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March 25, 2014

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

2012AP2356-CRNM State of Wisconsin v. Kraig A. Kowalski (L. C. #2008CF262)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Kraig Kowalski has filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge Kowalski's convictions for nine counts of possessing child pornography, contrary to WIS. STAT. § 948.12(1m). Kowalski was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we

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

conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction and the order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The State charged Kowalski with nine counts of possessing child pornography. The trial court denied Kowalski's pretrial motions to suppress statements made to law enforcement officers and evidence obtained from Kowalski's home during the execution of a search warrant. The court also denied Kowalski's motion to exclude other acts evidence. After a jury trial, Kowalski was found guilty of the charged offenses. Out of a maximum possible two-hundred-twenty-five-year sentence, the court imposed concurrent ten-year sentences consisting of four years' initial confinement and six years' extended supervision. After an initial no-merit report was rejected and that appeal dismissed, Kowalski filed postconviction motions for a new trial on grounds of juror bias and the ineffective assistance of trial counsel. The motions were denied after a hearing. Counsel then filed the present no-merit appeal.

Any challenge to the trial court's denial of Kowalski's motion to suppress statements would lack arguable merit. Kowalski challenged statements he made to police officers during the execution of a search warrant at his home, claiming the officers questioned him without first giving him the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966). The requirements of ***Miranda*** do not apply, however, when police question a person who is not in custody. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 344-45, 588 N.W.2d 606 (1999). A person is in custody for ***Miranda*** purposes if, under the totality of the circumstances, a reasonable person in that situation would not feel free to terminate the interview and depart. ***State v. Lonkoski***, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552. Factors relevant to the totality of

the circumstances include the defendant's freedom to leave; the purpose, place, and length of the interview; and the degree to which the defendant was restrained. ***Id.***

At the suppression motion hearing, Loreen Glaman, a special agent with the Wisconsin Department of Justice Division of Criminal Investigation, testified that after officers arrived to execute a search warrant at Kowalski's home, he "may" have been handcuffed when the officers initially cleared the residence, but any such restraint ended within two minutes. Before questioning Kowalski at his kitchen table, Glaman explained to Kowalski that he was not under arrest, that he did not have to answer any questions and that he was free to leave. According to Glaman, at times, Kowalski walked around the house while the officers searched the home. Glaman further testified that other officers participated in questioning Kowalski, but nobody raised their voices, threatened Kowalski or drew their weapons.

Even assuming Kowalski was briefly handcuffed, the use of handcuffs alone does not necessarily transform a detention into an arrest. ***State v. Pickens***, 2010 WI App 5, ¶32, 323 Wis. 2d 226, 779 N.W.2d 1. Here, the circuit court implicitly credited Glaman's testimony that any restraint was brief and incidental to ensuring the police could safely execute the warrant. Finding that Kowalski was told he was not under arrest, he was free to leave and he did not have to answer questions, the court concluded Kowalski was not in custody. The court additionally determined that Kowalski's statements were free and voluntary, as there had been "no coercion, no threats, no drawn weapons [and] no deprivation of amenities." Because the court's factual findings concerning the circumstances of the interrogation are not clearly erroneous, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), we concur with its legal conclusion that Kowalski was not in custody when he gave his statements. Any challenge to the denial of Kowalski's motion to suppress his noncustodial statements would therefore lack arguable merit.

Any challenge to the trial court's denial of Kowalski's motion to suppress evidence obtained pursuant to a search warrant would likewise lack arguable merit. A search warrant only issues upon probable cause. ***State v. Gralinski***, 2007 WI App 233, ¶14, 306 Wis. 2d 101, 743 N.W.2d 448. Probable cause exists if the magistrate is "apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***Id.*** (citation omitted). A defendant challenging a search warrant bears the burden of showing insufficient probable cause. ***Id.*** Probable cause is determined on a case-by-case basis considering the totality of the circumstances and applying a common-sense test. ***Id.***, ¶15. Law enforcement officers may rely upon "the usual inferences that reasonable individuals may draw from evidence," and the warrant-issuing court may consider "both the experience and special knowledge of police officers who are applying for search warrants." ***Id.***, ¶¶15-16 (citation omitted).

Here, Kowalski moved to suppress evidence of child pornography found on his computer, claiming the search warrant did not establish probable cause because it was premised on stale information. Kowalski noted that on August 13, 2008, David Matthews, a Department of Justice computer crimes investigator, identified a computer that was participating in the distribution of child pornography. Matthews traced the computer to Kowalski on September 30, 2008, and a warrant was ultimately applied for and issued on November 5, 2008. Kowalski argued that given the three-month delay, there is no way law enforcement could have known that the files identified on August 13 would still be contained on the computer when the warrant was applied for on November 5.

Whether probable cause is stale, however, is not determined merely by counting the months "between the occurrence of the facts relied upon and the issuance of the warrant." ***Id.***, ¶27 (citation omitted). We review "the underlying circumstances, whether the activity is of a protracted or continuous nature, the nature of the criminal activity under investigation, and the nature of what is being sought." ***Id.***, ¶28 (citation omitted). The tendencies of computer users to retain child pornography images are relevant to this inquiry. ***Id.***, ¶30.

In ***Gralinski***, a case involving child pornography found on a computer, the court held that a warrant affidavit was not stale even though it was offered two and one-half years after Gralinski was first identified through the use of his credit card on a website. The ***Gralinski*** court determined:

> Because possession of child pornography on one's computer differs from possession of other contraband in the sense that the images remain even after they have been deleted, and, given the proclivity of pedophiles to retain this kind of information, as set forth in the affidavit supporting the request for the search warrant, there was a fair probability that Gralinski's computer had these images on it at the time the search warrant was issued and executed.

Id., ¶31.

In Kowalski's case, the warrant affidavit recited that "in many instances, due to unavoidable investigative delays … Matthews ha[d] obtained warrants for computer equipment based on evidence gathered several months earlier." The affidavit continued: "In almost every instance [the agent] found that evidence related to the crime of possession of child pornography observed on computer equipment at a given location remained within the computer equipment regardless of its later location or the subsequent availability of internet access." The affidavit further reflected the investigating agent's knowledge, based upon training and experience, that

"persons who possess and collect child pornography are unlikely to ever voluntarily dispose of those images, as the images represent a great value in the minds of these individuals." At the suppression motion hearing, Matthews added that there is a "persistence of evidence" in digital media, noting that in many cases where defendants took affirmative actions to attempt to destroy or eliminate evidence, files that have been deleted "ultimately end up in unallocated space" and "can still very efficiently be recovered." The court ultimately denied the suppression motion, concluding the warrant was issued "with probable cause to believe that evidence of the possession of child pornography was on the computer and that [the] computer would still contain evidence of, if not the files intact, at least prior possession of that pornography." The record supports this conclusion. Therefore, any further challenge to the denial of Kowalski's motion to suppress evidence would lack arguable merit.

There is no arguable merit to challenge the admission of other acts evidence under WIS. STAT. § 904.04(2)—namely, evidence that Kowalski possessed additional pornographic images of children in addition to the pornographic images underlying the nine charged offenses. The admissibility of evidence lies within the trial court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). A three-step analytical framework governs the admissibility of evidence under § 904.04(2). ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The court must consider whether: (1) the evidence is offered for an acceptable purpose, such as establishing motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident; (2) the evidence is relevant;[2] and (3) its probative value outweighs the danger of unfair prejudice. ***Id.*** at 772-73.

Here, Kowalski maintained that he downloaded images of child pornography inadvertently. The State explained that it wanted to offer evidence that Kowalski possessed the additional images of child pornography for the purposes of showing a plan or scheme, absence of mistake, and intent. The court determined the evidence was relevant to demonstrate the purposes identified by the State. While acknowledging that the other acts evidence was prejudicial, the court concluded that any prejudice to Kowalski did not outweigh the evidence's probative value. The court reached a reasonable conclusion based on the relevant facts and the applicable law. Any further challenge to the admission of other acts evidence would lack arguable merit.

There is no arguable merit to challenge Kowalski's waiver of his right to testify. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The trial court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Kowalski in an on-the-record colloquy, informing him of both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, Kowalski confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

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[2] In assessing relevance, we must first consider whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The second consideration in assessing relevance is whether the

(continued)

Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). Here, with respect to each count, the State was required to prove that: (1) Kowalski knowingly possessed a recording; (2) the recording showed a child engaged in sexually explicit conduct; (3) Kowalski knew that the recording showed a person engaged in actual or simulated sexual intercourse, masturbation, or lewd exhibition of the vagina, breast and/or penis; and (4) Kowalski knew or reasonably should have known that the person shown in the recording engaged in sexually explicit conduct was under the age of eighteen years. *See* WIS JI—CRIMINAL 2146A (2006).

At trial, DOJ investigator Matthews explained how files are shared on peer-to-peer computer networks. Matthews described the steps leading to his conclusion that a computer in Merrill held child pornography files available for sharing. He further explained how he traced that computer to Kowalski's home. Special agent Glaman testified that during an interview with Kowalski, he admitted having approximately fifteen or twenty computer videos containing child pornography on his hard drive, but he claimed such videos are sometimes retrieved when searching for adult pornography. According to Glaman, Kowalski stated that when he suspected that videos retrieved during peer-to-peer file sharing contained child pornography, he looked at the videos to verify they were "inappropriate" before deleting them. Kowalski acknowledged to

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other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. ***Id.***

Glaman, however, that he opened some child pornography video files multiple times because "although they contain child pornography, they may also contain adult[] pornography."

Glaman examined the files recovered from Kowalski's computer that form the basis for the nine charges in this case. She testified that the names of each of these files included words descriptive of child pornography, such as "PTHC," which is "an acronym for preteen hard core indicative of child pornography." Glaman described the content of the nine files and played excerpts from the files for the jury, linking the respective images to the nine counts in the information. Andrew Schoeneck, a DOJ computer analyst, testified that a person can avoid downloading child pornography from a peer-to-peer network in a variety of ways. These include using a filter that blocks certain content from search results and opting not to select files with words in the titles that suggest child pornography, such as "Lolita" and "PTHC."

To the extent there may have been conflicting or inconsistent testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. 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 Kowalski's convictions.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Kowalski's character; the need to protect the public; and the mitigating factors Kowalski raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these

circumstances, it cannot reasonably be argued that Kowalski's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, any challenge to the denial of Kowalski's postconviction motions for a new trial would lack arguable merit. Kowalski argued that a juror was biased against him and trial counsel was ineffective for failing to strike the juror. The juror, Brian Schwartz, failed to disclose his criminal history during voir dire. The trial court asked the prospective jurors early in the jury selection process whether any of them knew either of the lawyers involved in the case. Schwartz responded that he knew "Mr. Don Dunphy," the Lincoln County District Attorney prosecuting Kowalski. In the colloquy that followed, the court asked Schwartz:

> Q: How do you know Mr. Dunphy?
>
> A: He did a couple cases for me in the past.
>
> Q: Did you feel, do you hold any hard feelings one way or the other?
>
> A: No.
>
> Q: Do you feel you would be able to judge the testimony and evidence he puts on the same way as anyone else's?
>
> A: Yeah.

The State later asked all of the prospective jurors: "how many on the panel have ever been accused of a crime?" Although Schwartz had been convicted of two counts of second-degree sexual assault of a child and one count of child abuse, he did not respond to counsel's inquiry.[3]

[3] We note that Schwartz's convictions arose in 1991 and 1994. Upon completion of the sentences imposed, the Department of Corrections issued a discharge certificate certifying the restoration of Schwartz's civil rights, including the obligation for jury duty, effective August 14, 2006. Because Schwartz's civil rights were restored before Kowalski's May 2010 trial, any challenge to Kowalski's convictions on the ground that Schwartz should have been disqualified would lack arguable merit.

We employ a two-part test when assessing juror bias. *See* ***State v. Funk***, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421. To warrant a new trial, a litigant must prove: "(1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." ***Id.***, ¶32. Juror bias may be subjective or objective.[4] *See* **id.**, ¶36. A juror exhibits subjective bias by revealing that he or she has formed an opinion about the case prior to hearing the evidence. ***Id.***, ¶37. An inquiry into objective bias focuses "on the facts and circumstances surrounding the *voir dire* and trial, and whether given those facts and circumstances, a reasonable person in the juror's position would be biased." ***Id.***, ¶38.

At the postconviction motion hearing, Schwartz clarified his reference during voir dire to District Attorney Dunphy doing "a couple cases for [him] in the past." In fact, Dunphy had prosecuted Schwartz's brother in a felony case. Schwartz nevertheless testified that his knowledge of Dunphy did not affect his ability to impartially view the evidence. Schwartz further testified that he did not form an opinion of Kowalski's guilt or innocence until all the evidence was heard. Schwartz added that his own convictions did not affect his ability to listen to the evidence impartially and make a fair decision in Kowalski's case. Based on Schwartz's testimony, the court concluded there was no evidence of subjective bias. The court also reasonably concluded that nothing in the record supported a finding of objective bias. While

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[4] In addition to subjective bias and objective bias, a juror may exhibit statutory bias, but the latter does not turn on a juror's ability to remain impartial. *See* ***State v. Funk***, 2011 WI 62, ¶36 & n.17, 335 Wis. 2d 369, 799 N.W.2d 421. The record and the submissions do not raise any concerns that Schwartz was statutorily biased.

acknowledging that its conclusion may have differed had Schwartz been the victim of child sexual assault or child pornography, the court noted there was nothing to suggest that the fact of Schwartz's convictions from roughly fifteen years earlier would make it objectively impossible for him to sit as an impartial juror. Any claim that juror bias warrants a new trial would, therefore, lack arguable merit.

There is likewise no arguable merit to Kowalski's claim that he is entitled to a new trial on the ground he was denied the effective assistance of trial counsel. To establish ineffective assistance of counsel, Kowalski must show both that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance affected the outcome of the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

At the postconviction motion hearing, counsel testified that before voir dire, she was aware Schwartz had been convicted of second-degree sexual assault of a child. She did not question Schwartz regarding his familiarity with Dunphy because she knew Dunphy had never been in private practice in Lincoln County and, therefore, assumed he had prosecuted Schwartz for the sexual assault case. Counsel further explained that she made a conscious decision not to question Schwartz or strike him as a juror after he failed to acknowledge his convictions during voir dire because she "assumed anybody with a conviction would be pro-defense." Counsel also testified there were jurors she wanted stricken more than Schwartz. The circuit court determined that counsel engaged in "the kind of strategy that lawyers make all the time when sitting at counsel table on whether … to strike a juror or to follow-up." "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

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

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Timothy T. O'Connell is relieved of further representing Kowalski in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals