**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 3, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-0880-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAY A. STARKWEATHER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dunn County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Jay Starkweather appeals from a judgment of conviction for first-degree intentional homicide, four counts of attempted first-degree intentional homicide, and one count of first-degree recklessly endangering safety, and from an order denying his postconviction motion. He also appeals his

sentence of life imprisonment plus five years for first-degree intentional homicide and imposed maximum concurrent sentences on all other counts.

Starkweather's principal argument is that the trial court erred when it denied his request for a ***Machner***[1] hearing on the issue of ineffective assistance of counsel. He also argues that the evidence is insufficient to support his conviction for first-degree intentional homicide and the jury's determination that he was responsible for his conduct under § 971.15, STATS. Additionally, he contends that the trial court misused its discretion in sentencing. We reject these arguments and affirm the judgment of conviction, postconviction order, and sentence.

## I. BACKGROUND

This case arises from the homicide of Theodore Demery and the attempted homicide of Wayne Kittleson, Martin Austreng, and two police officers. The following facts led to these crimes. Jay Starkweather believed that this father, Leo, owned fourteen acres of land, known as Pick-Nick Point Resort, on Tainter Lake. The property contained apartments and an old schoolhouse. Starkweather lived in one of the apartments, while Kittleson rented one of the apartments, and Demery rented trailer space. In 1995, a land survey revealed that Starkweather's father owned approximately seven acres, not fourteen acres. As a result, Starkweather believed there was a conspiracy to take his father's land, which Starkweather planned to develop.

On the morning of June 6, 1995, Starkweather called his childhood friend, Austreng, who was helping him renovate the old schoolhouse.

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

Starkweather told Austreng that he could have the schoolhouse and his father's land, but hung up before Austreng could ask for an explanation. Starkweather's statement made no sense to him, so he decided to go to Starkweather's residence and talk to him. When Austreng arrived at about 8:30 a.m., Kittleson was sitting across from Starkweather at a kitchen table. Austreng asked Starkweather what he had meant by his statement, and Starkweather replied that Austreng could have the schoolhouse and the land. Starkweather then pulled out a gun from under the table and shot Austreng and Kittleson. Kittleson was shot twice and badly wounded. Austreng suffered a gunshot wound and fled. Both men ultimately survived their injuries.

Starkweather then broke into a nearby home, the Wheelocks', looking for Austreng. Rebecca Wheelock, a tenant of Starkweather's, told him to leave, and he did. Carrying the gun, Starkweather went to his father's house, took his father's handgun and ammunition for a .9 millimeter and a .380 magnum handgun, threatened to kill his father, and left with a gun in each hand. Then at approximately 8:44 a.m., Rebecca heard a single shot coming from the area of Demery's trailer. A deputy who initially arrived on the scene in response to a report of gunfire also heard a single shot at approximately the same time. Starkweather subsequently fired at the police, who fired and wounded him. The police found Starkweather with a .9 millimeter handgun near his left hand and a .380 magnum handgun between his feet.

A police search for victims found Demery lying in the doorway to his trailer. A deputy testified that Demery appeared to have been shot in the face, appeared dead, and that the blood seemed "real fresh" and "real red." Three other officers also testified that the blood looked to be fresh. A pathologist testified that the cause of Demery's death was a gunshot from close range. The director of the

State Crime Laboratory testified that from the body's position on the floor, Demery had probably been shot in his doorway after opening the door.

The police recovered a .380 caliber bullet from the trailer floor that day, and on June 8, found a spent .380 shell casing underneath the steps leading to the trailer's front door. Both were fired from the .380 magnum gun police found near Starkweather's feet. Further, the police found a pair of sunglasses on the ground near the trailer's steps, which according to testimony, were likely Starkweather's.

In connection with the above charges, Starkweather entered pleas of not guilty and not guilty by reason of mental disease or illness under § 971.15, STATS. Pursuant to § 971.165, STATS.,[2] the jury trial was bifurcated into two phases in which the jury first found Starkweather guilty and then determined that while Starkweather suffered from a mental disease at the time he committed the crimes, he was able to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law.

[2] Section 971.165, STATS., provides, in part:

> **Trial of actions upon plea of not guilty by reason of mental disease or defect. (1)** If a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect:
>
> (a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

**1. Sufficiency of the Evidence**

*A. First-degree Intentional Homicide*

Starkweather contends that the evidence supporting the first-degree intentional homicide conviction is "completely circumstantial – and insufficiently so." To the contrary, the record contains overwhelming circumstantial evidence of Starkweather's guilt.

Our review for sufficiency of the evidence is the same whether the evidence is direct or circumstantial. ***State v. Poellinger***, 153 Wis.2d 493, 500, 451 N.W.2d 752, 755 (1990). We may not reverse a conviction "unless the evidence, viewed most favorably to the verdict, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id***. at 501, 451 N.W.2d at 755. We do not substitute our judgment for the jury's. ***Id***. at 507, 451 N.W.2d at 757-58. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we may not overturn a verdict even if we believe that the trier of fact should not have found guilt based on the evidence before it. ***Id***. at 507, 451 N.W.2d at 758. We are bound to accept the jury's reasonable inferences unless the evidence on which the inferences are based is incredible as a matter of law. ***Id***. at 507, 451 N.W.2d at 757. It is the State's burden to prove beyond a reasonable doubt that Starkweather caused Demery's death with the intent to kill. *See* § 940.01(1), STATS. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the State presented sufficient evidence to met its burden.

From the evidence that Starkweather's .380 magnum was used to kill Demery, the jury could reasonably infer that Starkweather killed him with his gun.

Demery was shot in the head at close range, from which the jury could reasonably infer that Starkweather intended to kill Demery. *See* ***State v. Morgan***, 195 Wis.2d 388, 441, 536 N.W.2d 425, 445 (Ct. App. 1995); ***Payne v. State***, 36 Wis.2d 307, 312, 152 N.W.2d 903, 906 (1967). Moreover, Starkweather had already shot Kittleson and Austreng and was looking for Austreng when he burst into the Wheelocks' home. Rebecca saw Starkweather walking toward Demery's trailer, and the jury could reasonably infer that he was headed toward the trailer to look for Austreng. In addition, there was evidence that it was Starkweather's sunglasses the police found on the ground near the steps of Demery's trailer; from this evidence, the jury could reasonably infer that Starkweather was near the trailer, and from the testimony regarding the single shot and the fresh blood at the scene, the jury could reasonably conclude that Demery was shot on the morning of June 6. Considering this evidence together, the jury could reasonably infer that Starkweather shot Demery on June 6 with the intent to kill him.

Starkweather also argues that no reasonable jury could have found him guilty of first-degree intentional homicide beyond a reasonable doubt because conflicting evidence about the time of Demery's death proves that he did not kill Demery. He also questions the validity of the ballistics evidence presented and emphasizes what he believes to be the questionable circumstances under which police discovered the casing on June 8 in the trailer doorway.[3] It is the trier of fact, however, not this court, that determines the credibility of the witnesses, resolves conflicting testimony, and weighs the evidence. ***Poellinger***, 153 Wis.2d at 503, 506, 451 N.W.2d at 756, 757. The jury is free to choose among conflicting

[3] In his closing argument, Starkweather implied that police planted the casing to cover up their "shoddy investigation." Starkweather also argued that the police may have shot Demery and that there was a conspiracy to hide that fact.

inferences and may, within the bounds of reason, reject an inference that is consistent with Starkweather's innocence. *See* ***id***. at 503, 451 N.W.2d at 756. As discussed above, the jury's inferences were reasonable, and the evidence upon which those inferences are based is not incredible as a matter of law. The circumstantial evidence supporting his conviction for the first-degree intentional homicide conviction of Demery was more than sufficient.

*B. Responsibility under § 971.15, STATS.*

Starkweather also contends that the evidence was insufficient for the jury to find him responsible for his conduct under § 971.15, STATS.[4] The State contends that there was ample evidence to support its theory that Starkweather was able to conform his conduct to the requirements of the law when he went on a shooting spree. We agree with the State.

Section 971.15(1), STATS., provides that persons are not responsible for criminal conduct if they are: (1) suffering from a mental disease or defect at the time they commit a crime; and (2) lack substantial capacity either to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of law.[5] It is the defendant's burden to prove a defense under § 971.15 to a reasonable certainty by the greater weight of credible evidence.[6] *See* ***State v. Leach***, 124 Wis.2d 648, 658-59, 370 N.W.2d 240, 246-47 (1985); ***State v.***

[4] Although Starkweather frames this argument as "[the] evidence [was] sufficient to find appellant not responsible for his conduct under § 971.15," the correct standard of review is whether the evidence is sufficient to support the jury's finding that he was responsible for his conduct.

[5] We will subsequently refer to this second requirement as "appreciate or conform."

[6] The trial court instructed the jury that the greater weight of credible evidence is "evidence, when weighed against evidence opposed to it, has more convincing power."

***Sarinske***, 91 Wis.2d 14, 47-48, 280 N.W.2d 725, 740 (1979). Whether a defendant has met the burden is a question of fact for the jury, not this court. *See* ***Sarinske***, 91 Wis.2d at 48, 280 N.W.2d at 740. The jury determines the weight and credibility of testimony given on the insanity issue and whether the accused met his burden of proving insanity. *See* ***Leach***, 124 Wis.2d at 660, 370 N.W.2d at 247.

Here, there was conflicting expert testimony. The State presented two board-certified forensic psychiatrists, Drs. Patricia Jens and Frederick Fosdal.[7] Jens offered the opinion that, based on her examination of Starkweather and her review of collateral information, no matter what the source of Starkweather's illness, he was able to appreciate the wrongfulness of his conduct or conform to the requirements of the law at the time of the shootings. Fosdal testified that he could not "state with a reasonable degree of medical certainty that [Starkweather] did, in fact, lack substantial mental capacity to appreciate the wrongfulness of killing Mr. Demery or that he was unable to conform his conduct to the requirements of law in regard to that charge." In contrast, two defense experts, Drs. Dennis Philander and John Marshall, testified that Starkweather was indeed unable to appreciate or conform.

Starkweather maintains that the testimony of the State's experts is "shaky and unconvincing." This goes to the weight and credibility of the experts' testimony, however, which is a question of fact for the jury. *See* ***Sarinske***, 91 Wis.2d at 48-49, 280 N.W.2d at 740-41. Moreover, the jury is free to disbelieve the defense witnesses entirely, even when the State presents no experts in rebuttal.

[7] Both of the State's experts agreed that Starkweather had a mental illness at the time of the shootings.

*See* ***id***. Here, the jury believed the State's experts, which it may do. This court will not second-guess the jury's credibility determination.

## 2. Ineffective Assistance of Counsel

Starkweather contends that his counsel was ineffective and that the trial court erred when it denied his postconviction request for a ***Machner*** hearing. Starkweather claims that his second trial counsel was ineffective for: (1) failing to move for change of venue; (2) failing to oppose joinder of the intentional homicide count with the remaining counts; and (3) waiving his right to testify.[8]

[8] We will not address four additional arguments because they are inadequate, undeveloped, and without citation to legal authority, *see* ***Shannon v. Shannon***, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989); § 809.19(1)(e), and we will not supply Starkweather's legal research and argument for him. *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). The four undeveloped arguments are whether he was rendered ineffective assistance when his first counsel failed to preserve Demery's body and when his second counsel "failed to assist him at sentencing," introduced his "previously suppressed inculpatory" statement, and pursued a § 971.15, STATS., defense against his wishes.

Regarding his second counsel's alleged failure to assist him at sentencing, Starkweather states in his brief, as he similarly did in his postconviction motion, that "the record in this matter speaks for itself and there need not be any further discussion as to this issue." Starkweather also makes no adequate argument regarding the "previously suppressed inculpatory" statement; instead, he notes that without an evidentiary hearing, he cannot determine if the decision to introduce the statement was a tactical decision. Likewise, Starkweather offers no argument in his brief as to his first counsel's failure to preserve Demery's body, and the allegations in his postconviction motion are conclusory.

Regarding the § 971.15 defense, in his reply brief, Starkweather cites the cases upon which the State relies and simply asserts that the State incorrectly relies on them. He argues that he has indeed alleged sufficient facts and cites law providing that an attorney shall abide by his client's decision as to the plea, but he does not indicate how this plea prejudiced him. As the State correctly points out, Starkweather would have had the same trial on the guilt phase with or without a separate trial on mental responsibility. In any event, his allegation is conclusory and does not entitle him to a ***Machner*** hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996).

*A. Standard of Review*

Under ***State v. Bentley***, 201 Wis.2d 303, 310-11, 548 N.W.2d 50, 53-54 (1996), we review the trial court's denial of Starkweather's postconviction request for a ***Machner*** hearing by applying a two-prong test. First, we determine whether Starkweather's motion, on its face, alleges facts which if true, constitute deficient performance and prejudice entitling him to relief. *See* ***id***. at 310, 548 N.W.2d at 53 (citing ***Nelson v. State***, 54 Wis.2d 489, 497, 195 N.W.2d 629, 633 (1972)). If it does, the trial court has no discretion and must hold an evidentiary hearing. *See* ***id***. Whether a motion fails to allege facts, which if true, would entitle a defendant to relief is a question of law we review de novo. ***Id***.

However, if the motion does fail to allege sufficient facts, a trial court may exercise its discretion and deny a request for a ***Machner*** hearing based on any one of the following factors: (1) the defendant fails to raise a question of fact; (2) the defendant presents only conclusory allegations; or (3) the record demonstrates conclusively that the defendant is not entitled to relief. ***Id***. at 309-10, 548 N.W.2d at 53 (quoting ***Nelson***, 54 Wis.2d at 497-98, 195 N.W.2d at 633). We review a trial court's discretionary determination under the erroneous exercise of discretion standard. ***Id***. at 311, 548 N.W.2d at 53-54. A trial court exercises appropriate discretion when it examines the relevant facts, applies a proper standard of law, uses a demonstrative rational process, and reaches a conclusion that a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis.2d 768, 780, 576 N.W.2d 30, 36 (1998).

Here, because a claim of ineffective assistance of counsel requires proof of both deficient performance and resulting prejudice, *see* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), Starkweather's motion must make specific

allegations to allow a court to meaningfully assess both prongs or he is not entitled to a ***Machner*** hearing. *See* ***Bentley***, 201 Wis.2d at 315-17, 548 N.W.2d at 55-56. To establish that he did not receive effective assistance of counsel, Starkweather must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***. (quoting ***Strickland***, 466 U.S. at 687). Even if Starkweather can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice. *See* ***id***. at 127, 449 N.W.2d at 848. To prove prejudice, he must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). A reasonable probability is a probability sufficient to undermine our confidence in the outcome. *See* ***id***. In assessing the defendant's claim, this court need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697.

In its postconviction decision, the trial court concluded that Starkweather had not raised sufficient factual issues to warrant a ***Machner*** hearing because he had failed to show prejudice. Applying ***Bentley*** to the facts here, we agree with the trial court and see no reason to remand this matter to the trial court for a ***Machner*** hearing.

*B. Analysis*

We reject Starkweather's claim that his second trial counsel was ineffective for failing to move for change of venue. To determine whether to grant

a change of venue due to pretrial publicity, a court considers the following factors: the inflammatory nature of the publicity; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and specificity of the publicity; the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; the extent to which the jurors were familiar with the publicity; and the defendant's utilization of the challenges, both peremptory and for cause, available to him. *See* ***McKissick v. State***, 49 Wis.2d 537, 545-46, 182 N.W.2d 282, 286 (1971). Starkweather simply sets forth Wisconsin law on change of venue due to pretrial publicity, and then concludes that his attorney's "failure to raise undoubtedly fell below the Standard in light of the extensive pretrial publicity."

Both his postconviction motion and his appellate brief fail to provide any evidence showing the extent of pretrial publicity, and he does not address any of the factors that show a reasonable likelihood that the pretrial publicity prejudiced the prospective jurors so that he could not receive a fair trial. *See* ***id***. at 545, 182 N.W.2d at 286. Because his allegations are conclusory, they do not warrant a ***Machner*** hearing.[9] *See* ***Bentley***, 210 Wis.2d at 309-10, 548 N.W.2d at 53.

Next, Starkweather alleges that his counsel was ineffective for failing to oppose the joinder of the intentional homicide count with the remaining counts because the direct evidence of the attempted first-degree intentional

[9] Starkweather argues that the trial court indicated that his counsel was ineffective in failing to move for change of venue: "I'm really concerned whether we're going to get a fair jury in this county, I really am. I don't have any motion in front of me." At the close of trial, however, the trial court stated that it was confident that Starkweather had a fair and impartial jury. In any event, the trial court's comment is not, as he seems to suggest, prima facie evidence of ineffective assistance.

homicide of Kittleson, Austreng, and two police officers would have been inadmissible in his severed trial for the first-degree intentional homicide of Demery. The State replies that Starkweather's argument is meritless because the two crimes arose out of one episode and because he fails to show that he was prejudiced. The State is correct.

First, joinder was appropriate under § 971.12(2), STATS., because the charges were based on two or more acts or transactions connected together constituting parts of a common scheme or plan, as they were closely connected in time, place, and modus operandi. *See* ***State v. Bellows***, 218 Wis.2d 614, 624, 582 N.W.2d 53, 58 (Ct. App. 1998). Second, if the offenses meet the requirement for joinder, which they do here, it is presumed that the defendant will suffer no prejudice from a joint trial. *See* ***Leach***, 124 Wis.2d at 669, 370 N.W.2d at 251. A defendant may rebut this presumption by proving that joinder would prejudice him. *See* ***id***. Starkweather merely alleges that the direct evidence of the shootings of Austreng, Kittleson, and two police officers should not have been admitted in the trial and that he was severely prejudiced. He offers no proper argument and no legal authority, either in his postconviction motion or his appellate brief, regarding why such evidence would have been inadmissible.

Starkweather does assert that under ***United States v. Archer,*** 843 F.2d 1019, 1020 (7th Cir. 1988), severance is necessary if the defendant makes a convincing showing that he has both important testimony to give regarding one count and a strong need to refrain from testifying as to the other count. He states that this case "calls into question defense strategy in terms of whether … a

previously suppressed statement should have been introduced by the defense."[10] However, he offers no legal analysis as to how ***Archer*** applies to the facts here, and he does not indicate how he would have made a convincing showing that he had important testimony to give as to one count and a need to refrain concerning the others. Therefore, we need not address the applicability of ***Archer*** to this case. *See* ***Shannon v. Shannon,*** 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1985). Because Starkweather has failed to carry his burden to show that his counsel's failure to request severance prejudiced him, the trial court properly exercised its discretion in denying his request for a ***Machner*** hearing.

Starkweather next argues that his trial counsel rendered ineffective assistance because he waived his right to testify. During the first phase, Starkweather stated that he would testify, and the court discussed with Starkweather his understanding of his constitutional right not to testify. On the morning of the eighth day, however, Starkweather's counsel stated:

> Well, Your Honor, we had a talk this morning. I explained to [Starkweather] my opinion with respect to testifying in this phase of the case. My client has a desire to tell his story; however, it's my opinion, based on my knowledge of the case and experience, that what he has to say would be better fit in the second phase of this trial, if there is a second phase. I advised him as you advised him yesterday

[10] After Starkweather underwent surgery for his wounds, he was asked if he recalled shooting two people, and he nodded affirmatively. He was then asked how many people he had shot that morning, and he put up two fingers. The trial court suppressed the statements because they were obtained in violation of his Fifth Amendment rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), and it also found the statements were "not involuntary." Although his argument is undeveloped, and we thus have no obligation to address it, *see* ***Shannon***, 150 Wis.2d at 446, 442 N.W.2d at 31, we note that there was a reasonable basis for his strategic decision. Submitting the statement was evidence that he did not shoot Demery and was therefore not guilty of first-degree intentional homicide. We will not second guess trial counsel's obvious strategic decisions. *See* ***Strickland v. Washington***, 466 U.S. 668, 689 (1984).

> that he has a right not to testify. And it's my advice to him not to testify. He told me this morning, and I believe he's going to tell the court now, that he has decided not to testify in this phase of the case, knowing full well that he has an absolute right to testify and that not his lawyer or anybody else in the world could stop him from testifying.

Starkweather then stated, "I waive my right," and the court again inquired of Starkweather whether he understood his rights. During the second phase, Starkweather told the trial court that he "did not testify during the first phase against – it was against my wishes but I followed his direction."[11]

We conclude that these facts do not establish deficient performance and prejudice entitling him to relief. *See* ***Bentley***, 201 Wis.2d at 310, 548 N.W.2d at 53. First, the waiver colloquy is part of the trial record, and the motion raises no question of fact regarding the waiver. Starkweather contends that a hearing is required so that a record can be made regarding his discussions with his attorney. However, Starkweather was present during these conversations, and he makes no suggestion in his motion that his counsel somehow forced him to waive his right in court. Starkweather cannot rely on subjective, bare-bones conclusions and hope to supplement them with objective facts at a ***Machner*** hearing. *See* ***Bentley***, 201 Wis.2d at 313, 548 N.W.2d at 54. Second, the record conclusively demonstrates that he is not entitled to relief because it shows that his counsel's recommendation was not deficient performance. Although Starkweather's right to testify was fundamental, he may waive this right, *see* ***State v. Simpson,*** 185 Wis.2d 772, 778,

[11] During the second phase, Starkweather testified that after he argued with his father that morning, he found Demery dead on the floor with his father's gun laying next to him. According to Starkweather, he then picked up the gun and returned to his apartment. Starkweather insisted that he acted in self-defense in shooting Austreng and Kittleson and that he was surrendering with his hands up when police shot him.

519 N.W.2d 662, 663-64 (Ct. App. 1994), and the record here shows that he did so voluntarily.

While Starkweather cites ***State v. Albright***, 96 Wis.2d 122, 291 N.W.2d 487 (1980), to support his argument, the case's language supports the State's argument:

> If counsel determines that it is not advisable for the defendant to testify and the defendant acquiesces in that decision, then the right will be deemed waived. If on the other hand the defendant at the time of the trial raises his objection in the record before the trial court, he must be given the option to testify.

***Id.*** at 135, 291 N.W.2d at 493. Unlike in ***Albright***, counsel did not waive the right for him; by contrast, Starkweather himself waived the right after colloquy with the court. S*ee* ***id***. at 126, 291 N.W.2d at 488-89. Starkweather's counsel made a strategic decision to wait until the second phase to testify, and this recommendation had a reasonable basis. ***Strickland***, 466 U.S. at 689-91. Accordingly, Starkweather fails to show that his counsel's recommendation was deficient performance; therefore, we need not address ***Strickland's*** prejudice prong.

Based on the trial record and his postconviction motion brief, Starkweather's arguments for a ***Machner*** hearing not only fail to establish deficient performance or prejudice, but remain so speculative and conclusory that a ***Machner*** hearing was not required. *See* ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53.

**4. Sentencing**

Finally, Starkweather argues that the trial court misused its discretion when it set his parole eligibility date at the year 2068 on the mandatory life sentence plus five years for his first-degree intentional homicide conviction and imposed the maximum concurrent sentences on the remaining convictions. This argument is without merit.

We review a trial court's sentencing decision for misuse of discretion, ***State v. Macemon***, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983), and assume that the trial court's decision was reasonable. ***State v. Littrup***, 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991). A misuse of discretion will be found only if the sentence is excessive, unusual, and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). To show that his sentence is excessive, Starkweather must meet the heavy burden of showing that the record contains an unreasonable or unjustifiable basis for the sentence. *See* ***Elias v. State***, 93 Wis.2d 278, 281-82, 286 N.W.2d 559, 560 (1980). The three primary factors that a trial court should consider in sentencing are the gravity of the offense, the defendant's character and rehabilitative needs, and the need to protect the public. ***State v. Echols***, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993).

The trial court reviewed the presentence report, statements from Starkweather's family, 200 pages of information from Starkweather,[12] his school records, statements from the victims and their families, and statements from law enforcement. After considering these and other information, the trial court considered the seriousness of his crime, the protection of the community, and Starkweather's rehabilitative potential. The court gave the first two considerations "absolute priority" and stated that the willful taking of a human life must be severely punished and that Starkweather is a dangerous person from whom the community must be protected. The weight to be given to each of the relevant factors is particularly within the trial court's wide discretion. ***State v. C.V.C.***, 153 Wis.2d 145, 163, 450 N.W.2d 463, 470 (Ct. App. 1989). Here, the record shows that the trial court examined the relevant facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. *See* ***Sullivan***, 216 Wis.2d at 780, 576 N.W.2d at 36.

In summary, sufficient evidence supports Starkweather's conviction; sufficient evidence supports the jury's determination that he was able to appreciate or conform; and the trial court appropriately exercised its discretion in sentencing.

*By the Court.*–Judgment and order affirmed.

Not recommended for publication in the official reports.

[12] Starkweather provided the court with 200 pages of information regarding such things as trial tactics, trial evidence, juror misconduct, jail personnel misconduct, presentence investigator misconduct, and information about the press.