COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3397-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ISOM BRUMFIELD, JR.,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed; vacated in part and affirmed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Isom Brumfield, Jr., appeals from judgments entered after he pleaded guilty to one count of child enticement, one count of exposing a sex organ to a minor and one count of sexual intercourse with a child, contrary to §§ 948.07(3), 948.10 and 948.09, STATS. He also appeals from an

order denying his postconviction motion. He claims: (1) he should be entitled to withdraw his guilty plea to the child enticement charge because there was an inadequate factual basis to support the acceptance of the plea and because it was not knowingly, intelligently and voluntarily entered; and (2) double jeopardy and § 939.66, STATS., prohibit convicting him of both exposing a sex organ and sexual intercourse with a minor. Because the trial court failed to establish a sufficient factual basis before accepting Brumfield's plea, we vacate that portion of the order and remand with directions. Because Brumfield's remaining two convictions do not violate double jeopardy or § 939.66, we affirm the judgments and that part of the order.

I. BACKGROUND

On February 2, 1997, sixteen-year-old Yolanda D., was driving to church with a friend. Brumfield followed them in his car. Yolanda and her friend stopped to pick up additional people. The car became too crowded so Yolanda and her brother decided to ride with Brumfield. Brumfield drove Yolanda and her brother to church and waited for them. After church, he drove them to a grocery store to buy candy. Yolanda got back into Brumfield's car and they talked. Yolanda told Brumfield that when she was grown, she was going to leave home and get a house. Brumfield told her he could get her a house in five days and that in the meantime she could stay at his cousin's house.

Without notifying her mother, Yolanda agreed and went to Brumfield's cousin's house, where she stayed until February 6. Brumfield was not living there, but did come to visit Yolanda every day. On February 4, while Brumfield was visiting Yolanda at his cousin's house, he started kissing her and

asked if she would have sex with him. She said yes, they took off their clothes and had sexual intercourse. This occurred again the following day.

Brumfield was charged with one count of abduction, one count of child enticement, one count of exposing a sex organ to a minor, and one count of sexual intercourse with a child. Pursuant to a plea bargain, Brumfield agreed to plead guilty to the latter three charges and the abduction charge would be dismissed.

At the plea hearing, the trial court engaged in the following colloquy with Brumfield:

> THE COURT: And did you read this criminal complaint I'm holding up?
>
> DEFENDANT: Yes, sir.
>
> ….
>
> THE COURT: Okay. Do you understand what you're charged with, child enticement, it says on February 2nd, 1997, at 2774 North 15th Street, you did cause a child who had not attained the age of 18 years, to wit, Yolanda D[.], who was born 6/11/80, to go into a building with intent to expose your sex organ.
>
> Count 3 says that on February 4th, 1997, two days later, at the same location for the purpose of sexual arousal or sexual gratification, you did expose your genitals to a child, again Yolanda D[.], contrary to Wisconsin Statute Section 948.10.
>
> And the third one is sexual intercourse with a child. It alleges that on February 4th, again at the same location, you did have sexual intercourse, penis to vagina, with Yolanda D[.], who was not your spouse. Do you understand that?
>
> DEFENDANT: Yes, I do.
>
> THE COURT: Okay. Do you understand what the penalties are, why you've been charged, and the elements of each of these three offenses?
>
> DEFENDANT: Yes, I do.

The trial court went on to question Brumfield as to whether he understood what rights he was waiving. Brumfield replied affirmatively. The trial court never asked Brumfield, however, whether the facts alleged in the complaint were true. Rather, as a factual basis for accepting the plea, the trial court engaged in the following colloquy:

> THE COURT: And are you willing to stipulate to this criminal complaint to serve as a basis for the plea?
>
> [DEFENSE COUNSEL]: So stipulated, Your Honor.
>
> THE COURT: Was there a preliminary hearing or not?
>
> [DEFENSE COUNSEL]: Yes, there was.
>
> ….
>
> THE COURT: Will you stipulate also to the preliminary -- stipulate to the preliminary hearing to serve also as a basis for the plea?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

The trial court accepted the plea. Brumfield was sentenced to five years for the child enticement charge and nine months on both of the remaining two counts, to run concurrent with each other, but consecutive to a previous conviction. Brumfield filed a postconviction motion seeking to withdraw his guilty plea to the child enticement charge. He also filed a postconviction motion seeking to vacate his conviction of exposing a sex organ on the basis that conviction on both this charge and sexual intercourse with a child violates double jeopardy and § 939.66, STATS.[1] The trial court denied both motions without holding a hearing. Brumfield now appeals.

[1] Brumfield also filed a postconviction motion seeking to modify his sentence. This issue, however, was not raised on appeal and will not be addressed.

II. DISCUSSION

A. Plea Withdrawal.

Withdrawal of a plea following sentencing is permitted only if a manifest injustice has occurred. *See* ***White v. State***, 85 Wis.2d 485, 488, 271 N.W.2d 97, 98 (1978). A manifest injustice includes a trial court's failure to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads. *See* ***State v. Smith***, 202 Wis.2d 21, 25, 549 N.W.2d 232, 233-34 (1996). The defendant has the burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***White***, 85 Wis.2d at 491, 271 N.W.2d at 100. Permitting withdrawal is within the trial court's discretion, and we reverse the trial court's denial of the motion only if the trial court erroneously exercised its discretion. *See* ***id.***

As noted above, our review of the plea hearing demonstrates that the trial court never asked Brumfield to personally acknowledge that the facts as alleged in the complaint were true. The trial court merely asked Brumfield whether he had read the complaint. This is insufficient to establish a factual basis to support a guilty plea. "The purpose of ascertaining a factual basis for a plea is to make certain that the defendant is pleading guilty to a crime he committed." ***Peterson v. State***, 54 Wis.2d 370, 385, 195 N.W.2d 837, 847 (1972) (footnote omitted). This was not done. The trial court failed to ascertain whether Brumfield was pleading guilty to a crime he committed.

Moreover, although the trial court also relied on the preliminary hearing to attempt to establish a factual basis, such reliance is also faulty for two reasons. First, there is no indication that the trial court was aware of the content of the preliminary hearing. The plea hearing transcript documents that the trial court

had to ask the attorneys whether a preliminary hearing even took place in this case. Second, there was no personal acknowledgment by Brumfield as to the truth of the facts ascertained at the preliminary hearing. Such deficiency also fails to comply with the statutory requirements of accepting guilty pleas set forth in § 971.08(1)(b), STATS. This section requires the trial court to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Section 971.08(1)(b).

Because of these deficiencies, we must conclude that the trial court erroneously exercised its discretion in summarily denying Brumfield's postconviction motion to withdraw his guilty plea to the child enticement charge.[2] Our supreme court, however, has held that a deficiency may be cured by evidence presented at a hearing on a postplea challenge. *See* ***Edwards v. State***, 51 Wis.2d 231, 236, 186 N.W.2d 193, 195 (1971). The supreme court explained that it

> recommended that a postplea inquiry should be held to insure the accuracy of a plea of guilty and suggested the evidence could consist of the district attorney's presenting the facts and introducing any statements, confessions, or information given in any manner which the court deemed appropriate, including testimony of the defendant.

Id. Because the trial court summarily denied Brumfield's postconviction motion, the opportunity to cure the deficiency did not arise. We deem it appropriate to remand this matter to the trial court with instructions to hold such a hearing to determine whether the deficiency may be cured. Accordingly, we vacate that portion of the trial court's postconviction order denying Brumfield's motion to withdraw his guilty plea to the child enticement charge. We remand this matter to

[2] We note that Brumfield did not, and does not, seek to withdraw his guilty pleas entered on the remaining two convictions.

the trial court to conduct a hearing consistent with this opinion. If the hearing can cure the deficiency, the trial court may reinstate the order denying Brumfield's motion to withdraw his plea. If, however, the deficiency cannot be cured despite the hearing, the trial court must grant Brumfield's motion to withdraw his plea and the corresponding judgment of conviction for child enticement would then be reversed.

B. Double Jeopardy/Section 939.66, STATS., Claim.

Brumfield also contends that he cannot be convicted of both exposing his sex organ to a minor and having sexual intercourse with a child because the acts necessary to commit the latter offense will always be included in the acts required to commit the former. In other words, a defendant could never have sexual intercourse without also exposing his sex organ. Hence, he contends, convicting him of both crimes violates double jeopardy and § 939.66, STATS.[3] We are not convinced.

Whether a defendant's double jeopardy rights are violated is a question of law that we review independently. *See* ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992). The analysis to be applied in assessing whether Brumfield was subjected to multiple punishments for the same offense when he was convicted and sentenced for both exposing his genitals and sexual intercourse with a minor is the "elements-only" test of ***Blockburger v. United States***, 284 U.S. 299 (1932). *See* ***State v. Harris***, 190 Wis.2d 718, 722, 528 N.W.2d 7, 8 (Ct. App. 1994) ("where a single course of conduct gives rise to

[3] Section 939.66, STATS., provides in pertinent part: **Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both.

multiple charges to be prosecuted in a single trial, the proper test to determine whether there is a double jeopardy violation is the 'elements only' test"). The test involves determining whether the two crimes contain the same elements or whether each contains an element the other does not. *See* ***id.*** at 722-23, 528 N.W.2d at 8. The specific facts of the individual case are not relevant to this analysis. *See* ***State v. Carrington***, 134 Wis.2d 260, 264, 397 N.W.2d 484, 486 (1986).

In comparing the elements of these two offenses, we review §§ 948.09 and 948.10, STATS.[4] In reviewing the content of these two statutes, it is clear that each offense contains an element the other does not. Section 948.09 requires that the defendant engage in sexual intercourse. This element is not contained in § 948.10. Likewise, § 948.10 requires that a defendant expose either his or the victim's genitals or pubic area. This element is not contained in § 948.09. This simple review demonstrates that conviction of both crimes does not violate double jeopardy or § 939.66, STATS. Based on this review, exposing a sex organ is not the same offense as sexual intercourse with a minor.

Accordingly, we affirm that portion of the trial court's order denying Brumfield's motion to vacate his conviction under § 948.10, STATS.

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[4] Section 948.09, STATS., provides: **Sexual intercourse with a child age 16 or older.** Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor.

Section 948.10, STATS., provides in pertinent part: **Exposing genitals or pubic area. (1)** Whoever, for purposes of sexual arousal or sexual gratification, causes a child to expose genitals or pubic area or exposes genitals or pubic area to a child is guilty of a Class A misdemeanor.

By the Court.—Judgments affirmed; order vacated in part and affirmed in part and cause remanded with directions.

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