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April 23, 2014

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

2011AP2666-CRNM State of Wisconsin v. Warren Roy McNeail (L.C. #2010CF3483)

Before Blanchard, P.J., Lundsten, Higginbotham, JJ.

Warren Roy McNeail appeals from a judgment of conviction for first-degree reckless homicide. His appellate counsel has filed a no-merit report under WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). McNeail has filed a lengthy response.[2] We required appellate counsel to file a supplemental no-merit report to address

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] McNeail was granted four extensions of time to file his response and filed his response thirteen months after the no-merit report was filed.

certain parts of McNeail's response which raised facts outside of the record in the context of his contention that he was denied the effective assistance of trial counsel. Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21(1).

McNeail was charged with first-degree intentional homicide for strangling Marianne York to death in her home. McNeail admitted to police that he was visiting at York's house and was responsible for her death. He stated he had a fight with his girlfriend just before going to York's house and, when York got mad at him and starting yelling at him, he saw the face of his girlfriend and became enraged. At his jury trial, he testified that after he laughed at York's suggestion that he move in with her, York attacked him with a wooden statue of a parrot and wielded a knife. When he knocked the knife out of York's hand, she said she would kill him and clawed at him. He testified he put his hand on York's throat to keep her away as she attempted to harm him. McNeail testified that he had lied to police who were investigating York's death to protect York's reputation. When the prosecutor suggested that McNeail had had a long time to think up the story he testified to, McNeail countered that he had told the attorney who represented him at an initial appearance that he had lied to the police and why he had done so. The jury was instructed on first-degree intentional, second-degree intentional, first-degree reckless, and second-degree reckless homicide. McNeail was convicted of first-degree reckless homicide. He was sentenced to forty years' initial confinement and five years' extended supervision.

The no-merit report concludes that any defect in the preliminary hearing is moot, jury selection was proper, any argument that there was improper opening or closing argument was

forfeited by the failure to object, the trial court properly ruled on evidentiary objections made during the trial, McNeail knowingly, intelligently, and voluntarily exercised his right to testify, motions to dismiss after the prosecution rested and at the close of evidence were properly denied, the trial court properly exercised its discretion in denying a motion for acquittal notwithstanding the verdict, and the sentence was a proper exercise of discretion and not excessive. We are satisfied that the no-merit report properly explains its conclusion that the issues it raises are without merit, and this court will not discuss them further except as necessary to address McNeail's response. We have also considered whether there was any improper argument during opening or closing arguments,[3] whether the jury instructions were proper, and whether there was sufficient evidence to support the jury's verdict. We conclude no issues of arguable merit arise from those points.

We turn to McNeail's lengthy response suggesting, as he numbers them, eight claims of ineffective assistance of trial counsel. Our consideration of McNeail's claims is limited because claims of ineffective assistance by trial counsel must first be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This court normally declines to address such claims in the context of a no-merit review if the issue was not raised postconviction in the trial court. However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether McNeail's claims have sufficient

[3] Although the no-merit report concludes that any issue about improper argument is forfeited for want of an objection, it is also appropriate to consider whether any objectionable argument occurred because if improper argument was made but not objected to, a related claim of ineffective assistance of trial counsel might be arguably meritorious. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

merit to require appointed counsel to file a postconviction motion and request a ***Machner***[4] hearing.

A claim of ineffective assistance of counsel has two parts: the first part requires the defendant to show that his counsel's performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The deficient performance inquiry is "whether counsel's assistance was reasonable considering all the circumstances." ***Id.*** at 688. Every effort is made to avoid the effects of hindsight and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within a wide range of reasonable assistance and that some challenged conduct "'might be considered sound trial strategy.'" ***Id.*** at 689 (quoted source omitted). Most importantly here, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Id.*** at 691. The prejudice test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. The prejudice determination considers "the totality of the evidence before the judge or jury." ***Id.*** at 695.

In determining whether appointed counsel is obligated to pursue a postconviction claim of ineffective assistance of trial counsel, we consider whether sufficient facts can be alleged to support a motion for a ***Machner*** hearing. *See* ***State v. Allen***, 2004 WI 106, ¶23 & n.7, 274

[4] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Wis. 2d 568, 682 N.W.2d 433 (to be entitled to a hearing, the defendant's motion must provide sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle the defendant to relief). We also consider whether the defendant can establish prejudice from trial counsel's alleged deficient performance.

Before addressing McNeail's specific claims, we observe that in large part McNeail's focus is that his trial counsel should have emphasized self-defense and had that been done, he would have been acquitted. At trial, defense counsel argued that McNeail had not intended to kill York and that he killed her in an attempt to fend off what he perceived as an attack by York. Defense counsel emphasized evidence that McNeail would not have had to apply much pressure or apply pressure for long to have caused York's death, so that McNeail's fatal conduct might have been merely reckless and not intentional. Defense counsel makes a strategy decision when formulating arguments to the jury. *See* ***Wainwright v. Sykes***, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (once counsel is appointed, the day-to-day conduct of the defense, including what defenses to develop, rests with the attorney); ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979) (defense counsel has a right to select from the available defense strategies); ***Lee v. State***, 65 Wis. 2d 648, 654–56, 223 N.W.2d 455 (1974) (a reviewing court will not usurp trial counsel's right and responsibility to engage in trial tactics and strategies that counsel believes will best serve the client).

The record supports defense counsel's strategy choice as reasonable. York was a sixty-six-year-old woman who weighed 135 pounds. McNeail was forty-nine years old and weighed 165 pounds. McNeail's own testimony at trial did not lend itself to a clear defense of any kind, let alone complete reliance on self-defense. McNeail acknowledged in his testimony that he told police that he could have easily overpowered York. Although specifically asked by police if

York had hit him with the wooden parrot statue, McNeail did not tell police that she did. During his testimony, he first described his conduct as follows:

> And I shot my hand out. And I was not trying to grab her throat but I was holding her back. And I don't know how long before that she buckled and her head hit my knee. And I caught her. And I laid her down on her side. And she wasn't breathing.

He later stated:

> Now, I know what's coming at me. I did not try to hurt that woman. I tried to defend myself. And I'm not even trying to saying [sic] it's self-defense. I'm saying I tried to push her off of me. Whether my strength or how many pounds, I don't know how much I did. But I did not try to hurt that woman.

Despite McNeail's claim that he was only defending himself, the evidence was that after he realized that York was not breathing, he did nothing to care for her. He said he panicked and sat for several moments thinking about what had happened. He went through York's purse, took her credit card, and after about twenty minutes, left in York's car.

Considering the circumstances and McNeail's own admission and testimony, it was reasonable for defense counsel not to limit the theory of defense to self-defense. Therefore, as much as McNeail now faults trial counsel for not presenting additional evidence supporting a self-defense claim, trial counsel's strategy decision was sound and "virtually unchallengeable" on appeal. ***Strickland***, 466 U.S. at 690. Further, trial counsel need not undermine the chosen strategy by presenting inconsistent alternatives. ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

In his response, McNeail claims that trial counsel was ineffective for: (1) not spending an adequate amount of time consulting with him about the important witnesses he wanted at trial

and keeping him informed of the progress of trial preparation; (2) failing to investigate witnesses and other evidence; (3) not striking a specific juror that McNeail asked counsel to strike; (4) not calling certain witnesses at trial to explain the background of his relationship with York and why York attacked him; (5) not asking that the self-defense instruction indicate that it was the prosecution's burden to disprove self-defense; (6) "giving the case away" during closing arguments; (7) failing to object to statements in the prosecutor's closing argument; and (8) not reporting to the trial court the possibility that the victim's daughter had spoken to the jury outside of the courtroom. We conclude that McNeail's response does not identify any issue of arguable merit.

(1) Inadequate consultation time and (2) failure to investigate witnesses and other evidence.

McNeail first complains that his trial counsel did not consult with him sufficiently for him to become aware that trial counsel had not talked to certain witnesses he wanted to testify at trial. He states that if he had known trial counsel was not calling any witnesses for his defense, he never would have gone to trial with that attorney. The related claim is that his trial attorney failed to investigate what the witnesses identified by McNeail would say and how their testimony at trial would have been useful.

McNeail sets forth information and statements from his girlfriend and three others which he gathered from the police reports. The information pertains to the events leading up to McNeail's arrival at York's house, his reason for being there, and observations of his injuries and conduct after he left her house. That information was only tangentially relevant to the issue at trial—whether he intended to kill York. Because his proposed witnesses did not witness York attack McNeail with the wooden parrot statue or wield a knife and could not support his

testimony that she had done so, McNeail was not prejudiced by trial counsel's failure to call them.

McNeail focuses on police reports that a print, hair, and finger splint found in the home could not be traced to him and that York's doors were found unlocked. He believes more investigation should have been done. However, given McNeail's admission that he alone was responsible for York's death, neither the police nor trial counsel were required to investigate the possibility that another person committed the offense.

McNeail claims his trial counsel should have followed up with York's treating physician after he told trial counsel that he had seen York's face black and blue weeks before her death. He suggests York was being treated for an unknown medical problem and his trial counsel should have investigated how York's condition played into the events of her death. However, the jury heard evidence that York had medical conditions such that she was medically in a vulnerable condition. McNeail was not prejudiced by trial counsel's failure to gather the same information from York's treating physician.[5]

McNeail also claims that his trial counsel was ineffective for not contacting and calling as a witness attorney Paul J. Manley, the attorney who had represented McNeail at his initial appearance. McNeail states that he told Manley that he lied to the police to protect York's reputation. McNeail states he told his trial counsel about his conversation with Manley. McNeail argues that Manley should have been called at trial to rebut the prosecutor's suggestion

[5] Moreover, it would have been potentially dangerous territory for trial counsel to explore York's medical condition based on McNeail's report of seeing her face black and blue on a previous occasion. If (continued)

that McNeail had taken a long time to come up with the version of events he told the jury and to corroborate McNeail's testimony about why his statement to police was untruthful. The supplemental no-merit report includes an affidavit from Manley in which he states, "I do not recall that Mr. McNeail told me anything about lying to the police during his interrogation."[6] This demonstrates that even if McNeail told his trial counsel about the conversation with Manley,[7] had trial counsel contacted Manley no useful evidence would have come of it. Trial counsel is not ineffective for not calling a witness who would not have supported McNeail's testimony.

McNeail states in his response that he told his trial counsel that his blood and skin would be on the wooden parrot statue that York hit him with. He complains that the statue was never tested for DNA. We conclude that trial counsel's failure to have the object tested for DNA was not ineffective counsel in light of McNeail's own conduct. First, the supplemental no-merit report indicates that not until the day before trial did McNeail identify for trial counsel the object that he claimed York struck him with.[8] Trial counsel could not be ineffective for not testing an object not identified until the day before trial. Second, even if McNeail's DNA was on the

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the jury were to hear that McNeail was aware of York's vulnerability, it could have detracted from the reckless nature of his conduct.

[6] *See* WIS. STAT. RULE 809.32(1)(f) ("If the attorney is aware of facts outside the record that rebut allegations made in the person's response, the attorney may file … a supplemental no-merit report and an affidavit or affidavits, including matters outside the record.").

[7] In his affidavit included with the supplemental no-merit report, appellate counsel reports that trial counsel did not recall any pre-trial conversation with McNeail about his conversation with intake attorney Paul Manley and that trial counsel was surprised by McNeail's trial testimony relating to Manley.

[8] The supplemental no-merit report includes appellate counsel's affidavit summarizing this information he received from trial counsel and from his review of trial counsel's file notes.

statue, it would not have excluded the possibility that York used the object against McNeail in trying to defend herself. The prosecution argued that McNeail's DNA was found under York's fingernails because she defended herself. It could also easily argue that the statue was used for the same purpose. Thus, the evidence McNeail claims was missing or not pursued by trial counsel had no exculpatory significance.

(3) Impaneling a biased jury.

McNeail suggests trial counsel was ineffective for allowing juror number 33 to remain on the jury. That juror indicated during voir dire that, because he was originally from Africa and had seen the horrors of eleven years of war there, he was worried the evidence in the case might trigger anger from his past about persons exerting power over others. McNeail indicates that he told his trial counsel to exercise a peremptory strike against juror 33 but she failed to do so and juror 33 became the jury foreperson. McNeail contends that the trial testimony that McNeail knew he could overpower York would have triggered the juror's concern about persons exerting power over others and made the juror biased. We reject his suggestion. McNeail's claim relates to subjective bias of a juror. *See* ***State v. James H. Oswald***, 2000 WI App 3, ¶4, 232 Wis. 2d 103, 606 N.W.2d 238 ("Subjective bias refers to the prospective juror's state of mind."). Juror 33 was asked whether, despite his past experiences, he could still fairly and impartially hear the evidence in the case. The juror replied, "I think so." A juror need not give an unequivocal assurance. ***Id.***, ¶19. Thus, the juror's answer provided sufficient assurance of impartiality. *See* ***State v. Theodore Oswald***, 2000 WI App 2, ¶19, 232 Wis. 2d 62, 606 N.W.2d 207 (1999). Trial counsel was not ineffective for not striking a juror who acknowledged he could be impartial.

(4) Witnesses not called at trial.

This portion of McNeail's response repeats much of what was set forth in sections (1) and (2) and we do not address these claims again. An additional claim made under this heading is that trial counsel should have called witnesses who would have enlightened the jury on the nature of McNeail's relationship with York as perhaps more than platonic from York's view. He believes this would have shown why York would have attacked him when he allegedly laughed after her request that he stay with her. Such evidence did not bear directly on McNeail's conduct in defense of York's alleged attack on him or the theory of defense that the incident transpired quickly.

(5) Self-defense jury instruction did not address burden of proof.

McNeail claims that trial counsel was ineffective for not requiring the self-defense jury instruction to clearly state that the prosecution has the burden of disproving self-defense. Because self-defense is generally viewed as an affirmative defense, "the burden is on the State to disprove the defense beyond a reasonable doubt" and "the jury must be instructed as to the State's burden of proof regarding the nature of the crime." ***State v. Austin***, 2013 WI App 96, ¶¶12, 16, 349 Wis. 2d 744, 836 N.W.2d 833.

The jury was instructed by the reading of WIS JI—CRIMINAL 1017 (2012), which incorporates self-defense into the elements of each of the four crimes the jury was to consider. Thus, the jury was instructed:

> Because the law provides that it's the state's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead you'll be

> asked to determine whether the state has established the necessary facts to justify a finding of guilty for first or second-degree intentional homicide or for first and second-degree reckless homicide. If the state does not satisfy you that these facts are established by the evidence, you'll be instructed to find the defendant not guilty.

In addition, before hearing the elements of the offenses of first- and second-degree homicide and first-degree reckless homicide, therefore, three times, the jury was told, "the state must prove by evidence which satisfies you beyond a reasonable doubt, that the following … elements were present." This instruction adequately stated the prosecution's burden. Even if it did not, McNeail could not demonstrate prejudice from trial counsel's failure to request that the jury instruction explicitly state the prosecution's burden to prove he did not act in self-defense. Under the facts related to York's age and size compared to McNeail's and his own admissions, including that he could have overpowered her, no reasonable jury would have found that McNeail acted reasonably in self-defense.

(6) Defense closing argument.

McNeail believes that his trial counsel's closing argument painted him in a bad light and took away any chance he had for a self-defense verdict when counsel told the jury she agreed with certain things said by the prosecution. Specifically, he points to counsel's acknowledgement that York's death was tragic, "that it was horrendous and it was a bad way to die," that it was not known exactly at what point McNeail's hands came off York's neck, and that it might have been that "he used too much resistance" or "he went too far and his conduct was reckless." We have reviewed the entirety of the defense closing argument and nothing inappropriate was said. Acknowledging the obvious, that York's death was tragic, served to mitigate not only the circumstances but also McNeail's admission of responsibility for her death.

Counsel was not calling McNeail a liar when she stated that it was not known when McNeail's hands came off York's neck. McNeail's testimony was that he did not know when he took his hands away. Counsel's argument sought to keep the jury focused on the absence of intent to kill, while attempting to walk the very fine line that McNeail's admissions left for the defense. McNeail's claim of ineffective assistance during closing lacks merit.

(7) Prosecution's closing argument.

McNeail argues that his trial counsel should have objected during the prosecution's closing argument when the prosecutor told the jury that McNeail was coming up with story after story and lying. He also argues that it was objectionable for the prosecutor to suggest McNeail had the knife found in his possession for the purpose of killing his girlfriend. Generally, counsel is allowed considerable latitude in closing argument. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). New evidence may not be introduced during closing; closing arguments are limited to comment on the facts of the record. *See* ***State v. Richardson***, 44 Wis. 2d 75, 83, 170 N.W.2d 775 (1969). The prosecutor's argument that McNeail was lying was permissible. In its rebuttal argument the prosecution suggested McNeail picked up the knife after he killed York and was on his way to see his girlfriend. Contrary to McNeail's characterization of the argument, the prosecutor did not state McNeail intended to kill his girlfriend with the knife. Even if interpreted as McNeail suggests, the argument about the knife was not outside the evidence since a jail inmate testified that McNeail told him he was going to kill his girlfriend because she had called the police. Trial counsel is not ineffective for not objecting when there was no basis to do so.

(8) Jury contact outside court room.

McNeail states that at the end of the second day of the trial, after the jury had been instructed but was going home before staring deliberations the next day, a woman said something to the jury outside of the courtroom. He believes the woman was York's daughter whom he had seen in the gallery during the trial. In his response he explains how he was waiting with a deputy to be returned to the jail when another deputy returned to the courtroom after escorting the jury. He states he overhead the deputy call the prosecutor and complain about the incident. He states he told his trial attorney that a deputy reported to the prosecutor that the jury had been approached by a woman and something was said to the jury but the deputy did not know what. His trial attorney responded that the prosecutor had not said anything to her about the occurrence.

McNeail suggests that trial counsel's failure to do anything about his report resulted in the lost opportunity to question the jury about what was said. He argues his due process right to an impartial jury was violated by the jury's exposure, if any, to what the victim's daughter said.

Trial counsel cannot be ineffective for not taking action on something trial counsel was not aware of. The supplemental no-merit report includes an affidavit from the prosecutor stating he does not recall being made aware that the jury had contact with any member of York's family, that his trial notes do not include any reference to anything like that occurring, and that if he had been told of such an incident, his practice would have been to notify the court and defense counsel. The affidavit of appellate counsel reports that McNeail's trial counsel stated she was not approached by a deputy to report such an incident and trial counsel had no independent knowledge of York's daughter contacting the jury.

Moreover, even if the incident had occurred, the jury was instructed that "[a]nything you may have seen or heard outside the courtroom is not evidence. You are to decide this case solely on the evidence." We presume that the jury followed the instruction given by the trial court. ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992). Thus, the prejudice prong of the ineffective assistance of counsel analysis could not be met.

There is no arguable merit to a claim that McNeail was denied the effective assistance of counsel.[9] Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent McNeail further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Kevin M. Gaertner is relieved from further representing Warren Roy McNeail in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[9] McNeail filed an "Answer to Supplement No-Merit Report" in which he again asserts that trial counsel was ineffective for not calling Attorney Manley as a witness, for not having the wooden parrot statue tested, and for not reporting that the victim's daughter may have said something to the jury outside of the courtroom. WISCONSIN STAT. RULE 809.32(1)(f) makes no provision for another response from the defendant to a supplemental no-merit report, and this court did not invite McNeail to file an additional response. We have read the additional response but need not separately address it. Although we may not have specifically addressed each of McNeail's points in either response, they all fall within the ineffective assistance of counsel rubric and lack arguable merit for the reason that our confidence in the result would not be undermined.