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

2019AP651-CRNM State of Wisconsin v. Darshawn D. Nolan (L.C. # 2017CF5916)

Before Brash, P.J., Dugan and White, 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).

Darshawn D. Nolan appeals from a judgment of conviction for one count of theft from a person, one count of robbery with use of force, and one count of fleeing an officer, contrary to

WIS. STAT. §§ 943.20(1)(a), 943.32(1)(a), and 346.04(3) (2017-18).[1] Nolan's appellate counsel, Bradley J. Lochowicz, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Nolan filed a response, and appellate counsel filed a supplemental no-merit report. We have independently reviewed the record, the no-merit reports, and the response, as mandated by ***Anders***. We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgment.

The criminal complaint alleged that Nolan committed crimes on three different days, involving three different vehicles. First, it alleged that he approached a man at a gas station, shoved him, entered the man's vehicle, and drove away. Nolan was charged with robbery with use of force for this incident.

Second, the complaint alleged that Nolan approached a woman who was washing her vehicle, got into her vehicle, and drove away. The woman told police that as Nolan backed up the vehicle, the open passenger door struck her, causing her to fall and fracture her ribs. Nolan was charged with robbery with use of force and second-degree recklessly endangering safety for his interactions with the woman. The complaint also noted that later in the day, the woman's stolen vehicle was involved in an accident that killed one of its occupants. One of the vehicle's occupants told police that Nolan "was in the car at the time of the accident but must have crawled out after the crash."

Third, the complaint alleged that a police officer attempted to stop a vehicle that had been reported stolen. The vehicle fled at speeds up to eighty miles per hour. Ultimately, the vehicle

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

stopped in an alley, and four individuals exited the vehicle. All of them were apprehended, including Nolan, who had been driving. Nolan was charged with fleeing an officer in connection with this incident.

The case was scheduled for trial on Monday, May 7, 2018. On Wednesday, May 2, 2018, the parties appeared before the trial court to discuss a potential change in trial counsel. The trial court said that after it was informed that Nolan wanted to retain a particular attorney, it tried, unsuccessfully, to reach that attorney by phone "throughout the morning."

Trial counsel told the trial court that five days earlier, he spoke with the attorney by phone after Nolan's family indicated that they had retained him. Trial counsel said the attorney told him that he was in Houston and would be out of town for a week. Trial counsel continued: "I told him I would try to get it into court and try to set something up but that I would need his cooperation. This morning I have sent several texts to him because his voicemail was not accepting calls."

The State expressed concern about the new attorney's ability to proceed with a trial the next week, noting that the attorney did not yet have discovery for a case with "a significant number of counts." The State also noted that the attorney's law license was ordered suspended by the Wisconsin Supreme Court effective May 17, 2018, which meant that the attorney would not be able to begin representation until "the middle of July at the earliest."

The trial court denied Nolan's request to substitute trial counsel. The trial court said that it was concerned about delaying the trial and that it would not be realistic for the attorney to prepare the case in a few days when he did not yet have the discovery. The trial court said: "[W]e don't want you held in custody any longer than you need to be. This date is scheduled, witnesses have been subpoenaed, and it is time for this to go."

Nolan personally addressed the trial court, indicating that he felt his current trial counsel was "not giving me the right counsel that I need." The trial court told Nolan that he and trial counsel could continue to prepare for trial in the coming days.

As the hearing concluded, the State indicated that the parties had been engaging in settlement negotiations and said that any agreement would have to be made "this week" due to the number of victims who were scheduled to appear at the trial.

Two days later, on Friday, May 4, 2018, the parties appeared before the trial court with a plea agreement. Pursuant to the agreement, the first count, concerning the theft of the vehicle at the gas station, was amended to theft from a person. Count three, second-degree recklessly endangering safety, was dismissed and read in. Nolan agreed to plead guilty to count one, as amended, and to counts two and four. The State agreed to recommend "significant prison, leaving the exact amount to the discretion of the [c]ourt."

The trial court conducted a plea colloquy with Nolan and accepted his guilty pleas. It reviewed with Nolan his plea questionnaire and a written addendum outlining additional rights being waived. The trial court confirmed that Nolan understood the maximum potential sentences for each crime. In addition, the trial court went over the elements of each crime with Nolan, which were also listed on the printed jury instructions that were attached to the guilty plea questionnaire. Further, the trial court explained the significance of having count three dismissed and read in.

During the plea colloquy, the trial court asked Nolan if he was "satisfied" with trial counsel's representation. When Nolan answered, "No," the trial court talked with Nolan about his concerns. Nolan said that trial counsel sometimes got mad at him. Nolan expressed frustration

that trial counsel had not listened to Nolan's suggestions about case law and the discovery materials and had told Nolan that there were no good "fighting points" to pursue.

The trial court said that it had "not heard anything that tells me that you're not able to effectively communicate with" trial counsel. The trial court also confirmed with trial counsel that he was prepared to try the case on Monday. Ultimately, the trial court told Nolan that he had two choices: proceed with the trial or proceed with the plea agreement. The trial court told Nolan:

> I don't want you to do anything you don't want to do. I know you wanted to say what you wanted to say about [trial counsel], and you've said it, and we've had a discussion about it. I want you to feel comfortable with whichever decision you're making, but you have to understand that if we're … not going to do the plea today, I don't know for sure, but I suspect that the State's going to withdraw their offer, and then that's where it stands.

Nolan told the trial court that he wanted to proceed with the plea agreement. The trial court continued with the plea colloquy, which included asking Nolan to affirm that he committed the crimes. When Nolan "bec[a]me emotional," the trial court said: "I just want to make sure that this is what you want to do. You admit you've done these things, and you want to take responsibility for them by pleading guilty? Is that true?" Nolan replied, "Yes."

The trial court, who had previously confirmed that Nolan read the criminal complaint, asked him, "Do you admit the facts that are in that complaint are true?" Nolan replied, "Yes." The trial court accepted Nolan's guilty pleas to the amended information, dismissed and read in count three, and scheduled the matter for sentencing.

At sentencing, the trial court imposed three consecutive sentences totaling ten years of initial incarceration and eight years of extended supervision. It declared Nolan eligible for the Wisconsin Substance Abuse Program and the Challenge Incarceration Program after he has served

six years of initial confinement, noting that whether Nolan was ultimately allowed to participate in either of those early release programs will be a decision for the Department of Corrections to make. The trial court also imposed the mandatory DNA surcharges, but it did not impose a fine.

At a subsequent restitution hearing, Nolan stipulated to $7500 in restitution to the woman whose vehicle he stole, which was later destroyed in the accident. This appeal follows.

The no-merit report addresses two issues: (1) whether there is a basis to seek plea withdrawal; and (2) whether the trial court erroneously exercised its sentencing discretion. The no-merit report discusses those issues, including references to relevant statutes, case law, transcripts, and other court documents. This court agrees that there would be no arguable merit to seek plea withdrawal or to challenge the sentences that were imposed. We will briefly discuss those issues, as well as the issues Nolan raises in his response.

Appellate counsel concludes that the "plea colloquy was sufficient and there is no manifest injustice requiring Nolan's guilty pleas be withdrawn." (Capitalization and bolding omitted.) We agree. As detailed above and in the no-merit report, it is clear that the trial court complied with both WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). Nothing in the record suggests that there would be arguable merit to asserting that Nolan's pleas were not knowingly, voluntarily, and intelligently entered.

We also agree with appellate counsel that there would be no arguable merit to assert that the trial court erroneously exercised its sentencing discretion. At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives

are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider additional factors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the required sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. For instance, the trial court discussed Nolan's education and juvenile history. The trial court also addressed the seriousness of the offenses. For instance, it said that the woman whose car Nolan took from the car wash was hurt both physically and emotionally. The trial court said that stealing cars is "not a game" and "terroriz[es] the community."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenging the trial court's compliance with ***Gallion***. Further, there would be no merit to asserting that the sentences were excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Nolan was facing up to sixteen and one-half years of initial confinement and twelve years of extended supervision. Nolan's sentences totaling ten years of initial incarceration and eight years of extended supervision are well within the maximum total sentences, and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). This is especially true where Nolan also benefitted from having another count dismissed and read in.

We turn to Nolan's response to the no-merit report. Nolan raises numerous issues in his twenty-four-page response, a number of which appellate counsel addresses in his supplemental no-merit report. We conclude, like appellate counsel, that Nolan has not identified an issue of arguable merit.[2]

First, Nolan argues that trial counsel was ineffective for not challenging the first count, which involved the vehicle taken from the gas station. Nolan argues that he should have been charged with auto theft because "there was never any use of force proven by the [S]tate" and the surveillance video does not show that Nolan pushed the victim. Nolan has not raised an issue of arguable merit. At the final pretrial, the State acknowledged that the defense had raised a concern that the surveillance video "does not clearly show the defendant pushing the victim." The State said that its plea offer would amend the charge to theft from a person, as the defense had requested. Ultimately, the plea agreement that Nolan accepted reflected that change. Therefore, the record does not suggest a basis to challenge trial counsel's effectiveness with respect to count one.

Second, Nolan asserts that trial counsel "did not have a defense strategy" and told Nolan that he would not win at trial. Nolan also contends that trial counsel should have investigated who was driving the vehicles and whether the woman's ribs could have really been broken by the way the vehicle was driven. Nolan raised his concerns about trial counsel with the trial court at the plea hearing. The trial court addressed those concerns and confirmed multiple times with Nolan

[2] Nolan's response includes many assertions and legal conclusions, some of which are only a sentence long. We have concluded that none of the issues Nolan identifies have arguable merit, and we will address the main issues that we are able to discern. However, we do not consider Nolan's complaints about appellate counsel's performance because we have independently reviewed the record and because challenges to appellate counsel's performance must proceed under ***State v. Knight***, 168 Wis. 2d 509, 520-22, 484 N.W.2d 540 (1992). Finally, we do not address Nolan's request for sentence modification. Motions for sentence modification must be brought in the trial court.

that he wanted to proceed with his guilty pleas. Because Nolan knowingly, intelligently, and voluntarily entered his guilty pleas, admitted the facts in the criminal complaints, and explicitly waived his right to raise defenses and contest the evidence, there would be no arguable merit to pursuing an appeal based on allegations that trial counsel should have identified a viable defense or done more investigation. Nolan's assertion that he was "coerced" into pleading guilty by his trial counsel and the trial court is belied by the record. While Nolan did become emotional, the trial court confirmed with Nolan multiple times that he wanted to proceed with the plea agreement.

