COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2993-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT L. BARBER,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Brent L. Barber appeals from a judgment convicting him of armed burglary as a habitual criminal and first-degree recklessly endangering safety as a habitual criminal. The trial court sentenced Barber to consecutive sentences totaling twenty years of imprisonment.

Barber's counsel, Attorney William J. Remington, filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967), raising ten potential issues for appeal: (1) whether Barber knowingly and voluntarily waived his right to a preliminary hearing; (2) whether the trial court erred in concluding that Barber was competent; (3) whether the jury selected had a racial bias; (4) whether the trial court erred in its evidentiary rulings during trial; (5) whether the trial court erred in instructing the jury on attempted first-degree intentional homicide's lesser-included offense of first-degree recklessly endangering safety; (6) whether Barber's statements to police were voluntarily made; (7) whether the jury's verdict was supported by sufficient evidence; (8) whether the trial court erroneously exercised its discretion at sentencing; (9) whether Barber was denied the effective assistance of counsel at trial; and (10) whether new evidence exists to compel a new trial. Barber's response and amended response address the issues of sufficiency of the evidence and the alleged denial of effective counsel. In addition, Barber's response and amended response identify two more potential issues: (1) whether the State made an improper closing argument; and (2) whether the trial court erred by failing to instruct the jury on misdemeanor criminal trespass. Following our summary of the factual background of this case, we will address each issue *seriatim*.

We begin with a summary of the evidence presented at trial. During the afternoon of September 27, 1995, Denise Benton was at home ironing when Barber, the father of Benton's three school-aged children, called her on the telephone. Benton declined to talk to Barber and cut off the conversation shortly after it began. Twenty minutes later, Benton's doorbell rang. Benton looked out the front of her residence but did not see anyone. Moments later, Benton heard a noise coming from the balcony outside her apartment. She saw Barber on the

balcony. He picked up the lid of a charcoal grill and banged the lid against a sliding glass door leading into Benton's apartment. Benton panicked and ran into her bedroom to dress. After pulling on some clothes, she ran for the front door of her apartment. Barber, who had gained entrance to her apartment by that time, grabbed Benton by the collar before she reached her front door and dragged her back to the kitchen where he bit her on the face and told her that he was going to kill her. Barber then took a butcher's knife with an eight-inch blade from a kitchen drawer and held it three inches from Benton. Benton testified that at this point Barber stated "that he ought to kill me now because he's going to jail anyway."

Benton persuaded Barber to put the knife down so that they could talk. Shortly thereafter, however, Barber grabbed the knife and again threatened to kill Benton. Benton succeeded a second time in persuading Barber to put the knife down. Benton testified that Barber then grabbed her by the throat and choked her until she lost consciousness. As Benton regained consciousness, she heard police sirens. Barber stated to her that he was afraid that someone had seen him climb up her balcony. Barber directed Benton to the back bedroom after securing the front door with a dining room chair. Benton pleaded with Barber to let her go. Finally, Barber allowed Benton to answer the door. He instructed her to tell the police that he was gone and that nothing had happened. Benton then fled the apartment and ran to the police.

The State's information charged Barber with one count of armed burglary as a habitual criminal and one count of attempted first-degree intentional homicide as a habitual criminal. The jury returned a verdict finding Barber guilty of armed burglary as a habitual criminal and first-degree recklessly endangering

safety as a habitual criminal. The trial court entered judgment on the verdict and sentenced Barber. This appeal followed.

The first issue identified in the no merit report is whether Barber knowingly and voluntarily waived his right to a preliminary hearing. A defendant claiming error at a preliminary hearing may obtain relief only prior to trial. ***State v. Webb***, 160 Wis.2d 622, 467 N.W.2d 108 (1991). Because Barber did not raise this alleged claim prior to trial, it is waived.

The trial court ordered a competency evaluation of Barber at the request of his trial counsel, who reported significant communication problems with Barber to the trial court. The trial court ordered Barber's commitment to the Mendota Mental Health Institute (Mendota) for an evaluation. *See* 971.14(2), STATS. The mental health professionals at Mendota concluded that Barber was competent to proceed. At the hearing on Barber's competency, the trial court considered the report prepared at Mendota, Barber's own opinion both before and after the evaluation that he was competent to proceed and Barber's trial counsel's comment that Barber's communication problem had ceased. The trial court accepted the report without objection and concluded that Barber was competent. This record does not suggest the presence of any issue of arguable merit challenging the trial court's disposition of the issue of Barber's competency.

A claim of potential juror bias is preserved by motion to the trial court for a new trial. *See* ***State v. Wyss***, 124 Wis.2d 681, 717-18, 370 N.W.2d 745, 762 (1985). The motion for a new trial is necessary because "[t]he trial court is in the best position to evaluate the relevance of undisclosed evidence or later discovered facts and to consider their impact on the outcome of the trial." ***Id***. at 717, 370 N.W.2d at 762. "[T]he decision whether to grant or deny a motion for a

new trial lies within the discretion of the trial court." ***Id***. Because the trial court was not presented with a motion for a new trial on the ground of alleged juror bias and therefore did not exercise its discretion with respect to this issue, we decline to address this issue. *See* ***Barrera v. State***, 99 Wis.2d 269, 282, 298 N.W.2d 820, 826 (1980) (the appellate court must not exercise the trial court's discretion).

The fourth potential issue raised in the no merit report is whether the trial court erred in its evidentiary rulings during Barber's trial. A trial court has wide discretion in determining whether to admit or exclude evidence, and consequently, we will reverse such determinations only when the trial court has erroneously exercised its discretion. ***State v. Evans***, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). "The trial court properly exercises its discretion if its determination is made according to accepted legal standards and if it is in accordance with the facts on the record." ***Id***. Our review of the trial transcript does not disclose trial court rulings to admit or exclude evidence that would support a meritorious appeal.

The fifth issue identified in the no merit report is whether the trial court erred in instructing the jury on first-degree reckless endangerment, a lesser-included offense of attempted first-degree intentional homicide. *See* ***State v. Weeks***, 165 Wis.2d 200, 205-06, 477 N.W.2d 642, 644 (Ct. App. 1991). Barber objected to the State's request that the jury be instructed on first-degree reckless endangerment. The trial court denied the objection and submitted instructions to the jury on attempted first-degree intentional homicide and both first-degree and second-degree reckless endangerment.[1]

[1] Section 941.30, STATS., provides:

(continued)

A trial court has wide discretion as to jury instructions, but whether the evidence at trial permits the giving of a lesser-included offense instruction is a question of law that we review independently. ***State v. Wilson***, 149 Wis.2d 878, 898, 440 N.W.2d 534, 541 (1989), *denial of habeas corpus aff'd sub nom.* ***Wilson v. McCaughtry***, 994 F.2d 1228 (7th Cir. 1993). Submission of a lesser-included offense instruction is proper only "when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***State v. Kramar***, 149 Wis.2d 767, 792, 440 N.W.2d 317, 327 (1989). "'The evidence supporting submission of the lesser-included offense [instruction] must be relevant and appreciable when viewed in a light most favorable to the defendant.'" ***State v. Fleming***, 181 Wis.2d 546, 560-61, 510 N.W.2d 837, 842 (Ct. App. 1993) (citation omitted; brackets in original).

Barber argued to the trial court that the evidence of his attack on Ms. Benton did not show his "utter disregard" for her life. The trial court disagreed, concluding that the evidence that Barber choked Ms. Benton until she was unconscious "could constitute utter disregard for human life." We agree with the trial court. Barber's attempt to suffocate his victim was ample evidence that his conduct evinced an utter disregard for her life. Accordingly, we conclude that an appeal predicated on this issue would lack all arguable merit.

We further conclude that no basis exists to challenge the court's specific ruling admitting Barber's custodial statement to police. The trial court

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> **Recklessly endangering safety.** **(1)** FIRST-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class D felony.
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> **(2)** SECOND-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety is guilty of a Class E felony.

conducted a ***Goodchild*** hearing[2] to determine whether Barber's statements were voluntarily made. Detective Steven Reinstra, the interrogating officer, testified at the hearing. He testified that he questioned Barber in an interview room at the Madison Police Department after giving Barber ***Miranda*** warnings from a standard card. Barber indicated that he understood his rights and agreed to talk to Detective Reinstra without an attorney present. Their conversation lasted approximately thirty minutes. Detective Reinstra testified that he made no threats or promises to Barber during the interview. Detective Reinstra indicated that Barber was not restrained during the interview and that he was cooperative. Based on this testimony, the trial court determined that Barber's statement was admissible. Because the record reveals no basis to challenge the trial court's determination that Barber's statement to police was voluntarily made, there would be no arguable merit to a challenge to the admission of Barber's custodial statement.

We now turn to the potential issue of the sufficiency of the evidence admitted at trial. "[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value … 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." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). On review of jury findings of fact, viewing the evidence most favorably to the State and the conviction, we ask only if the evidence is inherently or patently incredible or so lacking in probative value that no reasonable jury could have found guilt beyond a

[2] ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

reasonable doubt. *See* ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

The record contains direct testimony from Benton and circumstantial evidence, including the recovery of the butcher knife at the scene and Benton's injuries, upon which the jury could reasonably find that Barber armed himself with the butcher knife while invading Benton's apartment and engaged in conduct that endangered her safety "under circumstances which show utter disregard for human life." Section 941.30(1), STATS. Viewing the evidence in the light most favorable to the conviction, we conclude that there was ample evidence presented to the jury to support Barber's conviction for armed burglary as a habitual criminal and first-degree reckless conduct as a habitual criminal.

We conclude that an appellate challenge to sentencing would be without arguable merit. Sentencing is left to the trial court's discretion. ***State v. Echols***, 175 Wis.2d 653, 681, 499 N.W.2d 631, 640 (1993). Relevant factors governing the trial court's exercise of that discretion include the gravity of the offense, the character of the defendant and the need to protect the public. *See* ***id.*** at 682, 499 N.W.2d at 640. The record reflects that Barber had an opportunity to review the presentence report with his attorney and agreed that it was accurate. The court considered the seriousness of the armed burglary and Barber's life-threatening attack on Benton. In addition to the seriousness of these crimes, the court considered other factors as well: Barber's criminal history and his lack of willingness to accept responsibility for his conduct. Our review of the record satisfies us that the trial court considered the proper factors and properly exercised its discretion in sentencing Barber. Accordingly, there would be no arguable merit to an appeal on this issue.

The next potential issue that counsel and Barber identify is whether Barber received effective assistance of counsel at trial. Barber must first properly preserve this claim by raising it in a postconviction motion before the trial court. Accordingly, we decline to address this issue. *See* ***State v. Waites***, 158 Wis.2d 376, 392-93 & n.10, 462 N.W.2d 206, 213 (1990). Similarly, we decline to address Barber's contention that he has been denied effective assistance of appellate counsel in this appeal. Such a claim is properly raised in a petition under ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992).

The final potential issue identified in the no merit report is whether new evidence exists supporting a request for a new trial. The court of appeals is an error correcting court. *See* ***State ex rel. Swan v. Elections Bd.***, 133 Wis.2d 87, 93, 394 N.W.2d 732, 735 (1986). Accordingly, any claim regarding the existence and significance of new evidence belongs first before the trial court and not this forum. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 (1980).

We now turn to the two additional potential issues raised in Barber's response and amended response. Barber contends that during closing arguments, the State improperly referred to Benton as having been "permanently scarred" by Barber during the altercation. Barber's contention is made without record reference. Our review of the record does not disclose that the alleged statement was made or that a contemporaneous objection was entered by the defense to any similar statement. Accordingly, any claim of error by Barber on this point was waived. *See* ***State v. Holt***, 128 Wis.2d 110, 137, 382 N.W.2d 679, 692 (Ct. App. 1985) (to properly preserve an objection to alleged prosecutorial misconduct, defendant must move for a mistrial on those grounds). With respect to Benton's second issue, we note that the State opposed an early defense request for an

instruction on criminal trespass to a dwelling. The trial court correctly ruled that the misdemeanor criminal trespass to a dwelling is not an included offense of burglary. *See* ***Raymond v. State***, 55 Wis.2d 482, 487-88, 198 N.W.2d 351, 353-54 (1972).

In sum, we reject Barber's arguments. We are satisfied that the record reveals no potential issues of arguable merit. We therefore affirm the judgment and discharge Attorney Remington from any obligation to represent Barber further in this appeal.

By the Court.—Judgment affirmed.