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DISTRICT III

February 15, 2022

To:

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James M. Hutter 560148
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1190-CRNM State of Wisconsin v. James M. Hutter (L. C. No. 2016CF1266)

Before Stark, P.J., Hruz and Gill, 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).

James Hutter appeals a judgment, entered following a jury trial, that convicted him of second-degree sexual assault of a child, as a repeater and with lifetime supervision as a serious sex offender. Attorney Melissa Petersen has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Hutter was advised of his right to respond to the no-merit report and has filed a response raising three issues. Counsel has filed a

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

supplemental no-merit report addressing Hutter's claims. Having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

Hutter was charged with three counts, each pertaining to the same victim: second-degree sexual assault of a child, as a repeater and with lifetime supervision as a serious sex offender (Count 1); attempted possession of child pornography, as a repeater (Count 2); and second-degree sexual assault, as a repeater and with lifetime supervision as a serious sex offender (Count 3).

With respect to Count 1, the victim testified at trial that she and her family moved to a residence on Eddy Lane in Eau Claire in November 2013, when the victim was fourteen years old. The victim testified that while she lived at the Eddy Lane residence, Hutter would come into her room and lie on her bed, where he would get on top of her and "dry hump" her. The victim elaborated that Hutter would touch her breasts over her clothes and try to kiss her. He would also press his erect penis against her vaginal area while they were both clothed. With respect to Count 2, the victim testified that Hutter asked her to send him a picture of herself without her shirt on. With respect to Count 3, the victim testified that while she and Hutter were lying on the floor of the living room at the Eddy Lane residence following a bonfire in the summer of 2015, Hutter grabbed her hand and forced her to touch the tip of his erect penis.

The jury found Hutter guilty of Count 1—the second-degree sexual assault of a child count—but not guilty of Counts 2 and 3. At sentencing, the defense stipulated that the repeater enhancer applied to Hutter's conviction on Count 1. The circuit court sentenced Hutter to eight

years of initial confinement, followed by eight years of extended supervision. The court also imposed lifetime supervision as a serious sex offender, pursuant to WIS. STAT. § 939.615.

The no-merit report addresses whether Hutter's trial attorney was ineffective by failing to file any motions to suppress evidence; whether the circuit court's pretrial rulings were improper; whether any errors occurred during the jury selection process; whether the court properly instructed the jury; whether any improper statements were made during the attorneys' opening or closing statements; whether there was sufficient evidence to support the jury's verdict; whether Hutter is entitled to a new trial in the interest of justice; and whether the court properly exercised its sentencing discretion. We agree with counsel's description, analysis and conclusion that any challenge to Hutter's conviction or sentence on these grounds would lack arguable merit, and we do not discuss them any further.

Hutter raises three arguments in his response to the no-merit report. First, he contends the jury should have been told that the victim's father threatened one of the defense witnesses, Hutter's former girlfriend Eliese Weiland, during the trial. During the victim's testimony at trial, the victim/witness coordinator informed the prosecutor that the victim did not want her father in the courtroom during her testimony. The victim's father therefore left the courtroom, but upon doing so, he approached Weiland and threatened her. The unspecified threat was brought to the circuit court's attention during a recess following the victim's testimony. Law enforcement provided Weiland with a form that she could use to submit a statement regarding the threat, and Weiland was permitted to go home for the remainder of the day. She returned to court the following morning and testified for the defense as planned.

Hutter asserts that if the jury had been informed about the threat against Weiland, "reasonable doubt would [have been] found." Counsel has submitted an affidavit, however, averring that she retained an investigator to investigate the threat's impact on Weiland's testimony. Weiland told the investigator that she testified truthfully at trial and would not have testified any differently absent the threat. Given that the threat did not affect Weiland's testimony, we agree with counsel that the mere fact a threat was made would not have been relevant to the jury's determination of Hutter's guilt. The threat, in and of itself, did not tend to show whether Hutter committed the charged crimes. The victim's father did not testify at trial, and, accordingly, evidence regarding the threat would not have been relevant to bolster or lessen his credibility, nor would it have served to bolster or lessen the credibility of any other witness. Because evidence regarding the threat was irrelevant and therefore inadmissible, any claim that the jury should have been informed of the threat would lack arguable merit. *See* WIS. STAT. § 904.02 ("Evidence which is not relevant is not admissible.").

Second, Hutter asserts that the circuit court's response to a question posed by the jury during deliberations "forced the jury to come to a conclusion they would not have come to without [the court's] direction." After the jurors had been deliberating for approximately two and one-half hours, they sent the court a note stating: "We have reached a unanimous decision on Count 2, but it is our firm belief we are hung on Counts 1 and 3. How should we proceed?" After discussing the issue with both parties' attorneys, the court provided the jury with the following response: "You should continue your deliberations. You may deliberate into the evening if you wish. We could order pizza. If you prefer to adjourn for the evening and return for more deliberations in the morning, you may do so."

Hutter argues the circuit court's response gave "the illusion that the jury would be made to deliberate until they reached a unanimous decision." "[A] verdict cannot stand when the jury have been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to agreement at all, unless it be clearly shown that no influence was thereby exerted." ***State v. Echols***, 175 Wis. 2d 653, 666, 499 N.W.2d 631 (1993) (citation omitted). Here, however, the court merely informed the jurors that they should continue deliberating, that they could deliberate into the evening if they wished, that food could be ordered for them if they desired, and that they could instead choose to continue their deliberations in the morning. The court's response to the jury was not inherently coercive, nor did it reasonably imply that the jurors would be made to continue deliberating indefinitely until a unanimous decision was reached.

Hutter contends the circuit court should have instead read the jury WIS JI—CRIMINAL 520 (2001), which provides:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> You will please retire again to the jury room.

The circuit court considered giving WIS JI—CRIMINAL 520 in response to the jury's question. The court concluded, however, that it was "too soon" to give that instruction, as the jurors had only been deliberating for two and one-half hours and had only once indicated that

they were having trouble reaching a unanimous decision. On this record, there would be no arguable merit to a claim that the court erroneously exercised its discretion by choosing not to read the jury WIS JI—CRIMINAL 520 and by instead providing the response discussed above.[2] *See* ***State v. Langlois***, 2018 WI 73, ¶34, 382 Wis. 2d 414, 913 N.W.2d 812 (circuit court has broad discretion in instructing a jury).

Third, Hutter argues the circuit court erred by allowing the State to introduce at trial four photographs of the victim from the time period when the charged conduct was alleged to have occurred. Hutter argues these photographs should have been excluded because they were irrelevant, immaterial, and prejudicial. He further argues that his trial attorney was ineffective by failing to object to the introduction of the photographs.

Again, these arguments lack arguable merit. Contrary to Hutter's assertion, the record shows that his trial attorney did object to the introduction of the photographs, specifically arguing that they were irrelevant and would serve only to arouse the jury's sympathy for the victim. The circuit court rejected counsel's argument, concluding that because the victim was eighteen years old at the time of trial, and because the assaults were alleged to have taken place when she was fourteen and fifteen, the photographs were relevant to help the jury understand "that the witness testifying in court today is different, much older … than she was at that time." The court also stated it was "fair" for the jury to see what the victim looked like at the time of the alleged offenses.

[2] To the extent Hutter argues his trial attorney was ineffective by failing to object to the circuit court's response to the jury's question, or by failing to ask the court to give WIS JI—CRIMINAL 520, those claims lack arguable merit. An attorney is not ineffective by failing to raise a meritless objection. *See* ***State v. Cameron***, 2016 WI App 54, ¶27, 370 Wis. 2d 661, 885 N.W.2d 611.

Under these circumstances, there would be no arguable merit to a claim that the circuit court erroneously exercised its discretion by admitting the photographs. *See* ***State v. Ringer***, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448 ("The admission of evidence is subject to the circuit court's discretion."). The court reasonably concluded that the photographs were relevant under WIS. STAT. § 904.01. Although the court did not explicitly address whether the photographs' probative value was substantially outweighed by the danger of unfair prejudice under WIS. STAT. § 904.03, the record does not support a conclusion that the photographs were unfairly prejudicial. There is nothing particularly inflammatory about the photographs, and they do not appear to have any tendency to influence the outcome of the case by improper means. *See* ***State v. Hurley***, 2015 WI 35, ¶88, 361 Wis. 2d 529, 861 N.W.2d 174.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Melissa Petersen is relieved of further representing James Hutter in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals