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DISTRICT II

October 4, 2023

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

2021AP465-CRNM State of Wisconsin v. Dane E. Hunt (L.C. #2018CF592)

Before Neubauer, Grogan and Lazar, 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).

Dane E. Hunt appeals a judgment of conviction for three counts of possession of child pornography. Hunt's appointed appellate attorneys filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Hunt filed a response to the no-merit report, and, upon this court's order, appellate counsel filed a

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

supplemental no-merit report. Upon consideration of the no-merit report, Hunt's response, and the supplemental no-merit report and upon an independent review of the Record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The State charged Hunt with three counts of possession of child pornography based on his alleged possession of three different photographs. The case proceeded to a jury trial, during which Hunt stipulated to three of the four elements of the child pornography charges, following a colloquy with the circuit court to ensure that the stipulation was freely and voluntarily made. Specifically, Hunt stipulated that: (1) all three photographs showed a child engaging in sexually explicit conduct—namely, lewd exhibition of an intimate part; (2) if the jury found that Hunt knowingly possessed the photographs, Hunt reasonably should have known that the photographs contained depictions of a person engaged in lewd exhibition of an intimate part; and (3) if the jury found that Hunt knowingly possessed the photographs, Hunt reasonably should have known that the individuals shown in the photographs who were engaged in sexually explicit conduct were under eighteen years old. *See* WIS JI—CRIMINAL 2146A. Thus, the only disputed issue at trial was whether Hunt knowingly possessed the photographs. *See* ***id.***

At trial, Detective Jeremy Wilson of the Oshkosh Police Department testified that on July 12, 2018, Google provided a cyber tip to the National Center for Missing and Exploited Children (NCMEC) that an email account purportedly belonging to Hunt had been used to access potential child pornography between June 12, 2018, and July 2, 2018. The cyber tip included a phone number, date of birth, and social media accounts associated with the email account as well as a list of IP addresses that had been used to access the images. The cyber tip also provided an address for Hunt in the City of Oshkosh.

NCMEC forwarded the cyber tip to the Wisconsin Department of Justice, which sent the tip to the Oshkosh Police Department. Detective Wilson investigated the tip and confirmed through "local databases" that a person named "Dane Hunt" lived in the City of Oshkosh. Wilson then investigated the social media accounts associated with the email address referenced in the NCMEC tip and saw photographs of Hunt on those accounts. Wilson further testified that "local records" showed that Hunt owned the email address from the NCMEC tip. Pursuant to a search warrant, Google subsequently provided Wilson with eight photographs that had been accessed using Hunt's email account, and Wilson confirmed that those photographs included three different images of child pornography.

Detective Wilson further testified that, during the course of his investigation, he interviewed Hunt at the Winnebago County Jail. Wilson advised Hunt of his ***Miranda***[2] rights, and Hunt agreed to give a statement. Hunt told Wilson that he did not own a cell phone, tablet, or computer. Instead, Hunt would check his email using a cell phone owned by Adam Brockman—Hunt's cousin and roommate. Hunt stated that, with the exception of one occasion when he was running late, he always logged out of his email account after using Brockman's phone. Hunt denied searching for child pornography. He admitted, however, that he had searched for information on nudist colonies. Wilson testified, based on his training and experience, that individuals sometimes search for information on nudist colonies as a means of accessing child pornography. Hunt admitted to Wilson that he had seen photographs of naked children while looking for information on nudist colonies. In particular, Hunt admitted to seeing

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

an image on a Russian website that showed two girls who were "underage or very close" bending over.

On cross-examination, Detective Wilson conceded that he had never examined Brockman's cell phone. Wilson also conceded that, if other individuals knew Hunt's email address and password, they could have used Hunt's account to access child pornography.

Brockman testified that when Hunt was living with him in 2018, Hunt did not own a cell phone and would instead borrow Brockman's phone. Brockman testified that other individuals would also use his phone at times. Brockman further testified that although he did not know all of Hunt's account passwords, Hunt kept a notebook with that information in his bedroom, and Brockman had access to the notebook. Brockman conceded that Hunt would sometimes return Brockman's cell phone with Hunt's email account still open, but Brockman denied that he had ever used Hunt's account to access the internet. Brockman later admitted, however, that he had previously given a statement to Hunt's trial attorney indicating that he had accessed the internet using Hunt's account. Brockman denied telling Howard Vasey, a former coworker, that he had used his cell phone to access child pornography.

Conversely, Vasey testified that during a conversation at work, Brockman admitted that Brockman, not Hunt, was the person who had searched for child pornography. On cross-examination, Vasey admitted that in addition to working with Brockman for about one and one-half months, he had worked with Hunt for one and one-half to two years.

Finally, Bridget Davis testified that she lived with Hunt and Brockman in 2018. During that time period, Hunt would occasionally use her phone, but she never found any evidence

indicating that he had used it to access child pornography. Davis also testified that she never found any other evidence of Hunt possessing child pornography while they lived together.

The jury found Hunt guilty of all three of the child pornography charges. The circuit court subsequently imposed concurrent sentences of three years' initial confinement and three years' extended supervision on each count. The parties later stipulated that Hunt was entitled to 149 days of sentence credit, and the court entered an amended judgment of conviction awarding him credit in that amount.

The no-merit report addresses the following potential issues: (1) whether the evidence was sufficient to sustain the jury's verdicts; (2) whether the circuit court erroneously exercised its discretion when making any evidentiary rulings; (3) whether the court erroneously exercised its sentencing discretion; (4) whether the court relied on any inaccurate information at sentencing; and (5) whether any new factors exist that would warrant sentence modification. This court is satisfied that the no-merit report properly analyzes the issues it raises as without arguable merit, and we will not discuss them further.

The no-merit report does not address whether any issues of arguable merit exist regarding: (1) jury selection; (2) the parties' opening statements and closing arguments; (3) the jury instructions; (4) Hunt's stipulation to three of the elements of the child pornography charges; and (5) Hunt's waiver of his right to testify at trial. Nevertheless, having independently reviewed the Record, this court is satisfied that none of these potential issues has arguable merit.

Hunt has filed a response to the no-merit report, raising multiple issues. Hunt asserts that these issues, "when combined as a whole, support a claim of both ineffective assistance and

insufficient evidence[.]" As explained below, we conclude that none of the issues raised in Hunt's response provide an arguably meritorious basis to challenge his convictions.

First, Hunt contends that the State alleged that the child pornography was "downloaded to and opened on a Hawaii-brand [sic] cellular phone in mid-to[-]late 2018." Hunt asserts that this would have been impossible because that device was confiscated and destroyed by the Wisconsin Department of Corrections in early 2018. Any challenge to Hunt's convictions on these grounds would lack arguable merit. The State did not allege at trial that Hunt had used a "Hawaii-brand" cell phone to access child pornography. Instead, the State alleged that Hunt had used Brockman's cell phone to do so, and Brockman testified that he owned a Motorola phone in 2018. Evidence that a different, non-Motorola phone was destroyed in early 2018 was therefore irrelevant. Consequently, any argument that Hunt's trial attorney was constitutionally ineffective by failing to present evidence regarding the destruction of that phone would lack arguable merit as the evidence would have been properly excluded. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (counsel is not ineffective for failing to raise a meritless argument).

Hunt next argues that the email address referenced in the NCMEC cyber tip did not actually belong to him and that the State failed to prove otherwise at trial. This claim lacks arguable merit. Detective Wilson testified at trial regarding the cyber tip that he received from NCMEC and the subsequent steps he took to confirm that the email address referenced in that tip belonged to Hunt. It was the jury's responsibility to weigh the evidence and determine whether it believed that Hunt was the owner of the email address. This court cannot usurp the jury's role by reweighing the evidence on appeal. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451

N.W.2d 752 (1990) (stating that the trier of fact, not an appellate court, is responsible for resolving conflicts in the testimony and weighing the evidence).

Next, Hunt contends that Brockman confessed during recorded jail phone calls that he was the person who accessed the child pornography. Hunt also asserts that, prior to his own arrest in this case, Brockman was being investigated in Outagamie County for sexually assaulting a child and was a person of interest in a different investigation involving the alleged possession of child pornography. After reviewing Hunt's response to the no-merit report, we questioned whether there would be arguable merit to a claim that Hunt's trial attorney was constitutionally ineffective by failing to seek to introduce evidence at trial regarding Brockman's alleged recorded confessions or any prior investigations of Brockman for child sexual assault or possession of child pornography. We therefore ordered Hunt's appellate attorneys to file a supplemental no-merit report addressing these potential issues.

Hunt's appellate attorneys subsequently filed a supplemental no-merit report and an accompanying affidavit of a defense investigator. In the affidavit, the investigator asserts that he reviewed recordings of 139 phone calls that Hunt made from the Winnebago County Jail between July 18, 2018, and July 15, 2019, including calls made to Brockman. According to the investigator, during those phone calls, Brockman never admitted to searching for or possessing child pornography. The investigator also asserts that he investigated Brockman's prior criminal history in Wisconsin and found no evidence that Brockman was investigated for sexual assault of a child or possession of child pornography prior to the investigation that led to the charges in this case.

Based on these averments, Hunt's appellate attorneys contend that there is no evidence that Brockman actually confessed to possessing child pornography during recorded conversations or that Brockman was previously investigated for child sexual assault or possession of child pornography. Consequently, appellate counsel asserts that there would be no arguable merit to a claim that Hunt's trial attorney was constitutionally ineffective by failing to introduce evidence regarding these topics. Having reviewed the supplemental no-merit report and the accompanying affidavit, we agree with appellate counsel that these potential issues lack arguable merit.

Hunt next asserts that Brockman confessed to two other individuals, who "testified that … Brockman told them, in general terms, that it was *his* pornography for which [Hunt] was arrested." Our review of the trial transcript shows that only one individual testified that Brockman confessed to possessing child pornography—namely, Vasey. Brockman, however, denied making any such confession to Vasey. As the sole arbiter of witness credibility, *see* ***State v. Below***, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95, the jury was entitled to determine whether to believe Vasey's or Brockman's testimony on this point. Again, we will not usurp the jury's role by reweighing the evidence on appeal. *See* ***Poellinger***, 153 Wis. 2d at 506. Accordingly, Vasey's testimony regarding Brockman's alleged confession does not give rise to an arguable basis to claim that the evidence was insufficient to support Hunt's convictions.

Relatedly, Hunt asserts that the "two … witnesses" referenced above were not charged with perjury, which indicates "that the [S]tate had no reason to believe … that either were in any way perjuring themselves." Again, we note that only one witness—Vasey—testified at trial that Brockman had confessed to possessing child pornography. As explained, it was the jury's responsibility to determine whether it found Vasey's testimony in that regard to be credible. *See*

Below, 333 Wis. 2d 690, ¶4. Moreover, even if Vasey testified falsely, the State had "almost limitless" discretion in deciding whether to charge Vasey with perjury. *See* ***State v. Kenyon***, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978). The State's discretionary decision not to charge Vasey with perjury has no relevance to whether the evidence at Hunt's trial was sufficient to support the jury's verdicts.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorneys Susan E. Alesia and Megan Elizabeth Lyneis are relieved of further representation of Dane E. Hunt in this appeal. *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