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April 22, 2020

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

2018AP1689-CR State of Wisconsin v. Kristopher L. Young (L.C. #2016CF1104)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Kristopher L. Young appeals from a judgment of conviction and an order denying his postconviction motion for plea withdrawal. 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 (2017-18).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Young used his cellphone to send online messages to two teenagers. Young's messages included requests for and offers of sexual favors, and contained sexually explicit images. The State charged Young with seventeen counts arising from seven different exchanges with the teens. As part of a negotiated settlement, Young pled guilty to four of the counts, including two counts of causing a child to view or listen to sexually explicit conduct in violation of WIS. STAT. § 948.055(1) (counts three and sixteen). On the State's motion, the circuit court dismissed the remaining thirteen counts, including two counts of exposing a child to harmful material in violation of WIS. STAT. § 948.11(2)(a) (counts two and fifteen). At sentencing, pursuant to the parties' agreement, the State recommended prison but stood silent on the length. The court imposed a global bifurcated sentence totaling ten years of initial confinement followed by ten years of extended supervision.

Young filed a postconviction motion for plea withdrawal, arguing that dismissed counts two and fifteen were lesser-included offenses of counts three and sixteen, respectively,[2] and that therefore, convictions on both the lesser and the greater offenses would have been multiplicitous in violation of constitutional protections against double jeopardy.[3] Young asserted that he was not aware when entering his pleas that he could not be convicted of both the greater and the

[2] It is undisputed that counts two and three arise from a picture sent by Young to one of the teens showing Young naked on all fours with his buttocks, anus and scrotum visible. Counts fifteen and sixteen arise from a picture sent by Young to the other teen showing a man's penis inside another man's anus.

[3] In the multiplicity context, double jeopardy prohibits multiple punishments for the same offense. WISCONSIN STAT. § 939.66 protects against multiplicity by providing that an "actor may be convicted of either the crime charged or an included crime, but not both." A lesser-included offense "may be … A crime which does not require proof of any fact in addition to those which must be proved for the [greater] crime charged." § 939.66(1).

lesser offenses, and that this rendered his pleas unknowing because he misunderstood the "actual value" of his plea bargain.

The circuit court denied the motion, concluding that there was "no indication of a manifest injustice" because Young "received quite a bit of reduction in exposure based on the dismissal of the charges, and he didn't plead to any [multiplicitous] charges." Young appeals.

A defendant seeking to withdraw his or her plea after sentencing must prove by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Dillard***, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44. "A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea which rendered it unknowing, involuntary, and unintelligently entered." ***State v. Denk***, 2008 WI 130, ¶71, 315 Wis. 2d 5, 758 N.W.2d 775.

Young maintains that his pleas were not knowing and voluntary because he was unaware that the plea agreement called for the dismissal of lesser-included, or, multiplicitous, charges. Multiplicity claims are analyzed using a two-prong test. ***State v. Ziegler***, 2012 WI 73, ¶60, 342 Wis. 2d 256, 816 N.W.2d 238. The first prong asks whether the offenses are identical in law and fact using the elements-only test, also known as the ***Blockburger*** test. ***Id***. (citing ***Blockburger v. United States***, 284 U.S. 299, 304 (1932)).[4] If the offenses are identical in law and fact, a rebuttable presumption arises that the legislature did not intend to authorize cumulative punishments. ***Ziegler***, 342 Wis. 2d 256, ¶61. "Conversely, if the offenses are different in law or

[4] WISCONSIN STAT. § 939.66(1) is a codification of the ***Blockburger*** test. ***State v. Davison***, 2003 WI 89, ¶52, 263 Wis. 2d 145, 666 N.W.2d 1.

fact, the presumption is that the legislature intended to permit cumulative punishments." ***Id.***, ¶62.

Applying the elements-only test, it is clear that the offenses are not identical in law. The greater offense, causing a child to view sexual activity, requires the State to prove that Young (1) intentionally caused a child (or a person he believed had not attained the age of eighteen) to view sexually explicit conduct, and (2) acted with the purpose of sexually arousing or gratifying himself or humiliating or degrading the child. *See* WIS. STAT. § 948.055(1) and (2)(b);[5] *see also* WIS JI—CRIMINAL 2125 (2013). The elements of the lesser crime, exposing a child to harmful material, are that: (1) Young knowingly sold, rented, exhibited, played, distributed, or loaned harmful material[6] to a child; (2) Young had knowledge of the character and content of the material; (3) the child was under the age of eighteen years; and (4) Young knew or reasonably should have known that the child was under the age of eighteen. *See* WIS. STAT. § 948.11(2)(a); *see also* WIS JI—CRIMINAL 2142 (2019).[7]

[5] Mistake of age is not a defense, and a defendant is guilty even if the presumed "child" is really an adult (as in a law enforcement sting operation). The statute also defines "sexually explicit conduct" *see* WIS. STAT. § 948.01(7), and the jury instructions explain that "intent" requires that the defendant "acted with the mental purpose to cause the prohibited result[,]" *see* WIS JI—923A cmt. i (2001).

[6] "Harmful material" is defined in the statute as "[a]ny picture, photograph, drawing, sculpture, … or image of a person or portion of the human body that depicts nudity, sexually explicit conduct, sadomasochistic abuse, physical torture or brutality and that is harmful to children." WIS. STAT. § 948.11(1)(ar)1. "Harmful to children" means that the material: (1) predominantly appeals to the prurient, shameful or morbid interest of children, (2) is patently offensive to prevailing standards in the adult community with respect to what is suitable for children, and (3) lacks serious literary, artistic, political scientific or educational value for children, when taken as a whole. § 948.11(1)(b)1-3.

[7] For exchanges involving face-to-face contact, the statute provides an affirmative defense if the defendant had "reasonable cause to believe" that the child was at least 18 and the child exhibited documentary evidence purporting to establish that age. WIS. STAT. § 948.11(2)(c).

The offenses contain entirely different elements. For example, the greater offense requires that Young acted with the purpose of sexually arousing or gratifying him or herself or humiliating or degrading the child, while the lesser offense must involve material that was both "harmful" and "harmful to children." Harmful material can include depictions that are not necessarily "sexually explicit," such as physical torture. Whereas mistake of age is never a defense to the greater offense, the lesser allows for an affirmative offense in certain situations.

Turning to the second prong, we see nothing that would overcome the presumption that the legislature intended cumulative punishments. The fact that the legislature created the two offenses under separate statutory provisions with elemental differences supports an intent to permit cumulative punishments. ***State v. Davison***, 2003 WI 89, ¶53, 263 Wis. 2d 145, 666 N.W.2d 1. Additionally, the legislature has repeatedly evinced an intent to treat crimes against children seriously. *See, e.g.*, ***Ziegler***, 342 Wis. 2d 256, ¶76. "[T]he legislature is entitled to attack a discrete social problem by writing multiple statutes with subtle elemental differences in order to capture and criminalize the widest possible variety of conduct …." ***State v. Derango***, 2000 WI 89, ¶36, 236 Wis. 2d 721, 613 N.W.2d 833. For the first time in his reply brief, Young asserts that the legislative history of the statutes supports his position. We disagree. None of the arguments in his reply brief provides a basis for overcoming the presumption in favor of cumulative punishment.

Even assuming that the complained-of charges were multiplicitous, Young has not established that plea withdrawal is necessary to correct a manifest injustice. As the postconviction court concluded, Young received the benefit of his bargain. *See* ***Denk***, 315 Wis. 2d 5, ¶70 (defendant not entitled to plea withdrawal where, regardless of whether dismissed charge might have lacked a factual basis, he received the benefit of his bargain). Like ***Denk***,

Young "did not plead to the charge in question," here, to any allegedly multiplicitous count. ***Id.***, ¶76. Like ***Denk***, Young bargained for "exactly what happened[,]" namely, the dismissal of thirteen counts and the State's declining to recommend a specific prison length. ***Id.*** Like ***Denk***, Young did not bargain for a legal impossibility or an unenforceable agreement. ***Id.***, ¶¶72-75 (distinguishing, for example, ***State v. Brown***, 2004 WI App 179, ¶¶2, 11, 13, 276 Wis. 2d 559, 687 N.W.2d 543, where the defendant entered into a plea agreement based on erroneous information provided by the attorneys and the circuit court that the bargain would permit him to avoid sex offender registration).

We are not persuaded by Young's reliance on ***Dillard*** and ***State v. Douglas***, 2018 WI App 12, 380 Wis. 2d 159, 908 N.W.2d 466, wherein the defendants were induced to plead based on undisputed and material misunderstandings of the law concerning their exposure at sentencing. In ***Dillard***, the defendant pled pursuant to an agreement that dismissed an inapplicable penalty enhancer carrying a mandatory life sentence. 358 Wis. 2d 543, ¶¶5-6. Postconviction, he testified that the "greatest benefit of the plea deal" was avoiding the penalty enhancer, and that the dismissed enhancer "was his main reason for accepting the plea offer [.]" ***Id***., ¶¶45-46. The defendant in ***Douglas*** was charged with both first-degree and second-degree sexual assault of a child. 380 Wis. 2d 159, ¶2. He pled to second-degree sexual assault after being misinformed by his attorney, the State, and the circuit court that he faced 100 years if convicted on both counts. ***Id.***, ¶¶4, 6, 18. Under the plain language of WIS. STAT. § 939.66 (2p), second-degree sexual assault of a child is a lesser- included offense of first-degree sexual assault of a child, and Douglas could not have been convicted of both.

Like ***Denk***, Young's asserted misunderstanding about the value of his plea bargain does not call into question the fundamental integrity of his plea. ***Denk***, 315 Wis. 2d 5, ¶¶71, 76. *See*

also ***Brown***, 276 Wis. 2d 559, ¶11 (not every misunderstanding of the law by a defendant negates the knowing and voluntary nature of a plea). In ***Dillard*** and ***Douglas***, it is clear from the record that the attorneys and circuit court provided misinformation about a clear and settled point of law. Here, nothing in the record shows that Young was told that he could be convicted of all charges if he went to trial and, as in ***Denk***, the predicate question of law—whether Young's charges were multiplicitous—is disputed. Moreover, there is no specific allegation from Young articulating any desire to go to trial, or asserting that the dismissal of counts two and fifteen was his primary reason for accepting the State's offer and the offer's greatest benefit. *See* ***Dillard***, 358 Wis. 2d 543, ¶67 ("[T]he appropriate inquiry is into the defendant's motivation for entering [his] plea in the first place."). Indeed, whereas the defendants in ***Dillard*** and ***Douglas*** were induced to plead based on misinformation that greatly reduced their exposure at sentencing, Young's agreement resulted in the dismissal of eleven counts in addition to counts two and fifteen. In sum, Young has not shown the existence of circumstances constituting a manifest injustice.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals