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September 17, 2013

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

2012AP2807-CRNM State of Wisconsin v. Bradley L. Bearheart (L.C. # 2011CF6)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Bradley Bearheart filed a no-merit report concluding there is no arguable basis for Bearheart to challenge his convictions and sentences for attempted first-degree intentional homicide of his wife, first-degree recklessly endangering safety of Joshua Swanson and carjacking of Swanson's truck. Bearheart filed a response contending there was insufficient evidence that he intended to kill his wife; the State's expert witness, Dr. Donald Jenkins, did not have all of the facts necessary to make an informed opinion regarding the number of shots fired and the prosecutor presented false testimony on that question; and Bearheart's trial attorney was

ineffective for failing to present an expert witness to prove he shot his wife only once. Counsel filed a reply discussing these issues. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

Any challenge to the sufficiency of the evidence to support the jury's verdicts would lack arguable merit. The credibility of witnesses and the weight to be accorded their testimony are matters for the jury to decide. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Regarding the crimes against Swanson, Swanson's testimony was not contradicted. Swanson gave Bearheart a ride to Bearheart's wife's house on the day of the shooting. Swanson stopped his truck along the way because Bearheart indicated he needed to urinate. At that time, Bearheart pointed a gun at Swanson's face. After a brief struggle, Swanson jumped from his truck and started running. When he was fifteen to twenty feet away, he heard a gunshot. When he turned back to look at Bearheart, he saw Bearheart aiming the gun at him while stabilizing his elbows on the truck bed. Swanson kept running until he came to a house where he made a 9-1-1 call. Bearheart drove away with Swanson's truck. Bearheart's counsel conceded the carjacking offense in his closing argument. Based on the overwhelming evidence and Bearheart's own testimony, that concession constitutes a reasonable trial strategy. See *State v. Gordon*, 2003 WI 69, ¶26, 262 Wis. 2d 380, 663 N.W.2d 765. Bearheart's counsel succeeded in convincing the jury to find Bearheart guilty of first-degree recklessly endangering safety, rather than attempted first-degree intentional homicide of Swanson as charged in the amended information.

Regarding the attempted homicide of Bearheart's wife, the jury could reasonably find Bearheart's wife was shot twice based on her testimony, Dr. Jenkins' analysis, and the physical

evidence. She testified she was shot twice as she struggled to disarm Bearheart. She also demonstrated how she was shot during the struggle and how she heard the second shot as she laid on the floor.

A sheriff's department detective who responded to the 9-1-1 call testified he found Bearheart's wife with one gunshot wound in her back and another in her leg. He pointed out two bullet holes in her clothing. However, the only bullet that was accounted for, was lodged in the victim's thigh. Police were unable to locate the second bullet.

The State's expert witness, Dr. Jenkins, presented a forty-six page curriculum vitae that established his expertise as an army trauma surgeon, the senior associate consultant for the division of trauma at the Mayo Clinic, and an assistant professor of surgery for the Uniformed Services University of Health Sciences. Jenkins testified that the victim was struck by two bullets. One bullet entered the back of her neck and came out below her breast. The second lodged in her thigh. Based on x-rays and a CT scan, Jenkins opined that the bullet in her thigh looked "perfectly intact," indicating it was not the same bullet that damaged the victim's rib and vertebrae. He further testified it was "pretty hard to imagine" how a single bullet could have made both wounds. On cross-examination he agreed that a steel-jacketed bullet would be more resistant to deformation and "mushrooming."

Bearheart testified, denying intending to kill his wife. He claimed to have accidentally shot her once when she struggled for the gun. However, when the gun was recovered, it contained three spent shell casings, consistent with the State's contention that Bearheart shot his wife twice and fired one shot at Swanson. As the arbiter of the witnesses' credibility, the jury could reasonably find Bearheart shot his wife twice, demonstrating his intent to kill. *See Poellinger*,

153 Wis. 2d at 506. Even if the jury believed he shot her only once, it could convict him of attempted first-degree intentional homicide based on the location and trajectory of the shot.

Bearheart faults his trial attorney for failing to find an expert witness to testify that all of the victim's wounds could have been caused by a single steel-jacketed bullet. At pretrial hearings as much as four and one-half months before the trial, Bearheart's counsel indicated he had been talking to an expert and was planning on mailing copies of x-rays and CT scans to the expert. Counsel also asked the court for additional time to try to find a ballistics expert who might have an opinion contrary to Jenkins'. On the first day of the trial, counsel indicated he might have a last-minute, out-of-town expert that he had not previously disclosed. However, after the court made arrangements for the witness to testify by telephone or video conferencing, the court excluded his testimony because the witness, a gunsmith, lacked sufficient credentials to offer an expert opinion as to the effect of bullets on a human body.

The court conceded the expert would be qualified to offer an opinion as to whether a steel-jacketed bullet would be more likely to distort. However, the court indicated it had only two choices: to advise the jury of non-compliance with the discovery statutes or to exclude the evidence. It chose to exclude the evidence after concluding the evidence could be introduced through another witness. That witness, the gun's owner, testified a steel-jacketed bullet would not distort and would remain intact and go through a carcass. Therefore, it appears Bearheart's trial counsel attempted to find an expert witness to contradict Jenkins, but was unable to find an expert witness who would opine that a single bullet could have caused all of the victim's injuries. There is no reason to believe a medical expert exists who would have supported the single-bullet theory. Although counsel could have complied with the discovery rules and identified the gunsmith as an expert witness at an earlier time, the evidence regarding the lack of distortions in

a steel-jacketed bullet came in through another witness. Therefore, Bearheart was not prejudiced by his counsel's failure to timely disclose his witnesses.

Finally, the record discloses no arguable basis for challenging the sentences. The court imposed consecutive sentences totaling thirty-five years' initial confinement and thirty years' extended supervision. The court appropriately considered the seriousness of the offenses, Bearheart's character and prior record, and the need to protect the public. See *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered no improper factors and the sentences are not arguably so excessive as to shock public sentiment. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Bearheart in this matter. WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals