STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP194-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER E. MASARIK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE KEVIN E. MARTENS, PRESIDING AT TRIAL, AND THE HONORABLE JEFFREY A. WAGNER, PRESIDING AT THE POSTCONVICTION STAGE

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Has Masarik proven that the postconviction court erred when it held that he failed to prove his trial attorney was ineffective for: (a) not challenging the probable cause for his warrantless arrest; and (b) not arguing that the

court should have suppressed his inculpatory statements because they were coerced by police tactics that played upon his mental health issues?

Trial counsel moved pretrial to suppress Masarik's inculpatory statements because they were obtained in violation of his rights to counsel and to remain silent, and because they were coerced by police misconduct. The trial court denied the suppression motion after an evidentiary hearing. It held that even though Masarik did not unequivocally invoke his rights to counsel or to remain silent, police stopped the interview believing that he had invoked the right to counsel. The interview began anew only after Masarik initiated further conversations with police and once again waived his rights to silence and to counsel. The trial court also held that the statements were uncoerced by police misconduct.

The postconviction court held that Masarik failed to prove that his attorney was ineffective for not arguing that police lacked probable cause to arrest him and that his statements were coerced by police misconduct that played upon his mental health issues.

2. Did the trial court properly deny Masarik's motion to suppress his inculpatory statements as having been obtained in violation of his rights to remain silent and to counsel, when police continued the interview after Masarik had requested a break and asked for an attorney?

The trial court denied Masarik's suppression motion after the pretrial evidentiary hearing. It held that Masarik did not unequivocally invoke his rights to silence or to counsel when he requested a break and, even if he did, Masarik initiated further conversation with police after the break.

The postconviction court upheld the trial court's ruling on the suppression motion for the reasons stated by the trial court.

3. Did the trial court properly exercise its discretion in denying Masarik's motion to modify his sentence?

The postconviction court held that Masarik's mere preference for concurrent rather than consecutive sentences did not warrant sentence modification.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state agrees with Masarik that neither oral argument nor publication is warranted. The state believes that this case is appropriate for summary affirmance. Wis. Stat. § (Rule) 809.21.

STATEMENT OF THE CASE

Masarik appeals (103) from a judgment of conviction entered November 8, 2010 (37), and from an order denying direct postconviction relief (102), entered January 6, 2015, in the Circuit Court for Milwaukee County, the Honorable Kevin E. Martens, presiding at trial, and the Honorable Jeffrey A. Wagner, presiding at the postconviction stage.

A Milwaukee County jury found Masarik guilty as charged (15) of first-degree reckless homicide and arson after a trial held August 16-19, 2010 (29-30; 120:21).

The court sentenced Masarik November 4, 2010, to twenty-five years of initial confinement in prison followed by ten years of extended supervision for reckless homicide, and to a consecutive term of seven years of initial confinement followed by six years of extended supervision for arson (121:59). Masarik filed a notice of intent to pursue postconviction relief November 8, 2010 (38).

After nearly four years, Masarik finally filed a motion for direct postconviction relief October 27, 2014 (94).[1] As he does here, Masarik challenged the effectiveness of his trial counsel, the trial court's order denying his pretrial motion to suppress his inculpatory statements to police, and the imposition of consecutive sentences (94).

The postconviction court, Judge Jeffrey A. Wagner now presiding, denied Masarik's motion without an evidentiary hearing in a Decision and Order issued January 6, 2015 (102; A-Ap. 120-23). Judge Wagner ruled that Masarik failed to sufficiently allege that his trial attorney was ineffective for not challenging the probable cause for his arrest (102:2-3; A-Ap. 121-22); failed to sufficiently allege that his trial attorney was ineffective for not arguing that his inculpatory statements were coerced by police misconduct that played upon his mental health issues (102:3; A-Ap. 122); failed to sufficiently allege that the trial court erred when it denied his suppression motion because police did not violate Masarik's rights to silence and to counsel (102:3-4; A-Ap. 122-23); and failed to sufficiently allege grounds for sentence modification (102:4; A-Ap. 123).

The relevant facts will be developed and discussed in the pertinent sections of the Argument to follow.

[1] This lengthy delay was caused almost entirely by Masarik and his attorneys (39-93).

ARGUMENT

I. THE POSTCONVICTION COURT PROPERLY EXERCISED ITS DISCRETION TO DENY MASARIK'S POSTCONVICTION MOTION WITHOUT AN EVIDENTIARY HEARING BECAUSE HIS UNDERLYING CHALLENGES TO THE PROBABLE CAUSE FOR HIS ARREST AND TO THE VOLUNTARINESS OF HIS INCULPATORY STATEMENTS LACKED MERIT.

Masarik insists that his trial attorney was ineffective for not arguing that his arrest was without probable cause, and that Masarik's inculpatory statements were coerced by police tactics that apparently played upon his mental health problems.

These claims are utterly devoid of merit. Police had probable cause to arrest Masarik in the form of a credible and corroborated report by a named citizen informant with no motive to falsely accuse Masarik. Masarik's offer of proof that his mental health issues somehow coerced his inculpatory statements fell far short of what would be required to hold an evidentiary hearing.

A. The applicable law and standard for review of the denial of a postconviction motion challenging the effectiveness of trial counsel without an evidentiary hearing.

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this court de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

To be sufficient to warrant further evidentiary inquiry, the postconviction motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically allege within its four corners material facts answering the questions who, what, when,

where, why and how Masarik would successfully prove at an evidentiary hearing that he is entitled to a new trial: "the five 'w's' and one 'h'" test. *Id.* ¶ 23. *See Balliette,* 336 Wis. 2d 358, ¶ 59; *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62.

If the motion is insufficient on its face, presents only conclusory allegations, or even if facially sufficient the record conclusively shows that Masarik is not entitled to relief, the trial court may in the exercise of its sound discretion deny the motion without an evidentiary hearing, subject to deferential appellate review. *Balliette,* 336 Wis. 2d 358, ¶ 50; *Allen,* 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley,* 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); *Nelson v. State,* 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). *See State v. Roberson,* 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111.

To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the motion must allege with factual specificity both deficient performance and prejudice. *Balliette,* 336 Wis. 2d 358, ¶¶ 20, 40; *Bentley*, 201 Wis. 2d at 313-18. Masarik could not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *Id.* at 313, 317-18; *Levesque v. State*, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974). The motion had to allege with factual specificity how and why trial counsel's performance was both deficient and prejudicial to the defense. *Balliette,* 336 Wis. 2d 358, ¶¶ 40, 59, 67-70; *Bentley*, 201 Wis. 2d at 313-18; *State v. Saunders*, 196 Wis. 2d 45, 49-52, 538 N.W.2d 546 (Ct. App. 1995). Even when the allegations of deficient performance are specific, the trial court in its discretion may deny the motion without an evidentiary hearing if the allegations of prejudice are only conclusory. *Bentley*, 201 Wis. 2d at 313-18. *See Balliette,* 336 Wis. 2d 358, ¶¶ 40, 56, 70.

1. Deficient performance.

To establish deficient performance, it would not be enough for Masarik to prove that his attorney's performance was "imperfect or less than ideal." *Balliette*, 336 Wis. 2d 358 ¶ 22. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. Masarik had to make specific allegations in his motion to overcome that strong presumption. Only then would Masarik be entitled to an evidentiary hearing. *Id.* ¶ 78. *See Burt v. Titlow*, __ U.S. __, 134 S. Ct. 10, 17 (2013).

"Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690). Masarik had to show that trial counsel's deficiencies sunk to the level of professional malpractice. *See State v. Maloney*, 2005 WI 74, ¶ 23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583. Counsel need not even be very good to be deemed constitutionally adequate. *State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386; *State v. Mosley,* 201 Wis. 2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996); *McAfee,* 589 F.3d at 355-56 (citing *Dean v. Young,* 777 F.2d 1239, 1245 (7th Cir. 1985)).

2. Prejudice.

Masarik had to also specifically allege prejudice in his motion because it would be his burden to affirmatively prove by clear and convincing evidence at an evidentiary hearing that he suffered actual prejudice as the result of counsel's proven deficient performance. Masarik would have to prove a reasonable probability that he would have received a more favorable outcome at trial but for counsel's deficient performance. *See Strickland,* 466 U.S. at 687. He could not speculate. *Balliette,* 336 Wis. 2d 358, ¶¶ 24, 63, 70. "The

likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

To prevail on a claim that counsel was ineffective for failing to file a suppression motion, Masarik must prove the suppression motion would have succeeded had it been brought. *See, e.g., State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (citing *Kimmelman v. Morrison*, 477 U.S. [365], 375 [(1986)]). This is because trial counsel is not as a matter of law ineffective for failing to interpose what would have been a meritless objection. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren,* 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110; *State v. Quarzenski*, 2007 WI App 212, ¶ 18, 305 Wis. 2d 525, 739 N.W.2d 844; *State v. Swinson*, 2003 WI App 45, ¶ 59, 261 Wis. 2d 633, 660 N.W.2d 12; *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

B. Masarik failed to prove deficient performance because a challenge to the probable cause for his arrest lacked merit.

1. The relevant facts.

Someone intentionally set an "incendiary" fire (neither accidentally nor naturally caused) by pouring and igniting a flammable liquid onto the porch leading to the rear (and only) entrance to Michael Jansen's second floor apartment on South Wentworth Street in the City of Milwaukee in the wee hours of August 7, 2009 (116:110-33, 137; 117:84-85). Michael Jansen was asleep in his apartment and unable to get out. Firefighters found Jansen unconscious on the floor of his bedroom. He died a grisly death caused by a combination of smoke inhalation and burns over 57 per cent of his body (116:74-76; 118:56, 61-65).

Jason Kuehn testified at trial that he was Masarik's co-worker and friend for fourteen years. He and Masarik were also mutual friends of Michael Jansen (117:55, 59-60). According to Kuehn, Masarik was supposed to work with him at 8:00 a.m. August 7, 2009, but did not show up for work until 12:30 p.m. Kuehn had learned before then that Michael Jansen was "killed" and his house was "burned." When Kuehn revealed this information about their mutual friend to Masarik, Masarik could not believe it and wanted to know how it happened. According to Kuehn, after they worked for an hour-and-a-half, Masarik told him that he put a piece of paper inside Jansen's lawn mower and set it on fire. When Kuehn said he would have to tell on him, Masarik just laughed (117:56).

One week later, on August 14, 2009, Kuehn and Masarik got together to go fishing and drink beer (117:56-57). When he retrieved the beer from the back of Masarik's van, Kuehn saw a gas tank. When Kuehn asked about the tank, Masarik told him that it was what he used "on Mike's house." When Kuehn remarked that he thought Masarik had told him he did not use gas, Masarik did not respond. Masarik repeated a couple of times that he could not believe Jansen was dead. Masarik seemed, according to Kuehn, both happy and sad about it (117:57). According to Kuehn, Masarik and Jansen had some disagreements (117:71-72). As they were smoking marijuana together on August 14, Masarik warned Kuehn that he would burn down Kuehn's and Kuehn's mother's houses if he told anyone about what he had said (117:57-58, 67-68). Masarik also threatened to burn down a home where another mutual friend and the friend's stepfather lived (117:70). Kuehn did not say anything in response to the threats and pretended to remain calm, but inside he felt "that's not right" (117:58).

Kuehn next saw Masarik four days later, August 18, 2009. Masarik admitted to Kuehn that he poured gasoline in Jansen's backyard, lit it and left (117:58-59). Kuehn went home and decided to go to the police with this information because it was "the right thing to do" (117:59, 72). Kuehn

feared that if he did not report him, Masarik would follow through on his threats to burn down not only his but the houses of others as well (117:72). Kuehn did not receive a reward for this information (117:72).[2]

Masarik was arrested in his maroon Chevy minivan at a gas station on Farwell Avenue in the City of Milwaukee two days later, August 20, 2009, based on information provided by Kuehn (2:3; 117:59, 77; A-Ap. 107). Police searched Masarik's minivan after it was impounded and found three gas cans in the rear, matches wedged in between the front seats, and a cigarette lighter on the passenger side (2:3; 117:79-82, 91; A-Ap. 107).

2. There was probable cause to arrest Masarik.

Masarik does not deny that he knew Kuehn for many years, they worked together, they went fishing and drinking together, and they were mutual friends of Michael Jansen. Masarik does not deny that he and Kuehn got together during the day on August 7, got together again to go fishing on August 14, and lastly got together on August 18, 2009. Masarik admitted to Kuehn on those occasions that he started the fire at the rear of Jansen's house (*see* 121:31). Masarik does not claim that Kuehn received anything from the state in exchange for the information he provided. To this day, as the trial court observed at sentencing, Masarik has provided no motive for Kuehn to make up this story (121:40). As the prosecutor pointed out in his closing argument to the jury at trial in response to defense counsel's challenge to Kuehn's credibility, Kuehn was credible because everything he said was later corroborated by Masarik's confession to police (120:7-8).

[2] Kuehn's statements about what Masarik told him also appear in the criminal complaint (2:4-5; A-Ap. 108-09).

> There is probable cause to arrest "when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. . . . The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility." *State v. Cash*, 2004 WI App 63, ¶ 24, 271 Wis. 2d 451, 677 N.W.2d 709 (citations omitted); *accord Leroux v. State*, 58 Wis. 2d 671, 683-84, 207 N.W.2d 589 (1973).

State v. Sykes, 2005 WI 48, ¶ 18, 279 Wis. 2d 742, 695 N.W.2d 277. *See State v. Dubose*, 2005 WI 126, ¶ 36 n.13, 285 Wis. 2d 143, 699 N.W.2d 582; *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993); *State v. Kutz*, 2003 WI App 205, ¶¶ 11-12, 267 Wis. 2d 531, 671 N.W.2d 660; *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

To establish probable cause for arrest, police need even less inculpatory information than that required for a bindover after a preliminary hearing. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). Probable cause is a "'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" *Id.* (quoted source omitted). In determining whether probable cause exists:

> The court is to consider the information available to the [arresting] officer from the standpoint of one versed in law enforcement, taking the officer's training and experience into account. . . . The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department.

Kutz, 267 Wis. 2d 531, ¶ 12.

It is a firmly established principle that hearsay and the collective knowledge of the entire police department may be used in assessing whether there was probable cause to make the arrest. *State v. Cheers*, 102 Wis. 2d 367, 388-89, 306 N.W.2d 676 (1981); *State v. Mabra*, 61 Wis. 2d 613, 625-

26, 213 N.W.2d 545 (1974); *State v. Black*, 2000 WI App 175, ¶ 17 n.4, 238 Wis. 2d 203, 617 N.W.2d 210, *cert. denied*, 531 U.S. 1182 (2001); *State v. Wille*, 185 Wis. 2d 673, 683, 518 N.W.2d 325 (Ct. App. 1994). *Also see State v. Orta*, 2000 WI 4, ¶ 20, 231 Wis. 2d 782, 604 N.W.2d 543 (Prosser, J., concurring).

The fact that the informant was identified, known to and working with police, greatly enhanced the credibility of the information he provided:

> Unlike the confidential (undisclosed) informants in the cases cited by the defendants, Savage's identity was made known to the magistrate judge at the probable cause hearing. Though an anonymous tip "alone seldom demonstrates the informant's basis of knowledge or veracity," *Alabama v. White,* 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), a magistrate in the exercise of sound judgment is entitled to give greater weight to a tip from a known informant, who can be held responsible should he be found to have given misleading information to police officers, and thus has an incentive to provide truthful information to the detectives . . . . For these reasons and others set forth herein, we hold that the judge acted within his discretion when deciding to give greater weight to the information gained from [informant] Savage rather than from some anonymous informant, considering that the police found Savage in possession of a quantity of illegal drugs and he identified Koerth contemporaneously, at the same time of his arrest.

United States v. Koerth, 312 F.3d 862, 870-71 (7th Cir. 2002).

Police had probable cause to believe that someone committed arson at Jansen's home, causing his death, on August 7, 2009. Masarik knew Jansen, as did Kuehn. Kuehn came to the police station on his own less than two weeks later, identified himself, and told police that he knew both Jansen and Masarik. Kuehn then revealed to police the inculpatory admissions Masarik made to him. The details of what Kuehn said Masarik told him corroborated what police already knew about the fire: someone started the fire at the

rear landing of Jansen's house in the early morning hours of August 7, 2009, with a liquid accelerant near where the lawn mower was located, and left. Masarik admitted to Kuehn that he set fire to the lawn mower at the rear of Jansen's house in the early morning of August 7, poured gasoline, ignited the fire, and left.

This valuable information gave police "reasonable grounds to believe" that Masarik committed the arson and homicide. Wis. Stat. § 968.07(1)(d). Masarik's guilt was far more than a mere possibility.

Masarik insists that police lacked probable cause to arrest him because Kuehn was unreliable, but does not bother to explain why. Masarik's brief at 17. Simply saying something is so does not make it so. Moreover, Masarik confuses reliability with credibility. It is completely irrelevant whether or not Kuehn was "an unreliable person." Masarik's brief at 21. The details of his account prove that Kuehn was a *credible* citizen informant regardless of his personal reliability. Police often rely on informants who may not be "reliable" people because they are themselves criminals, co-conspirators, drug users, etc. But they are nonetheless credible informants because of their detailed accounts, their ability to know those details, the ability of police to quickly corroborate their accounts, and the jeopardy they would put themselves in if they provided false information. If personal reliability were the standard, rather than credibility, police would be hard-pressed to ever muster probable cause sufficient to obtain a search warrant or an arrest warrant when relying on information provided by an informant.

Although it is not clear at all, Masarik seems to argue that police should not have believed Kuehn because Kuehn claimed that Masarik threatened him if he went to police. Masarik's brief at 21. If Masarik truly threatened Kuehn with bodily harm, the argument apparently goes, Kuehn would have been too afraid to go to police. So, it apparently follows, Masarik never confessed to Kuehn and never

threatened him; it was all made up by Kuehn for reasons unknown. As Masarik less than articulately explains in his brief:

> Jason Kuehn was a plainly unreliable person as he presented to the police the alleged threats against him, yet he himself arranged to have Masarik meet him as a friend when Masarik was arrested at the gas station, a point that [sic] which would indicate a complete inconsistency.

Masarik's brief at 21.

Why is that "a complete inconsistency?" Masarik does not bother to explain. This court apparently has to take Masarik at his word because he offers no argument on the point. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994); *State v. Pettit,* 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Police reasonably saw no inconsistency. Kuehn went to police *because he was threatened by Masarik.* Kuehn reasonably feared that Masarik would carry out his threats to burn down Kuehn's house and others even if he did nothing. That was a credible threat because Masarik had just admitted to committing an arson fire that killed their mutual friend, Jansen, and Kuehn saw the gas can Masarik said he used to start the fire in the back of Masarik's van. Having identified himself to police, Kuehn also risked prosecution if he knowingly provided false information. Kuehn learned that Masarik had murdered their mutual friend and said he felt compelled to go to the police because it was "the right thing to do." The detailed account that Kuehn said Masarik admitted to him closely corroborated what police already knew about the fire: it was started in the early morning hours of August 7 at the rear porch of Jansen's house near where the lawn mower was kept, and gasoline was used to ignite the fire. Kuehn saw the gas can inside Masarik's van. Police had every reason to believe that Kuehn, reliable person or not, provided credible, citizen-witness, information.

Masarik next argues that Kuehn provided "inconsistent and highly suspect information" when he told police that he was drinking and smoking marijuana with Masarik on August 14. Masarik's brief at 21. Why this is "inconsistent and highly suspect" is anyone's guess, because Masarik again does not bother to explain. *See Flynn,* 190 Wis. 2d at 39 n.2; *Pettit,* 171 Wis. 2d at 646-47.

A week earlier, August 7, Masarik admitted to Kuehn that he set fire to the lawn mower at the rear entrance to Jansen's house. There is nothing to indicate that Kuehn was drinking or smoking marijuana on August 7. Kuehn did not become overly concerned about what Masarik said to him on August 7 until they met on August 14 when Kuehn saw the gas tank in the back of Masarik's van and Masarik admitted for the first time that he used that gas tank to set the fire at Jansen's house. This admission was made before they started drinking and smoking marijuana that day. It was later on August 14 that Masarik threatened to burn down Kuehn's house when they were supposedly drinking and smoking marijuana while fishing. It was four days later, on August 18, that Masarik admitted to Kuehn that he poured gasoline at Jansen's house, lit it, and left. There is nothing to indicate that Kuehn was drinking or smoking marijuana on August 18.

Therefore, the fact that Kuehn may have been high on beer or marijuana on August 14 does nothing to disprove what Masarik told Kuehn on August 7 and on August 18, 2009. Even if Kuehn was high on August 14, that does not mean he was unable to comprehend what Masarik was telling him that day. It is just as likely that their ingestion of beer and marijuana while fishing caused Masarik to open up and confide in Kuehn about what was clearly bothering him.

Perhaps Masarik is right that Kuehn proved to be "an unreliable person" when he breached Masarik's confidence, but that breach of confidence proved to be credible in the eyes of police.[3]

3. There was sufficient attenuation from the allegedly illegal arrest to Masarik's voluntary statements two days later.

Moreover, the voluntary statements Masarik gave to police two days after his arrest, and after receiving *Miranda*[4] warnings, were sufficiently attenuated from his warrantless arrest to be admissible. *See State v. Yang,* 2000 WI App 63, ¶¶ 18-39, 233 Wis. 2d 545, 608 N.W.2d 703, *overruled on other grounds by, State v. Knapp,* 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881; *State v. Simmons,* 220 Wis. 2d 775, 780-81, 585 N.W.2d 165 (Ct. App. 1998); *Oregon v. Elstad,* 470 U.S. 298, 314, 318 (1985). The three factors this court considers in the attenuation analysis are: (1) the amount of time that passed between the illegal activity and obtaining the evidence; (2) intervening circumstances; and (3) the purpose and flagrancy of police misconduct. *State v. Felix,* 2012 WI 36, ¶ 31, 339 Wis. 2d 670, 811 N.W.2d 775.

These factors insulated Masarik's confession from the taint of any Fourth Amendment violation at the time of his arrest. The statements introduced at trial were obtained from Masarik on August 22, 2009, two days after his arrest.

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[3] Masarik also argues that, assuming police had probable cause, they should have gotten "a search [*sic,* arrest] warrant" because they had time to do so. Masarik's brief at 21. Police did not have to get a warrant because they knew where Masarik would be and they had reasonable grounds to believe he had committed arson. Armed with that knowledge, police were free to arrest Masarik at the gas station without a warrant regardless whether they had time to get one. Wis. Stat. § 968.07(1)(d). *See United States v. Watson,* 423 U.S. 411, 415-17 (1976); *State v. Felix,* 2012 WI 36, ¶¶ 86-87, 339 Wis. 2d 670, 811 N.W.2d 775 (Prosser, J., concurring).

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

They were preceded by *Miranda* warnings and by his voluntary waiver of those protections (117:97-98, 103; 118:22, 34). The statements were voluntary. The voluntariness of an inculpatory statement has been called the "threshold requirement" in any attenuation analysis. *State v. Tobias*, 196 Wis. 2d 537, 545-46, 538 N.W.2d 843 (Ct. App. 1995).

Masarik's arrest, even if without probable cause, was at the very least supported by reasonable suspicion under *Terry v. Ohio,* 392 U.S. 1 (1968), based on what Kuehn told police. Masarik does not argue that police also lacked the minimal *Terry* reasonable suspicion. The arrest at the gas station was also public and swift. It did not involve any flagrant police misconduct. *See Elstad*, 470 U.S. at 314, 318; *Yang*, 233 Wis. 2d 545, ¶¶ 18-39. Masarik does not argue that there was any flagrant misconduct.

Masarik's confession was voluntary and obtained in full compliance with *Miranda.* A significant amount of time passed and there were intervening circumstances. Any "taint" from the August 20 arrest allegedly without probable cause was, therefore, removed by the time Masarik confessed on August 22, 2009.

4. Masarik's confession and other derivative evidence would have been inevitably discovered by lawful means.

Police would have inevitably obtained Masarik's confession on August 22 lawfully because, even assuming police only had reasonable suspicion when they arrived at the gas station on August 20, *see Terry,* and Wis. Stat. § 968.24, they would have compiled probable cause for Masarik's arrest as soon as they looked inside his van once he got out. Police would have seen in plain view the three gas containers in the rear, one of which Kuehn said he saw in the back of the van when he went to get beer out of it on August 14, the same gas can that Masarik told Kuehn he used to start the fire at Jansen's house.

Wisconsin has adopted the inevitable discovery doctrine which precludes suppression if the evidence inevitably would have been discovered by lawful means. *See State v. Kennedy*, 134 Wis. 2d 308, 318-19, 396 N.W.2d 765 (Ct. App. 1986); *State v. Washington*, 120 Wis. 2d 654, 664-65, 358 N.W.2d 304 (Ct. App. 1984), *aff'd on other grounds by*, 134 Wis. 2d 108, 396 N.W.2d 156 (1986).

This doctrine is based on the common-sense assumption that, since the evidence would have been discovered by lawful means, then the deterrence rationale behind the exclusionary rule is not furthered and has little to justify exclusion of the evidence. It adds nothing to the integrity or fairness of the criminal trial. *See Washington*, 120 Wis. 2d at 664-65. The idea is to place the state and the accused in the same position they would have been in had the illegal conduct not occurred. If the state can prove that the evidence would have been found inevitably and lawfully, there is no rational basis to keep that evidence from the jury because the state has gained no advantage and the defendant has suffered no prejudice. Suppression under these circumstances would, indeed, put the state in a worse position than it would have been without the police misconduct. *Nix v. Williams*, 467 U.S. 431, 447 (1984). *See Washington*, 120 Wis. 2d at 665.

In *Kennedy*, 134 Wis. 2d at 316-19, this court upheld the admissibility of a vodka bottle found in the defendant's crashed car during an unlawful search several days after the accident in a homicide-by-intoxicated-user prosecution. This court concluded that the vodka bottle remained admissible despite the illegal search because it inevitably would have been discovered during a lawful and routine inventory search of the car later on. *Id.* at 318-19.

Here, we have the reverse situation. The gas tanks, as well as the matches and the cigarette lighter, were discovered during a lawful inventory search of the van at the police station later on, rather than at the scene (117:79-82, 91). But that damning evidence, corroborative as it was of

Kuehn's account, would have been lawfully observed by police in plain view at the gas station even if this were no more than a *Terry* stop on mere reasonable suspicion without probable cause. That discovery would have then established the requisite probable cause to arrest Masarik on the spot.

Under the inevitable discovery doctrine, the state must prove the following by a preponderance of the evidence:

(1) It is reasonably probable that the evidence would have been discovered by lawful means;

(2) Police already had leads making the discovery inevitable before the illegal search occurred; and

(3) Police were actively pursuing these leads at the time of the illegal search.

State v. Lopez, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996); *State v. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992). *See Nix*, 467 U.S. at 447.

Police already had leads in the form of the credible information provided by Kuehn, and were actively pursuing those leads when they came upon Masarik at the gas station. It is reasonably probable that police would have obtained probable cause, even if this started out as only a *Terry* stop, had they briefly looked inside Masarik's van. They would have seen the gas tanks in plain view in the back of the van. They would have seen those gas cans once they ordered Masarik out of the van and quickly scanned the interior. *See Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997) (allowing officers to order passengers out of a car during a routine traffic stop); *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11 (1977). At that point, Kuehn's account would have been significantly corroborated by the gas cans, giving police the probable cause that Masarik insists they lacked when they arrived at the gas station. He would then have been placed under arrest.

Trial counsel performed reasonably in not pursuing this meritless challenge to Masarik's confession, focusing instead on whether the confession was voluntary and obtained in violation of his rights to counsel and to remain silent.

C. Masarik failed to prove deficient performance because his new challenge to the voluntariness of his confession based on his supposed mental health problems had no merit.

Masarik's trial attorney, Richard Poulson, challenged the admissibility of his confession to police on the dual grounds that: (1) it was obtained in violation of his rights to counsel and to remain silent, and (2) it was coerced. After the suppression hearing, the trial court ruled that police did not violate Masarik's rights to silence or to counsel, and his statements were voluntary (113:37-39).

Masarik now argues that Attorney Poulson was incompetent for not also challenging his statements on the ground that they were coerced by police exploitation of his mental health difficulties. Masarik's brief at 23-32.[5]

This is not, however, what Masarik testified to at the suppression hearing. Masarik testified that police coerced his inculpatory statements by promising that they would view the fire as a "tragic accident" and would testify on Masarik's behalf at trial if he confessed (113:21-22, 27). Masarik also said he felt compelled to talk because he was afraid of being charged with murder and going to prison for

[5] Although it is not clear from Masarik's brief, his trial attorney challenged at the suppression hearing the admissibility of a statement he gave police on the day of his arrest, August 20, 2009, but the state only introduced into evidence at trial statements that Masarik gave to police two days later, August 22, 2009 (117:97-98, 103; 118:22, 34). The state assumes Masarik is arguing that the August 22 statements were also coerced by the same factors that he maintains coerced the August 20 statements, or that the August 22 statements were derivative of the allegedly coerced August 20 statement.

a long time (113:23). Masarik did not testify that he was confused or unusually susceptible to what were otherwise normal police interview techniques. Masarik did not mention that he suffered from mental difficulties that rendered him peculiarly susceptible to police tactics. Trial counsel wisely declined this dubious strategy in favor of arguing that Masarik's confession was coerced by a false promise of leniency.

Voluntary admissions of guilt are desirable. *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991); *Elstad*, 470 U.S. at 305. *See Arizona v. Mauro*, 481 U.S. 520, 529 (1987).

A statement is not involuntary for constitutional purposes unless it is the product of coercive conduct by police. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). The issue concerning voluntariness is whether the suspect's ultimate decision to talk to police was a free and deliberate choice on his part or was the product of police coercion. *See Colorado v. Spring*, 479 U.S. 564, 573-74 (1987). Police "coercion" is defined as "'physical violence or other deliberate means calculated to break [a suspect's] will.'" *Id.* at 574 (quoting *Elstad*, 470 U.S. at 312).

A defendant's mental illness does not render his statements involuntary absent proof of coercive conduct by police. *See Connelly*, 479 U.S. at 163-67. A defendant's mere intoxication, or his physical or mental illness, does not render a statement involuntary absent coercive conduct on the part of police. *State v. Clappes*, 136 Wis. 2d 222, 237-44, 401 N.W.2d 759 (1987) (mere proof of pain and/or intoxication does not render a statement involuntary absent proof the defendant was irrational or incapable of providing a voluntary response); *State v. Hanson*, 136 Wis. 2d 195, 215-16, 401 N.W.2d 771 (1987) (same).

Masarik did not testify at the suppression hearing that he suffered from mental illness and presented no proof that police knew he had a mental illness that they then played upon to coerce his confession.

Masarik now claimed for the first time in his postconviction motion that the officers also threatened that they would physically restrain him if he did not confess, as he claims police did on another occasion before his arrest (94:12-17). Masarik's brief at 25. Again, Masarik did not mention this supposed threat of police violence when he testified at the suppression hearing. He only mentioned the supposed promise that police would treat this as a tragic accident and would testify on his behalf. The only fear he claimed to have had was that of being charged with murder and going to prison for a long time. If there was also a threat of physical violence, no doubt Masarik would have mentioned it in his suppression hearing testimony. He did not, no doubt, because that threat was dreamt up later in the harsh light of Masarik's conviction and lengthy prison sentence.

In any event, the described incident of physical restraint by police demonstrates Masarik's combativeness and refusal to cooperate with police, not his peculiar susceptibility to police pressure. That incident best demonstrates Masarik's ability to exercise his constitutional rights and to refuse to answer police questions despite the alleged coercive circumstances of the interview.

Moreover, it appears that Masarik did not mention his supposed mental health issues, and their supposed negative impact on his ability to give an uncoerced statement, to his trial attorney. He waited until after his conviction and lengthy sentence to tell his current counsel that he had mental health issues adversely affecting his ability to exercise his constitutional rights during the interview. *See* Masarik's brief at 26-28 (relying primarily on a competency report prepared by a psychiatrist in *2013,* four years after his conviction). No one was more aware of Masarik's mental health issues than Masarik. Trial counsel was not required to read Masarik's mind. Trial counsel's investigative decisions are often based on information supplied by the client. The reasonableness of counsel's investigative decisions may be determined or substantially influenced by

the words and actions of the client. *See Strickland,* 466 U.S. at 691; *State v. Leighton*, 2000 WI App 156, ¶ 40, 237 Wis. 2d 709, 616 N.W.2d 126.

Nowhere in his brief does Masarik explain how his "emotional and cognitive problems" adversely affected his ability to give a voluntary statement or, conversely, to exercise his right to remain silent. Masarik does not explain how his anxiety, personality disorder and multiple substance dependence prevented him from exercising his rights when interviewed in August 2009. Masarik's brief at 26-27. Many suspects with anxiety, personality disorders and drug dependence are still able to exercise their rights to silence and to the presence of counsel when questioned by police. Masarik fails to explain why his situation is any different.

The postconviction court correctly found as fact that a letter from a doctor evaluating Masarik's competency for court proceedings in 2013 proved nothing about his mental capacity to exercise his constitutional rights when questioned in August 2009 (102:3; A-Ap. 122).

Finally, Masarik does not claim that his mental health problems caused him to confess to *Kuehn* on August 7, 14, and 18, 2009. Kuehn exerted no pressure on him whatsoever. Masarik was not under arrest or even a suspect when he hung out with Kuehn on those dates. Masarik volunteered everything unprompted by Kuehn. Unlike the pressures inherent in a police interview, Masarik was relaxed when speaking to his friend Kuehn while fishing, drinking and smoking marijuana. Indeed, it was Masarik who tried to coerce Kuehn's silence; threatening to burn down Kuehn's home and the homes of others if he went to police. His supposed mental health issues did not coerce Masarik when he confessed to and threatened his friend and co-worker Kuehn. Masarik's mental health issues did not, therefore, impact Masarik's decision to waive his constitutional rights and confess to police.

Trial counsel performed reasonably in not pursuing this obviously meritless "too mentally ill to voluntarily waive my rights" challenge to Masarik's confession, focusing instead on whether the confession was coerced by false promises of leniency, and was obtained in violation of Masarik's rights to counsel and to remain silent.

II. THE TRIAL COURT PROPERLY HELD THAT POLICE DID NOT VIOLATE MASARIK'S RIGHTS TO COUNSEL AND TO SILENCE WHEN HE INITIATED THE INTERVIEW AFTER THE SHORT BREAK.

A. The relevant facts.

Milwaukee Detective Erik Gulbrandson testified that he and Detective Rodney Young interviewed Masarik on August 20, 2009, beginning at 8:59 p.m. in a police station interview room (113:6-7). They advised Masarik of his rights under *Miranda* thirty-five minutes later after they obtained "pedigree" background information (113:7). Two-and-a-half hours into the recorded interview, as the detectives confronted Masarik with inconsistent information he had provided up to that point, Masarik said, "I think I need an attorney, man" (113:7-9). Gulbrandson answered that it was his right. Masarik then continued, "I mean I want to talk to you but I want an attorney present." Gulbrandson told Masarik they could no longer talk to him and the case would be presented to the district attorney (113:9). Masarik then said, "I just need a minute. I need to think" (113:9). The detectives left and told Masarik they would stop back to check on him (113:9-10). They turned off the recorder and left the room at 11:47 p.m. (113:10).

When the detectives returned fifteen minutes later intending to take Masarik back to his cell, Masarik began talking about the incident while the recorder was still off. The detectives again reminded Masarik that they could not speak with him about the case because he had asked for an attorney (113:10-12). They told Masarik that if he wanted to

talk about the case, they would have to read the *Miranda* warnings again. He agreed to speak and the interview began anew. The detectives restarted the tape at 12:07 a.m. and the *Miranda* warnings were given a second time (113:13-15). The detectives testified that they did not initiate any communication with Masarik during the break (113:14).

B. The state never introduced the August 20, 2009, statement at trial.

Masarik insists that the trial court erred in denying his pretrial motion to suppress the August 20, 2009, statement into evidence because it was obtained in violation of his rights to silence and to counsel. Masarik's brief at 34-35. This argument is meritless for one obvious reason: the state did not introduce that August 20 statement into evidence at trial. It only introduced separate statements that Masarik made to police two days later, August 22, 2009 (117:97-98, 103; 118:22, 34). The state, therefore, in essence "suppressed" the August 20 statement from trial by deciding not to use it.

Perhaps Masarik is trying to argue that the August 22 statements actually introduced at trial were improper fruits of the Fifth Amendment violation that he alleges occurred on August 20. If that is his argument, Masarik has not developed it at all. This court must reject it for that reason alone. *Flynn,* 190 Wis. 2d at 39 n.2; *Pettit,* 171 Wis. 2d at 646-47. The state will, however, briefly address Masarik's apparent argument that the August 22 statements were tainted by what occurred during the August 20 interview.

C. There was no Fifth Amendment violation during the August 20 interview that would have tainted Masarik's August 22 statements to police.

To safeguard an individual's Fifth Amendment right to be free from compelled self-incrimination, the United States Supreme Court has held that a state may not use any

statements obtained during custodial interrogation unless police employ the procedural safeguards established in *Miranda*.

It is plain that the detectives honored Masarik's exercise of his right to counsel and stopped the interview when Masarik said, "I think I need an attorney, man." Police ended the interview, turned off the recorder and left the room. When they returned fifteen minutes later to take Masarik back to his cell, Masarik initiated further conversation. Even then, the detectives told Masarik they could not speak to him without an attorney present. Masarik insisted on talking about the case and the interview resumed. *See Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (no violation of the right to counsel if the defendant initiates further communications, exchanges or conversations with police after invoking his right to counsel). *Also see Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (defendant reinitiated conversation with police by asking "what is going to happen to me now?").

Masarik confuses the issue by arguing that police violated his right to *silence* when they spoke with him after the break. Masarik's brief at 32-35. It is plain that, if he tried to exercise any right at all, it was his right to counsel – not to remain silent ("I think I need an attorney, man."). Indeed, that statement indicates that Masarik wanted to continue talking, but with an attorney present. So, any claim that police violated Masarik's exercise of his right to remain silent would be even less meritorious than the argument that police violated his invocation of the right to counsel.

The issue whether the state violated Masarik's right to remain silent is to be reviewed de novo, but in light of the not clearly erroneous facts as found by the trial court. *State v. Markwardt,* 2007 WI App 242, ¶ 30, 306 Wis. 2d 420, 742 N.W.2d 546; *State v. Ross*, 203 Wis. 2d 66, 79, 552 N.W.2d 428 (Ct. App. 1996); *State v. Owen*, 202 Wis. 2d

620, 640-41, 551 N.W.2d 50 (Ct. App. 1996). *See State v. Jennings*, 2002 WI 44, ¶¶ 20-21, 25, 252 Wis. 2d 228, 647 N.W.2d 142.

The right to silence in the context of police custodial interrogation takes on two distinct forms: (1) the right, exercised before questioning begins, to refuse to be interviewed at all; and (2) the right, exercised after the suspect agrees to be interviewed and questioning has begun, to cut off the interview at any point. *Markwardt,* 306 Wis. 2d 420, ¶¶ 24, 34; *Ross,* 203 Wis. 2d at 73-74. This case involves the latter form of the right to silence.

In *Ross*, this court held that a suspect must *unequivocally invoke* his right to remain silent before police are required either to stop the interview or to clarify any equivocal remarks by him. 203 Wis. 2d at 75-79. This is the same "clear articulation rule" adopted by the United States Supreme Court when assessing whether a suspect has invoked his right to counsel during police custodial interrogation. *Id.* at 70, 74-75. *See Davis v. United States*, 512 U.S. 452, 459 (1994); *Jennings*, 252 Wis. 2d 228, ¶¶ 5-6; *Markwardt,* 306 Wis. 2d 420, ¶¶ 26-27; *State v. Coerper*, 199 Wis. 2d 216, 223, 544 N.W.2d 423 (1996). In requiring unequivocal invocation of the right to silence, this court in *Ross* was following the "nearly unanimous lead of other jurisdictions," both state and federal. *Ross*, 203 Wis. 2d at 75. *Also see id.* at 75 n.4, 77-79. *See Jennings*, 252 Wis. 2d 228, ¶¶ 5-6, 31-32, 36, 44; *Markwardt,* 306 Wis. 2d 420, ¶ 27.

This court's analysis in *Ross* was correct. In *Berghuis v. Thompkins,* 560 U.S. 370, 130 S. Ct. 2250, 2260 (2010), the Court adopted in the right to silence context the same "clear articulation" rule that it had adopted in *Davis* to determine whether an individual had unequivocally invoked his right to counsel during custodial interrogation. As with the right to counsel, the individual being interrogated by police must unequivocally invoke his right to silence. *Id.*

In *Ross*, the suspect remained silent in the face of police questioning. This court held:

> Clearly, however, Ross did not unambiguously invoke his right to remain silent; he never said anything. Thus, the police were free to continue questioning him, and his subsequent inculpatory statements were not procured in violation of his Fifth Amendment privilege against self-incrimination.

203 Wis. 2d at 79.

In *Markwardt,* this court held to be ambiguous in context a suspect's statement an hour and eleven minutes into the interview, after the officer refused to believe her, "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright. I've been through enough today." 306 Wis. 2d 420, ¶ 35. In reversing the trial court's ruling that the defendant had unequivocally invoked her right to silence, this court reasoned:

> Under the rule established in *Ross,* a suspect's claimed unequivocal invocation of the right to remain silent must be patent. *See Ross,* 203 Wis. 2d at 75-79. The *Ross* rule allows no room for an assertion that permits even the possibility of reasonable competing inferences: there is no invocation of the right to remain silent if *any* reasonable competing inferences can be drawn. *See id.* Accordingly, an assertion that permits reasonable competing inferences demonstrates that a suspect did not sufficiently invoke the right to remain silent. *See id.* We therefore reverse the circuit court because Markwardt's comments permit reasonable competing inferences. A reasonable interpretation of Markwardt's comments could be that she was invoking her right to remain silent. However, an equally reasonable understanding of her comments could be that she was merely fencing with Clark as he kept repeatedly catching her in either lies or at least differing versions of the events. Markwardt's comments are equivocal as a matter of law because there are reasonable competing inferences to be drawn from them. *See id.* at 78 . . . .

Id. ¶ 36 (emphasis in original).

In *Owen*, this court held a defendant's statement that he did not wish to speak to a specific officer was not an unequivocal invocation of the right to silence. 202 Wis. 2d at 641.

In *State v. Lindh*, 161 Wis. 2d 324, 369, 468 N.W.2d 168 (1991), the supreme court held that a suspect did not invoke his right to silence by saying "only that he did not want to discuss the details of the shootings" but never said he did not want to answer additional questions or wanted to end the interview.

Masarik never invoked his right to silence on August 20. He asked the detectives for a break to give him time to think *so he could speak to them later*. "I mean *I want to talk to you* but I want an attorney present" (113:9) (emphasis added). "I just need a minute. I need to think" (113:9). This is not an expression of any desire to remain silent. It is unequivocally Masarik's expression of his desire to continue the interview, but only after a break to give him time to think. When the detectives returned after the break, and even though they had decided to end the interview because they believed Masarik wanted an attorney, Masarik unequivocally insisted on continuing the interview even without an attorney present. The police granted his request and continued the interview after providing a fresh set of *Miranda* warnings. There was no Fifth Amendment violation.

Finally, as discussed above, even if Masarik unequivocally invoked his right to counsel, he initiated further conversation with the detectives after the break and after they had announced to him that the interview was over. The interview properly started anew after he received a fresh set of *Miranda* warnings, waived those protections, and gave a voluntary statement. *Edwards,* 451 U.S. at 484-85; *Bradshaw,* 462 U.S. at 1045.

III. THE TRIAL COURT PROPERLY EXERCISED ITS SENTENCING DISCRETION.

A. The applicable law and standard for review.

Masarik complains that the trial court erroneously exercised its sentencing discretion when it imposed consecutive, rather than concurrent, sentences for arson and first-degree reckless homicide. This claim is utterly meritless. It would be impossible to find a more thorough exercise of sentencing discretion than that engaged in by Judge Martens here (121:35-59; A-Ap. 131-50).[6]

This court's review is limited to determining whether the trial court erroneously exercised its sentencing discretion. There is an erroneous exercise of discretion if that discretion was exercised on the basis of irrelevant or improper factors. *State v. Harris,* 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409; *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. If discretion was exercised, there is a strong policy against appellate court interference with that exercise of sentencing discretion. *Gallion,* 270 Wis. 2d 535, ¶ 18.

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[6] Masarik hopelessly confuses the issue by arguing that the trial court erroneously denied sentence *modification*. Masarik's brief at 35. This has nothing to do with sentence modification, which requires proof of a "new factor" that was not in existence at the time of sentencing or was unknowingly overlooked by everyone at sentencing. *State v. Harbor,* 2011 WI 28, ¶ 40, 333 Wis. 2d 53, 797 N.W.2d 828; *State v. Kluck,* 210 Wis. 2d 1, 7, 563 N.W.2d 468 (1997). *See also State v. Courtney E. Sobonya,* 2015 WI App 86, ¶¶ 7-8, __ Wis. 2d __, __ N.W.2d __. Nothing was overlooked here. Everyone knew that consecutive sentences could be imposed, the prosecutor requested them (121:12), and the trial court explained why consecutive sentences were necessary (121:56-57).

This court's duty is to affirm if, from the facts of record, the sentence is sustainable as a proper discretionary act. *State v. Berggren,* 2009 WI App 82, ¶ 44, 320 Wis. 2d 209, 769 N.W.2d 110.

There is a strong presumption that the exercise of sentencing discretion was reasonable because the sentencing court is best suited to consider relevant factors as well as the demeanor of the defendant. *Id.* Appellate courts are not to substitute their preferences for a particular sentence simply because, had they been in the sentencing court's position, they would have meted out a different sentence. *Id. See McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

The sentencing court is presumed to have acted reasonably, and Masarik bears the burden of proving an unreasonable or unjustifiable basis on the record for the sentence imposed. *State v. Davis,* 2005 WI App 98, ¶ 12, 281 Wis. 2d 118, 698 N.W.2d 823. Due to this presumption of reasonableness, the burden imposed on him to prove an erroneous exercise of sentencing discretion is a "heavy" one. *Harris,* 326 Wis. 2d 685, ¶ 30. Masarik must prove by clear and convincing evidence that the court relied on improper factors. *Id.* ¶¶ 34-35, 60.

There are a variety of factors which a sentencing court may consider when exercising discretion. They include: the defendant's criminal record and history of undesirable behavior patterns; his personality, character, and social traits; the results of a presentence investigation; the aggravated nature of the crime; the defendant's degree of culpability; his age, educational background, and employment record; his remorse and cooperativeness; the need for close rehabilitative control; and the rights of the public. The three primary factors to be considered are the gravity of the offense, the defendant's character and the need to protect the public. *Id.* ¶ 28; *Gallion*, 270 Wis. 2d 535, ¶¶ 43-44; *State v. Paske*,

163 Wis. 2d 52, 62, 471 N.W.2d 55 (1991); *State v. Larsen*, 141 Wis. 2d 412, 426-27, 415 N.W.2d 535 (Ct. App. 1987); *State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). *See* Wis. JI-Criminal SM-34 (Rel. No. 37—4/99).

The sentencing court is not required to address all of the sentencing factors on the record. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Moreover, the court has considerable discretion in deciding what weight to give each factor it considers. *Harris,* 326 Wis. 2d 685, ¶ 28; *Larsen*, 141 Wis. 2d at 428; *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). *See State v. Patino*, 177 Wis. 2d 348, 385, 502 N.W.2d 601 (Ct. App. 1993); *Echols*, 175 Wis. 2d at 681-82. The court also has considerable discretion to determine the length of the sentence within the permissible statutory range. *Hanson v. State*, 48 Wis. 2d 203, 207, 179 N.W.2d 909 (1970).

> The trial court exhibits the essential discretion if it considers the nature of the particular crime (the degree of culpability) and the personality of the defendant and, in the process, weighs the interests of both society and the individual.

State v. Daniels, 117 Wis. 2d 9, 21, 343 N.W.2d 411 (Ct. App. 1983).

The sentencing court is to identify the most relevant factors and explain how the sentence imposed furthers the sentencing objectives. *Harris*, 326 Wis. 2d 685, ¶ 29. The court need only, however, provide an explanation for the "general range" of the sentence imposed within the statutory range, not for the precise number of years chosen, and need not explain why it decided against imposing a lesser sentence. *Davis,* 281 Wis. 2d 118, ¶ 26 (citing *Gallion,* 270 Wis. 2d 535, ¶¶ 49-50, 54-55).

Pertinent here, the trial court has "wide discretion" in deciding whether to impose consecutive sentences. *Davis*, 281 Wis. 2d 118, ¶ 27. *See* Wis. Stat. § 973.15(2)(a). The trial court properly exercises its discretion in imposing

consecutive sentences by considering the same factors it applies when determining the overall length of the sentence. *Berggren,* 320 Wis. 2d 209, ¶ 46.

B. The trial court properly exercised its discretion in imposing consecutive sentences that were still far short of the maximum.

The trial court considered a wide variety of relevant factors, including Masarik's complete lack of remorse or acceptance of responsibility as starkly demonstrated in his allocution (121:30-35), his bad character and criminal history, his need for rehabilitation, his risk of recidivism, his drug and alcohol abuse, the need to protect the public, the aggravated nature of these offenses,[7] and the need for punishment. The court also took into account the results of the presentence investigation, the remarks of the victim's relatives, and the arguments of counsel before arriving at its decision to impose consecutive sentences.

Although it is not entirely clear, Masarik seems to be arguing that the trial court could not impose consecutive sentences because first-degree reckless homicide and arson are somehow the "same offense." Masarik's brief at 36-37. His argument relies on a case involving a conviction for arson and felony murder. Masarik was not convicted of felony murder. He was convicted of first-degree reckless homicide and arson. Although it should have gone without saying, the trial court succinctly explained at sentencing why these are not the same offense and why consecutive sentences were appropriate:

[7] The aggravated nature of these offenses was established not just by the fact that Masarik started a house fire that killed Jansen, he did so in a crowded residential neighborhood where other houses and their occupants were at risk. The fire damaged a neighboring house and firefighters risked their own lives trying to rescue Jansen (116:19, 49-56; 119:39-40).

> The Court is imposing sentences on Counts 1 and 2 and making them consecutive, at least in terms of the reasoning for them being consecutive. They're separate and distinct acts.
>
> Obviously, while related, the arson to building, the damage caused and the risks created with respect, potentially, to anyone else who may have been in or around the scene, and that includes even the firefighters who arrived there thereafter, I think merit a consecutive sentence with respect to Count 2. So the sentences on Counts 1 and 2 will be consecutive.

(121:56-57).

Masarik's consecutive sentences totaling thirty-two years of initial confinement for first-degree reckless homicide and arson (121:59), are not unduly harsh because they were less than half the sixty-five year maximum initial confinement for these offenses (121:57). The consecutive sentences did not, "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas,* 70 Wis. 2d at 185. The trial court properly exercised its discretion.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin this 3rd day of December, 2015

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,785 words.

Dated this 3rd day of December, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of December, 2015.

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Daniel J. O'Brien
Assistant Attorney General