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June 1, 2022

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

2019AP1586-CRNM State of Wisconsin v. Bruce A. Love, Jr. (L.C. # 2016CF4259)
2019AP1587-CRNM State of Wisconsin v. Bruce A. Love, Jr. (L.C. # 2016CF2743)

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).

Bruce A. Love, Jr., appeals from judgments, entered upon his guilty pleas, convicting him of two counts of substantial battery, three counts of misdemeanor battery, and one count of felony intimidation of a witness, all as a habitual criminal and as acts of domestic violence. Appellate counsel, Pamela Moorshead, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Love has filed a

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

response to counsel's report, and counsel has filed a supplemental report. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Love's response, we conclude that there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgments.

BACKGROUND

According to the criminal complaint filed June 26, 2016, in Milwaukee County Circuit Court case No. 2016CF2743, Love physically assaulted his girlfriend, M.O., on January 31, October 7, and October 10, 2015, after becoming angry and arguing with her. On January 31, she suffered multiple lacerations and a broken tailbone. On October 7, Love allegedly grabbed M.O. by the neck, which caused her pain and left a mark. On October 10, M.O. suffered a ruptured eardrum. Love was charged with substantial battery, misdemeanor battery, and disorderly conduct for the events of January 31; misdemeanor battery and disorderly conduct for the events of October 7; and substantial battery, misdemeanor battery, and two counts of disorderly conduct for the events of October 10. Each charge carried the habitual offender penalty enhancer, and each offense was alleged to be an act of domestic violence.

Love was taken into custody on or about June 26, 2016. On July 28 and 29, 2016, Love made three outgoing phone calls from the jail in which he called his father, his great-great-grandmother, and M.O. Based on the content of the phone calls, Love was believed to be attempting to prevent or dissuade M.O. from showing up in court. As a result, he was charged in Milwaukee County Circuit Court case No. 2016CF4259 with three counts of felony intimidation of a witness as a habitual criminal and as an act of domestic violence.

A jury trial began on December 12, 2016. The State's first witness was M.O.; she began testifying that afternoon but did not finish. The following morning, Love's attorney informed the court that Love wanted to stop the trial and enter a plea. In exchange for his guilty pleas to the five batteries and one witness intimidation charge, the disorderly conduct and two remaining intimidation charges would be dismissed and read in. Both parties would be free to argue for what they believed to be an appropriate sentence. The trial court conducted a plea colloquy and accepted Love's pleas. Love asked to forgo a presentencing investigation report so he could be sentenced that day. That afternoon, the trial court imposed consecutive sentences totaling ten years of initial confinement and eight years of extended supervision. Love appeals. Additional facts will be discussed herein as necessary.

DISCUSSION

I. The Plea Colloquy

The United States Constitution requires that a guilty plea be affirmatively shown to be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). It is the trial court's obligation to ensure that a plea satisfies constitutional standards. *See* ***State v. Brown***, 2006 WI 100, ¶33, 293 Wis. 2d 594, 716 N.W.2d 906. To that end, the trial court must engage the defendant in a personal colloquy. *See* ***id.***, ¶28. The trial court has several required duties during a plea colloquy. *See* ***id.***, ¶35. If those required duties are not fulfilled, the defendant may be able to move for plea withdrawal. *See* ***id.***, ¶36. Thus, the first issue appellate counsel addresses in the no-merit report is whether there is any arguable meritorious basis for challenging Love's pleas as not knowing, intelligent, and voluntary. *See* ***id.***, ¶¶23, 25.

The record reflects that the trial court's plea colloquy with Love was less than thorough. *See* ***id.***, ¶35; *see also* ***Bangert***, 131 Wis. 2d at 261-62. However, Love completed a plea questionnaire and waiver of rights form for each case. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). A plea questionnaire form "lessen[s] the extent and degree of the colloquy otherwise required between the trial court and the defendant[.]" ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and brackets omitted). The questionnaires indicate that Love: has a high school diploma, understands English, was not then receiving treatment for a mental illness or disorder, and had not had any alcohol, medication, or drugs in the preceding twenty-four hours. There is nothing in the record that would support an arguably meritorious claim that Love could not understand the proceedings.

We note that the trial court did not expressly review the elements of the offenses with Love. *See* ***Bangert***, 131 Wis. 2d at 267-68; *see also* WIS. STAT. § 971.08(1)(a). The trial court did, however, take other steps to establish Love's understanding of the nature of the crimes. The trial court asked Love whether he understood "what the State would have to prove to find [him] guilty of each of these charges" if the trial continued, and Love answered, "Yes, Your Honor." The trial court next asked if Love had "talk[ed] to [his] lawyer about what the elements of each charge are." Love answered, "Yes." Accompanying the plea questionnaire forms were jury instructions for felony intimidation of a witness, substantial battery, and misdemeanor battery, along with an elements sheet for misdemeanor battery. Love initialed the first page of the intimidation and substantial battery instructions, adding the notation, "I understand and have

reviewed," on each page.[2] On the elements sheet, battery and its elements were circled, and Love's initials are alongside. Further, by signing the plea questionnaire forms, Love acknowledged that his attorney had explained the elements of the offenses to him.

A defendant who seeks plea withdrawal because of the trial court's failure to fulfill a mandatory duty during a plea colloquy must not only allege a *prima facie* violation of a duty, but also that he or she did not understand the information that should have been provided. *See* ***Brown***, 293 Wis. 2d 594, ¶39. Although the trial court did not expressly review the elements of the offenses with Brown, counsel advises that, having met with Love, she cannot advance an argument that he lacked the required understanding. This is consistent with the documentation reflecting that he did indeed review and understand the elements with his attorney's assistance.

The trial court also failed to review the constitutional rights Love was giving up with his plea. *See* ***State v. Hampton***, 2004 WI 107, ¶24, 274 Wis. 2d 379, 683 N.W.2d 14. In his response, Love asserts that the trial court failed to inform him that a jury would have to be unanimous to convict him. As with the elements deficiency, counsel advised that, after meeting with Love, she would be unable to assert that he lacked an understanding of any of his constitutional rights.

[2] Both appellate counsel and Love appear to believe that the only jury instructions filed were for misdemeanor battery. However, it appears that the instructions were misfiled between the two cases. The appellate record in appeal No. 2019AP1586-CRNM, the intimidation case, includes only the jury instructions for misdemeanor battery. The appellate record for appeal No. 2019AP1587-CRNM, the battery and disorderly conduct case, contains the instructions for felony witness intimidation and substantial battery, as well as the elements sheet for misdemeanor battery.

Aside from the omissions identified herein, the trial court complied with its duties for ensuring that Love's pleas were knowingly, intelligently, and voluntarily entered. We conclude that the record does not support an arguably meritorious claim for plea withdrawal.

II. Factual Basis for the Pleas

A trial court accepting a guilty or no contest plea is required to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charge." *See* WIS. STAT. § 971.08(1)(b). Counsel thus also addresses whether the trial court properly established that there was a factual basis for the pleas. At the plea hearing, the court asked Love if it could rely upon the criminal complaint as well the testimony M.O. had already given. Love agreed that this was appropriate.

In determining whether there is a factual basis for the plea, the trial court may consider the criminal complaint and other sources. *See* ***State v. Black***, 2001 WI 31, ¶¶11, 14, 242 Wis. 2d 126, 624 N.W.2d 363. If the facts set forth in the criminal complaint meet the elements of the crime charged, this may be sufficient to form a factual basis. We are satisfied that the trial court appropriately determined that a factual basis for the plea existed, and that the information relied upon supports that determination.

Love protests that M.O.'s "medical report" was insufficient to establish her injuries because it was not "to a reasonable degree of medical certainty." However, the court need not "conduct a mini-trial … to establish that the defendant committed the crime charged beyond reasonable doubt." ***Black***, 242 Wis. 2d 126, ¶14. The complaint established that M.O. suffered a broken tailbone and a ruptured eardrum; that suffices for purposes of a guilty plea. Love's guilty pleas also waived all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI

101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Thus, he forfeited the right to challenge M.O.'s medical diagnoses.

III. Multiplicity

Appellate counsel notes that Love "raised concerns" with her that the two battery charges—substantial battery and misdemeanor battery—from January 31 were multiplicitous. This is Love's main focus in his response. We thus consider whether there is any arguably meritorious multiplicity challenge.

The double jeopardy clauses of the United States and Wisconsin Constitutions "protect a person from being 'placed twice in jeopardy of punishment for the same offense.'" *See* ***State v. Trawitzki***, 2001 WI 77, ¶20, 244 Wis. 2d 523, 628 N.W.2d 801 (citation omitted). Here, Love appears to be making both a "lesser-included offense" challenge as well as a "continuous offense" challenge. *See* ***State v. Lechner***, 217 Wis. 2d 392, 402, 576 N.W.2d 912 (1998).

With both challenge types, we start by inquiring whether the offenses are identical in fact and law. *See* ***id.*** at 402-03. If the offenses are not identical in law and fact, we inquire into legislative intent to allow multiple punishments. *See* ***State v. Koller***, 2001 WI App 253, ¶29, 248 Wis. 2d 259, 635 N.W.2d 838. If the offenses are different in law or fact, it is presumed that multiple punishments were intended. ***Id.*** This presumption may be rebutted only by showing clear legislative intent to the contrary. ***Id.***

Misdemeanor battery is a lesser-included offense of substantial battery. *See* WIS. STAT. § 939.66(2m). For our purposes, this makes the offenses identical in law. *See* ***State v. Kloss***, 2019 WI App 13, ¶¶20-21, 27, 386 Wis. 2d 314, 925 N.W.2d 563. We, therefore, need only

consider whether the charges are "identical in fact." *See* ***Koller***, 248 Wis. 2d 259, ¶30. Counsel concludes that there is no multiplicity problem in Love's case because although the charges arose on the same day at approximately the same time, the charges were based on different conduct. Love insists his behavior was a continuous course of conduct, the length of which is impossible to determine, and thus, he should have been charged with a single offense.

We agree with appellate counsel's conclusion. The misdemeanor battery occurred as M.O. was getting out of the shower. Love was upset because she was on the phone with her father. Love punched and kicked M.O. multiple times in the face, causing her to bleed. After one of the blows, M.O. was knocked off balance; when she reoriented herself, Love was leaving the apartment. M.O. called police and an ambulance and went outside to wait for help. The substantial battery occurred after Love approached M.O. outside, yelled at her to get back inside, and began dragging her by her hair. M.O. was able to stand up, at which point Love shoved her into the stairs, causing her to break her tailbone.

Though the two batteries occurred over what appears to be a relatively short span of time, "[w]e do not dispense justice solely by the hands of a clock[.]" ***Lechner***, 217 Wis. 2d at 415. While time is a consideration, multiple offenses may be separated by mere seconds. *See* ***Koller***, 248 Wis. 2d 259, ¶31. Here, there was not one continuous attack on M.O., but two separate ones. Love's assault of M.O. outside the apartment required a new impulse, a new volitional act, on his part after he had terminated the first assault by leaving the apartment. *See* ***id.***; *see also* ***Lechner***, 217 Wis. 2d at 415-16. The misdemeanor battery in this case is not a lesser-included offense of the substantial battery because they were charged for different acts. Similarly, there were two separate offenses, which permits two charges. *See* WIS. STAT. § 939.65; ***State v. Lomagro***, 113 Wis. 2d 582, 597 n.6, 335 N.W.2d 583 (1983). Further, there is nothing in the

record that would rebut the presumption that the legislature intended multiple punishments. *See* ***Koller***, 248 Wis. 2d 259, ¶29. Thus, there is no arguable merit to a multiplicity challenge.

IV. Sentencing

The other issue appellate counsel addresses in her report is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Love raises several sentencing concerns, contending that he was sentenced on inaccurate information, that he should not have been ordered to pay a DNA surcharge, and that the trial court improperly applied the habitual criminal penalty enhancer to four of his charges, resulting in an excessive sentence.

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 circuit court's discretion. *See* ***id.***

Our review of the record confirms that the trial court appropriately considered relevant sentencing objectives and factors. The consecutive sentences totaling eighteen years of imprisonment are well within the thirty-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 are 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). Thus, this court is satisfied that the no-merit report properly analyzes any sentencing discretion claim as lacking arguable merit.

Love first claims that he was sentenced on inaccurate information because "there's no medical report to substantiate the substantial battery charges." However, the criminal complaint indicated, and M.O. testified, that she suffered a fractured tailbone and ruptured eardrum, both of which satisfy the "substantial bodily harm" element of substantial battery. *See* WIS. STAT. § 939.22(38). There is nothing in the record that demonstrates those injuries were inaccurately described.

Love also complains that he should not have been ordered to pay a $250 DNA surcharge because he had paid it in a previous case. WISCONSIN STAT. § 973.046(1r) took effect on January 1, 2014. It imposes a mandatory $250 surcharge for *each* felony conviction and a mandatory $200 surcharge for *each* misdemeanor conviction. Although imposition of a DNA surcharge was previously a discretionary decision for the sentencing court, *see* WIS. STAT. § 973.046(1g) (2011-12) ("[I]f a court imposes a sentence or places a person on probation for a felony conviction, the court may impose a [DNA] analysis surcharge of $250."), the mandatory surcharge law had been in effect for over a year before Love's first offenses in this case.[3]

[3] In addition, we note that the trial court here imposed only a single felony surcharge in this case, waiving the other five as duplicative. Subsequently, the supreme court determined that the trial courts have no discretion to waive the mandatory surcharge. *See* ***State v. Cox***, 2018 WI 67, ¶24, 382 Wis. 2d 338, 913 N.W.2d 780. This error is to Love's benefit, as the circuit court waived $1,100 in additional obligations.

Finally, Love contends that the trial court improperly applied the habitual criminality enhancers to counts 1, 2, 6, and 8. Counts 1 and 6 are the felony substantial battery offenses from January 31 and October 10. Counts 2 and 8 are the misdemeanor batteries from the same dates.

Substantial battery is a Class I felony. *See* WIS. STAT. § 940.19(2). The maximum penalty for a Class I felony is a $10,000 fine, three years and six months of imprisonment, or both. *See* WIS. STAT. § 939.50(3)(i). The maximum initial confinement term for a Class I felony is one year and six months. *See* WIS. STAT. § 973.01(2)(b)9. The maximum term of extended supervision is two years. *See* § 973.01(2)(d)6. The habitual criminal penalty enhancer allows the term of initial confinement for this class of felony to be increased by four years. *See* WIS. STAT. §§ 939.62(1)(b); 973.01(2)(c). Penalty enhancers cannot be applied to increase terms of extended supervision. *See* ***State v. Volk***, 2002 WI App 274, ¶35, 258 Wis. 2d 584, 654 N.W.2d 24.

On count 1, the trial court imposed two years of initial confinement and two years of extended supervision. On count 6, the trial court imposed three years of initial confinement and two years of extended supervision. Both sentences reflect imposition of a maximum base sentence, plus enhanced confinement time; they are not excessive.[4]

[4] Love references WIS. STAT. § 973.01(2)(b)10., which says, "For any crime other than one of the following, the term of confinement in prison may not exceed 75 percent of the total length of the bifurcated sentence[.]" This subdivision does not apply to Love's case because his Class I felonies are excluded as "one of the following." ***Id.*** Even if it did apply, the sentences are not excessive. On count 1, the two years of initial confinement represent only 50 percent of the total four-year sentence. On count 6, the three years of initial confinement represent only 60 percent of the total five-year sentence.

Misdemeanor battery is a Class A misdemeanor. *See* WIS. STAT. § 940.19(1). The maximum penalty for a Class A misdemeanor is a $10,000 fine, imprisonment of nine months, or both. *See* WIS. STAT. § 939.51(3)(a). The habitual criminality enhancer provides that "[a] maximum term of imprisonment of one year or less may be increased to not more than 2 years." WIS. STAT. § 939.62(1)(a). On both counts 2 and 8, the trial court imposed one year of initial confinement and one year of extended supervision. This has been expressly approved as an appropriate sentence structure. *See* ***State v. Lasanske***, 2014 WI App 26, ¶¶3, 12, 353 Wis. 2d 280, 844 N.W.2d 417.

Accordingly, there are no arguably meritorious sentencing challenges to pursue.

V. Ineffective Assistance of Counsel

Love alleges that trial, postconviction, and appellate counsel were ineffective in multiple ways. The requirements for showing ineffective assistance of counsel are well-established; a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "Whether counsel was ineffective is a mixed question of fact and law." ***Id.***, ¶19. The defendant must show both elements of the test, and we need not address both prongs if the defendant fails to make a sufficient showing on one of them. *See* ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583.

1. Trial Counsel

Love asserts that trial counsel was "ineffective by failing to challenge the legal sufficiency of the felony intimidation of a witness charge in the criminal complaint." He

contends that trial counsel should have filed a motion to dismiss those charges. The record reflects Love's trial attorney *did* move to dismiss the intimidation charges at the end of the preliminary hearing. Accordingly, there is no arguable merit to a claim that trial counsel performed deficiently in this regard.

Love argues that trial counsel was ineffective for encouraging him to plead guilty because if he had known the elements of his offenses, he would not have pled. As noted, the record establishes that Love did know the elements of his offenses. Moreover, "a lawyer has the right and duty to recommend a plea bargain if he or she feels it is in the best interests of the accused." ***State v. Provo***, 2004 WI App 97, ¶17, 272 Wis. 2d 837, 681 N.W.2d 272. There is no arguable merit to a claim of ineffective assistance for encouraging a guilty plea.

Love also contends that trial counsel failed to argue that the record established he knew about potential punishments for his offenses. We observe that the plea questionnaire form in the battery case was deficient in this regard because it omitted any mention of the penalty enhancers. However, the court commissioner had advised Love of the enhanced maximum penalties at the initial appearance; the enhanced penalties were listed on both the criminal complaint and the information, and the trial court reviewed the maximum enhanced penalties with Love during the plea colloquy, where Love acknowledged his understanding of the potential penalties. Accordingly, we discern no arguably meritorious basis for a claim of ineffective assistance.

Finally, Love contends that his second trial attorney was ineffective for failing to seek a continuance. However, Love had made a speedy trial demand on September 26, 2016. His trial was thus scheduled for December 12, 2016. At a status conference on November 3, 2016, original trial counsel advised the court that he would be out of the country on the trial date.

Love initially asked to "continue the 90-day speedy trial." The trial court explained that in order to do so, Love would have to waive his speedy trial demand through at least the next trial date that could be scheduled. The trial court then told Love that it could allow counsel to withdraw and he could "hope that we can get a lawyer that can try your case … on December 12th." Love opted to "take [his] chances" and hope to find a lawyer who could be ready by December 12. The successor attorney committed herself to being ready for trial on time. Because Love was unwilling to waive his speedy trial demand, there is no arguable merit to a claim that either trial counsel was deficient for failing to seek a continuance.[5]

2. Postconviction Counsel

Love argues that postconviction counsel was ineffective for failing to move for a "cease and desist" letter to the Department of Corrections, directing it to stop withholding funds at the rate of fifty percent rather than the twenty-five percent rate Love believes applied to him.[6] However, the trial court lacks jurisdiction to consider such a request. *See* ***State v. Williams***, 2018 WI App 20, ¶4, 380 Wis. 2d 440, 909 N.W.2d 177. "Once an inmate is sentenced to prison, he or she is under the control of the executive branch" and "must address his or her objections to the internal operating procedures of the [Department] through the [Inmate Complaint Review System] … and then, if necessary, by writ of certiorari to the circuit court."

[5] Appellate counsel also notes that she investigated the material for which Love thought trial counsel should have sought a continuance, including looking for surveillance video and interviewing witnesses. She reports that this investigation "resulted in no useful information that counsel could argue should have been presented" at trial.

[6] Love had filed a *pro se* motion for such an order, but was advised that the motion would not be considered while Love was represented by counsel.

Id. Counsel is not ineffective for failing to pursue a meritless motion. *See* ***State v. Wheat***, 2002 WI App 153, ¶30, 256 Wis. 2d 270, 647 N.W.2d 441.

3. Appellate Counsel

Finally, Love claims that appellate counsel was ineffective because:

> [t]he no-merit does not reflect any independent review of the record by appellate counsel in that it fails to discuss any pretrial rulings, voir dire, the sufficiency of the evidence to support a guilty plea, evidentiary or other rulings at trial, or the circuit courts' [sic] exercise of sentencing discretion.

However, the no-merit report does indeed discuss sufficiency of the evidence and the trial court's exercise of sentencing discretion. There were no pretrial motions, which means there are no pretrial rulings to review. Any issues with voir dire became moot when Love decided to end the trial and enter his pleas. There were also no evidentiary rulings made at trial, save for admission of several photographs for which there was no basis for objection. Accordingly, there is no arguable merit to a claim that the no-merit report was inadequate.

Our independent review of the record reveals no other potential issues of arguable merit.[7]

Upon the foregoing, therefore,

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

[7] To the extent that the no-merit response makes other arguments that are not discussed with specificity in this opinion, these arguments are deemed to lack sufficient merit or development to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of further representation of Love in these matters. *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