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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP001411 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Richard J. Scott,

Defendant-Appellant.

On appeal from a judgment of the Kenosha County Circuit Court, The Honorable Bruce E. Schroeder, presiding

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Defendant-Appellant's Reply Brief

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Avenue, Suite 1200
Milwaukee, WI 53233

414.671.9484

Attorneys for the Appellant

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Argument

I The defects here are not mere technical errors that did not affect the defendant's substantial rights.

Here is what happened in this case. The information charged Scott with repeated sexual assault of a child under a statute that no longer existed, and the information alleged that one of the elements was that "fewer than three" of the assaults were first degree sexual assaults of a child. This was a Class C felony. However, at the plea hearing, the judge orally told the Scott the correct elements of the *new* statute-- a Class B felony-- which requires that at least three of the assaults be first degree sexual assaults.

This, the state says, is a mere technicality that does not affect the court's jurisdiction; and, to the extent there was any mistake, it was to Scott's benefit, because he admitted to conduct that would be a Class B felony had he been correctly charged under the new statute.

A This is not a mere technicality

The tate says that a failure to cite the most recent iteration of a statute is immaterial unless the defendant suffered prejudice. For this proposition, the state cites, *Craig v. State*,

55 Wis. 2d 489, 492, 198 N.W.2d 609, 610 (1972). (Respondent's brief p. 5)

Scott has no quarrel with this assertion. But what happened here is hardly just a matter of getting the statute number wrong.

In *Craig*, the the complaint contained an earlier, incorrect statute number. The defendant claimed on postconviction and appeal that this misled him into believing that the maximum penalty for the crime, armed robbery, was only ten years because that was the penalty under the old statute[1]. Under the new statute, the penalty was thirty years.

The court of appeals had little trouble dispensing with this argument, though. The court observed that the defendant's claim was wholly rebutted by the record of the plea hearing, where the judge told the defendant a number of times that the maximum penalty was thirty years.

The mistake in *Craig* had nothing to do with the elements of the offense. It had only to do with the maximum possible penalty, and the judge correctly described the maximum possible penalty to the defendant.

In Scott's case, though, it was not simply a matter of the wrong statute number. It was a matter of an entirely different element. It was a matter of the factual basis elicited at the plea hearing (three acts of finger to vagina) matching the element of

[1] Significantly, when the statute changed the elements of the crime remained the same. Only the penalty was increased.

the new-- uncharged-- statute, but not matching the element of the old statute alleged in the complaint. It was a matter of the penalty alleged in the complaint being wholly different than the penalty provided for the conduct elicited at the plea hearing.

B The defect here does affect the circuit court's subject matter jurisdiction.

While grudgingly conceding that, perhaps, it was a mistake for the state to fail to correct the information prior to Scott's guilty plea; nevertheless, the state claims that this error does not affect the court's subject matter jurisdiction. According to the state, an error in the criminal complaint deprives the circuit court of subject matter jurisdiction only where the allegations of the complaint *omit* an essential element. *State v. Schroeder,* 224 Wis. 2d 706, 714, 593 N.W.2d 76 (Ct. App. 1999). (Respondent's brief p. 8)

The state's argument, though, relies upon a far too narrow understanding of "omit". It is true that the complaint did not actually *omit* the element of the offense requiring that "less than three" of the assaults be first degree sexual assaults.

But is also undeniably true that, at the time Scott pleaded guilty, that element of the offense no longer existed in the law. So, although the information did not technically omit an element, it alleged an element that did not exist in law. This, too, deprives the circuit court of subject matter jurisdiction. The

state's argument ignores the whole line of cases holding that crimes which do not have an element of intent cannot be charged as an attempt. *See, e.g. State v. Briggs,* 218 Wis. 2d 61, 63, 579 N.W.2d 783, 784 (Ct. App. 1998) In all such cases, the information did not omit an element; rather, the information alleged an element, i.e. "attempt", that did not exist in the law.

The same is true here. The information alleged an element that no longer existed in the law.

II The state urges a far too narrow application of the waiver rule when it suggests that since Scott did not explicitly argue at the trial court level that the factual basis was insufficient to establish that (1) that anyone depicted in the images was under eighteen years old; and (2) that he possessed the computer in question; that those arguments are waived on appeal.

Concerning the sufficiency of the factual basis to support the possession of child pornography count, the state claims that Scott raises two new allegations on appeal: (1) that anyone depicted was under 18 years of age; and (2) that the computer belonged to him. Thus, according to the state, those arguments are waived. (Respondent's brief p. 16)

Without doubt, any grounds for relief not raised in the trial court are waived on appeal. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even

alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, P10, 235 Wis. 2d 486, 611 N.W.2d 727.

The reasons for the waiver rule are obvious. As the Supreme Court explained:

> The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. . . . It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. . . . Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. . . . Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. . . . For all these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

Huebner, 2000 WI 59, 235 Wis. 2d 486, P12, 611 N.W.2d 727.

Plainly, though, the waiver rule precludes the appellant from raising *issues* on appeal that were not raised in the trial court. However, where the appellant has properly raised an issue in the trial court, the rule does not, and should not, prevent the appellant from refining his arguments on appeal.

That is all that occurred here. In his postconviction motion, Scott raised the issue of whether there was a sufficient factual basis for his guilty plea to possession of child pornography. In the motion filed in the circuit court, Scott focused his argument as follows:

> Here, the record of the plea hearing was inadequate because there was not an adequate factual basis for the allegation that Scott knowingly possessed the image that was alleged to be child

> pornography. The complaint alleged only that the image was found on a device alleged to be "Scott's computer." There were no further allegation-- such as that only Scott had access to this computer-- to permit an inference that Scott was aware of the image.

(R:34 -7)

On appeal, Scott refined the argument:

> The complaint alleges that they were "nasty pictures", and in one of the pictures, a man was peeing into a girl's mouth. Was is conspicuously missing is any allegation that any of the individuals in the images were under the age of eighteen years. Similarly, the allegations concerning the images on "Scott's computer" is insufficient to permit an inference that Scott possessed those images. Simply calling the device "Scott's computer", with none of the surrounding circumstances, is a bald, conclusory allegation; and it is insufficient to establish possession.

(Appellant's brief p. 8).

Plainly, all that has occurred here is that Scott has slightly refined and expanded upon his arguments in the court of appeals. The argument in the postconviction motion that, "there was not an adequate factual basis for the allegation that Scott knowingly possessed the image that was alleged to be child pornography" has been clarified on appeal to include the fact that there is no allegation that any of the individuals in the images were under the age of eighteen years.

There is no waiver or forfeiture of an issues on appeal. The issue was raised in the trial court, and, on appeal, Scott has attempted to improve upon the

arguments in support of this issue.

Dated at Milwaukee, Wisconsin, this _____ day of December, 2016.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233

414.671.9484

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Jeffrey W. Jensen