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April 24, 2013

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

2011AP2664-CRNM State of Wisconsin v. Ernesto Cervantes (L.C. #2010CF3500)

Before Curley, P.J., Fine and Kessler, JJ.

Ernesto Cervantes appeals a judgment convicting him of first-degree recklessly endangering safety, with use of a dangerous weapon, and felon in possession of a firearm. He also appeals an order denying his motion for a new trial. Appointed appellate counsel Sara Heinemann Roemaat filed a no-merit report. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Cervantes responded to the no-merit report,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and Attorney Roemaat filed a supplemental no-merit report.[2] After reviewing the no-merit report, the response, and the supplemental no-merit report, and after conducting an independent review of the record, we conclude that there are no arguably meritorious appellate issues. Therefore, we summarily affirm.

The no-merit report and response address whether the circuit court erred in denying, without a hearing, Cervantes's motion for a new trial based on ineffective assistance of trial counsel. To establish ineffective assistance of trial counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697.

Cervantes argues that he received ineffective assistance of trial counsel because his lawyer was not adequately prepared for trial. In support, Cervantes points out that his lawyer did not introduce evidence from a fingerprint expert that Cervantes contends would have shown where the victim's fingerprints were located on the gun. Cervantes argues that this fingerprint evidence would have refuted the victim's story. The victim testified that Cervantes pointed the gun at her chest during the course of a fight they were having, that she pushed the barrel of the gun away toward the floor, and that Cervantes then fired the gun, which caused a bullet to go through the floor into the apartment below. The problem with Cervantes's argument is that the fingerprint evidence taken from the gun was not of sufficient quality to allow for testing, a fact

[2] We commend counsel for so thoroughly addressing the issues Cervantes raised in his response.

that Cervantes either knew or should have known because it was discussed in court when he was present. We agree with the circuit court's analysis and decision rejecting this argument:

> The record establishes that … the defendant was present in court when trial counsel indicated that he had read the police reports and that the fingerprint impressions "were of insufficient quality to get any match or do any testing." He continued, "So for me to request that the alleged victim be examined and see if the print was hers would really have no effect because it was of insufficient quality." The court inquired, "So at this point you are not going to pursue that?" Counsel responded, "[I]t wouldn't really assist in any further testing." Since the defendant was present at this hearing, he either knew or should have known that counsel was not planning to use a fingerprint expert…. In any case, the defendant has not presented any evidence in support of his motion for a new trial showing that (1) the fingerprint impressions were sufficient for testing purposes or (2) testimony from a fingerprint expert that [testing] would have made a meaningful difference in the outcome of the trial. (Record citations omitted.)

There would be no arguable merit to a claim that Cervantes's trial lawyer was not prepared because he failed to test fingerprint evidence since there was no evidence that could be tested.

Cervantes next contends that his lawyer should have introduced evidence from a ballistics expert that would have shown the direction the gun was pointing when it fired, which he believes would have matched his version of events, rather than the victim's version of events. At trial, he testified that the victim pointed the gun at him, that he grabbed it to prevent her from shooting him, and the gun fired. As aptly explained by the circuit court in rejecting this argument, however, "the trajectory of the bullet was not determinative of who fired the gun" because "the gun could have been pointing at almost any angle" at the time it fired in the direction of the floor, piercing the ceiling and ending up in the apartment below. Expert testimony about the angle of the gun when it fired would not have made Cervantes's trial testimony any more or less likely to be true. Cervantes's trial lawyer did not render deficient performance in failing to call a ballistics expert because the testimony would not have helped his defense.

Cervantes next argues in his response that his lawyer should have questioned the victim about her criminal history when she testified. Evidence that a witness has been convicted of a crime or adjudicated delinquent is admissible for the purpose of attacking the witness's credibility. WIS. STAT. § 906.09(1). However, Cervantes contends that a warrant had been issued for the victim's arrest, not that she was convicted of a crime. This information would not have been admissible under § 906.09(1). Moreover, Cervantes's lawyer explains in her supplemental no-merit report that she searched the circuit court automated docket entries (CCAP) but did not find that the victim had prior convictions. Therefore, this claim would have no arguable merit.

Cervantes next contends in his response that he received ineffective assistance of counsel because his lawyer should have objected to the fact that the State was not prepared to proceed to trial on the first trial date. There was a *joint request* for adjournment on the first trial date. Cervantes was present in court and did not in any way indicate that he did not agree with the joint adjournment request made by his lawyer. Moreover, despite Cervantes's assertion to the contrary, the prosecutor *was* prepared to go to trial on the first trial date and had a number of witnesses present that day, although the prosecutor stated that there was one additional witness that he had trouble locating. Therefore, there is no arguable merit to a claim that Cervantes received ineffective assistance of counsel.

Cervantes contends in his response that the evidence was insufficient to convict him because there were no eyewitnesses other than him, the victim, and the victim's neighbor. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before

it." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The testimony of the victim and her neighbor established that Cervantes pointed a gun at the victim's chest in anger, which then discharged when the victim pushed it away from her chest, entering the apartment one floor below through the ceiling. After the gun fired, Cervantes fled the scene. This testimony from the witnesses is more than sufficient to support the verdict. There would be no arguable merit to a challenge to the sufficiency of the evidence.

Our independent review of the record reveals no other potential arguments. Therefore, we conclude that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Sara Heinemann Roemaat is relieved of any further representation of Cervantes in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals