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

2013AP585-CRNM State of Wisconsin v. Randolph W. Melsness (L.C. # 2010CF780)

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

Randolph Melsness appeals a judgment convicting him, following a jury trial, of first-degree intentional homicide and operating a firearm while intoxicated. Attorney Dennis Schertz has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses several pretrial motions, the sufficiency of the evidence,

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

the sentence, and counsel's performance. Melsness was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Pretrial Issues

Melsness initially entered an NGI plea—that is, not guilty by reason of mental disease or defect. In response, the circuit court appointed Dr. Kent Berney to perform an NGI examination pursuant to WIS. STAT. § 971.16. Berney filed a report finding that, although Melsness had been hospitalized in the late seventies and early eighties for manic depression, there was no indication of current or recent manic or hypomanic symptoms, audio or visual hallucinations, or paranoid delusional ideas. Berney also conducted a series of cognitive tests that showed Melsness had no neurological problems. Berney noted that Melsness suffered from alcohol dependency, and that his consumption of alcohol may have contributed to his behavior, but concluded that did not constitute a mental disease or defect and found no other ongoing psychopathy or significant personality disorder. Given the expert's opinion, we see no potential appellate issues arising from the withdrawal of the NGI plea.

Melsness moved for a change of venue based upon pretrial publicity. The record shows, however, that the circuit court properly exercised its discretion when denying the motion by discussing the application of the relevant law to the facts before it. In addition, the court sent out voir dire questionnaires and, based upon the responses, accepted a stipulation from the parties as to an acceptable pool of potential jurors. The voir dire panel was selected from that stipulated pool; the parties conducted additional questioning resulting in the undisputed dismissal of several

panel members during voir dire; Melsness offered no objection to any juror who served on the jury; and there is nothing in the record to suggest actual bias on the part of any of the jurors.

Next, Melsness moved to suppress evidence collected in a warrantless search of his camper, where police discovered the body of the homicide victim.[2] At the suppression hearing, Deputy Brian Behrendt testified that police went out to the Melsness residence—where Randolph and his brother Rolland lived with their mother Leona—in response to a report from Rolland that Randolph was intoxicated and firing a .22 caliber gun in the basement. Rolland told Deputy Behrendt that he feared for his life based upon several prior incidents in which Randolph had threatened to kill or harm Rolland or other family members. Randolph's son, David, confirmed that Randolph had made threats against Rolland in the past, that Randoph's agitation level had increased recently along with his alcohol use, and that Randolph had been drinking heavily and firing a weapon in the basement that day. David also told Behrendt that, while David was in the basement with his father, Randolph had stated that he was at the end of the line.

After the police arrested Randolph on the firearm charge, Rolland asked Sergeant Patricia Christianson to remove all of the firearms from the Melsness property, because Rolland feared Randolph would try to kill him and their mother in the morning when released from custody. Rolland told Christianson that he, Randolph and another brother had jointly inherited the property from their father, and Rolland gave permission to the police to search the entire property, including outbuildings, to find the firearms. Rolland did not mention that a camper

[2] Melsness also filed a motion to suppress his statement to police, claiming that he was intoxicated when he gave his statement and was not properly advised of his rights. That motion was subsequently withdrawn however, and therefore there is nothing in the record that would provide an evidentiary basis for it.

parked on the property was solely owned by Randolph, and Christenson mistakenly assumed that it was jointly owned along with the rest of the property the brothers had inherited. Deputy Rick Doty found the labeled keys to the camper on one of several hooks in an area of the basement accessible to all of the residents and used them to open the camper, where he almost immediately observed the body of a deceased female under a blanket.

The circuit court denied the suppression motion on the dual grounds that the police had a good-faith basis to believe they had consent to search the camper, and that they also had grounds to conduct a warrantless search of the camper vehicle for the firearms that Randolph had used to threaten Rolland in the past and that Rolland feared Randolph might use to kill him when released on bond. *See* ***State v. Reese***, 2014 WI App 27, ¶¶19-22, 353 Wis. 2d 266, 844 N.W.2d 396 (suppression not required when police acted in good faith upon established exception to warrant requirement); ***Carroll v. United States***, 267 U.S. 132, 153 (1925) (no warrant needed to search a vehicle when probable cause and exigent circumstances are present). Regardless whether a challenge to the suppression ruling would be frivolous on its merits, we conclude that any error in admitting evidence relating to how the body was discovered would be harmless given the strength of the evidence presented at trial, which we will discuss below.

Next, Melsness moved to sever the charges, on the basis that evidence of his behavior with the gun in the basement would be unduly prejudicial in relation to the homicide charge, since the victim was beaten to death, not shot. Two or more crimes may be jointly charged in a single complaint or information when they are of the same or similar character, or are based on the same act or transaction, or are based on multiple transactions that are connected together or constitute parts of a common scheme or plan. WIS. STAT. § 971.12(1). Here, the circuit court reasonably determined that the charged offenses were connected because Melsness's behavior

with the gun and statement that he was at the end of the line a few days after he killed the victim would have been admissible in the homicide case as an "emotional manifestation" of his state of mind—i.e., consciousness of guilt.

Melsness also moved for the admission of ten items of "other acts" evidence relating to the victim's alleged past violent conduct toward Melsness, including striking him and throwing things at him on several occasions. The State conceded that seven of the items could be properly admitted under ***McMorris v. State***, 58 Wis. 2d 144, 152, 205 N.W.2d 559 (1973) (allowing a defendant who has met the burden of production for a self-defense claim to present evidence of specific prior instances of violence by the victim that were within the defendant's knowledge at the time of the charged crime). At the hearing on motions in limine, Melsness withdrew a portion of one of the requests challenged by the State; the parties agreed on the parameters of what would be offered on another item; and the court granted the ***McMorris*** motion on the remaining disputed item relating to an incident in which the victim had allegedly grabbed the steering wheel while Randolph was driving. Since Melsness prevailed on the motion, there are no grounds to appeal it.

Finally, Melsness moved for the exclusion of several photographs of the victim, on the grounds that they were either cumulative or unduly prejudicial. The circuit court struck one of the photos as cumulative, and provided a reasoned explanation why the probative value of the remaining photographs outweighed their potential for prejudice.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in

probative value and force that'" it can be said as a matter of law that "'no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1).

Here, the circuit court granted Melsness's request to instruct the jury on the defense theories of self-defense and adequate provocation. Accordingly, the circuit court instructed the jury that, in order to find Melsness guilty of first-degree intentional homicide, it needed to determine that Melsness committed an act that was a substantial factor in causing the victim's death; that he was aware his conduct was practically certain to cause death; that he did not believe that the force he used was necessary to prevent imminent death or great bodily harm to himself; and that Melsness had no reasonable belief that the victim had done something that would be sufficient to cause complete loss of self-control in an ordinary person.

Melsness's own testimony, in conjunction with the statement he made to police and the medical evidence, was sufficient to support the verdict on the homicide charge. According to Melsness, he and a woman he had recently begun dating—Renee Maki—were drinking heavily and playing cards in the camper one evening when they got into an argument that turned physical. Melsness claimed that Maki initiated the fight by coming at him from behind, hitting him in the back. She then continued to hit him, pulling his ear, scratching at his eyes, hitting him in the nose, and eventually pulling one of his fingers back until it broke. In response, Melsness said that he "just--I lost it" and that he "beat the fuck out of" Maki because she "really wound him up" and he was the "most angry … that he'd ever been in his life." Specifically, Melsness told police that he repeatedly punched Maki in the face until she was down on the floor, after which he repeatedly kicked her back and stomped on her head each time she tried to get up,

saying that she was "not going to fuck with [him]." Melsness then straddled Maki on the floor, grabbed her by the hair, and slammed her head left and right against a table and cabinet, while telling her to "be quiet" and "stay down, bitch."

Melsness asserted that he was afraid of Maki because she had a violent temper and had hit him and thrown things at him on several occasions in the past without provocation, and because she had threatened during and/or after the fight to kill him or have friends come after him. Melsness acknowledged, however, that Maki had made similar threats in the past without following through; that he knew she was not armed during the fight; that he knew he was physically dominant to her; and that there was no reason he could not have simply left the trailer once she was down on the floor. He further admitted that the physical evidence contradicted his initial claim to police that Maki was alive and talking when he left the trailer; that he never called to request medical assistance for Maki; and that he straightened up the camper and threw bloody clothing in the garbage rather than reporting the incident.

The pathologist who performed the autopsy, Dr. Robert Corliss, testified about multiple injuries Maki had sustained, including lacerations and other blunt force trauma to the head resulting in the complete detachment of her frontal scalp tissue from her skull, consistent with having her head banged against a hard surface at least seven times; contusions on her back and shoulders consistent with having been stomped on with significant force; a fractured rib consistent with having been knelt on; and defensive injuries to her arms. The pathologist concluded that the cause of death was diffuse axonal injury from the blunt force trauma to the head, and that death was nearly instantaneous after one or more of the head blows.

A jury could reasonably determine based upon this evidence that Melsness acted out of rage, rather than fear, and that nothing Maki had done would have been sufficient under the law to justify an ordinary person engaging in the level of violence that Melsness used.

Assistance of Counsel

As we have described above, counsel advanced numerous pretrial motions on behalf of Melsness, and was successful in obtaining the admission of evidence and jury instructions favorable to the defense. As we will discuss below, counsel also presented an alternative presentence investigation report to the court, and successfully argued for a parole eligibility date for Melsness. In short, we see nothing in the record to indicate that counsel's performance fell below professional norms.

Sentence

A challenge to Melsness's sentences would also lack arguable merit. The offense of first-degree intentional homicide carries a mandatory penalty of life in prison under WIS. STAT. § 939.50(3)(a). Therefore, the focus of the sentencing hearing in this case was whether the circuit court would determine that Melsness would be eligible for release on extended supervision, and if so, when.[3] *See* WIS. STAT. § 973.014. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

[3] The nine-month sentence for the misdemeanor firearm offense was made concurrent, and is not controlling.

The record shows that Melsness was afforded an opportunity to comment on the PSI, to present an alternate PSI and letters from several family members, and to address the court both personally and by counsel. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court observed that the homicide was not the result of a single blow, but rather involved a "brutal" and "horrendous" beating that "went on for some time." The court also noted that Melsness did not accept responsibility by coming forward to report what he had done, but instead hid evidence of the crime. With respect to the defendant's character, the court observed that Melsness had lifelong issues with alcohol use, paranoia, anger, and making verbal threats, but had no apparent history of physical violence and had successfully raised a family and held down jobs throughout his life, giving him a low recidivism risk in the COMPAS evaluation. The court concluded that a supervision eligibility date of twenty-five years—just five years more than the minimum allowed by statute—was appropriate and sufficient to protect the public, given the additional procedures set in place before Melsness would actually be granted extended supervision. The sentence was plainly not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals