COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP557-CR **Cir. Ct. No. 2010CF000652**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-PETITIONER,

V.

COREY R. KUCHARSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DiMOTTO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. This case comes to us on remand from the Wisconsin Supreme Court, which reversed our split decision[1] granting Corey

[1] ***State v. Kucharski***, No. 2013AP557–CR, unpublished slip op., ¶31 n. 2 (WI App May 6, 2014).

Kucharski a discretionary reversal. In its remand instructions the supreme court directed us to address Kucharski's three remaining unaddressed issues: (1) whether the trial court misapplied the elements of WIS. STAT. § 971.15 (2013-14)[2]; (2) whether the trial court's conclusions regarding mental responsibility lacked support in the record; and (3) whether Kucharski was entitled to a new trial due to ineffective assistance of counsel. *See* ***State v. Kucharski***, 2015 WI 64, ¶12 n.19, 363 Wis. 2d 658, 866 N.W.2d 697.

¶2 We conclude, for the reasons that follow, that: (1) the trial court correctly applied the elements of WIS. STAT. § 971.15; (2) the record supports the trial court's finding that Kucharski failed to meet his burden of showing that he lacked mental responsibility when he killed his parents; and (3) trial defense counsel's representation was not ineffective: (a) in choosing not to call two of the three doctors to testify in person; and (b) in not offering into evidence delusional writings that were found in Kucharski's home at the time of the homicide. Accordingly, we affirm.

BACKGROUND

¶3 The following is the background of this case as stated by the Wisconsin Supreme Court in its decision in this case:

> Kucharski called 911 after midnight on a February night in 2010 to request a coroner. He told the 911 operator that his parents were dead, named the gun he had used to kill them, and was clear in communicating that there was no need to send medical assistance. When police arrived, he surrendered without incident. Police found

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Kucharski's father and mother in the home, dead of multiple gunshot wounds.

Once in police custody, Kucharski invoked his right to counsel when asked specifics about the shootings. When he was questioned by detectives, after he received his ***Miranda***[3] warnings, Kucharski stated, "[A]s far as the statement about most of what happened that evening and I'd rather have a lawyer here for that." When the detective reiterated his right to do that, Kucharski stated, "If you want to ask me any questions about my background or any, any other questions, fine.... I know you want to talk about the evening but I still rather have somebody here before I start answering questions about that night."

He willingly talked to investigators without counsel present about his history, prior drug use, alcohol use, and his experience of hearing voices, which he said began five years earlier after a period of extensive drug use. He said he continued hearing the voices after he stopped using drugs. The voices he heard told him to do specific things and berated him for certain mistakes. He also disclosed that he had experienced other auditory distortions such as hearing another person's voice while a person was speaking to him. He drank heavily, which he said was an effort to quiet the voices. He had held jobs in prior years both in Wisconsin and in other states. In 2005 he had returned to his parents' Milwaukee home, where he spent his time increasingly isolated, drinking daily and amassing a gun collection. He sought disability benefits for a medical condition but gave no indication at that time that he was experiencing mental health problems. He was never treated for mental health issues and never told anyone that he was experiencing them.

At trial, Dr. Rawski testified that Kucharski's account of the evening was that he had been present at an argument between his parents in the early evening. Afterward, he recalled, he had heard voices saying, "[J]ust [expletive] kill them, give them what they want...." At that point, he had gone to his bedroom to sleep. He had awakened a couple of hours later and had heard a clear voice telling him to "end it"—to kill his parents and die while engaging in a shootout with police when they arrived. At that point, he had gone downstairs and confronted his

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

father in the kitchen and shot him. He had stepped into another room and shot his mother, apparently as she was coming toward him. Kucharski's father was shot 10 times; his mother was shot four times. He had waited a couple of hours before placing the 911 call. He stated that in the past his father had stated that if he had a medical emergency, he wished for Kucharski to delay an hour before calling 911 so that there would be no possibility of resuscitation. He stated he did so in this instance in keeping with his father's wishes.

Kucharski was charged with two counts of first-degree intentional homicide while using a dangerous weapon. He entered an NGI plea under WIS. STAT. § 971.15.

Kucharski waived his right to trial on the issue of guilt, instead pleading no contest. The issue of mental responsibility was tried to the court after he waived his right to a jury. The three doctors who examined him all concluded in their reports that, as a result of his schizophrenia, Kucharski "lacked substantial capacity either to appreciate the wrongfulness of his ... conduct or conform his ... conduct to the requirements of law," that he satisfied both requirements of the test, and that he was therefore not mentally responsible.

The circuit court found that Kucharski had failed to meet his burden of proving that he was not responsible. The circuit court concluded that Kucharski did suffer from schizophrenia; however, it also concluded that the experts' opinions that he was not mentally responsible were speculative and insufficient to overcome other evidence from which it could be inferred that he appreciated the wrongfulness of his conduct and had the capacity to conform his conduct to the requirements of the law.

As to the question concerning his ability to appreciate the wrongfulness of his conduct, the circuit court stated, "[T]here are indications, very near the point in time that the Defendant committed these crimes, that he understood they were wrongful, illegal." For example, the court said, he had expressed the knowledge that he needed a lawyer and would be "rotting in jail" for the killings.

As to the issue of whether he could conform his conduct to the requirements of the law, the circuit court stated that Kucharski had heard

> command voices about killing himself, and he did not follow through with that before or after he killed his parents.... [Y]et he doesn't respond to the command voice, especially the derogatory one that he was the cause of the fight, and he should kill himself and so on, whether directly, or through a shootout with the police.
>
> The court subsequently stated, "I'm finding him legally responsible because I'm not persuaded beyond a level scale.... It's not tipping, even slightly, that he lacked substantial capacity to conform his conduct to the law." The circuit court observed that "the basis of [the experts'] opinions ... is that they're speculating about what happened."
>
> The court of appeals reversed, and the State petitioned for review, which we granted.

Kucharski, 363 Wis. 2d 658, ¶¶13-22 (footnotes omitted; brackets and ellipses in original).

¶4 The supreme court reversed our decision, which had addressed only one of Kucharski's four issues on appeal—discretionary reversal—and remanded to the court of appeals with directions to address the remaining three issues.

DISCUSSION

1. The trial court properly applied WIS. STAT. § 971.15.

¶5 Kucharski first argues that the trial court misapplied the elements of WIS. STAT. § 971.15(1), which states:

> **Mental responsibility of defendant.**
>
> **(1)** A person is not responsible for criminal conduct if at the time of such conduct 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 the law.

(Emphasis added.)

¶6 The construction of a statute is a question of law, which we review independently of the trial court. *See* ***State v. Duychak***, 133 Wis. 2d 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986). It is well-established law that the requirements of WIS. STAT. § 971.15(1) are written in the disjunctive. ***Duychak***, 133 Wis. 2d at 316**.** "The legislature intended to excuse a defendant from criminal liability only where a mental condition has the requisite effect, i.e., the inability to appreciate wrongfulness *or* to conform conduct." ***Id.*** at 316-17 (emphasis added).

¶7 The first issue in this appeal is whether the trial court understood, and applied, the correct legal standard from the statute.

¶8 Appellant argues, from a confusing exchange between the trial court and trial defense counsel, that the judge incorrectly believed that Kucharski had the burden of showing *both* that he lacked substantial capacity to appreciate the wrongfulness of his behavior *and* to conform his conduct to the law. The State asserts that the court's words at trial and later at the postconviction hearing demonstrate that the court correctly understood that Kucharski only had to show one of the incapacities to avail himself of the affirmative defense. We agree with the State.

¶9 Kucharski entered an NGI plea to two counts of first-degree intentional homicide for killing his parents.[4] At the first phase of the trial, he pled

[4] The bifurcated trial procedure for a plea of not guilty by reason of mental disease or defect, (commonly referred to as an NGI plea), is set forth in WIS. STAT. § 971.165(1)(a):

> **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:

(continued)

no contest to each charge. At the second phase, the criminal responsibility phase, he waived the jury, and a court trial was held. At the conclusion of that court trial, the trial court said it was not convinced that Kucharski lacked the substantial capacity to *either* appreciate the wrongfulness of his conduct *or* to conform his conduct to the law. In other words, the court found Kucharski's evidence deficient as to *both* grounds. The court addressed the capacity to conform first, then the capacity to appreciate, and then worded its finding in the negative, saying it was *not* convinced he lacked either of the two capacities. The trial court said:

> I'm finding him legally responsible because I'm not persuaded beyond a level scale. I can't -- It's not tipping, even slightly, that he lacked substantial capacity to conform his conduct to the law.
>
> …
>
> What the speculation is, is whether in killing his parents, he could not appreciate, he lacked substantial capacity to appreciate, the wrongfulness of his conduct.
>
> I'm not convinced that he did.

¶10 What transpired next was a sort of "Who's On First," Abbott and Costello routine of semantic confusion.[5] In a combination of mishearing each

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> **(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.

[5] "Who's on First?" is a comedy routine made famous by Abbott and Costello. The premise of the sketch is that Abbott is identifying the players on a baseball team for Costello, but their names and nicknames can be interpreted as non-responsive answers to Costello's questions. For example, the first baseman is named "Who"; thus, the utterance "Who's on first" is ambiguous between the question ("Which person is the first baseman?") and the answer ("The name of the first baseman is Who"). *See* https://en.wikipedia.org/wiki/Who%27s_on_First%3F (last visited January 22, 2016).

other and confusing grammar, trial defense counsel and the trial court talked past each other about the statutory requirements and the trial court's actual findings. Right after the trial court made the above findings as to Kucharski's failure to prove *each* incapacity, trial defense counsel said she thought the trial court had to make specific findings on each incapacity—appreciation of wrongfulness *and* conforming conduct to the law. She stressed the linking word "and." The trial court corrected her, apparently hearing the word "and," saying the statute only required "either or." Trial defense counsel again asserted that the statute required "*and* conform his behavior to the requirements of the law." (Emphasis added.)

¶11 We recognize that this type of communication confusion is easier for this court to sort out with transcripts than it was for the participants in real time at trial. Nonetheless, with the assistance of the transcripts, we are satisfied that the record shows that the trial court understood and applied the correct requirements of WIS. STAT. § 971.15.

¶12 Additionally, we note that the trial court affirmatively explained at the February 12, 2013 postconviction hearing that it had understood the correct requirements and made the correct findings at trial. The trial court stated that it had "a strong and distinct independent recollection of" the court trial and that it was unpersuaded as to *both* prongs of WIS. STAT. § 971.15. The trial court stated at the postconviction hearing:

> But in fact I found that he lacked substantial capacity to appreciate the wrongfulness of his conduct, and he lacked substantial capacity to conform his conduct to the laws or rather to the law.

¶13 The fact that the trial court addressed both incapacities at trial demonstrates that it was aware that *either* finding would satisfy the affirmative

defense. In this case, the trial court actually found that Kucharski had failed to prove *both* prongs. And the trial court's confirmation at the postconviction hearing that it correctly understood the statute at trial further demonstrates that the trial court did not misapply WIS. STAT. § 971.15.

2. The trial court's finding that Kucharski failed to meet his burden of showing he was not mentally responsible for the crime is not clearly erroneous.

¶14 Pursuant to WIS. STAT. § 971.15(3), the defendant has the burden in an NGI trial to establish the affirmative defense of lack of mental responsibility by a preponderance of the evidence:

> Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

Id. Kucharski contends he met that burden and that the trial court's findings to the contrary are not supported in the record.[6]

¶15 The trier of fact in an NGI trial has the responsibility "to determine the weight and credibility of the testimony on the issue of insanity and to determine whether the accused has met the burden of proving he was insane."

[6] In his Reply Brief, Kucharski makes the argument—totally contradicted by the record–that the trial court applied the wrong burden of proof, clear and convincing evidence, not preponderance. He quotes the trial court as saying that the question of Kucharski's mental responsibility was a close one: "I think this is a very close question." He argues that the statement shows the defense had met the lower of the two burdens, preponderance, and supports his argument that the trial court erred in finding he failed to meet his burden. In fact, Kucharski ignores the paragraph before that sentence, where the trial court clearly stated that the proper burden is preponderance: "the affirmative defense must be proved at the level of the greater weight of the credible evidence or what we colloquially refer to as preponderance of the evidence." The court goes on to explain that the clear and convincing standard only came up "because that's the standard used in the *third* phase of these proceedings, depending on how the second phase is decided." (Emphasis added.)

State v. Sarinske, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979). On appeal, we review the trial court's finding on criminal responsibility to determine if there is sufficient credible evidence to support the court's finding. *See* ***id.***

¶16 Whether the accused has met this burden on mental responsibility is a question of fact, not law, for this court on appeal. *See* ***Kucharski***, 363 Wis. 2d 658, ¶27, (citing ***Sarinske***, 91 Wis. 2d at 47-48.) "It is well established that factual findings are upheld unless they are clearly erroneous." ***Kucharski***, 363 Wis. 2d 658, ¶27. *See also* WIS. STAT. § 805.17(2).

¶17 At the outset we indicate some confusion as to whether the supreme court meant us to address this issue. The supreme court's instructions on remand in this case directed us to resolve this "unaddressed" issue and two others. The supreme court described the "unaddressed" issues as follows:

> Kucharski argued at the court of appeals that the trial court erred in its application of Wis. Stat. § 971.15, that the trial court's conclusions regarding mental responsibility lack support in the record, and that he was entitled to a new trial due to ineffective assistance of counsel.

Kucharski, 363 Wis. 2d 658, ¶12 n.19 (emphasis added) (citation omitted).

¶18 It is certainly true that those three issues were not addressed in our decision. But it appears that the supreme court addressed this particular issue in its decision. In two places the supreme court found that the trial court's factual finding concerning the burden of proof was not clearly erroneous. First, the supreme court stated in its opening statement in the holding of the case: "Applying the proper standard of review *and not disturbing the factual findings of the circuit court concerning the burden of proof because they are not clearly*

erroneous, we conclude that the court of appeals erroneously exercised its discretion." ***Id.***, ¶11 (emphasis added).

¶19 Second, the supreme court stated the same conclusion in its title to the second section of the opinion:

> B. THE FACT-FINDING OF THE TRIER OF FACT THAT KUCHARSKI DID NOT MEET HIS BURDEN IS NOT CLEARLY ERRONEOUS[.]

Id., ¶¶43-44 (bolding omitted).

¶20 The supreme court also instructed that "[t]he determination of whether a party has met his or her burden is a matter of fact, not law" and then instructed that if the trial court's finding that Kucharski did not meet his burden on mental responsibility was not clearly erroneous, then "the court of appeals is *obligated* to uphold the finding that Kucharski did not meet his burden of showing by the greater weight of the credible evidence that he was not mentally responsible for the crimes." ***Id.***, ¶44 (emphasis added) (footnote omitted). By concluding that the trial court's finding on the mental responsibility burden was not clearly erroneous, the supreme court has in effect directed us to then find, as we do, that Kucharski did not meet his burden. In this way, the supreme court resolved the issue for us.

¶21 Nonetheless, in an excess of caution, (and in the interest of not receiving a second remand), because of the instructions on remand in the supreme court's footnote, we respectfully briefly address this issue and resolve it as the supreme court did, adopting the supreme court's reasoning.

¶22 Kucharski contended on appeal that the trial court's findings on his mental responsibility were not supported in the record based on three doctors'

opinions that he lacked mental responsibility and the fact there was no contradictory doctor opinion. Kucharski argued that the trial court improperly disregarded the three doctors' opinions and improperly speculated that Kucharski made a volitional choice not to kill himself, which demonstrated mental responsibility. Finally he argued, relying on ***Kemp v. State***, 61 Wis. 2d 125, 138, 211 N.W.2d 793 (1973), that the evidence in his case, like that in ***Kemp***, weighed "quite heavily" in his favor, which showed a different result was likely at retrial.[7]

¶23 The State relied on ***Sarinske*** for the well-established law that the trial court is free to disbelieve the experts, even uncontradicted experts, and need not adopt their opinions. *See* ***Sarinske***, 91 Wis. 2d at 48 ("The opinion of an expert even if uncontradicted need not be accepted by the jury."). As ***Sarinske*** noted, where the expert's opinions are based on self-report, as was the exclusive case here, their opinions are subject to greater question: "Because the defense doctors relied substantially on information provided by Sarinske, the basis of their opinion and their diagnoses could be questioned by the jury on this ground alone." ***Id.*** at 49.

¶24 Here the trial court rejected the three doctors' opinions but gave sound reasons for doing so. The record supports those reasons:

[7] In ***State v. Kucharski,*** 2015 WI 64, 363 Wis. 2d 658, 866 N.W.2d 697, the Wisconsin Supreme Court distinguished ***Kemp v. State***, 61 Wis. 2d 125, 211 N.W.2d 793 (1973) from ***Kucharski*** on its facts. Kemp had a long and well-documented mental health history which was relied on by the doctors for their opinions as to his mental responsibility. The supreme court noted that in Kucharski's case, unlike Kemp's, there was an absence of "external corroborating evidence that existed prior to the charged offense." ***Kucharski***, 363 Wis. 2d 658, ¶38. Kucharski had no mental health treatment record at all. This difference, in addition to the great weight the ***Kemp*** court put on the presence of that corroborating mental health history, rendered it unreasonable for Kucharski to rely on ***Kemp*** for support of reversal. ***Kucharski.*** 363 Wis. 2d 658, ¶40.

- The bulk of information on which the experts relied came from Kucharski's self-report, which the trial court found unreliable.

- There were no witnesses to his crime, so there were no observations from third parties as to his behavior or words.

- Dr. Rawski quoted Kucharski as saying he knew right after the shooting that he needed a lawyer, showing that he understood what he did was wrong.

- Kucharski obeyed part of what the voices commanded and chose not to obey other parts (killing his parents but not himself), showing he was able to make a volitional choice.

- Kucharski had no prior reported mental health history of any kind.

- Five months before the murders, Kucharski denied having hallucinations or delusions at a Social Security interview.

¶25 These factual findings, together with the court's ultimate finding that Kucharski did not meet his burden of showing by the greater weight of the credible evidence that he was not mentally responsible for the crimes, are not clearly erroneous and are supported by sufficient credible evidence in the record.

3. Trial counsel was not ineffective for: (1) failing to call two doctors to testify in person; or (2) not seeking to admit Kucharski's writings in support of Kucharski's mental responsibility defense.

¶26 We review claims of ineffective assistance of counsel under a mixed standard of review. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). We affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *See* ***id.*** at 324-25. The ultimate question of whether counsel's performance was deficient and prejudicial, however, is a legal one, subject to our independent review. *See* ***id.*** at 325.

¶27 It is well-established law that to prove an ineffective-assistance claim, the defendant must satisfy the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984): (1) that counsel's performance was deficient; and (2) that the defendant was prejudiced thereby. *See* ***Strickland***, 466 U.S. at 687.

¶28 Deficient performance requires errors so serious that counsel cannot objectively be seen to be functioning as the "counsel" guaranteed by the Sixth Amendment. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

> Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.

Id. (footnote omitted). To succeed, "'the defendant must overcome the presumption that, under the circumstances, the challenged action might be

considered sound trial strategy.'" ***State v. Maloney***, 2005 WI 74, ¶43, 281 Wis. 2d 595, 698 N.W.2d 583 (citation and one set of quotation marks omitted).

¶29 As noted in ***Strickland***, the defendant has the burden of affirmatively proving prejudice. "Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." ***Strickland***, 466 U.S. at 693. For deficient performance to be prejudicial, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

a. Trial counsel's strategic decision not to call Dr. Pankiewicz or Dr. Jurek to testify at trial, and to rely instead on their reports and the testimony and report of Dr. Rawski, was neither deficient nor prejudicial.

¶30 Kucharski contends that trial counsel's decision not to call two of the three experts to testify at trial, and to rely instead on the testimony of Dr. Rawski and all three doctors' reports, was deficient performance. He argues that putting them on the stand "would have bolstered the assertions made by Dr. Rawski during his testimony and would have provided additional testimony in support of the alternative basis for Mr. Kucharski's NGI defense—that he was not capable of conforming his conduct to that required by law." As an example he cites Dr. Pankiewicz's report, wherein Dr. Pankiewicz opines that Kucharski was incapable of both appreciating the wrongfulness of his actions and conforming his behavior. But a closer review of his supporting citation illustrates the flaw in his argument. He cites to the record of Dr. Rawski's testimony about Dr. Pankiewicz's report. Trial defense counsel asked Dr. Rawski whether Dr. Pankiewicz's reasoning on Kucharski's inability to appreciate and to conform

differed from his own. Dr. Rawski answered that their opinions were *not substantially different*. Dr. Rawski answered:

> It is not substantially different. It is actually written with a bit better clarity than my opinion. He uses smaller -- smaller sentences and more concrete details to support his opinion. Mine for some reason tends to look more like major literature in this case, but it does come to the same opinion.

¶31 Given that Dr. Rawski testified there was no substantial difference between his opinion and that of Dr. Pankiewicz, there can be no ineffective representation of trial counsel in the choice not to call Dr. Pankiewicz in person. Perhaps recognizing this, Kucharski morphs his argument into a claim that live testimony from Dr. Pankiewicz would be more "forceful" than his written report. Of course that is a conclusory statement and hardly evidence that trial counsel's representation fell below professional norms in choosing to rely on Dr. Pankiewicz's report rather than his live testimony.

¶32 Kucharski's extremely experienced trial counsel testified that the reason she relied on the report only was that she viewed the mental responsibility defense as "probably the strongest case I've ever seen." She noted that the State hired its own doctor, who came up with the same conclusion as the defense doctor and that she had been told by the prosecutor that the State would not be presenting any evidence contesting the defense claim that Kucharski lacked mental responsibility. We review trial counsel's representation objectively, from counsel's perspective at the time of trial, not in hindsight. *See* ***Johnson***, 153 Wis. 2d at 127. Clearly from that perspective, trial counsel's decision to rely on the report, as opposed to Dr. Pankiewicz's live testimony, was not deficient.

¶33 Additionally, Kucharski has failed to show that using the two doctors' reports without their testimony was prejudicial to his defense. The trial court confirmed in its ruling on Kucharski's WIS. STAT. § 809.30 motion that even if trial counsel had called Dr. Pankiewicz to testify, the court would not have reached a different result because it had already considered all three doctors' reports and opinions in reaching its conclusion.

¶34 And finally, the trial court that heard Kucharski's postconviction motion for plea withdrawal, in rejecting that motion, also concluded that even if trial counsel had called Dr. Pankiewicz to testify, it was "highly unlikely" that the live testimony would have changed the original trial court's mind.[8]

b. Trial counsel's decision not to offer into evidence Kucharski's delusional writings was neither deficient nor prejudicial.

¶35 Kucharski argues that his writings found in his home during the murder investigation are "delusional" and would have shown he was unable to appreciate the wrongfulness of his behavior and unable to conform his conduct to the law. There is no dispute that the writings were found in his home, were undated, and were odd at the least ("very disorganized, somewhat delusional" is how Dr. Rawski described them). But it is also undisputed that both Dr. Rawski and Dr. Pankiewicz read all of the writings and used them as bases for their professional opinions, even referencing them in their reports. Kucharski contends that choosing not to put the actual writings into evidence was deficient performance by trial counsel because the writings demonstrate "Kucharski's very

[8] The Hon. Jean A. DiMotto presided at the court trial. After conviction, but prior to sentencing, the trial court that heard the motion for plea withdrawal was the Hon. Jeffrey A. Conen. Post-sentencing, the case was reassigned to the original trial court, Hon. Jean A. DiMotto, for a decision on the postconviction motion appealed here.

impaired ability to comprehend reality, including an understanding of the difference between right and wrong."

¶36 Kucharski's argument assumes the trial court lacked an understanding of the content of the writings and that had the court seen them, it would have concluded Kucharski lacked mental responsibility. Neither assumption is supported in the record.

¶37 Kucharski's argument fails in the first instance because the trial court was aware of the content of the writings, having read all of the doctors' reports. Dr. Rawski testified at trial that he read the writings, and they formed part of the basis for his opinion in that they "strongly suggest[] the -- the presence of mental illness." He also described the content of the writings generally:

> I went through the writings with him page by page. There's probably at least 40, maybe 50 pages of writings and most of it are his attempts at documenting what the voices are saying and -- and trying to make some sense of them. He still has trouble understanding what some of these are, but they appear to be influenced by fragmented experiences throughout his life. Some of the voices speak in Spanish. He had worked with Hispanic workers.

¶38 Additionally, Dr. Rawski's report of July 10, 2001, describes the writings further. Kucharski indicated that he had written them over the course of the year prior to the murders. In his report, Dr. Rawski described some of the writings, even giving specific quotes from them as follows:

> Some names mention [sic] correlate to past persons in his life, particularly co-workers or supervisors. Many comments are directly derogatory statements or warnings to him. Some of the contents referred to threats of similar retaliation or retribution compared to that experienced in the past. There was one reference to "all seeing eyes." Some of the information involved religious themes. An example of the bizarre, disorganized and illogical content is included in the following excerpt: "You can't—take—

> State—John…you don't know what…Iron man. The Jews are f---ing you with that stick. Brown Eyes Blue Armour—Take off you had sex."

(Some editing for decorum.)

¶39 Likewise, Dr. Pankiewicz's report, which the trial court read, described the writings that the doctor indicated he read and relied on for his opinion.

> Copies of a number of handwritten materials were reviewed. At face value they were largely incoherent and often bizarre. Mr. Kucharski described most of these writings as responses to auditory hallucinations over the past year. His descriptions of the notes varied from describing presumed threats, commentary about his behavior, derogatory references towards him, as well as homicidal demands.

¶40 From this we conclude that the trial court was aware of the content of the writings and in some cases had actual quotes from them, revealing their bizarre, delusional content. Trial counsel made a reasonable professional decision not to use the actual writings, given the perceived strength of the defense case, the cumulative and difficult-to-read nature of the writings, their volume, and their description in the doctors' reports and in Dr. Rawski's testimony.

¶41 Kucharski's second point about the writings is completely unsupported in the record and, in fact, is contradicted. He states that had the trial court seen them, it would have reached a different conclusion about his mental responsibility. First, as noted immediately above, even if the court had not read all of them, it had a very good flavor of them from the two doctors' reports. But more significantly, the trial court stated when ruling on Kucharski's WIS. STAT. § 809.30 motion that even if it had read them all, its "reasoning would not have been any different." Because the trial court would not have changed its

conclusion, there can be no prejudice to Kucharski from trial counsel's decision not to offer the specific writings. We conclude that trial defense counsel was not deficient in her representation of Kucharski, and, in any event, Kucharski has failed to show any prejudice.

¶42 Lastly, with regard to his ineffective assistance argument, Kucharski argues he was entitled to a ***Machner***[9] hearing. Although none was held here, trial court's strategic reasons were in the record from other hearings and useful in our analysis. Because Kucharski failed to meet his burden of showing that trial counsel behaved deficiently, or that there was any prejudice to him, he was not entitled to a hearing on his postconviction motion.

¶43 Accordingly, we affirm the decision of the trial court on all three issues above.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

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