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May 6, 2021

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

2019AP1259-CRNM State of Wisconsin v. Jeffrey L. Young (L.C. # 2017CF1606)
2019AP1260-CRNM State of Wisconsin v. Jeffrey L. Young (L.C. # 2017CF1629)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, 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).

Attorney Michael Covey, appointed counsel for Jeffrey Young, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Young was sent a copy of the report and filed a

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

response, and counsel filed a supplemental no-merit report. In addition, counsel filed a second supplemental no-merit report in response to this court's order seeking further input from counsel. Upon consideration of the report, Young's response, the supplemental reports, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Young was charged in two circuit court cases with multiple offenses arising out of abusive incidents that caused injuries to the victim, F.C. The cases were joined and proceeded to trial. The jury found Young guilty of seven offenses: (1) mayhem, for cutting F.C.'s tongue; (2) strangulation and suffocation; (3) aggravated battery; (4) negligent handling of a weapon; (5) disorderly conduct while possessing or threatening to use a dangerous weapon; (6) a second count of disorderly conduct; and (7) a third count of disorderly conduct. The circuit court imposed sentences resulting in a total global sentence of fourteen years consisting of seven years of initial confinement and seven years of extended supervision.

The no-merit report addresses sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. We will not overturn a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Without reciting all of the evidence here, we are satisfied that it was sufficient to support each of Young's convictions.

We acknowledge that F.C. testified that she had blocked out or did not recall most of the conduct for which Young stood accused. For example, at one point F.C. testified: "I blocked

most of this out. I don't remember this stuff that you say I should remember. I don't know how much of this is true and how much of it isn't." However, there was ample other evidence to support Young's convictions. This evidence included numerous photographs documenting F.C.'s injuries, F.C's statements to other witnesses, and testimony by a forensic nurse examiner and a physician who examined F.C. Furthermore, in the context of this other evidence, the jury could have reasonably found that F.C.'s testimony was also incriminating. The jury could have reasonably found that Young's abuse of F.C. was so traumatic that she could not recall it or, alternatively, that F.C. was reluctant to testify against Young because she was afraid of him or otherwise motivated to cover up for his crimes.

In his response to the no-merit report, Young contends that the evidence was insufficient because it was based on circumstantial evidence and inadmissible hearsay. This contention is wholly lacking in merit. First, "[i]t is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." ***Id.*** Second, when we review sufficiency of the evidence, we consider "all of the evidence that was submitted at trial, including any evidence that was erroneously admitted." ***State v. LaCount***, 2008 WI 59, ¶25, 310 Wis. 2d 85, 750 N.W.2d 780.

Moreover, we conclude that there would be no arguable merit to a claim that Young's convictions were based on inadmissible hearsay. The circuit court properly admitted F.C.'s statements to other witnesses as prior inconsistent statements—which are not hearsay, *see* WIS. STAT. § 908.01(4)(a)1.—or as excited utterances, an exception to the general rule against admitting hearsay, *see* WIS. STAT. § 908.03(2).

Young makes an additional sufficiency of the evidence claim that relates only to the mayhem charge. Specifically, Young claims that the evidence was insufficient on the mayhem charge because there was no evidence that the cut to F.C.'s tongue caused great bodily harm, an element of mayhem. For the reasons we now explain, we conclude that there is no arguable merit to this claim.

"Great bodily harm" is defined as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14). The final phrase, "other serious bodily injury" was added to the definition to broaden its scope and includes "bodily injuries which [are] serious, although not of the same type or category as those recited in the statute." ***La Barge v. State***, 74 Wis. 2d 327, 332, 246 N.W.2d 794 (1976).

The evidence was sufficient to satisfy this definition of great bodily harm. The forensic nurse examiner who examined F.C. after Young cut F.C.'s tongue testified that F.C. was barely able to move her mouth, and unable to move her tongue such that the nurse examiner could not examine underneath it. Additionally, the physician who examined F.C. two days later testified that F.C. was admitted to the hospital for an aspirin overdose and was experiencing significant pain in her mouth. The physician was able to examine underneath F.C.'s tongue and testified that he found a four-centimeter laceration on its underside, "right at the base of the tongue and the tissue that connects the tongue to the floor of the mouth." Based on this testimony, the jury could reasonably conclude that the cut to F.C.'s tongue caused "protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." *See* WIS. STAT. § 939.22(14).

In his response to the no-merit report, Young points out that the forensic nurse examiner testified that F.C. had bitten her tongue, not that there was a cut to F.C.'s tongue. However, inconsistencies in the evidence do not make the evidence insufficient. "It is the jury's job to resolve any conflicts or inconsistencies in the evidence." ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. Further, a close examination of the evidence reveals that there is no real inconsistency. The nurse examiner's testimony that F.C. bit her tongue appears to have been based on F.C.'s self-reporting and on the nurse examiner's limited observations of the top of L.C.'s tongue. The most reasonable inference from the evidence as a whole is that the nurse examiner was unable to see the cut underneath F.C.'s tongue because F.C. could not lift or otherwise move her tongue at that time. The nurse examiner testified that patients were usually asked to touch the tips of their tongues to the tops of their mouths to facilitate examination under the tongue, but the nurse examiner was "unable to do that [with F.C.] because of her pain."

Young asserts that juries in other cases have *not* found great bodily harm when presented with evidence of injuries more serious than the cut to F.C.'s tongue. Young is incorrect. The juries in the cases upon which Young relies found great bodily harm. *See* ***Flores v. State***, 76 Wis. 2d 50, 52-53, 250 N.W.2d 720 (1977); *overruled on other grounds by* ***State v. Richards***, 123 Wis. 2d 1, 365 N.W.2d 7 (1985); ***La Barge***, 74 Wis. 2d at 328, 342. Young may mean to

argue that these cases show that the evidence of great bodily harm here was insufficient as a matter of law, such that the question should not have gone to the jury. If so, we disagree.[2]

Young next contends that the circuit court committed reversible error by allowing the physician who treated F.C. to testify as a fact witness, even though the circuit court had excluded the physician's underlying treatment records based on the State's failure to timely disclose them. Counsel addresses this issue in his second supplemental no-merit report and concludes that it has no arguable merit. We agree with counsel's conclusion because there was no basis for the defense to claim that it was surprised by the physician's testimony. The physician was on the State's witness list, and the record shows that the defense received a previous disclosure from the State referencing the physician.

Our review of the record discloses no other issues of arguable merit with respect to events before or during trial, including any issue relating to motions in limine, jury selection, the opening statements or closing arguments, Young's decision not to testify, and the jury instructions. In his response to the no-merit report, Young asserts that his convictions present a multiplicity or duplicity issue. We see no arguable merit to such a claim. Likewise, we see no arguable merit to any remaining claims that Young makes regarding the evidence or the jury's verdicts.

[2] Young cites an unpublished per curiam opinion in which this court concluded as a matter of law that biting off a small portion of a victim's earlobe was not great bodily harm. *See* ***State v. Slack***, No. 1991AP377-CR, unpublished slip. op (WI App Jan. 16, 1992). Unpublished per curiam opinions cannot be cited as precedent. *See* WIS. STAT. RULE 809.23(3). Further, even if ***Slack*** could be cited for this purpose, it would not provide a basis to challenge the sufficiency of the evidence against Young. The court in ***Slack*** focused on whether the evidence of damage to the victim's earlobe was a serious permanent disfigurement. Here, in contrast, we conclude that the evidence was sufficient to support a finding of "protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." *See* WIS. STAT. § 939.22(14).

In his response to the no-merit report, Young claims that trial counsel was ineffective in numerous respects. We now discuss those claims. We agree with no-merit counsel that the claims have no arguable merit.

To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Further, a defendant is not entitled to a postconviction hearing on a claim for ineffective assistance unless the defendant alleges sufficient facts to "allow the reviewing court to meaningfully assess his or her claim." ***State v. Bentley***, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996). Stated otherwise, a hearing is not required if a postconviction motion fails to "raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Young claims that trial counsel was ineffective by failing to investigate certain Manitowoc police records. Young alleges that these records would have shown that, shortly after he allegedly injured F.C., he and F.C. were stopped by police in Manitowoc, and the police observed no signs of F.C. being injured or in distress. No-merit counsel addresses this issue in the second supplemental no-merit report and concludes that it has no arguable merit. We agree

based on no-merit counsel's representation that the police records show that the traffic stop occurred on a different date than the date Young claimed.

Young claims that trial counsel was ineffective by failing to honor his speedy trial demand. We see no arguable merit to this issue. The record shows that trial counsel filed a speedy trial demand, and that Young was tried within the ninety-day time period that the statute requires. *See* WIS. STAT. § 971.10(2)(a). Young may mean to argue that counsel was ineffective by failing to file the speedy trial demand sooner. If so, Young makes no allegations that could support a claim of ineffective assistance of counsel on this basis.

Young claims that trial counsel was ineffective by failing to inform him of the State's joinder motion. Young asserts that, had counsel informed him of the motion, he would have requested that counsel object to joinder. However, based on the circumstances of this case, an objection to joinder would have lacked merit. *See* ***State v. Linton***, 2010 WI App 129, ¶¶14-15, 329 Wis. 2d 687, 791 N.W.2d 222 (setting forth standards for joinder). Accordingly, we see no basis to argue that trial counsel was ineffective with respect to joinder.

Young claims that trial counsel was ineffective by failing to move for a mistrial based on testimony by F.C. about Young being in jail. There is no arguable merit to this issue. The testimony was not a clear reference to Young being in jail. Rather, F.C. testified that Young was "gone" because of his arrest. It is not reasonable to argue that this testimony was grounds for a mistrial.

Young claims that trial counsel was ineffective by failing to request lesser included offense jury instructions. However, Young does not allege which instructions counsel should

have requested. We see no arguable basis to contend that trial counsel was ineffective on this basis.

Young also claims the trial counsel was ineffective by failing to: (1) obtain phone records that, according to Young, might have pointed to alternative suspects; (2) obtain and use voice messages that would have been exculpatory and cast doubt on F.C.'s credibility; (3) present DNA evidence showing that others had contact with F.C. around the time of the incidents; (4) seek DNA testing of a knife that the State alleged Young used to cut F.C.; and (5) call witnesses to testify in Young's defense. We see no arguable basis to pursue any of these claims. Young does not sufficiently allege how any of these purported errors by counsel resulted in prejudice. Young provides no plausible basis to believe that, with further investigation or witnesses, the defense might have shown that someone else caused F.C.'s injuries.

We turn to sentencing. The no-merit report addresses whether there is any arguable merit to challenging Young's sentences. We agree with counsel that there is not. The circuit court discussed the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not rely on any improper factors. The sentences were within the maximum allowed. We see no other arguable basis for Young to challenge his sentences.

In his response to the no-merit report, Young claims that the circuit court erred by allowing evidence at sentencing that was not admissible and not admitted at trial. Young also claims that trial counsel was ineffective by not objecting to this evidence. We see no arguable merit to these claims. "The rules of evidence do not apply at sentencing, and a sentencing court

will generally know more about the crime and its circumstances than will the jury." ***State v. Marhal***, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992) (internal citation omitted).

Our review of the record discloses no other potential issues.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Michael Covey is relieved of any further representation of Jeffrey Young 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