COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1626-CR **Cir. Ct. No. 2005CF115**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT N. MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Martinez appeals from a judgment of conviction for seven counts of possession of child pornography and an order denying postconviction relief. Martinez argues we should vacate the convictions

and grant a new trial because the real controversy was not fully tried. We reject his arguments and affirm.

¶2 An Amended Information charged Martinez with ten counts of child pornography. A jury trial was held on July 19-20, 2007. Shown Kehoe testified she was roommates with Martinez, also known as "Nate." Kehoe contacted police on July 13, 2003, concerning a computer disc, or CD-ROM, she found while packing up Martinez's things after he "was not allowed back into the house." Kehoe had previously asked Martinez if he "borrowed any of my blank CD's or three-and-a-half-inch floppies because I came up missing quite a few of them." Kehoe testified Martinez "told me no," but while packing up his belongings, she found the CDs and floppy discs she was missing. She was curious and started looking through the CDs and came across one with a video of a very young child being molested by an older man. The CD was labeled "NATHANS [sic] INSTALL & Pictures." Kehoe provided the CD to officer Randall Jensen, and a search warrant was obtained for the residence. During the search, officers seized a computer and other peripheral items.

¶3 Jensen interviewed Martinez and asked him if any child pornography would be found on the seized computer. Martinez stated he did not think there was any child pornography on the computer, although there might be a "questionable" image of the actresses Mary-Kate and Ashley Olsen. Martinez also told Jensen he downloaded pornographic movies from a site in the United Kingdom.

¶4 Jensen also asked Martinez about the CD's contents. Jensen testified, "[H]e has – he put it as [having] a passion for installer type programs,

that I would find only installed programs on there, he told me I wouldn't find anything pornographic in nature on that disc."

¶5 The CD was marked for identification at trial as exhibit 2, and contained various folders, including Martinez's photos of family and friends, installation programs, and an "adult folder." Brad Montgomery, a special agent with the Wisconsin Department of Justice Division of Criminal Investigation, testified the files on exhibit 2 were placed on the CD "at one time by one user," within six minutes of each other on April 14, 2003.

¶6 When asked at trial if he placed the files on exhibit 2, Martinez replied, "I really couldn't say." Martinez admitted he used the computer to view and download "adult-themed" pornography "[o]ff of a download program named Kazaa." However, Martinez denied saving any child pornography on the CD, which Martinez testified was:

> Primarily used as an archive disc so that I can keep my files off of the hard drive in the event that my computer crashes, I would lose all my data. So periodically I would create an archive disc of all my pictures which were family, friends, pictures of back home of where I come from, and installation programs, the installation programs for Yahoo Messenger, Internet Explorer, MSN Messenger, messenger programs as well as device drivers for my computer as well.

¶7 The jury found Martinez guilty of counts one and five through ten.[1] The court withheld sentence and placed Martinez on five years' probation on each

[1] The CD was identified in counts one and five through ten of the Amended Information. The jury entered not guilty verdicts on counts two through four, related to the child pornography found on the computer hard drive.

count, concurrently, with eight months in jail with Huber privileges as a condition. Martinez filed a motion for postconviction relief that was denied.[2]

¶8 On appeal, Martinez complains about the prosecutor's closing argument. Martinez contends the prosecutor "repeatedly asserted that when Officer Jensen interviewed Martinez on July 16, 2003, Officer Jensen actually showed that particular disc to Martinez, then asked Martinez whether that disc was Martinez's property, and that Martinez answered yes." Martinez insists that when Jensen interviewed him, the CD was locked inside the police evidence locker, and Martinez was not shown the CD until trial. According to Martinez, the State's closing argument in this regard was therefore misleading and prevented the real controversy from being fully tried.

¶9 The State responds that Martinez failed to object to the challenged closing arguments. Martinez does not reply to this argument and it is therefore deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Martinez has thus waived the right to review this claim. *See* ***State v. Coulthard***, 171 Wis. 2d 573, 590, 492 N.W.2d 329 (Ct. App. 1992).

¶10 Regardless, Martinez's argument fails even on the merits. Martinez does not present a fair interpretation of the prosecutor's closing argument. The

[2] In the postconviction motion, Martinez raised three issues. The only issue raised on appeal concerns whether the real controversy was fully tried.

prosecutor did not state Martinez was shown the CD. Rather, the prosecutor stated Martinez admitted the CD belonged to him.[3] The cited argument is as follows:

> Now, Jensen specifically asked the defendant about Exhibit Number 2, the CD. The CD is labeled written on it, "Nathans [sic] Installer and Pictures" is written with ink on that Exhibit Number 2, the CD. The defendant admitted to Officer Jensen that that disc belonged to him. Remember, he told Officer Jensen that he had a passion for installer programs, and he admitted that that was his disc.
>
> ….
>
> … and in July of 2003 when Officer Jensen asked the defendant specifically about the disc labeled Nathans [sic] Installer and Pictures, he admitted that it was his. He admitted that he had a passion for installer programs. It's his, and he's the one who burned it, every single image.
>
> ….
>
> They want you to believe there's no evidence that the defendant is the one who wrote on Exhibit Number 2, but the fact is, folks, that when Officer Jensen specifically asked the defendant about that particular CD, there's no statement that he said I don't know what that is, I didn't write that on there. No. What did he say? Well, yeah, that's mine. I have a passion for installer programs. That's what Officer Jensen learned from the defendant.

¶11 Martinez insists in his reply brief, "Regarding the operative meaning of those words, Martinez maintains that they convey an unmistakable image of Officer Jensen actually showing the disc admitted as Exhibit 2 to Martinez, and

[3] Defense counsel objected to a characterization of Martinez's testimony as admitting that he wrote "Nathans [sic] Install & Pictures" on exhibit 2. The circuit court sustained the objection. The prosecutor then clarified the State's argument was based upon an inference from the evidence. The jury heard this clarification and thus was informed that the State's argument of indicia of ownership of exhibit 2 was inferential, rather than based on direct evidence in the form of a statement by Martinez that he actually wrote on exhibit 2. The jury was not therefore deliberating under any mistaken factual or legal statements.

Martinez then admitting ownership of that item." We disagree. The challenged closing arguments were neither misleading nor improper.

¶12 Moreover, we note the jury was instructed prior to closing arguments, "Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." We assume a properly given admonitory instruction is followed, and that the jury acted according to law. ***State v. Pitsch***, 124 Wis. 2d 628, 645 n.8, 369 N.W.2d 711 (1985) (citations omitted). Martinez does not contend this instruction was improper.

¶13 The real controversy in this case was whether Martinez had possession and control of child pornography contained on the computer and on the CD marked as exhibit 2. Martinez admitted he downloaded adult pornography. The jury also heard Martinez testify he possessed the CD and used it to archive documents from his hard drive. Martinez testified he would "create an archive disc of all my pictures which were family, friends, pictures of back home ... and installation programs…." The jury also heard testimony that the data contained on the CD, including Martinez's personal folders and the illegal child pornography, was burned onto the CD during a single, six-minute session on April 14, 2003. Although he denied downloading child pornography, the jury was entitled to infer from the evidence that Martinez had possession and control of the child pornography. There is no legitimate reason to conclude the prosecutor's closing argument prevented the real controversy from being fully tried.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).