

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2720-CR

Cir. Ct. No. 2009CF192

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON J. MUELLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Brandon J. Mueller appeals from a judgment convicting him of first-degree intentional homicide and mutilation of a corpse and from an order denying his motion for postconviction relief. He argues that the

facts underlying the mutilation charge effectively assured the jury would reject a lesser degree of homicide, such that the failure to at least present the option of pleading guilty or no contest constituted ineffective assistance of counsel. We disagree and affirm the judgment and order.

¶2 After bingeing on cocaine and alcohol, Mueller and his girlfriend, Renee Redmer, got into a vehement argument that turned physical. Mueller put his hands around Redmer's neck; she died in the struggle. Mueller called his mother crying and saying he "might have done something bad" and that he "might have choked or strangled her." Mueller put Redmer's body in a cooler in his mother's garage and, a few weeks later, drove to the home of the mother's boyfriend, Donald Worth, doused the body in gasoline and burned it in a burn barrel. Mueller and Worth then drove out onto Lake Winnebago, drilled a hole through the ice and dumped in the ashes.

¶3 The State charged Mueller with first-degree intentional homicide (Count 1) and mutilation of a corpse (Count 2). The defense theory was that Redmer's death was the tragic but accidental result of a drug-stoked lover's quarrel and that fear and panic drove Mueller's further actions. The jury rejected trial counsel's argument that the evidence proved nothing more than second-degree reckless homicide and returned guilty verdicts on both charges. Mueller was sentenced to life without the possibility of extended supervision or parole on Count 1 plus a consecutive twelve and a half years on Count 2.

¶4 Postconviction, Mueller argued that trial counsel was ineffective for not presenting the option of pleading guilty or no contest to the mutilation charge so as to improve his odds of convincing the jury that Redmer's killing was not

intentional.¹ The trial court denied the motion after a *Machner*² hearing. This appeal followed.

¶5 Mueller reasserts the ineffective-assistance claim on appeal. While he never disputed that he killed Redmer or disposed of her body in the manner alleged, he contends that the main trial issue should have been whether the killing was intentional, and presenting the grisly corpse-mutilation evidence prevented the jury from fairly considering a lesser degree of homicide.

¶6 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of the attorney that fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. To establish prejudice, the defendant must show a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. *Id.* at 695. A reasonable probability is one that undermines our confidence in the outcome. *Id.*

¶7 Mueller testified at trial that he killed Redmer, making acquittal virtually impossible. The *Machner* hearing testimony showed that trial counsel's strategy was to try to convince the jury that the homicide was reckless, not

¹ Mueller also alleged three other areas of ineffectiveness. He does not address those arguments on appeal; we deem them abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

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

intentional. He aimed to show that evidence of the pair's mutual drug use, the heated argument, Redmer's frailty due to her slight stature and chronic drug abuse, and Mueller's immediate distress permitted such an inference. Counsel did not believe a motion to sever the charges would have been successful and considered that, even if Mueller pled, much of the evidence relative to Count 2 likely would have been relevant to show concealment of evidence and consciousness of guilt on Count 1. His strategy included using the Count 2 evidence to show that Mueller's actions were the panicked response to an accident. We cannot say that counsel's actions fell outside the wide range of professionally competent assistance.

¶8 Even if we concluded as the trial court did that counsel "may have been deficient" in not discussing a plea option with Mueller, we also conclude it was not prejudicial. A guilty or no-contest plea to Count 2 may have kept from the jury the gruesome name of the crime with respect to Mueller but the jury still would have heard it: Worth testified that, for his similar role, he pled no contest to mutilating a corpse. A plea also would not have erected a barrier to evidence of Mueller's elaborate efforts to conceal and dispose of Redmer's remains. Such evidence would have been admissible to prove consciousness of guilt and a desire to destroy evidence of an intentional killing.

¶9 Furthermore, sufficient other evidence supported the jury verdict. Mueller testified that he did not call 911 because he was "messed up on drugs" and had warrants out for his arrest. The jury reasonably could have rejected that explanation and believed instead that he did not call because he meant to kill her. Redmer's mother testified that Mueller's and Redmer's relationship was "extremely violent," that Mueller had choked Redmer on a prior occasion, and that Mueller had badly beaten Redmer a few weeks before she went missing. Mueller's friend, Terry Wasserman, testified that Mueller told him that he "finally

killed Renee” because “she was a bitch, she was lying to him.” One of Mueller’s jail dorm mates testified that Mueller often joked to other inmates about being charged with Redmer’s murder. The jury was shown an exhibit consisting of a clear plastic cup that held a woman’s photograph and a drawing of flames with the words “Burn Baby Burn!!” The dorm mate testified that Mueller would turn the woman’s picture inside the cup so it looked like she disappeared into the fire, and then would laugh and say, “Burn, bitch, burn.” The chief medical examiner testified about how long it might take to strangle someone. While he could not be specific without Redmer’s body to examine, the jury reasonably could infer that Mueller had time to change his mind and remove his hands from Redmer’s neck.

¶10 Matters of reasonably sound strategy, without the benefit of hindsight, are “virtually unchallengeable” and do not constitute ineffective assistance. *Strickland*, 466 U.S. at 690-91. The *Machner* hearing transcript establishes that the trial court carefully considered Mueller’s claim. We cannot improve on the court’s thorough analysis. On this record, we refuse to second-guess defense counsel’s chosen strategy.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

