COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1190 **Cir. Ct. No. 2013CF3980**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NYROBI WILLIAM ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed*.

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Nyrobi William Allen appeals from a judgment of conviction for two counts of unauthorized use of personal identifying information

to obtain a thing of value, contrary to WIS. STAT. § 943.201(2)(a) (2013-14).[1] He also appeals from two postconviction orders that partially denied his requests for relief. Allen, who pled guilty pursuant to a plea agreement, asserts that the trial court committed errors at sentencing that entitle Allen to one of several remedies. He also alleges ineffective assistance of trial counsel with respect to the pleas and challenges the imposition of a single discretionary DNA surcharge. We reject Allen's arguments and affirm the judgment and orders.

BACKGROUND

¶2 Allen was charged with four counts of burglary, five counts of unauthorized use of personal identifying information, and one count of attempted burglary as a party to a crime. The complaint alleged that Allen and an accomplice stole purses from several homes and then used credit and debit cards to make purchases and withdraw cash. At the time Allen was alleged to have committed those crimes, he was on extended supervision for other crimes. His extended supervision was subsequently revoked, and he was ordered to serve four years of reconfinement as a result of that revocation.

¶3 Allen entered into a plea agreement with the State. At the plea hearing, the State told the trial court that Allen would plead guilty to two counts of unauthorized use of personal identifying information to obtain a thing of value (counts five and six of the information), which is a crime that carries a maximum penalty of three years of initial confinement and three years of extended supervision. *See* ***id.*** & WIS. STAT. § 939.50(3)(h). Three additional criminal

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

counts would be dismissed and read in, and five counts would be dismissed outright. In addition, a separate charge in a misdemeanor case would be dismissed and read in.

¶4 The State told the trial court that pursuant to the plea agreement, it would be recommending a prison sentence. It stated: "Well, it would be six years [of] initial confinement followed by [extended supervision] of five years, Judge. So [an] 11-year prison sentence total, concurrent with the defendant's revocation." In response, trial counsel clarified that the recommendation "is a concurrent recommendation to his present sentence."

¶5 Trial counsel then notified the trial court that Allen had a question, and the trial court gave Allen an opportunity to consult with trial counsel. After speaking with Allen, trial counsel told the trial court about Allen's question, which led to the following exchange:

> [Trial Counsel]: My client's confusion is that the State used the terminology six years for initial confinement and five years for extended supervision. Our understanding is that it was a concurrent recommendation. Each Count carrying a penalty of three years [of] initial confinement, and three years [of] extended supervision.
>
> THE COURT: [The State] gave me a global recommendation which if you want to do what you have to say then instead of five years extended supervision it would be six. Is that what he wants so he understands it better?
>
> [Trial Counsel]: Does that clarify it for you, sir?
>
> THE COURT: I mean [the State] gave me a global recommendation. [The State] actually cut off one year on the extended supervision. Had I given him three and three on each—
>
> [Trial Counsel]: It would be six years.
>
> THE COURT: That's correct…. Now, you know whatever you want to say. If you want to say three years

> and three years. I mean I'm willing to say what you want to say, but interestingly just because he asked for five or six I'm not bound by what he asked for anyway. So you know I'm just saying to you that's—what [the State] asked for actually saved him a year.
>
> [Trial Counsel]: I understand that, Your Honor.
>
> THE COURT: Well, make sure he understands it.
>
> THE DEFENDANT: I was looking for a better understanding.
>
> THE COURT: All right. Well, that's all I can tell you. That's the understanding, okay, that it would be based upon what was stated to the Court. But interestingly I want you to understand that … these Counts … bear a maximum penalty as to each Count of up to a $10,000 fine and up to a six-year stay in the Wisconsin State Prison with that divided up, up to three years initial phase of incarceration followed by up to three years of extended supervision as to each Count.

Allen indicated that he understood the maximum penalties and the trial court continued with the plea colloquy.

¶6 At sentencing, the trial court restated which counts had been dismissed pursuant to the plea agreement and then further addressed the parties:

> THE COURT: Now, according to my other notes, the State at the time of the plea to count five and six asked for an 11 year stay in the Wisconsin State prison, six years initial phase of incarceration followed by five years of extended supervision concurrent with his revocation, restitution in an amount to be determined, any other conditions up to [the] Court and of course defense free to argue.
>
> Is that an accurate statement of what was requested at the time of the plea?
>
> [Trial Counsel]: Yes.
>
> THE COURT: [State?]
>
> [State]: Yes.

> THE COURT: Is that what you understand as well, Mr. Allen?
>
> THE DEFENDANT: Yes.

Notably, neither the defendant nor his trial counsel raised any questions or concerns about the accuracy of the State's recommendation.

¶7 The State urged the trial court to follow its sentencing recommendation. In contrast, both trial counsel and Allen asked the trial court to impose concurrent sentences on counts five and six. Trial counsel read a statement from Allen that asked the trial court to sentence him to three years of initial confinement and three years of extended supervision on each count, "both concurrent to the time" Allen was "presently serving" as a result of the revocation of his extended supervision.

¶8 After hearing Allen's statement, the trial court told Allen that he had caused "psychological damage" to his victims. The trial court expressed frustration that Allen was forty-two years old and had not yet changed his criminal ways. The trial court continued:

> Now, you better start figuring it out because otherwise you're just gonna start doing life imprisonment on the installment basis, and that's not good for you, it's not good for your family, it's not good for your children or your grandchildren. But I'm not gonna let you go out there and do this thing to people in society that are innocent victims of this type of behavior.
>
> The Court is going to determine in this case, you know, that you deserve punishment, no question about it. *And my punishment's going to go ahead and give you some extra time in prison.* Why? Because you deserve it, not because you got such a great atta-guy award that you deserve leniency….
>
> ….

> So I have to consider what's gonna be the appropriate sentence then to finally get your attention and keep it. And keep it. Don't give me any more excuses about mitigation. I don't see mitigation being a big factor in this case. This is ongoing criminality, and this is the problem.

(Emphasis added.)

¶9 On count five, the trial court sentenced Allen to three years of initial confinement and two-and-one-half years of extended supervision. It imposed a variety of conditions on Allen, including counseling. Then, it considered count six and stated: "As to count six I'm gonna give you the five[-]and-a-half years in the Wisconsin State prison *concurrent* to that which is given to you in count five; three years in, two[-]and-a-half years on extended supervision." (Emphasis added.) The trial court imposed the same conditions of extended supervision and also said that it would give Allen sentence credit against both counts because they are concurrent. Finally, the trial court said that Allen would have to pay a mandatory DNA surcharge on both counts pursuant to the applicable statute. *See* WIS. STAT. § 973.046(1r)(a) (imposing a mandatory $250 DNA surcharge for each felony conviction for all defendants sentenced on or after January 1, 2014).

¶10 After the trial court explained the sentence, the State asked the trial court to clarify whether the sentences on counts five and six were intended to be concurrent or consecutive to one another. The following exchange occurred:

> [The State]: I just had a clarification question, Judge.
>
> So is it five and six are concurrent to each other but consecutive to the revocation or how did you —
>
> THE COURT: No. I did five —
>
> What we did on count five is five[-]and-a-half years in the Wisconsin State prison, three years incarcerated and

> then have that concurrent to the revocation. That's what you asked for.
>
> [The State]: Consecutive to each other, though. That was my —
>
> THE COURT: All right. Well then I didn't, I didn't —
>
> Okay. Well, then count six will be consecutive to count five with three years in and two[-]and-a-half years on extended supervision if that was not clear.
>
> [Trial Counsel]: Judge —
>
> THE COURT: That's my ruling.
>
> THE CLERK: Wait. I need to re-do the form.
>
> THE COURT: All right, just hang on.
>
> I'm giving him additional punishment. He deserves additional punishment. So that was the Court's intention in this case, and I didn't quite read that into what they said but I meant it to be that way.
>
> [Trial Counsel]: Your honor —
>
> THE COURT: Yes.
>
> [Trial Counsel]: -- is my objection at least noted for the record --
>
> THE COURT: Sure.
>
> [Trial Counsel]: -- as the Court is changing its sentence.
>
> THE COURT: Well, I did it right here during the course of the sentence, so it's not a re-sentence, it's a sentence; it's being done here, it's not a re-sentence, don't confuse the record.

Later, in response to requests for clarification from trial counsel, the trial court indicated that Allen would receive sentence credit against count five. It also explained: "Effectively he'll end up having some more time beyond his four years [that he is serving as his revocation sentence] when he gets all said and done."

¶11 Postconviction counsel was appointed for Allen, and he filed a postconviction motion on Allen's behalf. The motion argued that the trial court had erroneously exercised its sentencing discretion by modifying the sentence after first indicating that counts five and six would be served concurrently to each other and the revocation sentence. Allen sought an order imposing concurrent sentences. Allen argued that if that request was not granted, he should be resentenced. If that request was also not granted, then Allen sought a ***Machner*** hearing based on allegations that his trial counsel misled him "regarding the consequences of the plea deal." (Some capitalization omitted.) *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Finally, Allen sought an order vacating the mandatory DNA surcharges on grounds that imposition of the surcharges was an *ex post facto* law violation because Allen committed his crimes prior to the effective date of the mandatory DNA surcharge statute. Allen also asserted that he should not have to pay the DNA surcharges because he had previously provided a DNA sample, was indigent, and would have difficulty securing employment upon release from prison.

¶12 The trial court rejected Allen's challenges to his sentence and denied his request for a ***Machner*** hearing, for reasons discussed below. After delaying consideration of the DNA surcharge issue pending resolution of appellate cases addressing *ex post facto* claims, the trial court exercised its discretion and issued a second postconviction order that vacated one of the DNA surcharges, consistent with ***State v. Radaj***, 2015 WI App 50, ¶¶35, 38, 363 Wis. 2d 633, 866 N.W.2d 758 (holding that the new mandatory, per-conviction, DNA surcharge was an unconstitutional *ex post facto* law as applied to a defendant sentenced for multiple felonies after January 1, 2014, when the underlying crimes were committed before January 1, 2014, and remanding the case with directions that trial court apply the

DNA surcharge statute that was in effect at the time the crimes were committed). The trial court refused to vacate the other DNA surcharge, finding that a single discretionary surcharge was appropriate because "a single surcharge is rationally connected to the costs of maintaining the DNA database and is not punitive in effect." The trial court added: "The court will consider vacating the surcharge on count five if the defendant provides proof that he has paid a surcharge in a prior case." This appeal follows.

DISCUSSION

¶13 Allen seeks a variety of remedies on appeal, beginning with his request that we direct that his sentences be served concurrently. We consider in turn his challenges to his sentencing, his trial counsel's representation, and the DNA surcharge.

I. Challenges to the sentencing.

¶14 When imposing sentence, the trial court must impose "'the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***State v. Gallion***, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). "It is a well-settled principle of law that a [trial] court exercises discretion at sentencing" and "[o]n appeal, review is limited to determining if discretion was erroneously exercised." ***Id.***, ¶17.

¶15 In his postconviction motion, Allen argued that the trial court erroneously exercised its discretion when it ordered that counts five and six be served consecutively because it had initially ordered that they be served concurrently. Allen asserted that in changing the sentences only after being

prompted by the State to do so, the trial court imposed more than the minimum amount of time that was necessary to achieve its sentencing objectives. The trial court rejected those arguments in its written order, explaining:

> The recommendation that was presented to the court was a global 11-year prison sentence consisting of six years of initial confinement and five years of extended supervision, to be served concurrently with four years of reconfinement the defendant was already serving. The court understood what the State's recommendation was at the time of sentencing and intended to follow it based upon the factors that it considered as part of its sentencing decision. Although the court initially ordered counts five and six to be served concurrently with each other, it did so inadvertently and promptly altered the sentences to run consecutively to each other in order to accomplish what it intended to do all along – i.e. to impose an 11-year concurrent sentence consisting of six years of initial confinement and five years of extended supervision as set forth by the state[d] plea negotiation. Indeed, even before the court imposed sentence, the court recognized that the defendant needed to serve extra time in prison as punishment for his actions. This objective can only be accomplished if counts five and six are consecutive to each other. The court finds that the sentence ultimately imposed constitutes the minimum amount of confinement necessary to achieve its sentencing objectives in this case and that the court did not erroneously exercise its discretion when it altered the sentence consistent with those objectives.

(Record citation omitted.)

¶16 On appeal, Allen takes issue with the trial court's suggestion that it had "inadvertently" ordered the sentences to be served concurrently. Allen argues:

> [The trial court's] *post hoc* rationalization is belied by the record on appeal, which reflects that the [trial] court clearly intended Mr. Allen to serve concurrent sentences. This was not a slip of the tongue. When the [trial] court said that Mr. Allen would receive credit "on both counts because they're both concurrent[,]" it manifested a clear intent to impose concurrent sentences. It was only after the State asked for consecutive sentences that the [trial] court said it was doubling Mr. Allen's sentence to give him "additional punishment."

(Record citations omitted.)

¶17 We are not persuaded by Allen's arguments. While it is unfortunate that the trial court initially misstated the sentence it wished to impose, the record supports the trial court's explanation in its postconviction order that it had always intended to follow the State's recommendation. It is especially compelling that when Allen asked the trial court at sentencing to impose concurrent sentences for counts five and six, the trial court responded negatively. As noted above, the trial court said that Allen had been given chances in the past and had failed to change his ways. The trial court explicitly said that Allen "deserve[s] punishment, no question about it" and that the trial court was "going to go ahead and give [Allen] some extra time in prison" because he "deserve[d] it." With those statements, the trial court signaled its clear intent that Allen would serve time beyond the four years of reconfinement he was already serving. If the new sentences were imposed concurrent to one another, Allen would serve three years of initial confinement concurrent with four years of reconfinement—not a single day longer than his reconfinement sentence. That would be inconsistent with the trial court's clear intent to impose additional punishment beyond the reconfinement sentence.

¶18 Further, we reject Allen's argument that the trial court's reference to imposing "additional punishment" at the end of the sentencing hearing signaled that the trial court had just decided to impose additional punishment. We read the trial court's statement as a reference to its earlier comment that additional punishment, beyond the time Allen was serving for his revocation sentence, was appropriate in this case. For these reasons, we conclude that the trial court did not erroneously exercise its discretion at the sentencing hearing or when it denied Allen's motion to amend his sentences or be resentenced.

II. Allegations concerning trial counsel's performance.

¶19 In Allen's postconviction motion, he said that if he was not granted concurrent sentences or a resentencing hearing, then he was requesting a ***Machner*** hearing based on allegations that his trial counsel provided ineffective assistance by "[m]isleading Mr. Allen regarding the consequences of the plea deal." (Some capitalization omitted.) Specifically, Allen's motion alleged that he "understood the language of the plea agreement to require that the State recommend concurrent sentences on both counts." The motion said that Allen "repeatedly asked trial counsel to explain the meaning of the State's recommendation," including at the plea hearing, and that Allen "understood his attorney's explanation to mean that the State's recommendation would not only be for sentences running concurrently to his revocation sentence, but concurrently to each other." The motion further asserted that if Allen had known that the State was free to recommend consecutive sentences for counts five and six, Allen "would not have entered his pleas" and would have instead gone to trial. The motion said: "[H]e was only willing to enter his pleas because the State's recommendation (as he understood it), would not have exceeded his reconfinement sentence."

¶20 When a defendant alleges that his trial counsel provided ineffective assistance, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). A defendant claiming ineffective assistance of counsel must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the deficient performance prejudiced the defense. ***Id.*** at 687. An evidentiary hearing preserving the testimony of trial counsel is "a prerequisite to a claim of ineffective

representation on appeal." ***Machner***, 92 Wis. 2d at 804. A motion for such a hearing may, at the discretion of the trial court, be denied when: (1) the defendant has failed to allege sufficient facts in the motion to raise a question of fact; (2) the defendant has presented only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111.

¶21 Applying those standards, the trial court concluded that Allen was not entitled to a ***Machner*** hearing because the record conclusively demonstrated that Allen was not entitled to relief. The trial court explained:

> Even if counsel was deficient in explaining the meaning of the State's recommendation, the court fails to perceive how the defendant was prejudiced. The record shows that the defendant understood that the State would be recommending a total sentence of 11 years, including six years of initial confinement and five years of extended supervision, concurrent with his four years of reconfinement. Although the defendant may not have understood how the sentences on the individual counts could be bifurcated in order to reach a total sentence [of] six years of [initial] confinement and five years of extended supervision, or that the individual counts would be served consecutive to each other, the fact of the matter is that the defendant received the very sentence he bargained for 11 years, concurrent with his revocation term, including six years of initial confinement and five years of extended supervision. Simply stated, the defendant knew that he had four years of reconfinement time to serve in his other case, he bargained for six years of confinement to be served concurrent to his reconfinement time, and therefore, he certainly understood at the time he entered his pleas that he would have some additional confinement time to serve in this case. Under the circumstances, the court is not persuaded that the defendant has alleged a viable ineffective assistance of counsel claim.

¶22 We agree with the trial court's analysis and conclusion. The record conclusively demonstrates that Allen was not prejudiced by any alleged

deficiencies in trial counsel's explanation of the plea agreement. Two facts in the record are particularly compelling. First, at the beginning of the sentencing hearing, the trial court restated the plea agreement, noting that the State had agreed to recommend "an 11 year stay in the Wisconsin State prison, six years initial phase of incarceration followed by five years of extended supervision concurrent with his revocation, restitution in an amount to be determined, any other conditions up to [the] Court and of course defense free to argue." The State, trial counsel, and Allen all explicitly indicated that was correct. This belies Allen's assertion that he believed the State would recommend two concurrent terms of three years of initial confinement.

¶23 Second, the statement from Allen that trial counsel read to the trial court at sentencing explicitly asked the trial court to sentence Allen to three years of initial confinement and three years of extended supervision on each count, "both concurrent to the time" Allen was "presently serving" as a result of the revocation of his extended supervision. If Allen believed that the State was recommending two concurrent sentences of three years of initial confinement and two-and-one-half years of extended supervision, then Allen could have simply urged the trial court to follow the State's recommendation. Indeed, if the State was supposedly recommending two concurrent sentences, then Allen would have been asking for an extra year of extended supervision by asking for two concurrent sentences that each included three years of extended supervision. The record conclusively demonstrates that Allen knew the State was seeking two consecutive sentences of three years of initial confinement and two-and-one-half years of extended supervision. That is why Allen chose to exercise his right to ask for a lesser sentence. We agree that the record conclusively demonstrates that Allen was not prejudiced by any alleged deficiency in trial counsel's explanation.

Therefore, the trial court did not erroneously exercise its discretion when it denied Allen's motion without a hearing. *See* ***Roberson***, 292 Wis. 2d 280, ¶43.

III. Challenge to one discretionary DNA surcharge.

¶24 As noted above, the trial court applied the holding in ***Radaj*** and exercised its discretion to determine whether Allen should be required to pay DNA surcharges. *See* ***id.***, 363 Wis. 2d 633, ¶¶35, 38. Allen claims that the trial court offered an insufficient reason for deciding to impose a single DNA surcharge. Allen argues that the trial court's statement that the surcharge was being imposed to maintain the DNA database "is insufficient to demonstrate a proper exercise of discretion and is in fact, in direct contravention of the ***Cherry*** court's clear pronouncement that [trial] courts cannot impose the DNA surcharge for the sole purpose of maintaining the DNA database." *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (holding that trial court could not impose a discretionary DNA surcharge "simply because it can" or "to support the DNA database costs").

¶25 Although ***Cherry*** held that supporting the DNA database costs is not a sufficient reason to impose a discretionary DNA surcharge, it also identified a non-exhaustive list of proper factors that could be considered, which included the "financial resources of the defendant." *See* ***id.*** Recognizing that financial resources is a factor that can be considered, Allen argued in his postconviction motion that he "should not be subjected to the DNA surcharge because he is indigent, 42 years old, and serving a six-year term of initial confinement" and also "has a long criminal record which will make it difficult for him to find work upon release." On appeal, Allen builds on that argument, stating that if the trial court had "properly balanced the appropriateness of imposing the cost of one DNA

surcharge against Mr. Allen's ability to pay, it could have only concluded that the imposition of a surcharge was not proper because Mr. Allen was indigent, was 42 years old at the time of sentencing, and was incarcerated."

¶26 In response, the State notes that the fact Allen previously provided a DNA sample does not prevent the imposition of a discretionary DNA surcharge. *See* ***State v. Jones***, 2004 WI App 212, ¶11, 277 Wis. 2d 234, 689 N.W.2d 917. The State also asserts that the trial court considered Allen's ability to pay, an appropriate factor under ***Cherry***, and therefore did not erroneously exercise its sentencing discretion.

¶27 Although the trial court's written order did not explicitly state that it had considered Allen's ability to pay, we infer that the trial court did so when it reviewed Allen's written postconviction motion, which asked the trial court to vacate both DNA surcharges on grounds that Allen was poor and was unlikely to find employment when he was released. Allen's assertions were contrary to his positions at the sentencing hearing, at which he stipulated to joint and several restitution of $478[2] and told the trial court that he had worked while on extended supervision and planned to pursue higher education in prison.

¶28 The situation in this case is similar to that in ***State v. Ziller***, where the defendant challenged the imposition of a discretionary DNA surcharge on grounds that the trial court did not explicitly discuss whether the defendant had the ability to pay it. *See* ***id.***, 2011 WI App 164, ¶6, 338 Wis. 2d 151, 807 N.W.2d 241.

[2] At sentencing, Allen questioned whether $28 of the requested restitution was necessary where that item was returned to the victim, but he did not raise any concerns about his ability to pay restitution or other costs and surcharges.

During Ziller's sentencing hearing, he told the trial court that he "want[ed] to make things right with the victims as soon as I can," which led the trial court to order Ziller to pay roughly $10,000 in restitution to his victims. *See* ***id.***, ¶11. On appeal, we rejected Ziller's argument that the trial court's explanation for imposing the DNA surcharge was insufficient. We explained:

> As the court determined that Ziller was employable such that he could pay $10,000 in restitution, and as Ziller stated that he wanted "to make things right with the victims," the court was well within its discretion to order Ziller to pay the $250 surcharge rather than force the cost upon the public.
>
> If Ziller is asking this court to adopt a rule whereby a [trial] court must explicitly describe its reasons for imposing a DNA surcharge, we decline to adopt such a rule. The [trial] court is in the best position to examine the relevant sentencing factors in each case. The burden is therefore on the defendant to show that the sentence is unreasonable, and Ziller has failed to point to any aspect of his sentence that is unreasonable.
>
> While a [trial] court must articulate the basis for its sentence, it is not required to use magic words. Here, the [trial] court considered the primary sentencing factors in reaching its sentencing decision. Given that the court found that Ziller had the ability to pay $10,000 in restitution based on his employability, there was no reason for the court to restate that Ziller had the ability to pay the $250 DNA surcharge. What is obvious need not be repeated.

Id., ¶¶11-13 (citations omitted).

¶29 In this case, Allen argued that he should not be required to pay even a single DNA surcharge because he was poor and would have trouble finding employment. Those assertions are belied by his positions at sentencing. The trial court approved Allen's stipulation to restitution, and it subsequently determined that imposing a single DNA surcharge against Allen was reasonable. The

sentencing transcript supports the trial court's exercise of discretion and, therefore, we reject Allen's argument that the trial court's order should be reversed.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.