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DISTRICT I

November 16, 2021

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Jermel A. Robertson
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You are hereby notified that the Court has entered the following opinion and order:

2020AP581-CRNM State of Wisconsin v. Jermel A. Robertson (L.C. # 2014CF2937)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jermel A. Robertson appeals a judgment of conviction entered after a jury found him guilty of substantial battery causing bodily harm, a Class I felony, and disorderly conduct, a Class B misdemeanor. The circuit court found that he committed each crime as a repeat offender and as an act of domestic abuse. The circuit court imposed an evenly bifurcated four-year term of imprisonment for the felony and a consecutive, evenly bifurcated two-year term of imprisonment for the enhanced misdemeanor. The circuit court additionally imposed a domestic abuse surcharge for each conviction, found that Robertson was not eligible for the Wisconsin

substance abuse program (SAP) or the challenge incarceration program (CIP) and awarded him the 491 days of credit that he requested for his presentence confinement.

Robertson's first appellate counsel, Attorney Mitchell Barrock, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20), and ***Anders v. California***, 386 U.S. 738 (1967).[1] Robertson filed multiple responses raising a host of claims that he contends warrant further postconviction proceedings. Attorney Barrock filed a supplemental no-merit report in reply, then withdrew for reasons unrelated to this appeal. Robertson's successor appellate counsel, Attorney Dustin C. Haskell, notified us that he would rest on Attorney Barrock's submissions. Upon review of the no-merit reports, Robertson's responses, and an independent review of the record as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm.

The State filed a criminal complaint on July 9, 2014, charging Robertson with substantial battery, criminal trespass to dwelling; and disorderly conduct, all as acts of domestic abuse and all as a repeat offender. According to the complaint, Robertson arrived uninvited at the home of his former girlfriend, J.V., at approximately 7:45 a.m. on July 3, 2014. J.V. and a guest, J.M.R., were in the home at the time. Robertson entered without permission, asked for his belongings, and then battered J.V. J.M.R. and J.V. both gave statements to police about the incident. J.M.R. said that he heard J.V. yelling for help soon after Robertson entered the home. J.V. said that when she told Robertson to leave the home, he punched her in the face and kicked her numerous times in the head and upper body. She sustained multiple injuries, including a laceration above

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

her left eye, a fractured orbital socket, broken bones, and swelling to her eye and mouth. The State went on to allege that Robertson had been convicted of a felony within the previous five years, and the State attached a certified copy of a judgment of conviction showing that on May 4, 2011, Robertson was convicted of fleeing an officer, a Class I felony.

In January 2018, police took Robertson into custody on a warrant in this matter.[2] He entered pleas of not guilty and requested a jury trial.

On the morning of Robertson's April 2018 trial date, Robertson, by counsel, moved for an adjournment to explore the issues that Robertson had raised in a letter to the circuit court. The circuit court granted the motion, and the matter was rescheduled for July 2018. At the final pretrial that month, his defense counsel moved to withdraw based on a conflict of interest that involved another case in the public defender's office. The circuit court granted the motion and, following appointment of new counsel, the matter was scheduled for trial in October 2018. On the day of trial, however, the State requested an adjournment because J.V. had refused to come to court. The circuit court granted the request, rescheduled the trial for January 14, 2019, and ordered a body attachment for J.V. When J.V. appeared in court a few weeks later, the circuit court released her on a signature bond and ordered her to return on January 14, 2019. J.V. appeared as ordered, and the trial commenced as scheduled. At its conclusion on January 15, 2019, the jury found Robertson guilty of substantial battery and disorderly conduct, but not guilty of criminal trespass to property. On June 13, 2019, the case proceeded to sentencing.

[2] The arrest warrant for Robertson reflects that it was returned on January 22, 2018, the day that he made his initial appearance. Documents that Robertson filed on his own behalf while the matter was pending in the circuit court suggest that he was arrested on January 16, 2018.

We begin our review by considering an issue that Robertson raises in response to the no-merit report, specifically, whether he can pursue an arguably meritorious claim that his trial attorneys were ineffective for failing to request a speedy trial. Robertson contends that the State would not have been able to convict him without J.V.'s testimony, and therefore if counsel had demanded a speedy trial, he would have been acquitted or the case would have been dismissed when J.V. failed to appear for his October 2018 trial date.

A defendant who claims that counsel was ineffective must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether any deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. To demonstrate prejudice, "[t]he 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. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

Forgoing a speedy trial demand in this case was not prejudicial as a matter of law. When a defendant demands a speedy trial under WIS. STAT. § 971.10, a trial on a misdemeanor must begin within sixty days, and a trial on a felony must begin within ninety days. *See* § 971.10(1)-(2); ***State v. Hyndman***, 170 Wis. 2d 198, 207, 488 N.W.2d 111 (Ct. App. 1992). The only remedy for a statutory violation, however, is release on bond pending trial. *See*

§ 971.10(4);[3] *see also* ***State v. Carson***, No. 2012AP2616-CR, unpublished slip op. ¶17 (WI App Sept. 17, 2013).[4] Robertson was granted a signature bond at his initial appearance on January 22, 2018, and the signature bond was not revoked until he was remanded into custody following the circuit court's receipt of the jury verdicts on January 15, 2019.[5] Because Robertson would not have received an additional remedy had he invoked his statutory right to a speedy trial, any claim that he was prejudiced by trial counsels' failure to invoke that right would lack arguable merit.

We also conclude that Robertson could not pursue an arguably meritorious claim that he suffered a violation of his constitutional right to a speedy trial. Before a defendant can pursue such a claim, the defendant must suffer a delay that is long enough to be presumptively prejudicial, *see* ***State v. Borhegyi***, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998), and a delay of a year between arrest and trial is the "bare minimum needed to trigger the presumption," *see* ***id.*** at 518. In calculating the period of delay, courts do not count delays caused by the defendant, nor do courts consider delays that are "intrinsic to the case, such as witness unavailability." *See* ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324.

[3] WISCONSIN STAT. § 971.10(4) further provides that when a defendant is discharged from custody under that section, the obligations of the defendant's bond or other conditions of release continue until modified or until the bond is released or the conditions removed. *See* ***id.***

[4] Pursuant to WIS. STAT. RULE 809.23(3), an authored but unpublished opinion issued on or after July 1, 2009, may be cited for its persuasive value.

[5] In light of the signature bond that Robertson signed in this matter, the basis for the 491 days of presentence credit that his trial counsel successfully requested at sentencing is unclear. The time period from January 15, 2019, when he was remanded after trial, until his June 13, 2019 sentencing date, was 149 days. Because the record does not suggest any basis on which Robertson is aggrieved by the sentence credit awarded, however, we do not discuss this matter any further. *See* WIS. STAT. RULE 809.10(4) (an appeal brings before this court nonfinal orders and rulings adverse to the appellant).

Rather, a court considers only delays attributable to the State. *See* ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976). Here, the trial began exactly one year after Robertson's arrest in January 2018, but many months of the one-year delay were directly attributable to the defense, including three months of delay occasioned by Robertson's request to adjourn his trial in April 2018, and three additional months occasioned by appointed counsel's motion to withdraw in July 2018. Because the remaining delay was only six months, and because even that delay appears due to matters intrinsic to the case, Robertson cannot pursue an arguably meritorious claim that he was denied the constitutional right to a speedy trial. *See* ***Borhegyi***, 222 Wis. 2d at 518.

We next consider whether Robertson could pursue an arguably meritorious claim that he was denied his right to a public trial when the circuit court conducted a colloquy in chambers with one of the potential jurors. We are satisfied that he could not do so. The circuit court questioned Robertson about the matter, and he said that he was "willing to waive the public right to access to the response of [the] juror." A defendant may give up the right to a public voir dire if the defendant is aware that the judge has excluded the public from the procedure and does not object. *See* ***State v. Pinno***, 2014 WI 74, ¶¶6-7, 356 Wis. 2d 106, 850 N.W.2d 207. There is no arguable merit to further pursuit of this issue.

Predecessor appellate counsel states in the no-merit report that no arguably meritorious issues arose in regard to pretrial motions, jury instructions, or opening and closing arguments of

counsel. We agree with that assessment.[6] Further discussion of these aspects of the record is not required.

We next consider whether Robertson could pursue an arguably meritorious claim that the State failed to present sufficient evidence to support the guilty verdicts. Before the jury could find Robertson guilty of substantial battery in violation of WIS. STAT. § 940.19(2) (2013-14), the State was required to prove beyond a reasonable doubt that Robertson: (1) caused substantial bodily harm to J.V.; and (2) intended to cause bodily harm to J.V. *See* ***id.***; *see also* WIS JI—CRIMINAL 1222A. Additionally, because Robertson successfully sought a self-defense instruction, the State was required to prove beyond a reasonable doubt that he did not act lawfully in self-defense. *See* WIS. STAT. § 939.48 (2013-14); *see also* WIS JI—CRIMINAL 1222A. Before the jury could find Robertson guilty of disorderly conduct in violation of WIS. STAT. § 947.01 (2013-14), the State was required to prove beyond a reasonable doubt that: (1) Robertson engaged in violent, abusive, or otherwise disorderly conduct; and (2) his conduct,

[6] Predecessor appellate counsel's no-merit report includes a paragraph discussing a "***McMorris*** motion" in this case. In ***McMorris v. State***, 58 Wis. 2d 144, 150-51, 205 N.W.2d 559 (1973), our supreme court held that a defendant who has established a basis to raise the issue of self-defense may present evidence that he or she was aware of prior acts of violence committed by the alleged victim of an assault. Although the circuit court in this case permitted Robertson to present the issue of self-defense to the jury, our review of the record does not reveal an accompanying ***McMorris*** motion. Similarly, predecessor appellate counsel's discussion of a pretrial ruling addressing "other acts evidence" and the "greater latitude rule" does not correspond to any portions of the record that we can identify. It thus appears that predecessor appellate counsel misremembered the record in several respects when preparing the no-merit report in this case. Although these lapses concern us, as does successor appellate counsel's silence in regard to these matters, we are satisfied from our independent review of the record that Robertson's appellate attorneys reached the correct conclusion, namely, that this case does not present any arguably meritorious issues for appeal. We take this opportunity, however, to remind appellate counsel that we expect rigorous attention to detail in no-merit reports and an accurate and thorough discussion of the proceedings.

under the circumstances as they then existed, tended to cause or provoke a disturbance. *See* ***id.***; *see also* WIS JI—CRIMINAL 1900.

The State called J.V. to testify as the first of its two witnesses. She said that she and Robertson were formerly romantic partners and had lived together in the past, but the relationship ended before July 3, 2014. That morning, she was in her bedroom with J.M.R. when Robertson arrived at the home uninvited and entered the bedroom. When she told him to leave, he struck her in the face, knocking her to the floor, and then kicked her repeatedly. She said that J.M.R. ran for help, and in due course the police and an ambulance arrived. She told the jury that as a result of Robertson's actions she suffered multiple broken ribs and a fractured eye socket. She further testified that after Robertson left her home, she discovered that her car had a broken windshield and a dent in the hood. J.V. identified and discussed the medical records from her hospital stay, photographs taken of her home and car after Robertson left the premises on July 3, 2014, and photographs that were taken of her while she was hospitalized. The pictures and J.V.'s hospital records were admitted as exhibits.

The State also presented testimony from Milwaukee Police Officer Scott Lemke. He said that at 7:49 a.m. on July 3, 2014, police received a call for service at an address in the 2200 block of North 15th Street, and officers were dispatched approximately two minutes later. He testified that he arrived at approximately 8:11 a.m., after other officers had already responded. He said that he canvassed the area for witnesses but, although a few people he spoke to said that they had heard a disturbance, no one had any specific information. He described taking pictures at the scene, and he described taking pictures of J.V. at the hospital.

Robertson testified on his own behalf and described the events of July 3, 2014, somewhat differently than did the State's witnesses. He said that J.V. told him that he could get his belongings from her home on July 3, 2014, so he called his sister to pick him up from work sometime between 8:00 a.m. and 9:00 a.m. that morning. When his sister dropped him off at J.V.'s home, three people opened the door to admit him. The door closed, and then he was "grabbed from behind by [J.V.'s] Uncle Carl" or by J.M.R. One of the men held him up in the air and tried "to tie up [his] feet because [he] was on probation at the time and [J.V.] was telling them that [he] had violated his probation." He said that they "had him up in the air" and then moved him "throughout the house from the dining room to the living room." He said that while they tried to tie him down, he "kicked [J.V.] and [J.M.R]." He admitted that when he arrived at the home on July 3, 2014, J.V. did not have the injuries depicted in the photographs taken of her at the hospital, and he admitted that it was "possible" that he caused the injuries while he was "up in the air" kicking J.V. and her companions.

On cross-examination, Robertson said that he didn't know how long he was in the home on July 3, 2014, but that he and his assailants "twirled on the couch for maybe two minutes before the pepper spray came out." He went on to say that a fourth person, a woman, was also in the home and that she used pepper spray during the incident.

Robertson confirmed that he was required to report the events of July 3, 2014, to his probation agent, and he acknowledged that he did not do so, specifically stating that he "didn't notify anyone about the situation." On redirect examination, he said that when he escaped from J.V.'s home, he returned to work and that "if [he was] not mistaken, [he] dialed 911."

The State called Lemke in rebuttal. He testified that pepper spray has an odor and that he did not smell pepper spray when he arrived at J.V.'s home on July 3, 2014.

When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that ... no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The finder of fact, not this court, considers the weight of the evidence and the credibility of the witnesses and resolves any conflicts in the testimony. *See* ***id.*** at 503.

The jury here had an opportunity to consider and evaluate evidence from both the State and from Robertson in regard to whether the State proved the elements of substantial battery and disorderly conduct and whether the State proved that Robertson did not act in self-defense. In light of the evidence summarized above, any challenge to the sufficiency of that evidence would be frivolous within the meaning of ***Anders***.

Robertson asserts in response to the no-merit report that he could pursue an arguably meritorious claim that J.V. should not have been permitted to testify because, he alleges, she suffers from PTSD and other unspecified mental health problems. However, "a fundamental tenet of our modern legal system, is that the public has a right to every person's evidence," unless the potential witness is protected by a privilege. *See* ***State v. Gilbert***, 109 Wis. 2d 501, 505, 326 N.W.2d 744 (1982) (some punctuation omitted); *see also* WIS. STAT. § 906.01. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Next, Robertson alleges that he could pursue an arguably meritorious claim that his trial counsel was ineffective for failing to impeach J.V. regarding her legal name. According to Robertson, her testimony that her name was "J.V." reflected badly on her character and truthfulness because she changed her surname when she divorced her husband in 2007, and thereafter she was "J.G." The record shows that trial counsel's performance was not deficient as a matter of law. The circuit court directed all parties to use the name "J.V." in reference to this witness. Moreover, when the record reveals a strategic basis for trial counsel's actions, we will conclude that those actions are objectively reasonable. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶¶31-32. Here, any effort to question J.V.'s truthfulness based on her use of more than one surname would have raised similar questions about Robertson. On direct examination, he identified himself as "Jermel Robinson," and on cross-examination he testified that his name was "Jermel Robertson." Further, when the trial was adjourned in October 2018, defense counsel advised the circuit court that the parties were not certain about Robertson's surname and that the jail was holding him as "Robinson."[7] In sum, trial counsel's actions were objectively reasonable in avoiding any suggestion that use of multiple surnames was a reason to doubt the credibility of a witness. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Robertson next asserts that he has an arguably meritorious claim that his trial counsel was ineffective for failing to impeach J.V. in regard to her testimony that she had not been drinking on the morning of July 3, 2014. The record shows that in fact trial counsel did impeach that testimony, establishing by use of her medical records that when J.V. was admitted to the hospital that morning she had a blood alcohol level of .167%. Lemke then testified that such a blood

[7] Four aliases for Robertson are listed on the judgment of conviction in this case.

alcohol level exceeds the "drunk driving limit[]" and would render J.V. too intoxicated to drive. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Robertson next asserts that he has arguably meritorious claims that his trial counsel was ineffective for failing to present evidence of the body attachment that the circuit court ordered when J.V. did not appear for the October 2018 trial date and the signature bond that the circuit court subsequently required J.V. to sign to ensure her appearance. Robertson asserts that this evidence would show the jury that J.V.'s testimony was coerced. Trial counsel could reasonably conclude, however, that a jury would infer from J.V.'s reluctance to testify that she cared about Robertson and did not want to help convict him, thus heightening the credibility of her incriminating testimony. Because trial counsel's actions were objectively reasonable, *see* ***Kimbrough***, 246 Wis. 2d 648, ¶¶31-32, further pursuit of this claim would lack arguable merit.

Robertson next suggests that he has an arguably meritorious claim that trial counsel was ineffective for failing to present evidence that J.V. had admitted making a false claim of abuse in the past. In support, Robertson points to a report prepared by the State Public Defender's in-house investigator. There, the investigator documented making an open records request for 911 calls placed by J.V. because the "client stated that she made a false report of abuse" and that "he was arrested but never charged because 'the police knew she was lying.'" Robertson tells us that "the client is J.V./witness/alleged victim." This allegation is patently meritless. As is too obvious to discuss, the State Public Defender's client was Robertson. Further, the investigator's report reflects that a prior battery allegation against Robertson did not lead to charges because the State concluded that it lacked sufficient evidence to proceed. "[T]he fact that [an accused] was never prosecuted in connection with [a complainant's] allegations, in and of itself, does not support a finding that the allegations were untruthful." ***State v. Ringer***, 2010 WI 69, ¶40, 326

Wis. 2d 351, 785 N.W.2d 448. To the contrary, a prosecutor has broad discretion to determine whether to bring charges against an accused person, and may choose not to do so if the prosecutor believes that he or she cannot prove the allegations beyond a reasonable doubt. *See* ***id.*** The law recognizes that "[n]ot all the guilty are convictable[.]" *See* ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶31, 271 Wis. 2d 633, 681 N.W.2d 110. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Robertson next faults his trial counsel for failing to obtain reports that, he alleges, would show that J.V. was in a car accident at some unspecified time because, he says, his "defense was also that ... [J.V.] was involved in a car accident." The record shows that Robertson was not prejudiced by a failure to obtain records documenting an alleged car accident. While Robertson may have contemplated grounding his defense on a claim that J.V. received her injuries in a car accident, he admitted during cross examination that when he arrived at J.V.'s home on July 3, 2014, she did not have the injuries for which she was hospitalized shortly after he left. Moreover, the materials that Robertson submitted to us with his responses show that his appellate counsel sought records from the Department of Motor Vehicles and determined that no relevant accident reports existed. Further pursuit of this issue would lack arguable merit.

Robertson next asserts that his trial counsel was ineffective for failing to obtain and play for the jury the 911 call that he alleges he made after leaving J.V.'s home on July 3, 2014. Nothing in the record supports Robertson's claim that he called 911 on the day of the incident. The police dispatch summary in the record does not reflect such a call, and Robertson himself testified during his cross-examination that he "didn't notify anyone about the situation" before offering his uncertain testimony that he may have called 911 "if [he was] not mistaken." Even assuming that he made such a call, his attorney could not have played the recorded call for the

jury. Anything exculpatory that Robertson said would have been inadmissible hearsay if he offered it on his own behalf. *See* ***State v. Ziebart***, 2003 WI App 258, ¶8 n.4, 268 Wis. 2d 468, 673 N.W.2d 369; *see also* WIS. STAT. §§ 908.01, 908.02. Because Robertson shows no prejudice from the alleged deficiency, further pursuit of this issue would lack arguable merit. *See* ***Strickland***, 466 U.S. at 694.

Robertson next contends that his trial counsel was ineffective for failing to subpoena the people that, according to Lemke's testimony, heard a disturbance on July 3, 2014. Robertson asserts that he was entitled to confront and cross-examine those unnamed witnesses. The record does not suggest any possibility that Robertson was prejudiced by this alleged failure. Robertson admitted that a disturbance occurred in J.V.'s home and did not dispute that police and an ambulance arrived after he left. There is no merit to further pursuit of this claim. *See* ***id.***

Robertson next contends that he has an arguably meritorious claim that his trial counsel was ineffective for failing to subpoena J.M.R. The record does not suggest any reason to believe that J.M.R. would have offered testimony helpful to Robertson. Trial counsel was objectively reasonable in not calling a witness whose pretrial statements supported J.V.'s account. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶¶31-32. There is no merit to further pursuit of this claim.

Robertson next contends generally that his trial counsel "failed to subpoena [his] witnesses" and that, although he repeatedly asked his trial counsel to subpoena witnesses, he "was told that [the witnesses] were useless." Nothing in the materials or in Robertson's submissions supports a claim that trial counsel failed to call available witnesses who would have offered favorable testimony on Robertson's behalf. Rather, Robertson's submissions reflect that his trial counsel searched for witnesses with the assistance of a private investigator but concluded

that the witnesses were not helpful. This court "will not 'second-guess the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Hunt***, 2014 WI 102, ¶55, 360 Wis. 2d 576, 851 N.W.2d 434 (citation and brackets omitted). Accordingly, further pursuit of this issue would lack arguable merit.

Robertson next asserts that he has an arguably meritorious claim that the State failed to prove that he committed each crime as a habitual offender because he never admitted a prior conviction and because the prosecutor misstated the date of the prior conviction when describing it at sentencing. The determination of whether a defendant committed a crime as a repeat offender rests with the circuit court. *See* ***State v. LaCount***, 2008 WI 59, ¶52, 310 Wis. 2d 85, 750 N.W.2d 780. A person is a habitual offender if, as relevant here, the person was convicted of a felony during the five-year period immediately preceding the commission of the crime for which the person is being sentenced. *See* WIS. STAT. § 939.62(2). The best evidence of a prior conviction is normally a certified copy of a judgment of conviction. *See* ***State v. Saunders***, 2002 WI 107, ¶55, 255 Wis. 2d 589, 649 N.W.2d 263. Here, the State attached a certified copy of a judgment of conviction to the criminal complaint. That certified judgment reflects that on May 4, 2011, Robertson was convicted of a felony. The circuit court indicated that it would take judicial notice of the prior conviction. Further pursuit of this issue would lack arguable merit.

We next consider whether Robertson could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of

the [circuit] court in passing sentence[.]" ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offenses, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that are relevant in imposing sentence and the weight to assign to each relevant factor. *See* ***Stenzel***, 276 Wis. 2d 224, ¶16.

Here, the circuit court indicated that deterrence, punishment, and community protection were the primary sentencing goals, and the circuit court discussed appropriate factors that it viewed as relevant to achieving those goals. The circuit court considered the gravity of the offenses, finding that the injuries Robertson inflicted were "very significant" and that he continued to attack J.V. while she was defenseless. The circuit court considered the need to protect the public, explaining that members of the community "must make sure that people respect the law and the safety of others."

The circuit court then turned to Robertson's character. The circuit court acknowledged that while Robertson was incarcerated and awaiting sentencing, he and a second inmate came to the aid of a corrections officer who was being assaulted by another prisoner. The circuit court

thanked Robertson for bringing the matter to the court's attention and praised him for his actions, finding that they revealed "good aspects to [his] character." The circuit court determined, however, that Robertson failed to acknowledge the "bad aspects." The circuit court found that Robertson attempted to avoid responsibility for his crimes by not reporting the events of July 3, 2014, to the Department of Corrections even though he was required to make a report under the rules of the community supervision that he was serving at that time. The circuit court also found that Robertson then evaded the criminal justice system for nearly four years. The circuit court was most troubled, however, by Robertson's trial testimony, which the circuit court found was not credible and "made no sense at all." The circuit court explained that, while Robertson was entitled to exercise his right to testify in his own defense, he did not have "the right to commit perjury." The circuit court went on to find that Robertson "did lie" and did "testify[] falsely at the trial, and that shows a lack of good character."

The circuit court identified the factors it considered in fashioning an appropriate disposition. The factors were proper and relevant. *See* ***Gallion***, 270 Wis. 2d 535, ¶43 & n.11. Accordingly, the circuit court properly exercised its sentencing discretion. Moreover, the sentences are not unduly harsh. Robertson faced seven years and six months of imprisonment and a $10,000 fine for substantial battery as a repeat offender, and he faced two years of imprisonment and a $1,000 fine for disorderly conduct as a repeat offender. *See* WIS. STAT. §§ 940.19(2), 939.50(3)(i), 939.62(1)(b), 947.01(1), 939.51(3)(b), 939.62(1)(a) (2013-14). The aggregate six-year term of imprisonment that the circuit court imposed was significantly less than the nine and one-half years of imprisonment and $11,000 in fines that he faced upon conviction. Robertson therefore cannot mount an arguably meritorious claim that his sentences

are excessive or shocking.[8] *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173.

Robertson emphasizes that he received a longer aggregate sentence than did the inmate who joined him in coming to the aid of a corrections officer, and he argues that he therefore has an arguably meritorious claim that the circuit court sentenced him in violation of his right to equal protection. Pursuit of this claim would lack arguable merit. "Disparity alone does not amount to a denial of equal protection." ***Ocanas v. State***, 70 Wis. 2d 179, 189, 233 N.W.2d 457 (1975). When "[t]he sentence imposed upon the defendant was based upon relevant factors with no improper considerations on the part of the [circuit] court" and "[t]he sentence was not excessive[,] '[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one.'" ***Id.*** (citation omitted).

We next conclude that there is no arguable merit to a claim that the circuit court improperly imposed a domestic abuse surcharge for each conviction in this case. As relevant here, the domestic abuse surcharge under WIS. STAT. § 973.055 is implicated if a circuit court imposes a sentence on an adult offender for a violation of WIS. STAT. § 940.19 or WIS. STAT. § 947.01(1), and "[t]he court finds that the conduct constituting the violation ... involved an act by the adult [defendant] against ... an adult with whom the adult [defendant] resides or formerly resided[.]" *See* § 973.055(1)(a). J.V. testified that she formerly lived with Robertson, and he

[8] Robertson suggests that the circuit court imposed an illegal sentence by imposing a year of extended supervision as a component of his two-year misdemeanor sentence. There is no merit to this suggestion. When, as here, the base penalty for a misdemeanor is "increased to not more than 2 years" pursuant to WIS. STAT. § 939.62(1)(a), an evenly bifurcated two-year term of imprisonment is lawful. *See* ***State v. Lasanske***, 2014 WI App 26, ¶¶2-3, 12, 353 Wis. 2d 280, 844 N.W.2d 417.

gave similar testimony. A challenge to the domestic abuse surcharges here would be frivolous within the meaning of ***Anders***.

Last, we conclude that Robertson cannot pursue an arguably meritorious claim that the circuit court erroneously found him ineligible for the SAP and the CIP. Upon successful completion of either prison program, an inmate's remaining initial confinement time is normally converted to time on extended supervision. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b)1., 302.05(1)(am), 302.05(3)(c)2.a.; *but see* ***State v. Gramza***, 2020 WI App 81, 395 Wis. 2d 215, 952 N.W.2d 836. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g)-(3m).[9] Here, the circuit court indicated that the sentences imposed were necessary to ensure Robertson's future compliance with the law. Moreover, the circuit court found when it addressed Robertson's postconviction claim for sentence adjustment under WIS. STAT. § 973.195, that "it would unduly depreciate the seriousness of the offense if the defendant did not serve 100% of the confinement time as ordered by the court." *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct.

[9] The SAP was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05, 973.01(3g).

App. 1994) (circuit court may clarify the sentencing rational in postconviction proceedings). Further pursuit of this issue would lack arguable merit.[10]

Robertson's responses to the no-merit report include suggestions of claims that Robertson believes are arguably meritorious in addition to those that we have discussed. We will not address any more of those suggested claims here. We assure Robertson that we have examined his submissions in light of the record, and we have concluded that further postconviction or appellate proceedings would be frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of any further representation of Jermel A. Robertson. *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

[10] We observe that Robertson is statutorily disqualified from both SAP and CIP while serving his sentence for substantial battery—the first of his two consecutive sentences—because that crime is codified in WIS. STAT. ch. 940. *See* WIS. STAT. §§ 302.05(3)(a), 302.045(2)(c). Additionally, he reached the age of forty years old a few months after his sentencing and is therefore statutorily disqualified from participation in CIP while serving any sentence. *See* § 302.045(2)(b).