COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-1328-CR
98-1329-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JONATHON D. BELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Jonathon D. Bell appeals from a conviction of second-degree sexual assault of a child contrary to § 948.02(2), STATS., and third-degree sexual assault in violation of § 940.225(3), STATS., and from orders

denying his motion for postconviction relief and motion for reconsideration. Bell raises a number of issues on appeal: (1) whether he should have been granted an evidentiary hearing on his postconviction claims seeking to withdraw his plea of no contest based on newly discovered evidence and ineffective assistance of counsel; (2) whether the State violated the parties' plea agreement; and (3) whether conviction under §§ 948.02(2) and 940.225(3) violated the prohibition against double jeopardy.

¶2 We conclude that Bell is entitled to an evidentiary hearing on his postconviction claims of newly discovered evidence and ineffective assistance of counsel. As to the plea agreement, we determine that the State breached its promise to recommend an eight-year prison term limit on the second-degree sexual assault of a child charge (count one) by subsequently requesting that the court sentence Bell to a minimum of eight years in prison. While we reject Bell's double jeopardy argument, we reverse and remand on the other issues.

BACKGROUND

¶3 Bell's sexual assault charges stem from an August 28, 1996 encounter with fifteen-year-old Karen S. According to Karen's preliminary hearing testimony, she met Bell for the first time while in the company of two friends, Brianna H. and Brooke S. Karen testified that Bell stated that he was nineteen years old and that she responded that she was fifteen. Bell, Karen, Brianna and Brooke went to Brooke's house where Karen and Bell began kissing. While Brooke and Brianna remained at the house, Bell and Karen went for a walk to a nearby park. Karen testified that at the park Bell "kind of pushed" her down, pulled down her pants and then had sexual intercourse with her. She stated that she said "no" several times during the encounter. Karen explained that Brianna

and Brooke found her and Bell after the sexual encounter, that Bell told her not to say anything about what had happened and that before Bell departed they kissed.

¶4 After the State charged Bell with two counts of sexual assault, he entered a not guilty plea on both counts. At a November 22, 1996 change of plea hearing, the State offered to recommend an eight-year prison sentence cap on count one.[1] Bell then changed his plea to no contest on both charges.

¶5 On March 3, 1997, the court received a letter from Bell asking to change his plea of no contest to not guilty and requesting new counsel. At the ensuing motion hearing on March 7, Bell's attorney moved to withdraw as his counsel; the court denied his motion. The court adjourned the hearing so that Bell's attorney could file a formal motion to withdraw Bell's plea. Bell's attorney then sought reconsideration of his motion to withdraw as counsel and the court granted his request.

¶6 On April 16, 1997, Bell's motion to withdraw his plea was heard. The court considered his motion on grounds of ineffective assistance of counsel and a lack of understanding of the plea conditions. The court conducted a ***Machner***[2] hearing in which Bell's original attorney testified that he believed the November 22, 1996 plea hearing accurately reflected the plea agreement. Bell testified that he did not fully understand the severity of the plea he had entered into. The court denied Bell's motion to withdraw his plea. The State then

[1] The State also offered to recommend a "lengthy, stayed prison sentence with a lengthy period of probation" on count two—the third-degree sexual assault charge.

[2] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

reiterated that it would follow its plea offer of a cap of eight years in prison on count one.

¶7 At Bell's May 15, 1997 sentencing hearing, however, the State requested "no less than 8 years prison" on count one. The court then sentenced Bell to ten years in prison on count one and placed him on six years of probation on count two.

¶8 On October 13, 1997, Bell brought a pro se motion to modify his sentence. He complained that the State violated its plea agreement with him and that the sentence was too harsh under the circumstances. The court denied his motion without a hearing.

¶9 On December 17, 1997, new counsel for Bell brought a motion for postconviction relief to withdraw his plea or, in the alternative, to modify his sentence. Bell asserted that newly discovered evidence existed showing that Brianna and Brooke believed that Karen had consented to sexual intercourse with him. He also claimed ineffective assistance of counsel and a violation of the parties' plea agreement. On March 30, 1998, the court denied Bell's postconviction relief motion on the basis of newly discovered evidence, finding that Bell's exhibits did not "in themselves create sufficient concern to justify a hearing."[3] As to his request for sentence modification, the court concluded that Bell's October 13, 1997 pro se motion addressed the issue, that the court had denied his motion and that therefore it was barred from addressing the matter on the basis of res judicata.

[3] The March 30, 1998 proceedings were held before Judge John Mickiewicz.

¶10 On April 8, 1998, Bell brought a motion for reconsideration again seeking to withdraw his plea or to have his sentence modified. The court decided to schedule a hearing on the issues presented by Bell's October 13, 1997 pro se motion and any other issues presented prior to December 26, 1997. At the subsequent hearing, the court determined that it did not have jurisdiction to consider Bell's arguments because he had already filed an appeal. Bell appeals.

DISCUSSION

A. Plea Withdrawal

1. Newly Discovered Evidence

¶11 Bell first contends that the circuit court erred in determining that he failed to provide sufficient evidence to justify a hearing to address his newly discovered evidence claim. The newly discovered evidence included affidavits of Brianna and Brooke indicating that after Karen had stated that she had been raped by Bell she did not appear concerned about the sexual assault, and that Karen had confided that "that thing really didn't happen with Jonathan." Bell also submitted affidavits from Brianna's and Brooke's mothers corroborating their daughters' statements. At the March 30, 1998 postconviction hearing, Bell offered to have the affiants testify on his behalf. The court refused to hold an evidentiary hearing and denied Bell's motion to withdraw his no contest plea.

¶12 Before we address the applicable legal standards at issue here, we note that Bell's newly discovered evidence only impacts one of the charges with which he was convicted. The first count, second-degree sexual assault of a child, is defined as "sexual contact or sexual intercourse with a person who has not attained the age of 16 years," § 948.02(2), STATS.; the second count, third-degree sexual assault, involves "sexual intercourse with a person without the consent of that person," § 940.225(3), STATS. Bell's newly discovered evidence serves to

impeach the victim, Karen, by attempting to show that she consented to Bell's sexual advances. Bell's evidence, therefore, only bears on the nonconsent element of third-degree sexual assault since second-degree sexual assault of a child does not concern the victim's state of mind.

¶13 "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710 (1997); *see* ***State v. Krieger***, 163 Wis.2d 241, 249, 471 N.W.2d 599, 602 (Ct. App. 1991). A plea withdrawal is committed to the trial court's discretion. *See* ***McCallum***, 208 Wis.2d at 473, 561 N.W.2d at 710. A reviewing court may reverse the trial court only if it has failed to properly exercise its discretion, which includes an erroneous application of the law. *See* ***id.***

¶14 Newly discovered evidence may be sufficient to show that a manifest injustice has occurred. *See* ***id.*** Such evidence may be introduced by a defendant seeking to withdraw a plea because of the requirement that all pleas be supported by evidence establishing a factual basis to support the plea. *See* ***Krieger***, 163 Wis.2d at 255, 471 N.W.2d at 604. The following elements must be satisfied if such evidence is to justify a plea withdrawal:

> First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.

McCallum, 208 Wis.2d at 473, 561 N.W.2d at 710-11. Facts meeting the newly discovered evidence test (the ***McCallum*** test) can establish that conduct originally admitted by the defendant did not constitute the offense charged. *See* ***Krieger***, 163 Wis.2d at 255, 471 N.W.2d at 604.

¶15 The State concedes the first four ***McCallum*** elements; therefore, we need not address them further. The State, however, requests that we review the final criterion—whether a different outcome would have occurred at trial—and make a final determination without the benefit of an evidentiary hearing. Because we conclude that a hearing before the circuit court is necessary to resolve this issue, we reject the State's request.

¶16 ***McCallum*** governs the present case. There, the defendant was charged with sexual assault of a child; after the complaining witness testified at the preliminary hearing, the defendant entered an ***Alford***[4] plea. *See* ***McCallum***, 208 Wis.2d at 468, 561 N.W.2d at 709. The complaining witness then recanted her testimony. After the defendant filed a postconviction motion seeking to withdraw his plea, the trial court rejected his motion. The ***McCallum*** court then set forth the following standard for applying the "reasonable probability of a different outcome" criterion: "whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." ***Id.*** at 474, 561 N.W.2d at 711. This standard is "equally applicable to motions to withdraw an ***Alford*** plea, motions to withdraw a guilty plea, and motions for a new trial." ***McCallum***, 208 Wis.2d at 474, 561 N.W.2d at 711.

[4] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

¶17 Because both the present case and ***McCallum*** concern motions to withdraw pleas based on newly discovered evidence, we conclude that ***McCallum*** applies to Bell's motion to withdraw his no contest plea.[5] Two modifications, however, are in order. First, because the instant case does not contain a direct recantation from the victim, we modify the standard to address Bell's newly discovered impeachment evidence rather than "the accusation and the recantation." ***Id.*** Second, unlike ***McCallum***, this case involves two counts of sexual assault. However, because only count two is affected by the newly discovered evidence, we only concern ourselves with whether a jury would have "a reasonable doubt as to the defendant's guilt" *on count two*. ***Id.*** In sum, therefore, a determination must be made as to whether a reasonable probability exists that a jury, looking at the newly discovered impeachment evidence, would have a reasonable doubt as to Bell's guilt on count two. If a jury would have a reasonable doubt as to Bell's guilt on count two, then Bell is entitled to a trial on this count.

¶18 The State contends that Bell's new evidence of Karen's inconsistent statements would only provide "some impeachment value" and would not lead to a not guilty verdict. We are not so certain. In a sexual assault case such as this, the credibility of the witnesses is critical. Because only Bell and Karen were present during the assault, a jury verdict would hinge on a credibility contest between the accused and the victim. *See* ***State v. O'Brien***, 223 Wis.2d 303, 326, 588 N.W.2d 8, 18 (1999) (In most sexual assault cases, the jury's verdict is a matter of which

[5] We reject the State's suggestion that we look beyond ***State v. McCallum***, 208 Wis.2d 463, 561 N.W.2d 707 (1997), and create a new standard inquiring whether a reasonable probability exists that Bell would have rejected the plea bargain and gone to trial based on the newly discovered evidence.

person the jury finds more credible—the victim or the defendant.). Here, the testimony of Brianna and Brooke would serve to undermine the veracity of Karen's testimony of nonconsent and may provide a jury with a reasonable doubt as to Bell's guilt on count two. However, because a hearing has not taken place and because the credibility of witnesses is more appropriately determined by the trial court, *see* ***McCallum***, 208 Wis.2d at 479-80, 561 N.W.2d at 713, we do not feel comfortable making this decision. We therefore defer this determination to the trial court. *See* ***id.*** at 480, 561 N.W.2d at 713.

2. Ineffective Assistance of Counsel

¶19 Next, Bell argues that the court erred in failing to hold a hearing on his claim that his trial counsels were ineffective for failing to discover evidence of inconsistent statements by Karen. As with Bell's newly discovered evidence claim, the State replies that we should decide this issue in its favor without an evidentiary hearing. Because we conclude that this determination also would be more aptly made by the trial court with the benefit of an evidentiary hearing, we reject the State's argument.

¶20 Bell was represented by two trial counsels—the first attended Bell's plea hearing and the second appeared with Bell at his plea withdrawal hearing and at sentencing. At Bell's April 16, 1997 plea withdrawal hearing, the court conducted a ***Machner*** hearing in which Bell's first counsel testified that he relied on the preliminary hearing testimony of the victim, the discovery materials in the State's files and his conversations with Bell in preparing the case. Bell testified that he did not fully understand the severity of the plea he had entered into, that he was put "under tremendous pressure from [his] attorney" and that his counsel should have conducted a more substantial investigation. The court concluded that Bell's counsel had not been ineffective. Bell now contends that both of his trial

attorneys were ineffective for failing to discover impeachment evidence against Karen.

¶21 A defendant who shows that he or she was denied effective assistance of counsel may withdraw a guilty plea after sentencing if a "manifest injustice" is established by clear and convincing evidence. *See* ***State v. Bentley***, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996).

¶22 The two-part test in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to pleas based on ineffective assistance of counsel. *See* ***Bentley***, 201 Wis.2d at 311-12, 548 N.W.2d at 54. To prevail on an ineffective assistance claim, the defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance resulted in prejudice. *See* ***Strickland***, 466 U.S. at 687. A court need not review both components if the defendant fails to make a sufficient showing on one of them. *See* ***id.*** at 697.

¶23 Under the first ***Strickland*** prong, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *See* ***id.*** at 687-88. Under the prejudice prong, the focus is on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). To show prejudice, the defendant seeking to withdraw his or her plea must allege facts indicating that there is "a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty [or no contest] and would have insisted on going to trial." ***Id.*** Where the purported error of counsel is a failure to investigate or discover potentially exculpatory evidence, ***Hill*** advises that

> [t]he determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have *changed the outcome of a trial* …. [T]hese predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker."

Id. at 59-60 (emphasis added; quoted source omitted).

¶24 Under ***Hill***, the prejudice prong centers on whether a different outcome at trial is probable. We read ***Hill***'s different-outcome-at-trial inquiry as setting the same standard as ***McCallum***'s "reasonable probability of a different outcome" criterion discussed above. As we previously set forth, this standard inquires whether a reasonable probability exists that a jury, looking at the newly discovered evidence, would have a reasonable doubt as to Bell's guilt on count two. As before, we believe an evidentiary hearing is needed to address this issue.

¶25 Although ***Hill*** advises that the prejudice prong rests "in large part" on predicting whether a different result at trial would occur, *see* ***Hill***, 474 U.S. at 59, we believe consideration should also be given to how the plea agreement would have been affected by the newly discovered evidence and whether knowledge of the new evidence would have led the defendant to reject his or her plea deal and have gone to trial.[6] Here, the State offered Bell a deal consisting of an eight-year prison sentence cap recommendation on count one and "a lengthy, stayed prison sentence with a lengthy period of probation" on count two. This

[6] Although Bell's new evidence directly implicates only the nonconsent element on the third-degree sexual assault count, the court should determine the extent to which Bell's new evidence would have likely affected the plea agreement as to both counts of sexual assault since the plea deal was negotiated with the understanding that Bell would be convicted on both counts.

arrangement was negotiated in lieu of Bell's exposure to a maximum penalty of twenty years in prison and a $10,000 fine on count one and five years in prison and a $10,000 fine on count two. If Bell's new evidence is true and credible, then count two is improper.

¶26 The State contends that because count two is the less serious of the felony convictions, it is reasonably probable that Bell would not have rejected the plea bargain because it contained a recommendation for a maximum eight-year sentence on the twenty-year prison exposure on count one. We cannot agree. Because count two adds the element of nonconsent to the assault, this fact may have influenced the sentence recommendation on count one and the trial court may have considered Karen's lack of consent as an aggravating factor in imposing a sentence of ten years on count one. In addition, had the district attorney known of the newly discovered evidence, this knowledge may have affected the charging decision as well.

¶27 We cannot say as a matter of law that the State has established that Bell would have adhered to the plea agreement and not gone to trial or that a different result at trial would have occurred. As with Bell's newly discovered evidence claim, we believe this determination should be made with the benefit of

an evidentiary hearing. We therefore remand to the trial court to hear Bell's ineffective assistance claim.[7]

¶28 In addressing Bell's grounds for plea withdrawal, we recommend that the trial court first make a determination on Bell's newly discovered evidence claim. If he succeeds, then he may withdraw his plea and the ineffective assistance of counsel issue need not be addressed; if he fails, then the court should entertain Bell's ineffective assistance of counsel argument, paying particular attention to the probability of a different outcome at trial and the likelihood that Bell would have rejected the plea deal and gone to trial in light of the newly discovered evidence.[8]

B. Breach of Plea Agreement

¶29 Bell next contends that the State violated its plea agreement in which it recommended an eight-year prison sentence cap for the second-degree sexual assault of a child charge (count one). The State responds that Bell waived his breach of the plea agreement claim because rather than making a contemporaneous objection, he waited six months to raise the argument in his

[7] The State points out that evidence indicating that counsels' performance was deficient in failing to uncover newly discovered evidence would likely cut against the second ***McCallum*** criterion that the defendant was not negligent in failing to discover the evidence. *Cf.* ***State v. McCallum***, 198 Wis.2d 149, 157, 542 N.W.2d 184, 187 (Ct. App. 1995), *rev'd in part on other grounds*, 208 Wis.2d 463, 561 N.W.2d 707 (1997) (defendant was not negligent because his attorney attempted to challenge alleged victim's story). While this may be true, it does not prevent a court from treating Bell's claims of newly discovered evidence and ineffective assistance of counsel as alternative grounds for seeking withdrawal of his plea. *See* ***State v. Petty***, 201 Wis.2d 337, 350 n.6, 548 N.W.2d 817, 822 (1996) (a party may argue inconsistent positions in the alternative).

[8] Although we realize that the different-outcome-at-trial criterion is at play under both of Bell's grounds for plea withdrawal, we are not convinced that Bell's failure to demonstrate the criterion under his newly discovered evidence claim would necessarily be fatal to his ineffective assistance of counsel claim.

postconviction motion. Although we agree that Bell technically waived his claim, we nonetheless address the issue in the interests of justice and conclude that the State breached its plea agreement.

¶30 On at least two occasions, the State promised to recommend an eight-year prison term cap on count one. At Bell's November 22, 1996 change of plea hearing, the State expressly stated that it "would recommend a cap of 8 years prison on count one." After this recommendation was made, Bell changed his plea to no contest. At Bell's April 16, 1997 hearing on his motion to withdraw his plea, the State agreed "in no uncertain terms" to "abide by the terms of the plea agreement which was originally" reached. However, the State changed its tune at the May 15, 1997 sentencing hearing, "requesting that the Court sentence the defendant to *no less than 8 years* prison in Count I of the Criminal Complaint." (Emphasis added.) Bell did not object to this recommendation and the court sentenced him to ten years in prison on count one.

¶31 The right to object to an alleged breach of a plea agreement is waived when the defendant fails to object and proceeds to sentencing after the basis for the claim of error is known to the defendant. *See* ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989). We may overlook waiver where the error is so plain or fundamental as to affect the substantial rights of the defendant. *See* ***State v. Neuser***, 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995). Here, we consider the issue because there are no unresolved factual issues concerning the plea agreement or its breach, and it is in the interest of justice that we do so. *See* ***State v. Kircher***, 189 Wis.2d 392, 404, 525 N.W.2d 788, 793 (Ct. App. 1994).

¶32 Bell has a due process right to the enforcement of a negotiated plea agreement upon which he relied. *See* ***State v. Knox***, 213 Wis.2d 318, 321, 570 N.W.2d 599, 600 (Ct. App.), *review denied*, 215 Wis.2d 426, 576 N.W.2d 282 (1997). Whether the State's conduct violated the terms of the plea agreement is a question of law which we review de novo. *See* ***State v. Ferguson***, 166 Wis.2d 317, 320-21, 479 N.W.2d 241, 243 (Ct. App. 1991). If a guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." ***Id.*** at 321, 479 N.W.2d at 243 (quoted source omitted). A plea agreement may be vacated where the defendant shows a "material and substantial breach of the agreement." ***State v. Smith***, 207 Wis.2d 258, 272, 558 N.W.2d 379, 385 (1997) (quoted source omitted). The breach must result in the loss of a material and substantial benefit for which the defendant bargained. *See* ***id.***

¶33 In the present case, the terms of the plea agreement were unambiguous. In return for Bell's plea of no contest, the State promised to recommend a prison sentence on count one of no more than eight years. The State's recommendation was a material and substantial term of the agreement. On appeal, the State concedes that its recommendation at the sentencing hearing was "at some variance with [the] promise" of the eight-year prison sentence cap. Certainly, changing the recommendation from an eight-year maximum prison term to an eight-year minimum was substantially contrary to what the parties had agreed to. We are convinced that Bell relied upon this plea agreement in deciding to change his plea from not guilty to no contest. The plea agreement allowed him to avoid a twenty-year maximum prison term on count one in exchange for a term of eight years or less. Because the State reneged on its plea agreement, Bell was deprived of the benefit for which he negotiated; therefore, the State committed a

material and substantial breach of the plea agreement. *See* ***id.*** at 273, 558 N.W.2d at 386. Thus, we grant Bell's request for a new sentencing hearing.[9]

C. Double Jeopardy

¶34 Bell asserts that his conviction for second-degree sexual assault of a child and third-degree sexual assault violates the prohibition against double jeopardy pursuant to the Fifth Amendment and Article I, § 8 of the Wisconsin Constitution. We disagree.

¶35 Multiple convictions for the same offense violate state and federal double jeopardy protections. *See* ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992). Wisconsin utilizes a two-pronged test to analyze problems of multiplicity. First, the reviewing court applies the "elements-only" test set forth in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). Under the "elements-only" test, we must determine whether each charged offense requires proof of an additional element or fact which the other does not. *See* ***Sauceda***, 168 Wis.2d at 494, 485 N.W.2d at 4. If the statutes involved meet this test, a presumption arises that the legislature intended to permit cumulative convictions unless other factors indicate otherwise. *See* ***id.*** at 495, 485 N.W.2d at 4. "The question then becomes whether there are 'other factors which evidence a contrary legislative intent.'" ***State v. Johnson***, 178 Wis.2d 42, 49, 503 N.W.2d 575, 576 (Ct. App. 1993).

¶36 The ***Blockburger*** analysis begins with the applicable statutes. Under § 948.02(2), STATS., second-degree sexual assault of a child is defined as "[w]hoever has sexual contact or sexual intercourse with a person who has not

[9] Bell may be sentenced before a different judge if he so chooses. *See* § 971.20(7), STATS.

attained the age of 16 years is guilty of a Class BC felony." The third-degree sexual assault statute, § 940.225(3), STATS., reads, "Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony." Here, the two convictions were based on the same course of conduct—Bell's intercourse with Karen on August 28, 1996.

¶37 Under the elements-only test, we observe that while § 948.02(2), STATS., requires that the victim be under the age of sixteen, § 940.225(3), STATS., does not have an age requirement, but rather is conditioned on the victim's lack of consent to engage in sexual intercourse. Despite these differing elements, Bell argues that "because someone under sixteen years of age is presumed incapable of giving consent for intercourse under [§ 948.02(2)] … it is multiplicitous to prosecute someone for having intercourse 'without consent' under [§ 940.225(3)]." This argument, however, was rejected in ***State v. Selmon***, 175 Wis.2d 155, 498 N.W.2d 876 (Ct. App. 1993).

¶38 In ***Selmon***, the defendant argued that being charged with second-degree sexual assault of a child contrary to § 940.225(2)(e), STATS., 1987-88,[10] and sexual assault with the use of force contrary to § 940.225(2)(a) was multiplicitous. *See* ***Selmon***, 175 Wis.2d at 159, 498 N.W.2d at 877. Selmon claimed that sexual assault of a child is a lesser-included offense of sexual assault with the use of force because proof that the victim is under the age of sixteen under para. (2)(e) "necessarily proves" that the victim could not have given consent. *See* ***Selmon***, 175 Wis.2d at 162, 498 N.W.2d at 878. Therefore, Selmon

[10] Section 940.225(2)(e), STATS., 1987-88, is the precursor to § 948.02(2), STATS.

contended, the element of consent under para. (2)(a) is encompassed by the age requirement under para. (2)(e).

¶39 We dismissed Selmon's position, observing that

> [u]nder sec. 940.225(2)(e), Stats., it is necessary to prove that the victim was over the age of twelve but under the age of sixteen. The issue of consent of the minor is not relevant to a determination of whether sexual assault of a child is a lesser included offense of sexual assault with the use of force. Assuming *arguendo* that the law presumes nonconsent when an individual is a child, sec. 940.225(2)(e) nevertheless expressly requires a showing that the victim was from the age of twelve to sixteen. Section 940.225(2)(a) does not require the state to prove the age of the victim. It follows that sexual assault of a child is not a lesser included offense of sexual assault with the use of force. Sexual assault of a child contains an element, the age of the victim, additional to the elements in sexual assault with force.

Selmon, 175 Wis.2d at 162, 498 N.W.2d at 878.

¶40 Although Bell was charged with third-degree sexual assault rather than sexual assault with the use of force as in ***Selmon***, we nonetheless believe that our holding in ***Selmon*** applies with equal force here. Regardless of the nonconsent element, second-degree sexual assault of a child requires that the victim be under the age of sixteen; third-degree sexual assault plainly does not. Section 948.02(2), STATS., therefore, is not a lesser-included offense of § 940.225(3), STATS. Accordingly, we presume that the legislature intended to permit cumulative convictions under these two statutes.

¶41 Next, we would ordinarily be required to discuss whether other factors overcome the presumption of legislative intent to allow cumulative convictions under §§ 948.02(2) and 940.225(3), STATS. Bell, however, does not raise any issue of legislative intent. Our independent research discloses no

contrary intent. *See, e.g.,* ***Selmon***, 175 Wis.2d at 163-65, 498 N.W.2d at 879. We therefore conclude that the charges are not multiplicitous. *See* ***State v. Kanarowski***, 170 Wis.2d 504, 513, 489 N.W.2d 660, 663 (Ct. App. 1992) (where defendant failed to address issue of legislative intent, we chose not to conduct a full legislative analysis under ***Sauceda***).

CONCLUSION

¶42 On remand, we direct the trial court to first address Bell's plea withdrawal motion on the grounds of newly discovered evidence and ineffective assistance of counsel. If Bell fails on both grounds, then the court is to resentence him on counts one and two—on the basis of the State's plea agreement breach—and Bell gets the benefit of the originally agreed-upon plea deal. If, however, the court grants Bell's motion to withdraw his plea, then he is entitled to a trial on count two and the plea agreement no longer stands. If he is found guilty, then he will be resentenced on both counts; if acquitted, he will be resentenced only on count one.[11]

By the Court.—Judgment and orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

[11] Because we direct the trial court to resentence Bell, his motion for sentence modification is rendered moot.