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DISTRICT IV

August 27, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2011AP1897-CRNM State of Wisconsin v. Porfirio Olivas (L.C. #2008CF1836)

Before Lundsten, Higginbotham and Sherman, JJ.

Porfirio Olivas appeals a judgment convicting him, following a jury trial, of multiple counts of felony child abuse. Attorney Jon LaMendola has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses Olivas'

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

contentions that his wife testified falsely that the victim should have been subjected to a psychological examination, that Olivas' statement to police was unknowingly made due to a language barrier, and that Olivas was not advised of his right to request a substitution of judge. Olivas was sent a copy of the report, and has filed a response further contending that the state withheld evidence during discovery, that counsel provided ineffective assistance in multiple respects, that the prosecutor threatened a witness and made inappropriate comments during closing arguments, that other acts evidence should have been excluded, and that Olivas discovered after trial that his wife had coached the children. Counsel filed a supplement to his no-merit report addressing the additional issues identified by Olivas. Upon reviewing the entire record, as well as the no-merit report, response and supplement, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

Olivas was convicted of fifteen counts of child abuse-intentionally causing harm, two of which included an enhancer for use of a dangerous weapon; one count of child abuse—failing to prevent bodily harm; four counts of child abuse with high probability of causing great harm, two of which were enhanced for use of a dangerous weapon; and one count of child abuse-recklessly causing harm. When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1).

The primary victim testified about a series of abusive incidents that occurred over a period of two years, including that Olivas had: (1) twisted her arm behind her back; (2) punched her in the stomach; (3) punched her in the side or back; (4) struck her on the buttocks with a belt; (5) struck her on the back with a belt; (6) struck her in the face with his hand; (7) struck her body with a clothes hanger; (8) struck her hand with a clothes hanger; (9) kicked her in the torso; (10) refused to intervene or take her to the hospital after her mother had beaten her; (11) strangled her with a belt; (12) struck her body with a metal tube; (13) struck her legs with a metal tube; (14) restrained and confined her in two plastic bags until she nearly suffocated; (15) tied her up and left her in a closet for hours; (16) burned her leg and foot with a lighter; (17) burned her vagina with a lighter; (18) sprayed paint in her mouth; (19) strangled and lifted her off the ground by her neck; (20) pressed a metal tube against her neck until she lost consciousness; and (21) broke her brother's leg by throwing him across the room.

The victim's testimony was sufficient in and of itself to satisfy the elements of each of the twenty-one counts of conviction. *See* WIS. STAT. §§ 948.03(2)(b) (child abuse—intentionally causing harm); 948.03(4)(b) (child abuse—failing to prevent bodily harm); 948.03(2)(c) (child abuse—high probability of great bodily harm); 948.03(3)(b) (child abuse—recklessly causing harm); 939.63(1)(b) (use of a dangerous weapon). As we will discuss further below, the testimony was also corroborated by medical evidence and testimony from the victim's mother, Minerva Lopez, and one of her siblings.

Assistance of Trial Counsel

Olivas complains that trial counsel failed to advise him of his right to judicial substitution; to investigate Lopez's mental state at the time she made her statement to police; to

consult a mental health expert on the effect of medications Lopez was taking; to present testimony from a doctor with whom Olivas had discussed changes in his wife's behavior; to speak with and present testimony from the children; and to move to suppress a photograph of Olivas' belt.

Olivas' contention that he was unaware of his right to request a substitution of judge is undermined by the record, which reveals that the right was mentioned in open court at the preliminary hearing. Moreover, Olivas has not asserted that he ever asked his attorney about a judicial substitution, nor explained why he would have been likely to do so if counsel had discussed the matter with him.

As we noted above, Lopez's mental state at the time she gave her statement to police was immaterial since she provided essentially the same testimony at trial, and it was that testimony upon which the jury could rely. In any event, Lopez acknowledged on the stand that she herself had inflicted some of the abuse upon the victim, and Olivas acknowledged in his own testimony that he had struck the victim with his belt on multiple occasions, slapped her on the face once, kicked her many times, twisted her arm once, lifted her by the neck three times, punched her in the stomach two or three times, and hit her with a coat hanger on two occasions—all of which he characterized as disciplinary in nature. Expert testimony as to why Lopez inflicted abuse would not have been probative as to which specific acts of abuse were committed by Lopez and which by Olivas.

Regarding the photograph of the belt, the police did not need a warrant since the belt was collected during an inventory search incident to Olivas' arrest. In any event, suppression of the

photograph would not have had any impact on the outcome of the trial since Olivas did not dispute that he used the belt on the victim.

As to interviewing the children, Olivas has again failed to present affidavits stating what specific testimony interviews would have revealed that would have been helpful to the defense. Olivas himself testified that his wife coached the children to blame him for the most serious acts of abuse, and he does not explain why or how interviewing the children would have changed their account, or even assert that they have in fact changed their account.

With regard to the doctor with whom Olivas now claims that he discussed his wife's condition, he could have testified to that himself. Instead, his explanation for why he did not alert authorities to the abuse committed by his wife was that he did not realize the seriousness of his daughter's injuries. Since discussing the abuse with a third party would have been inconsistent with the defense that Olivas was unaware of any abuse beyond discipline, counsel did not perform deficiently for failing to pursue that line of questioning.

Olivas also contends counsel should have obtained an independent psychological evaluation to present expert testimony that the victim's behavior was inconsistent with that of other sexual assault victims. However, the State agreed prior to trial that it would not attempt to elicit testimony from its own expert that the victim's behavior was consistent with that of other sexual assault victims. *See* ***State v. Jensen***, 147 Wis. 2d 240, 256, 243 N.W.2d 913 (1988).

Finally, Olivas contends that counsel should have filed a suppression motion challenging his statement to the police on the ground that he did not understand English well enough to knowingly waive his rights. However, Olivas himself signed a stipulation in the circuit court that his statements to police were knowingly and voluntarily entered.

Prosecutorial Misconduct

Olivas claims that Lopez told him after the trial that she was in an altered mental state due to drugs when she gave her statement to police, and that when she later attempted to recant her statement, the police intimidated her and told her that they would not terminate her parental rights if she agreed to testify against Olivas. Olivas argues that the State's failure to disclose Lopez's mental state or promises made to induce her testimony constitutes a ***Brady*** violation, while counsel frames the issue as one of newly discovered evidence. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963) (state must disclose evidence favorable to the defense); ***United States v. Bagley***, 473 U.S. 667, 676 (1985) (***Brady*** encompasses impeachment evidence). The issue does not have merit under either framework.

The first problem with Olivas' claims about Lopez's testimony is that they are not supported by an affidavit from Lopez affirming that she is now recanting her testimony, or explaining what different testimony she would have given absent the alleged favorable treatment offered by the State. Even assuming that Lopez would testify in conformity with Olivas' own affidavits,[2] the recantation is not supported by other newly discovered evidence or guarantees of trustworthiness. *See* ***State v. McCallum***, 208 Wis. 2d 463, 477-78, 561 N.W.2d 707 (1997) (recantations of sworn testimony are inherently untrustworthy, and must therefore be supported by additional evidence).

[2] Olivas claims that Lopez indicated her desire to recant on the record in another case, but that he does not have access to the transcripts.

As to the State's alleged failure to disclose Lopez's mental state at the time she gave her statement to police, we conclude that the information was immaterial because Lopez testified at trial, and her testimony was consistent with the statement she had previously given to police. As to the State's alleged failure to disclose that it had made promises regarding termination of parental rights, evidence that serves only to impeach the credibility of witnesses who testified at trial is insufficient to warrant a new trial as a matter of due process, because it does not in and of itself create a reasonable probability of a different result. *See* ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

Olivas also complains that the prosecutor referred to him as a "monster" during closing argument. That is a mischaracterization of the prosecutor's remark. The prosecutor was responding to a hypothetical question posed by the defense: if Olivas was such a monster, why would the victim have come to sit by him on the couch? In any event, given the overwhelming evidence in this case, we are not persuaded the remark influenced the outcome of the trial.

Olivas next contends that the prosecutor acted improperly in joining the charges against him, allowing the strength of the evidence on some charges to overcome the weakness on others and ignoring the "mitigating evidence" that Lopez had committed some of the abuse. As we have discussed above, however, the victim's testimony was sufficient to convict Olivas on each and every act of abuse that was attributed to him. Moreover, joinder was proper given that the charges arose out of a continuing course of conduct and the same evidence would have been admissible in each case if the matters had been tried separately.

Other Acts Evidence

Olivas claims that the circuit court erroneously exercised its discretion by failing to conduct a ***Sullivan*** analysis regarding other acts evidence or to provide the jury with a limiting instruction. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 791, 576 N.W.2d 30 (1998). Although Olivas does not identify what other acts evidence he is referring to, we presume this argument relates to a defense motion in limine to preclude the introduction of any acts of abuse other than those charged. It was not necessary for the court to conduct a ***Sullivan*** analysis or provide a jury instruction, however, because the State agreed *not* to introduce any such other acts evidence. In other words, the defense won the motion.

Newly discovered evidence

Olivas claims that Lopez told him after the trial that she had coached the children on their testimony. Once again, he has failed to submit any affidavit from Lopez affirming that she would testify to that, or to provide any other corroborating evidence or guarantee of reliability. Moreover, Olivas himself testified that his wife had coached the children to blame him for the most serious acts of abuse. Therefore, the allegation of coaching does not qualify as newly discovered evidence. Additionally, as counsel notes, Olivas' own confession undermines his assertion that Lopez's testimony was false.

Sentences

A challenge to the defendant's sentences would also lack arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence

complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record here shows that the defendant was afforded the opportunity to comment on the PSI and to address the court prior to sentencing. The trial court considered the standard sentencing factors and explained their application to this case in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court considered the gravity of the offense to be the most important sentencing factor, explaining that the horrific injuries and starvation inflicted on Olivas' daughter—which had resulted in her looking like a concentration camp survivor suffering some permanent disfigurement, and would almost certainly have ended in the girl's death without intervention—were shocking and appropriately described as torture. As to the defendant's character, the court found little of redeeming value and little chance of rehabilitation, given Olivas' criminal record, his limited work history, and his absolute refusal to take responsibility for his actions, blaming not only his wife but his daughter for lying. The court then sentenced the defendant to consecutive terms of one year of initial confinement and two years of extended supervision on Counts 1-4, 6-11, 13-14, and 18-21. It imposed sentences of three years of initial confinement and four years of extended supervision on Counts 12, 17, 23 and 24, to be served concurrent to each other, but consecutive to the previously mentioned counts. And finally, the court imposed a term of one year of initial confinement and one year of extended supervision on Count 25, to be served consecutive to all other counts. The court awarded 464 days of sentence credit, as stipulated by the parties, and determined that Olivas would not be eligible for the Challenge Incarceration or Earned Release programs or for a risk reduction sentence.

The sentences imposed were within the applicable penalty ranges, and were not so excessive or unduly harsh as to shock the conscience. *See* WIS. STAT. §§ 948.03(2)(b)

(classifying child abuse—intentionally causing harm as Class H felony); 948.03(4)(b) (classifying child abuse—failing to prevent bodily harm as Class H felony); 948.03(2)(c) (classifying child abuse—high probability of great bodily harm as a Class F felony); 948.03(3)(b) (classifying child abuse—recklessly causing harm as a Class I felony); and 973.01(b) and (d) (setting forth maximum confinement and supervision terms for the various classes of felonies).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here amounted to less than a third of the maximum initial confinement that could have been imposed, particularly taking into account the concurrent sentences on the most serious felonies. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted) (setting forth test for evaluating whether sentences are unduly harsh). Additionally, as the court noted, Olivas was unlikely to actually serve the extended supervision time because he would likely be deported upon his release from prison.

Assistance of Postconviction/Appellate Counsel

Olivas alleges that postconviction/appellate counsel provided ineffective assistance during the no-merit proceeding by failing to obtain a translator for their meeting and failing to address all of the potential issues for appeal in his no-merit report. However, we have already explained why neither the record nor Olivas' submissions reveal any issues of arguable merit. Therefore, we do not need to address whether it was deficient performance for counsel to fail to obtain a translator or address any additional issues because Olivas could not demonstrate prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 692 (1984).

Conclusion

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of WIS. STAT. RULE 809.32 and ***Anders***.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jon LaMendola is relieved of any further representation of Porfirio Olivas in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals