COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2758-CR **Cir. Ct. No. 2004CF1**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL LEE SWISHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Paul Swisher appeals a judgment, entered upon his no contest plea, convicting him of attempted first-degree sexual assault of a child and child enticement by exposing a sex organ. Swisher also appeals an order denying his motion for postconviction relief. Swisher argues there was no

probable cause for the attempted sexual assault of a child charge, his convictions violate double jeopardy and the trial court erroneously exercised its sentencing discretion. We reject Swisher's arguments and affirm the judgment and order.

BACKGROUND

¶2 An amended Information charged Swisher with attempted sexual assault of a child and child enticement, both counts as a repeater. Swisher ultimately agreed to plead no contest to a second amended Information that removed the repeater modifiers. Swisher was convicted upon his no contest pleas and the court imposed consecutive sentences of twenty years' initial confinement and ten years' extended supervision on the attempted sexual assault conviction, and fifteen years' initial confinement and ten years' extended supervision on the child enticement conviction. Swisher's motion for postconviction relief was denied and this appeal follows.

DISCUSSION

A. PROBABLE CAUSE

¶3 Swisher argues that the complaint does not adequately set forth a basis for the attempted sexual assault of a child charge. Whether a criminal complaint sets forth probable cause to justify the charge is a question of law we review de novo. ***State v. Reed***, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. There is a specific probable cause standard we apply to criminal complaints:

> We look within the four corners of the complaint to see whether there are facts or reasonable inferences set forth that are sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it. A complaint is sufficient if it answers the following questions: (1) Who is charged?; (2) What is the person charged with?; (3) When and where

> did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? Or how reliable is the informant?

Id., ¶12 (citations omitted). Further, "[w]here reasonable inferences may be drawn establishing probable cause and equally reasonable inferences may be drawn to the contrary, the criminal complaint is sufficient." ***State v. Manthey***, 169 Wis. 2d 673, 688-89, 487 N.W.2d 44 (Ct. App. 1992).

¶4 WISCONSIN STAT. § 948.02(1)[1] provides that "[w]hoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." WISCONSIN STAT. § 939.32(3) details the statutory requirements for attempt:

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

¶5 Here, the complaint recited, in relevant part:

> [Courtney L.] advised [Hudson Police Officer Bradley Kusmirek] that a short time earlier she had been walking to the Hudson Library northbound on Third Street, crossing Orange Street, when a westbound tan vehicle pulled up to her and stopped. [Courtney] advised that the male, who she described as having a moustache, no glasses, short grayish hair and a stocky build, approximately 40 years of age, asked her where Division Street was. [Courtney] advised that she told the man that she had just moved to Hudson from California and did not know. [Courtney] stated that the man then turned on the overhead dome light in the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> vehicle. [Courtney] stated that she was then standing next to the driver's side door and that when she looked down she observed that the man's erect penis was exposed and that he was rubbing it up and down with his right hand. [Courtney] stated that the individual then stated "Do you want to play with it for me?" [Courtney] stated that she replied, "No" and that the male then stated, "Please." [Courtney] stated she then yelled "No" and began to run away from the vehicle, at which time she heard the male yell "Don't run, don't run." [Courtney] stated that the vehicle then drove off on Orange Street … and she ran into the Hudson Library.

¶6 First, Swisher argues there was no intervention by a third party to interfere with his completion of the crime. The intervention of a third party or an extraneous factor, however, is not an element of attempt. As our supreme court explained, the crime of attempt has two elements: "(1) an intent to commit the crime charged; and (2) sufficient acts in furtherance of the criminal intent to demonstrate unequivocally that it was improbable the accused would desist from the crime of his or her own free will." ***State v. Stewart***, 143 Wis. 2d 28, 34, 420 N.W.2d 44 (1988). "The crime of attempt is complete when the intent to commit the underlying crime is coupled with sufficient acts to demonstrate the improbability of free will desistance; the actual intervention of an extraneous factor is not a 'third element' of the crime of attempt." ***State v. Robbins***, 2002 WI 65, ¶¶36-37, 253 Wis. 2d 298, 646 N.W.2d 287.

¶7 Citing ***State v. Henthorn***, 218 Wis. 2d 526, 546, 581 N.W.2d 544 (Ct. App. 1998), Swisher nevertheless contends that the facts alleged in the complaint are "so few or of such an equivocal nature as to render doubtful the existence of the requisite criminal intent." ***Henthorn***, however, addressed whether the evidence at trial was sufficient to support Henthorn's conviction. Swisher is not challenging the sufficiency of the evidence to support his conviction but, rather, the sufficiency of the criminal complaint to establish probable cause for the

crime charged. The two inquiries involve different standards. Thus, we need not address whether the State proved the elements of the crime beyond a reasonable doubt. We need only determine whether the facts alleged in the complaint are sufficient to support a finding of probable cause for the attempted crime.

¶8 Emphasizing that he did nothing more than expose his penis through a car window while making comments, Swisher argues that his conduct was insufficient to establish probable cause to believe he possessed the requisite intent. The intent to commit a crime, however, can be inferred from the defendant's words and gestures and acts taken in the context of the circumstances. ***State v. Thiel***, 183 Wis. 2d 505, 541, 515 N.W.2d 847 (1994). While exposing his penis and masturbating, Swisher asked Courtney, "Do you want to play with it for me?" When Courtney replied "No," Swisher said "Please." Courtney then yelled "No" and as she ran away, heard Swisher yell "Don't run, don't run." If Courtney had complied with Swisher's request rather than run away, the crime of sexual contact with a child would have been completed. The facts alleged in the complaint were sufficient to establish probable cause to believe Swisher possessed the intent to commit the attempted sexual assault of a child charge and engaged in unequivocal acts in furtherance of that criminal objective such that it was improbable that he would desist of his own free will. *See* ***Stewart***, 143 Wis. 2d at 34.

B. DOUBLE JEOPARDY

¶9 Swisher argues that his convictions are multiplicitous, arising from a single course of conduct, and thus violate double jeopardy. The double jeopardy protections prohibit multiple convictions for the same offense. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996). "Whether a

violation exists in a given case is a question of constitutional law which we review de novo." ***Id.***

¶10 We analyze claims of multiplicity using a two-prong test: "1) whether the charged offenses are identical in law and fact; and 2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count." ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Here, Swisher argues that child enticement and attempted sexual assault of a child are the same in law, thus raising a lesser-included challenge. *See* ***State v. Lechner***, 217 Wis. 2d 392, 402, 576 N.W.2d 912 (1998). Under Wisconsin law, whether offenses are different in law is controlled by the "elements only" test set out in ***Blockburger v. United States***, 284 U.S. 299, 304 (1931), and codified in WIS. STAT. § 939.66(1). *See* ***Lechner***, 217 Wis. 2d at 405. Where, as here, the same act constitutes a violation of two different statutory provisions, the test under double jeopardy is whether each provision requires proof of a fact that the other does not. ***Blockburger***, 284 U.S. at 304.

¶11 The crime of child enticement by exposing a sex organ requires proof that: (1) the defendant caused or attempted to cause a child to go into a vehicle, building, room, or secluded place; (2) the defendant did so with the intent to expose a sex organ to the child or cause the child to expose a sex organ in violation of WIS. STAT. § 948.10; and (3) the victim had not attained the age of eighteen. WIS. STAT. § 948.07(3). In turn, first-degree sexual assault of a child requires proof that (1) the defendant had sexual contact with the child; and (2) the child was under the age of thirteen at the time of the alleged sexual contact. WIS. STAT. § 948.02(1). Attempted sexual assault does not require proof of a completed act of sexual assault but, rather, proof of an attempt to commit the act

of sexual assault of a child. WIS. STAT. § 939.32(3); Wis JI—Criminal 580 (2002).

¶12 The crimes of child enticement and attempted sexual assault of a child are not the "same offense" under the "elements only" test. Child enticement, unlike attempted sexual assault of a child, requires proof that the defendant caused or attempted to cause a child to go into a vehicle or other enclosure. In turn, attempted sexual assault of a child requires more than mere intent—it also requires sufficient acts in furtherance of the criminal intent to demonstrate unequivocally that it was improbable the accused would desist from the crime of his or her own free will. Because each crime requires proof of an element that the other does not, we presume that the legislature intended to permit cumulative punishments for both offenses. *See* ***State v. Sauceda***, 168 Wis. 2d 486, 495, 485 N.W.2d 1 (1992). Swisher bears the burden of proving that the legislature did not intend to authorize cumulative punishments. *See* ***State v. Davison***, 2003 WI 89, ¶¶44-45, 263 Wis. 2d 145, 666 N.W.2d 1.

¶13 Swisher does not rebut the presumption but, rather, asserts that under the particular facts and circumstances of this case, the offenses of child enticement and attempted sexual assault of a child are also identical in fact. We have concluded, however, that the offenses are different in law. Two offenses are the same offense only if they are identical in law *and* fact. *See* ***id.***, ¶¶43-44. Because the offenses are not the same in law and Swisher has not rebutted the presumption that the legislature intended cumulative punishments, there was no violation of double jeopardy.

C. SENTENCE

¶14 Finally, Swisher argues that the circuit court erroneously exercised its sentencing discretion. Sentencing lies within the discretion of the circuit court. ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." *See* ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983).

¶15 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court, and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶16 Here, Swisher argues that the sentencing court erroneously exercised its discretion by imposing consecutive sentences for one course of conduct. Swisher cites no relevant authority in support of his assertion and failed to include the sentencing transcript in the appellate record. In the absence of the sentencing hearing transcript, this court will assume the transcript supports the trial court's

exercise of sentencing discretion. *See* ***State v. Provo***, 2004 WI App 97, ¶119, 272 Wis. 2d 837, 681 N.W.2d 272.

By the Court.—Judgment and order affirmed.

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