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June 13, 2013

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

2010AP2695-CRNM State of Wisconsin v. Anthony B. Stelter (L.C. # 2008CF752)
2011AP1442-CRNM State of Wisconsin v. Anthony B. Stelter (L.C. # 2008CF732)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Anthony Stelter appeals judgments of conviction and sentence for multiple counts of repeated sexual assault of a child, incest, and sexual intercourse with a child age sixteen or older. Stelter also appeals an order denying his postconviction motion. Attorney David Karpe has filed a no-merit report seeking to withdraw as appellate counsel. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32 (2011-12).[1] Stelter was provided a copy of the report

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and has filed several no-merit responses. Additionally, Attorney Karpe has filed several supplemental no-merit reports. Upon independently reviewing the entire record, as well as the no-merit report, responses, and supplemental no-merit reports, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

On April 21, 2008, the State charged Stelter with one count of repeated sexual assault of a child and two counts of incest as to victim T.S. On April 24, 2008, in a separate case, the State charged Stelter with one count of repeated sexual assault of a child as to victim B.J., and two counts of sexual intercourse with a child sixteen years or older as to victim J.B. In October 2009, a jury found Stelter guilty of all counts in the case involving T.S. In December 2009, a jury found Stelter guilty of all counts in the case involving B.J. and J.B. The court sentenced Stelter to a total of forty years of initial confinement and twenty-five years of extended supervision on the felony counts of repeated sexual assault of a child and incest, with a consecutive sentence of eighteen months of jail on the misdemeanor counts of sexual intercourse with a child sixteen years of age or older.[2]

First, we agree with counsel that a challenge to the sufficiency of the evidence to support the jury verdicts would lack arguable merit. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We need not repeat the details of the trial evidence

[2] Counsel filed a notice of appeal in each case, and we consolidated the appeals for purposes of briefing and disposition. We later converted the appeals to no-merit appeals.

here. The testimony of the victims at trial, if believed by the jury, was sufficient to support the jury verdicts as to each conviction.

The no-merit report also addresses the validity of Stelter's sentence. We agree with counsel that a challenge to Stelter's **Error! Reference source not found.** would lack arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The court explained that it considered the standard sentencing factors and objectives, including the seriousness of the offenses, the need to protect the public, and Stelter's character and criminal history. *See* ***State v. Gallion***, 2004 WI 42, ¶¶ 39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. While Stelter received a lengthy total sentence, in light of the facts of these cases, we cannot say the sentence was so unduly harsh or excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The no-merit report, responses, and supplemental reports address potential postconviction issues related to each trial. We address each trial in turn.

Trial as to victim T.S.

The no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's order denying suppression of evidence obtained during the execution of a search warrant at Stelter's home. We agree with counsel's assessment that there is no arguable merit to this issue, because no evidence obtained during the search was introduced at trial. Thus, any error in denying suppression was harmless. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 ("A constitutional or other error is harmless if it is 'clear beyond a

reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" (quoted source omitted)).

We also agree with counsel that there would be no arguable merit to a challenge to the court's denial of the defense's request to give the jury instruction on the state policy of recording custodial interrogation. *See* Wis. JI—CRIMINAL 180. We review a circuit court decision as to requested jury instructions that correctly state the law under the erroneous exercise of discretion standard. ***State v. Wille***, 2007 WI App 27, ¶23, 299 Wis. 2d 531, 728 N.W.2d 343. The court explained that it denied the request because Stelter was not subject to interrogation at the time he made the unrecorded statements during booking at the Dane County Jail. We agree that a challenge to that determination would lack arguable merit.

In his no-merit responses, Stelter argues that statements used by the State at trial were obtained in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966). Stelter argues that: (1) the recording of his interrogation at the Town of Madison Police Department was altered to omit the police officer's statement, "Are you refusing to talk with me?" and Stelter's answer, "Yes"; and (2) the recording of the conversation between Stelter and the police officer during transport from the police department to the jail was altered to omit the officer's statement during the walk to the squad car that if Stelter ran the officer would pursue escape charges, and the officer's question to Stelter, "Is there anything else you wish to tell me?" We discern no arguably meritorious issues based on these claims.

Before trial, the circuit court held a hearing to determine whether any of Stelter's statements to police were subject to suppression. The investigating police officer testified as to the following circumstances under which he obtained incriminating statements from Stelter:

Before the interrogation at the police department, the officer advised Stelter of his ***Miranda*** rights. Stelter stated he understood his rights and agreed to speak with the officer. Stelter initially stated that he did not know if he wanted an attorney, and the officer offered to read Stelter his rights again, but Stelter then stated he understood his rights and agreed to answer questions. The interrogation lasted a little more than an hour, and then Stelter stated he wanted an attorney, and the officer ended the interrogation. The officer then transported Stelter to the jail, and Stelter initiated a conversation with the officer in the squad car, asking questions about therapy and the seriousness of the offenses. During booking at the jail, Stelter handed the officer a coin and asked him to give it to T.S., and to tell T.S. that Stelter was sorry for what he did to her.

Stelter did not argue that the statements he made at the police department were subject to suppression, but challenged the admissibility of statements Stelter made en route to and at the jail. The circuit court found that the officer did not initiate any conversation with Stelter in the squad car or during booking at the jail, and that Stelter voluntarily offered those statements without any interrogation by police.

We discern no arguable merit to any issue based on Stelter's claim of alteration of the recordings. Stelter claims that after he invoked his right to counsel at the police department, the officer asked "Are you refusing to talk with me?" and Stelter answered "Yes." Stelter argues that the police tampered with the recording by omitting this exchange and inserting the officer stating "Okay. All right, then we're gonna stop this interview at 12:05, okay?" However, even if this were so, that would not support a claim of a ***Miranda*** violation. The exchange that Stelter claims was omitted from the recording is not different in substance from the statement Stelter

claims was added in. Essentially, both establish that the officer ended the interview after Stelter invoked his right to counsel.

Stelter also argues that police altered the recording of the conversation en route to the jail to omit the conversation on the walk to the squad car. However, the police officer testified that he began the recording when he and Stelter were already in the vehicle. Thus, Stelter fails to identify any evidence in the record that any conversation while walking to the vehicle would have been recorded.

Additionally, Stelter's claim that the officer warned him not to run and asked him whether he had anything else to tell the officer does not support a claim of a ***Miranda*** violation. It is undisputed that the next exchange between Stelter and the officer was Stelter's question as to "what kind of therapy out there is good." The officer answered that there are many types of therapy available. Stelter then asked the officer how the officer would rate Stelter's offense on a scale of one to ten, and the officer indicated a seven or eight. Stelter responded he would rate himself a two or a three. The officer explained to Stelter that he rated him higher because Stelter showed a lack of remorse, to which Stelter responded that he was feeling remorse. Thus, as the record shows, the conversation in the squad car was initiated by Stelter's questions, which were not in response to the question Stelter claims the officer posed on the way to the car. *See* ***State v. Hambly***, 2008 WI 10, ¶13, 307 Wis. 2d 98, 745 N.W.2d 48 (no ***Miranda*** violation where defendant initiates conversation with police after invoking right to counsel); ***Martin v. State***, 87 Wis. 2d 155, 166, 274 N.W.2d 609 (1979) (a statement that is volunteered rather than in response to police questioning is not subject to suppression under ***Miranda***). Accordingly, even

if Stelter could establish that the officer had made the two alleged statements to him on the way to the car, there would still be no arguable merit to a claim of a ***Miranda*** violation.[3]

The no-merit report also addresses whether there would be arguable merit to a challenge to admission of a one-party consent recording of a telephone conversation between Stelter and T.S. *See* WIS. STAT. § 968.31(2)(b) (explaining that a party to a communication may give consent to interception of the communication); ***State v. Ohlinger***, 2009 WI App 44, ¶7, 317 Wis. 2d 445, 767 N.W.2d 336 (explaining that, under WIS. STAT. § 968.29(3)(b), "if a warrantless intercept complies with the one-party consent exception, WIS. STAT. § 968.31(2)(b), the contents of the intercept may be disclosed in a felony proceeding"). Stelter moved to exclude the recording at trial, arguing that the recording would only be admissible if there had been valid prior consent to the recording. Stelter argued that T.S., as a minor, may not have had legal capacity to give consent, and that it was unclear whether T.S.'s mother gave prior consent to the recording. At a motion hearing, the State offered police testimony that T.S. and her mother orally consented to the recording before the phone call, that T.S. signed a consent form before the recording, and that T.S.'s mother signed the consent form after the recording. The court found that testimony credible. Based on T.S.'s and the mother's testimony, the court found that valid prior consent was given, and denied the defense motion to exclude the recording.

In a postconviction motion, Stelter raised an additional challenge to the use of the one-party consent recording: that T.S.'s mother lacked authority to consent to the recording under

[3] Because we discern no arguable merit to any issue Stelter raises based on his claims of alteration to the recordings, we deny Stelter's requests to remand for an evidentiary hearing as to the contents of the recordings or to otherwise address this issue. We also deny Stelter's request to place this no-merit appeal on hold pending results of an analysis of the recordings.

the family law statutes because Stelter and T.S.'s mother had shared custody of T.S., and the recording was done during a time when Stelter had physical placement of T.S. *See* WIS. STAT. § 767.001(2m) and (5) (parent with physical placement has the right to make major decisions for the child). Stelter argued that the real controversy of the admissibility of the recording was not fully tried because the facts as to custody and physical placement were not presented to the court; that it was plain error to fail to suppress the recording; and that trial counsel was ineffective by failing to argue that Stelter was the only parent who had authority to consent to the recording under the family law statutes. *See* ***State v. Henley***, 2010 WI 97, ¶65, 328 Wis. 2d 544, 787 N.W.2d 350 (circuit court may order new trial in the interest of justice); WIS. STAT. § 901.03(4) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (a claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defendant).

The circuit court determined that both T.S. and her mother validly consented to the recording. The court explained that Stelter had not shown that T.S. lacked capacity to consent to the recording. The court then explained that, even if T.S. lacked capacity to consent, T.S.'s mother had authority to consent because she had shared legal custody of T.S. The court rejected, as absurd, Stelter's argument that he was the only one who could give consent for the recording on behalf of T.S. following T.S.'s allegations that Stelter sexually assaulted her based on his having physical placement of T.S. at that time. No-merit counsel opines that a challenge to the court's decision would lack arguable merit. Stelter argues in a no-merit response that the court's decision impermissibly transferred physical placement of T.S. from Stelter to T.S.'s mother. We do not agree that the record supports that argument. Rather, we agree with counsel's assessment

that any challenge to the court's determinations as to the admissibility of the recording would lack arguable merit.

The no-merit report also addresses the other argument Stelter raised by postconviction motion: that the real controversy was not fully tried and trial counsel was ineffective because counsel failed to introduce evidence that T.S. previously made an unsubstantiated allegation of sexual assault against Stelter. In the postconviction motion, Stelter argued that his trial counsel should have introduced evidence that T.S. made an unsubstantiated claim of sexual assault against Stelter when T.S. was three years old and should have used that evidence to impeach T.S.'s credibility in cross-examination. At the postconviction motion hearing, trial counsel testified that he did not pursue that issue because the allegation from when T.S. was much younger was too remote from the current allegations, and because there was a chance the jury might believe that the prior allegation of sexual assault was true even though it was unsubstantiated. The court determined that trial counsel's testimony was credible, that counsel's decision not to pursue the issue was a sound trial strategy, and that the real controversy was fully tried.

Stelter argues in a no-merit response that T.S., at age three, admitted to Stelter and T.S.'s mother that the allegation of sexual assault was "false," and that counsel was ineffective by failing to pursue this issue. Stelter disagrees with the circuit court's determination that trial counsel had a valid trial strategy for failing to pursue this issue. We conclude that the record supports the circuit court's decision, and that nothing in Stelter's responses alters our analysis. Thus, there is no arguable merit to this issue.

The no-merit report contends there would be no arguable merit to any issues related to evidence that Stelter had a sexually transmitted disease. In response, Stelter argues the prosecutor engaged in misconduct by arguing in closing that defense counsel never asked T.S. if she saw genital warts on Stelter's penis during the times she claimed Stelter had her perform oral sex on him. Stelter asserts that this was a comment on evidence not in the record and an improper attack on the defense strategy. We disagree that there would be arguable merit to this issue.

A medical expert testified for the defense that Stelter had exhibited genital warts consistent with infection of the human papillomavirus (HPV). In closing, the defense argued that T.S. would have noticed the genital warts on Stelter's penis and reported them if the oral sex had occurred as frequently as T.S. claimed. In rebuttal, the prosecutor noted that he did not hear defense counsel ask T.S. if she noticed anything unusual about Stelter's penis, and also argued that a thirteen or fourteen year old, T.S.'s age at the time of the assaults, may not have noticed that there was an abnormality. Thus, contrary to Stelter's assertion, the prosecution did not comment on evidence not in the record or otherwise make an impermissible argument.

Stelter also argues that the following is new evidence: (1) information on the Center for Disease Control website that HPV may be passed by oral sex; and (2) blood test results showing that Stelter has herpes. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) (evidence may support motion for new trial if the evidence was discovered after conviction; the defendant was not negligent in seeking the evidence; and the evidence is material and non-cumulative). Stelter argues that the defense expert medical witness, Dr. Khalid Ali, testified at trial that HPV cannot be transmitted by oral sex. Stelter mischaracterizes Dr. Ali's testimony on this topic. At trial, Dr. Ali testified that it was possible that HPV could be transmitted by oral

sex, but that it had not been proven. The information Stelter now offers, that HPV may be transmitted through oral sex, is not inconsistent with that testimony.

Stelter also asserts that test results show that he has herpes, and that a blood test would show whether T.S. had been exposed to herpes. However, no-merit counsel has submitted a supplemental no-merit report informing us that his investigation into this issue has not revealed an arguable meritorious argument. Counsel opines that evidence that Stelter tests positive for herpes and that T.S. does not test positive for exposure to herpes would be insufficient to support an argument for a new trial. We agree with counsel's assessment that this issue lacks arguable merit. Assuming Stelter could establish that he had the herpes virus at the time of the sexual assaults and that T.S. would test negative for exposure to the herpes virus, we conclude that it would be frivolous to argue that there is a reasonable probability of a different result at trial, in light of the other evidence presented by the State. *See* ***id***.

Stelter also asserts he would not have gone to trial had he known that he could receive a prison sentence beyond his life expectancy. He asserts that his trial counsel indicated that if he lost at trial his cases would be sentenced concurrently, and his total sentence would be limited to thirty years of incarceration. However, the letter from counsel that Stelter provides in support informs Stelter that counsel believed Stelter's decision to turn down a plea deal with a State's recommendation of ten years of initial confinement was "a very risky and ill-considered decision." Counsel explains in the letter that Stelter's "chances of prevailing at trial are very slim, and that if convicted after a jury trial, [Stelter's] risk of receiving a sentence two or three times longer than the present offer is significant." Thus, trial counsel did not give Stelter assurances that he would receive only up to thirty years of prison time if convicted; rather,

counsel tried to impress upon Stelter the significant chance that Stelter would receive a lengthy prison sentence after trial.

Trial as to victims B.J. and J.B.

The no-merit report addresses trial counsel's failure to object to testimony by B.J.'s mother, H.W., that she believed B.J.'s claims that Stelter had sexually assaulted her. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (no witness may give an opinion that another witness is telling the truth). H.W. testified that she did not initially believe J.B. when J.B. claimed Stelter sexually assaulted her, but that she ultimately believed B.J.'s claims that B.J. had been sexually assaulted. Based on our review of the entire record, we conclude that it would be frivolous to argue that H.W.'s statement prejudiced the defense, prevented the real controversy from being tried, or caused a miscarriage of justice. *See* ***Strickland***, 466 U.S. at 687; ***State v. Watkins***, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244. The evidence at trial included testimony by B.J. and J.B. as to the assaults; testimony by one of B.J.'s friends that B.J. had informed her, in a serious manner, about the assaults; and testimony by B.J.'s ex-boyfriend that B.J. had told him, in a serious manner, about the assaults, and that he had observed Stelter inappropriately eyeing B.J.'s body. Additionally, an investigating detective testified that Stelter initially denied any sexual contact with either victim, but then admitted to having sexual intercourse with J.B. There was no emphasis placed on H.W.'s statement that she believed her daughter during closing arguments. On this record, it would be frivolous to argue that one statement by H.W. that she believed her daughter B.J.'s claims impacted the outcome of the case.

The no-merit report again opines that there would be no arguable merit to any issues related to Stelter having a sexually transmitted disease. In response, Stelter contends that the real controversy was not fully tried because Stelter did not obtain testing showing that Stelter has the herpes simplex virus until eighteen months after trial. *See* ***State v. Hicks***, 202 Wis. 2d 150, 158, 549 N.W.2d 435 (1996) (real controversy not fully tried where jury did not hear exculpatory DNA evidence). Stelter also claims prosecutorial misconduct based on the prosecutor stating during closing arguments that there was no evidence of Stelter having a sexually transmitted disease. We conclude there are no arguable meritorious issues on these grounds.

H.W. testified on cross-examination that Stelter had stated to H.W.'s husband that Stelter had a sexually transmitted disease. Defense counsel argued in closing that there was a lack of evidence that B.J. or J.B. had been infected with a sexually transmitted disease. In rebuttal, the prosecutor argued that there was no evidence that Stelter had a sexually transmitted disease.

Stelter argues that the real controversy was not fully tried and the prosecutor engaged in misconduct by commenting on the lack of medical evidence, asserting that the prosecutor knew the Dane County Jail does not test for the herpes virus. However, we discern no arguable merit to an argument that the real controversy was not fully tried or to a claim of prosecutorial misconduct on this basis. The issue of whether Stelter had a sexually transmitted disease and whether either victim had been infected was not central to this case. Significantly, B.J. testified that the sexual assaults consisted of Stelter repeatedly fondling her breasts, and once performing oral sex on her and ejaculating onto her stomach. J.B. testified that Stelter had vaginal intercourse with her once, using a condom; and that another time, Stelter again had vaginal intercourse with her, using a condom, and also performed oral sex on her. Thus, even if Stelter were able to establish he had the herpes virus and the victims did not, that would not negate their

testimony, based on the type of sexual contact they reported. Additionally, the prosecutor accurately stated that, at trial, no evidence was presented that Stelter actually had a sexually transmitted disease.

Stelter also claims error in defense witness Allen Mendenhall appearing in Dane County Jail clothing. Stelter argues that the prosecutor then asked Stelter on the stand where he met Mendenhall, requiring Stelter to state that he met Mendenhall in the Dane County Jail. We do not agree that there would be arguable merit to any issues based on the prosecutor asking Stelter how he met the defense witness. Additionally, the record reveals that Stelter answered the question of how he knew Mendenhall as: "At one point we were housed together." Thus, Stelter did not state that he met Mendenhall in jail, only that the two were "housed" together. We discern no arguable merit to this topic.

Next, Stelter argues a double jeopardy violation based on the prosecutor arguing that J.B. testified to three separate acts of sexual intercourse, and that any two separate acts would support the two charges of sexual intercourse with a child. Stelter argues that he testified that the first claimed act of sexual intercourse occurred outside of the statute of limitations and that J.B. was unclear on the date. He argues that the jury should have been instructed that they had to find that the two sex acts J.B. claimed happened on the second date—vaginal intercourse and cunnilingus—were not close enough together to be considered one sexual act.

First, while Stelter testified that the first sex act occurred overnight on April 3 and 4, 2005, outside the statute of limitations, J.B. testified it may have occurred as late as June 2005, which was within the time frame charged. Second, the court instructed the jury that, as to the two counts of sexual intercourse with J.B., "evidence has been introduced of more than one act,

any one of which may constitute sexual intercourse with a child." The instructions made clear each count required a separate act, and there was evidence to support the jury's verdict as to each count. We conclude that there would be no arguable merit to a claim of multiplicity based on the prosecutor's closing argument or the jury instructions.

We have reviewed the balance of the arguments Stelter raises in his no-merit responses and determine they lack arguable merit. Upon our independent review of the record, we have found no other arguable basis to challenge the judgments of conviction or sentence. We conclude that any further postconviction or appellate proceedings would be frivolous.

IT IS ORDERED that the judgments of conviction and sentence, and the order denying the postconviction motion are affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Karpe is relieved of any further representation of Stelter in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals