COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3584-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH C. CLARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. On September 7, 1995, the State filed a criminal complaint charging Joseph Clark with eight crimes based upon allegations that he kidnapped a young boy, stomped on his legs and twisted his ankles until they broke in numerous places, threatened and suffocated him, and kept him imprisoned in a locked closet without food for days until he was finally able to

escape and call for help. Clark eventually entered no contest pleas, coupled with pleas of not guilty by reason of mental disease or defect, to one count of attempted first-degree intentional homicide (contrary to §§ 939.32 and 940.01, STATS.), one count of causing great bodily harm to a child (contrary to § 948.03(2)(a), STATS.), one count of mayhem (contrary to § 940.21, STATS.), one count of causing mental harm to a child (contrary to § 948.04(1), STATS.) and one count of child enticement (contrary to § 948.07(5), STATS.).

A jury found Clark to have been mentally responsible at the time of the offenses, and the circuit court adjudged him guilty. After the court sentenced Clark to a total of 100 years imprisonment on the five counts, Clark filed a plea withdrawal motion challenging the factual basis for his convictions on the homicide, mayhem and mental harm charges. The trial court denied the motion, and Clark appeals.

Standard of Review for Plea Withdrawal.

"Before a trial court can accept a [no contest] plea it must 'personally determine that the conduct which the defendant admits constitutes the offense ... to which the defendant has pleaded.'" ***State v. Johnson***, 200 Wis.2d 704, 708, 548 N.W.2d 91, 93 (Ct. App. 1996) (citation omitted). A circuit court's failure to establish a factual basis for the defendant's plea "is evidence that a manifest injustice has occurred, warranting withdrawal of the plea." ***Id.*** at 709, 548 N.W.2d at 93 (citation omitted). This court will not disturb a circuit court's finding regarding the existence of a factual basis for accepting a plea unless it is clearly erroneous. ***Id.***

Factual Basis for Mayhem.

Under § 940.21, STATS., the offense of mayhem is committed by one who, "with intent to disable or disfigure another, cuts or mutilates the tongue, eye, ear, nose, lip, limb or other bodily member of another." In addition, we have previously held that mayhem requires evidence of great bodily harm. ***Kirby v. State***, 86 Wis.2d 292, 301, 272 N.W.2d 113, 117 (Ct. App. 1978). Clark claims that causing multiple fractures to another person's legs does not constitute mayhem unless the victim suffers permanent damage as a result.[1] His argument raises the question of the proper statutory interpretation of the term "mutilates."

When we are asked to apply a statute whose meaning is in dispute, we focus on determining the underlying legislative intent. ***Truttschel v. Martin***, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). If the language of the statute clearly and unambiguously sets forth the legislative intent, our inquiry ends, and we will apply that plain language to the facts of the case. If the language used in the statute is capable of more than one meaning, however, we will determine legislative intent from the words of the statute in relation to its context, subject matter, scope, history, and the object which the legislature intended to accomplish. ***Id.***

The State argues that the plain language of the statute does not include any reference to the permanency of the victim's injuries. We conclude that the statute is nonetheless ambiguous, however, because reasonable people could differ as to whether the term "mutilates" requires permanent injury.

[1] The complaint addressed the nature and severity of the victim's injuries, but not the permanency of them. We therefore cannot tell what permanent damage the State may have been able to show that the victim suffered had the matter proceeded to trial.

Common usage indicates that to mutilate could mean to "permanently destroy a limb or essential part," or "alter radically so as to make imperfect." WEBSTER'S THIRD NEW INT'L DICTIONARY 1493 (1993).

At common law, mayhem was designed to address both certain types of disfigurement and the "crime of injuring another so that he loses the use of one of his members and is less able to fight." Wisconsin Legislative Counsel Report on Criminal Code 70 (1953) (discussing predecessor statute, § 340.21, STATS., 1953). Wisconsin's statutory enactments have not required such extensive injury that combat ability is affected, however. ***Kirby***, 86 Wis.2d at 301, 272 N.W.2d at 117. A predecessor to the current Wisconsin mayhem statute provided that the offense was committed by one who "with malicious intent to maim or disfigure, who shall cut out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut, slit or mutilate the nose or lip, or cut or disable a limb or member of another person." Section 340.35, STATS., 1951. The current intent requirement of § 940.21, STATS., indicates that mutilation must still be something which would be expected to result in some disablement or disfigurement.

Certainly, an injury to a limb which results in a permanent loss of function or altered appearance could constitute mutilation within the meaning of the statute. We do not, however, see anything in either the historical notion of mayhem or its current placement in the statutory scheme which would require a victim's disablement or disfigurement to be permanent. Modern medical advances have made cosmetic and reconstructive surgery increasingly effective, and have allowed the reattachment of severed body parts in many instances. Just as disfiguring a person's nose or ear with a knife may constitute mayhem by cutting regardless of whether or not doctors are later able to repair the facial damage, the deliberate disablement of a person's limbs may constitute mayhem by mutilation

regardless of whether doctors are later able to restore function to the injured body parts. Permanency of injury is not a statutory requirement.

The victim here was deprived of the use of his legs when Clark fractured one of his ankles, one of his knees, and bones in both of his legs. Left untreated, the fractures, particularly of the knee and ankle could have been expected to result in permanent impaired function, if not death. It is reasonable to infer that Clark knew that these injuries would disable his victim from escaping, especially in light of Clark's additional threat to paralyze the victim if he tried to leave the house. Therefore, the trial court's finding of a factual basis for mayhem was not clearly erroneous.

Factual Basis for Mental Harm to a Child.

Clark's second argument also raises a question of statutory interpretation. He claims that § 948.04(1), STATS., which applies only to someone who "is exercising temporary or permanent control of a child" requires proof that the defendant was a person in some way legally responsible for the child's welfare. We consider Clark's argument to be utterly unpersuasive and contrary to the plain language of the statute. If the legislature had intended the statute to apply only to persons having a special relationship with a child, it could easily have so stated. *See* §§ 948.01(3) and 948.02(3), STATS. It did not. The statute plainly applies to anyone who is exercising control over a child. There is nothing in the statutory language to indicate any legislative intent to exempt those whose control over a child is obtained by illegitimate means, such as kidnapping. We will not disturb the trial court's finding that a factual basis existed for the mental harm to a child conviction.

Factual Basis for Attempted Homicide.

Finally, Clark claims that the facts alleged in the complaint were insufficient to show that he intended to kill his victim and would have done so but for the intervention of another person or some other extraneous factor. Again, we consider Clark's contention to be without merit. The blood which pooled in the victim's broken legs was life threatening. The pillow which Clark held over the victim's face could have suffocated him. The deprivation of food, water or medical treatment would eventually have resulted in death if not for the boy's own efforts to reach a phone and call for help. The trial court's finding that the alleged facts, if proven, would establish an intent to kill was not clearly erroneous.

By the Court.—Judgment and order affirmed.

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