OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 25, 2024

To:

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Circuit Court Judge
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
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You are hereby notified that the Court has entered the following opinion and order:

2022AP613-CR State of Wisconsin v. Jay A. Hoppe (L. C. No. 2018CF105)

Before Stark, P.J., Hruz and Gill, 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).

Jay Hoppe appeals from a judgment convicting him of using a computer to facilitate a child sex crime, child enticement with sexual contact, and attempted second-degree sexual assault of a child. He also appeals from an order denying his postconviction motion. Hoppe contends that the child enticement and attempted sexual assault charges were multiplicitous and that his trial counsel provided ineffective assistance by failing to challenge them as such. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We reject Hoppe's multiplicity argument and affirm.

Multiplicity questions can arise under the Double Jeopardy Clause or the Due Process Clause when a single criminal episode or course of conduct is charged as multiple counts. ***State v. Davison***, 2003 WI 89, ¶¶33-34, 263 Wis. 2d 145, 666 N.W.2d 1. We will independently determine, as a question of law, whether a particular set of facts shows that an individual's double jeopardy rights have been violated or that multiple punishments have been imposed without due process. ***Id.***, ¶15.

The test for whether multiple counts are permissible begins by determining whether the charged offenses are identical in law and fact. ***Id.***, ¶¶22, 43 (citing ***Blockburger v. United States***, 284 U.S. 299 (1932)). Under the ***Blockburger*** elements test, charged offenses are different in law if each requires proof of a fact that the other does not. ***Davison***, 263 Wis. 2d 145, ¶22. Charged offenses are different in fact if they are separated in time or place, require separate acts of volition within a course of conduct, or are otherwise of a significantly different nature. *See* ***State v. Anderson***, 219 Wis. 2d 739, 748-49, 580 N.W.2d 329 (1998).

If two counts are identical in both law and fact, they qualify as the "same offense," and the Double Jeopardy Clause bars conviction on both counts. ***Davison***, 263 Wis. 2d 145, ¶¶33, 43. Conversely, if two counts are not identical in either law or fact, the Double Jeopardy Clause is not implicated, and a presumption arises that the legislature intended to provide multiple punishments.

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

Id., ¶¶33, 44. However, the defendant can overcome that presumption and establish a due process violation with clear evidence of a contrary legislative intent. ***Id.***, ¶¶33, 45-46.

Legislative intent as to multiple punishments may be gleaned from statutory language, legislative history and context of the statute, the nature of the proscribed conduct, and the appropriateness of multiple punishments for the conduct at issue. ***Id.***, ¶50. Typically, such evidence will focus on whether the legislature has defined one of the offenses as a lesser-included offense of the other under WIS. STAT. § 939.66, precluding dual convictions. *See* ***Davison***, 263 Wis. 2d 145, ¶¶51-77.

Here, the State alleged that Hoppe exchanged sexually explicit messages with an undercover police officer posing as a fictitious fifteen-year-old girl. Hoppe then drove his truck to an arranged meeting place in order to have sexual contact with her.

As the circuit court instructed the jury, the elements of child enticement were that Hoppe attempted to cause a child that he believed was under the age of sixteen years to go into a vehicle with intent to have sexual contact. The jury was instructed that the attempt element of child enticement required that Hoppe intended to cause a person that he believed to be a child who was under sixteen years of age to go into a vehicle for the purpose of having sexual contact and that he "did acts which demonstrate unequivocally under all the circumstances that he had formed the intent and would commit the crime except for intervention of … some other extraneous factor." The elements of attempted second-degree child sexual assault were that Hoppe intended to have sexual contact with a child that he believed was under the age of sixteen years and that he did acts which demonstrated unequivocally, under all of the circumstances, that he intended to and would have had sexual contact with that child except for the intervention of an extraneous factor.

Hoppe relies upon the formulation of the elements presented in the jury instructions in support of his contention that no additional facts were required to convict him of attempted second-degree sexual assault of a child than those the State needed to establish for the child enticement charge. The State, in contrast, relies upon ***State v. Hendricks***, 2018 WI 15, ¶18, 379 Wis. 2d 549, 906 N.W.2d 666, for the proposition that the intent to have sexual contact is not an element of child enticement—and, therefore, attempted sexual assault requires proof of an additional fact.

In ***Hendricks***, the Wisconsin Supreme Court considered the sufficiency of a plea colloquy under WIS. STAT. § 971.08 regarding a charge of child enticement. ***Hendricks***, 379 Wis. 2d 549, ¶18. The circuit court had informed the defendant that he was charged with having the prohibited intent to have sexual contact, but it did not provide the defendant with a definition of sexual contact. ***Id.***, ¶¶5-8. Our supreme court determined that the colloquy was not defective because the intent to have sexual contact was not an element necessary to understand the general nature of the crime of child enticement, which is focused on the act of luring a child to a secluded place for a prohibited purpose. ***Id.***, ¶33. Rather, the court characterized the intent to have sexual contact as one of six modes of commission identified in the statute for the prohibited-purpose element of child enticement. ***Id.***

The first problem with the State's argument is that nowhere in ***Hendricks*** did our supreme court suggest that the intent to have sexual contact was not a fact that would need to be proved in order to obtain a conviction under subsec. (1) of the child enticement statute or that the alleged mode of commission should not be considered in a multiplicity analysis. In fact, the court explicitly noted that the specific mode of commission for a charge of child enticement still must be specified at the plea hearing, even if it need not be defined. ***Id.*** Moreover, ***State v. Martin***,

156 Wis. 2d 399, 403, 405, 456 N.W.2d 892 (Ct. App. 1990), explicitly states that when a statute provides more than one mode of committing an offense, the charging document determines which mode to consider in applying the elements-only test for a multiplicity analysis.

Under ***Martin***, we conclude that the intent to have sexual contact was an element of each charge in this case for purposes of a multiplicity analysis. Based upon the complaint and the jury instructions that were given, neither charge required proof of a fact that the other did not. We will therefore assume that the charges were identical in law.

We conclude, however, that the charges were not identical in fact. The child enticement charge was primarily based upon the exchange of text messages that occurred over a six-day period and it focused on Hoppe's attempt to get the child to a secluded place. The attempted sexual assault charge was primarily based upon Hoppe's act of actually driving to meet the child to engage in sex. Although the evidence for each charge overlapped because the entire course of conduct could be considered in determining whether Hoppe had taken unequivocal acts, driving to meet the child required a separate act of volition and it was different in nature from the text messages.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals