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February 18, 2020

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

2017AP2433-CRNM State of Wisconsin v. Kenneth Payne, Sr.
(L. C. No. 2015CF3022)

Before Stark, P.J., Hruz and Seidl, 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 Kenneth Payne, Sr., has filed a no-merit report concluding there is no basis to challenge Payne's convictions, following a jury trial, for trafficking of a child, and for

second-degree sexual assault of a child, both with habitual criminality repeater enhancements.¹ Payne has responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we modify the judgment and conclude that the judgment, as modified, may be summarily affirmed because there is no arguable issue of merit that could be raised on appeal. The case is remanded for entry of a corrected judgment of conviction.

Milwaukee police officers responded to emergency calls reporting a shooting at an American Inn Motel. The call described two suspects: a black male and an Asian female. An officer testified at trial that upon responding to the call, he observed two individuals matching those descriptions just outside the entrance to a nearby motel. They were taken into custody, and it was discovered the female was fifteen years old.

The female testified at trial that on the first day she met Payne he asked her if she wanted to work with him by prostituting. Payne told her that he “had this one girl that he had working for him too.” The female told the jury that Payne took her to National Avenue to walk up and down the street to prostitute. She earned money by having oral sex for \$20 and sexual intercourse for \$40 to \$50, and she gave the money to Payne “so he could take care of me.”

The female also provided prostitution services at the American Inn. Payne paid for the room. She testified that Payne made a “Backpage” advertisement with a photograph Payne took of her in the motel room with his phone. She stated a potential customer would text or call Payne’s

¹ Payne was charged with trafficking of a child, as a habitual criminality repeater, with use of a dangerous weapon; second-degree sexual assault of a child under sixteen years of age, as a habitual criminality repeater; and possession of a firearm by a felon, as a party to a crime, and as a repeater. The use of dangerous weapon enhancer was subsequently dismissed. An amended Information omitted the possession of a firearm by a felon charge, as well as the dangerous weapon enhancer.

phone number, which was listed on the Backpage advertisement. Whenever a customer would come, Payne would “hide in the bathroom.” She also testified that she had oral sex with Payne at the American Inn on two occasions and intercourse on another occasion.

The female testified that on the date in question, a customer came to the room for prostitution services. She had received a text from him on Payne’s phone, and when the customer showed up, Payne hid in the bathroom. Upon entering the motel room, the customer asked if anyone else was in the room. The female said no, and the customer said, “Are you sure?” He then went to the bathroom door and attempted to open it, but Payne was holding the door shut from the inside. The customer demanded that the person in the bathroom come out. When Payne emerged from the bathroom, an altercation occurred between the customer and Payne. The customer was shot in the chest and then fled the scene. The female then ran out of the room and went to the side of the motel where she encountered two men who were drug dealers, and they refused to call the police. She then went to a nearby apartment but came back to the motel and saw Payne outside the American Inn. Payne said, “Let’s go to the next hotel.” The female asked Payne what happened, and Payne told her he had shot the customer.

A police officer testified at trial that he contacted the manager of the American Inn and confirmed that Payne had rented room 201, paid cash for the room, and filled out the registration receipt. A detective testified that she obtained documents from the Internet site Backpage, used predominantly to advertise escorts or prostitutes. The detective stated Backpage was also “utilized frequently with regard to sex trafficking.” The Backpage site advertisement at issue was entitled, “Asian persuasion for fill every sensacion!!! – 18.” The advertisement included a photograph of the fifteen-year-old female, together with other information “pertaining to who should or should not reply to the ad.” The credit card that was used to pay for the advertisement was retrieved from

Payne's personal property after he was taken to jail. The photograph of the female appeared to have been taken in room 201 of the American Inn, and the individual in the photograph was wearing a dress found in the female's backpack. Evidence establishing the birthdate of the female confirmed the fact that she was fifteen years old.

The customer who was shot in the chest testified that he had arranged for a prostitution date and was told to go to room 201 of the American Inn. When he arrived at the room, he was met by a "Chinese girl," then heard movement in the bathroom. A black man came out of the bathroom, after which the two of them fought, culminating in the customer being shot.

Another individual testified that he had been incarcerated with Payne after Payne's arrest, and that Payne had spoken to him about the case. He testified Payne told him that he had met an Asian or Hmong girl who was a teenage runaway, and Payne told her that she could make money having sex with men. He further testified that Payne told him that Payne took her to a motel room and put her on Backpage, which he paid for with a prepaid debit card. The individual stated that Payne told him about the incident with the customer, that the customer was shot, and then Payne and the female left the motel to get a room at another motel. He testified that Payne stated that he was worried about the debit card he used to purchase the Backpage advertisement because it was in his wallet, he needed somebody to get the property, and that Payne even signed a slip to release his property to someone. The individual also testified that Payne told him that Payne had sex with the female "to see how well she performed." Payne also told the individual that Payne took the female to a motel and "boned her."

Another detective told the jury that on the day of the shooting, Payne's phone showed two contacts with the customer's phone. Furthermore, the detective identified a photograph of the

female on Payne's phone that was the same photograph that appeared in the Backpage advertisement. The detective further testified that in a two-day span there were 626 text messages on Payne's phone, the majority of which were to arrange prostitution dates, and that approximately 500 of the texts occurred after the Backpage advertisement was posted on the Internet. The text messages identified a room number at the particular American Inn; what sex acts would be provided; the dollar amounts; photo requests of private parts; and references to the Backpage advertisement.

A DNA expert testified that a swab was taken from Payne's penile shaft that showed a mixture of DNA. The expert testified it was 22 trillion times more likely that the DNA mixture was from Payne and the female than from Payne and any other random individual.

The jury found Payne guilty on both counts charged in the amended Information. The circuit court imposed consecutive sentences consisting of seven years' initial confinement and four years' extended supervision on the child trafficking charge; and six years' initial confinement and three years' extended supervision on the sexual assault of a child charge.

The no-merit report addresses potential issues regarding whether sufficient evidence supported the jury's verdicts, as well as whether the circuit court properly exercised its sentencing discretion. Upon our independent review of the record, we agree with counsel's description, analysis, and conclusion that any challenge to these issues would lack arguable merit, and we will not address them further.

Payne's response to the no-merit report takes umbrage with the jury's verdicts. Payne contends he "was being nice offering [the 15-year-old female] a place to sleep for the night." The next morning, Payne was using the bathroom in the room, when the female "let someone in the

room” who had a gun “with the intent of robbing Payne.” According to Payne, during the ensuing fight, the man shot himself. Payne argues he “clearly went from being a victim of a robbery to being a suspect of a robbery” Irrespective of Payne’s contentions, more than ample evidence supported the jury’s verdicts, and we will not undermine the sanctity of the judgment. We search the record for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach. See *Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979).

Payne’s response to the no-merit report also argues “the witness list of Nov. 17, 2015 and the cell phone evidence violated Payne’s 6th constitutional right [sic].” Payne contends his trial counsel was ineffective by failing “to include Det. McQuown on the defendant’s witness list.” Payne also contends his counsel “failed to call any rebuttal witnesses; do any investigating that would lead to witnesses that could offer exculpatory evidence, and any other witnesses, including expert witnesses not included on the state’s witness list[, w]hich did NOT include Det. McQuown.” Payne asserts “the Extraction Report that was printed by the examiner Det. McQuown” shows a “text coming in asking for rates” prior to the posting of the Backpage advertisement.

Payne’s arguments are undeveloped and speculative. Payne fails to develop any argument as to how “Det. McQuown”—or any other uncalled witness—would have helped his defense, how the testimony would have been exculpatory, or how their absence as witnesses prejudiced his defense. Further, the fifteen-year-old female had testified that Payne had “another girl working for him too” on the day the fifteen-year-old girl first met Payne. As mentioned previously, a detective also testified that in a two-day span there were 626 text messages on Payne’s phone, the majority of which were to arrange prostitution dates, and that approximately 500 of the texts occurred after the Backpage advertisement was posted on the Internet. That text messages came

before the Backpage advertisement regarding the fifteen-year-old girl was posted is thus not dispositive. Our independent review of the record fails to establish any issue of arguable merit in this regard.

Payne also argues that the DNA evidence and the crime laboratory reports were “fruits of the poisonous tree.” Payne insists he received a “second” crime lab report that was not introduced into evidence, as well as a “third crime lab report in relation to the DNA findings” According to Payne, this evidence taken from the fifteen-year-old female excluded Payne as a contributor, and therefore the second-degree sexual assault charge should have been dismissed. Payne also claims a supplemental report shows that “the DNA was NOT from Kenneth Payne Sr., but, that of a Tony Lee Rivers.” In support of his contentions, Payne appends to his response to the no-merit report documents from outside of the appellate record. These documents purport to show that samples taken from the fifteen-year-old female’s shirt excluded Payne as the source of the DNA from those samples, and a cutting of a stain on a dress/shirt revealed a match between the evidentiary profile and a Michigan offender in the Offender Index named Tony Lee Rivers. Even if we could consider the documents Payne provides and assume that the shirt or dress samples from the fifteen-year-old female prostitute excluded Payne as a source of DNA from those items, that would not be relevant to the DNA mixture from Payne’s own penile shaft, which was 22 trillion times more likely to be from Payne and the female than from Payne and a random unrelated individual. Accordingly, any challenge to these issues would lack arguable merit.

Payne also argues that a conflict of interest was created when a Milwaukee police officer became involved with Payne’s criminal investigation, against whom Payne previously brought a civil suit. Because of the prior relationship with this officer, Payne contends the Milwaukee Police Department could not investigate or prosecute Payne regarding the present case. However, there

is no indication in the record on appeal that any issues Payne had in the past with this officer has any relevance to the issues in the present case. Quite simply, there is no arguable merit to any issue regarding the Milwaukee Police Department's jurisdiction to investigate crimes alleged against Payne in this matter, or the propriety in it doing so.

Payne also alleges various prejudicial conduct by the district attorney and "abuse" by the circuit court. For example, Payne contends "[t]he judge examined [the individual incarcerated with Payne] while the jury was inpanelled [sic]." However, the court conducted a brief discussion about the individual's testimony outside the presence of the jury. Our independent review of the record reveals no arguable issues of merit regarding improper conduct by the court or the district attorney.

Finally, although not discussed in the no-merit report, the judgment of conviction improperly refers to use of a dangerous weapon with regard to the trafficking of a child count. The use of a dangerous weapon enhancer was dismissed prior to trial, and the Information was amended accordingly. The circuit court noted at sentencing that the enhancer for use of a dangerous weapon "was struck prior to the trial." We therefore modify the judgment to delete the reference to use of a dangerous weapon in count one.

Our independent review of the record discloses no other issues of arguable merit. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction as modified, discharges appellate counsel of the obligation to represent Payne further in this matter, and remands for entry of a corrected judgment of conviction.

Therefore,

IT IS ORDERED that the judgment is modified and, as modified, is summarily affirmed and the cause remanded for entry of a corrected judgment of conviction. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Carl W. Chesshir is relieved of further representing Kenneth Payne, Sr., in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals