STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1411-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. SCOTT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff- Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State doesn't request oral argument or publication of this Court's opinion. The briefs fully present and meet the issues on appeal, and fully develop the theories and legal authorities on each side. Controlling precedent governs this appeal. Wis. Stat. §§ (Rule) 809.22(2)(b) and (Rule) 809.23(1)(b)1.

SUPPLEMENTAL STATEMENT OF THE CASE

Richard J. Scott pled guilty to repeated sexual assault of the same child, MM, in violation of Wis. Stat. §§ 948.02(1) and 948.025(1)(b) (2005-06), and possession of child pornography, in violation of Wis. Stat. § 948.12(1m) (2005-06). (15; 23.) He appeals from the judgment of conviction and order denying his motion for postconviction relief. (23; 34; 35; 36; 37.)

The following facts pertain to Scott's claim that the circuit court erred in denying his postconviction motion to withdraw his guilty plea to the charge of repeated sexual assault of a child. That charge appears as Count Four of the information. (15:1.) Relevant facts also appear in the State's Argument.

Count Four alleged a violation of Wis. Stat. §§ 948.02(1) and 948.025(1)(b) (2005-06). (15:1.) It stated that Scott committed "repeated sexual assaults involving the same child, MM," born June 9, 2002. (*Id.*) It stated that the assaults occurred between August 1, 2007, and August 31, 2008. (*Id.*) It stated that "fewer than three of the assaults were violations of sec. 948.02(1) Wis. Stats." (*Id.*) And it stated the offense constituted "a Class C felony," exposing Scott to a possible 40-year prison sentence and a hefty fine. (*Id.*)

Scott bases his appellate claim on statutory revisions that occurred during the charging period specified in Count Four. As charged in the information, Class C felony criminal liability attached to Scott's conviction if fewer than three of the assaults committed during the charging period constituted first-degree sexual assaults of a child under Wis. Stat. § 948.02(1) (2005-06). (15:1.)

The Wisconsin Legislature amended Wis. Stat. §§ 948.02 and 948.025 in 2008. Those amendments took effect on March 23, 2008. *See* 2007 Wisconsin Act 80. As of August 31, 2008—the last day of the charging period specified in Count Four—the amended statutes provided that if at least three of the violations constituted first-degree sexual assaults, the resulting conviction constituted a Class B felony. Wis. Stat. § 948.025(1)(d) (2007-08).

Alternatively, Class C felony criminal liability attached if at least three of the assaults during the charging period had constituted first- or second-degree sexual assaults of a child under Wis. Stat. § 948.02(1) or (2). Wis. Stat. § 948.025(1)(e).

Scott didn't object to the specifications contained in the information until he filed his motion for postconviction relief. (34.) The circuit court denied that motion, and Scott appeals. (35; 36; 37.)

ARGUMENT

I. Scott entered a valid guilty plea on the Class C felony charge of engaging in repeated sexual assault of the same child, as alleged in Count Four of the information. His plea resulted in a valid conviction.

A. Introduction.

Scott seeks to shed his guilty plea to Count Four in the information. He argues as follows:

- In all its iterations, Wis. Stat. § 948.025 creates a continuing criminal offense. "Where there is a continuing offense, the controlling statute is determined as of the date of the last act constituting the offense." (Scott's Br. 17.) That means the version of the statute in effect on the last day of the charging period—August 31, 2008—sets the outer boundary of the offense. (*Id.* at 17-18.)

- Because the statute changed during the charging period, Scott claims the State charged him under a statute no longer in effect on August 31, 2008. He says this resulted in his being charged with an offense unknown to law, and the circuit court therefore lacked subject matter jurisdiction. (*Id.* at 19-20.)

- Even if the circuit court possessed subject matter jurisdiction, Scott still challenges the plea colloquy "because the court's oral description of the nature of the offense differed from the offense charged in the information." (*Id. at* 20-22.)

- Scott also claims the historical facts recited by the circuit court didn't establish a violation of the offense charged in the information. (*Id.* at 22-23.)

The argument falters under scrutiny.

B. The standard of review.

This issue involves the construction and application of statutes. It presents questions of law, reviewed de novo. *State ex rel. Treat v. Puckett,* 2002 WI App 58, ¶ 9, 252 Wis. 2d 404, 643 N.W.2d 515. Reviewing courts seek to ascertain and apply legislative intent. *In re Estate of Kuhn,* 2000 WI App 113, ¶ 7, 235 Wis. 2d 210, 612 N.W.2d 385.

C. Scott suffered no prejudice from the parties' erroneous belief that an earlier version of Wis. Stat. §§ 948.02 and 948.025 established the charged crime.

1. Introduction.

The crime of engaging in repeated acts of sexual assault of the same child—codified at Wis. Stat. § 948.025—has been in place since the mid-1990's. And more general prohibitions against child sexual assault have existed since Scott's birth. *See, e.g.,* Wis. Stat. §§ 944.10 and 944.11 (1959-60).

Here, the parties and the circuit court incorrectly believed they were proceeding under the iteration of Wis. Stat. § 948.025 in effect at the end of the charging period—August 31, 2008. That erroneous belief, standing alone, doesn't entitle Scott to plea withdrawal or any other relief. That's true even if the erroneous belief found its way into the charging documents filed in this case. Any error was harmless.

2. Any errors in the charging documents didn't result in prejudice to Scott.

"No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." Wis. Stat. § 971.26. A failure to cite the most recent iteration of a statute is immaterial unless the defendant suffered prejudice. *See Craig v. State*, 55 Wis. 2d 489, 493, 198 N.W.2d 609 (1972).[1] *See also State v. Tisland,* No. 2012AP1570-CR, 2015 WL 264073, ¶ 17 (Wis. Ct. App. Jan. 22, 2015) (unpublished).[2]

Prejudice results if the alleged error prevented the defendant from understanding the charges and preparing a defense.

> The purpose of a charging document is to inform the defendant of the acts he allegedly committed and to allow him to understand the offense charged so that he can prepare a defense. The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him. There is no prejudice when the defendant has such notice.

State v. Flakes, 140 Wis. 2d 411, 419, 410 N.W.2d 614 (Ct. App. 1987) (citations omitted).

---

[1] Wisconsin law also permits, under certain circumstances, amendment of a complaint or information at any point in the proceedings. *See* Wis. Stat. § 971.29.

[2] Cited as persuasive authority only. *See* Wis. Stat. (Rule) § 809.23(3)(b). A copy appears in the supplemental appendix.

In *Flakes*, the defendant "never claimed that he had a viable defense against the charge of sexual contact or intercourse with a minor or that [because of a typographical error in the charging document] he failed to present such a defense because he did not realize age was an issue." *Id.* at 420. Thus, an "information which miscited the statutory reference was sufficient where it verbally described the violation and the defendant could not have been misled or prejudiced by the incorrect statutory reference." *Id.* at 417-18.

Here, Count Four of the information specified a violation of Wis. Stat. §§ 948.02(1) and 948.025(1)(b) (2005-06). (15:1.) It alleged that Scott committed "repeated sexual assaults involving the same child, MM," born June 9, 2002. (*Id.*) It alleged that the assaults occurred between August 1, 2007, and August 31, 2008. (*Id.*) It alleged that "fewer than three of the assaults were violations of sec. 948.02(1) Wis. Stats." (*Id.*) And it stated the offense was "a Class C felony," exposing Scott to a possible 40-year prison sentence.

Had the information used the language specified in the iteration of the statute in effect on August 31, 2008, it would have alleged Class C felony criminal liability "if at least 3 of the violations were violations of s. 948.02 (1) or (2)." Either way, it would have alleged that at least one of the repeated sexual assaults was a second-degree sexual assault.

