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DISTRICT II

May 5, 2021

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

2019AP1169-CR

State of Wisconsin v. Donald J. Gebhart (L.C. #2016CF714)

Before Reilly, P.J., Gundrum and Davis, 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).

Donald J. Gebhart appeals from a judgment convicting him of using a computer to facilitate a child sex crime. He contends that the circuit court erred in denying his motion to suppress evidence found on his cell phone. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

On June 10, 2016, Gebhart used a dating application on his cell phone to message a person he thought was a fifteen-year-old boy named Michael. In reality, Michael was an undercover police detective named Andrew Jicha. Gebhart asked Michael if he wanted to engage in oral sex, and the two agreed to meet.

Police approached Gebhart at the designated meeting place and saw him using the dating application on his phone. They arrested Gebhart and seized his phone. During the subsequent interview, police read Gebhart his *Miranda*² rights but did not give him a chance to acknowledge that he understood them. Police asked Gebhart whether he would consent to a search of his phone, and he agreed. They then asked for his phone passcode, and he provided it.

Gebhart moved to suppress evidence found on his phone, arguing that he did not freely and voluntarily consent to the search. The circuit court initially granted the motion due to the violation of Gebhart's *Miranda* rights. However, it subsequently changed its mind, concluding that Gebhart had freely and voluntarily consented. The matter proceeded to trial.

At trial, the State introduced screenshots from Gebhart's phone showing the conversation on the dating application between Gebhart and Michael. It also introduced identical screenshots of the same conversation taken from Detective Jicha's phone. The screenshots included two pictures that Gebhart had sent of himself.

¹ All references to the Wisconsin Statutes are to the 2019-20 version.

² *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Ultimately, the jury found Gebhart guilty of using a computer to facilitate a child sex crime. The circuit court sentenced him to five years of initial confinement and fifteen months of extended supervision. This appeal follows.

On appeal, Gebhart contends that the circuit court erred in denying his motion to suppress evidence found on his phone. He asserts that he did not freely and voluntarily consent to the search due to the violation of his *Miranda* rights.

Whether evidence is admitted in violation of *Miranda* is subject to harmless error review. See *State v. Martin*, 2012 WI 96, ¶44, 343 Wis. 2d 278, 816 N.W.2d 270. An error is harmless when “it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Id.*, ¶45 (citation omitted). Assessing harmless error presents a question of law that we review de novo. *State v. Ziebart*, 2003 WI App 258, ¶26, 268 Wis. 2d 468, 673 N.W.2d 369.

Assuming without deciding that the circuit court erred in admitting the evidence found on Gebhart’s phone, we conclude that the error was harmless. As noted by the State, the only piece of incriminating evidence found on Gebhart’s phone was the conversation on the dating application between Gebhart and Michael. The State had access to the same conversation via Detective Jicha’s phone. Because the same evidence was properly admitted at trial via screenshots taken from Detective Jicha’s phone, Gebhart would still have been convicted of his crime absent the evidence found on his phone.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to
WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals