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DISTRICT III

February 28, 2023

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

2020AP4-CRNM State of Wisconsin v. Michaela M. Sousa (L. C. No. 2016CF143)

Before Stark, P.J., Hruz and Gill, 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 Michaela Sousa has filed a no-merit report concluding that no grounds exist to challenge Sousa's convictions for child abuse by recklessly causing great bodily harm and obstructing an officer. Sousa has filed a response raising several challenges to her convictions. Counsel filed a supplemental no-merit addressing some of Sousa's concerns. 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 (2021-22).[1]

According to the complaint, law enforcement responded to a report questioning the welfare of four-month-old Rose,[2] who was in the care of Sousa and her live-in boyfriend, Sebastian Manneh. Rose was transported to the hospital, where medical staff determined that she had suffered a subdural hematoma likely caused by "a significant amount of abusive intentional force." Doctors noted that the subdural hematoma showed both acute and chronic blood on the brain. Sousa initially informed law enforcement that the injury occurred when her three-year-old daughter dropped Rose after removing her from a stroller. Manneh suggested that the "old blood" may have resulted from an earlier injury suffered when Rose fell out of her swing onto a hardwood floor. Although Sousa initially told law enforcement that she and Manneh were the only individuals caring for Rose, she later claimed that she had recently left the baby with Sousa's mother and, on a separate occasion, with a friend, "Mariah."

Sousa failed to appear for a scheduled trial, and the circuit court issued an arrest warrant. Sousa appeared on the first day of the rescheduled trial, during which a jury was selected and sworn, and several of the State's witnesses testified. When Sousa failed to appear for the second day of trial, the court determined that Sousa had voluntarily absented herself without leave of the court. Emphasizing that Sousa remained represented by counsel, the court determined that waiting would not assure Sousa's appearance. The court added:

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[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

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

> Based on the availability of witnesses, particularly a professional witness, the fact we have a jury sitting waiting in the other room, the fact she was supposed to be here at 8:30 and she was told that last night, and it is now after 9:00, then I'm going to start the trial, and she can join us if and when she shows.

The court proceeded with the trial consistent with WIS. STAT. § 971.04(3).[3] After the State rested, the court took a short recess and discussed the proposed jury instructions and verdicts with the attorneys to give Sousa additional time to arrive, as she was the only defense witness likely to testify. Sousa never appeared, and the defense rested.

The jury found Sousa guilty of the crimes charged. Out of a maximum possible aggregate sentence of fifteen years and nine months, the circuit court imposed concurrent sentences resulting in a thirteen-year term, consisting of eight years of initial confinement followed by five years of extended supervision.

The no-merit report addresses whether the circuit court properly proceeded with the trial despite Sousa's failure to appear on the second day; whether the court properly exercised its sentencing discretion; and whether Sousa's trial counsel was effective in cross-examining the State's witnesses and presenting a defense that suggested Manneh had abused the child. Upon

[3] WISCONSIN STAT. § 971.04(3) provides, in relevant part:

> If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times.

reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit.

In her response to the no-merit report, Sousa appears to suggest that her trial counsel was ineffective by failing to ask for jury selection from outside of Pierce County, noting that the county is "very small" and "everybody knows each other." To establish ineffective assistance of counsel, Sousa must show that her counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A prerequisite for an out-of-county jury is a finding that grounds exist for a change of venue. *See* WIS. STAT. § 971.225(1)(b). A circuit court's decision whether to change venue is discretionary; however, this court independently evaluates the circumstances "to determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or empaneled jurors." ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994) (citation omitted). Nothing in our review of the record supports a nonfrivolous claim that Sousa's trial counsel performed deficiently by failing to request a change of venue or that anything but an unbiased jury was impaneled.

Sousa also contends that the circuit court erred during voir dire by failing to ask the prospective jurors if they were "related through business in any way with" three of the possible witnesses. The court, however, asked whether any of the jurors were "related by blood, marriage or a close personal friend of any [of] those persons." In any event, the subject individuals did not, ultimately, testify at trial. To the extent Sousa also claims that the prospective jurors may have been confused when the court inquired whether anybody knew "Mr." Frederick, it had just

stated that the next potential witness was Kristi Frederick, noting "[s]he is employed by the Pierce County Human Services Department." That the court then inadvertently referred to a Mr. Frederick, rather than a Ms. Frederick, does not provide a nonfrivolous challenge to voir dire. Sousa further faults the court for failing to inquire whether the jury members were "sober/competent for jury duty." Nothing in the record, however, supports a nonfrivolous claim that the jury was somehow incompetent or impaired.

Sousa also intimates that because the circuit court told the jurors they could "doodle or draw funny pictures," they may not have been paying close attention during the trial. The court informed the jurors that they would have pads of paper during witness testimony, but it was up to each juror to decide whether to take notes. The court added:

> If you [choose to take notes], those notes are your property. Please bring them in and out of the courtroom when you go in and out. No one is entitled to see your notes. I don't even see your notes. They are shredded at the end of the trial. They are not part of the court record. You can doodle or draw funny pictures or do whatever you want. It's entirely up to you whether you take notes or not.

The circuit court correctly advised the jury that it was up to them to decide whether to take notes. In context, the court's isolated comment could not be construed as an invitation to ignore the evidence at trial, and nothing in the record supports a nonfrivolous claim to the contrary.

Both the no-merit report and Sousa's response address whether there was sufficient credible evidence to support the guilty verdicts. Any challenge to the jury's verdicts would lack arguable merit. With respect to the charge of physical abuse of a child by recklessly causing great bodily harm, the State had the burden to prove beyond a reasonable doubt that Sousa caused great bodily harm to Rose; that Sousa recklessly caused the great bodily harm; and that

Rose had not obtained the age of eighteen years at the time of the offense. *See* WIS. STAT. § 948.03(3)(a). To establish guilt of obstructing an officer, the State had the burden to prove beyond a reasonable doubt that Sousa knowingly gave false information to an officer while the officer was doing an act in an official capacity and acting with lawful authority. *See* WIS. STAT. § 946.41(1).

Regardless of whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Sousa's convictions "unless 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." *See* ***id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507.

As the no-merit report recounted, the officer who responded to a report of Rose's possible neglect testified that Rose was unable to support her head and she appeared to have only limited arm movement. When the officer asked Sousa about bruising he saw near a bald spot on Rose's head, Sousa responded that her three-year-old child had attempted to pick Rose up from a car seat, but Sousa caught the baby before she dropped. A child protection supervisor further testified that when she asked Sousa about Rose's symptoms and injuries, Sousa provided multiple different explanations for the causes of the injuries, the dates on which they may have occurred, and the people whom she claimed had been caring for Rose.

Another officer likewise testified about Sousa's changing explanations, stating:

> Initially it was that [the three-year-old] dropped [Rose]. Then it turned to [Sousa] taking [Rose] over to Mariah's residence and dropping her off there …. Then it changed to a person by the name of Nora, actually driving [Sousa] to Mariah's residence to drop her off. … Then the story changed to [Rose] falling out of a bouncy seat. Then ultimately Rose being literally in the middle of [Sousa and Manneh] during a physical altercation.

A third officer testified that when investigating Sousa's claim that Mariah recently babysat for Rose, Mariah acknowledged that she knew Sousa, but she denied ever meeting or babysitting for Rose. When the officer presented this information to Sousa, she claimed Mariah was lying and that "Nora" would verify Sousa's story. This officer also testified about a series of text messages between Sousa and her mother that were found during the execution of a search warrant for Sousa's cell phone. In the text messages, Sousa stated she might ask her aunt to adopt Rose "temporarily" because she wanted freedom and did not want to take care of a baby right now.

Nora Steiner, a friend of Sousa's sister, testified that Sousa asked her to lie about having had contact with Sousa and Rose—specifically, to tell police that she recently drove Sousa and Rose to and from a woman's home in Prior Lake. Steiner testified that although she initially lied to police on Sousa's behalf, she eventually admitted that she had not driven Sousa or Rose anywhere and, in fact, she had never seen Rose in person.

A "child abuse pediatrician" who examined Rose opined that linear bruising on the child's face was consistent with a slap to the face, and that bleeding in the subdural space around Rose's brain was likely caused by "significant, severe trauma." The doctor added that "[y]ou don't see subdural hemorrhage from short household falls" and "[i]t doesn't happen from falling off a couch or falling off a changing table." According to the doctor, "[a]ccidental events where

we might see subdural hemorrhage include unrestrained high-speed motor vehicle collisions or falls from buildings that are over 20 feet." The doctor further testified that Rose had retinal hemorrhages, which are often caused by shaking, slamming or throwing a baby. Rose also presented with swelling and bleeding in her spine and swelling in the tissues of her neck, suggesting a "whiplash injury" consistent with abuse. The doctor testified that if you shake, throw, or slam a baby, you "can cause damage to the tissues of the neck and then tracking of that bleeding down the spine." The doctor also disavowed alternative theories that could have contributed to Rose's injuries, such as birth trauma. Finally, the doctor opined that the events leading to the subdural hemorrhages created a substantial risk of death or serious bodily injury.

To the extent Sousa suggests there is conflicting testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony, including one officer's failure to notice bruising on Rose's face despite other witness testimony discussing the bruises. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, 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 Sousa's convictions.

Sousa additionally challenges the admission of the text messages, noting that her mother never testified to confirm she received the texts and that Manneh often used her cell phone. 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. As noted above, the text messages were discovered during a warranted search of Sousa's cell phone. An officer

testified that Sousa's mother confirmed receiving the texts and, during cross-examination, the jury heard that the subject cell phone was confiscated from Manneh's possession, though Manneh identified it as Sousa's phone. To the extent Sousa appears to challenge the authenticity of the text messages, authentication involves a threshold of proof merely "sufficient to support a finding that the matter in question is what its proponent claims." *See* WIS. STAT. § 909.01. The evidence presented here was sufficient to allow a reasonable jury to conclude that the text messages were on Sousa's phone and that she probably wrote them. Once the texts were admitted, the jury was left to resolve whether Sousa actually wrote them and how they weighed in its determination of whether Sousa was guilty of the charges.

Sousa's response also contends that there is newly discovered evidence justifying a new trial. To obtain a new trial based on newly discovered evidence, a defendant must prove: "(1) the evidence was discovered after [his or her] conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). If the defendant establishes all four of these factors, then the circuit court must determine "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Id.***

Here, Sousa asserts that she was pregnant when Rose's injuries occurred and that she was also suffering from postpartum depression, which may have explained why she seemed incoherent during the investigation. Sousa further contends that she ran out of a prescribed medication during that time, which would have impacted her brain functioning. This

information, however, was known by Sousa at the time of the trial and is therefore not newly discovered.

Sousa also claims that she recently learned that her prior mental health diagnoses were inaccurate; therefore, her previous medications based on those incorrect diagnoses likely caused irregular brain functioning. As the supplemental no-merit report notes, it appears Sousa is claiming she is entitled to present an involuntary intoxication defense at a new trial. An involuntary intoxication defense is established if a defendant's intoxicated or drugged condition is involuntarily produced and either: (1) "[r]enders the [defendant] incapable of distinguishing between right and wrong"; or (2) "[n]egatives the existence of a state of mind essential to the crime." WIS. STAT. § 939.42. The supplemental no-merit, however, states that reports obtained by counsel and Sousa's own letter to counsel show that Sousa was drinking alcohol and smoking marijuana to excess during the time leading up to the charges in this case. One who "'mixes a prescription medication with alcohol or other controlled substances' is not eligible for the involuntary intoxication defense." ***State v. Anderson***, 2014 WI 93, ¶33, 357 Wis. 2d 337, 851 N.W.2d 760 (citation omitted). Therefore, any request for a new trial based on this information would lack arguable merit.

Sousa also asserts that Rose appears to have made a full recovery from her injuries. The existence of permanent damage to the child, however, was not an element of the offense for which Sousa was convicted. Therefore, even assuming Rose suffered no permanent damage from her injuries, her present condition would not warrant a new trial.

Sousa also contends that her appointed appellate counsel has an unidentified conflict of interest apparently based on the fact that he practices law in Pierce County. That Sousa's

counsel has some familiarity with the Pierce County court and its employees does not support a nonfrivolous claim for new counsel. Sousa further argues that appointed counsel has not provided competent representation on appeal because he refused to meet with Sousa in person more than once. Sousa, however, fails to explain how additional in-person meetings would have altered counsel's assessment of her case. Finally, Sousa faults counsel for his unwillingness to file motions for her. A defendant may not, however, insist that counsel file substantive motions if counsel has concluded that there would be no arguable merit to pursuing such motions.

The no-merit appeal procedure seeks to reconcile a defendant's rights to postconviction proceedings and the effective assistance of counsel with counsel's duty to avoid making frivolous arguments. *See* ***State v. Parent***, 2006 WI 132, ¶¶17-19, 298 Wis. 2d 63, 725 N.W.2d 915. Sousa is not entitled to the appointment of new counsel merely because she disagrees with counsel's no-merit conclusion. Based on our independent review of the record, we conclude there is no arguable merit to further postconviction or appellate proceedings in this case. This court's decision accepting the no-merit report and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the required level of representation.

Therefore, upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of his obligation to further represent Michaela Sousa 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