OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 14, 2015

To:

Hon. Ellen R. Brostrom
Milwaukee County Courthouse
821 W State Street
Milwaukee, WI 53233

John Barrett, Clerk
Milwaukee County Courthouse
821 W. State Street, Room 114
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State Street
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kiley Zellner
4915 S. Howell Avenue, Suite 300
Milwaukee, WI 53207

William Oliver Bell
6220 W Kaul Avenue
Milwaukee, WI 53218

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

2014AP367-CRNM State of Wisconsin v. William Oliver Bell
(L.C. #2013CF000146)

Before Curley, P.J., Kessler and Brennan, JJ.

William Oliver Bell appeals from a judgment of conviction, entered upon a jury's verdict, for substantial battery, contrary to WIS. STAT. § 940.19(2) (2011-12).[1] Bell's postconviction and appellate lawyer, Kiley B. Zellner, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Bell has responded. After independently reviewing the record, the no-merit report, and the response, we conclude there are

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

no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

BACKGROUND

Bell was originally charged with second-degree sexual assault for an incident alleged to have occurred at the end of December in 2012. According to the complaint, the victim in this matter went to the apartment of her friend Shakey, who was later identified as Garland Taylor. At around 1 a.m., Shakey's nephew, Bell, came to the apartment. The victim reported that Bell had cocaine and that after Shakey left to buy cigarettes, Bell started to rub her thigh. When she resisted, Bell punched her in the face, grabbed her neck, and told her to get down on the floor. Then Bell raped her. The victim eventually went to the hospital and was told that she had fractures to two bones around her eye.

The State subsequently amended the information to add counts of substantial battery and false imprisonment. The jury found Bell guilty on the count of substantial battery; he was acquitted on the charges of second-degree sexual assault and false imprisonment.

DISCUSSION

A. *Sufficiency of the Evidence*

Counsel first addresses whether the evidence is sufficient to support the jury's verdict. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the inference necessarily drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury's verdict will be reversed "'only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury

could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

To convict Bell of substantial battery, the State was required to prove that he: (1) caused substantial bodily harm to the victim; and (2) intended to cause bodily harm to the victim. *See* WIS JI—CRIMINAL 1222. Substantial bodily harm includes any fracture of a bone or tooth. *See* ***id.***

During trial, the victim was shown photographs depicting her injuries and testified that as a result of a punch from Bell, she suffered a broken eye bone and cheek bone and a chipped tooth that would require surgery. Bell, in his testimony, admitted that he hit the victim with his fist and further stated that he believed he seriously hurt the victim and observed she was bleeding from her face.

We conclude that sufficient evidence of guilt exists. An appellate challenge to the sufficiency of the evidence would lack arguable merit.

B. *Self-Defense*

Bell asserts that the trial court's refusal to give the jury self-defense instructions was the result of his trial counsel's ineffective assistance. He argues that during his testimony, as he was describing the events that led to him striking the victim and just as he was about to describe what the victim did that, according to him, warranted self-defense—his trial attorney ordered him to stop and directed another line of questioning. In his response to the no-merit report, Bell asserts: "This created a structural vacuum in my testimony leaving valuable testimony to be omitted. When I was allowed to continue I was directed to continue a scene that began after [the victim]'s

actions that warranted self-defense." Bell continues, "I actually did not know what [the victim] had in mind until she raised her hand in a prepared stabbing motion with that piece of wire hanger. (The essence of my statement if I was not stopped by my attorney and directed elsewhere.)" (Parenthetical in Bell's response.) Bell submits that the omission of this critical statement caused the trial court to deny the request for the jury to have self-defense instructions due to the lack of supporting evidence: evidence that would have been provided if Bell had not been redirected during his testimony.

Our consideration of Bell's claim 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 Bell's claims have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** 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 (citation omitted). Notably 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 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.

Bell's argument is that his trial counsel performed deficiently when he did not pursue a line of questioning that would have allowed Bell to establish that he acted in self-defense.

Our review of Bell's testimony reveals that he told the jury he went to his uncle's house on the night of December 28, 2012, to pick up some cocaine. After picking up the cocaine, he went to "the Motorcycle Club" where he had "[q]uite a few drinks." Later, Bell returned to his uncle's house where he drank and used cocaine. He testified that the victim approached him, asking for drugs. In exchange for the drugs, she performed oral sex on him.

Bell further testified that once this had occurred, he told the victim that she could have some of his crack cocaine:

[Bell:] … I told her I had dope on the plate, crack on the plate, and I told her she can have some. Just go get you a piece, and she—I guess she figured that I meant all of it. So she took all of it and put it in her pipe.

[Bell's trial counsel:] Now, I'm just going to stop your right there. How do you feel about that?

[Bell:] I figure she just felt as though she should have all of it. I mean, it's the first time, and someone's just helping theyself [sic] to my stuff. I'm like no.

[Bell's trial counsel:] Okay. And then what happened?

[Bell:] She freaked out.

[Bell's trial counsel:] Okay. And what do you mean she freaked out?

[Bell:] After she blew that smoke out she freaked out. She started mumbling, like started mumbling. She was saying some sort of words underneath her breath, and she was steadily pushing the pipe while she was talking.

I seen this before with people. They can either end up dangerous or they can end up calming down. So I tried to calm her down. I told her …, don't stand over me. Are you all right? There was no response. I asked her three or four times. [Victim], don't stand over me. She was leaning like this towards me even more. I didn't know whether she was—

[Bell's trial counsel:] Hold it. Hold on. When you say she's pushing the pipe, what are you talking about?

[Bell:] They use a pipe to smoke cocaine. They usually cut off a piece of clothes hanger to push the stuff that's inside the cylinder in the pipe back and forth.

….

[Bell's trial counsel:] Okay. So she's got a piece of hanger—wire hanger?

[Bell:] Yes.

[Bell's trial counsel:] And she's pushing and pulling it out of her crack pipe?

[Bell:] Yes.

[Bell's trial counsel:] And you say she's freaking out?

[Bell:] She still mumbling. I don't know what she [is] talking about, but I seen people do that before. I mean, I been around for a[]while. I know that can end up pretty bad to themselves or to anyone that is around them.

[Bell's trial counsel:] Now, you had a lot to drink and been smoking crack, too?

[Bell:] Yes.

[Bell's trial counsel:] Do you think that affected your perception as well?

[Bell:] Of course. I was high.

[Bell's trial counsel:] Okay. So how did you react to the way she was behaving?

[Bell:] I freaked out. I didn't know 'cause she was—I didn't know if she was coming to sort of—like she was coming to something. I don't know if she was coming out or if she was incoherent. I didn't know what she was doing. So I freaked out.

[Bell's trial counsel:] Now, when you say you freaked out, meaning what?

[Bell:] I hit her. I told her to get back. I hit her….

….

[Bell's trial counsel:] With what?

[Bell:] I hit her with my fist.

[Bell's trial counsel:] How many times?

[Bell:] Once.

[Bell's trial counsel:] Okay. And what happened?

[Bell:] She fell down, and she was still mumbling. I called for Shak[e]y. He never came in. I started asking for him because I thought I probably actually hurt her, you know, seriously. I thought I seriously hurt her.

We find no support in the record for Bell's claim that his trial counsel "stopped [his] testimony right before a critical statement and did not return." Bell contends that the essence of his statement—had he not been stopped by trial counsel—was that he "did not know what [the victim] had in mind until she raised her hand in a prepared stabbing motion with that piece of wire hanger." As set forth above, at one point in his testimony, his trial counsel said: "Hold it. Hold on. When you say she's pushing the pipe, what are you talking about?" This interjection allowed Bell to explain to the jury: "They use a pipe to smoke cocaine. They usually cut off a piece of clothes hanger to push the stuff that's inside the cylinder in the pipe back and forth." After this testimony, Bell had more than one opportunity to explain what he meant when he said the victim was "freaking out," and yet, he never mentioned the victim making a stabbing motion.

Additionally, considering the circumstances and Bell's own admissions, it was reasonable for defense counsel to decide not to pursue the theory of self-defense. Bell was almost twenty years younger than the female victim, he admitted to hitting the victim with his fist, and he believed he "seriously hurt her." Bell further admitted that he was high at the time of the incident and that this impacted his perception. Although Bell 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.[2] ***Strickland***, 466 U.S. at 690. Particularly, given that the jury acquitted Bell on the charges of second-degree sexual assault and false imprisonment. We further note that 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 light of the evidence that was before it, we agree with counsel's assessment that the trial court properly denied the request for the self-defense instruction. *See* ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604 ("To support a requested jury instruction on a statutory defense to criminal liability, the defendant 'has the initial burden of producing evidence to establish [that] statutory defense.'") (citation omitted; brackets in ***Giminski***); *see also* WIS. STAT. § 939.48.

C. *Sentencing Discretion*

The last issue counsel addresses is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and

[2] At trial, defense counsel challenged the victim's credibility and stressed the lack of DNA evidence that would connect Bell to the alleged sexual assault. 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).

determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

Here, Bell's trial counsel requested an imposed and stayed sentence with a period of probation and jail time ranging from three to six months. The trial court's sentence was in accord with this request: one year and six months of initial confinement and two years of extended supervision, stayed, with Bell to serve three years of probation, with six months in jail as a condition of probation.

The trial court's sentence is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock public sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There were no improper factors considered by the court in setting forth its sentence. There is no arguable merit to a claim the trial court erroneously exercised its sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Kiley B. Zellner is relieved of further representation of William Oliver Bell in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals