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 III

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To:

Hon. Jay R. Tlusty
Circuit Court Judge
Lincoln County Courthouse
1110 E. Main Street
Merrill, WI 54452

Marie Peterson
Clerk of Circuit Court
Lincoln County Courthouse
1110 E. Main Street, Ste. 205
Merrill, WI 54452

Galen Bayne-Allison
District Attorney
1110 East Main Street
Merrill, WI 54452

Andrew Hinkel
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Stacey A. Hansen 190519
Taycheedah Corr. Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2018AP3-CRNM State of Wisconsin v. Stacey A. Hansen (L. C. No. 2015CF253)

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

Stacey Hansen appeals from a judgment of conviction for attempted second-degree intentional homicide and first-degree reckless injury. Her appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[1] and ***Anders v. California***, 386 U.S. 738

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

(1967). Upon consideration of the no-merit report, Hansen's response, and an independent review of the record, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Hansen was charged with attempted first-degree intentional homicide for trying to suffocate seventy-six-year-old Walter[2] by placing a plastic bag over his head. Hansen and Walter lived in the same apartment building and she helped him out with meals and laundry. At the hospital, Walter told police that Hansen had tried to kill him by placing a bag over his head and cutting off his ability to breathe. She was also charged with strangulation and suffocation, intentional abuse of a person at risk by causing great bodily harm, aggravated battery, and misdemeanor bail jumping. On two occasions during the prosecution, Hansen's competency to stand trial was questioned and competency evaluations were ordered. On both occasions, Hansen was found competent to stand trial.

The circuit court denied Hansen's pretrial motions to suppress statements Hansen made to police and to suppress evidence obtained from a warrant search of her apartment. The parties reached a plea agreement under which Hansen entered ***Alford*** pleas[3] to the amended charges and the three other counts were dismissed and read in at sentencing. The prosecution agreed to cap its sentencing recommendation at twenty years' of initial confinement and was free to argue regarding the amount of extended supervision. Hansen was sentenced to concurrent terms of

[2] Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

[3] An ***Alford*** plea is a guilty plea in which a defendant pleads guilty to a charge but either protests his or her guilt or does not admit to having committed the crime. *See* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). The plea derives its name from the United States Supreme Court's decision in ***North Carolina v. Alford***, 400 U.S. 25 (1970).

fifteen years' initial confinement followed by ten years' extended supervision on the homicide count, and five years' initial confinement followed by ten years' extended supervision on the reckless injury count.

The no-merit report first addresses whether a challenge to the rulings on Hansen's suppression motions is arguably meritorious. The report concludes there is no arguable merit but only states so in a conclusory fashion without discussion of the applicable constitutional principles, the standard of review, and the evidence underlying the denial of the suppression motions.[4]

Hansen had three pre-arrest contacts with law enforcement: (1) when officers and medical personnel responded to Walter's apartment, Hansen was there and was asked questions about Walter's condition; (2) several hours after Walter was taken to the hospital, Hansen approached an officer who was posted at Walter's apartment door and, although she was denied access to the apartment, the officer asked Hansen what happened; and (3) a few hours after Hansen had contact with the officer at Walter's apartment door, Hansen opened her apartment door to officers, and there was a twenty-minute conversation culminating in Hansen's arrest. The threshold question is whether Hansen was ever subjected to custodial interrogation in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966). *See* ***State v. Armstrong***, 223 Wis. 2d 331, 344, 588 N.W.2d 606 (1999). A person is in custody when he or she is deprived of freedom

[4] Appointed counsel is reminded that a no-merit report must satisfy "the discussion rule," which requires a statement of reasons why the appeal lacks merit. ***State ex rel. McCoy v. Court of Appeals***, 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987). The discussion might include a brief summary of any case or statutory authority that appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. ***Id.*** More than a conclusory statement of the frivolity of the appeal is required. ***Id.*** at 100-01.

of action in any significant way. ***Id.*** at 353. Custody is to be viewed from the perspective of a reasonable person in the suspect's position. ***State v. Torkelson***, 2007 WI App 272, ¶13, 306 Wis. 2d 673, 743 N.W.2d 511. In reviewing the circuit court's suppression ruling, we uphold its findings of fact unless they are clearly erroneous. ***Id.***, ¶11.

The circuit court found that Hansen was a bystander in Walter's apartment when officers responded to the medical emergency, that the officers' questions were simply to get information regarding Walter, and that Hansen was free to leave at any time. It found that when Hansen talked to the officer posted at Walter's apartment door hours later, she did so voluntarily, in a public hallway, and she left the area when she wanted. It found that when officers spoke to Hansen outside her apartment, the officers remained in the hallway and did not cross the threshold until the twenty-minute conversation had ended. It also found that the two officers did not restrain Hansen's movements in any way and did not engage in any custodial actions such as drawing weapons, frisking Hansen, or moving her to another location. The circuit court's findings are not clearly erroneous. Thus, the record establishes that Hansen was not in custody at any of the times she may have made statements prior to her arrest. *See* ***Armstrong***, 223 Wis. 2d at 353 (whether the facts meet the legal standards is a question of law we decide independently of the circuit court).

The circuit court also found that although officers observed an odor of intoxicants in their contacts with Hansen, there were no other indicia of impairment. She was not stumbling about or unable to talk. Consequently, there is no basis to argue Hansen's possible intoxication rendered her noncustodial statements involuntary. *See* ***State v. Clappes***, 136 Wis. 2d 222, 240, 401 N.W.2d 759 (1987) (the mere existence of pain and/or intoxication is insufficient to render a

statement involuntary). There is no arguable merit to an argument that Hansen's pre-arrest statements should have been suppressed.

In reviewing the denial of Hansen's motion to suppress the statement from her interview at the sheriff's department after her arrest, we consider whether the prosecution met its burden to show that Hansen was informed of her ***Miranda*** rights, that she understood them, that she intelligently waived them, and that her statement was voluntary. *See* ***State v. Lee***, 175 Wis. 2d 348, 359, 499 N.W.2d 250 (Ct. App. 1993). At the conclusion of the presentation of evidence at the suppression hearing, defense counsel conceded that Hansen was given ***Miranda*** warnings when questioned at the sheriff's department. The record supports that concession. There was no argument that Hansen failed to understand the warnings. Thus, the prosecution established a prima facie case that law enforcement complied with ***Miranda***.

The determination of whether the waiver of ***Miranda*** rights and statements was voluntary is made by examining the totality of the circumstances, and it requires the court to balance the personal characteristics of the defendant against the pressures imposed by police in order to induce a response to the questioning. ***Clappes***, 136 Wis. 2d at 236; ***Lee***, 175 Wis. 2d at 361. The circuit court found that the officers had not used threats, coercions or other improper practices to obtain Hansen's answers to their questions. It found Hansen was willing to waive her rights and give her statement. The circuit court properly concluded that Hansen's post-arrest statement was not subject to suppression.

Hansen's pretrial motion challenged the warrant issued for a search of her apartment on the ground that the supporting affidavit had speculative and conclusory statements that should have been disregarded in determining if probable cause existed for the search. Specifically, she

challenged as conclusory the officer's averment that Walter had "injuries about the face and arms consistent of a person fighting off someone attempting to suffocate them," and she challenged the relevance of a plastic bag and latex glove found in the ground floor garbage bin accessible to residents of the apartment building. She also challenged the officer's averment that, based on his training and experience, he was aware that suspects research via the internet and printed matter the crimes they are contemplating. Hansen argued it was speculative to suggest that she had a computer or a device with internet access.

Probable cause is determined by applying the totality of the circumstances test.

> The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983). Moreover, probable cause is concerned with probabilities and not hard certainties. *See* ***State v. Anderson***, 138 Wis. 2d 451, 469, 406 N.W.2d 398 (1987). "[O]fficers are entitled to the support of the usual inferences which reasonable people draw from facts." ***State v. Lopez***, 207 Wis. 2d 413, 425-26, 559 N.W.2d 264 (Ct. App. 1996).

When this court gauges whether there was sufficient evidence to support a warrant, we give substantial deference to the issuing judge's determination. *See* ***State v. Ehnert***, 160 Wis. 2d 464, 468, 466 N.W.2d 237 (Ct. App. 1991). We only gauge whether the facts offered in support of the warrant established a "fair probability" that the desired evidence would be found at the targeted location. *See* ***Anderson***, 138 Wis. 2d at 468 (citation omitted).

The circuit court found that, given the timing of the issuance of the warrant, the plastic bag and latex glove were found in the communal trash bin within a seven-hour window following the commission of the crimes. It observed that Walter had specifically linked Hansen to use of a plastic bag and that it was common sense that a person fighting off someone suffocating him would have some injuries to the face and arms. Finally, it found that in this "electronic age" a huge percentage of people have cell phones or computers with internet access. With these findings, and reasonable inferences from the circumstances, probable cause for the warrant existed. There is no arguable merit to a claim that evidence recovered from the search of Hansen's apartment should have been suppressed.

We turn to consider whether Hansen has an arguably meritorious challenge to the second determination that she was competent to stand trial.[5] Again, the no-merit report's conclusion that there is no arguable claim lacks reference to the applicable standards and a discussion of the evidence.

A competency determination is functionally a factual finding. ***State v. Byrge***, 2000 WI 101, ¶33, 237 Wis. 2d 197, 614 N.W.2d 477. We review the circuit court's competency determination under a clearly erroneous standard of review that is particularized to competency findings. ***Id.***, ¶45; ***State v. Garfoot***, 207 Wis. 2d 214, 224, 558 N.W.2d 626 (1997). Hansen stood mute on the question of whether she was competent. Thus, it was the prosecution's burden

[5] After the first competency evaluation was done, Hansen claimed to be competent when the matter was called for consideration. The court heard the testimony of the examining psychologist and found Hansen to be competent. Having made no challenge to the evidence that she was competent before the circuit court, Hansen cannot challenge the first ruling on appeal. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (a position on appeal which is inconsistent with that taken at trial is subject to judicial estoppel).

to prove by the greater weight of the credible evidence that Hansen was competent to proceed. *See* ***id.*** at 222; *see also* WIS. STAT. § 971.14(4)(b). A person is not competent to stand trial if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in preparing a defense. ***Garfoot***, 207 Wis. 2d at 222; WIS. STAT. § 971.13(1).

A second competency evaluation resulted in a report that Hansen was competent to stand trial. Both the first and second court-appointed examiners testified at the hearing with regard to the conclusion that Hansen was competent. Even Hansen's expert, the psychologist who evaluated Hansen for her not guilty by mental disease or defect plea, indicated that Hansen understood the roles of the participants in court, including the judge, prosecutor, witnesses, and jury, that she understood potential sentences if found guilty, and that she understood what was going on in court.

The only countervailing evidence as to her competency to proceed was her expert's opinion that she was unable to assist in her defense because she had no memory of what took place regarding Walter on the day of the alleged attack. The expert linked the lack of memory to Hansen's "intellectual disability … in conjunction with the alcohol and the prescriptive medications" Hansen had used that day. Lack of memory, in the absence of mental disease or defect, does not render a defendant incompetent to stand trial. *See* ***State v. McIntosh***, 137 Wis. 2d 339, 347, 404 N.W.2d 557 (Ct. App. 1987) ("the majority rule is that amnesia does not by itself either render a defendant incompetent to stand trial or, if tried, unable to be tried fairly"). The circuit court found that Hansen had sufficient knowledge and ability to understand the legal process. It also found that Hansen had memory of what occurred on both sides of the alleged attack and that her possible memory issues were not significant enough to render her

unable to assist in her defense. The circuit court's findings are not clearly erroneous, and there is no arguable merit to a claim that the competency ruling was made in error.

The no-merit report addresses the potential issues of whether Hansen's plea was freely, voluntarily and knowingly entered; whether there was the required "strong proof of guilt"[6] to establish a factual basis for Hansen's ***Alford*** pleas; and whether the sentences were the result of an erroneous exercise of discretion, were unduly harsh or excessive, were based on inaccurate information, or otherwise subject to modification based on the existence of any new factor. This court is satisfied that the no-merit report properly analyzes these issues as without merit, and this court will not discuss them further.

In her response to the no-merit report, Hansen requests that this court look at her sentence structure and consider a sentence reduction. She suggests she wanted her attorneys to say more at sentencing, but the attorneys said the matters she wished to raise were not important. She lists her medical conditions and the state of her marriage as reasons she requests a sentence reduction. Hansen's defense attorneys filed a sentencing memorandum. The record does not reveal any gaps in the sentencing argument by defense counsel, as counsel appropriately stressed that Hansen's past criminal record did not involve any violent offenses and that it was likely she could not remember attacking Walter due to a blackout like those she had experienced before. The state of Hansen's health and her marital status were known to the court at sentencing. The sentences were a product of a proper exercise of discretion, and there is no arguable basis to seek a sentence reduction.

[6] ***State v. Smith***, 202 Wis. 2d 21, 26, 549 N.W.2d 232 (1996).

We note that at one point Hansen changed her plea to not guilty by reason of mental disease or defect (NGI). That plea was withdrawn because the defense determined that Hansen's consumption of alcohol and prescriptions drugs negated an NGI defense. It was not necessary for the circuit court to engage in a personal colloquy with Hansen about the decision to forgo an NGI plea. *See* ***State v. Francis***, 2005 WI App 161, ¶1, 285 Wis. 2d 451, 701 N.W.2d 632. Any other possible appellate issues from the proceedings before Hansen's pleas are forfeited because the pleas waived her right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Our review of the record discloses no other potential issues for appeal requiring discussion. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Hansen further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that attorney Andrew R. Hinkel is relieved from further representing Stacey A. Hansen in this appeal. *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