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DISTRICT I

December 22, 2020

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

2014AP1301-CRNM State of Wisconsin v. Kenneth Lovell McDade
(L.C. # 2010CF3671)

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

Kenneth Lovell McDade appeals from a judgment, entered on a jury's verdicts, convicting him on one count of child enticement and one count of second-degree sexual assault of a child under sixteen years of age. Appellate counsel, Patrick Flanagan, has filed a no-merit

report. *See* ***Anders v. California***, 386 U.S. 738 (1967); WIS. STAT. RULE 809.32 (2017-18).[1] McDade was advised of his right to file a response, and he has responded. Pursuant to an order of this court, appellate counsel filed a supplemental no-merit report. We also accepted three additional responses from McDade. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and McDade's responses, we conclude there are no arguably meritorious issues that could be pursued on appeal. We therefore summarily affirm the judgment of conviction.

BACKGROUND

According to the criminal complaint, then-twelve-year-old S.S. ran away from home on Friday, July 16, 2010. Around 5:30 a.m., as she was walking near a gas station, a man started talking to her and asked her if she needed a place to stay. She responded that she did, and the man, later identified as McDade, told her to keep walking and he would pick her up. Shortly thereafter, McDade pulled up next to her in a silver minivan and told her to get in. McDade drove her to a motel where, once inside a room, he told S.S. to take her clothes off, and they snorted cocaine together.

Another man, Kenya Ragland, was already in the room. McDade and Ragland had penis-to-vagina intercourse with S.S. multiple times, McDade made her perform fellatio on him multiple times, and Ragland had penis-to-anus intercourse with her multiple times. The men also provided S.S. with cocaine, beer, and vodka.

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

S.S. reported that she spent the entire day and night in the motel room, staying until Saturday morning when McDade told her she should find somewhere else to go. She left the motel room around 9:30 or 10:00 a.m. and walked to another gas station, where she asked a woman if the woman knew a safe place to go. The woman took her into the gas station and called police.

S.S. identified the motel for police. McDade was developed as a suspect, and S.S. identified him in a photo array as the man who picked her up. McDade was charged with one count of second-degree sexual assault of a child less than sixteen years of age, contrary to WIS. STAT. § 948.02(2) (2009-10), and one count of child enticement, contrary to WIS. STAT. § 948.07(1) (2009-10).[2]

In October 2010, McDade pled guilty to child enticement, and the sexual assault charge was dismissed. Prior to sentencing, McDade moved to withdraw his guilty plea; the trial court granted the motion in June 2011 and both charges were reinstated. While being represented by his fourth trial attorney, McDade expressed a desire to represent himself. McDade ultimately did represent himself, though he also requested and the trial court appointed standby counsel. In June 2012, a jury convicted McDade on both charges. The trial court sentenced McDade to ten years of imprisonment on the child enticement and twenty years of imprisonment on the sexual

[2] "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony." WIS. STAT. § 948.02(2) (2009-10).

"Whoever, with intent to commit any [violation of WIS. STAT. § 948.02], causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony[.]" WIS. STAT. § 948.07 (2009-10).

assault, to be served consecutively. McDade now appeals; additional facts will be discussed herein as necessary.

DISCUSSION

Appellate counsel discusses three potential issues in the no-merit report and three additional issues in the supplemental no-merit report. McDade raises thirteen issues in his responses—the six issues that counsel discussed plus seven others.[3]

I. Motion to Suppress the Photo Array Identification

The first issue appellate counsel discusses in the no-merit report is whether the trial court erred when it denied McDade's motion to suppress S.S.'s out-of-court identification of McDade through the photo array. McDade originally moved for suppression on the ground that the array had been "unduly suggestive" because S.S. told police her assailant was wearing a white shirt, and only McDade was wearing a white shirt in the array. At the motion hearing, McDade—who was at this point representing himself—argued that the array was also suggestive because of his heavier physical build and "fat face" compared to the other subjects, as well as the zoom, cropping, and background color of his photo.[4]

[3] To the extent that there are other issues in McDade's responses that are not specifically addressed in this opinion, they are deemed to lack sufficient arguable merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

[4] McDade's fourth trial attorney filed the motion to suppress based on the shirt color in October 2011. After that attorney was allowed to withdraw in December 2011, McDade filed an additional *pro se* suppression motion in which he raised the other manners of suggestiveness.

The standard for reviewing whether an out-of-court identification was properly admitted has two steps. *See* ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). First, the defendant must show that the out-of-court identification was impermissibly suggestive. *See* ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404. An impermissibly suggestive procedure is one that makes it "all but inevitable" that the defendant would be identified. *See* ***Foster v. California***, 394 U.S. 440, 443 (1969). If the defendant meets this burden, then the State must show that the identification is nevertheless reliable under the totality of the circumstances. *See* ***Drew***, 305 Wis. 2d 641, ¶13. A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We do not reverse the trial court's factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.***

Milwaukee Police Detective Gregory Jackson, who assembled the photo array, and S.S. both testified at the suppression hearing. S.S. had been given a phone number by the man who picked her up, and Jackson testified that he ascertained the number was registered to McDade. Jackson checked the Milwaukee Police Department's records and found a booking photo of McDade, then selected "five other [photos] with similar facial features[,] complexion[,] and so on." Jackson testified that in assembling an array, police "go by gender, age as close as possible, the complexion of the individual, hair, if they have any scars, major scars," and facial hair. He further explained that police "try to get as close as possible, but we can only use what's available to us in our data bank." When McDade questioned whether weight was a consideration—S.S. had reported that her assailant had a beer belly—Jackson explained that the photos are usually just "from the shoulders up," so he focused on facial features and complexion, not weight.

Jackson also explained the process by which a witness reviews a photo array. Although there is a "six-pack" array that shows all six photos together, the witness does not view that composite. After the six photos are selected, each one is placed in an individual folder; the folders are then shuffled and numbered one through six so that the officer conducting the lineup does not know which photo is in which folder. Two empty folders are labeled seven and eight and added to the end of the stack. The set of folders is then presented to the witness along with a form; the witness is instructed to view each folder and indicate "yes" or "no" on the form for whether they recognized the person pictured, and they are instructed that they will view all folders, even if they make an identification before the end.

S.S. testified and confirmed that she viewed the photos one at a time. She said that she identified McDade's photo because she recognized his face and that she did not pick him out because of the white shirt. She also testified that Jackson did not "do anything that … indicated he was trying to signal [her] who to pick[.]"

The trial court concluded that "in totality this is a fair line up," that the array was not impermissibly suggestive, and that McDade had not met his burden. Thus, it denied the motion to suppress the out-of-court identification.[5]

Appellate counsel concludes that there is no arguable merit to challenging the trial court's ruling because the record of the suppression hearing "fully supports the trial court's [ruling.]" In his response, McDade asserts that there was "conflicting testimony as to how the identification

[5] McDade, by counsel, had also filed a motion to suppress a statement he gave to police. That motion was not litigated because the State agreed not to use McDade's statement in its case-in-chief.

procedure was conducted, which would question the integrity of this procedure." We agree with appellate counsel.

"Suggestiveness in photographic arrays may arise in several ways—the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves." *See* ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). McDade appears to be alluding to the "conflict" between Jackson's testimony that he said nothing to S.S. when handing her each photo folder to view, and S.S.'s testimony that Jackson opened each folder and asked her "to say yes or no, if it's him or not" before opening the next folder. But this discrepancy in descriptions of the viewing process does not establish any undue suggestiveness. Even if Jackson handed S.S. each folder and asked her to say "yes" or "no" to each photo, that question alone is not inherently suggestive, and there is no evidence that the detective did anything to specifically influence S.S.'s identification of McDade.

The fact that only McDade was wearing a white shirt is insufficient to establish undue suggestiveness. *See* ***id.*** at 654 ("[W]e decline to assume that a unique identifying feature *ipso facto* is unduly suggestive, without more persuasive proof by the defendant[.]"). While photos in the array must be similar, they need not be identical. *See* ***Powell***, 86 Wis. 2d at 67. The trial court noted that all of the individuals had similar facial hair and appeared to be roughly the same age. Further, the folder review process by which S.S. examined the pictures means that any distinction of McDade's shirt would have been apparent only in retrospect. Indeed, S.S. testified that she picked McDade's photo because of his face, not his shirt. And, while McDade complains about other features unique to his photo, those would also have been apparent only in retrospect.

In the light of the trial court's factual finding that the photos were similar, and given our standard of review, *see* ***Casarez***, 314 Wis. 2d 661, ¶9, there is no arguable merit to a claim that the trial court improperly denied the motion to suppress the photo array.

II. Sufficiency of the Evidence

The second issue appellate counsel discusses in the no-merit report is whether sufficient evidence supports the jury's verdicts. On review of a jury's verdicts, we view the evidence in the light most favorable to the verdicts. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***id.*** "'[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis.2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

To secure a conviction on the child enticement charge, the State had to prove that McDade, with the intent to have sexual intercourse with S.S. in violation of the statutes, caused S.S. to go into a room and that S.S. was under eighteen years of age at the time. *See* WIS. STAT. § 948.07 (2009-10); WIS JI—CRIMINAL 2134. To secure a conviction on the charge of second-degree sexual assault of a child under age sixteen,[6] the State had to prove that McDade

[6] Though S.S. allegedly told McDade that she was seventeen years old, mistake of age is not a defense. *See* WIS. STAT. § 939.43(2).

had sexual intercourse with S.S. and that S.S. had not reached the age of sixteen at the time of the alleged intercourse. *See* WIS. STAT. § 948.02(2) (2009-10); WIS JI—CRIMINAL 2104.

S.S. testified that she was born on October 3, 1997. She further testified that on July 16, 2010, she ran away from home and encountered McDade while she was walking in the early morning hours. She said he asked her if she "wanted to go somewhere with him." He told her to keep walking and he would pick her up. S.S. testified that when McDade drove up, she got into his van and he took her to a motel. S.S. identified photos of the motel room to the jury. She reported a second man was sleeping in the bed when they arrived. She testified that McDade had given her a phone number and that she had identified McDade in a photo array. She also testified that McDade had repeated penis-to-vagina intercourse with her.

Detective Jackson testified that he determined the phone number given to S.S. was registered to McDade. He then obtained a photo of McDade and developed a photo array around it. Jackson explained the array review process to the jury and testified that S.S. identified McDade as her assailant. Jackson also testified about how he learned of Ragland's involvement.

Ragland first testified about the charges against him relative to S.S. and about his agreement with the State; in exchange for his testimony against McDade and a guilty plea to a charge of second-degree sexual assault, the State would recommend five to seven years of imprisonment, and, after testifying against McDade, Ragland would be permitted to file a motion for sentence modification.[7] The entire agreement was read to the jury, and the State reviewed the nature of Ragland's prior convictions. Ragland then testified that he was a childhood friend of

[7] *See* ***State v. Doe***, 2005 WI App 68, ¶10, 280 Wis. 2d 731, 697 N.W.2d 101.

McDade's. He said that on July 16, 2010, he called McDade and asked to borrow some money because he was short for the room. McDade brought the money, stayed briefly, then left. Ragland fell asleep and when he woke up, McDade was there with a naked girl. Ragland testified about his own sexual activity with S.S. and that he observed McDade having penis-to-mouth intercourse with her. Ragland also testified that he left the room to go to work and when he returned, McDade and the girl were still in the room.

Crime lab analyst Susan Noll testified about the DNA testing she performed on evidentiary samples collected and sent to the lab. She testified about creating DNA profiles for reference using "known standards" from buccal swabs collected from S.S., McDade, and Ragland. She testified that several profiles developed from the evidentiary samples were insufficient for inclusion purposes, though McDade was excluded as a contributor to the DNA found on S.S.'s cervical swabs. Noll also testified that the sperm fraction of a sample taken from the interior surface of a motel room comforter matched the known standard profile she had developed for McDade. In addition, when the profile developed from the comforter sample was entered into CODIS, the Combined DNA Index System, it was matched to McDade.

Appellate counsel concludes that the above evidence is sufficient to sustain the jury's verdicts. McDade disputes the conclusion of sufficient evidence, claiming that the State knowingly permitted S.S. and Ragland to testify falsely and asserting that motel registration records and his work records "contained facts that revealed discrepancies in the veracity of S.S.'s testimony." In part, he contends, the motel records show that the room in question was not rented to Ragland until 11:00 a.m. on July 16, 2010, meaning McDade could not have taken S.S. there earlier that morning.

Inconsistencies and errors in witness testimony do not, by themselves, render the evidence as a whole insufficient to support a jury verdict; these issues go to witness credibility. The jury is the sole arbiter of the credibility of witnesses and it alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. As the ultimate arbiter of credibility, the jury has the power to accept one portion of a witness's testimony and reject another portion; a jury can find that a witness is partially truthful and partially untruthful. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988).

McDade cross-examined Ragland about the motel records showing that Ragland had not checked in until 11 a.m. McDade also cross-examined Ragland with records showing someone else had rented the room the next day, despite Ragland's claim that he had re-rented it. McDade further challenged whether Ragland might have been at the Park Manor Motel instead of the Capitol Manor Motel. Ragland's credibility, and S.S.'s by extension, were thus squarely in front of the jury.

Moreover, McDade also testified and, in doing so, he corroborated several details that S.S. and Ragland provided. McDade testified that Ragland called him for money in the early morning, which McDade took to him at a motel before leaving to get cigarettes. At a gas station, he met S.S., talked to her, and took her back to Ragland's motel room, which they both entered. McDade also agreed that he had given S.S. his phone number. The jury could thus fairly infer that other details from S.S. and Ragland about McDade's activities were also true.

Moreover, neither child enticement nor second-degree sexual assault require the State to prove the date or time of the offense as an element of the crime. The jury could have accepted as true the evidence supporting the facts of the actual offenses, while giving little weight to

inconsistencies in details like time and date. *See, e.g.*, ***State v. Fawcett***, 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App. 1988) ("The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony[.]").

Our standard of review requires us to view the evidence in light most favorable to the State and the verdicts unless it is so "inherently or patently incredible … [that it] conflicts with the laws of nature or with fully-established or conceded facts." *See* ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). With that standard of review in mind, we conclude that there is no arguable merit to a claim that there was insufficient evidence to support the verdicts.

III. Sentencing Discretion

The final issue appellate counsel discusses in the no-merit report is whether the trial court erroneously exercised its sentencing discretion by imposing an excessive sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Appellate counsel concludes that the sentences "were both fair and reasonable, taking into account the factors the trial court considered[.]" McDade counters that the trial court's "assessment of the case was induced by a fallible hypothesis that the trial was fair. Thereby, the trial court subjectively considered the primary factors to impose its sentence" and, thus, "the imposed sentence was unduly harsh."

At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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 may consider several subfactors. *See* ***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* ***id.***

Our review of the record confirms that the trial court appropriately considered relevant sentencing objectives and factors. The thirty-year sentence imposed is well within the sixty-five-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We thus agree with appellate counsel that there is no arguable merit to challenging the trial court's exercise of sentencing discretion.

IV. Waiver of Counsel

In October 2011, McDade's fourth trial attorney filed a "Motion to Permit Self-Representation by the Defendant" pursuant to ***Faretta v. California***, 422 U.S. 809, 819 (1975) ("The Sixth Amendment … grants to the accused personally the right to make his defense."). At a November 2011 hearing, trial counsel informed the trial court that McDade "would like to exercise his constitutional right to self-representation" and noted that McDade had taken steps that might constitute a conflict of interest with counsel. Trial counsel also advised that while the trial was then-scheduled to begin on December 12, he was scheduled for non-elective surgery on December 13 and could not stay on the case. The trial court took the matter under advisement until the next hearing.

At the next hearing on December 6, 2011, the trial court asked McDade to "[t]ell me again exactly why you want to and think you are able to represent yourself." McDade launched

into several complaints about trial counsel's performance. The trial court ultimately permitted the attorney to withdraw because of the impending surgery and told McDade it would set a hearing date for pending suppression motions at which McDade could "provisionally" represent himself. If McDade could "represent himself adequately and appropriately at a motion hearing, I may allow him to continue and represent himself at the jury trial, but if Mr. McDade cannot, then he will not be allowed to represent himself at a jury trial." As part of its ruling, the trial court asked McDade to "sign the appropriate form regarding his waiver of his right to an attorney" and asked several follow-up questions. After a date was set for the motion hearing, McDade requested standby counsel, which the trial court later approved at county expense.

When a defendant seeks to proceed *pro se*, the trial court must make sure that the defendant knowingly, intelligently, and voluntarily waives the right to counsel. *See* ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). Because the initial no-merit report did not discuss the validity of McDade's waiver, we directed counsel to file a supplemental report. In the supplemental report, appellate counsel reviews the requirements for a valid waiver of counsel and discusses those portions of the record supporting the waiver, concluding that any argument that the waiver was invalid would lack arguable merit.

McDade argues that trial counsel's analysis is "hinged upon the examination of an invalid waiver form," noting that the "colloquy of the waiver form was conducted after the trial court had arbitrarily forced McDade to proceed without counsel." McDade also complains that the trial court erroneously hindered him from knowing other options for dealing with the conflicts alleged by counsel, such as waiving any conflict of interest or addressing counsel's surgery with an adjournment and the appointment of new counsel. McDade thus contends that he "never

made a deliberate choice to proceed to represent himself," did not knowingly and voluntarily waive his right to counsel, and was forced into proceeding without counsel.

A criminal defendant is guaranteed the fundamental right to the assistance of counsel by both the United States and Wisconsin Constitutions. *See* ***State v. Ruszkiewicz***, 2000 WI App 125, ¶25, 237 Wis. 2d 441, 613 N.W.2d 893. The defendant also has the right, conferred by the same sources, to conduct his or her own defense. *See* ***id.*** But these rights "seemingly conflict," *see* ***id.***, ¶26, so when a defendant seeks to proceed *pro se*, the trial court is required to engage the defendant in a colloquy regarding waiver of the right to counsel. *See* ***State v. Ernst***, 2005 WI 107, ¶14, 283 Wis. 2d 300, 699 N.W.2d 92. The colloquy is a court-created rule, not a constitutional mandate. *See* ***id.***, ¶21.

For there to be a valid waiver of the right to counsel, the colloquy must be designed to ensure, and the record must reflect, that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could be imposed. *See* ***State v. Gracia***, 2013 WI 15, ¶35, 345 Wis. 2d 488, 826 N.W.2d 87. "Nonwaiver is presumed unless waiver is affirmatively shown to be knowing, intelligent and voluntary." *See* ***Klessig***, 211 Wis. 2d at 204.

We conclude that the record does not support an arguably meritorious challenge to McDade's waiver of counsel. Although the trial court allowed the attorney to withdraw before confirming McDade's waiver of counsel, it is clear that the trial court, at that time, had not excluded the possibility of a successor attorney; this is evident from the trial court's express intent to prevent McDade from representing himself at trial if he could not successfully do so at

the motion hearing. McDade did, however, acknowledge that he was giving up the right to counsel at public expense.

Further, although there is not a "formal, capsulated hearing and colloquy" in this matter, *see* ***Ruszkiewicz***, 237 Wis. 2d 441, ¶30, the record nevertheless reflects a valid waiver of counsel. While McDade is correct that an expression of dissatisfaction with counsel, by itself, is not a clear and unequivocal declaration of a desire to proceed *pro se*, *see* ***State v. Darby***, 2009 WI App 50, ¶26, 317 Wis. 2d 478, 766 N.W.2d 770, he specifically indicated at least twice that he wanted to represent himself,[8] and again confirmed this desire when affirmatively answering the trial court's question, "[Y]ou are asking this Court repeatedly to … allow you to represent yourself. Correct?" The record thus reflects McDade's deliberate choice to proceed *pro se*.[9]

After asking McDade to sign the waiver of counsel form, the trial court asked McDade whether he understood that he was giving up access to advanced legal expertise, "expertise on potentially your rights," someone to speak for him, and someone to write and file things for him as well as whether he understood he would have to follow court rules and rulings. McDade answered each question affirmatively, reflecting his understanding of the difficulties and disadvantages of self-representation. The general tenor of McDade's discussion with the trial

[8] When the trial court attempted to explain that many of McDade's complaints about counsel were moot, McDade responded that he felt counsel was not "representing me to the best of his ability which is one of the reasons why I am requesting to go *pro se*." When the trial court asked McDade if he thought his own representation would be better than that of the four attorneys, McDade responded, "It is my right to. I have the very right to represent myself." It is disingenuous of McDade to protest that he was "forced" to proceed *pro se* when he clearly wanted to do so.

[9] The trial court was not required to provide McDade with options for addressing the "conflict of interest" with counsel or counsel's impending surgery, particularly when McDade wanted to represent himself.

court reflects an adequate understanding of the seriousness of the charges, and the waiver of counsel form specified the penalties he was facing.

Though McDade complains that he signed the waiver of counsel form requested by the trial court after his attorney was already withdrawn, and that the colloquy came after he signed the form, the record contains an earlier waiver of counsel form, completed and signed by McDade on October 27, 2011. Like the later form, this form represents that McDade was seeking to represent himself. It includes a list of the things an attorney can do for a client and possible pitfalls of self-representation. McDade marked the box after each list to signify that he "read and understood" each list. The earlier form also lists both charges against McDade and correctly states the maximum penalty for each.

The record, therefore, reflects that McDade made a deliberate choice to proceed *pro se* and was well aware of all the information required to be given through a waiver colloquy. There is no arguable merit to a claim McDade did not knowingly, intelligently, and voluntarily waive the right to counsel.

V. Competency to Proceed Pro Se

The validity of a defendant's waiver of counsel is not the only consideration when that defendant seeks to proceed *pro se*; the trial court must also determine whether a defendant seeking to self-represent is competent to do so. *See* ***Klessig***, 211 Wis. 2d at 203. "Whether a defendant is competent to proceed *pro se* is 'uniquely a question for the trial court to determine.'" ***State v. Imani***, 2010 WI 66, ¶37, 326 Wis. 2d 179, 786 N.W.2d 40 (citation omitted).

Competency to represent oneself is a higher standard than the competency required to stand trial. *See* ***Klessig***, 211 Wis. 2d at 212. "In determining whether a defendant is competent to proceed pro se, the [trial] court may consider the defendant's education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense." ***Imani***, 326 Wis. 2d 179, ¶37; *see also* ***Klessig***, 211 Wis. 2d at 212.

A defendant competent to stand trial but unable to effectively communicate or obtain a minimum understanding necessary to present a defense will not "be allowed 'to go to jail under [their] own banner.'" *See* ***Klessig***, 211 Wis. 2d at 211 (citation omitted). "A defendant of average ability and intelligence may still be adjudged competent for self-representation[.]" ***Imani***, 326 Wis. 2d 179, ¶37. Thus, "a defendant's 'timely and proper request' should be denied only where the [trial] court can identify a specific problem or disability that may prevent the defendant from providing a meaningful defense." ***Id.*** (citation omitted).

A determination of competency must appear in the record. *See* ***id.*** at 212. Here, the trial court did not expressly make a finding that McDade was competent; to the contrary, it more than once stated that McDade was not competent to represent himself,[10] and yet McDade represented himself anyway. We thus asked appellate counsel to address this issue in the supplemental no-merit report.

[10] The trial court stated, at various points, "You're not competent to handle this, Mr. McDade," "[T]he problem with Mr. McDade representing himself is that he's not competent to do that," and, after McDade interrupted the court to quarrel, "This is further evidence of why Mr. McDade is not competent to represent himself and will be a problem at trial."

Appellate counsel notes that McDade confirmed, via the waiver of counsel form, that he had a high school diploma, could read and write English, was not receiving and had not received in the past any treatment for mental or emotional problems, and did not have any physical or psychological problems that would have affected his ability to understand the court proceedings or communicate his position. Further, though the trial court initially appeared to have reservations about McDade's competency to represent himself, those concerns were allayed. At the start of trial, the trial court recounted the history of representation and its earlier colloquy with McDade and stated that McDade "is capable of representing himself[.]" It noted that McDade "understands his rights" and "understands this case." It commented that McDade "was able to participate in the motion to suppress to an adequate degree for someone who was not an attorney."[11]

Although McDade told the trial court that he was "incapable of representing" himself at trial and "begg[ed] the court to appoint [him] counsel," the trial court denied the request, explaining that it had tried to discourage McDade from self-representation, but McDade "insisted with me six months ago that [he] did not want an attorney" and "insisted that [he] wanted to represent [himself]." The court went on to explain that while McDade's "voluminous" filings were largely meritless, they were "generally well written" and McDade was "more than capable." It also stated that McDade's request was "nothing other than an attempt to manipulate the Court and to further delay this case."

[11] We caution trial courts that technical legal knowledge is not a prerequisite to self-representation. *See* ***Imani v. Pollard***, 826 F.3d 939, 946 (7th Cir. 2016).

While the form of the competency determination is not ideal, the trial court was clearly satisfied that McDade was competent to represent himself at trial.[12] This conclusion is not "totally unsupported by the facts apparent in the record," *see* ***Imani***, 326 Wis. 2d 179, ¶37 (citation omitted), so there is no arguably meritorious challenge to the trial court's decision and no arguable merit to a claim that McDade was incompetent to represent himself.

VI. Violation of the Right To Self-Representation

The third issue we asked appellate counsel to address in the supplemental no-merit report, which McDade raised in his original response, relates to an off-the-record conference regarding Ragland. As noted above, Ragland had made an agreement with the State in exchange for his testimony against McDade. Prior to Ragland's testimony, the trial court held an off-the-record conference in open court that centered on the details of that deal and Ragland's anticipated testimony, particularly with respect to Ragland's criminal record. Standby counsel attended the conference on McDade's behalf because McDade was not permitted to be present. When McDade attempted to make a record regarding his exclusion, the trial court explained that because McDade was in custody, "that was the only way it could be accomplished."

McDade claims that his exclusion from this hearing violated his right to self-representation by interfering with his right to conduct his own defense under ***Faretta***. He further contends that had he been present at the hearing, he "would have petitioned to go on the record

[12] The trial court's findings regarding McDade's competency at the start of trial effectively constitute a *nunc pro tunc* determination. *See* ***State v. Klessig***, 211 Wis. 2d 194, 213, 564 N.W.2d 716 (1997).

during said meeting for an evidentiary hearing for an inquiry into the veracity of Mr. Ragland's expected testimony" to allow the trial court to "scrutinize the admissibility" of that testimony.

Defendants have a constitutional right to conduct their own defense, provided they knowingly and intelligently waive the right to counsel and are able and willing to abide by rules of procedure and courtroom protocol. *See* ***Faretta***, 422 U.S. at 806. "In determining whether a defendant's ***Faretta*** rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." ***McKaskle v. Wiggins***, 465 U.S. 168, 177 (1984). "The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." ***Id.*** at 174.

"Whether a defendant was denied his or her constitutional right to self-representation presents a question of constitutional fact, which this court determines independently." ***Imani***, 326 Wis. 2d 179, ¶19. "An improper denial of a defendant's constitutional right to self-representation is a structural error subject to automatic reversal." ***Id.***, ¶21. The record, however, reflects that McDade's ***Faretta*** rights were not violated by this off-the-record conference.

The core of the ***Faretta*** right is the defendant's entitlement to "preserve actual control over the case he chooses to present to the jury." *See* ***McKaskle***, 465 U.S. at 178. If standby counsel's participation allows counsel "to speak *instead* of the defendant on any matter of importance," or allows counsel to "destroy the jury's perception that the defendant is representing himself[,]" the ***Faretta*** right is eroded. *See* ***McKaskle***, 465 U.S. at 178. However,

"the appearance of a *pro se* defendant's self-representation will not be unacceptably undermined by counsel's participation outside the presence of the jury." ***Id.*** at 179.

Contrary to McDade's assertion that "there is no record as to what was actually discussed" at the hearing, a record was made immediately following the hearing. This record reflects that the discussion regarded Ragland's plea agreement, which was marked as a trial exhibit, and Ragland's criminal record, the details of which the State chose to discuss at trial rather than simply informing the jury of his nineteen prior convictions. Standby counsel confirmed that he told McDade what transpired at the meeting, and McDade does not dispute that standby counsel informed him of the off-the-record discussion's contents.

While McDade asserts that, had he been present, he would have requested an "evidentiary hearing" on the "veracity" of Ragland's testimony, he would not have been granted such a hearing. The veracity or truthfulness of a witness's testimony goes to its weight, not its admissibility, and McDade was permitted to test the veracity of Ragland's testimony through cross-examination at trial. We conclude that there is no arguable merit to a claim that the off-the-record conference deprived McDade of his right to present a defense or his right to self-representation.[13]

[13] We have also independently considered whether McDade's absence might have violated his right to be present. *See* WIS. STAT. § 971.04(1); ***Snyder v. Massachusetts***, 291 U.S. 97 (1934), *overruled on other grounds by* ***Duncan v. Louisiana***, 391 U.S. 145 (1968), ***Malloy v. Hogan***, 378 U.S. 1 (1964). However, McDade's presence was not statutorily required, *see* § 971.04(1), and, while conferences during trial should be rarely held without the defendant, the defendant's presence is only constitutionally required "'to the extent a fair and just hearing would be thwarted by his absence.'" *See* ***State v. Alexander***, 2013 WI 70, ¶22, 349 Wis. 2d 327, 833 N.W.2d 126 (citations omitted). Thus, there is no arguable merit to a claim that the off-the-record conference violated McDade's right to be present.

VII. Collection of Buccal Swabs

We turn now to the substantive claims raised by McDade but not addressed by counsel. At the preliminary hearing, after McDade was bound over for trial, the State advised the court commissioner that it was filing a notice of motion for a court order directing McDade to provide buccal swabs for analysis.[14] Defense counsel asked for time to review the motion; the State responded that the matter was set to be heard by the assigned trial court judge at a later date. Before the trial court could hear the State's motion, Detective Jackson applied for and received a search warrant from a court commissioner for McDade's "DNA to be obtained through a [b]uccal [s]wab[.]" McDade challenges the issuance of the warrant, asserting that Jackson "omitted facts from the affidavit that would have defeated probable cause for a search warrant," thereby entitling him to a ***Franks/Mann*** hearing.[15] *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978); ***State v. Mann***, 123 Wis. 2d 375, 385-86, 367 N.W.2d 209 (1985).

When we review a challenge to probable cause for the issuance of a search warrant, we examine "'the totality of the circumstances presented to the warrant-issuing commissioner to determine whether the … commissioner had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing.'" *See* ***State v. Silverstein***, 2017 WI App 64, ¶13, 378 Wis. 2d 42, 902 N.W.2d 550 (citation

[14] A buccal, or cheek, swab is used to develop a DNA profile. *See* ***State v. Deadwiller***, 2013 WI 75, ¶¶5, 12, 350 Wis. 2d 138, 834 N.W.2d 362.

[15] Neither the application nor the resulting warrant are in the record, but McDade has appended them to his no-merit response.

omitted). "We accord great deference to the warrant-issuing [commissioner's] determination of probable cause[.]" ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

To be entitled to a ***Franks/Mann*** hearing on a search warrant application, there must be allegations that essential facts were omitted from the warrant application; such allegations must be stated in an affidavit or offer of proof which identifies what has been omitted and what part of the warrant application, because of the omission, has been rendered inadequate for a finding of probable cause. *See* ***Franks***, 438 U.S. at 155-56; ***Mann***, 123 Wis. 2d at 385-86, 388; ***State v. Fischer***, 147 Wis. 2d 694, 701, 433 N.W.2d 647 (Ct. App. 1988). If these requirements are met, and if, when the material previously omitted is inserted into the warrant application, there remains sufficient content in the application to support a finding of probable cause, no ***Franks*** hearing is required. *See* ***Mann***, 123 Wis. 2d at 388.

McDade complains that "essential information that relates to the chronology of the police investigation" was omitted from the application. Specifically, McDade complains that the warrant application failed to mention that: (1) in the course of developing a photo array, Jackson learned that McDade "was on file as a convicted felon with a DNA profile in the Wisconsin DNA Databank" and (2) Jackson "conveyed the rape kit evidence, with a requisition (identifying Kenneth L. McDade Jr., as a suspect) to the State Crime Lab." He contends that these facts would have shown that Jackson knew his DNA was on file and, thus, "an analyst from the Crime Lab would have been able to examine the rape kit evidence against McDade's DNA profile so as to determine whether or not McDade committed this offense. For these reasons, [the] Court Commissioner … could not have found probable cause to support a search warrant[,]" and

McDade thus believes that the omission of these facts from the warrant application violated his Fourth and Fourteenth Amendment rights.[16]

We conclude that McDade would not have been entitled to a ***Franks/Mann*** hearing. The police report that supposedly shows that Jackson knew McDade's DNA was on file does not make any specific mention of the "DNA Databank"; what it says is that Jackson "learn[ed] that Kenneth L. McDade Jr, was on file with the Milwaukee Police Department[.]"[17] Further, matching crime scene DNA to a databank profile is only a preliminary screening step; the convicted felon samples on file are not evidence. *See* ***State v. Ward***, 2011 WI App 151, ¶5, 337 Wis. 2d 655, 807 N.W.2d 23. Indeed, Jackson testified at trial that it was irrelevant if McDade's DNA profile was in the databank, "because I am always going to get a fresh set [of swabs] for you as a standard, which is something that the crime lab would always request[.]"

Finally, even if Jackson knew that McDade had a DNA profile in the databank,[18] such knowledge does not defeat probable cause for a search warrant. "Where there is evidence that would lead a reasonable person to conclude 'that the evidence sought is likely to be in a particular location,' there is probable cause for a search of that location[.]" ***State v. Ward***, 2000

[16] McDade had filed a *pro se* motion to suppress "any and all fruits of this unlawful search and seizure," claiming Jackson "went behind the Judge's back" to get a search warrant instead of litigating the State's motion for McDade to provide buccal swabs. However, there is no arguably meritorious appellate issue arising from Jackson pursuing a warrant before the State could litigate its motion. One avenue of relief does not foreclose the other, and whether by application for a search warrant or motion to the court, probable cause had to be shown. *See* ***State v. Ward***, 2011 WI App 151, ¶¶10-11, 337 Wis. 2d 655, 807 N.W.2d 23.

[17] This is likely in reference to McDade's booking photo.

[18] A letter from the laboratory to McDade appears to indicate that his DNA profile has been on file since 2007.

WI 3, ¶34, 231 Wis. 2d 723, 604 N.W.2d 517 (citation omitted). This probable cause exists "even if it may also be reasonable to conclude that the evidence may be in a second or third location as well. *See* ***id.***

McDade also refers to instructions, issued by the Wisconsin Department of Justice, that appear to be part of a "buccal swab collection kit." It is not clear what argument McDade is making based on these instructions, but we note that the instructions specify, in part, that "[i]f the subject's record shows a 'DNA Sample on File,' do not collect a duplicate sample." McDade thus appears to be protesting collection of a duplicate sample when his DNA was already on file.

There are obvious pragmatic reasons—time, space, and resources—against collecting duplicate samples. In any event, the kit instructions are not derived from any statutory or other legal limitations on sample collection or evidence admission. Duplicate collection of a DNA sample does not defeat probable cause for a warrant. Thus, there is no arguable merit to a claim that McDade was entitled to a ***Franks/Mann*** hearing or that the warrant for the collection of McDade's DNA via buccal swab violated his constitutional rights.

VIII. Motion for a Continuance

After multiple adjournments, the trial was scheduled to begin on June 4, 2012. McDade sought a further continuance "for the State to satisfy a specific discovery demand."[19] The State

[19] McDade's discovery dispute was never very clear. However, Jackson had sent a "Foreign Profile Initiative" form to the crime lab on July 22, 2010, listing McDade as a suspect. McDade appears to believe this shows police had developed a DNA profile of him on that date, a profile he never received in discovery. However, the crime lab analyst testified that while specimens were submitted to the lab on July 22, 2010, and August 20, 2010, she did not retrieve them from storage and begin testing until August 7, 2010. Thus, there is no arguably meritorious claim of a discovery violation.

said that it had no remaining discovery to turn over. The trial court denied the continuance, stating that the discovery issue had been dealt with previously. When proceedings resumed in the afternoon, the trial court supplemented its denial decision, explaining that the case had been filed almost two years prior "so this case needs to be tried and will be tried. Mr. McDade has had plenty of time to prepare. He has had the discovery turned over to him months ago by the State…. There is no basis for the continuance." McDade complains that the trial court's ruling reflects "its insistence upon expeditiousness rather than inquiring [about] all the facts to properly balance McDade's constitutional rights to a fair trial against the administration of justice."

"The decision to grant or deny a continuance is a matter within the discretion of the trial court." ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶28, 313 Wis. 2d 542, 753 N.W.2d 496 (citation omitted). We will set aside a trial court's ruling on a motion for a continuance only if the trial court erroneously exercised its discretion. *See* ***id.*** There are several factors to be considered in the discretionary decision whether to grant a continuance, including the length of the delay requested; whether trial counsel has associates prepared to act in his or her absence; whether other continuances had been granted; the convenience or inconvenience to the parties, witnesses, and the court; and whether the delay seems to be for legitimate reasons. *See* ***id.***, ¶93. In determining whether the trial court erroneously exercised its discretion by denying a continuance, "a single inquiry is to be made. This inquiry requires the balancing of the defendant's constitutional right to adequate representation by counsel against the public interest and the prompt and efficient administration of justice." ***State v. Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979).

McDade asserts that the single inquiry identified in ***Wollman*** "should be tailored to fit the facts of this case as to whether standby counsel is adequately prepared to try the case."

However, that is not the role of standby counsel; the appointment of standby counsel is based on the needs of the trial court and for its convenience, not the defendant's. *See* ***State v. Cummings***, 199 Wis. 2d 721, 754 n.17, 546 N.W.2d 406 (1996); ***State v. Lehman***, 137 Wis. 2d 65, 77, 403 N.W.2d 438 (1987). Thus, whether standby counsel is prepared to try the case is not a consideration for the trial court in deciding whether to grant a continuance.

The record reflects that there had been multiple continuances, that the trial court believed McDade had been given sufficient time to prepare for trial, that the trial court considered the discovery demand underlying the request for a continuance to have been resolved, and that the trial court concluded that there was no legitimate basis for further delay. None of these determinations is clearly erroneous, so there is no arguable merit to a claim that the trial court erroneously exercised its discretion in denying McDade's request for a continuance.

IX. Admission of Physical Evidence (Chain of Custody)

As noted, McDade's DNA was found on a comforter from the motel room. In his motion in limine, McDade objected to admission of the DNA results, crime scene photos, and any related evidence, relying on WIS. STAT. § 904.01 (definition of relevant evidence), § 904.02 (general admissibility of relevant evidence), § 904.03 (exclusion of relevant evidence on certain grounds), and § 907.02 (expert testimony), as well as a leading case on expert testimony, ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 570 (1993). In his no-merit response, McDade continues to object to evidence from the scene without "proof that the original items were in the same condition when tested as at the time of the alleged incident." He notes that while the 911 call was placed on S.S.'s behalf on July 17, 2010, police did not investigate the motel room until July 20, 2010, and motel records showed others rented the room in between. McDade thus

claims that there is "a reasonable probability that the bedding … was exchanged, contaminated, or tampered with[.]" That is, McDade argues that this evidence was inadmissible because the purported crime scene was not processed immediately.

"The law with respect to chain of custody issues requires proof sufficient 'to render it improbable that the original item has been exchanged, contaminated or tampered with.'" ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (citation omitted). "A perfect chain of custody is not required. Alleged gaps in a chain of custody 'go to the weight of the evidence rather than its admissibility.'" ***Id.*** (citation omitted). That is, the State is not required to trace custody of an item from the possession of its owner until it is offered at trial; the State need only offer evidence sufficient to show that the item is what the witness says it is. *See* WIS. STAT. § 909.01 ("The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.")

Here, the comforter itself was not offered as evidence. Police Officer Alan Winter testified about going to the Capitol Manor Motel on July 20, 2010, to collect evidence. He verified that photos shown to the jury "accurately represent[ed]" what he saw when he arrived to process the scene. He testified about examining the scene using an alternative light source, identifying stains on the comforter and mattress not visible to the naked eye, collecting samples for testing, and securing them for transport to the crime lab. Analyst Noll testified about retrieving the samples for testing from storage and their condition—sealed and marked. This testimony is sufficient to establish a complete chain of custody from the collection of possible DNA evidence on July 20, 2010, to its later analysis and ultimate use at trial.

That police did not investigate the scene until three days after a crime supposedly occurred there, and what may or may not have happened to the bedding during that time, goes to the weight of the evidence and the validity of the inference the State wanted the jury to draw, not the admissibility of the crime scene photos, DNA results, or lab analyst's testimony. There is no arguable merit to challenging admissibility of that evidence because of a chain of custody issue.

X. Judicial Notice/New Trial in the Interests of Justice

During cross-examination of S.S., McDade asked her if she remembered what his genitals looked like. She said no and said that the room was dark. McDade then asked S.S. if she could "give a brief description of what [his] genitals look[ed] like." The trial court sent the jury out and asked McDade where he was going with his questioning. McDade explained that he had been shot in the scrotum, leaving him with a scar and one testicle. He reasoned that if S.S. had performed oral sex on him, she would have had to touch his genitals and, thus, should be able to describe them.

The trial court asked McDade how he was "planning to introduce that into evidence …. Do you have a photograph of your testicles?" McDade said he did, "but I haven't been able to get a hold of them" because they were with the attorney who "represented [him] in [his] claim" after the shooting. The trial court noted that the case had been pending for two years and barred McDade from asking S.S. further questions about his anatomy.

In his no-merit response, McDade asks this court to take judicial notice of him "being the victim of a shooting that resulted in his scrotum being damaged with the loss of one testicle." Assuming we will do so, McDade seeks a new trial in the interest of justice, claiming the real controversy of S.S.'s credibility was not fully tried because the jury "did not have the

opportunity to hear and evaluate evidence regarding his deformed genitalia which would have impeached the credibility of S.S." McDade asserts that the jury could have found S.S.'s testimony questionable because "she never gave a description of the apparent deformity that she allegedly should have noticed. Hence, if she never noticed something this obvious, it can be believed that she neither touched nor seen McDade's genitals, thus, [she] never … performed fellatio on McDade."[20]

We may take judicial notice of facts that are not subject to reasonable dispute. *See* WIS. STAT. § 902.01(2). A court must take judicial notice when, as relevant here: "(1) the fact for which judicial notice is requested is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'; and (2) a party asks the court to take judicial notice and gives the court 'the necessary information.'"[21] *See* § 902.01(2)(b), (4).

The nature and extent of McDade's injuries sustained in an unrelated incident are not the type of adjudicative facts for which judicial notice is appropriate. The conclusion he would have us draw, that S.S. should have been able to describe his anatomy, is also not appropriate for

[20] McDade's argument necessarily rests on the presumption that a typical twelve-year-old girl is so familiar with normal adult male genitalia that she would recognize, as a distinctive and abnormal feature, a missing testicle when she saw it despite being drunk and high. This presumption is unsupported by anything in the record.

[21] Additionally, "[a] party against whom the taking of judicial notice is sought must .. have a chance to object as to whether the matters are capable of indisputable proof and, therefore, subject to the taking of judicial notice." *See* ***Sisson v. Hansen Storage Co.***, 2008 WI App 111, ¶13, 313 Wis. 2d 411, 756 N.W.2d 667. We therefore question whether it is appropriate to take judicial notice of facts in a no-merit appeal, where the State is not called upon to respond.

judicial notice. Despite testifying, McDade never told the jury about his injury.[22] Further, McDade had already asked S.S. if she recalled what his genitals looked like, and she had answered, "No."

We have statutory authority to grant relief if we are convinced "that the real controversy has not been fully tried or that it is probable that justice has for any reason miscarried." *See* WIS. STAT. § 752.35. In order to establish that the real controversy has not been fully tried, McDade "must convince us that the jury was precluded from considering 'important testimony that bore on an important issue[.]'" ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). To establish a miscarriage of justice, McDade "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Id.*** (citations omitted). We exercise our power to grant a new trial in the interest of justice only in exceptional cases. *See* ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

McDade's had ample opportunity to challenge S.S.'s credibility, and he highlighted various issues with and inconsistencies in her testimony to the jury. We conclude that there is no arguable merit to a claim that the "real controversy" of S.S.'s credibility was not fully tried or to a claim that McDade is entitled to a new trial in the interests of justice.

[22] It is not clear whether McDade disclosed this information to the State in discovery. *See* WIS. STAT. § 971.23(2m)(c) (requiring defendants to disclose "[a]ny physical evidence" they intend to offer at trial).

XI. Trial Court Rulings on Pretrial Matters (Right to be Heard)

Prior to trial, McDade had filed, among other things, a motion to suppress "fruits of an unlawful search" and a motion in limine. The trial court did not address these before trial. After the State rested its case, the trial court made a record on McDade's outstanding motions.[23] McDade argues that his "constitutional rights were violated when the trial court arbitrarily ruled on several pre-trial motions after the State rested its case at trial" and asserts that he was denied his due process right to be heard at a meaningful time and in a meaningful matter on the suppression motion and his motion in limine. *See* ***Goldberg v. Kelly***, 397 U.S. 254, 267 (1970). McDade contends that if the trial court had addressed his motions before trial, he "would have been able to successfully challenge" and "expose several deficiencies in" the State's case prior to trial.

"Access to the courts is an essential ingredient of the constitutional guarantee of due process." ***Piper v. Popp***, 167 Wis. 2d 633, 644, 482 N.W.2d 353 (1992). "[D]ue process is satisfied 'if the procedures provide an opportunity to be heard at a meaningful time and in a meaningful manner.'" ***Id.*** (citations omitted). "Due process is flexible and requires only such procedural protections as the particular situation demands." *See* ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 91, 512, 261 N.W.2d 434 (1978); *see also* ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976). Due process determinations are questions of law we review de novo. *See* ***State v. Sorenson***, 2002 WI 78, ¶25, 254 Wis. 2d 54, 646 N.W.2d 354.

[23] McDade had also moved for reconsideration of the order denying his suppression motion; the trial court stated there was no basis for reconsideration and stood by its earlier ruling.

McDade's suppression motion relates to his belief that he was entitled to a ***Franks/Mann*** hearing regarding the collection of the buccal swabs. The key parts of his motion in limine relate to issues regarding the veracity of Ragland's testimony and the admission of the DNA and related evidence from the comforter based on his concerns about the chain of custody. We have already explained herein why those issues lack arguable merit. Due process simply requires that "litigants must be given their day in court." ***Piper***, 167 Wis. 2d at 644. McDade filed motions, the trial court ruled on them, and we have further reviewed those motions for any arguably meritorious challenge. We conclude that any complaint that McDade was deprived of the right to be heard lacks arguable merit.

XII. Prosecutorial Misconduct

McDade raises two claims of prosecutorial misconduct against the State. First, he contends that the State "intentionally mislead [sic] the trial court by claiming to have satisfied its discovery obligation." Second, he contends that the State "knowingly used and relied on false testimony to secure a conviction."

A. Discovery

With respect to discovery, McDade complains that the State did not disclose the crime lab analyst's "notes, worksheets, and any other analytical data relative to the composition of the DNA report" as McDade believes was required by WIS. STAT. § 971.23(1)(e). He also complains that the State neglected to notify him of its intent to introduce DNA evidence at trial. *See* WIS. STAT. § 971.23(9)(b).

The State is required to disclose to the defendant any "reports or statements of experts made in connection with the case or … a written summary of the expert's findings … and the results of any … scientific test … or comparison that the district attorney intends to offer in evidence at trial." *See* WIS. STAT. § 971.23(1)(e). This statute does not require disclosure of the foundational elements underlying the expert's report. *See* ***State v. Schroeder***, 2000 WI App 128, ¶9, 237 Wis. 2d 575, 613 N.W.2d 911 ("The statute does not require that the expert make out a report reciting in detail the bases for his or her opinion.").

McDade also complains that the State failed to notify him of its intent to use DNA evidence at trial. *See* WIS. STAT. § 971.23(9)(b). The purpose of pretrial discovery is to enable defendants to prepare for trial. ***Schroeder***, 237 Wis. 2d 575, ¶9. The trial court may waive the notice requirement for cause if no party will be prejudiced. *See* § 971.23(9)(c). Assuming without deciding that the State failed to give notice under this section, McDade was on notice that there might be DNA evidence in his case from almost its inception, when the State sought to collect buccal swabs from him. Moreover, McDade no contemporaneous objection to the evidence's introduction at trial. *See* ***State v. Delgado***, 2002 WI App 38, ¶12, 250 Wis. 2d 689, 641 N.W.2d 490 ("[A] specific, contemporaneous objection is required to preserve error."). Accordingly, the record does not support a claim of prejudice, so there is no arguable merit to a claim for relief from any discovery violation. *See* ***Schroeder***, 237 Wis. 2d 575, ¶9.

B. False Testimony

McDade also complains that the State relied on false testimony to convict him. Specifically, McDade reiterates his contention that the motel records and his work records reveal "discrepancies in the veracity of S.S.'s testimony." He contends that the records show the room

was vacant on July 16, 2010, prior to 11 a.m., and that these facts and records were withheld from the jury.

"Due process prevents a prosecutor from relying on testimony the district attorney knows to be false, or later learns to be false." ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987). "Due process requires a new trial if the prosecutor in fact used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury." ***Id.***

The fact that a witness may have testified inconsistently with other statements or may have given testimony that appears to conflict with other evidence does not mean that the testimony was false or that the State knowingly used false evidence to secure a conviction. The fact that McDade disputes the jury's interpretation of and conclusions from the evidence likewise does not mean that the State knowingly relied on false evidence to secure a conviction. Further, while the State is required to disclose exculpatory information to the defense, it is not required to present that exculpatory evidence at trial. There is no arguable merit to a claim that the State relied on false testimony.

XIII. Motion to Correct Transcripts

Finally, McDade filed a postconviction motion seeking to correct various minutiae in the various transcripts. The trial court denied the motion—correctly—because McDade was being represented by postconviction counsel. *See* ***State v. Redmond***, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996). Assuming without deciding that McDade's requested corrections accurately identify transcription errors, as opposed to correct transcription of speaker error, there is no arguably meritorious issue from the trial court's failure to order the transcripts corrected.

The need for accurate transcripts actually goes to a defendant's appeal rights; a defendant's right to appeal requires that he or she "be furnished a full transcript—or a *functionally equivalent substitute* that, in a criminal case, beyond a reasonable doubt, portrays in a way that is meaningful to the particular appeal exactly what happened in the court at trial." ***State v. Perry***, 136 Wis. 2d 92, 99, 401 N.W.2d 748 (1987) (emphasis added). Whether a transcript is sufficient for appellate use is a matter of law for the appellate courts. *See* ***id.*** at 97. "The usual remedy where the transcript deficiency is such that there cannot be a meaningful appeal is reversal with directions that there be a new trial." ***Id.*** at 99.

But "not all deficiencies in the record nor all inaccuracies require a new trial." ***Id.*** at 100. "An inconsequential omission or a slight inaccuracy in the record which would not materially affect appellate counsel's preparation of the appeal or which would not contribute to an appellate court's improper determination of an appeal do not rise to such magnitude as to require *ipso facto* reversal." ***Id.***

We have reviewed McDade's list of items for revision. Those for which he seeks correction are inconsequential to the trial, verdict, or this appeal. Accordingly, there is no arguably meritorious issue arising from any transcript errors.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Patrick Flanagan is relieved of further representation of McDade in this matter. *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