trial counsel was not doing everything according to Baker's liking and was followed by a condition, such as the appointment of new counsel, an extra day or two to prepare, or that trial counsel be allowed to ask questions of the witnesses and act as Baker's co-counsel.

To the extent Baker did declare his desire to proceed pro se, the circuit court properly exercised its discretion in declining to discharge appointed counsel. On review, we uphold the circuit court's competency determination unless clearly erroneous "because the trial judge is in the best position to observe the defendant's conduct and demeanor and to evaluate the defendant's ability to present at least a meaningful defense." ***Ruszkiewicz***, 237 Wis. 2d 441, ¶38 (citation omitted). Baker never expressed a knowing and voluntary desire to waive his right to counsel. Instead he argued with the circuit court judge and answered the court's questions with questions of his own. Further, the circuit court's finding that Baker was not aware of the difficulties and disadvantages of self-representation was not clearly erroneous, and its determination that he was not competent to represent himself was not "totally unsupported" by facts apparent in the record. *See* ***id.***

Our review of the record discloses no other potential issue for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Baker on appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Diane Lowe is relieved from further representing Logan J. Baker in this appeal. *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