The narrative portion of the criminal complaint and the information put Scott on notice about the charges against him and provided him with everything he needed to prepare a defense, if he had one. (9; 15.) *See Craig*, 55 Wis. 2d at 493; *Flakes*, 140 Wis. 2d at 417-20.

So even if there had been a "defect or imperfection" in this part of the information, it was non-prejudicial and did not "invalid[ate]" the information or otherwise "affect[ ]"

Scott's plea or the resulting judgment of conviction. Wis. Stat. § 971.26.

The fact that a version of Wis. Stat. § 948.025 was already in full force and effect further diminishes the possibility of prejudice. In *State v. Wachsmuth*, the court

> reject[ed] Wachsmuth's contention that his conviction must be reversed because the state charged him with a violation of sec. 948.02(1), Stats., a statute that did not exist at the time the alleged incident occurred. Section 948.02(1) is merely the successor statute to sec. 940.225(1), Stats., the controlling statute defining first-degree sexual assault at the time the incident occurred in this case. The judgment of conviction in this case correctly reflects that Wachsmuth was convicted of first-degree sexual assault in violation of sec. 940.225(1).
>
> Both statutes contain identical elements. The case was tried on the proper elements, and the jury was properly instructed as to the elements of the offense. Hence, the technical charging error made by the state was clearly harmless to Wachsmuth. *See State v. Dorcey,* 98 Wis. 2d 718, 720, 298 N.W.2d 213, 215 (Ct. App. 1980); *see also* sec. 971.26, Stats.

166 Wis. 2d 1014, 1026-27, 480 N.W.2d 842 (Ct. App. 1992).

Additionally, Scott doesn't account for his failure to make a timely objection to the "defects" in the charging documents until postconviction proceedings. *See* Wis. Stat. § 971.31(2) and (5)(a). Timely objection would have permitted amendment of the charge, removing any possibility of prejudice. Forfeiture of the claim on appeal appears apt.[3]

---

[3] "There is a recognized need for forfeiture in the criminal justice system." *State v. Thompson,* 2012 WI 90, ¶ 72, 342 Wis. 2d 674, 818 N.W.2d 904. It facilitates the fair, orderly administration of

D. The circuit court had subject matter jurisdiction over Scott's prosecution.

For argument, the State will assume the prosecution should have brought its charge of repeated sexual assault of the same child under the statutes in effect on the last day of the charging period—August 31, 2008.

But the conclusion Scott draws from this—that the circuit court lacked subject matter to accept his plea, enter his conviction, and sentence him—is incorrect.

Scott cites *Mack v. State,* 93 Wis. 2d 287, 295, 286 N.W.2d 563 (1980), for the black-letter proposition that the failure to allege an offense known to law is jurisdictionally defective and void. (Scott's Br. 19.)

But we don't have that situation here.

"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." *State v. Schroeder*, 224 Wis. 2d 706, 714, 593 N.W.2d 76 (Ct. App. 1999). "'A complaint which charges no offense is jurisdictionally defective and void and the defect cannot be waived by a guilty plea, the court does not have jurisdiction.'" *Mack*, 93 Wis. 2d at 295 (citation omitted).

---

justice, encourages vigilance by litigants, and conserves judicial and prosecutorial resources. *State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207; *State v. Boshcka*, 178 Wis. 2d 628, 643, 496 N.W.2d 627 (Ct. App. 1992). In this context, it also discourages sandbagging by defendants who might otherwise wait to see what sentence they receive before objecting. *Cf. Boshcka*, 178 Wis. 2d at 643; *Dudrey v. State*, 74 Wis. 2d 480, 485, 247 N.W.2d 105 (1976).

However:

> If the criminal complaint is defective, or if the defendant is convicted under an invalid law, the conviction itself is not void. The circuit court still has subject matter jurisdiction to render its judgment. Even where the error in the law or proceedings is fatal to the prosecution, the circuit court has the power to inquire into the sufficiency of the charges before the court.

Mack, 93 Wis. 2d at 295.

"A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wis. Stat. § 939.12. If Scott committed acts prohibited by the Wisconsin Statutes at the time he committed them, the circuit court had subject matter jurisdiction over his case.

And we have that situation here. Like the defendant in *Tisland*, who sought to parlay earlier statutory amendments to Wis. Stat. §§ 948.02 and 948.025 into a claim that he'd been charged with an offense unknown to law, Scott "was plainly charged with the sexual assault of a child under a then existing statutory scheme, WIS. STAT. §§ 948.02 and 948.025." 2015 WL 264073, ¶ 10. The last amendments to these statutes—the ones contained in 2007 Wisconsin Act 80, effective March 23, 2008—didn't expressly or impliedly repeal the statutory scheme under which the State charged Scott. *See id.* ¶ 16.

Here, the State charged Scott with a crime well-known to Wisconsin law.

At worst, the charging documents contained a defect. As argued above, such an error doesn't warrant postconviction relief unless the defendant can show prejudice. *See* Wis. Stat. § 971.26 *and supra* at 6-9. And under *Mack*, even if a "complaint is defective, or if the

defendant is convicted under an invalid law, … [t]he circuit court still has subject matter jurisdiction to render its judgment." 93 Wis. 2d at 295.

At most, Scott has shown the State charged him under the wrong version of a criminal offense that undeniably existed at the time he committed his crimes. *Mack* doesn't support his contention that this alleged error means he was charged with a crime unknown to law, or that the circuit court lacked subject matter jurisdiction over this case. The charging documents charged him with an existing crime. He entered a valid guilty plea to that crime. No reason exists to tinker with his conviction.

E. The plea colloquy adequately described the nature of the offense to which Scott pleaded guilty, and the facts relied upon provided a satisfactory basis to support Scott's guilt.

Scott argues alternately that, in taking his guilty plea to Count Four, the circuit court failed to adequately inform him of the nature of the offense. He claims the court described the gravamen of repeated sexual assault of the same child using the form of the statute in effect on August 31, 2008 which, in Scott's view, didn't adequately put him on notice, and didn't accurately describe the offense of conviction. (Scott's Br. 20-23.)

The circuit court rejected Scott's argument, concluding that "the plea as taken from the defendant involved his knowing admission of constituent acts which constitute the crime charged." (36:1.) The State agrees with the circuit court.

Wisconsin Stat. § 971.08(1)(a) and (b) specify in pertinent part that, before accepting a guilty plea, the circuit court must (1) address the defendant personally and

determine he understands the nature of the charge, and (2) make such inquiry as satisfies it that the defendant did in fact commit the charged crime.

Morones v. State explains the purpose of this inquiry:

> The purpose of the statutory requirement for a court inquiry as to basic facts is to protect the defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does not actually fall within the statutory definition of the charge. What is required is a sufficient postplea inquiry to determine to the court's satisfaction that the facts, if proved, constitute the offense charged and whether the defendant's conduct does not amount to a defense. At the time of taking the plea, the trial court may consider hearsay evidence, such as testimony of police officers, the preliminary examination record and other records in the case. Upon review, we are to determine whether the trial court possessed sufficient facts and made sufficient inquiry to satisfy itself that the acts admitted constituted the crime committed.

61 Wis. 2d 544, 552-53, 213 N.W.2d 31 (1973) (footnotes and internal quotation marks omitted). *See also State v. Sutton*:

> When we review a circuit court's determination that a sufficient factual basis exists to support a plea, we look at the totality of the circumstances surrounding the plea to determine whether the court's findings were clearly erroneous. We approach this issue recognizing that where, as here, the plea is pursuant to a negotiated agreement between the State and the defendant, 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.

2006 WI App 118, ¶ 16, 294 Wis. 2d 330, 718 N.W.2d 146 (citations and internal quotation marks omitted).

During the plea colloquy, Scott told the circuit court he was satisfied with his lawyer's performance, that he was

pleading guilty as a matter of free will, and that he'd had enough time to discuss the matter with his lawyer and to think about his decision. (45:5-6.) He considered his guilty pleas "the best thing under all the circumstances[.]" (*Id.* at 6.)

This exchange between the circuit court and Scott pertained to the charge of repeated sexual assault of the same child:

> THE COURT: The charge against you in the fourth count of the information is that between August 1st of 2007 and August 31st of 2008 at this county, you committed sexual assaults involving the same child, whose name is—what is it?
>
> MR BURGOYNE [The prosecutor:] Just a moment, please, Judge, I'm sorry.
>
> MR. ROSE [Trial defense counsel:] It is listed MM in the complaint.
>
> MR BURGOYNE: It is listed as MM?
>
> THE COURT: [The victim's first name?]
>
> MR. BURGOYNE: Yes. I believe it's [the victim's complete name.]
>
> THE COURT: All right.
>
> MR. BURGOYNE: Her date of birth is [complete date of birth.]
>
> THE COURT: She was born on [complete date of birth.] There were at least three offenses, incidents in which you applied your finger to her vagina.
>
> MR. BURGOYNE: Judge, count four is fewer than three assaults.

> THE COURT: No. I think it means—well, you are right, at least—well—but on at least three occasions you touched the child with some part of your body on the vagina for the purpose of your own sexual gratification. Do you understand this charge against you?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: How do you plead?
>
> THE DEFENDANT: Guilty.

(*Id.* at 6-7.) Scott asked no questions, and trial defense counsel made no objections or requests for clarification.

That's not surprising. This matter resolved by a negotiated plea that called for dismissal of multiple charges. (*Id.* at 2.) This case started out as a 2011 case file in Kenosha County. (38:2.) And that file—Case No. 2011CF1232—included a charge brought under Wis. Stat. § 948.025.[4]

Scott had faced a charge under Wis. Stat. § 948.025 for some time. He wasn't caught by surprise at the plea hearing.

When taking a guilty plea, a circuit court discusses the nature of the charge with the defendant to protect him from pleading to a crime he didn't commit, or to a crime for which he has a defense he could—and would—assert at a trial. *Morones*, 61 Wis. 2d at 552-53.

---

[4] *See* Wisconsin Court System Circuit Court Assess at https://wcca.wicourts.gov/caseDetails.do;jsessionid=AA53E39CD59F2FA2099175D84DAAC63B.render6?caseNo=2011CF001232&countyNo=30&cacheId=0016D582DD9C9DF3383249418F7B75AC&recordCount=1&offset=0&mode=details&submit=View+Case+Details (last visited December 2, 2016).

The discussion between the circuit court and Scott regarding Count Four was brief, but it fulfilled that purpose.

Scott believes "the court's oral description of the nature of the offense differed from the offense alleged in the information." (Scott's Br. 20.) That's incorrect. The nature of the crime—repeated sexual assault of the same child—didn't change between the first day of the charging period (August 1, 2007) and the last day of the charging period (August 31, 2008). Nor did it change between the last day of the charging period and the day Scott entered his plea.

The nature of the offense has remained constant. To address difficulties inherent in the prosecution of a pattern of sexual assaults committed against a young child, the Wisconsin Legislature enacted Wis. Stat. § 948.025, which allows three or more acts of sexual assault within a specified period to be actionable as a single, continuous course of conduct crime. *See State v. Nommensen,* 2007 WI App 224, ¶¶ 14-17, 305 Wis. 2d 695, 741 N.W.2d 481. Here, the circuit court communicated the essential nature of the crime to Scott when he described how his acts violated the statute:

> The charge against you in the fourth count of the information is that between August 1st of 2007 and August 31st of 2008 at this county, you committed sexual assaults involving the same child[.]
>
> . . . .
>
> There were at least three offenses, incidents in which you applied your finger to her vagina.
>
> . . . .
>
> [O]n at least three occasions you touched the child with some part of your body on the vagina for the purpose of your own sexual gratification.

(45:6, 7.)

The circuit court told Scott that he was admitting to three or more acts of sexual assault within a specified time period as a single, continuous course of conduct crime. Scott said he understood the nature of the offense, and no evidence exists that belies his claimed understanding.

Scott also believes the facts as described by the circuit court don't correspond to the offense of conviction—the Class C felony offense—because they describe three acts of first-degree sexual assault of a child. (Scott's Br. 22-23.)

Postconviction plea withdrawal is predicated on the need to correct a manifest injustice. *State v. Thomas,* 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. The State sees no manifest injustice here, at least not from Scott's perspective. Three separate acts committed during the charging period, each constituting first-degree sexual assault of a child, would have supported Scott's conviction under Wis. Stat. § 948.025 as a Class B felony—one more severe than his Class C offense of conviction. Wis. Stat. § 948.025(1)(d) (2007-08). If the circuit court erred in its statement of the facts supporting the plea to the Class C felony conviction—if the court described acts supporting a Class B felony conviction, but accepted Scott's negotiated plea to a Class C conviction, and adjudged him guilty of that crime—it's difficult to understand precisely how this worked to Scott's disadvantage, or why it would support a request for plea withdrawal as a manifest injustice.

II. The record satisfactorily demonstrates that Scott possessed child pornography as charged in Count Seven of the information.

In his postconviction motion to withdraw his guilty plea to Count Seven—possessing child pornography—Scott asserted that the facts alleged in the complaint didn't permit

an inference that he "knowingly possessed" the images recovered from his computer. (34:3, 7.)

The circuit court rejected that challenge, concluding that references in the amended complaint to Scott showing a child "nasty pictures of naked girls and movies with naked males, females, and children," including "one movie of a man peeing into a girl's mouth" supported the conclusion that Scott knowingly possessed" the images found on his computer. (9:4; 36:2) (internal quotation marks omitted).

Scott raises two new contentions on appeal: (1) he asserts that the facts fail to satisfactorily demonstrate that anyone depicted in the material recovered from his computer was under 18 years of age, and (2) he asserts that the facts fail to satisfactorily demonstrate that the computer on which they were discovered belonged to him or that he possessed it. (Scott's Br. 24.) He also renews his assertion that the evidence is insufficient to establish that he knowingly possessed the images. (*Id.* at 25-26.)

The State has two responses.

First, the two new contentions on appeal aren't properly before this Court.

A defendant must raise his challenges to the validity of his plea in a postconviction motion filed in circuit court. *County of Racine v. Smith,* 122 Wis. 2d 431, 438, 362 N.W.2d 439 (Ct. App. 1984). Scott has raised his challenges to the sufficiency of the evidence regarding the age of the child and his actual ownership of the computer for the first time in this Court. This Court should deem them forfeited because the circuit court never had the opportunity to rule on them in the first instance. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

Second, all of his challenges—both the forfeited and the properly preserved challenges—fail. A sufficient factual basis exists to support the pleas.

> When we review a circuit court's determination that a sufficient factual basis exists to support a plea, we look at the totality of the circumstances surrounding the plea to determine whether the court's findings were clearly erroneous. We approach this issue recognizing that where, as here, the plea is pursuant to a negotiated agreement between the State and the defendant, 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.

Sutton, 294 Wis. 2d 330, ¶ 16 (citations and internal quotation marks omitted). The circuit court may consider the allegations contained in the complaint, the record of the plea hearing, and trial defense counsel's statements concerning the factual basis presented by the State. *Id.* ¶ 17.

A sufficient factual basis for a plea exists when it's probable that the defendant committed the charged crime. *State v. Payette,* 2008 WI App 106, ¶ 7, 313 Wis. 2d 39, 756 N.W.2d 423. A sufficient factual basis also exists "if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." *Sutton,* 294 Wis. 2d 330, ¶ 22 (citation omitted). The State need not allege facts establishing proof beyond a reasonable doubt to establish a factual basis for a plea. *See State v. Spears,* 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988).

Here, the State alleged sufficient facts to support Scott's plea.

The age of the child depicted in the material. The amended complaint contained these allegations:

> [MM's mother] talked to [MM,] who stated that whenever they were at the defendant's house alone with him the defendant would put them in his lap and make them look at "nasty pictures" of naked girls and movies with naked males, females, and children. [MM's mother] stated that [MM] told her that she remembered one movie of a man peeing into a girl's mouth. [MM's mother] stated that [RR, another minor daughter] confirmed the details of what [MM] told her.
>
> . . . .
>
> Seized from the defendant's home were two computers as well as a number of pornographically-titled DVDs, including "Young Girls in Lust," and "Pint Size Pussy." Also taken from a box in the defendant's garage were a penis pump and a "Two-Hole Rigged Masturbator."
>
> A forensic analysis of the defendant's computer revealed numerous images of child pornography. There is one specific photograph that was moved to a "lost folder," which means the item was deleted. It is a girl, clearly under age 18, with a penis in the photo ejaculating onto her face. The photo was deleted on December 20, 2011.

(9:4, 6.) The specific references to *nasty pictures, naked girls*, *children,* and *a man peeing into a girl's mouth* supports the reasonable, inculpatory inference that the pictures were photographs of children engaged in sexually explicit conduct. That inference is bolstered by the references to *child pornography* and a recovered, albeit deleted, image of a *girl, clearly under age 18, with a penis in the photo ejaculating onto her face.* It's also bolstered by the common meaning and usage of the word *girl:* a female child. *The Oxford Dictionary of English Etymology* (1976.)

And because Scott's plea resulted from negotiations, the circuit court could reasonably and sensibly conclude the allegations supported the inculpatory inferences. *Sutton,* 294 Wis. 2d 330, ¶ 16.

His possession of the computer, and his knowing possession of the child pornography on it. In addition to the facts alleged above, the amended complaint stated that "[MM] also indicated that the defendant would show her pornography on the computer and make her sit on his lap. [RR] would try not to look at it." (9:5.)

Scott lists other allegations the State could have included in the complaint to strengthen the inferences that the computer belonged to him, and that he knowingly possessed the child pornography found on it. (Scott's Br. 26.) He implies—but doesn't demonstrate—that the absence of these allegations somehow weakens the reasonable, inculpatory inferences contained in the complaint.

The iconic example of possessing child pornography has evolved from possessing photographs on paper to storing images electronically on personal computer equipment. But both situations involve intentional conduct, knowingly committed by the offender.

The allegation that police seized computers from Scott's home when Scott was present, that "the defendant's computer" contained pornographic images of children, and that Scott seated MM on his lap and showed her pornography on a computer supports the entirely reasonable, entirely inculpatory inference that Scott possessed the computer, and knew of the existence of the child pornography discovered within. And again, the fact that Scott's plea resulted from negotiations allowed the circuit court to reasonably and sensibly conclude the

allegations supported the inculpatory inferences. *Sutton,* 294 Wis. 2d 330, ¶ 16.

CONCLUSION

Scott's postconviction claims lacked merit. This Court should affirm his conviction and the order denying postconviction relief.

Dated at Madison, Wisconsin, this 6th day of December, 2016.

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 6,191 words.

_____
GREGORY M. WEBER
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 6th day of December, 2016.

_____
GREGORY M. WEBER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Richard J. Scott
Case No. 2016AP1411-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____

GREGORY M. WEBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 6th day of December, 2016.

_____

GREGORY M. WEBER
Assistant Attorney General