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DISTRICT IV

July 22, 2021

To:

Hon. Thomas T. Flugaur
Circuit Court Judge
Electronic Notice

Lisa M. Roth
Clerk of Circuit Court
Portage Co. Courthouse
Electronic Notice

Timothy M. Barber
Electronic Notice

Suzanne Edwards
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Louis J. Molepske Jr.
Electronic Notice

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

2019AP474-CR State of Wisconsin v. Christopher J. Ehlenfeldt
(L.C. # 2015CF113)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, 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).

Christopher Ehlenfeldt challenges the circuit court's restitution award to one of the victims in Ehlenfeldt's child pornography case. Ehlenfeldt argues that the circuit court erred by relying on federal restitution law for child pornography victims under ***Paroline v. United States***, 572 U.S. 434 (2014), which he contends is inconsistent with Wisconsin restitution law. Ehlenfledt states that, under Wisconsin law, the State was required to establish a causal connection between Ehlenfeldt's conduct and the victim's losses, and that it failed to do so. 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 summarily affirm.

Following a jury trial, Ehlenfeldt was convicted of one count of capturing an image of nudity without consent and twenty-nine counts of possessing child pornography. At sentencing, the State indicated it would request $5,000 in restitution for one of the victims of the child pornography, known by the pseudonym "Vicky." Ehlenfeldt objected to the State's restitution request, arguing that he had already made restitution to Vicky in his related child pornography case in a different county. The circuit court referred the contested restitution matter to a court commissioner. At the restitution hearing, Ehlenfeldt reiterated his objection to the requested restitution on grounds that he had already paid restitution to the same victim in another county. The court commissioner rejected that argument, explaining that the convictions in each county were based on different images, and finding that the restitution request was reasonable. The circuit court awarded the restitution recommended by the court commissioner.

On appeal, Ehlenfeldt contends that the circuit court erred by awarding the requested restitution because the State failed to establish a causal nexus between his criminal conduct and the victim's losses. *See* ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 ("Before restitution can be ordered, a causal nexus must be established between the 'crime considered at sentencing' … and the disputed damage.") (quoted source omitted). He argues that the State failed to meet its burden to prove that Ehlenfeldt's criminal conduct was a "substantial factor" in causing the victim's damages, *see* ***id.***, and that the restitution request should have been denied on that basis. He contends that the Supreme Court's holding in ***Paroline***, 572 U.S. at 450-

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

57, that a child pornography victim need not show "but for" causation under federal law making restitution mandatory in child pornography cases, is inconsistent with Wisconsin law.

The State responds that Ehlenfeldt forfeited this argument by failing to raise it in the circuit court. *See* ***State v. Bollig***, 222 Wis. 2d 558, 564, 587 N.W.2d 908 (Ct. App. 1998) (arguments generally deemed waived by an appellant if raised for the first time on appeal). In reply, Ehlenfeldt does not dispute that he failed to raise this argument in the circuit court, but argues that he did raise the issue of the disputed restitution, and that he is now raising an additional *argument* related to that issue. Ehlenfeldt cites ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 331 N.W.2d 320 (1983), for the proposition that the rule against raising issues for the first time on appeal does not prevent an appellant from making additional arguments as to issues already raised in the circuit court. ***Id.*** at 505.

We are not persuaded to reach the new argument Ehlenfeldt raises on appeal. As we explained in ***Townsend v. Massey***, 2011 WI App 160, ¶¶24-25, 338 Wis. 2d 114, 808 N.W.2d 155, "countless [cases] after ***Holland Plastics*** have reaffirmed that the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." We explained that the supreme court's statements in ***Holland Plastics*** that an argument it chose to address was "'merely an additional argument on issues already raised'" in the circuit court, and that "'the general rule against raising issues for the first time on appeal does not prevent the [appellant] from making its argument in this court,'" were "plainly true." ***Townsend***, 338 Wis. 2d 114, ¶24 (quoting ***Holland Plastics***, 111 Wis. 2d at 505). That is, we stated, "[n]othing prevents a party from making an argument for the first time on appeal and, as the statement implies, nothing prohibits an appellate court from addressing a new argument." ***Id.*** But, "***Holland Plastics*** does not require appellate courts to consider new arguments." ***Id.*** Here,

Ehlenfeldt does not provide us with a good reason to disregard forfeiture and reach the argument that he raises for the first time on appeal, and we do not independently discern a good reason.

Therefore,

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

Sheila T. Reiff
Clerk of Court of Appeals