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DISTRICT III

July 25, 2023

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

2020AP802-CRNM State of Wisconsin v. Joseph E. Newton (L. C. No. 2016CF211)

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 Joseph Newton has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] concluding that no grounds exist to challenge Newton's conviction for second-degree sexual assault of a child. Newton filed a response to the no-merit report raising multiple ineffective assistance of counsel claims, and appellate counsel filed a supplemental no-merit report addressing those additional issues. Appellate counsel later filed a motion seeking

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

to place this no-merit appeal on hold to allow counsel to investigate possible new evidence. We granted that motion, and counsel ultimately filed a second supplemental no-merit report asserting that her investigation had failed to reveal any new evidence that would provide an arguably meritorious basis for appeal.

Having considered the potential issues raised in the no-merit report, Newton's response, and the supplemental no-merit reports, and 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.

In March 2016, the State charged Newton—who was then thirty-five years old—with second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2). The complaint alleged that Newton had sexual intercourse with Maggie,[2] a fifteen-year-old girl, on multiple occasions between May and October 2014. Following a preliminary hearing, a court commissioner found that probable cause existed to believe that Newton had committed a felony, and Newton was bound over for trial. Newton entered a plea of not guilty, and the case proceeded to a jury trial in December 2018.

At trial, Maggie testified that during the summer of 2014, when she was fifteen years old, she moved into an apartment in Appleton with Newton and Leeann Westphal after being kicked out of her mother's home. Maggie testified that while living in the apartment, she had sexual

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

intercourse with Newton "[e]very day." Maggie described one specific instance of sexual intercourse that occurred on the day she moved into the apartment. She also testified about another incident, during which she blacked out after being given a "cocktail" of pills. The following morning, Newton showed Maggie a video that depicted Newton having sexual intercourse with another woman while that woman performed oral sex on Maggie.

Leeann Westphal testified that Newton moved into her apartment in Appleton during the summer of 2014. At some point that summer, Newton brought Maggie to live with them. Westphal testified that she saw Newton having sexual intercourse with Maggie in the Appleton apartment at least twice that summer, and she described two specific instances of sexual intercourse that she had witnessed.

Special Agent Carl Waterstreet testified that Maggie's trial testimony regarding the assaults was consistent with statements she had made during a February 2016 interview. Waterstreet also testified that Newton went missing after the criminal complaint in this case was filed in March 2016, and he was eventually located and arrested in Canada in the fall of 2017. Waterstreet further testified that law enforcement had executed search warrants for records associated with Newton's and Maggie's Facebook accounts. In Facebook messages sent during May 2018, Newton referred to Maggie as "beautiful" and asked her to send him "sexy pics." In messages from June 2018, Newton attempted to convince Maggie not to cooperate with prosecutors.

Newton testified in his own defense. He denied living with Westphal during the summer of 2014 but testified that he had visited her apartment on multiple occasions during that time frame. Newton testified that he had known Maggie since she was born but had only three

personal interactions with her during 2014. He denied ever having sexual intercourse with Maggie. He admitted having contact with Maggie through Facebook from March 2018 to June 2018. In particular, he admitted sending Maggie a Facebook message in June 2018 stating: "[I] do not want you to l[i]e[.] I just want you to tell them you will not testify or cooperate. I can be out of here today if you do that[.]" He also admitted sending messages in which he called Maggie "beautiful" and asked her to send him "sexy pics."

The jury found Newton guilty of the crime charged. The circuit court ordered a presentence investigation report (PSI), which recommended that the court impose a sentence consisting of twelve to fifteen years of initial confinement followed by seven to eight years of extended supervision. The court ultimately sentenced Newton to twenty years of initial confinement followed by ten years of extended supervision, consecutive to any other sentence. The court did not award Newton any sentence credit. Newton subsequently filed a postconviction motion asserting that he was entitled to 189 days of sentence credit, and the State stipulated that he was entitled to credit in that amount. The court therefore entered an amended judgment of conviction awarding Newton 189 days of sentence credit.

The no-merit report addresses whether there are any issues of arguable merit regarding: (1) the criminal complaint; (2) Newton's initial appearance; (3) the preliminary hearing; (4) the Information; (5) the arraignment; (6) Newton's speedy trial demand; (7) the circuit court's pretrial evidentiary rulings; (8) jury selection; (9) the jury instructions; (10) the parties' opening statements; (11) the court's evidentiary rulings during trial; (12) Newton's decision to testify and waiver of his right not to testify; (13) the parties' closing arguments; (14) the sufficiency of the evidence to support the jury's verdict; and (15) the court's exercise of

sentencing discretion. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.

In his response to the initial no-merit report, Newton asserts that his trial attorney was constitutionally ineffective in five ways.[3] To prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

Newton first asserts, generally, that he told his trial attorney "at many point[s] to do things, object to testimony [and] to invest[i]gate item[s] during trial and before trial." Newton suggests that his trial attorney was constitutionally ineffective by failing to comply with these requests. Newton does not, however, cite any specific errors that he believes his trial attorney

[3] Specifically, Newton asserts that his trial attorney's alleged errors resulted in the "[c]onstructive denial of [c]ounsel." "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." ***Strickland v. Washington***, 466 U.S. 668, 692 (1984). The constructive denial of counsel occurs where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *See* ***United States v. Cronic***, 466 U.S. 648, 659 (1984). Here, the record clearly shows that Newton's trial attorney subjected the prosecution's case to meaningful adversarial testing through cross-examination of the State's witnesses and Newton's testimony. As such, there would be no arguable merit to a claim that any of counsel's alleged errors resulted in the constructive denial of counsel.

committed, other than those individually addressed below. Accordingly, Newton's general claim that his trial attorney was ineffective by failing to "do" unspecified "things," object to unspecified testimony, and investigate unspecified items does not give rise to an arguably meritorious issue for appeal. *See, e.g.*, ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126 ("[A] defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case.").

Second, Newton asserts that his trial attorney was ineffective by failing to call two witnesses to testify at trial: (1) Consueala Mareno; and (2) the woman who was allegedly recorded performing oral sex on Maggie. Newton does not, however, provide any information about what Mareno would have testified to or how her testimony would have aided his defense. Having independently reviewed the record, we cannot determine how Mareno's testimony would have benefitted Newton. Under these circumstances, Newton cannot show that his trial attorney's failure to call Mareno as a witness was either deficient or prejudicial.

With respect to the woman who was allegedly recorded performing oral sex on Maggie, Newton again fails to specify what testimony that woman would have provided or how her testimony would have aided his defense. Nevertheless, we agree with appellate counsel that even assuming trial counsel could have produced that woman to testify at trial, and further assuming that she would have denied any sexual contact with Maggie, Newton cannot show that he was prejudiced by his attorney's failure to call her as a witness.

To convict Newton of second-degree sexual assault of a child, as charged in this case, the State needed to prove that Newton had sexual intercourse with Maggie on a single occasion

when Maggie was under sixteen years old. *See* WIS. STAT. § 948.02(2). It was undisputed at trial that Maggie was fifteen years old during the summer of 2014. Maggie testified that Newton had sexual intercourse with her on numerous occasions that summer, and her testimony was corroborated by Westphal, who testified that she saw Newton having sexual intercourse with Maggie at least two times. The specific instances described by Westphal were both separate from the incident in which the other woman allegedly performed oral sex on Maggie. Thus, there was strong evidence that Newton had sexual intercourse with Maggie on at least two occasions, regardless of whether the jury believed that the separate incident involving the other woman actually occurred. Newton's flight to Canada after the charge against him was filed further supported the jury's determination of his guilt, as did his Facebook messages to Maggie urging her not to cooperate with prosecutors. Under these circumstances, we agree with appellate counsel that Newton cannot establish prejudice because it is not reasonably probable that the result of his trial would have been different had the other woman allegedly involved in the oral sex incident been called to testify at trial. For these reasons, any claim that Newton's trial attorney was ineffective by failing to call that woman as a witness would lack arguable merit.

Third, Newton argues that his trial attorney was constitutionally ineffective by failing to argue that Newton was illegally detained in Canada and that his constitutional rights were violated while he was in Canadian custody. However, Newton cites no legal authority in support of his claim that any illegal acts committed by Canadian authorities provide a basis to challenge his Wisconsin conviction, and we have not located any legal authority supporting that proposition. Instead, we agree with appellate counsel's assertion in the supplemental no-merit report that this court "does not have jurisdiction to assess whether Newton's rights were violated

by agencies in another country." We also agree with appellate counsel that there are no arguable grounds to challenge Newton's arrest in Wisconsin, pursuant to a warrant, after he chose not to contest his extradition and voluntarily returned to Wisconsin. Accordingly, Newton's trial attorney did not perform deficiently by failing to argue that Newton was illegally detained in Canada or illegally arrested in Wisconsin.

Fourth, Newton contends that his trial attorney was ineffective by failing to challenge the admissibility of the Facebook messages introduced at trial on the grounds that the Facebook account attributed to him actually "belonged to [Leeann] Westphal and was only ever registered to her IP address." Newton further asserts that he "could not have had control" of the Facebook account on the dates in question because he was in custody for parole violations at those times.

This argument directly contradicts Newton's trial testimony regarding the Facebook messages. Newton expressly testified at trial that the Facebook account in question was his account. He also admitted that he had sent Maggie at least some of the messages that she received from that account, including a message asking her not to cooperate with prosecutors and messages calling her "beautiful" and asking her for "sexy pics." Newton also testified that some of the other messages that Maggie received from his Facebook account were sent at his direction by his girlfriend and his friend Mike. The State acknowledged at trial that some of the messages were sent while Newton was in custody in the Outagamie County Jail, but Newton conceded that he had provided his Facebook password to Mike during a recorded jail phone call and had directed Mike to contact Maggie on his behalf. Newton did not testify that Westphal had sent any of the Facebook messages that were admitted at trial or that the Facebook account in question actually belonged to Westphal. On this record, there would have been no basis for Newton's trial attorney to claim that the Facebook messages were inadmissible because

Westphal, rather than Newton, was in control of the relevant Facebook account. Consequently, trial counsel did not perform deficiently by failing to raise that argument.[4]

Fifth, Newton argues that his trial attorney should have objected when the circuit court allowed one of Newton's sisters to make a statement during his sentencing hearing. At sentencing, Newton's sister told the court that Newton had sexually assaulted her daughter on multiple occasions when her daughter was a child. Newton's sister also asserted that Newton had sexually assaulted other young women and children, but no charges had been filed in those cases because the victims were unwilling to testify. Based on those uncharged assaults, Newton's sister asked the court to impose the maximum sentence allowed by law.

Newton contends that his sister should not have been permitted to make a statement at sentencing because he had alleged in the PSI that she sexually assaulted him when he was a child. Newton further asserts that the circuit court gave "great weight" to his sister's allegations when imposing his sentence. We agree with appellate counsel that this issue lacks arguable merit. It is well settled that a court may consider uncharged and unproven offenses when assessing a defendant's character for purposes of sentencing. ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436. Accordingly, the court could properly consider Newton's sister's allegations about prior uncharged sexual assaults when imposing his sentence. Although

[4] In addition, the supplemental no-merit report thoroughly explains why the Facebook messages were properly admitted at trial. The record shows that law enforcement obtained and executed search warrants for Newton's and Maggie's Facebook accounts. The circuit court determined that the Facebook messages were admissible under the business records exception to the hearsay rule and that any dispute about whether Newton actually sent the messages went to their weight, not their admissibility. Moreover, the messages were clearly relevant, *see* WIS. STAT. § 904.01, and there is no basis to conclude that their probative value was substantially outweighed by the danger of unfair prejudice, *see* WIS. STAT. § 904.03. Under these circumstances, any argument that the court erroneously exercised its discretion by admitting the Facebook messages would lack arguable merit.

Newton asserts that his sister should not have been permitted to make a statement at sentencing because she had previously sexually assaulted him, he does not cite any legal authority in support of the proposition that his allegation regarding previous assaults by his sister precluded the court from considering her statement.

Moreover, the circuit court confirmed at sentencing that it had reviewed the PSI, which included Newton's sister's allegations about Newton's prior uncharged sexual assaults. Thus, the court would have been aware of Newton's sister's allegations, regardless of whether she was permitted to make a statement during his sentencing hearing. The PSI also set forth Newton's claim that his sister had sexually assaulted him when he was a child. Consequently, the court would have been aware of that claim at the time of sentencing and would have been able to consider it when determining how much weight to give Newton's sister's allegations. On this record, Newton's trial attorney did not perform deficiently by failing to object to Newton's sister making a statement at sentencing, nor did his failure to object prejudice Newton's defense.[5]

In addition to his claims that his trial attorney was constitutionally ineffective, Newton also asserts that his appellate counsel has provided ineffective assistance while representing him in this no-merit appeal. This claim lacks arguable merit. After filing a no-merit notice of appeal, appellate counsel filed a thorough no-merit report addressing numerous potential issues

[5] Although not expressly stated in his response to the no-merit report, Newton may intend to argue that his sister's statement during his sentencing hearing constituted inaccurate information. We agree with appellate counsel, however, that any claim in this regard would lack arguable merit because Newton has not presented any basis to conclude that his sister's allegations about previous sexual assaults were "extensively and materially false." *See* ***State v. Travis***, 2013 WI 38, ¶18, 347 Wis. 2d 142, 832 N.W.2d 491. Even assuming it is true that Newton's sister sexually assaulted him when he was a child, it does not necessarily follow that her claims about Newton sexually assaulting young girls, including her own daughter, were false or inaccurate.

regarding Newton's trial and sentencing and explaining in detail why each of those issues lacked arguable merit. Newton then filed a response to the no-merit report asserting that his trial and appellate counsel were ineffective in various ways. In response, appellate counsel filed a supplemental no-merit report addressing each of Newton's ineffective assistance claims and explaining why they lacked arguable merit. As explained above, we agree with appellate counsel that none of the issues addressed in the no-merit report or raised in Newton's response to the no-merit report are arguably meritorious. As such, there is no basis to conclude that appellate counsel has rendered ineffective assistance while representing Newton in this no-merit appeal.

Finally, as noted above, after Newton filed his response to the no-merit report, appellate counsel moved to place this appeal on hold to allow her to investigate possible new evidence. We granted that motion, and counsel ultimately filed a second supplemental no-merit report. In the second supplemental no-merit report, counsel explains that Newton contacted her and informed her "that a witness had reportedly told someone that she heard the victim recant." Counsel further explains that, after several attempts, her investigator was able to secure an interview with this witness. However, the witness advised the investigator that she had no knowledge of any new information or evidence, and she refused to provide any further statement to the investigator. We agree with counsel's assertion that "[w]ithout a statement from a witness who heard the [victim] recant, no new evidence exists." Consequently, we agree with counsel's conclusion that this issue does not provide an arguably meritorious basis for appeal.

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 Erica L. Bauer is relieved of her obligation to further represent Joseph Newton in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals