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**DISTRICT III**

February 7, 2017

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

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2015AP2464-CRNM      State of Wisconsin v. Mai Nhia Yang (L. C. No. 2011CF415)

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

Counsel for Mai Nhia Yang has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),<sup>1</sup> concluding no grounds exist to challenge Yang's convictions for two counts of attempted first-degree intentional homicide, one count as an act of domestic abuse. Yang was informed of her right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

(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.

The charges arose from allegations that Yang attempted to kill Y.X., with whom she shares a child, and Y.X.'s wife, A.X. After a hearing, the circuit court denied Yang's pretrial motion to admit other acts evidence and granted the State's motion to admit other acts evidence. Following a four-day trial, Yang was convicted upon a jury's verdict of the crimes charged. Out of a maximum possible 120-year sentence, the court imposed consecutive sentences totaling fourteen years' initial confinement and fifteen years' extended supervision. The circuit court subsequently granted Yang's postconviction motion to vacate a DNA surcharge. An initial no-merit report was filed, but later withdrawn following Yang's response to the report. Counsel then filed a motion for a new trial, claiming Yang had been denied the effective assistance of trial counsel. Counsel withdrew the motion after a *Machner*<sup>2</sup> hearing. This no-merit appeal follows.

Any challenge to the circuit court's determinations on the parties' respective motions to admit other acts evidence would lack arguable merit. The admissibility of evidence lies within the circuit court's sound discretion. *See State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). The court must engage in a three-step analysis to determine the admissibility of other acts evidence. *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan,

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<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

knowledge, identity, or absence of mistake or accident. *Sullivan*, 216 Wis. 2d at 772-73. Section 904.04(2) precludes proof of other crimes, acts, or wrongs for purposes of showing that a person acted in conformity with a particular disposition on the occasion in question. The rule prohibiting the use of other acts evidence to show propensity is applicable to witnesses as well as parties to a case. *State v. Johnson*, 184 Wis. 2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994). After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant and, finally, whether its probative value outweighs the danger of unfair prejudice. *Johnson*, 184 Wis. 2d at 336-37.

The State moved to admit evidence that Yang had made past threats to kill the victims. For at least two of the threats, A.X. had made a corresponding journal entry on the dates of the threats. After a hearing, the circuit court granted the motion to admit this evidence, concluding it was offered for an acceptable purpose—namely, to establish motive and intent. The court further determined that the evidence was relevant and any prejudice did not outweigh its probative value. The record supports this discretionary decision.

In her motion, Yang sought to admit evidence that Y.X. had a prior conviction for domestic abuse disorderly conduct and that A.X. denied anything happened during the incident when there were observable facts demonstrating otherwise. Yang argued this evidence would support her claim that she did not attempt to kill Y.X. and A.X. but, rather, attempted to give her handgun to Y.X. to assist in Yang's own suicide because she knew him to have a propensity for past violence, making Y.X. most likely to pull the trigger. Yang's own motion testimony, however, did not support her assertion, as she characterized A.X. as the aggressor in the disorderly conduct incident. Because Yang's testimony did not support her defense theory, the circuit court reasonably exercised its discretion in denying Yang's motion.

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 Y.X. and A.X. married in 1989 and had six children together. Yang began an affair with Y.X. and Yang became pregnant, ultimately giving birth to a son in October 2010. Yang married Y.X. in July 2010, according to Hmong customs, and the couple divorced in December 2010 with the approval of clan leaders. Y.X. and A.X. remained married throughout this time. A.X. testified that in December 2010, Yang threatened A.X. and her family, indicating they "will not have a life to live" and telling the children "you will be orphaned some day."

On the morning of June 7, 2011, Yang appeared at the home of A.X. and Y.X., upset that Y.X. was questioning the paternity of their son; that he no longer wanted a relationship with Yang; and that he had a new girlfriend. At that time, five of the couple's children—ranging in ages from twenty to twelve—lived at home. Yang asked to use the couple's bathroom, and when Yang removed the gun from her waistband to wash her face, the gun discharged. Several children testified they awoke to the gunshot and saw Yang enter their parents' bedroom.

A.X. testified that as Yang entered the bedroom, Yang blocked the door with her body, aimed the gun directly at A.X., and made several attempts to squeeze the trigger, while stating she was going to kill the couple, but the gun did not discharge. A.X. yelled for Y.X. to "get up" as her children screamed and tried to get into the room. Y.X. testified he awoke to A.X. screaming and then stood next to A.X., telling Yang "do not kill my wife." Yang then pointed the gun at Y.X., again squeezing the trigger. The couple's adult son eventually pushed in the door, and with Y.X.'s assistance, subdued Yang and took away the gun from her. Police were

called and Yang was taken into custody. During a pat down search, officers discovered a holster with extra ammunition.

Appleton police officer Joe Lidbury testified that after he was dispatched to the house, he retrieved the weapon. In securing the firearm, Lidbury observed the gun had a stovepipe malfunction. Lidbury explained that when the last round was fired, the spent casing had lodged into the chamber of the gun, thus jamming the gun and preventing it from cycling correctly. Lidbury further noted stovepipe malfunctions often happen when inexperienced shooters use an improper grip and fail to “manage the recoil.”

Appleton police detective Chue Thao testified that a round was shot through the heat register in the bathroom and embedded in the wall. Thao testified that he translated a ninety-minute cassette tape Yang left at her apartment, in which Yang gave instructions for her funeral and for taking care of her children from an earlier marriage, as well as the son she shared with Y.X. According to Thao, Yang’s recording also expressed frustration at Y.X., indicating:

Therefore, here forward, I will make sure that [Y.X.] cannot do it to anyone else. That I am the last one. The way of the [heartache] that I am the one that end it. I will revenge for any and all things that [Y.X.] have done to every woman, that it comes to end with me.

Based on his translation of the recording and how she left her apartment neatly organized, Thao opined that Yang had planned a murder-suicide. In turn, Yang testified that she did not point the gun at Y.X. or A.X. and tried to hand the gun to Y.X. to assist in her suicide. Yang further testified that when she spoke of revenge on the tape, she intended for her spirit to deprive Y.X. of happiness.

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. 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 Yang's convictions.

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 offenses; Yang's character; the need to protect the public; and the mitigating circumstances Yang raised. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Yang'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). There is likewise no arguable merit to challenge the circuit court's consideration of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment. The court properly utilized COMPAS consistent with our supreme court's decision in *State v. Loomis*, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749. The record shows COMPAS was not "determinative" of the sentence imposed. It merely informed the circuit court's assessment of other, independent factors.

Any claim that Yang is entitled to a new trial based on the ineffectiveness of trial counsel would lack arguable merit. To establish ineffective assistance of counsel, Yang must show both that her 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 trial.

*See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the withdrawn motion for a new trial, Yang argued her trial counsel was ineffective by failing to obtain an independent interpretation of the ninety-minute audio tape, portions of which were translated and presented at trial by Sergeant Thao. Yang also asserted that Thao's involvement in the case and translation of the tape presented a conflict of interest, as Thao was the brother of Yang's first ex-husband.

At the motion hearing, trial counsel testified that Yang challenged Thao's translation of the tape. Trial counsel consequently commissioned an independent translation of the tape. According to trial counsel, the alternative translation included statements that would have been beneficial to the State's case, so they opted not to introduce it. Rather, as a matter of trial strategy, counsel suggested that Yang testify, noting: "We thought having her explain what she was feeling [at the time she made the tape] and why it was being misinterpreted [by Thao] was the more effective tactic than going into competing translations." This strategy is reasonable. Actions constituting a reasonable trial strategy are virtually unassailable. *See State v. Nielsen*, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325.

Further, postconviction counsel conceded at the *Machner* hearing that he learned Thao is not the brother of Yang's first ex-husband but, rather, a member of the first ex-husband's family of 200-400 people that would see each other only a few times per year. Thao had similarly testified on cross-examination at trial that he was a distant relative of Yang's first ex-husband. Postconviction counsel explained that the language barrier with his client led to his mistaken belief that Thao was Yang's ex-brother-in-law, as alleged in the postconviction motion. Nothing about Thao's distant familial relationship with Yang's first ex-husband supports a nonfrivolous challenge to the effectiveness of trial counsel. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance.

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 Timothy T. O'Connell is relieved of further representing Yang in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*