Third, Nolan faults trial counsel for not filing a speedy trial demand. For the reasons appellate counsel outlines in his supplemental no-merit report, we conclude that this does not present an issue of arguable merit.

Fourth, Nolan argues that the charging of counts two and three (robbery with use of force and second-degree recklessly endangering safety) would have subjected him to double jeopardy. We conclude that there would be no arguable merit to assert that the two charges were multiplicitous and therefore violated the double jeopardy clauses of the federal and state constitutions. *See* ***State v. Davison***, 2003 WI 89, ¶¶34-46, 263 Wis. 2d 145, 666 N.W.2d 1 (discussing multiplicity claims that raise double jeopardy challenges). "[T]wo prosecutions are for the 'same offense,' and therefore violate the Double Jeopardy Clause, when the offenses in both prosecutions are 'identical in the law and in fact.'" ***State v. Schultz***, 2020 WI 24, ¶22, 390 Wis. 2d 570, 939 N.W.2d 519 (citations omitted). There would be no arguable merit to assert that standard was met here, where the crimes of robbery with use of force and second-degree recklessly endangering safety involve violations of different statutes with unique elements. *See* ***State v. Ziegler***, 2012 WI 73, ¶60, 342 Wis.2d 256, 816 N.W.2d 238 ("Under the 'elements-only' test, two offenses are identical in law if one offense does not require proof of any fact in addition to those

which must be proved for the other offense."). For instance, robbery by use of force requires the defendant to take property from another person with intent to steal. *See* WIS JI—CRIMINAL 1479 (2009). Second-degree reckless endangerment requires that the defendant endanger the safety of another person by conduct that created a risk of great bodily harm to another person that was unreasonable and substantial. *See* WIS JI—CRIMINAL 1347 (2015).

Fifth, Nolan argues that he was denied his counsel of choice because he was not able to be represented by the attorney his family contacted. We agree with appellate counsel's analysis of this issue. There would be no arguable merit to assert that the trial court erroneously exercised its discretion when it declined to allow the substitution of trial counsel where it had received no written or verbal communication from the attorney (even after trying to telephone him) and there was no indication when the attorney would be able to try the case.

Sixth, Nolan argues that he should be allowed to withdraw his guilty pleas because the State did not follow the procedures necessary when a juvenile is charged with a crime. Nolan asserts that he was a juvenile when he committed these crimes. He is incorrect, as appellate counsel points out. The record reflects that Nolan turned eighteen on October 28, 2017. The crimes were committed between November 20 and December 22, 2017. There is no basis for relief based on Nolan's age at the time he committed the crimes.

Seventh, Nolan contends that the trial court improperly involved itself in the plea negotiation process, such as when it told Nolan on the Wednesday before the scheduled trial:

> [W]e will remain on for trial on Monday. If something changes and you don't want to proceed to trial, [if] you want to resolve the case prior to that, let us know. I believe we will have time available to accomplish that prior to having all the victims come in on Monday."

We conclude that there would be no arguable merit to pursue an appeal based on this allegation. The trial court's comments concern the upcoming jury trial and the deadline for resolving the case with a plea agreement. The trial court did not suggest a particular resolution or recommend that Nolan accept a plea agreement.

Eighth, Nolan notes that during the sentencing hearing, the trial court at one point said, "I don't know if you were in that car or not." Nolan argues that the trial court should not have accepted his guilty pleas "when the court was not sure Mr. Nolan was in fact the correct suspect in the car for these incidents." Nolan misconstrues the trial court's statement, which was referring to the fact that when the vehicle Nolan stole from the woman at the car wash was involved in a fatal accident later that same day, Nolan may or may not have been in the vehicle. Nolan was not charged with any crimes related to the accident. The trial court commented on the accident in the context of discussing the fact that Nolan continued his crimes after his close friend's death. The trial court explained: "I don't think you have any idea that consequences are real. I don't know how you can have your friend dead in an accident fleeing from the police with a stolen car and then be in a stolen car and flee from the police five days later." The trial court's comments about the accident do not undermine the factual bases for the crimes to which Nolan pled guilty, which appellate counsel summarizes in the supplemental no-merit report.

For the foregoing reasons, we conclude that there would be no arguable merit to pursue postconviction proceedings or an appeal based on the issues appellate counsel addresses in the no-merit reports and that Nolan raises in his response. Further, our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit reports, affirms the convictions, and discharges appellate counsel of the obligation to represent Nolan further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Bradley J. Lochowicz is relieved from further representing Darshawn D. Nolan 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