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DISTRICT III

May 10, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Brown County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1650-CRNM State of Wisconsin v. Nicholas J. Van Eyck
(L. C. No. 2013CF299)

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).

Counsel for Nicholas Van Eyck has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge Van Eyck's convictions for two counts of first-degree sexual assault of a child (sexual contact with a person under age thirteen) and six counts of felony intimidation of a victim, as a party to the crime, all counts as a repeater. Van Eyck was informed of his right to file a response to the no-merit report, and he has

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

not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

Van Eyck was convicted of the counts listed above following a jury trial. The sexual assault charges were based on allegations that Van Eyck had sexually assaulted eleven-year-old Natalie[2] during the fall of 2012 while he was living with Natalie and her family. The victim intimidation charges were based on allegations that, while in custody on the sexual assault charges, Van Eyck had engaged in multiple recorded phone conversations with Natalie's mother—and one conversation directly with Natalie—during which he pressured them to have Natalie write a letter recanting her sexual assault allegations.

A forensic interview of Natalie was conducted in November 2012. A video recording of the interview was played for the jury at trial. During the interview, Natalie stated that Van Eyck had done "bad stuff" and "disgusting stuff" to her. Natalie also stated that Van Eyck had done the same thing that "Josh" had previously done to her.[3] Natalie stated the most recent incident with Van Eyck had occurred the prior Saturday in her mother's bedroom. Although Natalie had difficulty explaining what Van Eyck had done to her, she ultimately stated that Van Eyck had touched his "private" to her "private." When asked to mark, on diagrams of male and female bodies, what part of Van Eyck's body had touched her, and what part of her body it had touched,

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we refer to the victim using a pseudonym.

[3] The parties stipulated at trial that a different defendant with the first name "Joshua" had previously been convicted of sexually assaulting Natalie in an unrelated incident.

Natalie marked the penis on the male body and the vaginal area on the female body. Natalie stated this contact had happened at her house in De Pere, Wisconsin, more than four times since she started fifth grade.

At trial, Natalie testified that during the fall of 2012, when she was in fifth grade, she and Van Eyck would go into her mother's room to talk, and Van Eyck would then touch her body with his penis. Natalie was unwilling to say which body part Van Eyck's penis had touched, but she indicated on a diagram of the female body that it had touched her vaginal area. Natalie testified that the statements she made during the forensic interview were the truth. She acknowledged that she had subsequently written a letter recanting those allegations, and the letter was introduced into evidence at trial. Natalie testified, however, that Van Eyck and her mother had asked her to write the letter. Although the letter stated Van Eyck "didn't do the things [Natalie] said he did," Natalie testified that statement was false, and Van Eyck did do those things.

The jury also heard evidence regarding phone calls between Van Eyck and Natalie's mother that took place during December 2012 while Van Eyck was in custody on the sexual assault charges. Some of the calls were played for the jury, but due to technical difficulties, transcripts of other calls were read aloud. During the calls, Van Eyck repeatedly instructed Natalie's mother to have Natalie write a letter recanting the sexual assault allegations. Van Eyck also spoke directly to Natalie about writing such a letter.

Van Eyck testified in his own defense at trial. He denied ever improperly touching or sexually assaulting Natalie. With respect to the recorded phone calls, Van Eyck denied that he

had ever asked Natalie to lie and instead asserted that he had merely asked Natalie to tell the truth.

The jury found Van Eyck guilty of each of the eight charges against him. Prior to sentencing, the State informed Van Eyck and the circuit court that the charging documents incorrectly stated that Van Eyck was subject to a mandatory minimum sentence of twenty-five years' initial confinement on both of the first-degree sexual assault charges. The State clarified that because the allegations in Counts 1 and 2 involved sexual contact, rather than sexual intercourse, no mandatory minimum applied. The State therefore moved to "strike the mandatory minimum portion in Counts 1 and 2."

Based on this new information regarding the lack of any mandatory minimum sentence on Counts 1 and 2, Van Eyck moved to vacate the jury's verdicts and return the case to a pretrial posture. Van Eyck asserted that the circuit court's failure to inform him of the correct penalties for Counts 1 and 2 during his initial appearance violated WIS. STAT. § 970.02(1)(a). Van Eyck further argued that the inaccurate information about the mandatory minimum sentence violated his right to due process by preventing him from meaningfully engaging in plea bargaining with the State. Specifically, Van Eyck asserted that if he had known Counts 1 and 2 did not carry a mandatory minimum sentence, "it seems probable that some offer would have been made to Mr. Van Eyck that he could potentially have accepted." Finally, Van Eyck argued that his trial attorney was constitutionally ineffective by failing to discover the error regarding the mandatory minimum sentence.

