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May 18, 2018

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

2016AP400-CRNM State of Wisconsin v. Jonah A. Agnew (L.C. # 2010CF749)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jonah A. Agnew appeals a judgment convicting him of two counts of first-degree intentional homicide by use of a dangerous weapon. He also appeals the circuit court's order denying his postconviction motion. Appointed appellate counsel, Russell D. Bohach, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE

809.32 (2015-16).[1] The no-merit report addresses: (1) whether Agnew knowingly, intelligently, and voluntarily waived his right to a jury trial; (2) whether the evidence was sufficient to convict Agnew; (3) whether the circuit court properly excluded Dr. John Pankiewicz's report and trial testimony; and (4) whether the circuit court properly exercised its sentencing discretion. The response to the no-merit report addresses the above issues and also argues: (1) that Agnew was not allowed to present a "mental status" defense; (2) that Agnew received ineffective assistance of counsel; and (3) the jury instructions in this case were flawed. We conclude that there are no issues of arguable merit that could be pursued on appeal. Therefore, we affirm.

Agnew was convicted of two counts of first-degree intentional homicide with a dangerous weapon for killing Sherry Ann Jackson, his former girlfriend, and Mario Brown. Agnew went to Jackson's home in the late evening on February 15, 2010, intending, he said, to surprise her and believing that they might reconcile. After letting himself into Jackson's home with a key, he proceeded to Jackson's bedroom, where he found Jackson and Brown together. Agnew shot both Jackson and Brown repeatedly. He then went outside Jackson's home and asked a stranger walking past to call 911 for him. Agnew admitted that he killed Jackson and Brown. The only issue for trial was whether Agnew had acted with "adequate provocation," as defined in WIS. STAT. § 939.44, and was thus guilty of second-degree intentional homicide rather than first-degree intentional homicide. After a trial to the bench, the circuit court found Agnew guilty of two counts of first-degree intentional homicide.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Bohach was appointed to represent Agnew during postconviction and appellate proceedings. He filed a no-merit report. After reviewing the no-merit report and the record, we directed Bohach to file a supplemental no-merit report addressing whether there would be arguable merit to a claim that Agnew's decision to waive his right to a jury trial was not knowingly, intelligently and voluntarily made. Rather than file a supplemental no-merit report, Bohach moved to dismiss the no-merit appeal and filed a postconviction motion challenging the jury waiver. After a hearing, the circuit court denied the postconviction motion. Bohach then filed this second no-merit appeal.

The no-merit report first addresses whether Agnew knowingly, intelligently, and voluntarily waived his right to a jury trial in favor of a trial to the bench. To ensure that a defendant is knowingly, intelligently, and voluntarily waiving his right to a jury trial, the circuit court must conduct a colloquy during which the circuit court ascertains that the defendant: (1) is making "a deliberate choice … to proceed without a jury trial"; (2) is "aware of the nature of a jury trial," including the fact that twelve people must agree that the defendant committed each element of the charged crimes; (3) is aware of the nature of a trial to the bench, including the fact that the judge would decide whether the defendant is guilty of the crimes charged; and (4) has "had enough time to discuss this decision with his or her attorney." ***State v. Anderson***, 2002 WI 7, ¶24, 249 Wis. 2d 586, 638 N.W.2d 301.

Agnew's postconviction motion argued that the circuit court was required to hold a hearing to determine the validity of Agnew's jury waiver because the circuit court did not inform him during the waiver colloquy that a jury panel was comprised of twelve people and, in order to convict, all twelve would have to agree that the State established its case beyond a reasonable doubt. During the hearing on the postconviction motion, Agnew testified that even though the

circuit court failed to provide him with the information, he did, in fact, know that a jury was comprised of twelve people who would have to unanimously agree to convict him. Because Agnew was aware of the information that the circuit court failed to provide him during the jury waiver colloquy, he cannot establish that his jury waiver was not knowingly, intelligently and voluntarily made. Therefore, there would be no arguable merit to an appellate challenge to Agnew's jury waiver.

The no-merit report addresses whether there would be any arguable merit to a claim that the evidence was insufficient to support the guilty verdict on two counts of first-degree intentional homicide, with use of a dangerous weapon. We view the evidence in the light most favorable to the verdict, and if more than one inference can be drawn from the evidence, we must accept the one drawn by the trier of fact. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The verdict will be overturned only if no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt, viewing the evidence most favorably to the conviction. *See* ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982).

A person is guilty of first-degree intentional homicide if the State proves beyond a reasonable doubt that the person "cause[d] the death of another human being with intent to kill that person." WIS. STAT. § 940.01(1). The crime of first-degree intentional homicide is mitigated to second-degree intentional homicide if the "[d]eath was caused under the influence of adequate provocation as defined in s. 939.44." WIS. STAT. §§ 939.44(2), 940.01(2)(a).

Pursuant to WIS. STAT. § 939.44(2), the affirmative defense of adequate provocation is defined as follows:

> (a) "Adequate" means sufficient to cause complete lack of self-control in an ordinarily constituted person.
>
> (b) "Provocation" means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.

"Adequate provocation includes both subjective and objective components." ***State v. Schmidt***, 2012 WI App 113, ¶7, 344 Wis. 2d 336, 824 N.W.2d 839. "As to the subjective component, the defendant must actually believe the provocation occurred, and the lack of self-control must be caused by the provocation." ***Id.*** "'Complete loss of self-control' is an extreme mental disturbance or emotional state [during] which a person's ability to exercise judgment is overcome to the extent that the person acts uncontrollably. It is the highest degree of anger, rage, or exasperation.' WIS. JI–CRIMINAL 2012 (2006)." ***Schmidt***, 344 Wis. 2d 336, ¶6. "As to the objective component, the provocation must be such that [it] would cause an ordinary, reasonable person to lack self-control completely." ***Id.***, ¶7. "Once a defendant successfully places an affirmative defense in issue, the State is required to disprove the defense beyond a reasonable doubt." ***Id.***, ¶8. This means that "the lack of the defense becomes an element of the crime." ***Id.***

There was no dispute that Agnew shot and killed Jackson and Brown. Jeffrey Sutton, a citizen witness, testified that he came across Agnew outside Jackson's home in the middle of the night. Agnew was agitated and somewhat incoherent. Sutton testified that Agnew told him he needed to call the police because he had just killed his girlfriend and her lover by shooting them. Sutton testified that he called the police and stayed with Agnew until they arrived.

Agnew testified that he went to Jackson's house in the very early morning on February 16, 2010, intending to surprise her because he believed that they were going to reconcile after splitting up a month earlier. Agnew testified that he was carrying two guns with

him, a Taurus and a Glock, as was his usual practice when he intended to spend the night somewhere away from home. Agnew testified that he let himself into Jackson's house with the key he had and went to her room. Agnew testified that Jackson's door was slightly open so he opened it and saw Jackson on her bed. He was shocked to realize a man was there, who began to walk toward him, wearing nothing but boxers. Agnew testified that he "just snapped" and could not remember exactly what happened next. He remembered briefly firing his Taurus and, later, remembered firing his Glock in the bedroom. Agnew testified that he did not remember if he shot Jackson or Brown first. He remembered standing in the hallway and coming to his senses. Agnew testified that he started shaking, that it looked like a horror movie, and that there was a lot of blood on the bed near Jackson. He testified that he started calling her name and shaking her, trying to get her to wake up. Agnew testified that he decided to call the police but could not find Jackson's phone, so he went outside to look for his phone in his car. After he went outside, he could not find his car key. He began calling for help and ran into Sutton, whom he did not know, on the street.

Testimony from the police and medical examiners established that Jackson fired over thirty rounds from the two guns, hitting Jackson and Brown multiple times. Pictures were introduced into evidence showing the bodies of Jackson and Brown riddled with gunshot wounds.

At the close of evidence, the circuit court made factual findings and explained how it viewed the evidence that had been presented. In sum, the court found that Agnew caused the deaths of Jackson and Brown by shooting them multiple times; that Agnew acted with intent to kill each of his victims or was practically certain his actions would have that effect because he aimed for the victim's head and shot them at close range; and that Agnew did not act with

adequate provocation when he killed Jackson and Brown. Because the testimony and evidence was sufficient to support the guilty verdict, there would be no arguable merit to a challenge to the sufficiency of the evidence.

The no-merit report next addresses whether there would be arguable merit to claim that the circuit court misused its discretion by granting the State's motion to prohibit trial testimony by Dr. Pankiewicz, a psychologist, and to exclude his written report dated March 22, 2010, detailing his observations and conclusions about Agnew. This issue is also addressed at length in Agnew's response to the no-merit report. Dr. Pankiewicz examined Agnew shortly after the murders and wrote a report in which he opined that Agnew had acted with adequate provocation.

Under Wisconsin law, an expert is not allowed to give an opinion about whether a defendant had criminal intent. *See* ***Steele v. State***, 97 Wis. 2d 72, 97, 294 N.W.2d 2 (1980). The federal courts have considered whether the Wisconsin evidentiary rule violates due process under the federal constitution, and they have concluded that it does not. *See* ***Hass v. Abrahamson***, 910 F. 2d 384, 393 (7th Cir. 1990).

In its ruling, the circuit court explained that it did not allow Dr. Pankiewicz's testimony and written report because, as the trier of fact, it did not need assistance from an expert to determine whether Agnew's intent to kill Jackson and Brown was mitigated by an adequate provocation. The circuit court explained:

> When it comes to the question of whether somebody was provoked into killing somebody else, that's not something experts have ever really studied to the point that they know something that the rest of us don't. That's something people in their everyday wisdom can decide without having a doctor tell them what the facts are or tell them what we believe science tells us about that.

Because the circuit court reached a reasonable conclusion based on the appropriate legal standard, there would be no arguable merit to a claim that the circuit court misused its discretion in excluding Dr. Pankiewicz's report and testimony.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion when it sentenced Agnew to life imprisonment, with eligibility for extended supervision after serving forty-five years of imprisonment. "The principal objectives of a sentence include, but are not limited to, the protection of the community, the punishment of the defendant, 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. "A sentencing court should indicate the general objectives of the greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives." ***Id.***

In its lengthy and eloquent sentencing decision, the circuit court addressed the objectives of its sentence in light of the circumstances of this case. The circuit court said that Agnew had committed the most serious of crimes, killing two people by shooting them to death, but the circuit court also said that Agnew showed that he understood the horror of what he had done and there was potential for him to be rehabilitated given his relatively young age. The circuit court said that it was remarkable how some members of the victims' families were grieving for Agnew as well as for their own loss, and remarked that "every person who spoke in here has been an example of how noble people can be with each other." The court noted that Agnew had many positive qualities—he was educated, worked hard, was smart, and was dedicated and loyal to his family. Weighing the various aspects of the case, the circuit court set parole eligibility so that Agnew would be released in his early seventies, and thus have some opportunity to live outside

of prison. Because the circuit court applied the facts of this case to the proper legal standards to reach a reasoned and reasonable determination, there would be no arguable merit to a challenge to the sentencing court's discretion.

In his response, Agnew argues that his right to present a "mental status" defense was violated by the circuit court's decision to exclude Dr. Pankiewicz's testimony and written report. Agnew contends that he should have been able to present information about his extreme emotional disturbance—or "heat of passion"—at the time of the murders. Although Dr. Pankiewicz's testimony and report was not allowed as evidence, in accord with the law for the reasons we previously explained, Agnew *was* permitted to present evidence about his extreme emotional disturbance at the time of the murders. Agnew testified about what happened, but often was forced to respond that he did not remember because he could not remember the details due to his extremely agitated mental state when he killed Jackson and Brown. Because the circuit court properly excluded Dr. Pankiewicz's testimony, and Agnew did, in fact, present evidence about his mental status, there would be no arguable merit to this claim.

Agnew argues in his response that he received ineffective assistance of trial counsel because his lawyer failed to call and get a body attachment for three witnesses, Theresa Prus, Thomas Swell, and Justin Howell. Agnew contends that these witnesses would have supported his defense by establishing that he is always armed; therefore, the fact that he was armed when he went to Jackson's home did not tend to prove that the murders were premediated. There was ample trial testimony about the fact that Agnew carried multiple weapons as a matter of course. Additional testimony on this point would have added nothing. In addition, Agnew contends that Prus would have testified that he and Jackson still loved each other. Again, the circuit court heard testimony on the circumstances of Agnew's relationship with Jackson during trial. Agnew

himself testified about their last phone conversation: "And we made it clear that we loved each other. Those were the last … words that we said to each other." Even if Prus's opinion testimony about their relationship were admissible, and it likely would not have been, it would have added nothing to the evidence adduced at trial. There would be no arguable merit to these claims.

Agnew next argues that his trial lawyer should have presented the following items as evidence: photographs taken by the police at his father's house that showed that he slept with guns and ammunition nearby; an affidavit from the victim's mother, stating that he was a firearms enthusiast and he was known to be in possession of many firearms and other related items; and an affidavit from his father, Joel Bechitsao, stating that Bechitsao discovered a loaded handgun in Agnew's room on two occasions. Agnew contends that this evidence supports his claim that he always kept weapons with him and explains why he was armed when he went to Jackson's house. As we previously explained, however, the circuit court was aware that Jackson always carried weapons for his safety. This additional evidence would not have added anything to Agnew's defense. There would be no arguable merit to this claim.

Agnew next contends that his trial counsel failed to present cases similar to his case at trial in which the defendants were convicted of "heat of passion/adequate provocation." The circuit court's oral decision finding Agnew guilty establishes that the circuit court was well-versed in case law regarding the adequate provocation affirmative defense, formerly known as a "heat of passion" affirmative defense. It would not have been appropriate for Agnew's lawyer to bring additional cases to the circuit court's attention as it was rendering the verdict, and the circuit court's oral decision shows that additional case law would not have assisted Agnew. There would be no arguable merit to this claim.

Agnew next argues that trial counsel should have presented photographs of the front of Jackson's house that show that there were no other vehicles in front of her house. He contends that the photographs tends to prove that he was not aware that a man was inside the house with her when he entered. The circuit court was made aware of this information through Agnew's testimony. Agnew's lawyer asked him the following question: "When you pulled up to the residence … [were] there any cars out there that would lead you to believe that someone was at the residence other than Ms. Jackson." Agnew responded, "No." Because the photographs would have been cumulative evidence, there would be no arguable merit to this claim.

Agnew next argues that trial counsel should have presented evidence of his 911 calls after the murder. He contends that the call recordings would have bolstered his claim that he was in shock. Agnew contends that this is important because the trial judge did not believe that he was in shock after the murders. The circuit court heard testimony from multiple people—Sutton, Agnew, the police—that Agnew was extremely agitated right after the murders. The 911 calls were not necessary to establish this fact. As for Agnew's statement that the trial judge did not believe that he was in shock after the murders, that characterization is inconsistent with the circuit court's detailed review of the evidence in its oral decision, which was much more nuanced. There would be no arguable merit to this claim.

Agnew next argues in his response that his trial counsel should have presented evidence to rebut incorrect statements made at trial by the citizen witness who assisted Agnew after the murders. At trial, Sutton testified that while they were waiting for the police, Agnew said that Jackson had caused him to lose his job, a fact that was incorrect. This claim would be unavailing because Agnew's lawyer *did* elicit testimony from Agnew about his employment. Agnew testified that he worked as a web programmer and an i-Phone application developer at T & P

Directional. He also testified that he was employed when he committed the murders and testified that Jackson never caused him to lose a job. Agnew's testimony thus clarified Sutton's misunderstanding of Agnew's comments the night of the murder. Similarly, Agnew contends Sutton's testimony that Agnew told him he "had been planning this for a long time" should have been clarified. Agnew contends the testimony improperly implied he planned the murders, when what Agnew meant was that he was planning to go see Jackson. During cross-examination, Agnew's lawyer adequately clarified this point. Moreover, ample trial testimony established that Agnew was planning to go see Jackson the night of the murders and, perhaps, reconcile. There would be no arguable merit to this claim.

Agnew next argues that his trial counsel should have argued that his constitutional right against self-incrimination was violated because his conviction was based in part on involuntary statements to the police. He argues that after telling the police, "I lost it," he was trying to be cooperative so the interrogation would cease, and was therefore telling the police what he thought happened, rather than what he remembered. This argument would have no merit for two reasons. First, a confession is not involuntary, in the legal sense of the word, when a defendant decides to cooperate with the police so the questioning will end. Second, the circuit court was well aware that Agnew did not remember exactly what happened because Agnew repeatedly started his statements when testifying with "I believe …" or "I think …" because he could not remember. In fact, the circuit court stopped Agnew several times to explain that Agnew was required to tell the court only what he actually remembered, not what he guessed happened when he was unable to remember. There would be no arguable merit to this claim.

Agnew next challenges the jury instruction for adequate provocation, and by extension WIS. STAT. § 939.44, which defines adequate provocation. Agnew's argument on this point is

difficult to discern, but it appears that he is confusing the elements of first-degree intentional homicide and second-degree intentional homicide. Both crimes require the State to prove that the defendant intended to kill the victim. Where, as here, a defendant alleges that he acted with adequate provocation, however, the State *must also show* that the defendant did not act with adequate provocation, which is an affirmative defense. The jury instruction properly states the law. There would be no arguable merit to this claim.

We have carefully considered all of the points Agnew raises in his thirty-six page response. Our independent review of the record reveals no other potential issues of arguable merit. Therefore, we affirm the judgment of conviction and the order denying postconviction relief. We also relieve Attorney Russell D. Bohach of further representation of Agnew.

Therefore,

IT IS ORDERED that the judgment and the order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Russell D. Bohach is relieved of further representation of Agnew. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals