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June 19, 2018

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

2017AP154-CRNM State of Wisconsin v. Katie J. Boen (L. C. No. 2015CF29)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for Katie Boen has filed a no-merit report concluding no grounds exist to challenge Boen's conviction for intentionally causing bodily harm to a child, contrary to WIS. STAT. § 948.03(2)(b) (2015-16).[1] Boen filed a response raising several challenges to her

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

conviction. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State alleged that Boen struck Edward,[2] then seven years old, in the face. Boen was convicted upon a jury's verdict of the crime charged. Out of a maximum possible six-year sentence, the circuit court withheld sentence and imposed three years of probation, with sixty days of jail as a condition of probation, along with Huber privileges which included release for child visitation.

The no-merit report addresses whether there was sufficient credible evidence to support the jury's verdict and whether the circuit court properly exercised its sentencing discretion. Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993).

At trial, Brenda Lee, a certified social worker, testified that she responded to a Rhinelander school to investigate a child abuse allegation. When Lee asked Edward about the "noticeable … reddish, purplish mark on his left eye," Edward responded that Boen "smacked him." Edward added that "he thought it was on purpose but then found out that it was an accident." When Lee asked him to explain, Edward stated that at first he thought it was on purpose because Boen said "quit or I'll smack you in the face" when Edward was trying to wake

[2] Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

Boen. Edward later thought it might be an accident because after Boen woke up, she told him it was an accident. Lee took a photo of Edward's injuries, and she reported the allegation to police.

Brian Erickson, a patrol sergeant with the Oneida County Sheriff's Department, testified that he responded to the school and met with Edward. When asked about the bump above his left eye, Edward stated that Boen "smacked him in the face" and that he cried because it hurt him. Erickson further testified that when Boen arrived to pick Edward up from school, he asked her about Edward's injury. Boen stated she accidentally hit Edward with her elbow when he was crawling up next to her on the couch.

James Adams, an Oneida County deputy sheriff, testified that he was dispatched to the school, conducted a "field interview" with Edward, and photographed Edward's injuries. Later that day, Adams met with Edward at the sheriff's office to conduct a videotaped interview with Edward in a room "designed for interviewing children." After a discussion with Edward about "the difference between a truth and a lie" and the consequences of not telling the truth, Adams asked how Edward's day started. Edward responded: "I woke up and then I tried to wake up [Boen] and then she said, 'Quit it or else I'll hit you in the face,' and then she smacked me in the face[.]" When asked how Boen hit him, Edward responded "using her fist, like, boom" as he made a punching motion to his face. Edward's video-recorded interview, along with photographs that Lee and Adams took of Edward's injuries, were published to the jury.

Boen testified in her own defense, and she denied intentionally harming Edward. Boen stated that as she slept on the recliner portion of the living room couch, Edward "must have been trying to put his head on my lap," adding "[s]o when I moved my arm, I elbowed him in his brow

bone." Boen testified that when she woke up, her elbow was "hurting" as if she had hit something.

In her response to the no-merit report, Boen challenges the verdict, emphasizing both her testimony that any harm to Edward was accidental and Edward's statement to investigators that Boen was sleeping. It is, however, the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Boen's conviction.

Any claim that the circuit court erred by admitting Edward's videotaped interview would lack arguable merit. The decision whether to admit or exclude evidence at trial is within the circuit court's discretion. ***State v. Richard G.B.***, 2003 WI App 13, ¶7, 259 Wis. 2d 730, 656 N.W.2d 469 (2002). The State moved to admit the videotaped interview pursuant to WIS. STAT. § 908.08. Under that statute, an audiovisual recording of a child's oral statement is admissible into evidence if each of the following five elements is met: (1) the trial was held before the child's twelfth birthday; (2) the recording was accurate and free from excision, alteration, or distortion; (3) the child's statement was made with an understanding that false statements are punishable and of the importance of telling the truth; (4) the time, content, and circumstances of the child's statement provide indicia of trustworthiness; and (5) the admission of the statement was not an unfair surprise to the defendant. *See* WIS. STAT. § 908.08(1) and (3)(a)-(e).

In granting the motion to admit the videotaped interview, the circuit court noted that Edward would be eight years old at the time of trial, thus satisfying the first element. Based on testimony by the interviewer at the motion hearing and the court's own observation of the videotaped interview, the court found the recording was "an accurate portrayal" free from excision, alteration and distortions. The court further determined that during a discussion of the difference between a truth and a lie, Edward's answers exhibited knowledge about the negative repercussions of lying and presented "adequate indicia of being able to tell the … difference between a truth and a lie." With respect to the time, content and circumstances of the statement providing indicia of trustworthiness, the court concluded there was "nothing to indicate otherwise." The court specifically recognized that the interviewer did not use leading or suggestive questions, and Edward appeared to be "very chatty and forthright" with the interviewer. Finally, the court concluded that admission of the videotape was not an unfair surprise, as Boen had received it in discovery months before the trial, and she had notice of the State's motion to admit the videotape one month before trial.

In her no-merit response, Boen points out that Edward was not videotaped until his "fourth interview" with investigators, which left a "very high possibility of confusion and particularly coercion." The record—specifically, the circuit court's observations of the types of questions asked and Edward's interaction with the interviewer—undermines Boen's stated concerns. Ultimately, nothing in our review of the record would support a nonfrivolous challenge to the admission of the videotape.

Boen's response also suggests there was insufficient evidence to support the complaint filed against her. A defendant, however, waives the right to challenge the sufficiency of a complaint by failing to raise the issue by pretrial motion. WIS. STAT. § 971.31(2); ***State v.***

Copening, 103 Wis. 2d 564, 570-71, 309 N.W.2d 850 (Ct. App. 1981). In any event, a complaint is sufficient if a fair-minded magistrate could reasonably conclude that the facts alleged justify further criminal proceedings and that the charges are not merely capricious. ***State ex rel. Cullen v. Ceci***, 45 Wis. 2d 432, 442, 173 N.W.2d 175 (1970). Here, the complaint specifies the statute Boen was charged with violating and summarizes sufficient factual allegations to justify further proceedings on the crime charged. Therefore, even had Boen's challenge to the complaint been properly raised, it would lack arguable merit.

Boen additionally challenges the effectiveness of her trial counsel. To establish ineffective assistance of counsel, Boen must show that her counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that, but for counsel's error, there is a reasonable probability the jury would have reached a different verdict. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sholar***, 2018 WI 53, ¶¶45-46, __ Wis. 2d __, __ N.W.2d __. Boen first claims her trial counsel was ineffective by failing to adequately negotiate a plea deal. The record, however, belies her claim.

At a pretrial conference held more than six weeks before the trial, defense counsel recounted an attempt to resolve this case and two other pending cases, explaining there was "a deferred entry of judgment on one case, a couple pleas to a couple misdemeanors on another case, another case was [going to] be dismissed, [and] a joint recommendation of 12 months." Counsel further stated that although Boen was initially "on board," she had recently balked at the agreement. Boen then explained that she was concerned about how the plea agreement would impact her employment or ability to work with children. Ultimately, the circuit court recognized:

> [N]egotiations and negotiated resolutions are only one part of this process, and it is a decision left solely to the defendant to determine whether it's going to be a negotiated resolution or a trial. [Boen] understands. She's been around the block. She knows … what could happen at a trial, and she'll have to weigh the consequences of a trial versus a negotiated plea or success at a trial. … She makes that decision.

Before the matter proceeded to trial, defense counsel again recounted that the parties "had extensive negotiations as far as a final plea offer or settlement agreement" that involved a deferred prosecution agreement. Counsel added that Boen was aware of the offer and had rejected it. Based on this record, there would be no arguable merit to a claim that trial counsel was ineffective by failing to adequately negotiate a plea deal.

Boen also argues her trial counsel should have subpoenaed social workers to testify regarding supervised and unsupervised visits that Boen had with her children as part of a child in need of protection and/or services (CHIPS) case that was pending. Boen contends the social workers' observations that there were no safety concerns during Boen's supervised and unsupervised visits with her children would have undermined the child abuse allegation in the instant case. It was not, however, objectively unreasonable for trial counsel to avoid presenting evidence of the pending CHIPS matter in the present case. Moreover, nothing in the record would support a nonfrivolous argument that the absence of such testimony undermines confidence in the outcome at trial.

Boen next claims her trial counsel should have introduced Boen's police interview, so the jury could observe her "initial reaction to the situation." Her videotaped interview, however, does not include her "initial reaction," as the video recording did not occur until after she had been questioned at the school and transported to the sheriff's department. Moreover, Boen testified at trial and also discussed the contents of her videotaped interview, recounting that she

explained during that interview how she was sleeping on the couch and elbowed Edward in the eye. Because the jury had the opportunity to evaluate Boen's words and demeanor when she testified at trial, there is no arguable merit to a claim that trial counsel was ineffective by failing to introduce her videotaped interview. Our review of the record and the no-merit report discloses no other basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[3] hearing.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offense, Boen's character, the need to protect the public, and the mitigating factors Boen raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. There is a presumption that Boen's sentence, which is well within the maximum allowed by law, is not unduly harsh or unconscionable, nor "so excessive and unusual" as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; *see also* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

IT IS FURTHER ORDERED that attorney Diane Lowe is relieved of her obligation to further represent Boen in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals