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**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT II**

June 30, 2021

*To:*

Hon. David M. Bastianelli  
Circuit Court Judge  
Kenosha County Courthouse  
912 56th St.  
Kenosha, WI 53140

Rebecca Matoska-Mentink  
Clerk of Circuit Court  
Kenosha County Courthouse  
912 56th St.  
Kenosha, WI 53140

Robert J. Eddington  
Eddington Law Office LLC  
250 E. Wisconsin Ave., Ste. 1800  
Milwaukee, WI 53202-4299

Michael D. Graveley  
District Attorney  
912 56th St.  
Kenosha, WI 53140-3747

John W. Kellis  
Wisconsin Department of Justice  
P.O. Box 7857  
17 W. Main St.  
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

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2019AP2020-CR

State of Wisconsin v. Steven A. Blair (L.C. #2017CF1249)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Steven A. Blair appeals a judgment convicting him of one felony and three misdemeanor offenses, all as a repeater, and an order denying his postconviction motion seeking to “vacate enhanced sentence.” Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> For the reasons that follow, we affirm.

The State filed an information charging Blair with five crimes: (1) causing a child under the age of eighteen to listen to or view sexual activity; (2) sexual exploitation of a child; (3) using a computerized system to send a message that either used lewd, obscene, or profane language or suggested a lewd or lascivious act; (4) child enticement; and (5) attempted abduction of a child. The charges stemmed from several incidents in which Blair: sent sixteen-year-old victim J.M. a pornographic video; requested and received a photo of J.M.'s penis; exchanged numerous text messages with J.M. discussing drug use, masturbation, and sexual acts; attempted to sell marijuana and other drugs to J.M.; and arranged to pick J.M. up from school with anticipated plans for a sexual rendezvous.

On all five charges, the State alleged that Blair was a habitual offender (repeater) under WIS. STAT. § 939.62(1), which, as relevant here, authorizes the circuit court to impose an enhanced sentence if the defendant has been convicted of a felony within the five years preceding the commission of the new charges. As a factual basis, the charging documents alleged that in 2009, Blair was convicted of two felonies in a single Racine County case. The 2009 convictions were for injury by intoxicated use of a vehicle and first-degree recklessly endangering safety, and Blair received prison sentences on both counts.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Pursuant to a negotiated settlement, Blair agreed to plead guilty as a repeater to four offenses: one felony count of causing J.M. to view sexual activity and three misdemeanor counts of sending J.M. an obscene computer message. Before pleading, Blair stipulated to his statutory repeater status based on the 2009 felony convictions.

At sentencing, the circuit court examined the facts surrounding the offenses against J.M. and discussed information provided in the presentence investigation report about Blair's criminal and social history, including his longstanding substance abuse and mental health issues. Before pronouncing sentence, the court informed the parties that it had received a copy of the 2009 Racine County criminal complaint underlying Blair's prior felonies and provided trial counsel a copy to review with Blair. The court noted that the facts underlying the prior convictions—a car crash that left one vehicle on its roof and a severely injured victim lying in the road—were “[s]erious enough to result in the prison sentence.”

The circuit court determined that Blair's conduct in the present case showed that he did not learn from his prior sentence and that he had unmet treatment needs. The court found that another period of incarceration was necessary to protect the public. It imposed an aggregate bifurcated prison sentence totaling 122 months. Specifically, on the felony, the court imposed five years of initial confinement followed by two years of extended supervision, and on each of the three misdemeanors, it imposed thirteen months of initial confinement followed by six months of extended supervision.<sup>2</sup>

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<sup>2</sup> Given Blair's repeater status, the circuit court could have imposed up to seven years of initial confinement on the felony and up to eighteen months of initial confinement on each misdemeanor.

Postconviction, Blair moved the circuit court for an order vacating his sentence, arguing that his rights to a jury trial and to due process were violated when the sentencing court considered the facts alleged in the 2009 complaint. According to Blair, the sentencing court was only permitted to consider the elements of the prior convictions used to establish his repeater status. The postconviction court denied Blair's motion. Blair appeals.

Blair maintains that by considering the facts underlying his prior convictions, the sentencing court violated his constitutional rights to a jury trial and to due process. Blair's argument is unsupported by Wisconsin law and conflates the facts necessary to prove a defendant's repeater status with the facts a sentencing court may properly consider in fashioning an appropriate sentence once the defendant's repeater status is established.

A defendant's status as a repeater under WIS. STAT. § 939.62 requires proof. "A defendant is subject to an enhanced penalty for habitual criminality only if (1) the defendant personally admits to qualifying prior convictions, or (2) the existence of qualifying prior convictions is proved by the state." *State v. Saunders*, 2002 WI 107, ¶19, 255 Wis. 2d 589, 649 N.W.2d 263; *see also* WIS. STAT. § 973.12(1). Once the defendant's repeater status is established, the defendant "shall be subject to sentence" enhancement under § 939.62 unless he or she establishes a pardon for the crime on which the repeater status is based. Sec. 973.12(1). A circuit court is permitted but not required to invoke the statutory enhancer. "Rather, the maximum sentence [can] be imposed and enhanced by the [sentencing] court in the exercise of its discretion." *State v. Harris*, 119 Wis. 2d 612, 624, 350 N.W.2d 633 (1984).

Once Blair's repeater status was proven, here, by his own stipulation, the circuit court had broad discretion to impose any sentence up to the maximum authorized by the statutory enhancer.

The court was tasked with examining numerous aggravating and mitigating factors bearing on Blair's history of undesirable behavior and his personality, character, and social traits. *See State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Here, the facts of Blair's 2009 offenses were relevant and appropriate considerations related to Blair's character and the need to protect the public. To hold otherwise defies commonsense and flies in the face of well-established precedent permitting the sentencing court to consider facts related to uncharged and unproven offenses, expunged convictions, and even offenses for which a defendant was ultimately acquitted. *Id.*, ¶44; *see also State v. Bobbitt*, 178 Wis. 2d 11, 503 N.W.2d 11 (Ct. App. 1993).

The federal cases Blair relies on to argue that his right to a jury trial was violated are wholly inapposite. All address whether the federal statutory sentence enhancers at issue were properly established, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000) (the factual question of whether the defendant committed the crime with a discriminatory or biased purpose should be decided by a jury), or were factually applicable, *see e.g., Taylor v. United States*, 495 U.S. 575 (1990) (establishing a uniform definition of burglary and an elements-based test for use in determining whether a prior state burglary conviction permits application of federal statutory sentence enhancer); *Mathis v. United States*, 136 S. Ct. 2243 (2016) (whether the defendant's prior state conviction qualified as a statutorily delineated offense capable of triggering the federal sentence enhancer). As detailed in the State's brief, none of Blair's cited authority suggests that once a defendant's prior conviction has been admitted or proven so as to establish his or her status as a habitual offender under WIS. STAT. § 939.62, the circuit court cannot consider the facts underlying the prior conviction in fashioning an appropriate sentence.

Finally, we reject Blair's contention that the circuit court violated his right to due process by considering facts underlying his prior felony convictions at sentencing. Due process hinges on

fundamental fairness. *State v. Disch*, 119 Wis. 2d 461, 469, 351 N.W.2d 492 (1984). The court was transparent about its consideration of the 2009 complaint and provided a copy to Blair. Blair did not suggest that he needed more time to review the complaint or that the information therein was inaccurate. Even now, Blair does not claim that the court relied on inaccurate information. *Cf. State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1 (acknowledging a defendant's constitutional due process right to be sentenced on the basis of accurate information). The facts underlying his prior convictions were relevant to Blair's character and history of undesirable behavior. Given that a sentencing court is explicitly permitted to consider uncharged and unproven crimes, and even conduct for which the defendant was acquitted, it was fair and appropriate for the court to consider facts underlying Blair's prior convictions.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*