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DISTRICT IV

May 8, 2015

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

2013AP2798-CRNM State of Wisconsin v. Azuzena Vasquez (L.C. # 2011CF898)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Attorney Michelle Velasquez, appointed counsel for Azuzena Vasquez, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the sufficiency of the evidence to support the jury verdict; (2) potential procedural issues; and (3) the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

sentence imposed by the circuit court. Vasquez has not responded to the no-merit report.² Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Following a jury trial, Vasquez was convicted of intentionally causing great bodily harm to a child.³ The court sentenced Vasquez to eight years of initial confinement and six years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the conviction. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force 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 (1990).

We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The State presented evidence at trial that the

² After counsel filed the no-merit report, counsel moved to extend the time for Vasquez to file a no-merit response, explaining that Vasquez is unable to speak, read, or write in English, and unable to read or write in Spanish. Counsel informed us that she explained the substance of the no-merit report to Vasquez in Spanish and that Vasquez requested additional time to prepare a response. We extended the time for Vasquez to file a no-merit response, but we have not received a response from Vasquez, either personally or through counsel.

³ Vasquez was convicted following a second trial after Vasquez's first trial ended in a hung jury. When the jury at the first trial informed the court for the second time that it was unable to agree, the State moved for a mistrial. Defense counsel agreed that the jury had sufficient time to deliberate and had been unable to agree. While the no-merit report does not address whether there would be arguable merit to any claims based on the retrial, we have considered this issue and determined that it lacks arguable merit.

three-year-old victim sustained serious burn injuries consistent with forceful immersion in hot water while in Vasquez's care. The evidence presented by the State, if deemed credible by the jury, was sufficient to sustain the conviction.

Next, the no-merit report addresses whether there would be arguable merit to a claim of procedural error. Counsel notes that there were two instances of possible contact between jurors and witnesses discussed between the circuit court and the parties on the record. First, the circuit court acknowledged a report that someone, possibly a juror, had said "hi" to the victim. After a discussion, the court and counsel decided the best course was for the court to remind the jurors not to have any communication with witnesses, and the court did so. Second, the court was advised that a police officer who had testified for the State spoke to jurors by an elevator outside the courtroom, commenting that it was time for a coffee break, and a juror responded that the jurors were not supposed to speak to the witness. After a discussion, the court and counsel agreed that the court would inform the jury that it was aware of what had happened and ask if it affected how any of the jurors viewed the evidence. The court made that inquiry of the jurors, and none responded affirmatively. We agree with counsel's assessment that a postconviction claim based on contact between the jurors and witnesses would lack arguable merit.

Counsel also notes that there was no objection raised during voir dire, and that during the trial the court overruled one hearsay objection by the defense. We agree with counsel's assessment that there would be no arguable merit to any issues arising from jury voir dire, and that the court properly overruled the hearsay objection made during trial. In overruling the hearsay objection, the court reasoned that the testimony explained the witness's actions, and the court advised the jury not to consider the testimony to establish the truth of the statement.

Counsel addresses the circuit court's decision to submit a lesser-included offense over the defense's objection, and notes that Vasquez was not convicted of the lesser-included offense. We agree with counsel's assessment that any claim on this issue would lack arguable merit. Additionally, we agree with counsel's assessment that there would be no arguable merit to a postconviction claim based on closing arguments.

Finally, the no-merit report addresses whether a challenge to Vasquez's sentence would have 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 establishes that Vasquez was afforded the opportunity to address the court prior to sentencing, both through counsel and personally. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Vasquez's character, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Vasquez to eight years of initial confinement and six years of extended supervision. The sentence was within the maximum Vasquez faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances" (quoted source omitted)). Additionally, the court granted Vasquez seventy-nine days of sentence credit, on counsel's stipulation. We discern no erroneous exercise of the court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michelle Velasquez is relieved of any further representation of Azuzena Vasquez in this matter.⁴ *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Although appointed counsel is discharged from further representation, it remains counsel's obligation to notify Vasquez of this decision and inform Vasquez of her right to petition the Wisconsin Supreme Court for review. *See* WIS. STAT. RULE 809.32(3). As explained above, the record reflects that Vasquez does not speak English, nor can she read in English or Spanish. Because counsel has informed us that she is able to speak with Vasquez in Spanish, it appears that counsel will be able to fulfill her obligations under RULE 809.32(3) by explaining this opinion and Vasquez's rights to Vasquez in Spanish.