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DISTRICT III

July 8, 2025

To:

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

2022AP1026-CRNM State of Wisconsin v. Osuntoka L. Smith (L. C. No. 2018CF369)

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

Osuntoka Smith appeals from his convictions on eight felonies and two misdemeanors arising out of a series of domestic abuse incidents. Attorney Peter Anderson has filed a no-merit report addressing ten potential issues and seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2023-24).[1] Smith has filed a response to the no-merit report raising 27 enumerated issues and he has filed an addendum to his response raising an additional 9 issues. At our request, counsel has filed a supplemental no-merit report addressing several issues in further detail.

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

Having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that there are no arguably meritorious issues for appeal. Because the issues discussed by counsel and Smith overlap but do not directly correspond, we have organized our discussion into categories that encompass multiple issues, without regard to the order in which the issues were presented. We will discuss the facts relevant to each issue in the section discussing that issue. Any arguments that we do not explicitly address are deemed insufficiently meritorious to warrant further discussion. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention").

Amendments of the Complaint and Information

We begin by discussing Smith's objections to multiple amendments to the complaint and Information. Smith contends that the amendments violated his rights to notice, to a speedy trial, and to prepare and present a defense, and that they were made without the circuit court's permission.

The initial complaint filed on May 3, 2018, charged Smith with committing one Class F felony count of physical abuse of a child, one Class H felony count of physical abuse of a child, one Class H felony count of strangulation and suffocation, one Class H felony count of strangulation and suffocation as domestic abuse, one Class I felony count of substantial battery as domestic abuse, and one Class H felony count of battery as domestic abuse—all alleged to have occurred on or about March 31, 2018. The charges were based upon various acts of

violence that Smith's then live-in girlfriend Anne[2] reported to police that Smith had committed against her and two of her children, Bobby and Caleb, over an Easter weekend several weeks before she made the report.

On May 4, 2018, the State filed an amended complaint that changed the alleged date for the Class H child abuse count to on or about April 1, 2018; added one additional Class F felony count of physical abuse of a child, alleged to have occurred on or about April 1, 2018; added one Class G felony count of intimidation of a victim, alleged to have occurred on March 31, 2018; and added six Class B misdemeanor counts of disorderly conduct with use of a dangerous weapon—two of which were also alleged to be acts of domestic abuse and all six of which were alleged to have occurred on or about March 31, 2018.

On May 17, 2018, the State filed a second amended complaint adding domestic abuse repeater allegations to all of the counts alleged to have been committed as domestic abuse. On May 31, 2018, following a preliminary hearing at which Smith was bound over for trial, the State filed an Information charging the same 15 counts set forth in the second amended complaint.

On June 13, 2018, just prior to the arraignment hearing at which Smith entered not guilty pleas, the State filed an amended Information and a third amended complaint, which each added one Class H felony count of battery as domestic abuse and as a domestic abuse repeater, alleged to have occurred on or about August 1, 2015; one Class H felony count of strangulation as domestic abuse and a domestic abuse repeater, alleged to have occurred on March 2, 2014; one

[2] This matter involves several crime victims. Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the victims' names. We also use pseudonyms when referring to Anne's other children.

Class A misdemeanor count of battery as domestic abuse and a domestic abuse repeater, alleged to have occurred on March 2, 2014; and one Class B misdemeanor count of disorderly conduct as domestic abuse and a domestic abuse repeater, alleged to have occurred on or about March 2, 2014. The 2015 charge related to an incident in which Smith punched Anne in the eye, breaking her orbital bone and leading to the eventual loss of the eye. The 2014 charges all related to an assault at a storage unit, for which Anne was hospitalized.

On May 20, 2019, the circuit court granted the State leave to file a second amended Information and a fourth amended complaint, which each reduced the 2015 Class H felony battery charge to a Class I felony substantial battery charge and dropped five of the 2018 disorderly conduct counts.

On March 11, 2020, the circuit court granted the State leave to file a third amended Information and a fifth amended complaint, which each dropped the victim intimidation and 2018 Class H felony battery counts; reduced the March 31, 2018 Class F felony child abuse charge to a Class H charge; reduced the 2018 Class I felony substantial battery charge to a Class A misdemeanor battery charge; and changed the April 1, 2018 Class F felony child abuse charge to a Class H felony strangulation charge.

On July 9, 2020, less than a week before trial, the State filed a fourth amended Information, which changed the alleged date for the substantial battery against Anne in Count 4 from August 1, 2015, to August 3, 2015; changed the alleged date for the child abuse against Bobby in Count 5 from March 31, 2018, to April 1, 2018; changed the alleged date of the strangulation in Count 6 from March 31, 2018, to April 1, 2018; changed the alleged date of the child abuse against Caleb in Count 7 from March 31, 2018, to April 1, 2018; changed the alleged

date of the strangulation in Count 8 from March 31, 2018, to April 1, 2018; changed the alleged date of the misdemeanor battery against Anne in Count 9 from March 31, 2018, to April 1, 2018; changed the alleged date of the disorderly conduct in Count 10 from March 31, 2018, to April 1, 2018; changed the alleged date of the child abuse against Caleb in Count 11 from April 1, 2018, to April 2, 2018; and changed the alleged date of the strangulation in Count 12 from April 1, 2018, to April 2, 2018.

Smith objected to this amendment, asserting that his entire defense for several of the charges was built around having an alibi for March 31, 2018. The circuit court noted that the prior charging documents alleged "on or about" dates and that the amendment conformed to statements in the children's forensic interviews[3] about the incidents occurring on Easter which was April 1, 2018.

On the morning of trial, July 13, 2020, the circuit court questioned who the State was alleging to be the victims for Counts 1, 6, 8, 9, and 12. In response, the State filed a fifth amended Information, adding identification for the victims of those counts. Those were the final charges upon which Smith went to trial.

The State may amend a complaint or Information without leave of the court at any time prior to the defendant's arraignment. WIS. STAT. § 971.29(1). After arraignment, the State may amend a complaint or Information with leave of the court, provided that the amendment does not prejudice the defendant by violating his or her rights to notice, to a speedy trial, or to prepare and

[3] As we will discuss later, the childrens' interviews were the subject of a prior motion in limine litigated by the parties.

present a defense. ***State v. Bonds***, 2006 WI 83, ¶17, 292 Wis. 2d 344, 717 N.W.2d 133. The State's failure to obtain permission to file a postarraignment amendment to the Information is a procedural defect that is waived by the defendant's failure to object and does not deprive the circuit court of subject matter jurisdiction. ***State v. Webster***, 196 Wis. 2d 308, 319, 538 N.W.2d 810 (Ct. App. 1995).

Here, the first, second, and third amendments of the complaint and the first amendment of the Information all occurred prior to Smith's arraignment. Therefore, the State did not need the circuit court's permission for those amendments. Additionally, the amendments did not adversely affect Smith's rights because Smith was aware of the substantive changes to the charges made in those amendments, including allegations of additional incidents from other dates, by the time he entered his pleas.

The State did obtain the circuit court's permission for the subsequent amendments. Furthermore, the subsequent amendments did not adversely affect Smith's rights. The subsequent amendments did not deprive Smith of his right to a speedy trial because, as discussed below, there is no showing that any delays in the trial date were attributable to the amendments. The subsequent amendments also did not adversely affect Smith's right to notice or his ability to defend himself because they reduced or dropped charges against Smith and did not provide any new factual allegations against which Smith needed to defend. As the court noted, it was clear from the discovery materials that several of the incidents were alleged to have occurred on Easter day. We therefore conclude that nothing in the record would support a challenge to the amendments of the complaint or Information.

Preliminary Hearing

Smith complains that his first attorney, Assistant State Public Defender Heather Kavanaugh, did not present witnesses and evidence that Smith wanted presented at the preliminary hearing. However, a conviction resulting from a fair trial effectively cures any error at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Therefore, a defendant may not obtain relief from a bindover determination unless he or she contemporaneously seeks an interlocutory appeal. ***Id.*** at 630-31. Because Smith did not seek interlocutory review of his bindover prior to trial, he cannot challenge it on appeal.

Discovery Issues

Prior to trial, Smith sought to obtain access to assorted GPS data, call logs, texts, and videos from six different phones belonging to victims and witnesses, seeking to show that Smith and the victims were not in the same places at the times the charged incidents were alleged to have occurred. The circuit court granted the defense motions and signed communications warrants for the six phones. Although there were some delays in getting the third-party phone companies to comply, all of the records were turned over to the defense prior to trial. After reviewing the records, the defense advised the court that it would no longer seek to introduce GPS data from the phones at trial.

Smith also sought to obtain videos that he believed were stored in the Marco Polo app on one of his own cell phones that had been seized by law enforcement. When the State provided Smith with an extraction of all data from Smith's phone, Smith learned that data did not include the Marco Polo videos, prompting him to accuse law enforcement of either destroying or tampering with the videos. In response to that accusation, a law enforcement officer informed

the circuit court that Marco Polo videos are stored in "the Cloud" and that the extraction procedure only retrieves data stored on the actual phone.

The circuit court then ordered law enforcement officers to bring the phone to the jail so that Smith, in the presence of his lawyer, could show law enforcement officers how to access the videos from the Marco Polo app. The parties were able to view the videos at the jail through Smith's phone but they learned that they could not download them with original time stamps through the app. Marco Polo's parent company, Joya, agreed to provide Smith with copies of his own outgoing videos pursuant to a right-to-access statute, but Joya required a warrant to provide the received portions of videos.

After he elected to represent himself, Smith informed the circuit court that he was missing the disc containing the extracted data from his primary cell phone as well as other discovery materials. The circuit court then directed the State to provide Smith with duplicate copies of all the discovery within its possession, and the State informed the court that it had done so. Smith continued to assert that the Marco Polo videos he had been provided had been "edited" to only show his own portion of the video exchanges.

The circuit court arranged for Smith to have additional access to the phones in police custody for a two-hour period over the weekend between voir dire and opening arguments, so that Smith could make arrangements for the videos he would play at trial. During the trial, the court allowed Smith to play videos for the jury of Marco Polo exchanges between himself and Anne that had occurred on March 31, April 1, April 2, and April 3 of 2018. Smith also tried to introduce videos of Anne's son Alex, but the court excluded them for lack of foundation after Alex testified that he had no recollection of them and could not authenticate them.

Finally, Smith complains that Anne failed to bring a credit card statement or Food Share records with her to court and that his own prior investigator failed to bring medical records to court. The circuit court ruled that Smith could question Anne about the credit card statement and Food Share records to show her whereabouts during one of the alleged incidents and that the investigator could testify about medical records that were introduced into evidence. However, Smith never obtained a subpoena requiring Anne to bring the credit card statement or Food Share records to court or requiring the investigator to bring the medical records.

In sum, the record shows that the circuit court granted Smith's requests for discovery of materials within the State's possession, as well as his requests for third-party subpoenas of phone records. The State turned over copies of all the materials within its possession, and the phone companies eventually complied with the subpoenas. Smith has no basis to challenge Anne's failure to bring credit card statements or Food Stamp records to court, or his own prior investigator's failure to bring medical records to court, when he failed to subpoena those materials. We conclude Smith has no arguable basis to raise a discovery issue on appeal.

Seizure of Smith's Second Phone

Smith asserts that the police improperly seized his second phone from the possession of a third party at the time of his arrest, without a search warrant. However, Smith did not file a suppression motion to preserve his challenge to the seizure of the phone. *See* WIS. STAT. § 974.02(2); ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992) (for any issue other than the sufficiency of the evidence to be raised as a matter of right on appeal, it must first be preserved in the circuit court by a timely objection or a postconviction motion). Moreover, Smith does not identify any adverse evidence from the second phone that was actually

admitted at trial. We conclude Smith has no arguable basis to challenge the seizure of his second phone on appeal.

Other-Acts and Panorama Evidence

Prior to trial, the State moved to present other-acts evidence that Smith had: (1) assaulted Anne on March 3, 2014; (2) assaulted and threatened another former domestic partner in a series of incidents in 2012-2013; and (3) assaulted Anne's son, Alex, on March 24, 2016. The circuit court ruled that the prior incidents involving Anne and Alex qualified as panorama evidence but that the incident with the prior domestic partner would only be admissible if Smith opened the door. The court's decision represented a sound exercise of discretion under ***State v. Jensen***, 2011 WI App 3, ¶¶80-82, 331 Wis. 2d 440, 794 N.W.2d 482 (2010) (*habeas corpus granted on other grounds in* ***Jensen v. Schwochert***, 2013 WL 6708767 (E.D. Wis., Dec. 18, 2013)). We conclude that nothing in the record provides an arguable basis to challenge the other-acts or panorama evidence admitted at trial.

Competence to Proceed to Trial

At a motion hearing held on May 20, 2019, Smith's attorney, Ronald Colwell, requested a competency evaluation for Smith. At a hearing held on May 29, 2019, the circuit court found Smith incompetent to stand trial—over Smith's objection—based upon the report of Dr. Elliot Lee and the court's own observations of Smith's courtroom demeanor. Lee opined that Smith suffered from bipolar disorder and an unspecified personality disorder that, impaired his ability to process information, to organize his thoughts, and to provide a clear, coherent and linear account of information. The court ordered commitment and involuntary medication to restore Smith to competency. On August 30, 2019, the court found that Smith had been restored to

competency. We conclude that nothing in the record provides an arguable basis for Smith to challenge the competency proceedings.

Request for a Bench Trial

Smith requested a bench trial at a status conference on October 28, 2019. The record does not show, however, that the State ever consented to have the matter tried to the court without a jury. Smith had no right to unilaterally obtain a bench trial, and therefore he has no grounds to appeal the denial of his request. *See* WIS. STAT. § 972.02(1).

Disqualification of Judge

Smith filed a federal lawsuit against his first two attorneys and the circuit court judge and he moved to disqualify the judge based upon the lawsuit. The Court denied the recusal motion, finding nothing in the lawsuit that would create a conflict of interest or demonstrate bias in the present case.

Motions to disqualify a judge may be made upon either statutory or constitutional grounds. Here, Smith has not identified any relationship that would require a statutory recusal under WIS. STAT. § 757.19(2). Rather, Smith appears to be raising a due process claim based upon the absence of an impartial tribunal. *See* ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385.

In analyzing a claim of judicial bias, we begin with the presumption that a judge is fair, impartial, and capable of ignoring any biasing influences. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. To overcome that presumption, a party must

demonstrate the objective[4] existence of "actual bias" (i.e., that the judge in fact treated the party unfairly), or the "appearance of bias" (i.e., that there are circumstances present under which "a reasonable person—taking into consideration human psychological tendencies and weaknesses—[would conclude] that the average judge could not be trusted to 'hold the balance nice, clear and true"'). ***Id.***, ¶¶20-24. Opinions formed by a judge based upon facts introduced or events occurring during the course of a current or prior proceeding involving a party do not constitute the basis for a bias or partiality motion unless they display "a deep-seated favoritism or antagonism that would make fair judgment impossible." ***State v. Rodriguez***, 2006 WI App 163, ¶36, 295 Wis. 2d 801, 722 N.W.2d 136; *see also* ***Liteky v. United States***, 510 U.S. 540, 555 (1994) (judicial rulings alone almost never constitute a valid basis for a partiality motion). Our review of the record discloses nothing that would demonstrate the existence of actual bias or the appearance of bias on the part of the judge.

Discharge and Waiver of Counsel

The circuit court allowed Smith's first attorney, Heather Kavanaugh, to withdraw at Smith's request, based upon a breakdown in communication. Following the competency proceedings, Smith's second attorney, Ronald Colwell, moved to withdraw based upon a conflict of interest stemming from Colwell's inability to set aside an extremely negative personal feeling he had developed against Smith.

[4] Although a judge may also be subjectively biased, that is a determination that can only be made by the judge him- or herself. ***State v. McBride***, 187 Wis. 2d 409, 414-15, 523 N.W.2d 106 (Ct. App. 1994).

Smith's third appointed attorney, Daryl Laatsch, moved to withdraw shortly before the fifth scheduled trial date, at which time Smith informed the circuit court that he wished to proceed pro se. Smith filed a signed "Waiver of Right to Attorney" form, and the court conducted two colloquies to ensure that Smith's waiver of counsel was knowingly, voluntarily, and intelligently made. The court's colloquies satisfied its responsibility to ensure that Smith's waiver of counsel was made knowingly, voluntarily and intelligently, as a deliberate choice to proceed pro se with an awareness of the difficulties such self-representation entails. *See generally* ***State v. Klessig***, 211 Wis. 2d 194, 204-07, 564 N.W.2d 716 (1997).

The circuit court subsequently appointed attorney Gary Schmidt to serve as standby counsel for Smith. Smith confirmed at trial that he still wished to represent himself with Schmidt serving solely as standby counsel. We conclude that nothing in the record would support a challenge to Smith's ultimate waiver of counsel.

Assistance of Standby Counsel

Smith's standby counsel, Schmidt, sent out subpoenas to 17 witnesses. Schmidt also attempted to subpoena teachers from Bobby and Caleb's school to testify that they did not observe any injuries on the victims in the week following Easter, but the process server was not able to locate the teachers. The defense nonetheless was able to elicit testimony from the school resource officer that no teacher made any mandated report of abuse regarding the children.

Smith contends that Schmidt provided ineffective assistance by failing to file subpoenas for additional phone records, school records, medical records, other documents, and witnesses. However, there is no constitutional right to standby counsel—effective or otherwise. ***State v. Cummings***, 199 Wis. 2d 721, 753 n.15, 754 n.17, 546 N.W.2d 406 (1996) (under Wisconsin

law); ***United States v. Windsor***, 981 F.2d 943, 947 (7th Cir. 1992) (under federal law). By waiving his right to counsel, Smith waived his right to the effective assistance of counsel. *See* ***Moore v. State***, 83 Wis. 2d 285, 300, 265 N.W.2d 540 (1978). Smith was solely responsible for obtaining and serving any subpoenas he deemed necessary to his defense. Therefore, Smith has no arguable appellate issue arising out of his standby counsel's alleged failures.

Speedy Trial

Smith filed a pro se motion to dismiss this case due to an alleged speedy trial violation. Smith's appellate counsel asserts that there would be no arguable merit to a claim of a speedy trial violation because Smith never filed a written speedy trial demand.

It is true that a speedy trial demand is necessary to raise a statutory claim under WIS. STAT. § 971.10(2)(a), which provides that the trial of a defendant charged with a felony shall commence within 90 days after a speedy trial demand is made. However, whether a speedy trial demand was made is only one factor to consider when determining whether a defendant's constitutional right to a speedy trial was violated.

Courts employ a four-part balancing test to determine whether a person's constitutional right to a speedy trial was violated, considering: (1) the length of the delay; (2) the reason for the delay;(3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay resulted in prejudice to the defendant. ***State v. Ramirez***, 2025 WI 28, ¶29, — Wis. 2d —, —N.W.3d —. We will uphold the circuit court's factual findings unless they are clearly erroneous, but we will determine de novo whether those facts establish a constitutional violation. ***Id.***

Here, it does not appear that the circuit court ever ruled on Smith's motion to dismiss based upon an alleged speedy trial violation or made factual findings about it. Even assuming the facts most favorable to Smith based upon the record, we are not persuaded there are arguably meritorious grounds for a constitutional speedy trial challenge.

Smith's trial commenced on July 10, 2020, more than two years after the complaint had been filed on May 3, 2018. While he was awaiting trial, Smith served 200 days in jail on another case.

The circuit court removed this case from its first trial date scheduled in August of 2018 after Smith moved to discharge his first attorney, Heather Kavanaugh, and acknowledged that his request would impact the scheduling. Once the State Public Defender's Office had appointed Smith a second attorney, Ronald Colwell, the court set a second trial date beginning on January 29, 2019, to accommodate Colwell's calendar.

After the defense obtained a batch of records including GPS data from the phones of victims and witnesses, Smith asked to have the case removed from the trial calendar again so that he would have sufficient time to hire an expert witness to analyze the data. The circuit court subsequently set a third trial date beginning on June 7, 2019.

On May 29, 2019, the circuit court removed the case from the trial calendar again based upon the court's finding that Smith was incompetent to stand trial. After Smith had been restored to competency and had been appointed his third attorney, the court set a fourth trial date beginning on January 7, 2020.

On December 23, 2019, Smith again moved to remove the case from the trial calendar so that he could attempt to obtain time-stamped copies of videos from the Marco Polo app. The circuit court subsequently set a fifth trial date beginning on April 17, 2020.

On February 4, 2020, after electing to proceed pro se, Smith requested an earlier trial date. The circuit court denied the request because it had no earlier dates on its calendar to accommodate a trial that could take up to a week.

On April 6, 2020, the circuit court again removed the case from the trial calendar based upon an order from the Wisconsin Supreme Court directing that jury trials be suspended due to the COVID-19 pandemic. The court subsequently set a sixth and final trial date beginning on July 10, 2020.

Although the delays in proceeding to trial were substantial, Smith cannot demonstrate that the delays were primarily attributable to the State. Three of the five adjournments of scheduled trial dates were directly attributable to Smith's own requests for a different attorney, for more time to hire an expert, and for more time to obtain video evidence. The competency evaluation was triggered by defense counsel's observations, and, as discussed above, the determination that Smith was incompetent was supported by uncontroverted expert opinion. The COVID-19 delay was necessitated by a public health crisis that does not weigh against the State. *See* ***State v. Coleman***, 2025 WI App 7, ¶57, 415 Wis. 2d 71, 17 N.W.3d 307 (2024).

Smith also cannot show that he was prejudiced by the adjournments because, given that several of them provided him with the opportunity to obtain evidence for his defense and to be restored to competency, allowing him to better assist in his own defense. We conclude that there would be no arguable merit to a speedy trial claim.

Jurors

Smith's sole objection during voir dire to the composition of the jury was that he would have preferred for it to contain "a couple more younger people." Smith did not provide any case law, however, requiring any particular age requirements for jurors.

One of the jurors, Rene Braun, realized after the trial began that she had taught David, another of Anne's sons, in 4K. After additional questioning in which Braun affirmed that there was nothing in her interactions with David, his brothers or Anne that would cause her to be other than impartial, Smith informed the circuit court that he had no objection to Braun continuing on the jury. Another juror, Deb Jakel, realized after the trial began that she had tutored one of the defense's character witnesses. After additional questioning in which Jakel affirmed that there was nothing in her interactions with the witness that would cause her to be anything other than impartial, Smith informed the circuit court that he had no objection to Jakel continuing on the jury.

During the trial, the circuit court observed a couple of jurors close their eyes for brief periods of time, but it noted that they may just have been thinking. Prior to making a random draw as to which of the 14 members of the jury panel would be selected as alternates, the court asked whether the parties wished to move to strike any of the 14 for cause, including due to their potential inattention. Smith responded that he did not wish to strike any jurors. We conclude that Smith explicitly waived any potential objections to the composition of the jury.

Hearsay

Prior to trial, Smith told the circuit court he did not want to exclude hearsay statements from the children's videos that they had heard things from someone else because that testimony fit his defense that the children had been coached. Smith has therefore waived any objection to such hearsay statements in the children's videos.

After one of the children, Alex, testified that he could not recall what happened on March 2, 2014, the circuit court allowed a law enforcement officer to testify about what Alex told police during the early morning hours of March 3, 2014. Alex said that Smith and Anne were arguing in their bedroom throughout the day; that it sounded like his mother was getting hit; and that his mother was crying out in pain. This testimony was properly admitted under the hearsay exception for prior inconsistent statements. *See* WIS. STAT. § 908.01(4)(a); ***State v. Nelis***, 2007 WI 58, ¶32, 300 Wis. 2d 415, 733 N.W.2d 619. We conclude that there is nothing in the record that would support a hearsay challenge on appeal.

Expert Witnesses

The circuit court initially refused to allow defense investigator Elizabeth Vorpahl to sit at the defense table because she was no longer on retainer by the time of trial. The court subsequently stated that if Vorpahl agreed to be rehired, she would be able to sit at the defense table. Otherwise, she would be limited to testifying under her subpoena. Vorpahl declined to be rehired or sit at the defense table.

Smith sought to have Vorpahl testify about medical records from another doctor regarding Anne's eye injury, either in Vorpahl's capacity as an investigator or as an expert

witness. The circuit court refused to allow Vorpahl to testify as an expert because she lacked the medical qualifications to do so and the defense had not filed a pretrial motion for the admission of expert testimony.[5] The court also refused to allow Vorpahl to testify about her own investigative report discussing the medical records without admitting the records themselves, which Vorpahl did not bring with her.

Rob Namowicz, who served as a cell phone expert for the defense, had extracted data from Smith's cell phones in the custody of the Kaukauna Police Department while in Vorpahl's presence. Namowicz died prior to trial. However, Smith had previously informed the circuit court that he did not need Namowicz to testify because the defense had decided not to present GPS information. Smith also did not request a continuance after Namowicz died.

We conclude that neither the circuit court's limitations on Vorpahl's testimony nor Namowicz's death provide any arguable issues for appeal.

Smith's Decision to Testify

Smith elected to testify. Before allowing him to do so, the circuit court conducted a colloquy using the SM-28 materials from the Wisconsin Criminal Jury Instructions. The court found that Smith's decision was knowingly, voluntarily and intelligently made. Based on the colloquy and Smith's repeated assertions of his desire to represent himself, we conclude that nothing in the record would support a challenge to Smith's decision to testify.

Jury Instructions

[5] *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993).

Smith informed the circuit court during the jury instructions conference that he had no objections to the proposed instructions or verdict forms, which were based on slightly tailored pattern instructions. Based on Smith's waiver and our own review of the instructions, we conclude that nothing in the record would support a challenge to the instructions given.

Sufficiency of the Evidence

As background, Anne testified that Smith was her former boyfriend and that she and her four sons Alex, Bobby, Caleb, and David had previously lived with Smith for a period of about five years. Anne described Smith during that period as being very controlling about where she and the boys went and with whom she associated. Anne and Smith would use the phone app Marco Polo to exchange video messages while she was out of the house.

Alex testified that he would throw up and cry every time he had to return to Smith and Anne's residence from his father's or grandmother's homes because he was afraid that something bad would happen. He said that Smith would punish the boys by beating them with his hand, a belt, or another object because Smith would get mad about something they were doing, even though "it's not something to get mad over, especially that harshly." Alex also observed Smith beating his mother on multiple occasions beyond the charged incidents.

Regarding Counts 1, 2, and 3, Anne testified that on March 2, 2014, she and Smith went over to a friend's basement storage unit located in Appleton where Smith was keeping some of his belongings. While there, Smith became increasingly upset with Anne about events that had occurred in a bar the night before. Smith grabbed Anne around the throat, pushed her to the ground, choked her to the point that she was having difficulty breathing, and hit her face so hard

that her glasses and hat flew off. At one point during the assault, Smith also picked up a pipe and threatened to smash Anne's head if she made any noise.

Anne further testified that after she and Smith returned from the storage unit to their apartment in Menasha, Smith repeatedly punched her in the head and kicked her all while the children were home. Once everyone had gone to sleep, Anne left the apartment and called 911 in the early morning hours of March 3, 2014. The responding law enforcement officers found Anne "hiding" about a half block from her apartment wearing a nightgown that was not appropriate for the cold weather; observed injuries to Anne's eye, head and foot; and noted that Anne was visibly shaking, upset, crying, and appeared to be fearful. One of the officers drove Anne to the police station, after which she was transported to the hospital by ambulance.

The emergency room physician who treated Anne testified that Anne was missing hair from her scalp, had a bruised left eye, and had multiple bruises to her left lower extremity. The State introduced photographs of Anne's injuries and also the pipe at the storage unit. Anne decided a few weeks after the incident that she did not want to pursue charges at that time.

Regarding Count 4, Anne testified that on August 3, 2015, while she and her children were living with Smith in Appleton, Smith became upset with her for not giving him her full attention on a phone call. When Anne and the children returned home, Smith punched Anne so hard in her left eye that she immediately lost vision in that eye and could tell something was seriously wrong. Anne told Smith she needed to go to the emergency room, but he would only let her do so if she agreed to tell hospital personnel that she had been inadvertently struck by a baseball bat. Smith then drove Anne to the emergency room, but he kept Anne's two youngest sons in the car with him and threatened to hurt them if she contacted the police. The emergency

room doctor documented a "blowout" displaced fracture to an orbital bone and significant bruising around Anne's left eye. Anne eventually lost the eye and had a prosthetic eye implanted, but she did not tell hospital personnel or law enforcement at that time that Smith had caused the injury.

About six months after losing her eye, and having by then broken up with Smith, Anne confided in a friend about what had actually happened. The friend took Anne to the police station to file a report. When a law enforcement officer called Anne to follow up, however, she and Smith had gotten back together, and Smith was physically with Anne when she received the officer's call. In Smith's presence, Anne told the officer that she did not intend to pursue charges.

Regarding Counts 5 through 10, Anne testified that she was at home in Kaukauna with Smith and her three youngest children on Easter Sunday, April 1, 2018. Smith became angry that the three boys had visited a cousin while in the custody of their father, without Smith's prior knowledge. Smith told Anne, Bobby and Caleb to come into the living room and sit on the floor in front of the couch where Smith was seated holding a hammer. Smith directed Anne, Bobby and Caleb to each stretch out one leg and he threatened to smash their feet with the hammer if they did not answer his questions correctly. Smith proceeded to ask the boys questions about whether they had formed a "secret club" against him. If Smith did not like the boys' answers, he would make them stand up and then hit them in the head with a piece of exercise equipment or slap them so hard they would fall down. Smith also grabbed Bobby and strangled him to the point that he was having difficulty breathing and briefly lost consciousness, then threw Bobby down to the floor where he slid and hit his head against a humidifier.

Next, Smith called David out of his bedroom and directed him to bring Smith a large knife from the kitchen. Smith first set the knife by his side on the couch and asked Bobby and Caleb whether their mother "should die today." Smith later held the knife under Anne's chin. Smith proceeded to accuse Anne of being behind the secret club, grabbed her hair, pulled her to the floor, and strangled her with his hand around her neck to the point that she could hardly breathe. After letting Anne get back onto the couch, Smith stood on the couch and stomped, kicked, and punched her head, stomach, and anywhere else he could reach. During the beating, Anne experienced ringing and hearing loss in one ear. Eventually, Smith left and took Anne's phone with him so that she could not call the police.

The State introduced videos of forensic interviews with Bobby, Caleb, and David. A law enforcement officer and social worker testified that the videos were largely consistent with prior statements the boys had made to them—including that Smith had made Anne, Bobby and Caleb sit on the floor answering questions, that Smith struck Bobby and Caleb with his hands and exercise equipment, and that Smith strangled Bobby and Anne.

Regarding Counts 11 and 12, Caleb further stated in his forensic interview that the day following Easter, after Smith picked up Alex from his father, Smith became angry with Caleb for looking at him. Smith then punched Caleb so hard in the stomach that Caleb threw up, and he squeezed Caleb's throat so hard that Caleb lost consciousness.

After the Easter incident, Anne decided that she was done being with Smith because he had involved her children in the abuse. She did not believe that it was feasible to leave immediately, however, so she started to formulate an escape plan while trying to act as normal as possible. About a month later, after Smith left the house with two of the children and Anne

heard Smith over the phone threatening to harm the oldest child, Anne enlisted the help of a friend, Alex's father, and the police to get herself and her four children into a domestic violence shelter. The State presented expert testimony about the dynamics of domestic abuse and delayed reporting to help explain Anne's actions.

A family nurse practitioner who examined the children after Anne reported the Easter incident found scarring and postinflammatory pigmentation on Caleb's face that were consistent with his account of how Smith had hit him. The nurse further testified that the symptoms Bobby and Caleb described when Smith put his hand around their throats were consistent with strangulation.

The lead investigator, Matthew Kohl, acknowledged that there were discrepancies among the original statements from Anne and the children about whether the 2018 Easter weekend incidents had occurred on Saturday, March 31, or Sunday, April 1. The confusion stemmed from Anne using the day she picked up Alex from his father as a reference point—which usually occurred on Sundays but it had actually been a day later that weekend because Alex had a day off from school on the following Monday.

Regarding the repeater enhancers, Smith stipulated to two prior domestic abuse convictions in order to avoid that information going to the jury. The State also provided the circuit court with certified copies of the judgments of conviction prior to sentencing.

Regarding the dangerous weapon enhancer, Smith contends that it should not have applied because there was testimony that he set the knife on the couch next to him. The State's theory, however, was that Smith had used the hammer as a dangerous weapon, not the knife.

Regarding the domestic abuse enhancers on Counts 2 and 3, the jury found that they had not been proven. As a result of those verdicts, the underlying charges reverted to misdemeanors, and the State acknowledged that the statute of limitations had passed on them. Accordingly, the State agreed prior to sentencing to dismiss Counts 2 and 3.

Based on the evidence presented at trial, we conclude that Smith has no arguable basis to challenge the sufficiency of the evidence to support any of the ten counts on which he was convicted.

Sentencing

The circuit court held a sentencing hearing, at which Anne asked for Smith to remain in prison for eight years, at which time all of her children were adults; the State recommended a combined sentence of eight to ten years' initial confinement; the probation agent recommended a combined sentence of four years' initial confinement and four years' extended supervision; and Smith asked for a sentence of time served or probation.

After hearing from the parties, the circuit court discussed factors related to the severity of the offenses and Smith's character, and it explained how they related to the court's sentencing goals of punishment, rehabilitation, and protecting the public generally, as well as the victims of the offenses of conviction specifically. The court then sentenced Smith to consecutive terms of two years' initial confinement followed by two years' extended supervision on Count 1; three years' initial confinement followed by two years' extended supervision on Count 4; one-year initial confinement followed by two years' extended supervision on Count 5; one-year initial confinement followed by two years' extended supervision on Count 6; two years' initial confinement followed by two years' extended supervision on Count 7; and two years' initial

confinement followed by two years' extended supervision on Count 8. The court also imposed 200 days in jail on each of Counts 9 and 10, to be served concurrently with each other and the prior counts. The court withheld sentence on Counts 11 and 12 and placed Smith on probation for a period of four years consecutive to the bifurcated sentences. The court also granted the 761 days of sentence credit stipulated to by the parties.

We agree with counsel's analysis that none of the sentences imposed exceeded the available time. We further conclude that none of the sentences were "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Moreover, the circuit court adequately explained its reasoning, and there would be no arguable merit to a claim that the court erroneously exercised its sentencing discretion.

Upon our independent review of the record, we see no other arguably meritorious issues for appeal.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Peter Anderson is relieved of any further representation of Osuntoka Smith in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals