COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3157-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIAN ANDERSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. Julian Andersen has appealed from a judgment convicting him upon pleas of no contest of three counts of first-degree sexual assault of a child in violation of § 948.02(1), STATS. He was sentenced to three consecutive prison terms of thirty years each. He has also appealed from an order

denying his motion for postconviction relief. He raises the following issues: (1) whether the trial court erroneously exercised its discretion by denying his presentence motion to withdraw his no contest pleas, (2) whether the trial court erroneously exercised its discretion in denying his postsentencing motion to withdraw his pleas, (3) whether counts four and five of the information were multiplicitous, and (4) whether he is entitled to resentencing.

We conclude that Andersen is entitled to be resentenced based upon the State's breach of the portion of the plea agreement related to sentencing. We therefore reverse the portion of the judgment sentencing him to ninety years in prison and the portion of the order denying postconviction relief from the sentence. We affirm the remainder of the judgment and order and remand the matter for resentencing.

We address Andersen's multiplicity claims first. 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 counts four and five of the information both charged Andersen with violations of § 948.02(1), 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 either separated in time or 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.

While the acts charged in this case may have occurred as part of the same episode as alleged by Andersen, they were also significantly different in nature. Count four alleged that Andersen had sexual contact with the victim by requiring her to touch his penis with her hand. Count five alleged that Andersen had sexual intercourse with the victim by requiring her to perform fellatio on him.

Sexual contact and sexual intercourse constitute separate means of violating § 948.02, STATS., a factor relevant to whether they are different in fact. *See* ***State v. Bergeron***, 162 Wis.2d 521, 534-35, 470 N.W.2d 322, 327 (Ct. App. 1991). Moreover, each of Andersen's acts involved different body parts of the victim and contacts which were different in nature and character. Each involved a separate volitional act by Andersen which, as related in the complaint, were separated by Andersen's act of requiring the victim to sit on him so he could fondle her. Each also resulted in a new and different humiliation of the victim and a new violation of her integrity. As such, they were different in fact for purposes of the multiplicity test. *See* ***id.***; ***State v. Eisch***, 96 Wis.2d 25, 36-37, 291 N.W.2d 800, 805-06 (1980).

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.*** In cases like this involving separate volitional sexual assaults, it is well settled that the legislature intended to permit separate punishments. *See* ***Bergeron***, 162 Wis.2d at 535-36, 470 N.W.2d at 328. Andersen's multiplicity argument therefore fails.

We next address Andersen's motions to withdraw his no contest pleas. Andersen contends that he should have been permitted to withdraw his no contest pleas prior to sentencing because he consistently maintained his innocence to the three counts and pled no contest only because he was concerned about how a trial would affect the victim and his family. He also contends that he had a history of depression and that his mental state clouded his judgment.

A trial court order denying a motion to withdraw a no contest plea will be sustained by this court unless the trial court erroneously exercised its discretion. *See* ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). Prior to sentencing the trial court should freely allow a defendant to withdraw his or her plea provided a fair and just reason exists for withdrawal and the State has not been substantially prejudiced by reliance on the plea. *See* ***id.*** However, "freely" does not mean automatically, and the defendant must show some adequate reason for the change of heart other than a desire to have a trial. *See* ***id.*** at 861-62, 532 N.W.2d at 117. The defendant has the burden of proving a fair and just reason by a preponderance of the evidence. *See* ***id.*** at 862, 532 N.W.2d at 117.

Andersen argues that the trial court confused the standard to be applied to a presentence motion to withdraw a plea with the postsentencing standard which requires the showing of a manifest injustice. *See* ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). While it is true that the trial court cited some postsentencing plea withdrawal cases and language in denying Andersen's presentence motion, it also pointed out that it was required to give great consideration to the presentence request to withdraw the pleas, even though withdrawal was not automatic. In addition, it correctly and at length set forth the standard applicable to a presentence motion when it granted an

adjournment of sentencing to permit Andersen to pursue the presentence motion. We are therefore not persuaded that the trial court misunderstood the standard.

In any event, it is clear from a review of Andersen's arguments and the trial court's response to them that the denial of relief was proper. While an assertion of innocence is an important factor in assessing a presentence motion, it is not dispositive. *See* ***State v. Shanks***, 152 Wis.2d 284, 290, 448 N.W.2d 264, 266 (Ct. App. 1989). Here, the trial court noted that statements by Andersen could be viewed simply as a minimization of his contact with the victim rather than as consistent and clear claims of innocence. Based upon its review of Andersen's responses during the plea colloquy, the Request to Enter Plea and Waiver of Rights form executed by him, and his prior experience with the legal system, the trial court also concluded that Andersen understood the meaning and effect of his no contest pleas, despite his subsequent assertions that his emotional state interfered with his judgment.

Whether the motion to withdraw was brought quickly or delayed after entry of the plea is also relevant. *See* ***id.*** In this case, Andersen did not raise the issue of withdrawal of his pleas until after he reviewed the presentence report, which recommended "a maximum" prison term. The trial court concluded that Andersen rethought the issue of his plea in light of this knowledge, but that his change of mind did not justify permitting him to withdraw his pleas. The trial court thus believed that the impetus for Andersen's motion was not the reasons asserted by him, but rather his concern that he would be subjected to a lengthy period of incarceration. Because the trial court's determinations were reasonable based upon the record, no fair and just reason for withdrawal existed and it properly denied the motion. *See* ***State v. Canedy***, 161 Wis.2d 565, 585-86, 469 N.W.2d 163, 171-72 (1991).

We also uphold the trial court's denial of Andersen's postsentencing motion to withdraw his pleas. A court may accept a plea withdrawal following sentencing only if it is necessary to correct a manifest injustice. *See* ***State v. Rock,*** 92 Wis.2d 554, 558-59, 285 N.W.2d 739, 741-42 (1979). Andersen contends that a manifest injustice occurred because the trial court failed to establish a sufficient factual basis for his pleas at the time they were entered and because the State breached the plea agreement regarding sentencing.

In accepting a no contest plea, the trial court must ascertain that a factual basis exists to support it. *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 where there is no negotiated plea." *See* ***Broadie v. State***, 68 Wis.2d 420, 423-24, 228 N.W.2d 687, 689 (1975).

The State relied upon both the criminal complaint and a taped interview of the victim to establish a factual basis when Andersen entered his no contest pleas. While Andersen objected to the use of the taped interview, he consented to the use of the criminal complaint and information both at the hearing and in the Request to Enter Plea and Waiver of Rights form executed by him in conjunction with entering his pleas. The criminal complaint alone established a factual basis for the pleas. It alleged that the five-year-old victim, while observed by a police detective, told a social worker that Andersen had licked her in her vaginal area, put his penis in her mouth and made her suck his "private," and made her touch his penis. A factual basis for three counts of sexual assault of a child under § 948.02(1), STATS., therefore clearly existed.

Andersen also contends that withdrawal of his pleas should have been permitted because the State breached the plea agreement regarding sentencing. We agree that the plea agreement was breached. However, because the breach related only to sentencing, the proper remedy is a remand for resentencing rather than withdrawal of the pleas. *See* ***State v. Poole***, 131 Wis.2d 359, 365, 394 N.W.2d 909, 911-12 (Ct. App. 1986).

"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.'" ***State v. Ferguson***, 166 Wis.2d 317, 321, 479 N.W.2d 241, 243 (Ct. App. 1991) (quoting ***Santobello v. New York***, 404 U.S. 257, 262 (1971)). "***Santobello*** proscribes not only explicit repudiations of plea agreements, but also 'end-runs around them.'" ***Ferguson***, 166 Wis.2d at 322, 479 N.W.2d at 243 (quoting ***United States v. Voccola***, 600 F. Supp. 1534, 1537 (D.R.I. 1985)). The State may not accomplish through indirect means what it promised not to do directly—convey a message to the sentencing court that the defendant's conduct warrants a more severe sentence than that recommended pursuant to the plea agreement. *See* ***Ferguson***, 166 Wis.2d at 322, 479 N.W.2d at 243. The prosecutor may not render less than a neutral recitation of the terms of the plea agreement. *See* ***Poole***, 131 Wis.2d at 364, 394 N.W.2d at 911. Comments which imply reservations about the recommendation taint the process and breach the agreement. *See* ***id.***

When, as here, the facts are undisputed, the question of whether the State violated the plea agreement is a question of law which we review without deference to the trial court. *See* ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995). In determining that a breach occurred, we note that as part of the

parties' plea agreement, the prosecutor agreed to recommend a lengthy sentence.[1] As set forth in the Request to Enter Plea and Waiver of Rights form executed by Andersen, no particular length was specified in the agreement and the State was simply to recommend a "'lengthy' period of incarceration." This agreement was reiterated at the plea hearing.

At sentencing, the prosecutor properly contended that Andersen should receive a lengthy prison term, enumerating her reasons for the recommendation. However, she went on to say that the presentence report writer "called it right" and that the presentence report was "right on the money" in its characterization of Andersen. She then stated that the presentence report indicated that "the maximum term of imprisonment" was appropriate, a mischaracterization of the presentence report's recommendation of "a" maximum term.[2] She further stated that it was the State's position that the trial court should impose a lengthy sentence, "not a medium one, which would even be 60 years in this particular case. I don't think it's enough. I think he needs to get a lengthy one." After making these comments, the prosecutor proceeded to introduce the father of the

[1] The State contends that Andersen waived his right to review of whether the prosecutor breached the plea agreement by failing to adequately raise the issue at sentencing. However, as acknowledged by the State, defense counsel objected to the prosecutor's statement that sixty years was a medium sentence on the grounds that, under the plea agreement, she could argue only for a lengthy sentence and could not cast doubt on the promised recommendation. Moreover, even if defense counsel partially waived the issue by failing to object to the prosecutor's argument with more specificity, waiver is a rule of judicial administration which does not affect this court's power to decide an issue. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Because a defendant is entitled to fulfillment of a promise concerning sentencing made as part of a negotiated plea agreement and is automatically prejudiced when a material breach of the agreement occurs, *see* ***State v. Smith***, 207 Wis.2d 258, 281-82, 558 N.W.2d 379, 389-90 (1997), we elect to address the issue even if it could be deemed partially waived.

[2] The prosecutor's mischaracterization was objected to by defense counsel and corrected by the prosecutor when the trial court also pointed out that the specific language of the presentence report called for "a" maximum term rather than "the" maximum.

victim, stating that "his position is that Mr. Andersen receive as much time as the court can impose."

Taken together, the prosecutor's comments implicitly recommended the maximum sentence to the trial court rather than simply a lengthy sentence. While the prosecutor stayed within the technical limits of the plea agreement by expressly recommending only a lengthy sentence, her comments violated the spirit of the agreement by implicitly endorsing what she represented was the wish of the presentence writer and the victim's father, namely, the maximum sentence possible.[3] While the State need not enthusiastically recommend a sentence pursuant to a plea agreement, it also may not resort to a rigidly literal approach in construing the plea agreement's language. *See* ***Ferguson***, 166 Wis.2d at 322 & n.2, 479 N.W.2d at 243. Here, the prosecutor's comments, in conjunction with her discussion of Andersen's character, personal history and responsibility for these crimes, strongly implied that the maximum sentence was appropriate.[4] *See, e.g.,* ***Poole***, 131 Wis.2d at 362-64, 394 N.W.2d at 910-11. Since this was a harsher recommendation than the State was permitted to make under the plea agreement, the prosecutor's statements constituted a breach of the agreement.

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[3] The prosecutor was clearly entitled to present the victim's father to provide information to the trial court concerning the effect of Andersen's crimes. *See* ***State v. Voss***, 205 Wis.2d 586, 595-96, 556 N.W.2d 433, 436 (Ct. App. 1996), *review denied*, 207 Wis.2d 284, 560 N.W.2d 274 (1997). The problem arises from the fact that the prosecutor's comments about what the victim's father would say, when combined with her remaining comments about the recommendation in the presentence report and 60 years being a medium sentence, implied that the prosecutor was recommending the maximum sentence rather than simply a lengthy sentence.

[4] We recognize that a plea agreement cannot and should not prevent the prosecutor from noting pertinent, detrimental factors related to the defendant's character and conduct. *See* ***State v. Ferguson***, 166 Wis.2d 317, 324, 479 N.W.2d 241, 244 (Ct. App. 1991). However, the prosecutor must also make a good faith effort to avoid casting doubt on the recommended sentence. *See* ***State v. Wills***, 187 Wis.2d 529, 537, 523 N.W.2d 569, 572 (Ct. App. 1994), *aff'd*, 193 Wis.2d 273, 533 N.W.2d 165 (1995).

Because the State's breach related only to sentencing, we remand for resentencing. *See* ***id.*** at 365, 394 N.W.2d at 911-12. Resentencing may be before a different judge if Andersen so chooses. *See* § 971.20(7), STATS.

Because we remand for resentencing based on the State's breach, we need not address Andersen's claim that the trial court erroneously exercised its discretion in sentencing him.

By the Court.—Judgment 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.