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April 12, 2016

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

2013AP2843-CRNM State of Wisconsin v. Raymond Earl Baker (L. C. #2012CF77)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Raymond Baker has filed a no-merit report concluding no grounds exist to challenge Baker's conviction for second-degree intentional homicide while using a dangerous weapon. Baker has filed a response challenging his conviction and sentence. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we

conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2013-14).[1]

The State charged Baker with first-degree intentional homicide with use of a dangerous weapon, alleging Baker shot and killed Desiree Harrell, the lover of Baker's then wife. During pretrial proceedings, the court granted defense counsel's request for a competency examination. Consistent with the examining psychologist's opinion, the court found Baker competent to proceed. The court subsequently granted defense counsel's motion for an examination to evaluate Baker for a potential plea of not guilty by reason of mental disease or defect (NGI). The examining psychologist's report did not support an NGI plea, and an NGI defense was not pursued at trial. A jury ultimately found Baker guilty of the lesser-included offense of second-degree intentional homicide with use of a dangerous weapon. Out of a maximum possible sixty-year sentence, the court imposed a fifty-year term, consisting of forty years' initial confinement and ten years' extended supervision.

There is no arguable merit to challenge the circuit court's competency determination. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. ***Id.***, ¶31. A trial court's competency determination should be reversed only when clearly erroneous. ***Id.***, ¶45.

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

The evaluating psychologist, Dr. Deborah L. Collins, submitted a report opining to a reasonable degree of psychological certainty that Baker was competent to proceed. Collins noted that while Baker appeared to be experiencing "some emotional adjustment problems including symptoms of depression," he was not "rendered to lack substantial mental capacity to factually and rationally understand the pending proceedings or be of meaningful assistance in his behalf." Collins recounted that Baker "was productive in discussing case specific information," and was both "familiar with the contents of the criminal complaint" and "able to convey his perspective" about the case. According to Collins, Baker also displayed the capacity to grasp without significant difficulty the roles of court principals and his plea options. Collins concluded that, in effect, Baker's depressive symptoms "appear to co-exist with his competency to proceed at this time." At the competency hearing, Collins testified consistent with her report, and Baker agreed he was competent to proceed. The court found Baker competent to proceed, and the record supports the circuit court's determination.

Although the no-merit report does not address it, we conclude there is no arguable merit to challenge the circuit court's decision to admit inculpatory statements Baker made to law enforcement. Before trial, the court held a ***Miranda-Goodchild*** hearing and determined that Baker's statements were admissible at trial.[2] Upon review of lower court proceedings involving ***Miranda-Goodchild*** hearings, this court will not upset the findings of fact unless it appears they are against the great weight and clear preponderance of the evidence. ***Norwood v. State***, 74

[2] A trial court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

Wis. 2d 343, 361, 246 N.W.2d 801 (1976). When determining whether a confession or admission is voluntary, we look to the totality of circumstances. ***State v. Schneidewind***, 47 Wis. 2d 110, 117, 176 N.W.2d 303 (1970). In order to find a defendant's statement involuntary, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Clappes***, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987). In assessing the totality of circumstances, we must balance the personal characteristics of the defendant against any pressures imposed by the police, such as misleading or not informing the defendant of his right to counsel and right against self-incrimination. ***Id.*** at 236.

Here, Milwaukee police detective Daniel Thompson testified that after Baker was read his ***Miranda*** rights, Baker waived those rights. Thompson testified that Baker did not appear to be under the influence of drugs or alcohol, and he was calm and coherent during their exchange. During the interview, Baker denied any involvement in the crime. Shortly after being escorted out of the interview room, however, Baker sat on the floor, started crying, and asked to return to the interview room to talk some more. After returning to the interview room, Baker admitted shooting Harrell and offered to show the interviewing officers where he disposed of the gun used in the commission of the homicide, as well as clothing he wore at that time. During subsequent telephone calls made to his mother and daughter in the officer's presence, Baker made additional inculpatory statements. Baker voluntarily waived his right to testify at the ***Miranda-Goodchild*** hearing. Based on our review of the record, there is no arguable merit to a claim that the circuit court erred by admitting Baker's inculpatory statements.

Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993).

At trial, the jury heard testimony that Harrell was sitting in the driver's seat of her parked car with the door closed and the window up, talking on a cellphone while resting her hand on the steering wheel, when she was shot three times. A medical examiner opined that the cause of her death was a gunshot wound to her torso. The jury also heard testimony that after initially denying any involvement in the shooting, Baker admitted to police that he was the shooter.

According to his police statement, Baker indicated that he saw Harrell while driving around and planned to approach her in order to tell her to leave him alone. Baker claimed that Harrell said something that made him "snap" and he shot her repeatedly. Baker then showed police where he disposed of the gun and clothes he wore during the shooting. The boots recovered matched the tread pattern of shoeprints left at the crime scene.

Baker testified he felt Harrell had been harassing him for a considerable period of time and when he saw her the evening of the shooting, he felt she was following him. Baker further testified that when he approached Harrell's parked car to ask her to leave him alone, he saw a reflection of something he believed was a gun, so he reacted and shot Harrell as he moved away from the vehicle. Baker stated he believed he was in danger. The detective who interviewed Baker, however, testified Baker never mentioned he thought Harrell had a gun.

To the extent there was conflicting testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a

case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Baker's conviction.

The record discloses no arguable basis for challenging the effectiveness of Baker's trial counsel. To establish ineffective assistance of counsel, Baker must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the case. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Any claim of ineffective assistance must first be raised in the trial court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

In his response to the no-merit report, Baker argues his trial counsel was ineffective by failing to pursue a second doctor's opinion regarding the viability of an NGI plea. WISCONSIN STAT. § 971.15(3) provides: "Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence." The presence of a mental disease or defect, however, does not automatically excuse a defendant from the legal consequences of his or her conduct. ***State v. Duychak***, 133 Wis. 2d 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986). The critical inquiry is "whether, as a result of a certain mental condition, a defendant lacks substantial capacity to either appreciate the wrongfulness of the defendant's conduct or conform the defendant's conduct to the requirements of the law." ***Id.***

Here, Dr. Collins submitted a report opining to a reasonable degree of psychological certainty that despite Baker's diagnosis of Mood Disorder Not Otherwise Specified, there was "insufficient support to sustain a conclusion that … as a result of symptoms of this condition, … Baker was rendered to lack substantial capacity to appreciate the wrongfulness of his conduct or

conform his conduct to the requirements of the law in connection with the alleged offense." Collins noted that what was lacking in this case was "any indication that [Baker] at the time of the alleged offense was experiencing symptoms of psychosis or mania such that his reality contact or behavioral controls might have been substantially impaired." Based on Baker's account of his conduct in the moments leading up to the shooting, Collins opined that nothing suggested his perception of reality was distorted as a result of psychotic symptoms. Rather, Baker "retained the capacity to appreciate wrongfulness," as he was initially deceptive to authorities about his involvement in the crime. Baker also engaged in "goal directed and purposeful behavior" following the shooting, as he hid the gun and clothes. Based on the record, there is no reason to believe that a second opinion would have supported an NGI defense or otherwise changed the outcome at trial.

Baker also claims trial counsel was ineffective by failing to permit his daughter to testify regarding "events leading up to the shooting." Baker does not specify which events he is referring to, but to the extent Baker suggests his daughter could have corroborated Baker's allegations that he felt harassed and, ultimately, provoked by Harrell, adequate provocation serves only to mitigate first-degree intentional homicide to second-degree intentional homicide. *See* WIS. STAT. § 939.44. Because Baker was convicted of second-degree intentional homicide, he cannot establish that he was harmed by the absence of any testimony his daughter may have offered regarding provocation.

Next, Baker claims trial counsel was ineffective by failing to object to what Baker characterizes as a "misreading" of WIS JI—CRIMINAL 1014, the jury instruction for first-degree intentional homicide; self-defense; and second-degree intentional homicide. The record, however, belies this claim, as the court instructed the jury consistent with the pattern instruction.

To the extent Baker contends counsel should have objected to the circuit court's failure to give a self-defense instruction, the record again belies this claim, as a self-defense instruction was given. Counsel is not deficient for failing to raise meritless claims. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Our review of the record discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Baker's character, including his criminal history; the need to protect the public; and the mitigating circumstances Baker raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Baker's sentence is so excessive as to shock public sentiment. *See* ***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 pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Basil M. Loeb is relieved of further representing Baker in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals