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August 25, 2017

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

2016AP1155-CRNM State of Wisconsin v. Faizel Ka Ri (L.C. # 2012CF2297)

Before Brennan, P.J., Kessler and Brash, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Faizel Ka Ri appeals a judgment convicting him of two counts of child abuse – recklessly causing great bodily harm. Appellate counsel, John T. Wasielewski, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).¹

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Ka Ri was notified of his right to respond, but he has not done so. After reviewing the no-merit report and conducting an independent review of the record as mandated by *Anders*, we conclude that there are no issues of arguable merit that could be pursued on appeal. Therefore, we affirm.²

The no-merit report first addresses whether there would be any arguable merit to a claim that the evidence was insufficient to support the conviction. The verdicts ““will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.”” *State v. Alles*, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted). If more than one inference can be drawn from the evidence, we must accept the one drawn by the jury. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility. *See id.* at 506.

The State was required to prove beyond a reasonable doubt that Ka Ri was guilty of two counts of child abuse, recklessly causing great bodily harm. *See* WIS. STAT. § 948.03(3)(a). “‘Great bodily harm’ means injury which creates a substantial risk of death, or which causes ... a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.” WIS JI—CRIMINAL 2111. Reckless conduct means that the “conduct created a situation of unreasonable risk of harm to [the victim] and demonstrated a conscious disregard for the safety of [the victim].” *Id.*

² Ka Ri’s appointed appellate counsel previously filed a no-merit appeal, but we rejected the no-merit report and dismissed the appeal without prejudice on March 22, 2016. We explained that there was a potentially meritorious challenge to the DNA surcharges imposed by the sentencing court. Ka Ri then filed a postconviction motion challenging the DNA surcharges. The circuit court granted the motion, ordering Ka Ri pay only one DNA surcharge.

Dr. Angela Rabbit testified she is a pediatrician at Children's Hospital of Milwaukee. She testified that she specializes in treating children who are victims of child abuse. Dr. Rabbit testified that three-month-old M.R. was admitted to the hospital because he suffered serious injuries to his head, which caused bleeding between his brain and his skull. M.R. also suffered from retinal hemorrhaging, or rupturing of the blood vessels in his eyes, and from a leg fracture near his knee.

Dr. Rabbit testified that M.R. sustained permanent brain damage from his injuries. She explained to the jury that the injuries to M.R.'s head were caused by sudden acceleration and deceleration such as would occur if M.R.'s head struck a hard object at a fast speed, if M.R. had been violently shaken, if M.R. had been in a motor vehicle accident, or if M.R. had fallen several stories from a building. Dr. Rabbit testified that M.R.'s head injuries caused him to sustain prolonged seizures, and required that a hole be drilled into his head to relieve pressure. She also testified that there was evidence of both old and new bleeding in his brain, which suggested that M.R. likely experienced two episodes of severe trauma to his head.

Dr. Rabbit testified that M.R.'s leg fracture was caused by someone pulling and/or twisting his leg. Dr. Rabbit testified that she spoke to M.R.'s parents who said that they were the only two people who cared for M.R. Ka Ri told Dr. Rabbit that their seven-year-old child told his wife that M.R. had fallen off the couch a month earlier. The parents said that M.R. had not otherwise fallen or been injured.

Ja La testified that he lived with Ka Ri in 2008 and 2009 when he first arrived from Burma.³ Ja La told the jury that he worked with Ka Ri in the same factory and they often talked in the work cafeteria. Ja La testified that Ka Ri told him that his son M.R. was fussy so he held M.R. by the head and shook him to get him to stop crying. Ja La also testified that Ka Ri told him that he shook M.R.'s leg to get him to stop crying.

Hla Aung testified that he was Ka Ri's friend, had attended his wedding, and he worked with Ka Ri at the same factory. He testified that Ka Ri told him that he was not able to sleep because of the baby's crying, so he held his baby's head and shook it to get him to stop crying. Aung also testified that Ka Ri told him he shook the baby's leg and the baby stopped crying. Aung testified that he told Ka Ri that it was dangerous to shake the baby's head because an infant's head is soft and tiny. Aung said he told Ka Ri that the baby could have stopped crying because the baby became unconscious. Aung told the jury that Ka Ri told him he did this to the baby ten to twenty different times and admitted that he had made a mistake.

The evidence is sufficient to support the convictions. The medical testimony established that M.R. sustained serious injury to his head that was caused by violent shaking or rapid acceleration and deceleration. The medical testimony also established that M.R. sustained a serious injury to his leg caused by someone pulling and/or twisting his leg. Ja La and Aung both testified that Ka Ri told them that he shook the baby and pulled his leg to make him stop crying. Therefore, there would be no arguable merit to a challenge to the sufficiency of the evidence.

³ It is unclear from the record whether Ja La's surname is La. He was referred to during trial proceedings as Ja La. Therefore, we also refer to him as Ja La.

Second, the no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion when it made two evidentiary rulings. First, the circuit court allowed the prosecution to enter into evidence one photograph of M.R. in the hospital. A court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. We will “not disturb a circuit court’s decision to admit or exclude evidence unless the circuit court erroneously exercises its discretion.” *State v. Jackson*, 2014 WI 4, ¶43, 352 Wis. 2d 249, 841 N.W.2d 791 (citation omitted). When Ka Ri objected to the admission of multiple photographs of the child, the circuit court reviewed the photographs and decided that it would allow one photograph to be introduced to show the injuries to the child. The circuit court also ruled that the probative value of any additional photographs was outweighed by the danger of appealing to the jury’s sympathies. The circuit court applied the proper legal standards to the question presented and reached a reasonable result. Therefore, we conclude that there would be no arguable merit to a challenge to this ruling.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion in allowing Rosa Singh to testify because she was not on the State’s witness list. The State is not required to name potential rebuttal witnesses or witnesses called only for impeachment in advance of trial. *See* WIS. STAT. § 971.23(1)(d). Ka Ri testified that Ja La and Aung made up the story that he told them he shook M.R. and pulled his leg. Ka Ri testified that he had not spoken to Ja La since 2009 because they had an argument. Singh testified that Ja La and Ka Ri were friends and she often saw them together socializing. Singh’s testimony directly contradicted Ka Ri’s testimony. Singh was a rebuttal witness, and

thus did not need to be named as a witness prior to trial. There would be no arguable merit to a challenge to the circuit court's decision to allow Singh to testify.

Finally, the no-merit report addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion when it imposed a total of fifteen years of initial confinement and seven years of extended supervision for the two convictions. Sentencing is committed to the circuit court's discretion, and appellate review is limited to considering whether discretion was properly exercised. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court should specify the objectives of the sentence on the record, which “include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Id.*, ¶40. Additionally, the circuit court must explain the link between the sentencing objectives and the sentence imposed. *Id.*, ¶46.

In framing the sentence, the circuit court focused on the seriousness of the crime(s), noting that M.R. was an infant completely dependent on others for survival and he suffered a devastating head injury that caused permanent damage. The circuit court also considered Ka Ri's character, stating that he had no prior record, and had made a positive impact on the community by working hard and providing for his family. The circuit court noted that Ka Ri had a limited education, which may have impeded his ability to understand and express culpability for his actions. The circuit court said its sentence was intended to punish Ka Ri and to deter others by sending a message to the community that similar behavior would not be tolerated. Because the circuit court considered the appropriate factors and applied them to the circumstances of this case, we conclude that there would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the record reveals no other potential issues of arguable merit. Therefore, we affirm the judgment of conviction and relieve Attorney John T. Wasielewski of further representation of Ka Ri.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney John T. Wasielewski is relieved of further representation of Faizel Ka Ri. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals