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**DISTRICT I**

October 4, 2022

*To*:

Hon. Michael J. Hanrahan
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Lauren Jane Breckenfelder
Electronic Notice

Winn S. Collins
Electronic Notice

John D. Flynn
Electronic Notice

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

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2020AP1691-CRNM State of Wisconsin v. Dustin Robert Borrmann
(L.C. # 2018CF4173)

Before Donald, P.J., Dugan and White, JJ.

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

Dustin Robert Borrmann appeals from a judgment, entered on a jury's verdict, convicting him of one count of stalking, with a domestic abuse assessment; one count of second-degree recklessly endangering safety, with the use of a dangerous weapon and a domestic abuse assessment; one count of obstructing an officer; and one count of misdemeanor bail jumping, with a domestic abuse assessment. Appellate counsel, Mitchell Barrock, 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] Borrmann was advised of his right to file a response, and has filed multiple responses. Appellate counsel then filed a supplemental no-merit report.[2] Upon this court's independent review of the record, as mandated by ***Anders***, counsel's reports, and Borrmann's responses, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On September 2, 2018, the State filed a six-count criminal complaint charging Borrmann with the following: (1) one count of stalking, with a domestic abuse assessment; (2) one count of disorderly conduct, with a domestic abuse assessment; (3) one count of second-degree recklessly endangering safety, with the use of a dangerous weapon, and with a domestic abuse assessment; (4) one count of obstructing an officer; and (5) two counts of misdemeanor bail jumping, with domestic abuse assessments. The charges stemmed from incidents that occurred between August 28, 2018, and August 30, 2018. On August 29, 2018, Franklin police were dispatched to the home of Borrmann's ex-girlfriend, L.S., who told police that Borrmann was following her. L.S. told police that during the overnight hours between August 28, 2018, and August 29, 2018, Borrmann left several handwritten letters in her vehicle asking her to get back together. L.S. told police that she noticed the letters while on her way to work, and that shortly thereafter, she noticed that Borrmann was following her vehicle. Borrmann followed L.S. to a gas station and yelled at L.S. to get into his car. L.S. did not do so, but instead went into the gas station and asked the clerk to call the police. L.S. proceeded to work, where a co-worker later informed her

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

[2] This court received notice from Attorney Lauren Jane Breckenfelder that she was appointed as Borrmann's successor counsel after Attorney Barrock filed the no-merit reports at issue. Attorney Breckenfelder notified this court that she relies on predecessor counsel's no-merit reports.

that Borrmann dropped off a plastic bag for L.S., which included flowers, underwear, and a handwritten note.

The complaint further states that the following day, L.S. called 911 while driving to report that Borrmann was driving towards her head-on. The complaint states that L.S. was able to avoid a crash, but that Borrmann attempted to block her path and ultimately began tailing her vehicle. While speaking with dispatch, L.S. returned to her home, but Borrmann did not follow her home. Police located Borrmann, stopped his vehicle, and ultimately removed him from the vehicle after he failed to cooperate with the officers' demands.

The matter proceeded to trial, where L.S., the gas station clerk, and multiple police officers testified. Borrmann did not testify.

The jury found Borrmann guilty of four of the six charges: stalking, with a domestic abuse assessment (count one); second-degree recklessly endangering safety, with the use of a dangerous weapon, and with a domestic abuse assessment (count three); obstructing an officer (count four); and one count of misdemeanor bail jumping, with a domestic abuse assessment (count six). The trial court sentenced Borrmann to three years and six months of incarceration for count one; four years and six months of incarceration for count three; six months of incarceration for count four; and six months of incarceration for count six. This no-merit report follows.

The no-merit report addresses four issues: (1) whether Borrmann's right to a fair trial was violated during the court proceedings; (2) whether Borrmann received ineffective assistance of counsel; (3) whether sufficient evidence supports the conviction; and (4) whether the trial court erroneously exercised its sentencing discretion. Borrmann's responses focus primarily on

his contention that counsel was ineffective for failing to effectively cross-examine L.S. and for failing to impeach her credibility.

With regard to the first issue, appellate counsel specifically discusses voir dire and the objections made at trial. We have independently reviewed the record, including, but not limited to, the pretrial proceedings, voir dire, objections during trial, the parties opening and closing statements, and jury instructions, and we conclude that there is no arguable merit to challenge the fairness of Borrmann's trial.

Next, appellate counsel discusses whether Borrmann received ineffective assistance of trial counsel. Appellate counsel addresses multiple potential deficiencies, but categorizes them as weak and as failing to meet the standard for prejudice. Borrmann disagrees in his responses, arguing that trial counsel failed to effectively cross-examine L.S. and undermine her credibility.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that trial counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome.'" ***Id.*** (citation omitted). In assessing prejudice, we consider the totality of the circumstances before the trier of fact. *See* ***Sanchez***, 201 Wis. 2d at 236.

Appellate counsel's no-merit report and supplemental no-merit report address potential deficiencies in trial counsel's cross-examination of L.S. We agree with appellate counsel's analysis and conclude that none of trial counsel's alleged deficiencies amount to prejudice. Despite a few inconsistencies in L.S.'s testimony, the jury heard trial counsel elicit testimony that L.S. did not have a no-contact order in place, that L.S. did not hear Borrmann issue any threats, and that it was not unusual for Borrmann to drop items off at L.S.'s place of work. The jury also heard testimony from the gas station clerk that on August 29, 2018, she witnessed L.S. in a terrified state when L.S. saw Borrmann outside of the gas station and that she called the police. The jury also heard a recording of L.S.'s 911 call on August 30, 2018, in which L.S. described Borrmann following her vehicle. Given the evidence presented, we are not convinced that the jury would have reached a different verdict had trial counsel cross-examined L.S. more aggressively. We agree with appellate counsel that no arguably meritorious issues exist as to whether Borrmann's trial counsel was ineffective.

Appellate counsel next addresses whether the evidence was sufficient to convict Borrmann. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighting the evidence. *See* ***id.*** at 506. "[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).

Borrmann was ultimately convicted of four crimes: stalking, second-degree recklessly endangering safety, obstructing an officer, and misdemeanor bail jumping. The evidence presented at trial, namely, witness testimony, police bodycam footage, and a recording of L.S.'s 911 call, support these convictions. We agree with appellate counsel's conclusion that there is no arguable merit to challenging the sufficiency of the evidence supporting the verdict.

Appellate counsel next addresses 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; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the record confirms that the trial court thoroughly considered the relevant sentencing objectives and factors, focusing especially on Borrmann's character and the terror he instilled in L.S. The sentence the trial court imposed is within the 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). There would be no arguable merit to a challenge to the trial court's sentencing discretion.

To the extent Borrmann raised issues not addressed in this decision, we conclude that 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 Lauren Jane Breckenfelder is relieved of further representation of Borrmann in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Sheila T. Reiff*
*Clerk of Court of Appeals*