OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

September 22, 2016

To:

Hon. Rebecca F. Dallet
Circuit Court Judge
821 W State St., Branch 40
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Dustin C. Haskell
Assistant State Public Defender
735 N. Water St., Rm. 912
Milwaukee, WI 53203

Dean Clement Zawacki 292354
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2015AP1317-CRNM State of Wisconsin v. Dean Clement Zawacki (L.C. # 2013CF1479)
2015AP1318-CRNM State of Wisconsin v. Dean Clement Zawacki (L.C. # 2013CM3012)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

Attorney Dustin Haskell, appointed counsel for Dean Zawacki, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the sufficiency of the evidence to support the jury verdicts; (2) any potential issues that may have arisen during the course of the jury trial; and (3) the sentence imposed by the circuit court. Zawacki has responded to the no-merit report, arguing that he was denied the effective assistance of counsel

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and other constitutional rights during trial proceedings; that the evidence was insufficient; that the prosecutor and trial judge committed misconduct; and that the State withheld exculpatory and impeachment evidence.[2] Attorney Haskell has filed a supplemental no-merit report, concluding that none of the issues identified by Zawacki have arguable merit. Upon independently reviewing the entire record, as well as the no-merit report, responses, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Zawacki was convicted of one count of aggravated battery and two counts of misdemeanor battery, all as domestic abuse, following a jury trial. The court sentenced Zawacki to four years of initial confinement and five years of extended supervision.

No-merit counsel and Zawacki both address whether the evidence was sufficient to support the convictions. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial—including testimony

[2] Zawacki also contends that his appellate counsel is ineffective by failing to pursue issues that Zawacki believes have merit. However, this no-merit appeal is not the proper mechanism to argue that appointed counsel was ineffective by failing to raise arguments in postconviction proceedings or on appeal. *See* ***State v. Starks***, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146 (explaining that a claim of ineffective assistance of postconviction counsel must be pursued in the circuit court by motion under WIS. STAT. § 974.06 or by petition for writ of habeas corpus, and that a claim of ineffective assistance of appellate counsel must be pursued in the court of appeals by petition for writ of habeas corpus).

by the victim, the investigating officers, and the emergency room doctor who treated the victim, as well as photograph exhibits of the victim's injuries—was sufficient to support the verdicts.[3]

Zawacki argues that the evidence was insufficient because there was no physical evidence indicating that Zawacki caused the victim's injuries. However, lack of physical evidence incriminating Zawacki did not render the evidence insufficient. *See* ***id.*** ("It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.").

Zawacki also argues that the evidence was insufficient because there was no medical evidence that the victim suffered serious permanent disfigurement. However, evidence of permanent injury to the victim was not necessary. *See* WIS. STAT. § 940.19(5) (providing that aggravated battery is committed by intentionally causing great bodily harm to another); WIS. STAT. § 939.22(14) ("'Great bodily harm' means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or *other serious bodily injury*." (emphasis added)); ***La Barge v. State***, 74 Wis. 2d 327, 332-34, 246 N.W.2d 794 (1976) (phrase "other serious bodily injury" allows a jury to find "great bodily harm" when it finds that "serious" injuries have occurred). Here, the evidence was sufficient to support the jury's finding that the victim suffered "serious" injuries.

[3] Because the record transmitted to this court did not include the photograph exhibits introduced at trial, we ordered a supplement to the record containing the exhibits and allowed no-merit counsel an opportunity to inform us if anything about those exhibits changed his assessment of this case. Zawacki objected to our order allowing no-merit counsel an opportunity to change his assessment. Counsel has informed us he has not changed his assessment. Accordingly, we need not address Zawacki's objection.

Zawacki also argues that the evidence was insufficient because the victim lacked credibility based on inconsistencies in the victim's statements to police and at trial, and between the victim's testimony and defense witness testimony. However, the victim's testimony was not inherently incredible, and it was the role of the jury to weigh the witnesses' credibility. The jury was entitled to believe the victim's testimony and, if believed, the testimony was sufficient to support the convictions. Zawacki also asserts that the victim lacked credibility because she lied about the number of her past convictions, asserting that the victim had six convictions rather than two. However, the record indicates that the State informed the court that the victim had three prior convictions, and defense counsel argued that two of the convictions should be counted. The court agreed that the victim should testify to two prior convictions, and the victim did so. Zawacki asserts that the victim actually had six prior convictions, and states that the victim's conviction records are available to the public on CCAP.[4] However, no-merit counsel responds that he has not identified any additional convictions for the victim, and our review of CCAP reveals only the three convictions identified by the State. We discern no arguable merit to further proceedings as to this issue.

No-merit counsel addresses whether there would be arguable merit to a motion for a new trial based on trial error. Specifically, counsel addresses: (1) jury selection; (2) admission of hearsay evidence; (3) jury instructions; and (4) Zawacki's waiver of his right to testify. We

[4] "CCAP, which stands for Consolidated Court Automation Programs, is 'a case management system provided by Wisconsin Circuit Court Access program (WCCA). It provides public access online to reports of activity in Wisconsin circuit courts for those counties that use CCAP.'" ***State v. Hill***, 2016 WI App 29, ¶3 n.3, 368 Wis. 2d 243, 878 N.W.2d 709 (quoted source omitted).

agree with counsel's assessment that there would be no arguable merit to further proceedings as to any of these issues.

Zawacki argues that that the circuit court improperly amended the date of the aggravated battery in the complaint and information from March 29, 2013, to March 28, 2013. He argues that the amendment denied Zawacki his right to present a complete defense and that the amendment was otherwise improper because the evidence did not support the amendment. Zawacki argues that, at the preliminary hearing, the investigating officer testified that the offense occurred on March 29, 2013. Zawacki also argues that the trial evidence and other discovery indicated that the offense occurred before midnight on March 27, 2013. He asserts that the circuit court lacked subject matter jurisdiction over him because the date was wrong and that the error required dismissal of the case. He argues that he was denied his right to the effective assistance of counsel when his counsel failed to object to the amendment.

First, because the amendment occurred before Zawacki entered a plea, the State was free to amend the complaint and information at any time. *See* WIS. STAT. § 971.29(1) ("A complaint or information may be amended at any time prior to arraignment without leave of the court."). Second, the evidence supported the amendment. At the preliminary hearing, the investigating officer testified that he interviewed the victim at the hospital in the morning of March 28, 2013, and that the victim indicated the incident had occurred sometime around midnight. Third, the trial testimony established that the aggravated battery occurred late at night on March 27, 2013, or in the early morning hours of March 28, 2013. We conclude that any argument that the amendment deprived Zawacki of his right to present a complete defense, or that the amendment or any discrepancies as to the date of the offense deprived the court of subject matter jurisdiction or otherwise required dismissal of this case, would be wholly frivolous. We also conclude that

any argument that trial counsel was ineffective based on this issue would be wholly frivolous. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense).

Zawacki argues that the prosecutor committed misconduct by failing to correct the false testimony of the victim. However, this claim is based entirely on Zawacki's assertion that the victim lacked credibility and gave false testimony at trial. As set forth above, there was nothing inherently incredible about the victim's testimony. Nothing in the record or Zawacki's submissions would support a non-frivolous claim that the prosecutor committed misconduct by allowing the victim to testify.

Zawacki argues that he was denied his constitutional right to be present at a final pretrial hearing because, according to Zawacki, Zawacki was not present at an off-the-record final pretrial conference held on July 12, 2013. Zawacki contends that his trial counsel was ineffective by failing to produce him for the hearing and failing to object that there was no court reporter present for the hearing. Zawacki argues, alternatively, that there was no hearing held on July 12, 2013, citing news reports that the Milwaukee courthouse was closed on that date due to a fire. He contends that the court's failure to hold a final pretrial hearing deprived him of due process and showed that the prosecutor, defense counsel, and judge committed misconduct.

The circuit court record entries indicate that a pretrial conference was held on July 12, 2013. They reflect that Zawacki was present with counsel and the hearing was held off the record. They indicate that, at the hearing, the misdemeanor and felony cases were joined for trial and a jury trial was scheduled. If, as Zawacki contends, Zawacki was not present despite the

record entry noting Zawacki's presence, we discern no arguable merit to any issue based on Zawacki's absence. Zawacki's presence was not required by statute, s*ee* WIS. STAT. § 971.04(1), nor did Zawacki have a constitutional right to be present at the hearing, *see* ***Leroux v. State***, 58 Wis. 2d 671, 690, 207 N.W.2d 589 (1973) (a defendant has a constitutional right to be present at a pretrial hearing only when "a fair and just hearing would be thwarted by [the defendant's] absence"). Additionally, supreme court rules did not require that the hearing be reported. *See* SCR 71.01(2)(b). Alternatively, Zawacki claims that the hearing did not take place, based on news reports included in his no-merit response appendix, which indicate that the Milwaukee courthouse was closed due to a recent fire on July 12, 2013. However, those same news reports indicate criminal proceedings were being held in other government buildings on that date. Accordingly, Zawacki's submissions do not support a non-frivolous argument that the pretrial conference could not have been held as indicated in the court record entries. Because Zawacki has not identified any non-frivolous claim of error related to the final pretrial conference, we discern no arguable basis to contend that trial counsel was ineffective as to this issue. *See* ***Strickland***, 466 U.S. at 687-694.

Zawacki argues that he was denied his right to a speedy trial. However, as no-merit counsel notes, a claim of a constitutional speedy trial violation would be wholly frivolous because Zawacki's trial occurred within four months of the filing of the criminal complaint. *See* ***State v. Urdahl***, 2005 WI App 191, ¶12, 286 Wis. 2d 476, 704 N.W.2d 324 (the first factor in the constitutional speedy trial analysis is length of delay, which serves as "a triggering mechanism used to determine whether the delay is presumptively prejudicial. Generally, a post-accusation delay approaching one year is considered to be presumptively prejudicial" (citation omitted)). Additionally, as no-merit counsel notes, there would be no arguable merit to a claim of a

statutory speedy trial violation because Zawacki's trial occurred within ninety days of his speedy trial demand. *See* WIS. STAT. § 971.10(2)(a) ("The trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record.").

Zawacki argues that the State withheld material exculpatory and impeachment evidence, violating Zawacki's rights under ***Brady v. Maryland***, 373 U.S. 83 (1963). Zawacki asserts that the State withheld the victim's medical records, and police reports of domestic violence incidents involving Zawacki and the victim. No-merit counsel responds that all of the necessary police reports, medical records, and lab reports were turned over to the defense before trial, that trial counsel has stated she believes that she received the material in plenty of time to prepare for trial, and that no-merit counsel is not aware of any necessary material that was not turned over to the defense. In a second no-merit response, Zawacki cites his appendix for emails between the prosecution and defense regarding the discovery, and argues that they establish that the material was not turned over to the defense until after trial. Zawacki also complains of delays in Zawacki receiving that material from counsel. However, the emails between the prosecution and the defense occurred before trial, and provide a record of attempts to get the discovery to the defense. Nothing in the emails indicates that the release of the material did not occur prior to trial. Additionally, any delay in Zawacki personally receiving the material from his trial or no-merit counsel does not support a claim of a ***Brady*** violation, or any other constitutional violation. We discern no arguable merit to this issue.

Zawacki asserts that a neighbor left him a voicemail around the time of the aggravated battery stating that the victim was on the neighbor's porch, and threatening to "beat her ass." However, no-merit counsel asserts that both trial and no-merit counsel investigated that claim

and were unable to find any supporting evidence. Rather, no-merit counsel asserts, the phone records and police reports refute Zawacki's claim. Zawacki's second no-merit response does not dispute that point. Additionally, as no-merit counsel notes, Zawacki elected not to testify at trial, and thus did not present evidence that he received a voicemail from the neighbor around the time of the aggravated battery. We agree with counsel's assessment that any argument on this basis would be wholly frivolous.

Zawacki argues that successor counsel appointed to represent Zawacki at sentencing improperly waived Zawacki's appearance at a status hearing. Zawacki asserts that he wanted to be present at the hearing to pursue pro se motions he filed with the court. However, Zawacki's presence was not required at the status hearing. *See* WIS. STAT. § 971.04(1). Additionally, because Zawacki was represented by counsel, he was not entitled to pursue his pro se motions. *See* ***State v. Redmond***, 203 Wis. 2d 13, 19-20, 552 N.W.2d 115 (Ct. App. 1996) (a defendant may proceed with counsel or pro se, but is not entitled to hybrid representation). We discern no arguable merit to further proceedings as to this issue.

Zawacki argues that the circuit court erred by joining his cases for trial without requiring the State to file a formal motion, that joinder was improper, and that his trial counsel was ineffective by failing to object. First, nothing in the joinder statute requires the State to file a formal joinder motion to allow a court to join charges for trial. WIS. STAT. § 971.12. Second, joinder is proper "when two or more crimes 'are of the same or similar character,'" that is, when they are "the same type of offense occurring over a relatively short period of time and the evidence as to each … overlap[s]." ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993) (quoted source omitted). Moreover, "acts two years apart can be considered as 'occurring over a relatively short period of time.'" ***Id.*** (quoted source omitted). Here, the crimes

were all batteries by Zawacki against the same victim, within a two-and-a-half year period, and each would have required testimony by the victim as to her relationship with Zawacki. Any challenge to joinder, or any other claims based on this issue, would lack arguable merit.

To the extent that Zawacki asserts that the material he has submitted with his no-merit response, largely addressed above, would support a claim for a new trial based on newly discovered evidence, we disagree. Nothing in the material submitted would support a non-frivolous argument that there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to Zawacki's guilt. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42.

Finally, the no-merit report also addresses whether a challenge to Zawacki's sentence would have arguable merit.[5] Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Zawacki's character and criminal history, the seriousness of the offenses, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Zawacki to four years of initial confinement and five years of extended supervision. The sentence was within the maximum Zawacki faced and, given the facts

[5] The no-merit report indicates that Zawacki wishes to waive any challenge to imposition of the DNA and domestic abuse surcharges. *See* ***State ex rel. Ford v. Holm***, 2006 WI App 176, ¶¶6 & n.4, 8, 296 Wis. 2d 119, 722 N.W.2d 609. Zawacki does not dispute that assertion.

of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (quoted source omitted)). We discern no erroneous exercise of the court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction are affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dustin Haskell is relieved of any further representation of Dean Zawacki in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals