COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2015-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER P. VANDER LOGT,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. Roger P. Vander Logt has appealed pro se from judgments convicting him of five counts of sexual exploitation of a child in violation of § 948.05(1)(b), STATS.; eleven counts of possession of child pornography in violation of § 948.12, STATS.; three counts of attempted sexual

exploitation of a child in violation of § 939.32, STATS., and § 948.05, STATS.; and one count each of exposing his genitals in violation of § 948.10, STATS., and exposing a child to harmful material in violation of § 948.11(2)(a), STATS. The judgments were entered pursuant to no contest pleas, in exchange for which twenty-two other counts were dismissed.

Vander Logt was sentenced to a total of fifteen years in prison for the five counts of sexual exploitation of a child. Concurrent terms of nine months each were imposed for the convictions for exposing genitals and exposing a child to harmful materials. Vander Logt was given consecutive sentences of five years each for the attempted sexual exploitation charges, which were imposed and stayed in favor of a fifteen-year term of probation to commence upon his discharge from the sexual exploitation sentences. In addition, he was given consecutive sentences of two years each for the possession of child pornography convictions. Those sentences were also imposed and stayed in favor of a fifteen-year term of probation.

In addition to appealing his judgments of conviction, Vander Logt has appealed from an order denying postconviction relief. We affirm that order. In addition, we affirm the judgments in their entirety, with the exception of the conviction for possessing child pornography set forth in count ten of the complaint, which alleged that Vander Logt possessed a poster of Debra R. Because the State concedes that this item does not constitute a lewd exhibition of the subject's genitals, we reverse the portion of the judgment convicting Vander Logt of this particular count. We vacate the imposed and stayed two-year sentence for this count, thus reducing the total time Vander Logt would have to serve for the possession of child pornography charges if his probation was revoked from twenty-two years to twenty years.

None of the remaining arguments raised by Vander Logt provides a basis for relief from the judgments or the order. Vander Logt's first contention is that his appointed postconviction counsel rendered ineffective assistance by failing to investigate and pursue certain issues in the postconviction proceedings, leading Vander Logt to discharge him and proceed pro se on appeal. However, claims of ineffectiveness in the postconviction representation provided by appointed counsel must be raised in the context of a § 974.06, STATS., motion or a petition for a writ of habeas corpus filed in the trial court. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 681, 556 N.W.2d 136, 139 (Ct. App. 1996). The issue cannot be raised in Vander Logt's direct appeal from his judgments of conviction and the order denying the motion for postconviction relief filed by counsel.

Vander Logt's next argument is that certain of his convictions were multiplicitous and violated double jeopardy protections. Specifically, he objects that the same pictures and videotape provided the basis for his conviction of three counts of sexual exploitation of a child and four counts of possessing child pornography. He contends that possession of child pornography is in fact a lesser included offense of sexual exploitation of a child.

Wisconsin applies the "elements only" test to determine whether one crime is a lesser included offense of another. *See* ***State v. Kuntz***, 160 Wis.2d 722, 754, 467 N.W.2d 531, 544 (1991). Under the elements only test, an offense is a lesser included only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense. *See* ***id.*** at 754-55, 467 N.W.2d at 544. An offense is not a lesser included if it contains an additional statutory element. *See* ***id.*** at 755, 467 N.W.2d at 544.

The elements only test requires this court to place the statutes defining the offenses side by side to compare the elements of each. *See* ***State v. Carrington***, 134 Wis.2d 260, 265-66, 397 N.W.2d 484, 487 (1986). Doing so here, it is clear that possession of child pornography is not a lesser included offense of sexual exploitation of a child, regardless of whether the charges arise from the taking of the same picture. Sexual exploitation of a child under § 948.05(1)(b), STATS., requires that the defendant photographs, films, videotapes, records the sounds of or displays a child engaged in sexually explicit conduct. Proof of this element is not required for a conviction for possession of child pornography under § 948.12, STATS. Conversely, conviction under the latter statute requires proof that the defendant possesses the prohibited material, an element which need not be shown for conviction under § 948.05(1)(b).

Because possession of child pornography thus is not a lesser included offense of sexual exploitation of a child under the elements only test, punishment for both offenses is constitutionally permissible absent a clear indication of a legislative intent to the contrary. *See* ***Kuntz***, 160 Wis.2d at 756, 467 N.W.2d at 544-45. Other factors which may indicate a contrary legislative intent regarding multiple punishments are the language of the statutes, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishments. *See* ***id.*** at 756, 467 N.W.2d at 545. We have been shown nothing related to these factors which indicates a contrary legislative intent here. The fact that possession of child pornography is proscribed in a statute separate from the sexual exploitation statute reinforces the conclusion that the legislature intended to permit multiple punishments. *Cf.* ***State v. Bruckner***, 151 Wis.2d 833, 847, 447 N.W.2d 376, 382 (Ct. App. 1989). Moreover, as pointed out by the State, a child who is photographed while engaging in sexually explicit conduct is

victimized not only when his or her photo is taken, but each time the photo is viewed by a person who possesses it. Nothing in the nature of the proscribed conduct therefore indicates that multiple punishments for possession of child pornography and sexual exploitation of a child are inappropriate.

Vander Logt also appears to complain that many of the sexual exploitation counts of which he was convicted were the same in fact because although different photographs were taken, they were taken of the same child at the same place on the same day. He indicates that he should have been convicted of just one violation of § 948.05(1)(b), STATS., for each of the several victims.

Charges are multiplicitous if they are identical in law and fact. *See* ***State v. Davis***, 171 Wis.2d 711, 716, 492 N.W.2d 174, 176 (Ct. App. 1992). Because Vander Logt was charged with multiple violations of § 948.05(1)(b), STATS., those charges are the same in law. *See* ***Davis***, 171 Wis.2d at 716, 492 N.W.2d at 176. However, whether they are the same in fact depends upon whether one count requires proof of an additional fact which the other does not. *See* ***id.*** Offenses are different in fact if they are separated in time, are significantly different in nature, or if each involves a separate volitional act. *See* ***id.*** at 717, 492 N.W.2d at 176. Separate volitional acts occur when there is sufficient time between the acts for the defendant to reflect upon his or her actions and recommit himself or herself to the criminal activity. *See* ***id.*** at 717-18, 492 N.W.2d at 176.

These tests are satisfied here. As set forth in the State's brief, while all of the pictures taken by Vander Logt depicted girls engaged in sexually explicit conduct, the various pictures of each individual girl involved different poses in different settings and sometimes in different outfits. Because Vander Logt had to take the time to set up each different picture, the photos were separated in time. In

addition, because he had to reconsider his actions with each picture he took, each picture involved a separate volitional act. For these reasons, all of the sexual exploitation charges must be deemed different in fact.[1]

Like the situation where a defendant is charged with different statutory violations, charges which are the same in law but different in fact may still be multiplicitous if the legislature intended that only a single count should be charged. *See* ***State v. Carol M.D.***, 198 Wis.2d 162, 173, 542 N.W.2d 476, 480 (Ct. App. 1995). However, when charges satisfy the test of being different in law or fact, then this court must presume that the legislature intended to permit cumulative punishments. *See* ***id.***

As previously set forth, when determining legislative intent for multiplicity purposes, this court considers the language of the statute, its context and legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishments. *See* ***id.*** In this case, the language of § 948.05, STATS., proscribes numerous different activities involving children and gives no indication that each act in violation of the statute cannot be punished separately. Similarly, nothing shown to this court in the legislative history of the statute indicates that a defendant cannot be separately punished for each different picture he or she produces. Because each act subjects the victim to a new and separate harm and humiliation, it is also clear that the nature of the conduct renders multiple punishments appropriate. *Cf.* ***Carol M.D.***, 198 Wis.2d at 174-75, 542 N.W.2d at 481.

[1] One of the photos was not taken separately but was developed from a videotape. The analysis remains the same because the photo was developed at a different time from when the video was taped and reflected a separate volitional act.

Construing Vander Logt's brief liberally, he also appears to argue that there was an insufficient factual basis for his pleas to the possession of child pornography charges. As set forth above, based on the State's concession we conclude that a factual basis did not exist to convict Vander Logt of possession of child pornography based on his possession of the poster of Debra R. Consequently, the conviction for count ten of the criminal complaint is reversed and the imposed and stayed two-year sentence pertaining to it is vacated as set forth above.[2]

In accepting a guilty plea or a plea of no contest, the trial court must ascertain that a factual basis exists to support the plea. *See* ***State v. Bangert***, 131 Wis.2d 246, 262, 389 N.W.2d 12, 21 (1986). This requires a showing that the conduct which the defendant admits constitutes the offense charged. *See* ***White v. State***, 85 Wis.2d 485, 488, 271 N.W.2d 97, 98 (1978). However, when, as here, the plea is entered pursuant to a plea bargain, the court need not go to the same length to determine whether the facts would sustain the charge as it would if there had been no negotiated plea. *See* ***Broadie v. State***, 68 Wis.2d 420, 423-24, 228 N.W.2d 687, 689 (1975).

With some exceptions and objections which are immaterial here, Vander Logt stipulated to the facts as alleged in the complaint, both in the guilty plea questionnaire and at the time he entered his no contest pleas. The trial court

[2] Our reversal of this particular conviction does not affect Vander Logt's probation term, which was a single term of fifteen years for all of the possession of child pornography convictions and the attempted sexual exploitation convictions.

in turn relied on these facts and found that they provided a factual basis for the pleas. We agree.[3]

Initially, we note that Vander Logt objects that the photos taken and possessed by him were not pornographic because they were not obscene. However, this issue is immaterial because child pornography may be prohibited even if it is not obscene. *See* ***State v. Petrone***, 161 Wis.2d 530, 556 n.19, 468 N.W.2d 676, 686 (1991). The artistic merit of sexually explicit photos of children is no defense. *See* ***New York v. Ferber***, 458 U.S. 747, 761 (1982).

The videotape described in count one of the complaint depicts live sexual acts, including intercourse, masturbation, fellatio and cunnilingus, and thus clearly depicts sexually explicit conduct. *See* § 948.01(7)(a) & (c), STATS. Many photos depict bondage, another type of sexually explicit conduct. *See* § 948.01(7)(d). The lewd exhibition of the genitals or pubic area also constitutes sexually explicit conduct under § 948.01(7)(e), STATS., 1993-94.[4] This prohibition thus applied to many of the other photos involved here, which included depictions of the subjects with their legs spread apart to focus attention on their uncovered genitals, *see* ***State v. Lubotsky***, 148 Wis.2d 435, 437-39, 434 N.W.2d 859, 860-61 (Ct. App. 1988), and other visible displays of the genitals or pubic

[3] The photos and videotape which form the basis for the convictions are not in the record on appeal. However, Vander Logt's stipulation to the facts as alleged in the complaint constituted a stipulation that the descriptions of the photos and videotape as set forth in the complaint were accurate. Those descriptions clearly provide a factual basis for the convictions.

[4] Section 948.01(7)(e), STATS., 1995-96, was amended to define sexually explicit conduct as the lewd exhibition of "intimate parts" rather than simply the lewd exhibition of the genitals or pubic area as in § 948.01(7)(e), STATS., 1993-94. *See* 1995 Wis. Act 67 (published Dec. 1, 1995). The latter statutory definition was in effect when these offenses were committed and this complaint was filed.

areas of the subjects posed as sex objects, *see* ***Petrone***, 161 Wis.2d at 561, 468 N.W.2d at 688.

Vander Logt objects that one photo of him in bed with two semi-nude females did not depict the lewd exhibition of the victims' genitals. However, in stipulating to the facts of the complaint, he stipulated that the photo showed him lying in bed, nude, with genitals exposed. While he argues that neither of the females was naked below the waist, a child's genitals may be exhibited lewdly even if they are not naked. *See* ***United States v. Knox***, 32 F.3d 733, 737, 747-48 (3d Cir. 1994). A child's genitals are exhibited lewdly if that portion of the child's body is posed in a way which appeals to the lascivious interest of the intended audience. *See* ***Petrone***, 161 Wis.2d at 560-61, 468 N.W.2d at 688. Here, the exhibition of Vander Logt's naked genitals necessarily drew attention to the genitals of the semi-nude females in bed with him.

In his brief, Vander Logt also appears to dispute that he knew that the victims were under the age of eighteen. This argument provides no basis for relief for several reasons. First, in regard to the charges that Vander Logt photographed children engaged in sexually explicit conduct in violation of § 948.05(1)(b), STATS., the defendant's knowledge of the victim's age is not an element of the crime which must be proved by the State. Instead, mistake regarding the victim's age is an affirmative defense which must be raised by the defendant. *See* § 948.05(3). By pleading no contest to these charges, Vander Logt waived this defense. *See* ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis.2d 646, 651, 292 N.W.2d 807, 810 (1980).

To convict a person of possession of child pornography, the State must prove that the person knew or reasonably should have known that the victim

was under eighteen years old. *See* § 948.12(3), STATS. However, the criminal complaint against Vander Logt expressly stated that he knew that Debra R., Lisa T. and Brenda V. were under the age of eighteen. Vander Logt stipulated to these facts in entering his no contest pleas and agreeing that the complaint could be used as the factual basis for his pleas. The ages of these victims were therefore adequately established for purposes of providing a factual basis for his pleas.

The State correctly points out that the complaint did not allege that Vander Logt knew that Laura M. was under the age of eighteen. However, the State need not prove each element beyond a reasonable doubt to establish a factual basis for a plea. *See* ***State v. Spears***, 147 Wis.2d 429, 435, 433 N.W.2d 595, 598 (Ct. App. 1988). It is enough if an inculpatory inference can be drawn from the facts, even if an exculpatory inference could also be drawn. *See* ***id.***

The complaint alleged that Laura M. was sixteen at the time the photos were taken, that Vander Logt knew that the other three girls he photographed were under the age of eighteen, and that he tried to persuade two other sixteen-year-olds to pose for explicit photos. From Vander Logt's admissions to these facts, in conjunction with his admission that he understood the nature of the crimes he was charged with under § 948.12, STATS., it reasonably could be inferred that he knew or reasonably should have known that Laura M., like the other girls, was under the age of eighteen.

Vander Logt also raises several objections to his sentencing. He contends that he was sentenced on the basis of inaccurate information because the trial court stated that he had "some commercial interest" in photographing nude teenage girls and that he was "trolling" for victims. This argument fails because these statements by the trial court were reasonable inferences from the facts of

record. There was evidence in the sentencing record that Vander Logt told Debra R. that they could make money by selling the videotape made of her for $50 a copy. Twenty-six texts on Vander Logt's computer appeared to advertise the tape, plus he possessed the original and five copies, more than would be required for personal use alone. In addition, it appeared from correspondence in his possession that someone outside of Wisconsin had received a copy. Based on this information, the trial court could reasonably infer that some commercial interest existed, even if slight. Similarly, based on information the trial court received regarding Vander Logt's approaches to various teenage girls at a rock concert, restaurant and work site, and the fact that some of the subjects of his photographs had been in hunter safety courses taught by him, the trial court could also reasonably use the phrase "trolling" to describe some of his conduct.

Vander Logt also complains that the presentence report contained inaccurate and incomplete information and that he was not allowed to confront people who provided information for the presentence report. However, at sentencing the presentation of information regarding the defendant's past conduct and history is not subject to the rules of evidence and other restrictions which govern trial, *see* ***State v. Marhal***, 172 Wis.2d 491, 502-03, 493 N.W.2d 758, 763-64 (Ct. App. 1992), including the right to confrontation. Moreover, the record is clear that Vander Logt was given an opportunity to set forth any disagreement with the presentence report at the sentencing hearing. In fact, he presented his own witnesses and cross-examined witnesses presented by the State, including questioning the presentence report writer at length.

Furthermore, a defendant who alleges that a sentencing decision was based on inaccurate information must show that: (1) the information was inaccurate; and (2) the trial court actually relied on the inaccurate information at

sentencing. *See* ***State v. Harris***, 174 Wis.2d 367, 378, 497 N.W.2d 742, 746 (Ct. App. 1993). While Vander Logt may disagree with conclusions drawn by the presentence report writer, he fails to establish on appeal that any information actually relied on by the trial court at sentencing was inaccurate.

Vander Logt also complains that his sentence was excessive when compared to other defendants convicted of sexual misconduct involving minors. However, Vander Logt never raised this issue in a timely fashion in the trial court. Wisconsin law is clear that, absent compelling circumstances, a motion for sentence modification must be filed in the trial court before a defendant may challenge his or her sentence on appeal. *See* ***State v. Norwood***, 161 Wis.2d 676, 680, 468 N.W.2d 741, 743 (Ct. App. 1991); ***State v. Meyer***, 150 Wis.2d 603, 606, 442 N.W.2d 483, 485 (Ct. App. 1989). In his postconviction motion, Vander Logt alleged that the charges against him violated double jeopardy provisions, and, alternatively, that consecutive sentences upon the challenged counts were excessive and harsh. However, he never raised an issue regarding disparity in sentencing compared to other defendants.[5] He therefore waived these contentions for purposes of appeal. *See* ***Evjen v. Evjen,*** 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). In any event, the mere fact that a defendant's sentence is different than others is insufficient to support a conclusion that it is unduly disparate. *See* ***State v. Perez***, 170 Wis.2d 130, 144, 487 N.W.2d 630, 635 (Ct. App. 1992). The defendant must also establish that the disparity in sentences was

[5] At the postconviction hearing, Vander Logt failed to discuss his alternative argument that consecutive sentences on the allegedly multiplicitous charges were harsh and excessive. He thus never specifically raised any claim based on disparity in sentencing. In the absence of a specific objection which brings into focus the nature of an alleged error, a party has not preserved its objections for review. *See* ***Air Wis., Inc. v. North Cent. Airlines, Inc.,*** 98 Wis.2d 301, 311, 296 N.W.2d 749, 753 (1980).

arbitrary or based upon considerations not pertinent to proper sentencing, *see* ***id.***, a burden which Vander Logt has not met.

None of Vander Logt's remaining arguments provides any basis for relief. While he appears to raise a selective prosecution charge, this argument is not developed by any discussion of the law and therefore is inadequately briefed. *See* ***State v. Pettit,*** 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). In addition, it was waived for purposes of appeal when Vander Logt failed to raise it in the trial court. Similarly, while he contends that a continuance of the sentencing hearing should have been granted and that he should now be permitted to withdraw his no contest pleas, he never moved for such relief in the trial court and therefore cannot raise these issues on appeal.[6]

[6] In his reply brief, Vander Logt contends that the trial court took into account his political beliefs in sentencing him. Issues raised for the first time in a reply brief need not be addressed by this court. *See* ***Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (1981). In any event, nothing in the record supports this contention.

In his reply brief, Vander Logt also disputes the State's statement that he developed a photo from the videotape. However, Vander Logt stipulated to this fact when he entered his no contest pleas. He therefore cannot dispute it on appeal.

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.