COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP551-CR **Cir. Ct. No. 2009CF116**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG F. AHLMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Craig Ahlman appeals a judgment of conviction for possession of child pornography, contrary to WIS. STAT. § 948.12(1m), and an order denying his postconviction motion.[1] We reverse because the circuit court failed to establish a factual basis for Ahlman's guilty plea. Ahlman has therefore demonstrated a manifest injustice and is entitled to plea withdrawal.

BACKGROUND

¶2 A conviction for possession of child pornography under WIS. STAT. § 948.12(1m) requires proof that the defendant possessed a "photograph … or other recording of a child engaged in sexually explicit conduct."[2] *See* WIS. STAT. § 948.12(1m)(b). "Sexually explicit conduct," as it relates to § 948.12(1m), requires that the material depict very specific types of acts, like intercourse, masturbation, or "lewd exhibition of intimate parts." *See* WIS. STAT. § 948.01(7).

¶3 Eight images of children were discovered on Ahlman's computer while police were investigating an alleged sexual assault.[3] The statement of probable cause attached to the complaint indicated that investigators found a file "depicting nude females, including a nude child." Two other files depicted "a female child in a sexualized pose." A fourth file showed "a pubescent female

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] WISCONSIN STAT. § 948.12(1m) was amended after Ahlman's alleged offenses, in 2011. *See* 2011 Wis. Act 271, § 6. These amendments, which clarified the manner of commission and scienter elements of the offense, are not relevant to the present appeal.

[3] At sentencing, the State represented that nine images were discovered, but the probable cause statement discusses only eight.

torso including breasts." "[T]wo nude females, one of which is a female child yet to develop breasts or pubic hair," were shown in four other files.

¶4 Ahlman reached a comprehensive plea agreement with the State resolving two counts of sexual assault of the same child under the age of thirteen and three counts of possession of child pornography. Alman agreed to plead guilty to one count of possession of child pornography; he would be immediately convicted of that charge. He also agreed to plead guilty to one count of sexual assault of a child, but, pursuant to a deferred judgment agreement, entry of that judgment of conviction would be deferred for fifteen years and dismissed on completion of stated requirements. The remaining counts would be dismissed outright.

¶5 At the plea colloquy, the court did not ask Ahlman whether he understood what "sexually explicit conduct" meant. Ahlman was shown a copy of the Information, which also did not elucidate the meaning of the phrase. The court read Ahlman the elements of possession of child pornography, which did not include the definition of "sexually explicit conduct" contained in WIS. STAT. § 948.01(7). The court then asked, "Do you understand the charge generally?" Ahlman replied in the affirmative. The court also asked whether Ahlman understood the elements of possession of child pornography. Ahlman again responded in the affirmative.

¶6 The court realized it was required to establish a factual basis supporting Ahlman's plea. Defense counsel consented to the use of the complaint's statement of probable cause for that purpose. The State requested the court also consider a therapy report authored by Dr. Ron McGuire as a foundation for the plea. Defense counsel agreed, stating that admissions Ahlman made to

McGuire "clearly support[ed]" the plea. Both sources, along with Ahlman's acknowledgment of the offense generally, served as the factual predicate for Ahlman's plea. The allegedly pornographic images were not attached to either the complaint or McGuire's report, and it does not appear the circuit court personally viewed them.

¶7 The State argued for a lengthy prison term at sentencing. The prosecutor described the images taken from Ahlman's computer as depicting "children," and emphasized that Ahlman had admitted to repeatedly viewing "child pornography." Defense counsel argued for probation conditioned upon local jail time. Counsel emphasized that the images, which he viewed, were "just plain images, nothing sexual, no sexual activity or anything." The court ultimately was persuaded by the State and sentenced Ahlman to a twenty-year term of imprisonment, consisting of ten years' initial confinement and ten years' extended supervision.

¶8 Ahlman filed a postconviction motion requesting plea withdrawal.[4] The court summarily concluded Ahlman had not established a manifest injustice justifying withdrawal, and denied the motion.

DISCUSSION

¶9 To accept a plea, a circuit court is required to establish a sufficient factual basis for the defendant's guilt. *See* WIS. STAT. § 971.08(1)(b) (court must

[4] Ahlman also asserted, as he does on appeal, that a "new factor" entitles him to sentence modification, and that his attorney was ineffective. Because we conclude that Ahlman is entitled to plea withdrawal, we need not address these issues. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1977) (appellate courts should decide cases on narrowest possible grounds).

make "such inquiry as satisfies it that the defendant in fact committed the crime charged"). "A factual basis may be established through testimony by witnesses, reading of police reports or statements of evidence by the prosecutor." ***White v. State***, 85 Wis. 2d 485, 490, 271 N.W.2d 97 (1978). The court may examine the defendant regarding his actions, but the guilty plea, without more, is insufficient to establish the elements of the crime. ***Id.*** at 490-91.

¶10 Based on the probable cause statement's description of the images, the only conceivable way the images depicted "sexually explicit conduct" is if the minors depicted were engaged in the "lewd exhibition of intimate parts." *See* WIS. STAT. § 948.01(7).[5] If they were not, the images did not rise to the level of child pornography. *See* ***United States v. Griesbach***, 540 F.3d 654, 655 (7th Cir. 2008) (definition of "sexually explicit conduct" draws line between child pornography and child erotica).

¶11 There is no one definition of "lewd." ***State v. Petrone***, 161 Wis. 2d 530, 561, 468 N.W.2d 676 (1991), *overruled on other grounds by* ***State v. Greve***, 2004 WI 69, ¶31 n.7, 272 Wis. 2d 444, 681 N.W.2d 479. An image must visibly display the child's genitals or pubic area, but mere nudity is not enough. ***Id.*** The child must be posed as a sex object, with an "unnatural" or "unusual" focus on the genitalia. ***Id.*** A fact-finder must use common sense when determining whether an image is pornographic or innocent. ***Id.*** at 561-62.

[5] Although some images apparently included more than one female, there is absolutely nothing in the record to suggest the minors were engaged in any form of sexual intercourse. Nor is there anything suggesting the images depicted other forms of sexually explicit conduct, such as bestiality, masturbation, or "sexual sadism or sexual masochistic abuse." *See* WIS. STAT. § 948.01(7).

¶12 Given this rather amorphous standard, it is odd that the State apparently never offered the images into evidence during Ahlman's prosecution. Nor did the circuit court request to see them during the plea hearing. They are not in the record on appeal. Instead, the court primarily relied on law enforcement's bare descriptions of the images as variously depicting a "nude child," a "female child in a sexualized pose," a "pubescent female torso including breasts," and "a female child yet to develop breasts or pubic hair."

¶13 Reliance on such skeletal statements about what was in the images is obviously problematic. In any prosecution for child pornography, "the essential evidence is the pornography rather than a verbal description of it …." ***Griesbach***, 540 F.3d at 654. In ***Griesbach***, the court found a twenty-word description of an image practically worthless, and barely sufficient to support the issuance of a search warrant for child pornography.[6] ***Id.*** at 656. Without personally viewing the images or eliciting a highly detailed description of the images from the State or Ahlman, there was an insufficient factual basis for the plea.

¶14 This is true even though two of the images, in the investigator's judgment, depicted "a female child in a sexualized pose." A "sexualized pose" can mean any number of things, and need not rise to the level of "lewd exhibition of intimate parts." For example, in ***Griesbach***, 540 F.3d at 655, the government's affidavit described images investigators had found on the internet and traced to the

[6] Indeed, the warrant likely would have been unlawful had it been solely supported by law enforcement's brief description of the image. The court placed great emphasis on law enforcement's averment that the picture was from a known series of pornographic images. *See* ***United States v. Griesbach***, 540 F.3d 654, 656 (7th Cir. 2008) ("The fact that the third image was part of a known series of pornographic images is especially telling."). This supported a strong inference that additional, pornographic images would be found during the ensuing search. ***Id.*** at 656-57.

defendant. One of the images showed a prepubescent female posing with her top pulled up to expose her breasts, and a second showed a minor female in a standing pose to expose her full body. ***Id.*** The government conceded—and the court implicitly agreed—that these images were mere "child erotica," and could not establish probable cause to search for child pornography. ***Id.*** at 655, 657.

¶15 McGuire's report does not save Ahlman's plea. According to the report, the images "are basically stills of young girls and … there is no sexual activity, penetration or other activities shown." Ahlman agreed with that description and said the girls were in a "posing posture," but gave no further details. Although McGuire found that "there certainly was possession of child pornography," it is not evident McGuire was aware of, or understood, the "sexually explicit conduct" component of the offense. McGuire's finding appears to be solely based on Ahlman's acknowledgment that he possessed images he believed were illegal.[7]

¶16 Further, Ahlman's generic admissions of guilt are insufficient to establish a factual basis for his plea. *See* ***White***, 85 Wis. 2d at 490-91. At the plea hearing, Ahlman acknowledged that he understood the "charge generally" and the elements of child pornography. However, he was never asked to describe the images, or asked whether the images depicted "sexually explicit conduct." *See* ***id.*** at 490 (court may examine the defendant regarding his or her actions to establish factual basis for plea). We are left with the apprehension that Ahlman possessed images he believed were illegal, but in fact did not depict "sexually explicit

[7] It does not appear McGuire saw the images, either, as his characterization of the images was based on representations made by Ahlman's attorney.

conduct." The factual basis requirement is designed to insulate a defendant in precisely these circumstances. *See* ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836 (factual basis requirement protects a defendant "'who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his [or her] conduct does not actually fall within the charge.'" (quoting ***White***, 85 Wis. 2d at 491)).

¶17 However, the circuit court's failure to establish a factual basis at the plea hearing is not automatically fatal to the subsequent proceedings. A defendant who seeks to withdraw a guilty plea after sentencing must show, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice. ***Thomas***, 232 Wis. 2d 714, ¶16. "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (quoting ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995)). "[I]f a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred." ***Id.***, ¶17.

¶18 In applying the manifest injustice test, the issue is no longer whether the plea should have been accepted, but whether the plea should be withdrawn. ***State v. Cain***, 2012 WI 68, ¶30, 342 Wis. 2d 1, 816 N.W.2d 177. While a plea might be invalid at the time it was entered, as was the case here, it may be inappropriate, in light of later events, to allow withdrawal. ***Id.*** Thus, we must look at the totality of the circumstances to determine whether a factual basis for the plea has been established. ***Thomas***, 232 Wis. 2d 714, ¶18. The totality of the circumstances includes the plea hearing record, the sentencing hearing record, and the defense counsel's statements concerning the factual basis presented by the State. ***Id.***

¶19 Here, the record subsequent to the plea hearing bolsters our belief that Ahlman must be permitted to withdraw his plea. Ahlman described his offense to the presentence investigation report author as possession of "several nude underage girls found on computer equipment." Ahlman affirmed that the deficient probable cause statement was "generally accurate." The PSI report also relied on Ahlman's insufficient descriptions of the images to McGuire. And, at sentencing, defense counsel characterized the images as "just plain images, nothing sexual, no sexual activity or anything." Nothing in the subsequent record documents establishes that any of the images contained "lewd exhibition[s] of intimate parts," or any other form of "sexually explicit conduct."

¶20 We therefore conclude that, on remand, Ahlman must be permitted to withdraw his plea. He has established a manifest injustice: namely, the record is devoid of a factual basis for finding him guilty of possession of child pornography.

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)5.