COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP733-CR **Cir. Ct. No. 2006CF48**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS L. ZEISE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Reversed and cause remanded with directions*.

¶1 BRUNNER, J.[1] Thomas Zeise appeals a judgment of conviction for fourth-degree sexual assault and an order denying his postconviction motion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Zeise contends the circuit court erroneously denied his motion for plea withdrawal by concluding there was a sufficient factual basis for Zeise's ***Alford*** plea.[2] We agree and reverse and remand to allow Zeise to withdraw his plea.

BACKGROUND

¶2 Zeise was originally charged with second-degree sexual assault of a child under the age of sixteen, in violation of WIS. STAT. § 948.02(2). According to the criminal complaint, the victim, who was approximately thirteen and one-half years old at the time of the incident, told police Zeise "asked her if she wanted to have sex and she said yes." The victim told the investigating officer and testified at the preliminary hearing that she had sexual intercourse with Zeise.

¶3 As part of a global plea agreement including other pending cases, Zeise entered an ***Alford*** plea to a reduced misdemeanor charge of fourth-degree sexual assault under WIS. STAT. § 940.225(3m).[3] The proposed plea agreement was set forth in an email sent to Zeise's counsel at 4:53 p.m. the evening before the plea hearing. The agreement, submitted as an exhibit, required that the "non-consent element would be stipulated to; namely, that a child under 16 cannot give legal consent to sexual contact." In addition, a copy of WIS JI—CRIMINAL

[2] "An ***Alford*** plea is a guilty plea in which the defendant pleads guilty while maintaining his innocence or not admitting having committed the crime." ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995); ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[3] The global plea agreement disposed of additional cases with multiple counts, none of which are directly before this court on appeal. However, permitting withdrawal of Zeise's ***Alford*** plea could mean the cases would be returned to their pre-plea status, with all of the original charges against him restored; not just the felony child sexual assault charge. *See* ***State v. Robinson***, 2002 WI 9, ¶¶20, 48-55, 249 Wis. 2d 553, 638 N.W.2d 564, *overruled on other grounds by* ***State v. Kelty***, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886. The parties did not address the impact of plea withdrawal on the other charges.

1219 was attached to the plea questionnaire. That instruction lists the two elements of § 940.225(3m) that the state must prove: (1) the defendant had sexual contact with the victim and (2) the victim did not consent to the sexual contact.

¶4 At the plea hearing, the prosecutor orally amended the Information, alleging Zeise had "sexual contact with [the victim] … without the consent of that person, being a legal inability of that person to give legal consent due to her age contrary to Section 940.225(3m)…." The court then asked whether Zeise heard and understood the amended charge and Zeise replied affirmatively. After again stating he understood the charge, Zeise offered an ***Alford*** plea.

¶5 The court next discussed the nature and consequences of an ***Alford*** plea and Zeise and his counsel told the court Zeise understood. When asked whether there was a factual basis for the plea, the State noted the court had to find strong evidence of guilt. The State then asserted that strong evidence existed based on the complaint and all of the proceedings, including the victim's and Zeise's statements indicating they had sexual intercourse. Zeise and his counsel both agreed. The court found there was strong evidence of guilt.

¶6 The court next engaged Zeise in a colloquy concerning his understanding of the information addressed on the plea questionnaire. The following exchange took place:

> Now by entering your Alford plea … you are admitting that you committed the elements of the crimes. Do you understand that?
>
> Yes.
>
> ….
>
> Do you understand that you are admitting that you had sexual contact with the victim and that the victim did not consent to the sexual contact? Do you understand that?

> Yes.

The State then intervened and stated it wished to stress that:

> a child under the age of 16 cannot give a legal consent to contact or intercourse. Even from the State's standpoint in this case, this was consensual in fact, but illegal under law. So it's a legal inability of the child under 16 to consent to contact or intercourse that leads to the nonconsent element being satisfied. And I'd ask [defense counsel] to so stipulate with me so that's clear.

Defense counsel stipulated to the nonconsent element and then noted Zeise understood the elements but was not admitting to them. The State agreed Zeise did not have to admit to committing the crime, and the court moved on to the next charge, without comment on the matter. Ultimately, the court accepted Zeise's ***Alford*** plea.

¶7 After sentencing, Zeise moved to withdraw his ***Alford*** plea, contending it was not supported by a sufficient factual basis because the victim consented in fact.[4] An evidentiary hearing was held regarding a different issue, although there was also some discussion of the factual basis argument. The court later denied Zeise's postconviction motion in a written decision.

DISCUSSION

¶8 "Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice." ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). One type of manifest injustice is the circuit court's failure to establish a sufficient factual basis that the defendant committed the

[4] The motion also sought relief based on newly discovered evidence, alleging the victim recanted her allegations. That issue is not presented on appeal.

offense. ***Id.*** "When the plea entered is an ***Alford*** plea, the factual basis is deemed sufficient only if there is strong proof of guilt that the defendant committed the crime…." ***Id.*** To determine whether there is strong proof of guilt, a trial court must assess "'the prosecutor's summary of the evidence the state would offer at trial….'" ***State v. Garcia***, 192 Wis. 2d 845, 857-58, 532 N.W.2d 111 (1995) (quoting ***State v. Johnson***, 105 Wis. 2d 657, 663, 314 N.W.2d 897 (Ct. App. 1981)).

¶9 "The requirement of a higher level of proof in ***Alford*** pleas is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence." ***Smith***, 202 Wis. 2d at 27. Strong proof of guilt is less than proof beyond a reasonable doubt, but it is "clearly greater than what is needed to meet the factual basis requirement under a guilty plea." ***Id.*** The determination of the existence of a sufficient factual basis lies within the trial court's discretion and will not be overturned unless it is clearly erroneous. ***Id.*** at 25.

¶10 Another type of manifest injustice occurs when a defendant does not knowingly and understandingly enter an ***Alford*** plea. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906; ***Garcia***, 192 Wis. 2d at 859-60, 864-65. A defendant is "entitled to withdraw his plea as a matter of constitutional right if he demonstrates that he did not understand the elements of the crimes to which he pled." ***Garcia***, 192 Wis. 2d at 864.

¶11 The issue before us is whether a child under the age of sixteen is, as a matter of law, incompetent to give informed consent to sexual contact under WIS. STAT. § 940.225(3m). Zeise contends ***Smith*** is determinative of this case. There, the defendant entered an ***Alford*** plea to a reduced charge of child

enticement under WIS. STAT. § 948.07(1). That provision relies on WIS. STAT. § 948.02(2), which applies to sexual contact or intercourse with a person under the age of sixteen. Our supreme court ruled there could not be strong proof of guilt because it was impossible to satisfy the age element since it was undisputed the victim was sixteen years old. ***Smith***, 202 Wis. 2d at 28. Zeise asserts it was similarly impossible here to satisfy an element because the victim consented in fact.

¶12 The State asserts that no child under the age of sixteen can legally consent and also contends Zeise is bound by his counsel's stipulation on the matter. The State argues WIS. STAT. § 948.02(2) implicitly establishes our modern age of consent to be sixteen years of age. That strict-liability statute makes it a crime to have sexual contact or intercourse with any person under sixteen years of age, regardless of consent.[5] ***State v. Fisher***, 211 Wis. 2d 665, 565 N.W.2d 565 (Ct. App. 1997). However, § 948.02 does not explicitly address the issue of consent. Subsection 948.02(2) merely states: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony."

¶13 Curiously, neither party addresses the specific language of WIS. STAT. § 940.225(3m), the statute at issue in this case. That section criminalizes "sexual contact with a person without the consent of that person[.]" ***Id.*** Subsection (4) then defines consent:

> "Consent," as used in this section, means words or overt actions by a person who is *competent* to give informed

[5] WISCONSIN JI—CRIMINAL 2104 specifically instructs jurors that consent is not a defense to WIS. STAT. § 948.02(2).

> consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of sub. (2) (c), (cm), (d), (g), (h), and (i). The following persons are *presumed incapable* of consent but the presumption may be rebutted …:
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
>
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

WIS. STAT. § 940.225(4) (emphasis added). Notably absent from WIS. STAT. § 940.225 is any reference to age of a victim.[6] This absence is in contrast to the definition of "without consent" set forth in WIS. STAT. § 939.22(48), which would otherwise apply in absence of the more specific definition set forth above.[7] The definition provided in § 939.22(48)(c) states there is no consent if consent was given because, among other reasons, the victim does not understand the nature of the thing to which the victim consents, by reason of youth. Yet, even that section does not set forth a presumption of nonconsent for minors nor reference particular ages.

[6] WISCONSIN STAT. § 940.225 did contain age references at one time. However, they were removed to the separate child sexual assault statute in 1987. *See* ***State v. Harrell***, 182 Wis. 2d 408, 419-20, 513 N.W.2d 676 (Ct. App. 1994). In fact, WIS. STAT. § 940.225(4) once stated that a "person under fifteen years of age is incapable of consent as a matter of law…." ***State v. Kummer***, 100 Wis. 2d 220, 227, 301 N.W.2d 240 (1981). That language, however, was omitted in the 1981 and subsequent versions.

[7] WISCONSIN STAT. § 939.22 states its definitions apply in WIS. STAT. chs. 939 to 948 unless the context of a specific section requires otherwise. The comments to WIS JI—CRIMINAL 1200C and 1219 recognize that the definition in WIS. STAT. § 940.225(4) applies to prosecutions under WIS. STAT. § 940.225.

¶14 As comment 4 to WIS JI—CRIMINAL 1200C observes regarding WIS. STAT. § 940.225(4), "competent to give informed consent" is not further defined in the statute. The instruction committee further notes:[8]

> There is no indication whether the classes of persons described in § 940.225(4)(b) and (c) are those who are not "competent to give informed consent," or whether a different category of individuals is contemplated. The Committee took the view that a broader category was intended and defined "competent to give informed consent" by reference to the general principles that apply to "informed consent" in other contexts—the ability to understand the act and its consequences.

WIS JI—CRIMINAL 1200C, cmt. 4.

¶15 We agree that other persons might be found incompetent to give consent under WIS. STAT. § 940.225(4) in addition to the two classes described in subsecs. (4)(b) and (c). There is no limiting language in § 940.225(4) such as "only" those persons described in paras. (b) and (c). Additionally, we think it significant that the legislature chose to employ distinct terms, "competent" versus "presumptively incapable." The legislature simply created a rebuttable presumption for two classes of people. Therefore, we reject Zeise's argument that it is *impossible* to be convicted under § 940.225(3m) based on a given victim's incompetence to consent due to youth.

¶16 Jury instruction 1200C provides a special definition of "did not consent" for substitution into instruction 1219 in those cases "where consent was

[8] The Wisconsin jury instructions are persuasive authority for interpreting statutes. ***State v. Rardon***, 185 Wis. 2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994). The instruction committee's comments are also persuasive. ***State v. Wille***, 2007 WI App 27, ¶¶25-26, 299 Wis. 2d 531, 728 N.W.2d 343.

indicated and where the state contends that the victim was not competent to consent." WIS JI—CRIMINAL 1200C, introductory note and cmt. 1. The instruction states, in part:

> A person is not competent to give informed consent if that person does not have the mental capacity to understand the nature and the consequence of having sexual [contact]. The burden is on the State to satisfy you by proof beyond a reasonable doubt that [the victim] was not competent to give informed consent. (Footnoted omitted.)

¶17 In contrast, WIS JI—CRIMINAL 1219 provides the following definition of "did not consent" for the ordinary case where competency to consent consent is not an issue:

> "Did not consent" means that [the victim] did not freely agree to have sexual contact with the defendant. In deciding whether [the victim] did not consent, you should consider what she said and did, along with all the other facts and circumstances. This element does not require that [the victim] offered physical resistance. (Footnote omitted.)

As noted above, a copy of WIS JI—CRIMINAL 1219 was attached to Zeise's plea questionnaire; WIS JI—CRIMINAL 1200C, which contained the relevant definition, was not.

¶18 We conclude the circuit court erroneously determined there was strong evidence of guilt for the nonconsent element. Aside from the victim's age, the State did not provide any evidence indicating the victim was incompetent to give informed consent. For instance, there is no evidence of expert testimony on child development or evidence that the victim had not yet received sexual education in school. While the State asserted the victim could not consent as a matter of law, it failed to identify any law supporting that assertion.

¶19 The State cites ***State v. Harrell***, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994), which addressed the same issue presented here. The defendant in ***Harrell*** was charged with sexual assault of a child under WIS. STAT. § 948.02, but then pled to a less serious offense under WIS. STAT. § 940.225 that required proof of the additional consent element.[9] In ***Harrell***, where the victim was eleven years old, we stated "we do not go so far as declaring that the fact that the victim was under thirteen years of age provides a factual basis for lack of consent[.]" ***Harrell***, 182 Wis. 2d at 416, 420. Instead, we allowed the plea to stand by setting forth a new rule of law that the factual basis requirement is met if the trial court:

> satisfies itself that the plea is voluntary and understandingly made and that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the offense to which the plea is offered. This is the case even when a true greater- and lesser-included offense relationship does not exist.

Id. at 419.

¶20 Thus, if ***Harrell*** applied here, Zeise's appeal would fail. However, the ***Harrell*** rule does not apply in the ***Alford*** plea context because of the stricter requirement of strong proof of guilt.[10] ***Smith***, 202 Wis. 2d at 27-28. Thus,

[9] Harrell pled to third-degree sexual assault under WIS. STAT. § 940.225(3), rather than fourth-degree sexual assault under subsec. (4). ***State v. Harrell***, 182 Wis. 2d 408, 413, 513 N.W.2d 676 (Ct. App. 1994). The two sections are essentially the same except one involves the element of sexual intercourse and the other involves sexual contact.

[10] Additionally, it is questionable whether the ***Harrell*** rule is viable precedent. ***Harrell***, 182 Wis. 2d 408. As the jury instruction committee correctly observes, ***Harrell*** "flatly contradicts" the prior holding in ***State v. Harrington***, 181 Wis. 2d 985, 990-91, 512 N.W.2d 261 (Ct. App. 1994). WIS JI—CRIMINAL SM-32, n.24. ***Harrington*** was released January 27, 1994, and ordered published February 22, 1994. ***Harrell*** was released February 15, 1994, and ordered published March 29, 1994. Further, the ***Harrell*** rule has never been applied in any published Wisconsin case; ***Harrell*** was distinguished and thus not applied in ***State v. Smith***, 202 Wis. 2d 21, 27-28, 549 N.W.2d 232 (1996), and ***State v. West***, 214 Wis. 2d 468, 480-81, 571 N.W.2d 196 (Ct. App. 1997).

applying the definition of competence to consent utilized in WIS JI—CRIMINAL 1200C, the State failed to establish strong proof of guilt on the nonconsent element.[11]

¶21 We recognize a person may be convicted of a crime for engaging in sexual contact with a child under the age of sixteen, regardless of the child's consent in fact. Nonetheless, it is not inconsistent to allow that such children might "have the mental capacity to understand the nature and consequences of sexual contact," but for various policy reasons still criminalize another person's sexual contact with them. *See* ***Michael M. v. Superior Court***, 450 U.S. 464, 470-72 (1981). The statutes do not prohibit children of any age from giving consent to sexual contact nor do they criminalize the child's giving of consent or actions. In any event, we are bound by the language of the statute under which Zeise was convicted. Neither WIS. STAT. § 940.225(3m) nor any other statute sets forth a presumption of incompetence to give informed consent based on age.

¶22 We find additional support for our conclusion, that a person originally charged with sexual assault of a child under WIS. STAT. § 948.02 may not enter an ***Alford*** plea to WIS. STAT. § 940.225(3m) absent strong proof of nonconsent, at WIS. STAT. § 939.66. That section states:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime…. An included crime may be any of the following:
>
> (1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

[11] The jury instruction's definition of competence to give informed consent appears eminently reasonable and the State does not challenge it nor offer any alternative definition.

> ….
>
> (2p) A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.

The legislature could have also included an explicit reference at subsec. (2p) to WIS. STAT. § 940.225. That it did not suggests the legislature's intent was that the sexual assault of a child and general sexual assault statutes should be applied independently.

¶23 We also reject the State's argument that Zeise was bound by his counsel's stipulation to the factual basis that was based on the victim's perceived legal inability to consent. Because the State cites no supporting authority for this undeveloped argument, we need not address it. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Nonetheless, we reject the argument on its merits. Although a defendant's attorney may stipulate to the existence of facts, the court must independently "guarantee[] that the defendant is aware of the elements of the crime, and [that] the defendant's conduct meets those elements." ***State v. Thomas***, 2000 WI 13, ¶22, 232 Wis. 2d 714, 605 N.W.2d 836; ***State v. Harrington***, 181 Wis. 2d 985, 988-89, 512 N.W.2d 261 (Ct. App. 1994) (before accepting the plea, a court must "'personally determine'" that the stipulated conduct constitutes the offense) (quoting ***Broadie v. State***, 68 Wis. 2d 420, 423, 228 N.W.2d 687 (1975)).

¶24 As a final matter, we note our concern over a related issue, whether Zeise's plea was knowingly and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). This concern is primarily derivative of the factual basis issue, because it is improbable Zeise understood the elements of the crime when his attorney, the prosecutor, and the court all erred. Our concern is bolstered by the fact the court never personally addressed Zeise regarding the

victim's legal ability to consent and because the proper jury instruction on consent was not attached to his plea questionnaire.

¶25 Additionally, the court required Zeise to admit to the elements of the crime, including that the victim did not consent. Admission to the elements is inconsistent with entering an ***Alford*** plea and tends to show Zeise did not understand his plea. We need not decide the ***Bangert*** issue given our resolution of this case. However, we note our supreme court has previously raised the issue on its own motion and concluded a plea was not knowingly and intelligently entered, even when a defendant did not explicitly allege a lack of understanding. ***Kenosha County v. Jodie W.***, 2006 WI 93, ¶¶27-28, 293 Wis. 2d 530, 716 N.W.2d 845; *see also* ***Tempelis v. Aetna Cas. & Sur. Co.***, 169 Wis. 2d 1, 8, 485 N.W.2d 217 (the court of appeals has discretion to correct a circuit court error, regardless of whether the parties raised the issue).

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.