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DISTRICT III

February 14, 2023

To:

Hon. Michael H. Bloom
Circuit Court Judge
Electronic Notice

Brenda Behrle
Clerk of Circuit Court
Oneida County Courthouse
Electronic Notice

Winn S. Collins
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Kelsey Jarecki Morin Loshaw
Electronic Notice

Anthony C. Zoncki 687349
New Lisbon Correctional Inst.
P.O. Box 2000
New Lisbon, WI 53950-2000

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

2020AP1579-CRNM State of Wisconsin v. Anthony C. Zoncki (L. C. No. 2017CF252)

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 Anthony Zoncki has filed a no-merit report concluding no grounds exist to challenge Zoncki's conviction for using a computer to facilitate a child sex crime, contrary to WIS. STAT. § 948.075(1r) (2019-20).[1] Zoncki was informed of his right to file a response to the no-merit report, and he has not responded. Upon our independent review of the record as

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

The no-merit report was filed by Attorney Cary Bloodworth, who has been replaced by Attorney Kelsey Jarecki Morin Loshaw as Zoncki's appellate counsel.

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.

According to the complaint, Zoncki corresponded with a law enforcement officer posing as a fourteen-year-old girl on a mobile application called WHISPER. The online conversation eventually led to Zoncki asking the girl to engage in oral sex with him. Zoncki informed the girl that after work he would stop at Trig's grocery store in the City of Rhinelander to pick up protection, and he would meet the girl at Shopko. A surveillance team followed Zoncki from his place of employment to Trig's, where he entered the store. After exiting the store, Zoncki returned to his vehicle and proceeded to the Shopko parking lot. Zoncki remained in his vehicle for several minutes, and he did not, ultimately, enter Shopko before starting to drive out of the parking lot. Zoncki's vehicle was stopped, and Zoncki was arrested.

After waiving his ***Miranda***[2] rights, Zoncki admitted to communicating with a fourteen-year-old girl he knew as "Morgan14D" on WHISPER. Zoncki conceded that the conversation "became sexual" and that he drove to Trig's intending to buy condoms. Zoncki further stated that he decided it was not appropriate to meet with a fourteen-year-old girl, so he left the store without purchasing condoms. Zoncki added that he did not drive to Shopko with the intent to have sexual relations with the girl but, rather, with the intent to speak with her about "such activities," but he ultimately decided to avoid any contact. No condoms were found during a consent search of Zoncki's vehicle.

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

The matter proceeded to a jury trial, and, after the State rested its case, Zoncki moved for a directed verdict on the ground that the State had failed to prove an element of the offense. To find a defendant guilty of using a computer to facilitate a child sex crime, the State must prove beyond a reasonable doubt that: (1) the defendant used a computerized communication system to communicate with an individual; (2) the defendant believed or had reason to believe that the individual was under the age of sixteen years; (3) the defendant used a computerized communication system to communicate with the individual with intent to have sexual contact with the individual; and (4) the defendant did an act, in addition to using a computerized communication system, to carry out the intent to have sexual contact. WIS JI—CRIMINAL 2135 (2017). Zoncki argued that the State failed to prove the fourth element, and the circuit court denied the motion.

After a colloquy with the circuit court, Zoncki waived his right to testify, and the defense rested without calling any witnesses. During its deliberations, the jury asked for the legal definition of "an act," and the court then directed the jury to use the "common meaning" of the word in reaching its decision. Approximately thirty minutes later, the jury asked to see the trial exhibit of the screen shots of text messages Zoncki exchanged with the officer on WHISPER. The jury also informed the court that it was "hung" with respect to whether "'an act' was done prior to defendant leaving Shopko lot." The court sent the exhibit to the jury room, concluding that the screen shots of texts did not "create any danger of unfair prejudice," especially given that the primary question at issue did not involve the messages but, rather, "what happened after the

communications in total had concluded." The court also gave the ***Allen***[3] instruction to the jury. The jury ultimately found Zoncki guilty of the crime charged.

Before sentencing, Zoncki moved to set aside the verdict and requested a new trial on two grounds. First, he argued that the jury may have relied on irrelevant information when it found that the State had satisfied the fourth element of the crime, as the exhibit of screen shots requested during deliberations contained no information relative to whether Zoncki had done "an act, in addition to using a computerized communication system, to carry out the intent to have sexual contact." At a hearing on Zoncki's motion, the circuit court recounted that the exhibit was allowed in the jury room because the screen shots were relevant to the third element of the crime—namely, that the defendant used a computerized communication system to communicate with the individual with intent to have sexual contact with the individual. With respect to the fourth element of the crime, the court recognized that driving from Zoncki's place of employment to Trig's, and then to the Shopko parking lot, each constituted an "act" in "any rational sense of the word." Thus, the court rejected Zoncki's assertion that the screen shots

[3] The "Supplemental Instruction on Agreement," WIS JI—CRIMINAL 520 (2001), is commonly referred to as the "***Allen*** instruction" after ***Allen v. United States***, 164 U.S. 492 (1896). The jury was instructed:

> [Y]ou jurors are as competent to decide the disputed issues of fact in this case as the next jury that might be called to determine such issues. You are not going to be made to agree, nor are you going to be kept here until you agree.
>
> However, 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 the issues presented to them.
>
> I ask that you please retire again to the jury room and make an attempt to reach a unanimous verdict.

confused the jury or otherwise caused the jury to use "the common meaning of the word 'act' in any improper sense in reaching a verdict."

Zoncki alternatively sought a new trial based on newly discovered evidence. Specifically, the motion claimed that defense counsel discovered a purported 2017 mental health diagnosis two weeks after Zoncki's July 2019 trial. The motion further argued that if counsel had known of the diagnosis at the time of trial, "it would have greatly affected the conduct of the defense," given that Zoncki's mental state was highly relevant to the issue of intent at the time of the October 2017 crime. In rejecting this alternative argument, the circuit court noted that the motion and its attachments failed to indicate when the diagnosis was made or by whom. Rather, reference to a 2017 mental health diagnosis was made in a letter of support prepared by Zoncki's licensed clinical social worker. Also attached to the motion was a psychologist's October 2018 evaluation opining about the possible "emergence of [b]ipolar [a]ffective [d]isorder with psychotic involvement." The court added that even assuming a valid diagnosis was made at some point in the past, Zoncki was responsible to know that fact.

Out of a maximum possible forty-year sentence, with a mandatory minimum of five years of initial confinement, the circuit court imposed a ten-year term, consisting of five years of initial confinement followed by five years of extended supervision.

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdict and whether the circuit court properly exercised its sentencing discretion. The no-merit report also addresses several trial-related issues, including whether the jury was properly selected; whether the court properly ruled on evidentiary issues; whether Zoncki properly waived his right to testify; whether the court properly instructed the jury; whether the

court properly responded to the jury's notes during deliberations; and whether the court properly denied Zoncki's motion for a directed verdict and subsequent motion for a new trial. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion, and we need not address them further.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Kelsey Jarecki Morin Loshaw is relieved of her obligation to further represent Anthony Zoncki 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