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DISTRICT IV

March 31, 2022

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Circuit Court Judge
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Aneta Zapotoczny
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1956-CRNM State of Wisconsin v. Aneta Zapotoczny (L.C. # 2017CF61)

Before Fitzpatrick, Graham, and Nashold, 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).

Attorney Steven Roy, as appointed counsel for Aneta Zapotoczny, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Counsel provided Zapotoczny with a copy of the report, and both counsel and this court advised her of her right to file a response. Zapotoczny has not responded. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

After a jury trial, Zapotoczny was convicted of one count of causing mental harm to a child and one count of resisting an officer. The court placed her on probation for five years. In addition, the court imposed and stayed a sentence on the mental harm charge of three years of initial confinement and three years of extended supervision, and imposed and stayed a lesser concurrent sentence on the resisting charge.

The no-merit report addresses whether the evidence was sufficient. We affirm the 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). Credibility of witnesses is for the trier of fact. *Id.* at 504 (quoted source omitted).

We first address the charge of causing mental harm to a child. We start by considering the potential effect of an acquittal that occurred on a different charge. In addition to the above counts, Zapotoczny was charged with attempted first-degree intentional homicide, but was acquitted. All of the charges arose from the same incident in which Zapotoczny was alleged to have caused an injury to her husband.

As originally conceptualized by the State, it appears that Zapotoczny's alleged injuring of her husband was also alleged to be her act, or at least one of her acts, that caused mental harm to the child. However, with the jury having acquitted on the attempted homicide count, that raises a potential question as to what conduct of Zapotoczny can properly be regarded as a basis for the

conviction on the mental harm charge. In other words, it might be argued that the verdicts are inconsistent.

However, there are at least two ways to reconcile the verdicts. One is that the acquittal on attempted homicide was based on a reason other than Zapotoczny's defense. Zapotoczny's defense was that her husband caused the injury to himself, and this defense was supported by his testimony. This defense asserted that Zapotoczny did not cause the injury. However, it is possible that the jury's acquittal was not based on that defense, but instead was based on a conclusion that, although she may have caused the injury, she did not intend to kill her husband.

A second way to reconcile the verdicts is if the jury acquitted on attempted homicide because it concluded that the State did not prove that Zapotoczny caused the injury, but then it nonetheless convicted on the mental harm charge because it concluded that the State proved mental harm to the child based on other conduct by Zapotoczny that was testified about at trial. That conduct included what the jury could reasonably infer was, as argued by the State, her attempt to interfere with the child's efforts to aid her injured husband. In other words, the jury could reasonably have concluded that, regardless of who caused the injury, Zapotoczny attempted to interfere with the child's aid to her husband.

Therefore, in light of these ways to reconcile the verdicts, it would be frivolous to argue that the verdicts are inherently inconsistent, and that the acquittal on the one charge necessarily supports a conclusion that the evidence was insufficient on the other.

We next turn to whether there is a basis to argue that the evidence of Zapotoczny's conduct, if interpreted as interference with the child's efforts to provide aid, was insufficient to support a conviction for causing mental harm. The first and fifth elements of the charge asked

whether the defendant was exercising temporary or permanent control of the person, and whether the person was a child, and were easily satisfied.

The remaining elements were whether the child suffered mental harm, whether the defendant's conduct caused the mental harm, and whether the defendant's conduct demonstrated substantial disregard for the mental well-being of the child. The term "mental harm" was defined for the jury in accord with the definition in WIS. STAT. § 948.01(2):

"Mental harm" means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child, including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior. "Mental harm" may be demonstrated by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

Sec. 948.01(2). Despite all the references to psychological concepts in that instruction, it appears that the primary words that provide binding guidance in this circumstance are "substantial harm to a child's psychological ... functioning." The remainder of the instruction describes only things that "may" evidence or demonstrate mental harm. In other words, in making a sufficiency argument, there would be no arguable basis for Zapotoczny to assert that the State's evidence must have satisfied these other parts of the definition. The only legal requirement is for the State to show that there was a "substantial harm to the child's psychological ... functioning."

The no-merit report notes that there was not extensive evidence presented regarding the child's mental state during or after the incident. However, the instruction does not appear to include any requirement that the harm to the child's psychological or intellectual functioning last for any specific duration, or have any degree of permanence or persistence. In the absence of

other limiting language, “substantial” harm appears to include even relatively brief changes, if the changes are large enough to be considered “substantial” harm.

In that light, we conclude that it would be frivolous to argue that the evidence was insufficient to show that the child suffered mental harm, or insufficient to show that the harm was caused by Zapotoczny’s conduct in trying to prevent the child from aiding his injured father. The evidence showed that the injury was plainly severe, and the child was highly distressed. It would be reasonable for the jury to infer that Zapotoczny’s conduct was a substantial factor in that distress, even if the injury itself was also a substantial factor, but not one caused by her.

Finally, for similar reasons, it would be frivolous to argue that the jury could not reasonably conclude that Zapotoczny’s attempt to interfere with aid to her husband was not conduct that demonstrated substantial disregard for the mental well-being of the child.

We next consider whether the evidence was sufficient on the conviction for resisting an officer. The officer testified that, when he attempted to restrain Zapotoczny, she physically resisted. The testimony was not inherently incredible and, if believed, was sufficient to establish each element of the charge. There is no arguable merit to this issue.

The no-merit report addresses whether the circuit court erred by denying Zapotoczny’s motion during jury selection challenging the State’s use of a peremptory strike to remove an African-American from the jury. The State offered neutral reasons for the strike, including the juror’s conflicting medical appointment, the juror’s recent firing from county employment, and that the prosecutor had prosecuted the juror’s daughter three times. The circuit court denied the motion. In light of the State’s reasons, which were not factually disputed by Zapotoczny, there is no arguable merit to this issue on appeal.

The no-merit report addresses Zapotoczny's sentences. The probation term and the imposed and stayed sentences are within the legal maximums. As to discretionary issues, the standards for the circuit court and this court are well established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Roy is relieved of further representation of Zapotoczny 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