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DISTRICT III

April 11, 2023

To:

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

2019AP1611-CRNM State of Wisconsin v. James Michael Vanidestine
2019AP1612-CRNM (L. C. Nos. 2017CF87, 2017CF220)

Before Stark, P.J., Hruz and Gill, 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).

In these consolidated appeals, counsel for James Vanidestine has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] concluding that no grounds exist to challenge Vanidestine's convictions for five criminal offenses. Vanidestine has filed a response to the no-merit report, and counsel has filed three supplemental no-merit reports. Having reviewed the no-merit report, Vanidestine's response, and the supplemental no-merit reports, and based upon

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

our independent review of the appellate records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

In Marinette County case No. 2017CF87, the State charged Vanidestine with two counts of misdemeanor battery (Counts 1 and 3), two counts of disorderly conduct (Counts 2 and 5), and one count of strangulation and suffocation (Count 4). Counts 1 and 2 were based on an incident that occurred on January 26, 2016, while Counts 3, 4 and 5 were based on an incident that occurred on June 7, 2017. Both incidents involved allegations of violent conduct by Vanidestine against his then-wife, Natalie.[2]

The State subsequently charged Vanidestine with two counts of felony bail jumping and two counts of knowingly violating a domestic abuse injunction in Marinette County case No. 2017CF220. The complaint in that case alleged that on October 23, 2017, Vanidestine followed Natalie in his vehicle and called her cell phone, in violation of a domestic abuse injunction and the conditions of his bond in case No. 2017CF87.

Case No. 2017CF87 proceeded to a jury trial in April 2018. At trial, Natalie testified that at the time of the January 2016 incident, she and Vanidestine were married and were living together, along with their minor daughter, Hazel. On the day of the January 2016 incident, Vanidestine had kicked Natalie's son out of the house after her son told Natalie that Vanidestine

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86, we use pseudonyms when referring to the victim, her minor daughter, and her ex-husband.

was having an affair. As a result of her son's revelation, Natalie began packing her clothes in preparation to leave Vanidestine. Vanidestine was lying on a bed in the same room as Natalie, and at some point Natalie "snuck" his phone because she wanted to find evidence that he was cheating on her. When Vanidestine noticed that Natalie had his phone, he "jumped up" and pushed Natalie's head into the wall. Natalie tried to leave the room, but Vanidestine pushed her from behind, causing her to fall to the floor. While Natalie was on the floor, Vanidestine pushed down on her head with his knee. Hazel then came upstairs and called 911, at Natalie's request. At that point, Natalie was able to get up, and she and Hazel fled from the house and went directly to a police station.

The jury heard an audio recording of the 911 call, and the State also introduced photographs of Natalie that were taken at the police station and purportedly depicted injuries that she sustained during the January 2016 incident. In addition, Hazel testified that on the day of the January 2016 incident, she went upstairs after hearing yelling and a "thud," and she saw Vanidestine on top of Natalie. Hazel testified that Vanidestine had his knee on Natalie and was putting "pressure" on Natalie. Hazel confirmed that she called 911 at Natalie's request.

Regarding the June 2017 incident, Natalie testified that she and Hazel went to Vanidestine's residence to collect money to buy clothing for Hazel's middle school graduation. Natalie initially went into the house alone, while Hazel waited outside. Vanidestine became angry at Natalie, grabbed her arm, called her a "bitch," and tried to get her to sign a paper stating that he had "given this money to [Natalie] for [Hazel]." After Natalie refused to sign the paper, Vanidestine grabbed her throat, making it difficult for her to breathe, and pushed her down onto a couch. At some point, Hazel came inside and hit Vanidestine's head, which allowed Natalie to get away from him. Hazel similarly testified that she went inside Vanidestine's residence that

day after seeing Natalie struggling with Vanidestine through a window. Once inside, she saw Vanidestine "choking" Natalie, and she hit Vanidestine to try to make him stop.

With respect to the January 2016 incident, the jury found Vanidestine not guilty of the battery charge (Count 1), but guilty of disorderly conduct (Count 2). The jury found Vanidestine guilty of Counts 3, 4 and 5—the three charges related to the June 2017 incident.

Following Vanidestine's trial in case No. 2017CF87, the parties reached a plea agreement in case No. 2017CF220. The agreement provided that Vanidestine would enter a no-contest plea to one of the felony bail jumping charges in case No. 2017CF220, and the remaining counts would be dismissed and read in. At sentencing, the State would recommend six months in jail, consecutive to any other sentence, and the defense would be free to argue. Following a plea colloquy, supplemented by a plea questionnaire and waiver of rights form, the circuit court accepted Vanidestine's no-contest plea, finding that it was freely, voluntarily, and intelligently made. Vanidestine agreed that the court could rely on the facts alleged in the complaint as the factual basis for his plea, and the court found that an adequate factual basis for the plea existed.

The circuit court ultimately sentenced Vanidestine to ninety days in jail on Count 2 in case No. 2017CF87, consecutive to his sentences on the other charges in that case. On Counts 3, 4 and 5 in case No. 2017CF87, the court imposed concurrent sentences totaling three years of initial confinement followed by three years of extended supervision. On the felony bail jumping charge in case No. 2017CF220, the court sentenced Vanidestine to six months in jail, consecutive to his sentences in case No. 2017CF87.

With respect to case No. 2017CF87, the no-merit report addresses whether there are any issues of arguable merit regarding: (1) the criminal complaint; (2) Vanidestine's initial

appearance; (3) Vanidestine's waiver of his preliminary hearing; (4) the Information; (5) Vanidestine's request for judicial substitution; (6) the arraignment; (7) Vanidestine's rejection of the State's plea offer; (8) the circuit court's determination of the number of Vanidestine's prior convictions; (9) the court's rulings on the parties' motions in limine; (10) the court's denial of Vanidestine's motion to sever the charges stemming from the January 2016 incident from the charges stemming from the June 2017 incident; (11) the State's motions to admit other-acts evidence and evidence of bias; (12) Vanidestine's motion to compel discovery; (13) jury selection; (14) the jury instructions; (15) the parties' opening statements and closing arguments; (16) the sufficiency of the evidence to support the jury's verdicts; (17) the court's rulings on objections during trial; (18) Vanidestine's decision not to testify and the court's colloquy with him in that regard; (19) the verdict forms; (20) the polling of the jury; (21) the presentence investigation report (PSI); (22) the court's exercise of sentencing discretion; (23) sentence credit; and (24) the accuracy of the judgment of conviction. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.

With respect to case No. 2017CF220, the no-merit report addresses whether there are any issues of arguable merit regarding: (1) the criminal complaint; (2) Vanidestine's initial appearance; (3) Vanidestine's waiver of his preliminary hearing; (4) the Information; (5) the arraignment; (6) the validity of Vanidestine's no-contest plea; (7) the PSI; (8) the circuit court's exercise of sentencing discretion; (9) sentence credit; and (10) the accuracy of the judgment of conviction. Again, we agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit. Accordingly, we do not address them further.

As noted above, Vanidestine filed a response to the no-merit report raising multiple issues—all related to case No. 2017CF87. After independently reviewing the record in that case and appellate counsel's three supplemental no-merit reports, we conclude that none of these issues has arguable merit.

Vanidestine first contends that although the jury acquitted him of Count 1 in case No. 2017CF87, the circuit court failed to enter a judgment of dismissal/acquittal on that charge in a timely manner, which caused the Department of Corrections (DOC) to mistakenly believe that Count 1 had been dismissed and read in. Vanidestine asserts that this mistaken belief affected his offender classification, which prevented a certain individual from being added to his approved visitors list for over fifteen months and resulted in other consequences within the correctional institution. He further contends that the DOC's actions in this regard violated his constitutional rights. Accordingly, he asserts that he should be given "credit for the 17 months"—presumably referring to the time period when his offender classification was affected by the DOC's error.

This claim lacks arguable merit because the DOC's mistaken belief regarding the disposition of Count 1 does not have any relevance to the validity of Vanidestine's convictions and sentences on the charges at issue in these appeals. Furthermore, we are aware of no authority in support of the proposition that a mistaken decision by the DOC regarding an inmate's offender classification can provide a basis to grant the inmate credit against his or her sentence. Additionally, Vanidestine concedes that the circuit court entered a judgment of

dismissal/acquittal on Count 1 in case No. 2017CF87 in August 2019. Thus, the record in that case now correctly reflects that Vanidestine was acquitted of Count 1.[3]

Vanidestine next contends that the no-merit report is inaccurate because it refers to photographs of Natalie's injuries and states that those photographs support the jury's verdicts, but the photographs are not actually in the appellate record. Vanidestine is mistaken. Items 66 and 67 in the appellate record for case No. 2019AP1611-CRNM are two DVDs containing photographs of Natalie's injuries, which were introduced into evidence at Vanidestine's jury trial as Exhibits 5 and 6. This court has reviewed the photographs in question. To the extent Vanidestine claims the photographs prove that Natalie was not actually injured, we note that it was the jury's responsibility to weigh the evidence and determine whether it believed that the photographs showed any injuries. This court cannot usurp the jury's role by reweighing the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (stating that the trier of fact, not an appellate court, is responsible for resolving conflicts in the testimony and weighing the evidence).

Vanidestine also argues that the circuit court's pretrial ruling that his trial attorney would be "sanctioned" if she argued self-defense at trial "obstructed" counsel's ability to provide him "a defense based on the truth." Vanidestine misunderstands the court's ruling. Before trial, the State filed a motion in limine seeking to introduce other-acts evidence regarding a prior case in

[3] To the extent Vanidestine argues that the DOC's actions constitute a new factor warranting modification of his sentences, we conclude that any such claim would lack arguable merit. A new factor is a fact or set of facts that is highly relevant to the imposition of the defendant's sentence but was not known to the sentencing judge at the time of the original sentencing. ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. Here, there is nothing in the appellate records to indicate that Vanidestine's offender classification was highly relevant to the circuit court's imposition of his sentences.

which Vanidestine was charged with battering Natalie and was ultimately convicted of disorderly conduct. The court ruled that this evidence would be admissible at Vanidestine's trial in case No. 2017CF87 only to counter an argument by Vanidestine that he acted in self-defense or that any injury Natalie sustained was the result of a mistake or accident. The court ruled that if Vanidestine did not raise those arguments at trial, then the State would not be permitted to introduce the other-acts evidence. Thus, the court did not prohibit trial counsel from arguing self-defense; it merely held that if counsel raised that argument, the State could introduce the other-acts evidence to rebut it. The court's handling of this issue was an appropriate exercise of discretion and does not give rise to an issue of arguable merit for appeal.

Vanidestine next asserts that he is entitled to relief in the interest of justice, on the grounds of actual innocence, in case No. 2017CF87. As explained in the no-merit report, however, the evidence was sufficient to support the jury's guilty verdicts in case No. 2017CF87. Consequently, there would be no arguable merit to a claim that Vanidestine is entitled to relief in the interest of justice because he is innocent of the charges in that case.

Vanidestine also argues that his trial attorney was constitutionally ineffective in multiple ways. At our request, appellate counsel has filed three supplemental no-merit reports addressing these potential issues. After reviewing the record and the supplemental no-merit reports, we agree with appellate counsel that none of Vanidestine's ineffective assistance claims has arguable merit. To prevail on an ineffective assistance claim, a defendant must show *both* that trial counsel performed deficiently *and* that counsel's deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Vanidestine cannot establish both deficient performance and prejudice for any of his ineffective assistance claims.

Vanidestine first contends that his trial attorney was ineffective by telling him that evidence of Natalie's "mental illness, treatment, or behavior related to this illness" would not be admissible at trial. In support of this claim, Vanidestine asserts that Natalie has been diagnosed with bipolar disorder, depression, and anxiety. He further asserts that Natalie has been treated with antipsychotic drugs and "strong mood stabilizers," which cause hallucinations, delusions, and violence. Vanidestine apparently believes that evidence regarding Natalie's mental illness and the side effects of her medications would have caused the jury to doubt Natalie's credibility.

We agree with appellate counsel that this claim lacks arguable merit, for the reasons explained in the third supplemental no-merit report. Appellate counsel has provided this court with trial counsel's notes regarding her consultations with Vanidestine. Those notes reflect that Vanidestine told his trial attorney that Natalie had bipolar disorder "with other issues" and that she sometimes would not take her medications. Vanidestine also told trial counsel that Natalie was on "anti-psychotics." It is not clear, however, that Vanidestine told trial counsel about any alleged side effects of those medications.

Based on her conversations with Vanidestine and trial counsel's notes, appellate counsel asserts that it is not entirely clear with which mental health disorders Natalie was diagnosed or what medications she was taking to treat those disorders. The only evidence regarding those topics consisted of Vanidestine's vague assertions about Natalie's diagnosis and treatment. We agree with appellate counsel that, under these circumstances, in order to introduce evidence regarding Natalie's mental health at trial, trial counsel would have needed to file a motion for an in camera inspection of Natalie's mental health treatment records. To succeed on such a motion, Vanidestine would have needed to show a reasonable likelihood that the records in question were necessary to a determination of his guilt or innocence. *See* ***State v. Green***, 2002 WI 68, ¶32, 253

Wis. 2d 356, 646 N.W.2d 298. That is, Vanidestine would have needed to make a "fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it [was] relevant to and support[ed] his … particular defense." *See* ***id.***, ¶33. This evidentiary showing could not be based on mere speculation or conjecture, and Vanidestine would have needed to show more than a "mere possibility" that the records would contain evidence that might be useful to his defense. *See* ***id.***

According to the third supplemental no-merit report, Vanidestine's trial attorney determined that the information Vanidestine had provided regarding Natalie's mental health was too vague to support a motion for an in camera review of her mental health records. Appellate counsel further asserts that her conversations with Vanidestine have not revealed "a particularized manner in which information about [Natalie's] mental health diagnoses or treatment would have warranted a pretrial motion." Appellate counsel explains that, without "known instances of psychosis, hallucinations, or delusions having actually occurred, a request to access [Natalie's] mental health records would have simply been a fishing expedition"—which is not permissible under ***Green***.

Ultimately, we agree with appellate counsel that Vanidestine's trial attorney could reasonably determine that the vague information Vanidestine had provided about Natalie's mental health did not provide a sufficient basis to file a motion for an in camera inspection of Natalie's mental health treatment records. As such, counsel's failure to file such a motion—and her resultant failure to introduce evidence regarding Natalie's mental health at trial—did not fall below an objective standard of reasonableness. *See* ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (noting that an attorney's performance is constitutionally deficient when it falls below an objective standard of reasonableness).

Vanidestine also argues that his trial attorney was ineffective by failing to interview Vanidestine's adult son and Natalie's two adult children. The third supplemental no-merit report explains that trial counsel did not interview these individuals because none of them were present at the time of the alleged offenses and Vanidestine "did not identify anything they would be able to testify to that would warrant admission as other[-]acts evidence." In addition, the first supplemental no-merit report asserts that police reports obtained by trial counsel showed that none of the adult children appeared to be favorable defense witnesses, as they each "indicated a history of at least verbal abuse by Vanidestine, directed at [Natalie]," and "[n]one indicated the reverse." Under these circumstances, we agree with appellate counsel that there would be no arguable merit to a claim that Vanidestine's trial attorney performed deficiently by failing to interview Vanidestine's and Natalie's adult children.

Next, Vanidestine asserts that his trial attorney was ineffective by failing to interview Natalie's ex-husband, John. Vanidestine claims that he told trial counsel that John could provide information about Natalie's past violent behavior and her history of making false accusations. The third supplemental no-merit report and appendix indicate that appellate counsel's investigator attempted to contact John "many times" before finally making contact with him in November 2022. During that conversation, John stated that Natalie was "bat shit crazy." However, he admitted that he and Natalie had not been together in a long time, and he further conceded that he was unaware of any specific mental health diagnoses that Natalie might have.

As to specific instances of conduct by Natalie, John told appellate counsel's investigator that Natalie had a history of initiating contact with Vanidestine, despite protective orders prohibiting Vanidestine from having contact with her, and then calling the police if Vanidestine made her angry. As noted in the third supplemental no-merit report, however, John's statements

about this alleged behavior appear to be based on hearsay, and there is nothing in the investigator's report to indicate that John has any personal knowledge of this alleged conduct by Natalie toward Vanidestine. Furthermore, while John asserted that Natalie "did the same thing with me multiple times when we were together," he failed to provide any additional details to support that allegation, and he did not identify any specific instances when Natalie induced him to violate a protective order and then reported him to the police for doing so.

John also told appellate counsel's investigator that, at some point in 2004, he drove past Natalie on the highway and "flipped her off," and Natalie then falsely reported to the police that John had sideswiped her vehicle and forced her into the ditch. John claimed that he was arrested at gunpoint as a result of that false report. John also claimed that Natalie had broken his nose more than twenty years earlier, which resulted in Natalie going to jail. The investigator noted, however, that he "ran CCAP" on Natalie and John and "receiv[ed] no results." The investigator also contacted the Escanaba Police Department "to see if they could give any results of interactions with [Natalie]," but "no results were given." In addition, appellate counsel asserts that none of her investigative efforts corroborated John's account of Natalie's false report about John sideswiping her vehicle.

Finally, John told appellate counsel's investigator that when the children he and Natalie shared were growing up, Natalie kept the children from him to prevent him from seeing "bruises and stuff she put on the kids." John did not indicate, however, that he had any personal knowledge that Natalie was violent toward their children. He simply speculated that she had prevented him from seeing the children because they had bruises or other evidence of abuse. In addition, while John stated that Natalie had "beaten the crap out of" their son, he did not provide

any details to support that allegation or to show that he had any personal knowledge that such abuse had occurred.

In all, during his conversation with appellate counsel's investigator, John made various allegations regarding Natalie's prior false accusations and violent behavior. However, some of those allegations were vague, speculative, and not based on John's personal knowledge. Others involved behavior that allegedly occurred approximately twenty years earlier, which the investigator and appellate counsel could not corroborate. On this record, it is not reasonably probable that the result of Vanidestine's trial would have been different had his trial attorney interviewed John and called him to testify at trial. Consequently, there would be no arguable merit to a claim that Vanidestine was prejudiced by trial counsel's failure to do so. *See* ***Strickland***, 466 U.S. at 694 (explaining that, to demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

Vanidestine also argues that his trial attorney was ineffective by failing to obtain records from various law enforcement agencies and the Marinette County Department of Health and Human Services. Again, Vanidestine contends that these records would have shown that Natalie had a history of violent behavior and of making false accusations. As noted in the first supplemental no-merit report, however, trial counsel requested records from the following agencies before trial: (1) the Marinette County Sheriff's Department; (2) the Marinette Police Department; (3) the Dickinson County Sheriff's Department in Michigan; and (4) the Marinette County Department of Health and Human Services. Trial counsel received records from the Marinette County Sheriff's Department, the Marinette Police Department, and the Marinette County Department of Health and Human Services, but none of those records supported

Vanidestine's claims regarding Natalie's history of violence and of making false accusations. In addition, the Dickinson County Sheriff's Department informed trial counsel that it did not have any records regarding Natalie. On these facts, there would be no arguable merit to a claim that Vanidestine's trial attorney performed deficiently by failing to request records from law enforcement or from the Marinette County Department of Health and Human Services.[4]

Vanidestine further claims that his trial attorney was ineffective by failing to file a pretrial motion "to determine the admissibility of [Natalie's] prior false accusations." Vanidestine has not, however, identified any specific false accusation that he believes his trial attorney should have sought to admit. As discussed above, the records that trial counsel obtained from law enforcement agencies and the Marinette County Department of Health and Human Services did not support Vanidestine's claims regarding Natalie's history of making false accusations. The only specific false accusation that this court has located is John's claim that Natalie falsely told police that John had sideswiped her vehicle. As already explained, however, appellate counsel and her investigator were unable to corroborate John's claim about that false report. Given the lack of evidence regarding any prior false accusations by Natalie, there would be no arguable merit to a claim that Vanidestine's trial attorney performed deficiently by failing to file a pretrial motion to introduce evidence of such false accusations.

Vanidestine also argues that his trial attorney's maternity leave prevented her from properly preparing for trial and made her "completely unavailable" to investigate his case. In the

[4] To the extent Vanidestine claims that his trial attorney should have also requested records from the Menominee County Sheriff's Office in Michigan, he does not provide any information about what those records would have shown or what contacts Natalie may have had with that law enforcement agency. Thus, any claim that Vanidestine's trial counsel was ineffective by failing to request those records—in addition to the other records that counsel did request—would be purely speculative.

third supplemental no-merit report, however, appellate counsel asserts that trial counsel's file reflects "numerous consultations with Vanidestine" and "appropriate preparation" for trial. As appellate counsel notes, trial counsel contacted at least one available witness before trial, reviewed discovery, and sought to secure records that may have corroborated Vanidestine's claims about Natalie's history of violence and false accusations. In addition, we agree with appellate counsel that the record does not support a claim that trial counsel was ineffective in the manner in which she questioned witnesses and advocated on Vanidestine's behalf at trial. Ultimately, aside from Vanidestine's conclusory assertion, there is nothing to suggest that trial counsel's maternity leave prevented her from adequately preparing for trial, and any claim on that basis would lack arguable merit.

Vanidestine also asserts that the circuit court and the district attorney were colluding with each other to deny him a fair trial, which obstructed his trial attorney's performance and prevented her from presenting a defense. We agree with appellate counsel, however, that the appellate record does not contain any indication of bias by the circuit court or any indication that the district attorney acted improperly. Appellate counsel also notes in the third supplemental no-merit report that Vanidestine has never identified any "specific instances that would demonstrate collusion." Instead, he has expressed only a "general dissatisfaction" with the outcome of the case and a "feeling" that his trial attorney was not working hard enough. These vague complaints—which are not supported by any evidence in the appellate record—are insufficient to support an arguably meritorious challenge to Vanidestine's convictions or sentences.

Finally, Vanidestine asserts that his trial attorney's body language and demeanor—specifically, keeping her back to the jury, scowling at her computer, and "shushing"

Vanidestine—negatively affected the outcome of his trial. We agree with appellate counsel, however, that there is nothing in the record to support Vanidestine's claims regarding trial counsel's demeanor. In addition, appellate counsel asserts in the third supplemental no-merit report that she has discussed this issue with Vanidestine and, based on that discussion, counsel "cannot cite to any facts to support this claim." Vanidestine's vague and unsupported assertions regarding his trial attorney's demeanor are insufficient to support an arguably meritorious claim that trial counsel was constitutionally ineffective.

Our independent review of the records discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Erica Bauer is relieved of any further representation of James Vanidestine 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