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**DISTRICT III**

June 14, 2022

*To*:

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Circuit Court Judge
Electronic Notice

Hon. Jane M. Sequin
Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Marinette County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

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2021AP472-CR State of Wisconsin v. Andrew T. Giguere
(L. C. No. 2018CF210)

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).**

Andrew Giguere appeals from a judgment convicting him of child enticement and from an order denying his postconviction motion for plea withdrawal. The sole issue on appeal is whether there was a sufficient factual basis to support Giguere's no-contest plea. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We affirm. *See* WIS. STAT. RULE 809.21 (2019-20).[1]

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The State initially charged Giguere with four counts of sexual assault of a child under the age of sixteen. The complaint alleged that a fifteen-year-old girl, whom we will call Grace,[2] disclosed having sexual intercourse with Giguere on multiple occasions. Police found sexually explicit texts and photographs on Grace's phone showing: a naked Giguere cupping his genitals in one hand; Giguere and Grace reflected in a bathroom mirror wearing towels; the penis of a naked man (initially identified by Grace as Giguere) poised above the vagina of a naked girl (whom Grace identified as herself); and a male (also initially identified by Grace as Giguere) performing oral sex on Grace.

In the process of downloading the explicit pictures from the phone, the police inadvertently deleted several of them and were unable to recover them. The parties subsequently reached a plea agreement, pursuant to which Giguere entered a no-contest plea to an amended count of child enticement in exchange for the dismissal of the other charges and a joint recommendation of five years of initial confinement followed by five years of extended supervision, to be imposed concurrently with another sentence Giguere was already serving.

The State advised the circuit court that it still had the explicit text messages and some unspecified photographs to provide a factual basis for the plea. Giguere personally acknowledged to the court that he did not contest the State's ability to prove the facts necessary to constitute the crime of child enticement—including that Giguere caused Grace to go into a building with the intent to expose a sex organ to her or to have her expose a sex organ to him. Giguere's counsel also advised the court that he was satisfied—based upon his own independent investigation, in addition to the complaint—that there was a factual basis for the court to accept the plea.

[2] This matter involves the victim of a crime. Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

The circuit court accepted Giguere's plea, found Giguere guilty, and ordered a presentence investigation report (PSI). Giguere told the PSI agent that he had developed a relationship with Grace (to whom he was by then engaged to be married) and had exchanged "graphic" texts and pictures with her, but he had stopped short of having sex with her. Grace wrote the PSI agent a letter stating that Giguere had never "enticed" her because she was the one who had asked Giguere to "do stuff" with her.

At the sentencing hearing, Giguere did not dispute the statements attributed to him in the PSI or Grace's assertion that the two of them did "stuff." Giguere did, however, assert that the photograph referenced in the complaint showing the penis of a naked man poised above the vagina of a naked girl actually depicted Grace's prior boyfriend. The State acknowledged that Grace had recanted both her assertions that Giguere was in the photograph showing a penis hovering over a vagina, and her assertion that the two had engaged in any sexual intercourse. Giguere personally addressed the court and stated that he had failed miserably to exercise "restraint until she was age appropriate," and he had no explanation or excuse for his behavior during his "interactions" with Grace.

The circuit court exceeded the parties' joint recommendation and sentenced Giguere to eight years of initial confinement followed by five years of extended supervision, consecutive to the sentence Giguere was already serving. Giguere then filed a motion to withdraw his plea. Giguere argued that the factual basis for the plea was insufficient because there were no remaining explicit photographs showing Giguere and Grace together with either one's private parts exposed. The court denied the plea withdrawal motion following a hearing, and Giguere appeals.

In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that some manifest injustice occurred. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). One situation leading to manifest injustice occurs when a circuit

court fails to establish a factual basis for a plea—that is, that the defendant's conduct actually constitutes the crime charged. ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836; *see also* WIS. STAT. § 971.08(1)(b).

We review a circuit court's decision to deny a plea withdrawal motion under the erroneous exercise of discretion standard, and we will uphold the decision unless the facts fail to support it or the court applied the wrong legal standard. ***State v. Black***, 2001 WI 31, ¶¶9-10, 242 Wis. 2d 126, 624 N.W.2d 363. Supporting facts are not limited to those presented at the plea hearing, but rather they encompass the totality of the circumstances shown in the record. ***Thomas***, 232 Wis. 2d 714, ¶18. We will accept the circuit court's findings of historical and evidentiary facts surrounding the entry of a plea unless they are clearly erroneous. *See* ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. Our review of the factual basis for a plea, however, involves de novo consideration of any statutory interpretation necessary to resolve the issue. ***Black***, 242 Wis. 2d 126, ¶¶9-10.

Here, as a threshold matter, the parties dispute what conduct is necessary to establish the crime of child enticement. The statute provides in relevant part that child enticement is committed by whoever, with the intent to expose genitals to a child or to cause a child to expose genitals in violation of WIS. STAT. § 948.10, "causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place." WIS. STAT. § 948.07(3).

Giguere contends that a person cannot violate subsection (3) of the child enticement statute unless his or her conduct also violates WIS. STAT. § 948.10. With some exceptions not present here, § 948.10 makes it a crime to expose an adult's genitals to a child or a child's genitals to an adult for purposes of sexual arousal or gratification when those acts are done *in person*. *See* ***State v. Stuckey***, 2013 WI App 98, 349 Wis. 2d 654, 837 N.W.2d 160. Thus,

Giguere reasons, his sending a sexually explicit picture of himself to Grace was insufficient to provide a factual basis for a child enticement charge.

We first reject Giguere's interpretation of the child enticement statute. By its plain language, the child enticement statute applies to anyone who *attempts* to cause a child to go somewhere with the *intent* of violating WIS. STAT. § 948.10. The statute does not require an actual illegal exposure to occur. Attempting to lure a child to a location with the intent to expose one's genitals to a child or have the child expose his or her genitals is sufficient.

We next conclude that the record contains more than sufficient evidence to provide a factual basis for Giguere's plea to the child enticement charge. The surviving photograph on Grace's phone of Giguere exposing himself cannot be viewed in isolation. The photograph was accompanied by a long, sexually explicit text chain, in which Giguere made numerous statements about wanting to get together with Grace and Grace made numerous statements that supported her initial report that she and Giguere had engaged in sexual activity. Most incriminating, Grace texted Giguere: "[C]an't wait until we can fuck again, the wait is killing me"; and "I have my period but its only like a little bit n we're fucking okok." The surviving photograph of Giguere and Grace each wearing towels in a bathroom with no other clothing visible similarly supports the inference that actual, in-person exposure of genitalia occurred.

In addition, the circuit court observed at the sentencing hearing that recorded jail call conversations between Giguere and Grace "really cause[d him] to wonder" whether Giguere had coached Grace on the recantation. Given the texts, the surviving photographs, the observation by police of the subsequently deleted sexually explicit photographs showing Grace and a man naked together, Grace's unrefuted statement to the PSI agent that she and Giguere "did stuff," and the jail calls, the court could reasonably find Grace's initial statement to police that she had engaged in sexual activity with Giguere to be more credible than her recantation. We emphasize that the

evidence did not need to be sufficient to prove Giguere's guilt beyond a reasonable doubt, but merely to satisfy the court that Giguere's alleged conduct constituted the crime charged.

Upon the foregoing,

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

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*