

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 95-1527-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

IDELLA ARRINGTON,

Defendant-Appellant,

ELIJAH ARRINGTON,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Idella Arrington appeals a judgment convicting her of first-degree reckless homicide, party to a crime, §§ 940.02(1) and 939.05, STATS., and physical abuse of a child, party to a crime, §§ 948.03(2)(a)5 and 939.05, STATS. Idella was sentenced to twenty years in prison with 230 days

credit on count one, and fifteen years consecutive on count two. Arrington's appellate counsel has filed a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32, STATS. The no merit discusses two potential issues: (1) whether the evidence sustains the conviction; and (2) whether conviction of the two counts constitutes double jeopardy. The no merit report concludes that neither issue has arguable merit.

Idella was provided a copy of the report and has filed a response raising several issues. She contends that: (1) her trial was unfair because she was convicted as a result of lies and hearsay; (2) she did not cause her granddaughter's death; (3) her granddaughter's injuries were caused by others; (4) she told the truth when she denied hurting her granddaughter; (5) the doctor testified that Idella did not know that her granddaughter was dead until he told her; and (6) she does not understand what is going on because she has not been involved in court before.

We have independently reviewed the record. We conclude that the no merit report correctly describes and analyzes the issues it identifies. We conclude that Idella's response together with our independent review of the record fail to disclose any potential issue of arguable merit. We affirm the judgment.

Idella and her husband, Elijah Arrington, were charged as parties to the crimes of reckless homicide and child abuse of Idella's granddaughter. A competency examination was ordered and performed at Winnebago Mental Health Institute by Victor Broekema, Ph.D., who concluded that Idella understood the charges against her and was competent to participate in her defense. After a jury trial, Arrington was found guilty as charged. Arrington appeals her conviction.

The victim, Christine Gillespie, was born July 9, 1991, and lived with Idella and Elijah. Christine was declared dead at Milwaukee's Children's Hospital on December 3, 1993. Paramedic Mary Ann Horseman testified that when she answered a call on December 2, 1993, she intubated Christine to help her breathe and observed many injuries, old and fresh, including chafing around wrists as if she had been tied up, marks on her stomach and legs that appeared like she had been hit, bruising and a fresh abrasion to the face. Police

officer Malcolm Blakely testified that Christine's grandfather, Elijah, told him that he had called 911 because Christine had stopped breathing and that she had fallen down three steps leading to the basement earlier that day.

Dr. Mark Mannenbach, an emergency room pediatrician and expert in the area of child abuse, was on duty on the night of December 2, 1993, when the paramedics brought Christine in. He observed multiple abrasions, bruises, swelling about the head, face, hands and older wounds to chest or torso. Injuries to her chest and abdomen were consistent with being struck with an electrical cord. Low body temperature, flexed arms, stiff lower extremities, clenched teeth and unresponsiveness were strong indicators of swelling in her brain. Blood in her urine indicated trauma to her torso. Christine also suffered from elevated liver enzymes, indicative of blunt abdominal trauma. She had an irregular heartbeat and markedly elevated blood pressure. A CAT scan showed new and old subdural bleeding. Her head injuries were not consistent with a simple fall, but were consistent with repeated blows to the head or shaking. The swelling to her brain resulted in her death the next day. Based upon the nature of her injuries, Mannenbach believed that Christine "was most definitely abused."

Dr. Jeffrey Jentzen, a forensic pathologist and the Milwaukee Medical Examiner, performed Christine's autopsy. He concluded that she died as a result of complications from battered children's syndrome. Among his findings were numerous bruises, scars and wounds about the head, abdomen, legs and arms. Bilateral retinal hemorrhages indicated shaken infant syndrome. An examination of the brain showed chronic subdural hemorrhage, two to four weeks old, as well as recent hemorrhage. The brain tissue connecting the two hemispheres was torn. Jentzen did not believe the injuries were consistent with a fall. He concluded: "The injuries that I observed ... would only have been caused by a fall ... between two to three stories in height, and ... not ... with a simple fall off, for instance, the height of a table" Dr. Stephen Lazoritz, medical director of the Child Protection Center at Children's Hospital of Wisconsin, assistant professor in pediatrics at the Medical College of Wisconsin and head of the Child Protection Unit at the Medical College of Wisconsin, testified that the symmetrical patterns of Christine's abrasions were not consistent with a fall.

In Idella's statement to the police, she stated that on December 2, 1993, she had a bad headache, and "[t]hat's when I lost it. I picked Christine up and began to shake her hard.... Her head snapped back and forth. When I was done I saw she was bleeding from the mouth." When Idella testified in her defense at trial, she denied making this statement to the police and denied hurting her granddaughter.

A family member, Marjorie Harrington, testified that the Arringtons came to stay at her house on December 2, 1993. After Harrington returned from work at 4 p.m., Idella was in the living room with Christine when Harrington heard the sound of the baby flop to the living room floor. Idella took the baby into the bedroom and Harrington heard sounds of Idella slapping the bed, saying "lay down, go to sleep." Harrington then left for work. She never saw Idella strike the child.

Olisa Harrington, Marjorie's daughter, testified that on December 2, 1993, she saw Idella hit the baby with her fist. She also testified that she saw Idella shake the baby. She further testified that Idella was on the phone and said "you come home or I'm going to drown this baby in the tub." Idella put water in the bathtub, "Then she put the baby in the tub. She drowned the baby." Olisa also testified that when Elijah came home, he pulled Idella out of the way and took the wet clothes off the baby "cuz the baby can't breathe, and then Elijah, he trying to pat the baby."

A neighbor, Sandra Harrington, testified that she visited in the fall of 1993 and saw Idella take the child in the bathroom and heard the sound of slapping. She also saw Idella take a belt and take the child out onto the porch. An acquaintance testified that in the fall of 1993, she saw Christine with Idella and Elijah and the child had a wound on her forehead, and on a later occasion, had a black eye. The friend was told that Christine was clumsy and fell a lot. A cousin and the cousin's sixteen-year-old daughter testified that when the Arringtons were staying at their house, the Arringtons left the house and the sixteen-year-old daughter found Christine unattended in a bedroom closet.

1. Sufficiency of the evidence.

The record discloses no arguable merit based upon sufficiency of the evidence. First-degree reckless homicide is described as: "Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony." Section 940.02, STATS. Physical abuse of a child is defined as: "Whoever intentionally causes great bodily harm to a child is guilty of a Class C felony." Section 948.03(2), STATS. If the person who violates this section is the person responsible for the child's welfare, the term of imprisonment may be increased by not more than five years. Section 948.03(5), STATS.

An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). On review of jury findings of fact, viewing the evidence most favorably to the state and the conviction, we ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. *State v. Oimen*, 184 Wis.2d 423, 436, 516 N.W.2d 399, 405 (1994); *State v. Alles*, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982).

Here, overwhelming evidence supports the verdict. In addition to eyewitness testimony and medical opinion and autopsy results, Idella's statement to the officers admitted that when she chastised Christine, she would sometimes go overboard. She admitted to the officers that she shook Christine hard, causing her head to snap back and forth. Although at trial Idella denied making these statements, and testified that she did not hurt her granddaughter, the jury, not the appellate court, resolves conflicts in the testimony and determines its weight and credibility. See *State v. Fettig*, 172 Wis.2d 428, 448, 493 N.W.2d 254, 262 (Ct. App. 1992). Any challenge to the sufficiency of the evidence is without arguable merit.

2. Double jeopardy.

The record reveals no issue of arguable merit with respect to double jeopardy. Dr. Lazoritz testified that "clearly and unequivocally, she had been the victim of child abuse, both at this instance and in the past, also" and

"[b]ased on her old and new subdural hematomas, retinal hemorrhages, old and new cutaneous injuries, there could be no other diagnosis ... but the fact that she had been abused both at the present time as of December 2 and in the past also."

Because the offenses are separated in time and are distinct in law, no arguably meritorious double jeopardy issue is raised. See *State v. Kruzycki*, 192 Wis.2d 509, 521-22, 531 N.W.2d 429, 434 (Ct. App. 1995); *State v. Harris*, 190 Wis.2d 718, 722, 528 N.W.2d 7, 8 (Ct. App. 1994).

3. Response to no merit.

Idella's first five issues challenge the weight and sufficiency of the evidence and the credibility of witnesses. These issues have been discussed in Section 1 in which we concluded that there is no arguable merit to a challenge based upon those grounds.

Next, Idella contends that she does not understand what is going on because she has never been involved in court proceedings before. Although Idella may have never been in court before, her testimony at trial discloses that she very clearly understood the issues in the case and was able to testify in her own defense. Also, the record shows that a competency examination was ordered and the psychologist discovered no psychological reason that would impair her ability to participate in her defense. The record discloses that Idella was represented by counsel throughout the proceedings. No arguable merit is shown based upon Idella's lack of understanding.

4. Conclusion.

We are satisfied by our independent review of the record that there are no other issues of arguable merit that Idella could raise on appeal. Therefore, we affirm the judgment of conviction. Attorney Bernard Goldstein is relieved of any further obligation representation of Idella in this appeal.

By the Court.--Judgment affirmed.