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December 22, 2020

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

2017AP1969-CRNM State of Wisconsin v. Ruben V. Garcia (L.C. # 2015CF445)

Before Brash, P.J., Donald and White, 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).

Ruben V. Garcia appeals from a judgment convicting him of two counts of first-degree intentional homicide. Appellate counsel, Angela Conrad Kachelski, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1]

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Garcia was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude that there are no arguably meritorious issues that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

On January 22, 2015, then twenty-year-old Garcia called and texted his former girlfriend, A.D., several times. Garcia had been upset by an online video showing another man holding their five-month-old daughter, K.G., and making her laugh, and he asked A.D. to let him visit the child. A.D., who had ended her relationship with Garcia at the beginning of the month, agreed that he could visit K.G. the next day.

When Garcia arrived at A.D.'s home on January 23, 2015, two other men were there: A.D.'s godfather P.K. and C.H., the man in the video. Garcia played with K.G. for a bit before asking A.D. if they could get back together. A.D. asked Garcia to leave. An argument ensued in the kitchen, where Garcia, armed with two knives, stabbed A.D. in the face, shoulder, and neck. A.D. screamed. C.H. responded to A.D.'s screams and attempted to grab Garcia. Garcia turned and began stabbing C.H. in the face and neck. When P.K. entered the kitchen and attempted to intervene, Garcia stabbed P.K. multiple times. C.H. then grabbed a kitchen knife and attempted to stop Garcia, but Garcia disarmed him and stabbed him further. C.H. laid on the floor and pretended to be dead so that Garcia would stop stabbing him.

While Garcia was distracted by the men, A.D. ran to the bathroom, locked the door, and called the police. Garcia attempted to lure her out by saying he was near K.G.; A.D. refused to exit. This further upset Garcia. He went to the room where K.G. was sleeping. C.H. heard

Garcia apologize to the baby before slitting her throat. Garcia then kicked in the bathroom door and stabbed A.D. additional times. Garcia began to tire, and A.D. was able to flee the room. Garcia was still in the bathroom when the police arrived.

Upon their arrival, police located A.D., who had stab wounds to her neck, face, shoulders, back, and arms, and C.H., who had approximately twenty-two lacerations, including thirteen to his neck. K.G. and P.K. were already deceased; post-mortem autopsies identified two incisions and six stab wounds to K.G., and six incisions and forty-four stab wounds to P.K. Garcia had also been injured, sustaining several superficial injuries but also a severe injury to his left wrist, possibly self-inflicted, for which surgery was required. A.D., C.H., and Garcia were taken to the hospital for treatment.

Detectives Jeffrey Sullivan and James Hensley spoke with Garcia at the hospital, where Garcia gave an inculpatory statement. Garcia was discharged from the hospital three days later and taken to the Police Administration Building, where he was again interviewed by Hensley and Detective Kent Corbett. Garcia again gave an inculpatory statement in the interview.

Garcia was charged with two counts of first-degree intentional homicide with a dangerous weapon and two counts of attempted first-degree intentional homicide with a dangerous weapon. He filed a pretrial ***Miranda/Goodchild*** motion to suppress both of his

statements.[2] After a hearing, the trial court suppressed Garcia's first statement but not his second.

Ultimately, the case was resolved with Garcia's standalone not-guilty-by-reason-of-mental-disease-or-defect pleas to two counts of first-degree intentional homicide without the dangerous weapon enhancer. That is, Garcia pled guilty, pursuant to a plea agreement, to the essential elements of the two homicide charges while asserting that that he lacked the mental capacity to be held criminally accountable.[3] The issue of Garcia's responsibility was tried to a jury, which rejected his defense. The trial court later sentenced Garcia to concurrent terms of life imprisonment with eligibility for extended supervision after sixty years. Garcia appeals.

DISCUSSION

I. The Suppression Motion

The first issue appellate counsel discusses in the no-merit report is whether there is any "meritorious issue to appeal regarding the admissibility of the second statement" from Garcia.[4] A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We do not

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965). A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***id.***, 27 Wis. 2d at 264-65.

[3] As part of the plea agreement, the two attempted homicide charges were dismissed and read in for sentencing.

[4] An order denying a motion to suppress evidence may be challenged on direct appeal notwithstanding entry of a plea. *See* WIS. STAT. § 971.31(10).

reverse the trial court's factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.***

Garcia had moved to suppress both of his statements on the grounds that they were involuntary.[5] "We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary," balancing the "personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407. Factors that may be considered include "the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, [and] any … methods or strategies used by the police to compel a response[.]" ***Id.***, ¶39. The State must show, by a preponderance of the evidence, that the statements were voluntary. ***Id.***, ¶40.

As noted, the trial court conducted a hearing on the motion. With respect to the first statement that Garcia gave in the hospital, the trial court noted that Garcia had been given three doses of the narcotic fentanyl, the emergency room physician testified that Garcia was non-responsive to many of her questions, and Garcia had told detectives during the second interview that he did not recall half of the hospital interview. Concluding that Garcia would not have had a reason to fabricate such a statement during the second interview, the trial court doubted whether Garcia's first statement was truly voluntarily. Thus, the trial court concluded that the State had not met its burden and suppressed Garcia's first statement.

[5] Garcia also asserted that police had not obtained a valid waiver of rights as required by ***Miranda***. However, the trial court found, and the record clearly supports, that Garcia gave a proper waiver of his rights during the second interview. Thus, there is no arguable merit to a ***Miranda*** challenge on appeal.

With respect to Garcia's second statement, given at the Police Administration Building, Garcia claimed that the statement was involuntary because: (1) he was in "a lot of pain" after someone hit his injured and bandaged left arm on the way to the interrogation room; (2) he became "noticeably emotional" just before incriminating himself in K.G.'s death; (3) he was experiencing considerable despair; and (4) no medical treatment was provided to him.

The trial court found that despite his characterization, Garcia's arm had not been intentionally hit, only accidentally bumped. While Garcia received no medical care—none was available in that building—the trial court concluded that the hospital would not have released him if he were still in need of care and, further, that he was not displaying any outward signs of physical distress, nor did he request medical aid. Finally, the trial court concluded that under the circumstances, one could be expected to be highly emotional and despondent, but the stress of the situation was insufficient by itself to make Garcia's statement involuntary. It thus concluded that Garcia's second statement had been voluntary and denied suppression.

The trial court's factual findings are not clearly erroneous. Based on those findings and our independent review of the record, we agree with appellate counsel's conclusion that there are no arguably meritorious appellate issues relating to the trial court's denial of Garcia's motion to suppress his second statement.

II. The Guilty Pleas

The second issue appellate counsel discusses in the no-merit report is whether Garcia's "guilty pleas [were] made knowingly and voluntarily." A defendant charged with a criminal offense may plead not guilty by reason of mental disease or defect (NGI). *See* WIS. STAT. § 971.06(1)(d). When an NGI plea is joined with a not guilty plea, a bifurcated criminal trial

results, consisting of two phases: the guilt phase and the responsibility phase. *See* ***State v. Magett***, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W.2d 42. If the jury finds the defendant guilty in the first phase, the trial court withholds entry of judgment and the matter proceeds to the second phase. *See* WIS. STAT. § 971.165(1)(d). "In the second phase, the jury considers whether the defendant had a mental disease or defect at the time of the crime and whether, 'as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.'" ***Magett***, 355 Wis. 2d 617, ¶33 (quoting WIS. STAT. § 971.15(1)).

"[A] defendant may choose to plead NGI without also pleading not guilty[.]" ***State v. Fugere***, 2019 WI 33, ¶27, 386 Wis. 2d 76, 924 N.W.2d 469. This is known as a "standalone NGI plea." *See* ***id.*** In entering a standalone NGI plea, as Garcia did in this case, a defendant is admitting that "but for lack of mental capacity the defendant committed all the essential elements of the offense charged[.]" *See* WIS. STAT. § 971.06(1)(d). The defendant is then found guilty of the elements of the offense, and the responsibility phase is left for trial. *See* ***State v. Lagrone***, 2016 WI 26, ¶29, 368 Wis. 2d 1, 878 N.W.2d 636.

When a standalone NGI plea is entered, the trial court must conduct a proper plea colloquy with the defendant for the guilt phase of the case. *See* ***Fugere***, 386 Wis. 2d 76, ¶27. Our review of the record—including the plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Indeed, the trial court took particular care to ensure Garcia understood the plea proceedings. We are satisfied that there are no arguably meritorious appellate issues regarding Garcia's pleas in the guilt phase.

III. The Responsibility Phase

Appellate counsel next discusses several issues related to whether the trial court "properly rule[d] on evidentiary issues and properly conduct[ed] the second phase" of Garcia's case, the jury trial regarding his mental state and criminal responsibility for his crimes.

We agree with appellate counsel's conclusion that there is no arguable merit that would warrant further discussion in this opinion regarding the following issues. First, during voir dire, the trial court summoned additional jurors after strikes for cause would have left the parties without the proper number of peremptory challenges, and the trial court properly exercised its discretion in both granting and denying motions to strike jurors for cause. Second, the stipulation of facts regarding the underlying homicides, read by defense counsel to the jury, had been drafted jointly by defense counsel and the prosecutor, signed by both attorneys and by Garcia, and approved by the trial court after engaging Garcia in a colloquy about it. Third, although not required, the trial court engaged Garcia in a proper colloquy about whether he wanted to testify in the responsibility portion of his case;[6] Garcia declined to take the stand. Fourth, the jury was properly instructed. Finally, there is no basis for objection or challenge to either party's closing arguments.

Counsel also discusses two issues relating to the second phase of the case, which, although they give rise to no arguably meritorious issues, warrant expanded discussion. We also discuss an issue that we have independently identified.

[6] "[A]lthough a better practice, a [trial] court is not required to conduct a right-to-testify colloquy at the responsibility phase of a bifurcated trial resulting from a plea of not guilty by reason of mental disease or defect." ***State v. Lagrone***, 2016 WI 26, ¶57, 368 Wis. 2d 1, 878 N.W.2d 636.

A. The Hearsay Issue

There were two witnesses for the responsibility phase of this case: Dr. Diane Mosnick, who was called by Garcia, and Dr. Deborah Collins, who was called by the State. Collins had been appointed to examine Garcia when he entered his NGI plea; Mosnick was retained by the defense. During the State's opening comments, it told the jury that it would hear about a report from a corrections officer that Garcia had been overheard telling another inmate how to act in order to receive medication. Defense counsel interjected with a hearsay objection.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible. *See* WIS. STAT. §§ 908.01(3), 908.02. Whether to admit a hearsay statement under an exception is a matter for the trial court's discretion. *See* ***State v. Manuel***, 2004 WI App 111, ¶8, 275 Wis. 2d 146, 685 N.W.2d 525.

Because the corrections report was one of many things Collins considered in her assessment of Garcia, the trial court overruled his objection, noting that the report had been disclosed to the defense well beforehand and that it was "fair comment" for the State to give the jury all of the grounds on which Collins relied. Collins herself later testified about having considered the corrections report in her review. We discern no erroneous exercise of discretion.

Moreover, our review of the record satisfies us that the corrections report was not hearsay—that is, although it was an out-of-court statement, it was not offered to prove that Garcia was feigning mental illness or that he lacked a mental disease or defect; rather, it was merely one of several factors considered by Collins and was introduced solely to provide the context for her conclusions. We do not reverse an evidentiary decision if the record supports the trial court's decision, even if there were an error in reasoning. *See* ***id.*** Thus, there is no arguably

meritorious claim that the corrections report should not have been discussed, whether through the State's opening comments or Collins' testimony.[7]

B. Mosnick's Employer

Mosnick testified that she diagnosed Garcia with schizophreniform disorder, a precursor to schizophrenia, and that he had suffered an "acute psychotic break" at the time of the stabbings, which rendered him unable to conform his conduct to the requirements of the law. During her testimony, a sidebar was conducted to make sure that Mosnick knew not to reference being paid by the State Public Defender's office, which was representing Garcia.

Appellate counsel notes that Mosnick nevertheless "did state that she was being paid by the SPD." However, appellate counsel concludes there is no arguably meritorious issue because defense counsel declined any corrective measures from the trial court so as to avoid further highlighting the statement. The trial court agreed with that option, noting that the reference to the public defender's office was a brief one.

We agree that there is no arguably meritorious issue here. First, the State was not prohibited from exploring generally the fact that Mosnick was a paid defense expert. Second, the State did not ask a question that necessarily required Mosnick to reference the public defender. The State asked, "And what is the amount you're being paid to be here?" Mosnick replied, "For the initial assessment it's $800 an hour as my contractor right with the Wisconsin Public Defender's Association up to a maximum $6,000[.]"

[7] The jury was also instructed that statements of counsel are not evidence.

In this brief reference, a reasonable jury could have easily interpreted Mosnick's comment to mean that some agreement with a professional association set the payment rate for experts like her, without the comment necessarily implying that the public defender was the paying entity in this case. Thus, it was not deficient for defense counsel to move on without further highlighting the comment to the jury. In any event, our review of the record satisfies us that the fleeting reference to the funding source for Mosnick's testimony would not have had any conceivable impact on the verdict.

C. The Jury's Verdict

Appellate counsel did not discuss whether there is any arguable merit to challenging the jury's verdict as contrary to the weight of the evidence. However, we have independently analyzed that issue.

NGI is an affirmative defense. *See* ***Lagrone***, 368 Wis. 2d 1, ¶31. In the responsibility phase of a bifurcated case, the defendant bears the burden of establishing a mental disease or defect excluding responsibility to a reasonable certainty by the greater weight of the credible evidence. ***Id.***, ¶29. Both witnesses testified that Garcia had a mental disease or defect, but that is not enough for a successful NGI defense. The defendant must also persuade the jury that as a result of the mental disease or defect, he or she lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or to conform that conduct to the requirements of law. *See* WIS JI—CRIMINAL 605.

On this second prong, the success of Garcia's NGI defense essentially distills to a matter of competing expert testimony, and the "ultimate determinations of credibility and accuracy" of

competing expert opinions "are for the jury, not the court." ***State v. Giese***, 2014 WI App 92, ¶23, 356 Wis. 2d 796, 854 N.W.2d 687.

Garcia's expert, Mosnick, testified that she is a "clinical and forensic neuropsychologist" licensed in Wisconsin and Texas. She does not belong to any professional groups that focus on forensic psychology or have any particular certification in forensic psychology. Mosnick explained to the jury that she diagnosed Garcia with schizophreniform disorder after interviewing him and administering several cognitive and intellectual functioning tests, which she described. Mosnick also told the jury about Garcia's reports of hearing voices, including Holo, a supportive female voice, and Faith, an aggressive male voice. Garcia claimed to have heard Faith speaking during the stabbings, a factor in Mosnick's diagnosis and conclusion.

The State's expert, Collins, testified that she is one of about only 330 psychologists nationwide certified by the American Board of Forensic Psychology. She is the director of the Wisconsin Forensic Unit, which makes her the "primary supervisor of the state agency of psychiatrists and psychologists doing forensic work." She explained to the jury that she had diagnosed Garcia with unspecified depressive disorder, but this would not prevent him from appreciating the wrongfulness of his actions or conforming his behavior to the law. She opined that the cognitive tests administered by Mosnick had no real forensic value, as they were a present measure and could not retroactively assess Garcia at the time of his crimes. Collins also testified about why she rejected any schizophrenia spectrum diagnosis; in particular, she explained that while Garcia had a history of mental health contacts, none of his records, including post-arrest records in this case, made any mention anywhere of Garcia reporting hearing voices. Collins noted that through everything she had reviewed, the only time Garcia reported hearing voices was in the "context of this case."

Here, the jury ultimately decided, eleven to one,[8] that Garcia had a mental disease or defect. This is consistent with the fact that both doctors opined that Garcia had an identifiable mental disease or defect; identifying the specific disorder is not necessary. The jury unanimously agreed, however, that any mental disease or defect he had did not prevent Garcia from appreciating the wrongfulness of his conduct or conforming his behavior to the requirements of the law. If the jury rejected Mosnick's diagnosis and relied instead on Collins' testimony, as it was free to do, the jury would have had to conclude that Garcia failed to meet his evidentiary burden. The verdict is thus not contrary to the evidence, and there is no arguable merit to challenging it.

IV. Sentencing Discretion

The final issue appellate counsel addresses in the no-merit report is whether the circuit court erroneously exercised its sentencing discretion by imposing an excessive sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence

[8] A responsibility phase, though part of a criminal trial, shares traits with a civil trial, where only a five-sixths verdict is required. *See* ***State v. Lagrone***, 368 Wis. 2d 1, ¶¶33-34; *see also* WIS. STAT. § 971.165(2).

We observe that the jury was instructed to include any dissenting jurors' names on the verdict. While the dissenting vote to the first verdict question was noted, the dissenting juror was not identified. However, the need to identify the dissenting jurors arises from the requirement that "[i]f more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions." *See* WIS. STAT. § 805.09(2); *see also* ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983). Here, because there was only one dissenting vote on one of two questions, there is no question of the verdict's mathematical validity.

to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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* ***id.***

Here, the trial court was required to impose life sentences, *see* WIS. STAT. § 939.50(3)(a), and the only real question on which it needed to exercise discretion is whether and when Garcia might be eligible to seek release on extended supervision, *see* WIS. STAT. §973.014(1g)(a). The trial court made Garcia eligible for supervision after sixty years. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The sentences imposed are 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 are not so excessive so as to shock the public's sentiment under the facts of this case. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to challenge the trial court's exercise of 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski is relieved of further representation of Garcia in this matter. *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