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DISTRICT II

October 5, 2016

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

2015AP2306-CRNM State v. Benito Zuniga, Jr. (L.C. #2013CF683)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Benito Zuniga, Jr., appeals from a judgment of conviction for recklessly causing great bodily harm to a child as a repeater. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),¹ and *Anders v. California*, 386 U.S. 738 (1967). Zuniga received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

On October 31, 2013, paramedics responded to a 911 call from Zuniga and found Zuniga's four-month-old baby nonresponsive and on the verge of death. The baby was immediately transported from Zuniga's residence. Police responded, and over the course of the afternoon, interviewed Zuniga as to what had occurred. Zuniga indicated that the baby, who had been ill a few days earlier, had thrown up and as Zuniga tried to care for the baby, the baby had difficulty breathing and went limp. Zuniga, who for at least a month before the child was taken to the hospital was the baby's primary caregiver while the child's mother was at work, was arrested. A day later he asked to speak to investigators and explained that he had tripped while removing the baby from a swing and dropped the baby to the floor.

A four-day jury trial was held. The prosecution's expert opined that the baby had been subjected to a violent acceleration and deceleration force with rotation, a concept formerly known as shaken baby syndrome. Zuniga's expert rejected the notion that the baby had been subjected to any violence or abuse and opined that the baby suffered from seizures severe enough to interfere with the baby's ability to breathe. The jury found Zuniga guilty. He was sentenced to five years' initial confinement and five years' extended supervision.²

The no-merit report is very thorough in reporting on every stage of the criminal proceeding. The report details what occurred at the initial appearance, preliminary hearing,

² The sentencing court linked the imposition of the \$250 DNA surcharge to the requirement that Zuniga give a sample for what is his first felony conviction. That was a proper exercise of discretion. *See State v. Long*, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12.

arraignment, hearings on motions to reduce bail, for discovery compliance, to adjourn the trial, to exclude or limit expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), to suppress fruits of a search of Zuniga’s residence, and to suppress Zuniga’s statements, and all aspects of the jury trial, including jury selection, opening and closing arguments, evidentiary rulings on every objection made during the trial, conduct by a jail officer suggesting he had spoken with a juror, the colloquy conducted on Zuniga’s decision to not testify, jury instructions, and polling the jury. The report also discusses whether there is arguable merit to a potential claim that the sentence was the result of an erroneous exercise of discretion, based on inaccurate information, or otherwise unduly harsh or excessive. In our independent review of the record, we have considered the potential issues under the proper standard of review.³ We agree that the potential issues discussed by the report are without merit and that no trial errors occurred. We will not discuss any of those potential issues further.

Although the no-merit report lays out in detail the evidence presented at trial, it does not explicitly address whether there was sufficient credible evidence to support the guilty verdict. Our standard of review to determine whether the evidence was sufficient to support the conviction is that

³ In discussing the bindover decision, the no-merit report concludes that the trial court’s finding that Zuniga probably committed a felony “does not constitute an abuse of discretion.” We review a bindover decision as a question of law. See *State v. Dunn*, 121 Wis. 2d 389, 399, 359 N.W.2d 151 (1984). The no-merit report also uses an erroneous exercise of discretion standard of review in discussing the rulings on the suppression motions. However, a two-step standard of review applies to the suppression issues presented by this case. Thus, the trial court’s findings of evidentiary or historical facts will not be upset unless clearly erroneous but we independently apply the constitutional principles to the facts found to determine whether the standards of consent and voluntariness have been met. See *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998); *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987).

an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so [insufficient] in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Hayes, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (citation omitted). The evidence was sufficient and there is no arguable merit to a challenge to the sufficiency of the evidence.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Zuniga further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved from further representing Benito Zuniga, Jr., in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals