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COURT OF APPEALS
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OF WISCONSIN

DISTRICT II

Case No. 2015AP2328-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAUN M. SANDERS,

Defendant-Appellant.

**SUPPLEMENTAL BRIEF OF PLAINTIFF-
RESPONDENT**

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ARGUMENT

This issue in this case is one of competency, not jurisdiction.

In his opening brief in this appeal, Sanders argued that “[t]he State does not have jurisdiction to prosecute Sanders for criminal offenses allegedly occurring before his tenth birthday.” (Sanders’ Br. 10.) He argued that that is so because “acts committed by children under the age of ten are simply not violations of state or federal law.” (Sanders’ Br. 11; *see* Sanders’ Reply Br. 5.)

This Court requested supplemental briefing by the parties regarding whether this issue is one of competency, and not jurisdiction. It also asked that, if the issue is the latter, the parties clarify whether the challenge relates to “subject matter jurisdiction.”

The issue in this case is one of competency. The Wisconsin Constitution confers “original jurisdiction in all matters civil and criminal within this state.” Wis. Const. Art. VII, § 8. “Accordingly, . . . in Wisconsin, ‘no circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever.’” *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 8, 273 Wis. 2d 76, 681 N.W.2d 190 (quoted source omitted).

“Competency,” on the other hand, refers to the court’s ability to exercise its subject matter jurisdiction. *See Michael J.L. v. State*, 174 Wis. 2d 131, 137, 496 N.W.2d 758 (Ct. App. 1993) (citing *Green Cty. DHS v. H.N.*, 162 Wis. 2d 635, 645, 469 N.W.2d 845 (1991)¹). A court may lose its competency to

¹ *Green County DHS* is cited as *In re B.J.N.* in Sanders’ supplemental brief and in older cases such as *Michael J.L.* The citation above is consistent with usage in more recent Wisconsin

(continued on next page)

adjudicate a particular case if the court fails to comply with statutory mandates “pertaining to the exercise of subject matter jurisdiction.” *Mikrut*, 273 Wis. 2d 76, ¶ 9.

The State incorrectly used the term “jurisdiction” in its brief. (See State’s Br. 9-17.) It relied on language in *State v. Annala*, 168 Wis. 2d 453, 484 N.W.2d 138 (1992), using the term “jurisdiction” to describe the respective authorities of the juvenile and adult courts. But as this Court noted in *State v. Schroeder*, 224 Wis. 2d 706, 717-18, 593 N.W.2d 76 (Ct. App. 1999), *Annala* is one of several cases in which courts have incorrectly described competency issues as issues of jurisdiction.

Despite that inaccurate terminology, the substance of the State’s argument remains the same: Sanders is not entitled to relief because the circuit court here was competent to exercise its jurisdiction over count one in this case. When this Court reviews the parties’ briefs, the State asks it to understand the State to be referring to the circuit court’s “competency to exercise its jurisdiction” when it discusses “jurisdiction” in its response brief.²

In his supplemental brief, Sanders agrees that the issue is one of competency. He claims that here, the unmet statutory mandate, i.e., the minimum age for prosecution of a sex offense, deprived the circuit court of competency to exercise its subject matter jurisdiction. (Sanders’ Supp. Br. 2.)

But as argued in the State’s brief, Wis. Stat. §§ 938.12(1) and 938.02(3m) do not designate minimum ages

cases. See, e.g., *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 105, 370 Wis. 2d 595, 882 N.W.2d 738 (Abrahamson, J., dissenting).

² Alternatively, the State will gladly submit a replacement brief at this Court’s request.

at which someone can commit a crime. Rather, those provisions designate when—not whether—the juvenile court had competency to adjudicate matters depending on the actor’s age at the time of charging.

And the case Sanders invokes for support, *Green County DHS*, 162 Wis. 2d 635, is not on point. In that case, the circuit court lost its competency in child protection proceedings when it failed—contrary to statutory requirements—to timely hold a hearing on a request for an extension of a CHIPS order. *Id.* at 654. Unlike the statutory time limitation discussed in *Green County DHS*, there was no unmet statutory mandate here. Wisconsin Stat. § 938.12(1) designates a juvenile court’s exclusive jurisdiction over individuals who are juveniles at the time of charging. Here, Sanders was an adult at the time of charging, and adult court accordingly had competency to hear his case. The State did not fail to meet a statutory mandate by charging him in adult court.

Because the issue here is one of competency, not jurisdiction, the State does not answer this court’s second question, i.e., whether the challenge relates specifically to “subject matter jurisdiction.” But Sanders, apparently attempting to cover all of his bases, nevertheless argues that even though the issue here involves competency, the court here “alternatively” lacked subject matter jurisdiction. Sanders relies on *Mack v. State*, 93 Wis. 2d 287, 286 N.W.2d 563 (1980), which provided that a court lacks jurisdiction when the offense fails “to charge any offense known to law.” (Sanders’ Supp. Br. 4.)

The narrow exception recognized in *Mack* does not transform the competency issue to one of jurisdiction. “A complaint that charges an offense not known to law is one that omits an essential element of the crime charged as defined by statute or case law.” *Schroeder*, 224 Wis. 2d at

714. The State omitted no essential elements in charging Sanders with sexual assault in count one. Again, there is nothing to support Sanders' argument that the Legislature set the age of 10 as the minimum age at which a person could commit a prosecutable sexual assault.

In sum, for the reasons in the State's response brief, the circuit court had competency to exercise its jurisdiction in regard to count one. Sanders is not entitled to relief.

CONCLUSION

This Court should affirm the judgment of conviction and decision and order of the circuit court.

Dated this 12th day of December, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a supplemental brief produced with a proportional serif font. The length of this supplemental brief is 955 words.

SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of December, 2016.

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