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July 14, 2014

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

2012AP1181-CRNM State of Wisconsin v. Timothy Melvin Sloan (L.C. #2009CF328)
2012AP1182-CRNM State of Wisconsin v. Timothy Melvin Sloan (L.C. #2009CF425)

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

Timothy Sloan appeals judgments convicting him, after a jury trial, of one count of physical abuse of a child and one count of disorderly conduct, as well as one count of felony bail jumping entered after a no-contest plea. *See* WIS. STAT. §§ 948.03(2)(b), 947.01, 946.49(1)(b) (2007-08).[1] Attorney Faun Moses has filed no-merit reports in these consolidated cases, seeking

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

to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; *see also* ***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 reports address the sufficiency of the evidence, the court's exercise of discretion in its pretrial and evidentiary rulings, the validity of Sloan's plea, and the disposition imposed by the circuit court. Sloan was sent a copy of the reports, but has not filed any responses. Upon reviewing the entire record, as well as the no-merit reports, we conclude that there are no arguably meritorious appellate issues.

Pretrial Issues

Sloan's trial attorney filed a motion to withdraw prior to trial. A motion to withdraw as counsel is addressed to the sound discretion of the circuit court. *See* ***State v. Scarbrough***, 55 Wis. 2d 181, 186, 197 N.W.2d 790 (1972). The circuit court held a hearing on the motion, at which Sloan addressed the court individually and through his attorney. Sloan's wife, Linda, also addressed the court at the hearing. After hearing arguments, the court denied the motion. The court noted that the court previously had allowed four substitutions of counsel, which had caused significant delays in the proceedings, and that it was in the best interest of the child involved in the case not to delay the proceedings further. There was no allegation that Sloan's counsel was in any way incompetent or unprepared; rather, Sloan stated that he disagreed with counsel regarding what defenses to pursue. We agree with counsel's analysis that there would be no merit to pursuing a challenge to the circuit court's exercise of discretion in denying the motion to withdraw.

We also agree with counsel's assessment that there would be no arguable merit to a claim that Sloan was denied an impartial jury. After voir dire, Sloan made a motion to excuse a

potential juror, Jeffrey Selje, for cause. Selje had stated that his son was killed as the result of a drunk driving accident and that he could never really put that out of his mind. The court denied Sloan's motion to excuse Selje from the jury, stating that it was satisfied that Selje could be fair and impartial. The court reasoned that this was not an alcohol or driving-related case and that, when asked if he could be fair and impartial, Selje had unequivocally answered yes. There is no indication in the record that the circuit court's determination regarding Selje's ability to be fair and impartial was clearly erroneous and, thus, any argument to that effect would be without merit on appeal. *See* ***State v. Faucher***, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999) (we will uphold the circuit court's factual determination regarding whether a juror exhibited subjective bias unless that determination is clearly erroneous).

Evidentiary Rulings

On the morning of the first day of trial, the court heard testimony regarding a motion filed by Sloan to suppress statements he made to police officers on the day of the incident. When we review a suppression motion, we will defer to the circuit court's credibility determinations and will uphold its findings of fact unless those findings are clearly erroneous. *See* ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). After hearing testimony from Sloan and the two police officers who interviewed him, the court granted the motion to suppress Sloan's statements, on the basis that the interview amounted to custodial interrogation and Sloan was not given ***Miranda***[2] warnings. The court found that the statements had been voluntary, but that they were inadmissible due to the lack of ***Miranda*** warnings.

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

However, the court advised Sloan to be aware that the statements could potentially still be admitted as impeachment or rebuttal evidence, if Sloan were to testify at trial inconsistently with the statements that he made at the time of the investigation.

After the state had presented its case, and while the court was discussing with Sloan's counsel on the record whether Sloan planned to testify, the court again cautioned Sloan that his prior statements to police could potentially be used as impeachment evidence. The court asked Sloan if he understood, and, after he conferred with his counsel, Sloan confirmed that he did.

Sloan did elect to testify at trial. The court conducted a proper colloquy with Sloan about his waiver of the right not to testify. During his testimony, Sloan made statements about what he said to the police officers at his home on August 10, 2009. He stated he told police that the refrigerator had a manufacturer's defect and that was the reason the handle broke. Sloan further testified that he told police that he and the alleged child victim "fell down." These statements were inconsistent with what police officers Larry Bielke and Jason Lichucki said they had been told by Sloan. Bielke and Lichucki were then called again by the state for re-direct examination regarding what Sloan had told them on the day of the incident. We agree with counsel's assessment that the circuit court properly permitted the police officers to testify about Sloan's statements to them, since the statements were voluntarily given and were offered for the limited purposes of impeachment and rebuttal. *See* ***Oregon v. Elstad***, 470 U.S. 298, 307–08 (1985).

We have reviewed the other evidentiary rulings made by the circuit court, including those discussed in the no-merit report, and we agree with counsel's assessment that there would be no arguably meritorious basis upon which to challenge those rulings on appeal.

Sufficiency Of The Evidence

The no-merit report filed in 2012AP1181-CRNM addresses the issue of whether there was sufficient evidence to sustain the verdicts for physical abuse of a child and disorderly conduct. 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)).

In order to find Sloan guilty of physical abuse of a child, the state needed to prove that Sloan intentionally caused bodily harm to the victim. *See* WIS. STAT. § 948.03(2)(b) (2007-08). In order to find Sloan guilty of disorderly conduct, the state needed to prove that Sloan engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct and that his conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance. *See* WIS. STAT. § 947.01 (2007-08).

At trial, the state presented testimony from Sloan's wife, Linda, and from the child victim. Linda testified that, on August 10, 2009, Sloan became upset about not being able to find food in the refrigerator. Sloan yelled, threw containers of food onto the floor, backed her into a corner, put his hands around her neck, and stomped on her foot.

The child victim testified that he came into the house and saw Sloan stomp on Linda's foot. The child tried to get Sloan away from Linda. The child testified that Sloan pulled the handle off the refrigerator, came after him with it, and hit him on the back with it. The child further testified that the handle hurt him and left a scar. In addition to the child's testimony

about his injury, the state offered the testimony of child protective services assessment worker Leland Potter, who testified that he observed marks on the child's lower back when he examined the child a few days after the incident. Both Linda and the child testified that the child's date of birth rendered him 10 years old at the time of the incident.

Police officers Larry Bielke and Jason Lichucki also testified on behalf of the state. Both were dispatched to the Sloan residence on August 10, 2009. In the kitchen of the Sloan home, Lichucki observed food containers on the kitchen floor and the broken refrigerator handle. Lichucki also observed a red mark on the child's back and took a picture of it that was shown to the jury. Lichucki spoke with Sloan, Linda, and the child about the incident.

In light of the evidence discussed above, we agree with counsel that there would be no arguable merit on appeal to challenging the sufficiency of the evidence to support the jury's verdicts.

Plea

Sloan was released on a signature bond that stated he could not leave the state without written permission of the court. In October 2009, police received information from Sloan's ex-sister-in-law that Sloan was in Florida driving a U-Haul. Officers verified with U-Haul that Sloan had rented the vehicle and received roadside assistance for a break-down that occurred in Memphis, Tennessee. Sloan was charged with two counts of bail jumping. He entered into a plea agreement, pursuant to which he pled no contest to one count of bail jumping, the other count was dismissed, and another case was dismissed in its entirety. The court accepted the joint sentencing recommendation and placed Sloan on probation for a total of four years on all counts.

We see no arguable basis for withdrawal of Sloan's plea on the bail jumping charge. The no-merit report filed in 2012AP1182-CRNM addresses the potential issue of whether Sloan's plea was freely, voluntarily, and knowingly entered. This court is satisfied that the no-merit report filed in 2012AP1182-CRNM properly analyzes the issue as without merit, and this court will not discuss it further.

Disposition

The jury found Sloan guilty of one count of physical abuse of a child and one count of disorderly conduct. Sloan was also found guilty, based on his no contest plea, of one count of bail jumping. The court followed the joint sentencing recommendation to withhold sentence and placed Sloan on probation for a total of four years on all three counts. The disposition of four years of probation, sentence withheld, was well within the maximum penalty range permissible by law. *See* WIS. STAT. §§ 948.03(2)(b) (classifying physical abuse of a child as a Class H felony); 947.01 (classifying disorderly conduct as a Class B misdemeanor); 946.49(1)(b) (classifying the type of bail jumping here as a Class H felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony); 939.51(3)(b) (providing maximum imprisonment of 90 days for a Class B misdemeanor); and 973.09 (dealing with imposition of probation) (all 2007-08 Stats.).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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 ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Faun Moses is relieved of any further representation of Timothy Sloan in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals