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DISTRICT III

August 23, 2022

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

2020AP1996-CRNM State of Wisconsin v. Michelle S. Englin (L. C. No. 2019CF202)

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 Michelle Englin has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge Englin's convictions for two counts of second-degree sexual assault of a child, two counts of incest with a child, one count of failing to prevent mental harm to a child, and two counts of neglecting a child with the consequence that the child becomes a victim of a child sex offense. Englin was informed of her

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

right to file a response to the no-merit report, and she has responded. At our request, appellate counsel filed a supplemental no-merit report addressing a single issue, which we discuss below.

Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that 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.

Englin was charged with multiple offenses based on allegations that she sexually assaulted her older son (Victim 1) and her younger son (Victim 2) and failed to prevent the children's father, Wayne Englin, from sexually assaulting them.[2] With respect to Victim 1, Englin was charged with two counts of second-degree sexual assault of a child, two counts of incest, one count of child enticement, one count of failure to prevent mental harm to a child, and one count of neglecting a child with the consequence that the child becomes a victim of a child sex offense. With respect to Victim 2, Englin was charged with one count of first-degree sexual assault of a child under the age of twelve, one count of incest, one count of child enticement, and one count of neglecting a child with the consequence that the child becomes a victim of a child sex offense.

Shortly after the charges against Englin were filed, Englin's trial attorney raised concerns regarding Englin's competency. A competency evaluation was performed in May 2019, and the evaluator concluded that Englin was competent to proceed. During a subsequent hearing,

[2] Because Michelle and Wayne Englin share a surname, we refer to Wayne Englin by his first name throughout the remainder of this summary disposition order.

Englin's attorney confirmed that she was not contesting the evaluator's conclusion. Based on that concession and the evaluator's conclusion, the circuit court found that Englin was competent to proceed.

Englin's case advanced to a three-day jury trial in January 2020.[3] At trial, the jury heard evidence that a search warrant was executed at the Englins' residence on May 8, 2019, after law enforcement received a tip that child pornography had been downloaded at that location. During interviews with law enforcement following the search, Wayne stated that he had witnessed Englin performing oral sex on both Victim 1 and Victim 2. Wayne also admitted that he had performed oral sex on both children.

After the search warrant was executed, Englin asked to meet with Kayla Johnson, a social worker employed by the Dunn County Human Services Department who had been working with the Englin family since May 2017, to discuss whether Englin would be allowed to have contact with her children. Because of the ongoing police investigation, Johnson requested that Investigator Jake Mack of the Dunn County Sheriff's Office be present for that meeting.

Johnson and Mack interviewed Englin on May 9, 2019. An audio recording of a portion of that interview was played for the jury at trial. During the interview, Englin initially denied performing oral sex on Victim 1. However, approximately thirty-eight minutes into the interview, Englin indicated by nodding her head that she did, in fact, perform oral sex on Victim 1. Englin subsequently admitted that she had licked or put her mouth on Victim 1's penis

[3] Victim 1 was fifteen years old at the time of trial. The State alleged that Englin had sexually assaulted Victim 1 on two occasions—once when he was eleven or twelve years old, and once when he was fourteen years old. Victim 2 was three years old at the time of trial. The State alleged that Englin had sexually assaulted Victim 2 when he was one year old.

on two occasions—once when he was eleven or twelve, and once when he was fourteen. Englin denied having any sexual contact with Victim 2. Englin also stated that she had seen Wayne pull Victim 1's pants down and put his mouth on Victim 1's penis three times. When she saw that conduct, she "walked away" and never said anything to Wayne about it.

Victim 1's forensic interview was played for the jury at trial.[4] During the interview, Victim 1 stated that Englin had tickled his private part with her hand on more than one occasion. He stated that he told Englin to stop, but she would not stop. He denied that anyone had touched his private part with their mouth.

Victim 1 testified at trial by video conferencing from another room in the courthouse.[5] Victim 1 initially testified that no one had touched his private part. He then testified that he remembered stating during his forensic interview that Englin had tickled his private part, but that did not really happen. Victim 1 was then asked if anyone had used their mouth to touch his private part, and he responded, "No, not anymore." When asked to clarify that response, Victim 1 stated that Englin had touched his private part with her hands. Victim 1 then testified that Wayne had touched Victim 1's private part with his hands and mouth. Victim 1 subsequently testified that he remembered telling his foster parents that Englin had sucked his penis and that he was telling the truth when he said that. He then testified that Englin sucked his

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[4] Evidence was introduced at trial that Victim 1 has been diagnosed with autism spectrum disorder, attention-deficit/hyperactivity disorder, and an intellectual disability. A physician testified that although Victim 1 was fifteen years old at the time of trial, his IQ was estimated to be less than forty and he functioned at the level of a five- or six-year-old.

[5] During the final pretrial conference, Englin's attorney stated that Englin had no objection to Victim 1 testifying by videoconferencing. Defense counsel confirmed on the morning of the first day of trial that Englin did not object to that procedure.

penis "almost every bedtime." He also testified that he had seen Englin touching Victim 2's private parts.

Wayne also testified at trial. He acknowledged that he had told law enforcement that he saw Englin performing oral sex on Victim 1. He testified that was not true, however, and that he had never seen Englin do anything sexual to Victim 1. When asked whether he had ever seen Englin do anything sexual to Victim 2, Wayne testified that he had seen Englin bent over Victim 2 while changing his diaper, and it "appeared that she was sucking on his penis." Wayne also testified that, on a different occasion, he saw Englin lick Victim 2's penis when she was taking him out of the bathtub. Wayne denied that he had performed oral sex on either Victim 1 or Victim 2. He admitted, however, that he had pled guilty to performing oral sex on both boys on more than three occasions.

Following a colloquy with the circuit court regarding her right to testify and her corresponding right to remain silent, Englin chose to testify in her own defense. During her testimony, Englin denied that she had ever touched either Victim 1's or Victim 2's penis with her mouth. She testified that she had admitted touching Victim 1's penis with her mouth during the interview with Johnson and Mack because she felt "forced" and "bullied" into doing so. Englin testified that she has a learning disability that makes it difficult for her to understand some things, particularly when she is under stress.

With respect to Victim 1, the jury found Englin guilty of both counts of second-degree sexual assault of a child, both counts of incest, failing to prevent mental harm to a child, and neglecting a child with the consequence that the child becomes a victim of a child sex offense. The jury found Englin not guilty of the child enticement charge pertaining to Victim 1. As for

the charges pertaining to Victim 2, the jury found Englin guilty of neglecting a child with the consequence that the child becomes a victim of a child sex offense, but not guilty of first-degree sexual assault of a child, incest, or child enticement. The circuit court subsequently imposed consecutive and concurrent sentences totaling forty years' initial confinement followed by sixteen years' extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the jury's verdicts and whether the circuit court properly exercised its sentencing discretion. The no-merit report also asserts that the court properly instructed the jury, that the court did not err with respect to any of its evidentiary rulings before or during trial, and that the court conducted a proper colloquy with Englin regarding her decision to testify. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit. Accordingly, we do not address them further.

The no-merit report also asserts that there would be no arguable merit to a claim that Englin's trial attorney was constitutionally ineffective. On June 21, 2022, we ordered appellate counsel to file a supplemental no-merit report addressing whether there would be arguable merit to a claim that Englin's trial attorney was ineffective by failing to seek suppression of the incriminating statements that Englin made during her interview with Johnson and Mack. Counsel subsequently filed a supplemental no-merit report concluding that this issue lacked arguable merit and explaining the basis for that conclusion.

Having reviewed the supplemental no-merit report, we agree with appellate counsel that the record does not contain any basis for an ineffective assistance of trial counsel claim. In particular, we conclude there would be no arguable merit to a claim that Englin's trial attorney

was ineffective by failing to move to suppress Englin's incriminating statements to Johnson and Mack. Any such motion would have been properly denied, and an attorney is not ineffective by failing to file a meritless motion. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (counsel does not perform deficiently by failing to raise a legal challenge that would have been properly denied); ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (defendant is not prejudiced by counsel's failure to make a motion that would have been denied).

Although Englin was not given ***Miranda***[6] warnings at the beginning of the interview with Johnson and Mack, there would be no arguable merit to a claim that ***Miranda*** warnings were required at that time. "Custody is a necessary prerequisite to ***Miranda*** protections." ***State v. Lonkoski***, 2013 WI 30, ¶23, 346 Wis. 2d 523, 828 N.W.2d 552. "A person is in 'custody' if under the totality of the circumstances 'a reasonable person would not feel free to terminate the interview and leave the scene.'" ***Id.***, ¶6 (citation omitted). When determining whether a defendant was in custody, we consider the totality of the circumstances, including "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." ***Id.*** (citation omitted).

Here, the record shows that Englin asked to meet with Johnson multiple times after the search warrant was executed at the Englins' residence. Englin's subsequent interview with Johnson and Mack took place at the Dunn County Human Services office, rather than at a police station. At the beginning of the interview, Mack informed Englin that she was free to leave at

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[6] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

any time and was not under arrest. Mack told Englin that although the door was closed for privacy reasons, Englin was "welcome to get up and leave at any time." Mack also confirmed that Englin knew how to exit the building if she wanted to leave. There is nothing in the record to indicate that Englin was restrained during the interview. In total, the interview lasted approximately one hour and twenty-four minutes. Mack was dressed in plain clothes and kept his firearm holstered throughout the interview. Johnson—a social worker whom Englin had known for about two years—was also present during the interview. Johnson and Mack spoke calmly and respectfully to Englin throughout the interview and did not raise their voices. Under these circumstances, we conclude a reasonable person would have felt free to terminate the interview and leave the scene. *See* ***id.*** As such, ***Miranda*** warnings were not required.

After Englin made statements indicating that she had sexually assaulted Victim 1, Johnson and Mack stopped the interview and administered ***Miranda*** warnings. Englin stated that she understood her rights and was willing to answer questions or make a statement. Englin then reiterated that she had performed oral sex on Victim 1 on two separate occasions. There is nothing in the record to indicate that Englin's waiver of her ***Miranda*** rights was invalid.[7] *See* ***State v. Rockette***, 2005 WI App 205, ¶23, 287 Wis. 2d 257, 704 N.W.2d 382 (noting that a valid waiver of ***Miranda*** rights must be personally made by the suspect and must be knowing and intelligent).

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[7] In ***Missouri v. Seibert***, 542 U.S. 600 (2004), the United States Supreme Court concluded that police cannot deliberately use a two-step interrogation process in which ***Miranda*** warnings are intentionally withheld until after a suspect makes incriminating statements. However, ***Seibert***'s holding applies only to custodial interrogations. *See* ***United States v. Thompson***, 496 F.3d 807, 811 (7th Cir. 2007). Because we have concluded Englin was not in custody at the time she made her initial incriminating statements to Mack and Johnson, ***Seibert*** is inapplicable here.

Furthermore, there would be no arguable merit to a claim that Englin's incriminating statements to Mack and Johnson were otherwise involuntary. A defendant's statement is voluntary if it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. We apply a totality of the circumstances analysis to determine whether a statement was voluntary, balancing the defendant's personal characteristics against the pressures imposed upon the defendant by law enforcement officers. ***Id.***, ¶38. "The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." ***Id.***, ¶37. As such, "[c]oercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***Id.***

In this case, there would be no arguable merit to a claim that Johnson and Mack used improper or coercive tactics when questioning Englin. As noted above, Johnson and Mack spoke calmly and respectfully to Englin throughout the interview and did not raise their voices. They offered Englin water and Kleenex when she started to become upset. The interview was not overly long, lasting approximately one hour and twenty-four minutes. Although Mack lied to Englin during the interview, telling her that Victim 1 had told a forensic interviewer that Englin performed oral sex on him, "[t]he judiciary has authorized the government to lie and fabricate evidence in pursuit of a confession." *See* ***State v. Rejholec***, 2021 WI App 45, ¶22, 398 Wis. 2d 729, 963 N.W.2d 121. In particular, a lie, like the one here, "that relates to a suspect's connection to the crime is the least likely to render a confession involuntary." ***Id.***, ¶24.

We acknowledge Englin's trial testimony that she suffers from a learning disability that makes it difficult for her to understand certain things, particularly when she is under stress. The record also shows, however, that Englin was forty years old at the time of the interview and had completed high school. Given the totality of the circumstances, including Englin's personal characteristics and the minimal pressure imposed by law enforcement, we conclude there would be no arguable merit to a claim that Englin's incriminating statements were involuntary.

The no-merit report fails to address whether the circuit court erred by concluding that Englin was competent to proceed, whether any errors occurred during the selection of 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 Englin's convictions on these grounds would lack arguable merit.

Englin has filed a response to the no-merit report. She asserts, without elaboration, that she believes she did not receive a fair trial. We have independently reviewed the entire record, as required by ***Anders***. We do not discern any arguable grounds on which appellate counsel could assert that Englin did not receive a fair trial.

Englin also requests a reduction of her sentence on the grounds that she: is participating in counseling; is working to get into "groups" as they become available; would like to go to school and obtain work; and is working hard to better herself. A claim for sentence modification on these grounds would lack arguable merit, however, as postsentencing progress or rehabilitation does not, as a matter of law, constitute a new factor warranting sentence modification. *See* ***State v. Kluck***, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997); ***State v. Ambrose***, 181 Wis. 2d 234, 240-41, 510 N.W.2d 758 (Ct. App. 1993).

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 Dennis Schertz is relieved of further representing Michelle Englin 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