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July 31, 2017

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

2015AP1474-CR State of Wisconsin v. Damon J. Anker (L.C. #2011CF243)

Before Lundsten, Higginbotham and Sherman, 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).

Damon Anker appeals a postconviction order on a judgment convicting him of 111 counts of possession of child pornography and a single count of photographing a minor as a registered sex offender. After reviewing the record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] For the reasons discussed below, we affirm the convictions for possession of child pornography and reverse the conviction for photographing a minor as a registered sex offender.

Anker first contends that trial counsel provided ineffective assistance by failing to object to the testimony of a police detective regarding the ages of the persons depicted in the images and to the testimony of an FBI agent regarding whether the conduct depicted in the images was sexually explicit. Anker argues that the testimony was improper opinion testimony because neither witness had been qualified as an expert. Anker also argues that trial counsel provided ineffective assistance by failing to object to evidence concerning NCMEC reports that "identified and supplied the purported ages for some of the persons depicted on the images."

The State asserts that Anker failed to prove prejudice from any of his three ineffective assistance arguments—that is, that but for trial counsel's unprofessional errors there is a reasonable probability the result of the proceeding would have been different. *See* ***State v. Lepsch***, 2017 WI 27, ¶48, 374 Wis. 2d 98, 892 N.W.2d 682. We agree with the State that Anker failed in his initial brief to develop an argument that he was prejudiced by trial counsel's allegedly deficient performance. We further note that, in his reply brief, Anker did not contest the State's assertion that he failed to prove prejudice on any of his three ineffective assistance arguments. We therefore deem Anker to have conceded that he cannot demonstrate prejudice from counsel's alleged errors. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (a party concedes an argument by not

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[1] All reference to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

responding to it). Given that determination, we conclude that all of Anker's claims of ineffective assistance of counsel fail, without addressing whether counsel's performance was deficient. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

Anker next contends that the circuit court erred in allowing joinder of the count of intentionally photographing a minor with the other counts because that charge was not similar in character to the other charges and was not based on the same acts or transactions. *See* WIS. STAT. § 971.12(1) (setting forth criteria for joinder). Anker further argues that the count of intentionally photographing a minor should have been severed from the child pornography counts because it allowed the jury to hear that he was a registered sex offender. *See* § 971.12(3) (authorizing severance based upon prejudice). We reject both propositions.

We first address whether initial joinder was appropriate, which requires a discussion of some background facts. The photography count was based on Anker using a cell phone video camera to secretly video tape a child under the age of sixteen use the bathroom. The video shows the child pulling her pants down, but it does not show her private parts. Anker also secretly videotaped a seventeen-year-old girl in the bathroom, changing her clothes and using the restroom.

We construe the joinder statute broadly in favor of initial joinder. ***State v. Linton,*** 2010 WI App 129, ¶14, 329 Wis. 2d 687, 791 N.W.2d 222. The state supreme court recently described several factors to be used when determining "whether separate crimes are sufficiently 'connected together' for purposes of initial joinder." ***State v. Salinas***, 2016 WI 44, ¶43, 369 Wis. 2d 9, 879 N.W.2d 609. These factors include but are not limited to:

> (1) are the charges closely related; (2) are there common factors of substantial importance; (3) did one charge arise out of the investigation of the other; (4) are the crimes close in time or close in location, or do the crimes involve the same victims; (5) are the crimes similar in manner, scheme or plan; (6) was one crime committed to prevent punishment for another; and (7) would joinder serve the goals and purposes of WIS. STAT. § 971.12.

Id.

Construing the joinder statute broadly in favor of joinder, Anker's argument that initial joinder was improper fails. First, the charges are closely related because each crime involves possession of an image of a minor. *See* WIS JI—CRIMINAL 2146A; WIS. STAT. § 948.12(1m) (child pornography elements include possession of a recording of a child engaged in sexually explicit conduct) and WIS JI—CRIMINAL 2196; WIS. STAT. § 948.14[2] (photographing a minor elements include capturing a representation of someone under the age of seventeen). Furthermore, there is a common factor of substantial importance because each crime resulted in Anker possessing a recording of a child in the nude.

Other ***Salinas*** factors support joinder. The photographing a minor charge arose out of the child pornography charges because the secret cell phone videos were discovered during a forensic analysis of items obtained from Anker while executing a search warrant. The crimes were committed in the same place, Anker's house. Only one factor is somewhat in Anker's favor, which is that the crimes were not committed as part of the same scheme because the commonalities do not tend to establish the identity of the perpetrator. *See* ***Francis v. State***, 86 Wis. 2d 554, 560, 273 N.W.2d 310 (1979). This is outweighed because the result of both crimes

[2] As will be discussed later in the opinion, WIS. STAT. § 948.14 was ruled facially unconstitutional in ***State v. Oatman***, 2015 WI App 76, 365 Wis. 2d 242, 871 N.W.2d 513.

was Anker gaining possession of nude or sexually provocative images of underage girls. In the final analysis, initial joinder was proper because the crimes were sufficiently connected together.

Next, we address whether Anker was prejudiced by the failure to severe the joinder. Anker argues that the court's denial of his severance motion prejudiced him because the jury heard he was a registered sex offender. According to Anker, this denied him his due process right to a fair trial because it made it easier for the state to prove his guilt on the possession of child pornography counts.

In order for a defendant to prove that he or she was prejudiced by the joinder of cases, the defendant must show substantial prejudice or that a "certainty of prejudice" resulted from the joinder of two counts. ***Linton,*** 329 Wis. 2d 687, ¶¶15, 21 (quoted source omitted). Anker suffered little if any prejudice from the jury learning he was a registered sex offender because the jury learned separately of the crime underlying his required registration. Anker, testifying in his own defense, admitted that he pleaded guilty to three counts of possession of child pornography in a prior case. The underlying conviction is what caused Anker prejudice, not the consequences of that conviction, and any prejudice this may have caused him was not unfair. Furthermore, the jury acquitted Anker on three child pornography counts, which indicates that evidence that Anker was a registered sex offender did not prevent the jury from weighing the evidence for each child pornography count. To summarize, joinder of the photographing a minor and child pornography crimes was appropriate and did not result in substantial prejudice to Anker.

Finally, Anker argues that his conviction for violating the photography statute, WIS. STAT. § 948.14, should be reversed because we held that § 948.14 is facially unconstitutional in ***State v. Oatman***, 2015 WI App 76, 365 Wis. 2d 242, 871 N.W.2d 513. The State does not

respond to the merits of this issue; instead, the State argues that Anker forfeited this argument because he did not make it before the circuit court. We choose to address this issue and reverse the conviction on this count because it is in the interest of justice to reverse a conviction under a void statute. *See* ***State v. Benzel***, 220 Wis. 2d 588, 591-92, 583 N.W.2d 434 (Ct. App. 1998) ("an offense created by an unconstitutional statute is no longer a crime and a conviction under such statute cannot be a legal cause for imprisonment."). We conclude that ***Oatman*** compels the reversal of Anker's conviction for photographing a minor.

For the above reasons, we affirm the child pornography convictions, we reverse the conviction for photographing a minor, and we remand to the circuit court to vacate the conviction for photographing a minor.

IT IS ORDERED that the postconviction order is summarily affirmed in part and reversed in part under WIS. STAT. RULE 809.21(1). The judgment of conviction shall be amended to vacate the conviction for photographing a minor.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals