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DISTRICT I

August 29, 2023

To:

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
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Michael E. Covey
Electronic Notice

Jerrod B. Horton 268771
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2021AP2206-CRNM State of Wisconsin v. Jerrod B. Horton (L.C. # 2019CF3037)

Before White, C.J., Donald, P.J., and Dugan, J.

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).

Jerrod B. Horton appeals from a judgment, entered after a bench trial, convicting him of second-degree sexual assault of a child under the age of sixteen. His appellate counsel, Michael E. Covey, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22) and *Anders v. California*, 386 U.S. 738 (1967).¹ Horton filed a response and counsel filed a supplemental no-merit report. Upon consideration of the submissions and an independent review

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

of the record as required by *Anders*, we summarily affirm the judgment because there is no arguable merit to any issue that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

According to the complaint, officers spoke to S.C. who reportedly observed a young female performing oral sex on an adult male in his 40s or 50s. Officers subsequently conducted a traffic stop of a vehicle matching the description provided by the witness. Horton was in the driver's seat and when officers approached him, his pants were unzipped. The fifteen-year-old victim was also inside the vehicle. Initially the victim denied that anything sexual had happened with Horton. However, later she told police that Horton put his fingers in her vagina and that she performed oral sex on him. The victim additionally told police that Horton asked her to send him nude photos. She did so, including a picture of her vagina. She told police that at one point, Horton told her that "[s]he could make a lot of money from old white guys." He said he would rent a hotel room for her and she could give him the money she made, which he would keep in his account and give to the victim as needed. The victim took this to mean that she would exchange sex for money and Horton would keep the money.

The complaint additionally alleged that when officers interviewed Horton, he stated that he met the victim, was interested in her, and they exchanged numbers. Horton admitted that he may have asked the victim for some nude photos and that she sent him four, including one picture of her vagina. Horton denied having any sexual contact with the victim. Based on the allegations, the State charged Horton with the following crimes: second-degree sexual assault of a child under the age of sixteen, possession of child pornography, and trafficking of a child.

A bench trial followed. On the day the trial was to begin, the prosecutor moved to dismiss the charges of possession of child pornography and child trafficking. The prosecutor

explained that the victim was not present in court and without her, he would not be able to prove the charges. The trial court granted the motion.

The State called a number of witnesses including the following: S.C., the witness who saw Horton and the victim in the car; police officers; the DNA analyst who testified that the victim's DNA was found on Horton's penis; and the victim's family case manager who testified about the victim's age. Following the testimony, the trial court found Horton guilty of second-degree sexual assault of a child under the age of sixteen and sentenced him to twenty years of imprisonment. The sentence was bifurcated as ten years of initial confinement and ten years of extended supervision.

The no-merit report addresses potential issues including the sufficiency of the evidence presented at trial and whether the trial court appropriately exercised its discretion at sentencing. This court is satisfied that the no-merit report properly concludes that the issues it raises are without arguable merit.

Horton responded to the no-merit report. He argues that his confrontation rights were violated when the State proceeded to trial on the sexual assault charge even though the victim did not testify. *See Crawford v. Washington*, 541 U.S. 36, 59-60 (2004) (holding that the Confrontation Clause prohibits admission of a declarant's testimonial statement unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant). To support his claim, Horton references S.C.'s testimony that the victim's head was in his lap. He argues that this testimony described the victim's nonverbal conduct and constituted a "statement" under WIS. STAT. § 908.01(1). Horton claims that trial counsel was ineffective for not protecting his confrontation rights.

As explained in the supplemental no-merit report, this issue does not have arguable merit. Horton had the right to confront each witness who testified against him at trial, including S.C. To the extent he is arguing that the victim had to appear at trial, he is wrong. The right to confrontation “does not require the [S]tate to produce any particular witness or give the accused the right to insist that the [S]tate call any particular witness.... Not even the victim[.]” *State v. LaTender*, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979) (citation omitted). Additionally, Horton’s argument that the position of the victim’s head on his lap constitutes a statement is not supported by case law. Further pursuit of this issue would be frivolous within the meaning of *Anders*.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Horton further in this appeal.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Michael E. Covey is relieved of further representation of Jerrod B. Horton 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