The circuit court held an evidentiary hearing on Van Eyck's motion, during which both Van Eyck and his trial attorney testified. During the hearing, evidence was introduced that

Van Eyck had received a plea offer from the State on April 28, 2015. That offer required Van Eyck to enter a plea to one count of second-degree sexual assault of a child in the instant case. In a companion case, Van Eyck would plead to five counts of contempt of court, as a repeater. Five additional counts of contempt of court, as a repeater, would be dismissed and read-in. In a third case, ten counts of contempt of court, as a repeater, would also be dismissed and read in. The offer further provided that no other charges would be filed in Brown or Door Counties "regarding these matter[s]." The offer also stated that a presentence investigation report would be ordered, and the State would cap its sentence recommendation at ten years' initial confinement and ten years' extended supervision.

Van Eyck's trial attorney testified that he discussed this offer with Van Eyck, as well as other offers provided by the State, but Van Eyck "wasn't interested" in accepting them. Counsel explained that Van Eyck was "interested in pleading to misdemeanors" and "that was his ceiling as far as wanting to plead." Counsel further testified that, in response to the State's offer, Van Eyck made a counteroffer that he would plead to fifteen contempt charges in the companion cases and, in exchange, the State would dismiss outright all of the felony charges in this case. The State did not accept Van Eyck's counteroffer. Counsel testified that he was never under the impression that the State would accept Van Eyck's counteroffer, and under the circumstances, he found the counteroffer to be "absurd."

Van Eyck testified that his belief that Counts 1 and 2 each carried a mandatory minimum sentence of twenty-five years' initial confinement was a "factor" in his thinking throughout the plea bargaining process. He further testified that he would have "considered" an offer from the State to plead to a charge that did not have a twenty-five-year mandatory minimum sentence. Van Eyck conceded, however, that he had received and rejected the State's plea offer, which

would have allowed him to plead to second-degree sexual assault of a child—a charge without a mandatory minimum sentence—and which would have required the State to recommend only ten years of initial confinement.

The circuit court denied Van Eyck's motion to return his case to a pretrial posture. The court concluded, with respect to each of Van Eyck's claims, that Van Eyck had failed to show that he was prejudiced by the erroneous information he received regarding the mandatory minimum sentence. The court stated the record showed that Van Eyck

> was not interested in engaging in legitimate, meaningful plea negotiations because he had no intention of pleading to any of the charges in [this case], and the State was not going to consider a plea bargain that dismissed those charges entirely. Accordingly, Van Eyck could not have been prejudiced by the lack of an opportunity to meaningfully engage in plea negotiations when he had no intention of taking such a plea.

The circuit court subsequently imposed sentences of twenty years' initial confinement and twenty years' extended supervision on Counts 1 and 2. On each of the six remaining counts, the court imposed sentences of one year of initial confinement and three years' extended supervision. All of these sentences were to run consecutive to each other and to any other sentence Van Eyck was serving. As such, Van Eyck's sentences in this case totaled forty-six years' initial confinement and fifty-eight years' extended supervision.

The no-merit report addresses whether the circuit court properly exercised its discretion with respect to its pretrial evidentiary rulings; whether Van Eyck validly waived his right to remain silent before testifying at trial; whether the evidence was sufficient to support the jury's verdicts; whether the court properly denied Van Eyck's motion to return the case to a pretrial posture; whether the court properly exercised its discretion when sentencing Van Eyck; and

whether there would be any arguable basis to claim that Van Eyck's trial attorney was constitutionally ineffective. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.

The no-merit report does not address whether any errors occurred during the selection of the jury; whether the circuit court erred when ruling on any objections at trial; whether the court properly instructed the jury; or whether any improprieties occurred during the parties' opening statements or closing arguments. Having independently reviewed the record, however, we conclude that any challenge to Van Eyck's convictions on these grounds would lack arguable merit.

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 Angela Dawn Chodak is relieved of further representing Nicholas Van Eyck 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