COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2286-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. A jury found Jose Garcia guilty of several offenses[1] arising from the physical and sexual assault of Marta A. Garcia and

[1] Garcia was convicted of the following offenses: attempted first-degree intentional homicide by use of a dangerous weapon; second-degree sexual assault; attempted first-degree sexual assault; first-degree reckless injury by use of a dangerous weapon; kidnapping by use of a dangerous weapon; and false imprisonment by use of a dangerous weapon.

received a total sentence of seventy-two years. Appellate counsel for Garcia, Attorney Gregory N. Dutch, filed a postconviction motion alleging that Garcia's trial counsel had been ineffective. The trial court denied that motion. Attorney Dutch then filed a no merit report pursuant to RULE 809.32, STATS. Garcia has filed a response. After considering the no merit report, the response, and independently reviewing the record, we conclude there are no arguable appellate issues. Therefore, we affirm the judgment of conviction and postconviction order.

FACTS

Garcia and Marta had been romantically involved. However, at the time of the assault, they were no longer involved, and Marta was pregnant by another man. At trial, Marta testified[2] that she saw Garcia in the parking lot next to her apartment when she returned home on a lunch break. Garcia entered Marta's apartment with her. Marta's and Garcia's accounts of the incident differ in crucial aspects. Marta testified that Garcia began touching her while she ate her lunch, and that he tried to kiss her. Shortly after that, Garcia "pushed" Marta "into the bedroom" and said that he "wanted to make love." Marta testified that she said no, and told Garcia that she was pregnant, and "didn't want him to touch me." Garcia then "punch[ed]" Marta and took off her clothes. Marta testified that she was "very scared" and that she let Garcia remove her clothes because he had already hit her. Garcia "threw" Marta "onto the mattress and … sat on [her] legs and … started kissing [her]." Marta tried to push Garcia away and asked him to leave her alone. Garcia hit her again and then sexually assaulted her. Marta testified that Garcia pulled a knife from his pants and began stabbing Marta. She

[2] At trial and the preliminary hearing, an interpreter translated Marta's testimony. The accuracy of those translations will be addressed in greater depth below.

continued to struggle with Garcia, and ultimately wrestled the knife from Garcia. At one point Marta freed herself from Garcia's grasp and attempted to escape. However, after she unlocked the apartment door, Garcia "grabbed" her and threw her against a wall. Eventually police officers, who had been called by a neighbor who heard screams, arrived at the apartment. Marta had been stabbed eleven times, and a doctor testified that her wounds were life-threatening.

Garcia's version of the incident differed dramatically. Garcia described consensual sexual contact. He acknowledged that, at one point, Marta "stopped and she said she couldn't" but that after she "stopped to think for a moment, … she said, 'Okay, but do it slowly.'" Garcia testified that the sexual contact continued until they "began to wrestle, and then I realized that someone was knocking on the door, and that's when the police arrived." Garcia testified that he did not remember using a knife, and he denied stabbing or assaulting Marta.

NO MERIT REPORT

A. *Effectiveness of Trial Counsel*

In his no merit report, appellate counsel first discusses whether there would be any arguable merit to challenging the effectiveness of trial counsel. A postconviction motion on that basis was filed by appellate counsel and denied by the court. We agree that a continued challenge to the effectiveness of trial counsel would lack arguable merit.

In the postconviction motion appellate counsel initially asserted that trial counsel was ineffective for not pursuing a not guilty by reason of mental

disease or defect defense for Garcia.[3] After receiving Garcia's psychological reports, which did not indicate that an NGI defense would have been appropriate, counsel withdrew that portion of the postconviction motion.[4] Because the evidence did not support an NGI defense, trial counsel was not ineffective for not raising such a defense. Further review on this issue would lack arguable merit.

Appellate counsel also asserted that trial counsel had represented a relative of the victim in an unrelated matter, thereby creating a conflict of interest. At the ***Machner***[5] hearing, trial counsel testified that he knew of "no relationship" between the victim and a client with the same surname. Trial counsel also testified that Marta's surname was a common Colombian surname. In light of that testimony, the trial court found that no conflict of interest had been proven. That finding cannot be reasonably challenged on appeal.

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[3] Prior to trial, Garcia's competency to proceed was examined under § 971.14, STATS. Garcia's competency had been questioned because of his claimed lack of memory about the incident. At the competency hearing the two examining psychiatrists testified that Garcia was competent to proceed. Garcia's brother and wife testified that Garcia often forgot things. Garcia also testified, and recounted the incident until he and Marta were "kissing on the mattress." Garcia claimed no memory of any other event until the police arrived at the apartment.

When a defendant has the "capacity to understand the nature and object of the proceedings against him or her, to consult with counsel, and to assist in preparing his or her own defense," the defendant is competent within the meaning of § 971.13(1), STATS. ***State v. Garfoot,*** 207 Wis.2d 215, 226-27, 558 N.W.2d 626, 631 (1997) (citation omitted). The trial court's competency determination will be upheld unless clearly erroneous. *See* ***id.*** at 225, 558 N.W.2d at 631. The trial court found Garcia competent, noting that "[a]ny problems with [Garcia's] memory … are within normal limits and would not interfere with [his] ability to assist his counsel." That finding is not clearly erroneous.

[4] Another part of the postconviction motion was effectively withdrawn during the hearing. The postconviction motion faulted trial counsel for not pursuing a suppression motion on the grounds that Garcia did not understand the ***Miranda*** warnings which had been given him in both Spanish and English. After appellate counsel conferred with Garcia during the hearing, and Garcia apparently confirmed that he had understood the warnings, that aspect of the motion was abandoned.

[5] ***State v. Machner,*** 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Appellate counsel also faulted trial counsel for not raising a hearsay objection when the officer who interviewed Marta at the hospital testified to Marta's statements. Garcia's trial counsel testified that he did not object, in part, because he felt Marta's statements were "excited utterances," and thus were admissible under § 908.03(2), STATS.[6] In its postconviction ruling, the court agreed with trial counsel and held that Marta's statements were "excited utterances." Because the objection would have been overruled, the failure to voice the objection does not constitute deficient performance. *See* ***State v. Traylor,*** 170 Wis.2d 393, 405, 489 N.W.2d 626, 631 (Ct. App. 1992). An arguable claim of ineffective trial counsel cannot be made.

B. *Additional Charges*

Garcia was initially charged with only attempted first-degree homicide by use of a dangerous weapon. After the preliminary hearing the State filed a six-count information. In Count 1 Garcia was charged with attempted first-degree homicide by use of a weapon, and in Count 4 he was charged with first-degree reckless endangerment by use of a dangerous weapon. In his no merit report, appellate counsel addresses whether the evidence at the preliminary hearing supported the issuance of the additional charge. The State "may bring additional charges in the information so long as the charges are not wholly unrelated to the transactions or facts considered or testified to" at the preliminary hearing. ***State v. Burke,*** 153 Wis.2d 445, 457, 451 N.W.2d 739, 744 (1990). The additional counts arose from the same incident. Therefore, a challenge to the

[6] Section 908.03(2), STATS., provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. *See generally,* ***State v. Gerald L.C.,*** 194 Wis.2d 548, 535 N.W.2d 777 (Ct. App. 1995).

issuance of the additional charges, including the first-degree reckless endangerment charge, would lack arguable merit.

C. *Multiplicity*

Appellate counsel also addresses whether the convictions for attempted first-degree homicide and first-degree reckless endangerment, both by use of a weapon, violated Garcia's constitutional double jeopardy protection.[7] Garcia also discusses multiplicity at length in his response.[8] We conclude that this issue lacks arguable merit.

This case involves the double jeopardy protection against multiple punishments. *See* ***North Carolina. v. Pearce****,* 395 U.S. 711, 717 (1969). A defendant may be prosecuted for more than one crime arising from the same conduct without offending double jeopardy protections. *See* § 939.65, STATS.; ***State v. Sauceda****,* 168 Wis.2d 486, 493, 485 N.W.2d 1, 4 (1992). When a defendant is subjected to a single trial on two charges arising out of the same conduct, two questions must be answered: (1) are the two charges identical in law and fact; and (2) if they are not, did the legislature intend the multiple offenses to be brought as a single count. *See* ***State v. Anderson****,* 219 Wis.2d 740, 747, 580 N.W.2d 329, 333 (1988). If we respond negatively to both of these questions, multiplicity does not exist. ***Id.*** at 748-52, 580 N.W.2d at 333-35.

[7] U.S. CONST. Amend. V; WIS. CONST. Art. I, § 8.

[8] In his response, Garcia asserts that his trial counsel did not do enough to prevent the "amendment" of the reckless endangerment charge into attempted first-degree homicide. Garcia misapprehends the relationship between the charges. While a single course of conduct underlies both charges, they are distinct. One was not "amended" into the other.

To determine whether the two charged offenses are the same, the "elements only" test established in ***Blockburger v. United States,*** 284 U.S. 299, 304 (1932), is used. Under that test, "two offenses are different in law if each statutory crime requires for conviction proof of an element which the other does not require." ***State v. Lechner,*** 217 Wis.2d 392, 405, 576 N.W.2d 912, 919 (1998).

The crime of attempted first-degree homicide is different in law from the crime of first-degree reckless endangerment. Intent is an element of the former, and it need not be proven in the latter. *Cf.* ***State v. Ambuehl***, 145 Wis.2d 343, 363, 425 N.W.2d 649, 657 (Ct. App. 1988) (attempted first-degree homicide, which requires proof of intent to kill, is a different offense from injury by conduct regardless of life which does not require proof of intent).[9] Therefore, under the ***Blockburger*** test, the offenses are not the same in law.

When the first part of the multiplicity test is satisfied, as it is in this case, we begin the second part by presuming the legislature intended to permit cumulative punishments. ***State v. Carol M.D.***, 198 Wis.2d 162, 173, 542 N.W.2d 476, 480 (Ct. App. 1995). Considering the statutory language, legislative history and context, the nature of the proscribed conduct, and the appropriateness of multiple punishments, *see* ***id.***, we are not aware of any factors that would overcome the presumption in this case. Therefore, Garcia's double jeopardy rights were not violated, and an appeal on this issue would lack arguable merit.

[9] In ***State v. Ambuehl***, 145 Wis.2d 343, 363, 425 N.W.2d 649, 657 (Ct. App. 1988), we stopped our analysis at this point and determined that the defendant's double jeopardy rights were not violated. Recent case law requires that we also consider the second prong of Wisconsin's multiplicity test. *See* ***State v. Anderson***, 219 Wis.2d 740, 752, 580 N.W.2d 329, 335 (1998).

D. *Inconsistency in Translated Testimony*

The next issue discussed by appellate counsel in the no merit report arises from the inconsistencies in the translation of Marta's testimony between the preliminary hearing and trial. At both hearings Marta testified through a Spanish-speaking interpreter. The interpreters were different people. At trial Marta's testimony consistently described a sexual assault, with no suggestion that she was consenting to the sexual contact. Her testimony at the preliminary hearing, however, was markedly different, and suggested that she agreed to much of the sexual activity.

At Garcia's request the trial court permitted him to use the preliminary hearing testimony to impeach Marta's trial testimony. *See* § 908.01(4)(a)1, STATS. When confronted with the apparent inconsistency at trial, Marta testified that the interpretation at the preliminary hearing had not been accurate. The court also permitted the substantive use of Marta's prior inconsistent statements. *See* ***Vogel v. State,*** 96 Wis.2d 372, 384, 291 N.W.2d 838, 844 (1980).

No arguable appellate issue is present. The trial court properly admitted Marta's prior inconsistent statements from the preliminary hearing, and permitted Garcia to use those statements as substantive evidence. *See* ***id***. The trial court also properly exercised its discretion when it denied Garcia's request that the transcript of the entire preliminary hearing be admitted into evidence. The portions of the hearing that did not qualify as prior inconsistent statements remained hearsay, and the trial court correctly refused to admit the entire transcript.

Garcia raises several points in his response. We have already addressed that portion of the response that argues multiplicity. We address Garcia's remaining arguments, as best as they can be discerned, below.

A. *Provocation*

Garcia claims that he was "provoked" by Marta when she would not have sex with him and that he "overreacted" and injured her. Garcia argues, however, that he "did not intend the resultant harm that was inflicted upon" Marta. In Garcia's view provocation transforms an otherwise intentional act into a reckless act.

Criminal intent is often proven by circumstantial evidence. *See* ***W.W.W. v. M.C.S.****,* 185 Wis.2d 468, 489, 518 N.W.2d 285, 292 (Ct. App. 1994). Intent "must be inferred from the acts and statements of the person, in view of the surrounding circumstances." ***Id.*** (quoted source omitted). The evidence showed that Garcia repeatedly stabbed Marta in her midsection. The jury could infer that Garcia intended to kill her. And, the same course of conduct can also support a conviction for first-degree reckless endangerment. *See* ***Ambuehl,*** 145 Wis.2d at 361-63, 425 N.W.2d at 656-58. That one of the offenses requires proof of intent does not preclude conviction for both.

Garcia requested that the jury be given the "adequate provocation" instruction as it relates to first-degree homicide. *See* WIS J I—CRIMINAL 1012.[10]

[10] WIS J I—CRIMINAL 1012 provides, in pertinent part:

> First degree intentional homicide, as defined in § 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with the intent to kill that person or another. In this case, first degree intentional homicide also requires

(continued)

The trial court refused to give the instruction because the evidence did not support a finding that Garcia acted "under the influence of adequate provocation." The court noted that the instruction requires that Garcia reasonably believe that Marta did something that caused him to lose his self-control, but that Garcia testified that he had no memory of the stabbing part of the encounter. The court also considered Garcia's statement to police that Marta initially agreed to have sex and

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> that the defendant was not acting under the influence of adequate provocation.
>
> Before the defendant may be found guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.
>
> First, that the defendant caused the death of (name of victim).
>
> Second, that the defendant intended to kill ((name of victim)) (another human being).
>
> Third, that the defendant did not act under the influence of adequate provocation.
>
> …
>
> The third element requires that the defendant did not act under the influence of adequate provocation.
>
> "Provocation" means something which the defendant reasonably believed the intended victim had done which caused the defendant to lose self-control completely at the time of causing death. You must determine what the defendant believed and also whether the defendant's belief was reasonable. The standard for whether a belief was reasonable is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.
>
> "Adequate provocation" means sufficient provocation to cause complete loss of self-control in an ordinary person. "Complete loss of self-control" is an extreme mental disturbance or emotional state. It is a state in which a person's ability to exercise judgment is overcome to such an extent that the person acts uncontrollably. It is the highest degree of anger, rage, or exasperation.
>
> Therefore, it is for you to determine whether the defendant was so provoked that he completely lost self-control and whether an ordinary person would have completely lost self-control under the same circumstances.

then changed her mind. The court stated that interrupted sex does not constitute sufficient provocation that would cause an ordinary person to completely lose self-control. Because the evidence did not support a finding of adequate provocation, the trial court properly denied Garcia's request for WIS J I—CRIMINAL 1012.

B. *Prior Relationship*

In his response, Garcia argues that the trial court erroneously limited the inquiry into his and Marta's prior relationship. Garcia states that he wanted to ask whether it was unusual for he and Marta to "engage in sexual relations … during lunch breaks" and whether their "sexual encounters were limited by the amount of time they had." Garcia asserts that those questions would show that he and Marta often had sex "at the very types of times that were involved in this incident." Garcia wanted to show his "intent of … being there on that day."

Both Garcia and Marta testified that they had been sexually involved. *See* § 972.11(2)(b)1, STATS. (evidence of complainant's past conduct with the defendant may be admitted into evidence). They disagreed about when their affair had ended. The trial court refused Garcia's request to present evidence of "how they would meet and where they would meet and when these things would happen … to prove that the meetings … were … commonplace [and] … part of the ongoing affair." The trial court reasoned that any such evidence was not relevant because it did not tend to make any fact of consequence more or less likely. *See* § 904.01, STATS.

To be admissible at trial evidence must be relevant. Section 904.02, STATS. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01,

STATS. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Section 904.03, STATS. Whether to admit evidence is a matter within the trial court's discretion. ***State v. Evans***, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). When this court reviews a trial court's exercise of discretion, the question is whether that discretion was exercised "according to accepted legal standards and if it is in accordance with the facts on the record." ***Id.***

Garcia's motive in being at Marta's apartment does not tend to prove or disprove any element of any of the charged offenses. As was noted in ***State v. Neumann,*** 179 Wis.2d 687, 704, 508 N.W.2d 54, 61 (Ct. App. 1993), "[t]he fact that [the victim] had consented to previous non-violent sexual conduct has virtually no probative value regarding whether she would have consented to sexual intercourse under use or threat of violence." Similarly, the time of day or location of any prior consensual encounters is not relevant to whether Marta consented on the date in question. An appellate challenge to the court's determination would lack arguable merit.

C. *Jury Unanimity*

Garcia also argues that the fact that he was convicted of both attempted first-degree homicide, which requires proof of intent, and first-degree reckless endangerment, which does not, indicates that the jury "never determined to a required degree of certitude as to which version of events that they had believed." Again, Garcia questions how convictions for both an intentional crime and a reckless crime can be supported by the same conduct. As discussed above, there is nothing inherently contradictory or unconstitutional in being charged with both an intentional crime and a reckless crime. *See* ***Ambuehl,*** 145 Wis.2d at 361-

63, 425 N.W.2d at 656-58. When conduct gives rise to separate crimes, the requirement of jury unanimity is satisfied if the jury is instructed that unanimity is required as to each offense. *See* ***State v. Gustafson***, 119 Wis.2d 676, 697, 350 N.W.2d 653, 663 (1984), *modified,* 121 Wis.2d 459, 359 N.W.2d 920 (1985). This jury was so instructed and no arguably meritorious issue is present.

SENTENCING

While neither appellate counsel nor Garcia address sentencing, we consider whether a challenge to the sentence would be meritorious. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See* ***State v. Haskins****,* 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *See* ***id****.* The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. ***State v. Harris****,* 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State****,* 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

A review of the sentencing transcript shows that the court considered the relevant factors. The court discussed the nature of the crimes, noting that Marta and her unborn child would likely have been killed but for the fortuitous intervention of the police and her own struggles against Garcia's attacks. The court noted that the "nature of the attack was particularly aggravated," that it continued for "many, many minutes," and it "went on from room to room." The court acknowledged that Garcia had no previous criminal record, but noted that Garcia continued to blame Marta for

this incident. And, the court noted that the "offense somewhat came out of nowhere," and that the public needed to be protected from such unpredictable behavior.

Based on an independent review of the record, this court finds no basis for reversing the judgment of conviction or postconviction order. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, the judgment of conviction and postconviction order are affirmed, and appellate counsel is relieved of any further representation of the defendant on this appeal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.