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April 14, 2020

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

2019AP493-CRNM State of Wisconsin v. Brittney K. Young (L.C. # 2017CF2665)

Before Brash, P.J., Dugan and Donald, 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).

Brittney K. Young appeals judgments of conviction entered following a bench trial on March 30, 2018, at which the circuit court found her guilty of two crimes: (1) physically abusing a child by recklessly causing great bodily harm to a child; and (2) neglecting a child resulting in bodily harm to a child. For the crime of physically abusing a child, Young faced maximum penalties of $50,000 and fifteen years of imprisonment. *See* WIS. STAT. §§ 948.03(3)(a) (2017-

18),[1] 939.50(3)(e). For the crime of neglecting a child, she faced maximum penalties of $10,000 and six years of imprisonment. *See* WIS. STAT. §§ 948.21(1)(b) (2015-16),[2] 939.50(3)(h) (2015-16). The circuit court imposed a forty-five-month term of imprisonment for physically abusing a child, bifurcated as fifteen months of initial confinement and thirty months of extended supervision. The circuit court imposed a consecutive, evenly bifurcated sixty-month term of imprisonment for child neglect, stayed that sentence, and placed Young on probation for a consecutive term of thirty-six months. The circuit court awarded Young the eight days of sentence credit that she requested and denied her eligibility for the challenge incarceration program and the Wisconsin substance abuse program.

Appellate counsel, Attorney Jeffrey W. Jensen, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Young did not file a response. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State filed a criminal complaint on June 6, 2017, alleging that on May 31, 2017, when D.J.M. was two years old, he was hospitalized for bilateral lower leg burns, and that Young, D.J.M.'s mother, gave varying accounts of the events preceding the child's injuries. Each version reflected that Young gave D.J.M. a bath, and while he was unattended in the tub, it filled with

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[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Pursuant to 2017 Wis. Act 283, § 5, the legislature repealed and recreated WIS. STAT. § 948.21, governing the offense of neglecting a child. The recreated provisions took effect on April 18, 2018, after the circuit court found Young guilty of child neglect. *See* ***id.***; *see also* WIS. STAT. § 991.11. Accordingly, all references to WIS. STAT. § 948.21 are to the 2015-16 version unless otherwise noted.

excessively hot water. According to Dr. Angela Rabbit, who diagnosed and treated D.J.M., the pattern of the burns he sustained was consistent with immersion into a hot liquid. She opined that the burns were "extremely painful and carry ... a significant risk of disfigurement and disability." The State charged Young with one count of child abuse in violation of WIS. STAT. § 948.03(3)(a).

Young pled not guilty to the charge against her and requested a trial to the court. On the day of trial, the State filed an amended information charging Young with child abuse as alleged in the criminal complaint and with an additional count of child neglect in violation of WIS. STAT. § 948.21(1)(b). Young entered pleas of not guilty, and the charges proceeded to a bench trial.

We first consider whether Young could pursue an arguably meritorious claim that she was denied her right to a jury trial. We agree with appellate counsel that she could not do so. To obtain a valid jury trial waiver, the circuit court must conduct a colloquy sufficient to ensure that the defendant: (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) understood that a jury trial consists of a panel of twelve people, and that all twelve people must agree that the State has proved the elements of the crime charged before the defendant may be found guilty; (3) understood that at a court trial, the judge alone decides whether the defendant is guilty or not guilty of the crime charged; and (4) had enough time to discuss this decision with counsel. *See* ***State v. Anderson***, 2002 WI 7, ¶24, 249 Wis. 2d 586, 638 N.W.2d 301. The record shows that the circuit court conducted a colloquy with Young that satisfied the foregoing requirements. Further pursuit of this issue would lack arguable merit.

We next consider whether the State presented sufficient evidence to convict Young of the offenses charged. The test for sufficiency of the evidence is the same whether a jury or the circuit court acts as the fact finder. *See* ***State v. Curiel***, 227 Wis. 2d 389, 418, 597 N.W.2d 697 (1999).

Our standard of review is highly deferential. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate 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. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence are determinations that rest with the factfinder. *See* ***id.*** at 504.

Before the circuit court could find Young guilty of physical abuse of a child in violation of WIS. STAT. § 948.03(3)(a), the State was required to prove beyond a reasonable doubt that: (1) she caused great bodily harm to D.J.M.; (2) she recklessly caused him that great bodily harm; and (3) he had not attained the age of eighteen years at the time of the alleged offense. *See* ***id.***; *see also* WIS JI—CRIMINAL 2111. Before the circuit court could find Young guilty of child neglect in violation of WIS. STAT. § 948.21(1)(b), the State was required to prove beyond a reasonable doubt that: (1) D.J.M. was under the age of eighteen years; (2) Young was a person responsible for his welfare; (3) Young intentionally contributed to his neglect; and (4) D.J.M. suffered bodily harm as a consequence. *See* ***id.***; *see also* WIS JI—CRIMINAL 2150A (2017). We conclude that the evidence was sufficient to sustain the convictions.

Dr. Rabbit testified that D.J.M. was two years old when she examined him on June 1, 2017, the day after he was admitted to Children's Hospital of Wisconsin. She said that D.J.M. had second-degree burns to both of his lower legs below the knees and that the burns were severe enough to cause lifetime scarring. Dr. Rabbit said that she spoke with Young, who described placing D.J.M. in a shallow tub of water on May 31, 2017, leaving him alone for a short time, and then returning to find him crying and trying to get out of a tub of water that reached almost to his

knees. Dr. Rabbit opined that Young's description of events was not consistent with D.J.M.'s "physical presentation."

Dr. Rabbit said that D.J.M.'s injuries were consistent with an immersion burn, where the feet and lower legs are dipped in standing water. Further, the absence of splash marks indicated that D.J.M. could not move during the incident. She described D.J.M.'s burns as "symmetric on both sides ... start[ing] with [a] very sharp line of demar[c]ation between burned and unburned skin, and then a fairly uniform burn throughout the rest of the lower extremities." Dr. Rabbit said that a burn of the kind that D.J.M. sustained can occur in approximately four seconds in water just over 134 degrees Fahrenheit. She added that D.J.M.'s burns were "extremely painful" and that D.J.M. was treated with morphine at the hospital to control the pain.

Dr. Rabbit went on to testify that, according to Young, D.J.M. cried continuously after he was removed from the tub, and Young acknowledged that she saw his skin blistering. Young also said that she treated D.J.M. with Tylenol and cold towels for approximately half an hour before bringing him to the hospital.

Police Officer Christine Rutherford testified that on June 1, 2017, she tested the water temperature in Young's home. Rutherford determined that the running water reached a maximum temperature of 134.6 degrees Fahrenheit after ninety seconds. Rutherford also testified that she interviewed Young after administering the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 479 (1966). According to Rutherford, Young acknowledged giving D.J.M. a bath on May 31, 2017, and leaving him alone in the tub for three to five minutes. Young said that when she returned to the bathroom, D.J.M. was crying and the water was running. She admitted that she did not call 911 and did not seek immediate medical care for D.J.M.

Young, by counsel, stipulated that D.J.M. was younger than eighteen years old on May 31, 2017, and that she was responsible for his welfare. She also advised the circuit court that she would not present any witnesses on her own behalf.[3]

Following closing arguments by the parties, the circuit court ruled from the bench and found that the State had proven the two charges against Young beyond a reasonable doubt. We are satisfied that a challenge to the circuit court's findings would lack arguable merit. As to the crime of child abuse, the evidence was sufficient to prove beyond a reasonable doubt that D.J.M. was two years old, that Young recklessly exposed his lower limbs to scalding water, and that he suffered second-degree burns as a result. *See* WIS. STAT. § 948.03(3)(a); *see also* WIS JI—CRIMINAL 2111. Although some of the State's evidence was circumstantial, a finding of guilt may rest entirely on circumstantial evidence. *See* ***Poellinger***, 153 Wis. 2d at 501. As to the crime of child neglect, we note that appellate counsel characterizes the question of the sufficiency of the evidence as a "close call." Appellate counsel's discussion reflects, however, that he considered the sufficiency of the evidence in light of WIS. STAT. § 948.21(2) (2017-18), rather than in light of § 948.21(1)(b) as it existed at the time of the offense and trial. We have independently reviewed the evidence in light of the applicable law. The record shows that Young stipulated to the first two elements of child neglect, specifically, that on May 31, 2017, D.J.M. was younger than eighteen years old and that Young was responsible for his welfare. *See* ***id.***; *see also* WIS JI—CRIMINAL 2150A (2017). As to the elements that Young contributed to D.J.M.'s neglect and that he suffered

[3] The circuit court conducted a colloquy with Young pursuant to ***State v. Weed***, 2003 WI 85, ¶¶43-44, 263 Wis. 2d 434, 666 N.W.2d 485, and found that she knowingly, voluntarily, and intelligently chose to waive her right to testify.

bodily harm as a consequence, the record shows that she did not call 911 or take D.J.M. to the emergency room for at least twenty to thirty minutes after removing him from a tub of scalding water while he cried in pain from blistering burns.[4] Accordingly, a challenge to the sufficiency of the evidence would be frivolous within the meaning of ***Anders***.

We next consider whether the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that punishment, public protection, and deterrence to others were the primary sentencing objectives, and the circuit court discussed appropriate factors that it deemed relevant to achieving those objectives. *See* ***id.***, ¶¶40-43. The sentences imposed were well within the maximum sentences that Young faced upon conviction, and she therefore cannot mount an arguably meritorious claim that her sentences are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. Accordingly, a challenge to the sentences would be frivolous within the meaning of ***Anders***.

Last, we consider whether Young could pursue an arguably meritorious claim that the circuit court erroneously failed to find her eligible for the challenge incarceration program and the Wisconsin substance abuse program. Both prison programs offer substance abuse treatment, and an inmate who successfully completes either program may convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. In most cases, a circuit court exercises its sentencing discretion when determining a defendant's eligibility for these programs. *See* WIS. STAT. § 973.01(3g)-

[4] Pursuant to WIS. STAT. § 939.22 (4), "bodily harm" includes both physical pain and injury.

(3m).[5] A person convicted of any crime specified in WIS. STAT. § 948.03, however, is statutorily ineligible to participate in either program. *See* §§ 302.045(2)(c); 302.05(3)(a). Young therefore is excluded by law from those programs while serving her prison sentence for § 948.03(3)(a).

Young would not be statutorily excluded from admission to the challenge incarceration program and the Wisconsin substance abuse program if her probation was revoked in connection with her conviction under WIS. STAT. § 948.21(1)(b). *See* WIS. STAT. §§ 302.045(2)(c); 302.05(3)(a); *see also* DAI Policy #300.00.12 1.B.1.a, available at https://doc.wi.gov/DepartmentPoliciesDAI/3000012.pdf (last visited Feb. 16, 2020) (explaining that an inmate who reaches the end of a confinement term on a non-eligible sentence may be eligible for the programs while confined for a subsequent matter). The circuit court indicated, however, that the length of Young's confinement and her rehabilitative needs did not warrant eligibility for the programs. Further, the circuit court found that she did not present any evidence that she had a substance abuse problem. The circuit court added that, if Young's community supervision was revoked and "suddenly she has a drug or alcohol problem," she could move the circuit court to find her eligible for programming at that time. Accordingly, we are satisfied that the circuit court properly exercised its discretion at sentencing in finding Young ineligible for the

[5] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

challenge incarceration program and the Wisconsin substance abuse program. Further pursuit of this issue would lack arguable merit.[6]

Our independent review of the record does not disclose any other potential issues for appeal. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved of any further representation of Brittney K. Young. *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

[6] Our conclusion that Young cannot challenge the circuit court's exercise of discretion in finding her ineligible at the time of sentencing for the challenge incarceration program and the Wisconsin substance abuse program has no bearing on whether Young can present a claim for program eligibility in the future should her probation be revoked. *See* ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) (stating that claims based on future or hypothetical facts are not ripe for judicial determination).