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February 11, 2015

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

2014AP2186-CRNM State of Wisconsin v. Jacqueline N. Williams (L.C. #2013CF18)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Jacqueline N. Williams appeals a judgment convicting her of two counts of child abuse—recklessly causing harm, in violation of WIS. STAT. § 948.03(3)(b) (2011-12).[1] Williams's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Williams received a copy of the report and filed a response. Counsel indicated he saw no need to file a supplemental report. Upon consideration of the no-merit report and response and an independent review of the record as mandated by ***Anders*** and

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

RULE 809.32, we conclude that the judgment may be summarily affirmed, as there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We therefore affirm the judgment, accept the no-merit report, and relieve Attorney Gregory Bates of further representing Williams in this matter.

Police responded after Williams's twelve-year-old son telephoned his father, Williams's ex-husband, and told him that Williams was striking him and his fourteen-year-old sister with a leather belt and that they were afraid. Williams was arrested and charged with two counts of child abuse—recklessly causing great bodily harm. The complaint was amended to charge two counts of child abuse—recklessly causing harm. A jury found Williams guilty. The court ordered three years' probation on each count, to be served concurrently, and ordered fifteen days' conditional jail time. This no-merit appeal followed.

The no-merit report first considers whether sufficient evidence supported the jury verdict. We affirm a verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The jury decides credibility issues, weighs the evidence, and resolves conflicts in the testimony. ***State v. Gomez***, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993).

Williams's defense was that she exercised her legal privilege to reasonably discipline her children by use of physical force. *See* WIS. STAT. § 939.45(5). Williams's children testified that she woke them at 5:00 a.m. to clean the house because they had done an inadequate job the evening before; that, when they disagreed with Williams's criticism of coats their father had bought for them, she grew "really angry" at them for being disrespectful and used a leather belt

on their hands and forearms and slapped her son "so hard that he fell to the floor"; and that when her daughter began screaming and tried to intervene, Williams grabbed her by the hair, called her a "bitch" and a "whore," forced her outside into the car, and, so the neighbors would not hear her screaming, drove to a park to give her "a whooping," meaning that Williams used the belt on the girl's hands, lower back, and "bottom."

A responding police officer testified that he observed a six-to-eight-inch linear mark on the son's forearm, a picture of which was shown to the jury, and discoloration on the daughter's hands and wrist; that the discoloration resolved by the time he could photograph it;[2] and that both children reported feeling pain.

Williams testified that she woke the children, who recently had visited their father, with an "I love you" and began making breakfast, but that they "were almost programmed to come home and not listen to mama that day. It was as if they were purposefully trying to make me mad and just explode." As was its right, the jury accepted the children's and the officer's testimony as more credible than Williams's. There is no arguable merit to this issue.

The report also addresses several points of concern that Williams identified to counsel. We agree with counsel's conclusion that none have any arguable merit.

The first is whether trial counsel should have objected to the prosecutor's "overly zealous" demonstrative use of the belt at trial. One of the elements the State had to prove to show a violation of WIS. STAT. § 948.03(3)(b) was that Williams recklessly caused bodily harm,

[2] The daughter testified that her heavy sweater prevented the "whoopings" from leaving marks.

i.e., that her conduct created a situation of unreasonable risk of harm to the children. *See* WIS JI—CRIMINAL 2112. In her closing argument, the prosecutor argued that Williams could not realize how hard she hit the children because she did not absorb the force of the belt. To demonstrate, the prosecutor "whacked [the belt] as hard as [she] could" against a podium and stated that even with that amount of force she felt nothing in her own hand. She did not contend that Williams used similar force against the children.

The second issue is Williams's claim that the videotape from the police officer's body-worn camera should have been entered into evidence because it would have shown a lack of injury to the children. The prosecutor indicated that the videotape was not introduced because some of what was on it was inadmissible. In any event, the children and the police officer testified about the incident and resulting pain and injuries.

The third issue is whether the testimony of Williams's boyfriend was unfairly limited. A trial court has wide discretion in determining whether to admit or exclude evidence; we thus will reverse such determinations only when the trial court has erroneously exercised its discretion. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). Williams apparently wanted her boyfriend to testify about what she had told him occurred and that he believed her version of events. As he did not witness the events at issue, his testimony in that regard would have been hearsay. "The trial court properly exercises its discretion if its determination is made according to accepted legal standards and if it is in accordance with the facts on the record." ***Id.***

The fourth issue alleges juror bias. Several jurors voiced concerns about a parent using a belt to discipline. Those who expressed reservations about their ability to remain impartial were excused. The juror about whom Williams complains stated that "[a]t this point, I hear belt and

child … [and] unless that belt was used to hold up [the child's] pants … the way I'm thinking already *without hearing anything* is that it's not right" (emphasis added). The juror stated unequivocally, however, that he "could absolutely listen," would hold the State to its burden of proof, and would not convict Williams if the State did not prove its case beyond a reasonable doubt. There is no arguable merit to a claim that the juror was either subjectively or objectively biased. *See* ***State v. Faucher***, 227 Wis. 2d 700, 717-18, 596 N.W.2d 770 (1999).

The fifth issue Williams raised with appellate counsel is that the complaint was filed just six days before a child-support hearing was scheduled to occur in Milwaukee county family court. The prosecutor holds considerable discretion in the handling of a prosecution. ***State v. Johnson***, 74 Wis. 2d 169, 173, 246 N.W.2d 503 (1976). The criminal complaint was filed the day after the police were called to investigate. Nothing in the record suggests that the prosecutor was even aware that there was a pending hearing to review a family court commissioner's child support order in another county. No issue of arguable merit could arise.

Williams raises additional issues in her response to the no-merit. None have arguable merit. She first contends that trial counsel was ineffective for failing to introduce letters of support on her behalf at trial or medical expert testimony to establish that the mark on her son's arm came from being hit with a belt, rather than from his participation in football and wrestling.

One claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense, ***State v. Franklin***, 2001 WI 104, ¶11, 245 Wis. 2d 582, 629 N.W.2d 289 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)), and must overcome the strong presumption that counsel acted reasonably within professional norms, *see* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A

claim of ineffective assistance of trial counsel first must be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). On this record, however, we see no issue of arguable merit relating to the effectiveness of trial counsel's performance.

The letters of support Williams includes with her response do not speak to whether she committed the crimes charged. Expert testimony is required only if the issue to be decided by the trier of fact is beyond the general knowledge and experience of the average juror. ***State v. Whitaker***, 167 Wis. 2d 247, 255, 481 N.W.2d 649 (Ct. App. 1992). The jury saw the belt and a photograph of the boy's arm. It was allowed to infer causation.

Williams also challenges her ex-husband's testimony that this episode of using the belt on the children was worse than other times of which he was aware. She suggests his failure to take the children to a doctor or emergency room undercuts his testimony. As noted, it was for the jury to decide credibility and weigh the evidence. ***Gomez***, 179 Wis. 2d at 404.

Next, Williams seeks relief from the no-contact order with her children. This court cannot give her the requested relief. The trial court ordered her to comply with the family court in that regard. It ordered no contact with the children, who have a guardian ad litem, unless approved by her agent, with the children having a voice in the decision.

Williams last asserts that she was accused of being noncompliant with the PSI writer when it was the prosecutor who "persua[ded]" the PSI writer with an incorrect telephone number and address for Williams. She intimates that such "persuasive[ness]" led the jury to convict her. There is nothing to this claim.

The only potential issue our independent review has revealed is whether the trial court properly exercised its sentencing discretion.[3] The court withheld sentence, ordered three years' probation on each count, to be served concurrently, and ordered fifteen days' conditional jail time. We conclude that no issue of arguable appellate merit could be raised.

Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court must provide a "rational and explainable basis" for the sentence imposed to allow this court to ensure that discretion in fact was exercised. ***Id.***, ¶¶39, 76 (citation omitted). After considering whether confinement was necessary to protect the public, Williams's correctional treatment needs were available only in confinement, and probation would unduly depreciate the seriousness of the offense, the court deemed probation, plus the conditional jail time, a proper disposition. *See* ***id.***, ¶44. Williams faced seven years' imprisonment and a $20,000 fine. The sentence imposed is not so excessive or unusual so as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

[3] A no-merit report must address whether the sentence imposed represents an erroneous exercise of discretion. It also should contain record cites.

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of further representing Williams in this matter.

Diane M. Fremgen
Clerk of Court of Appeals