STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP845-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MEDFORD D. MATTHEWS, III,

Defendant-Respondent.

ON APPEAL FROM AN ORDER ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

PLAINTIFF-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

I. The circuit court erred in dismissing the six felony charges against Matthews by improperly usurping the district attorney's charging authority, and by improperly applying the absurdity doctrine to justify its actions.

While the State's opening brief addresses the arguments Matthews presents in his respondent's brief, some of his assertions warrant additional comment. The State will address them in the order presented in his brief.

Matthews sets a low tone for his brief by contending that the State "has muddied the waters and introduced several red-herring arguments" in its opening brief. (Matthews' Br. 6–7.)

The State disagrees. All it has done is present an argument that Matthews cannot adequately refute, in response to a circuit court decision that Matthews cannot adequately defend.

Matthews declares—without development and without citation to legal authority—"[i]t is important to note that a statute that produces an absurd result rises to the level of a constitutional violation of Due Process and Equal Protection under the law." (Matthews' Br. 7.) If he offers this observation as an abstract proposition, then it is irrelevant. And if he offers it as an as-applied challenge to the constitutionality of the three statutes involved in this case—Wis. Stat. §§ 948.10(1) (exposing intimate parts), 948.07 (child enticement), and 948.09 (sexual intercourse with a child age 16 or older)—then it is inadequately developed and briefed. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633

(Ct. App. 1992). Either way, this Court should not consider it.[1]

Matthews relies heavily on two law review articles regarding the absurdity doctrine. (Matthews' Br. 6, 8, 9, 12, 13, 14, 15.)[2] They discuss—in academic fashion—the philosophical underpinnings of the doctrine, and how it relates to other methods of construing statutes, such as textualism. But the articles contribute little to the two tasks facing this Court: (1) determining the current and proper scope of the absurdity doctrine as a canon of statutory construction, and (2) deciding whether the circuit court in this case improperly applied the doctrine to usurp and invalidate the district attorney's charging decision in this case.

The State provides a more relevant and helpful discussion of the absurdity doctrine in its own brief. (State's Opening Br. 11–14.)

In a nutshell, the doctrine provides a court with authority to decide that a particular statutory outcome, although called for by applying the plain language of the statutes, so offends reason and common sense that the Legislature simply could not have intended it.

The obvious danger of a circuit court, as here, subjectively declaring statutes absurd and substituting its

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[1] Matthews also failed to present a developed equal protection claim in his motion to dismiss the six felony charges. (R. 12.) He cannot properly offer it now. *Wirth v. Ehly*, 93 Wis. 2d 433, 443–44, 287 N.W.2d 140 (1983).

[2] Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation,* 44 Am. U. L. Rev. 127 (1994); Linda D. Jellum, *But That Is Absurd!: Why Specific Absurdity Undermines Textualism,* 76 Brook. L. Rev. 917 (2011).

own view of proper social policy, has resulted in limitations on the doctrine's scope. Courts now limit the doctrine's application "to solving problems in exposition, as opposed to the harshness that a well-written but poorly conceived statute may produce . . . . Otherwise judges would have entirely too much leeway to follow their own policy preferences by declaring that the legislative choice is harsh or jarring." *United States v. Logan*, 453 F.3d 804, 806 (7th Cir. 2006). (State's Opening Br. 11–14.) Wisconsin has followed suit. "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110.

Matthews says he does not dispute the fact that Wisconsin prosecutors possess wide discretion in charging criminal offenses. (Matthews' Br. 10.) But he is insensitive to how the circuit court's actions in this case usurped and subverted the district attorney's exercise of charging authority. (State's Opening Br. 9–11, 14–17.)

In our tripartite form of state government, the power to decide whether to bring criminal charges—and which charges to bring—vests exclusively in the district attorney. And the district attorney answers to the people "in respect to the manner in which he exercises those powers." *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969). Accordingly, circuit courts are entitled to disagree with a district attorney's charging decisions, yet they generally must live with that disagreement. *United States v. Malik*, 16 F.3d 45, 52 (2d Cir. 1994). Here, the court resorted to an impermissible act of judicial fiat to impose its subjective view regarding the charges Matthews should—and should not—face.

In its opening brief, the State noted that none of the three criminal statutes involved in this case contained

language that expressly or impliedly limited the district attorney's authority to charge all three offenses in one case. (State's Opening Br. 15–17.) The State also faulted the circuit court for its *ipse dixit* pronouncement—unsupported by reference to legislative history or other legal authority—that by enacting Wis. Stat. § 948.09, the Legislature expressed its "obvious" intent that a completed act of nonmarital sexual intercourse between an adult defendant and a child over the age of 16 should result only in a misdemeanor conviction for the adult. (State's Opening Br. at 16.)

In response, Matthews embraces the circuit court's *ipse dixit* pronouncement, to the point of proposing an aphorism: "[O]bviousness needs no citation." (Matthews' Br. 12.)

Some propositions in law are so obvious that it is difficult to find supporting authority. *See Markham v. Clark,* 978 F.2d 993, 994 (7th Cir. 1992) ("We cannot find a case so holding, perhaps because the point is obvious"). But the State urges caution in applying Matthews' aphorism to fill the void in the circuit court's pronouncement of legislative intent.

The text of section 948.09 is plain. It contains no limitation on the district attorney's charging authority. The State adheres to its original point—if the Legislature wanted to limit a district attorney's authority to bring additional charges when she decides to charge a violation of section 948.09, it could have done so plainly and unambiguously. The absence of such a pronouncement means no limitation existed on the district attorney's decision to charge violations of all three statutes in this case. (State's Opening Br. 11, 15–17.)

Matthews string-cites cases where reviewing courts applied the absurdity doctrine to nullify the application of

statutes in given fact situations. (Matthews' Br. 14–15.) But they contribute nothing to the resolution of this case. None of the cases are from Wisconsin. And none of them appear to involve statutes remotely similar to the ones at issue here.

Matthews repeats his subjective contention that the district attorney's charging decision in this case is somehow absurd and unfair. (Matthews' Br. at 15–16.) In particular, he considers it unfair that the prosecutor could charge him with two crimes (child enticement and displaying intimate parts) that he committed as he prepared to commit a third crime (sexual intercourse with a child over the age of 16). His subjective contention rests uneasily alongside Wis. Stat. § 939.65, which states that "[e]xcept as provided in s. 948.025(3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions."

And Matthews says nothing about the State's argument that there is nothing absurd or objectively unreasonable about charging all three crimes when each crime is intended to protect a different set of societal interests, consistent with the State's general responsibility to protect children. (State's Opening Br. 20–21.)

Matthews also claims that *State v. Asfoor*, 75 Wis. 2d 411, 249 N.W.2d 529 (1977), provides implicit support for his contention that the three statutes in play in this case, when applied to him, render an absurd result. (Matthews' Br. 19–20).[3]

Asfoor does not help Matthews. It holds that if a statutory scheme creates an arbitrary or irrational penalty structure, it may deny a defendant his right to equal protection. *Asfoor*, 75 Wis. 2d at 440–41. In that case, the

[3] The phrase *absurdity doctrine* does not appear in *Asfoor*.

arbitrariness and irrationality resulted from the fact that one who caused the death of another by a high degree of negligence in the operation or handling of a firearm committed a misdemeanor, while the simple causation of bodily harm in the same way committed a felony. *Id*. at 440.

But Matthews makes no effort to demonstrate that the designation of sexual assault of a child over the age of 16 as a misdemeanor and the designation of child enticement and exposing intimate parts as felonies results in an equal protection violation of the type found in *Asfoor*. In *Asfoor*, the Wisconsin Supreme Court could not conceive of any reason to support the penalty classification at issue. *Id*.

In contrast, the State showed in its opening brief that the three statutory crimes at issue here serve very different interests. (State's Opening Br. 20–21).

The crime of exposing intimate parts is intended to protect children in private and public settings from exposure to genitalia, regardless of whether the exposure is indecent or not.

The crime of child enticement is intended to prevent the social evil of isolating a child from public view and protection, thereby denying a criminal the opportunity to exercise force and control over the child for sexual purposes.

And the crime of nonmarital sexual intercourse with a child age 16 or older is to protect minors between the ages of 16 and 18 from the consequences of sexual intercourse, including the dangers and problems associated with pregnancy, damage to reproductive organs, and sexually transmitted diseases. The Legislature, acting reasonably, could conclude that exposure of intimate parts and child enticement pose a graver threat to the overall welfare and safety of younger children than does nonmarital sexual intercourse between an adult and a child on the cusp of adulthood.

The State now finds itself where it began. (State's Opening Br. 1–2.) Matthews and the circuit court believe that the district attorney overcharged this case. The court acted on its belief by invoking a doctrine of sharply limited applicability and dismissing the six felony charges. In so doing, the court improperly usurped the district attorney's charging authority, and improperly applied the absurdity doctrine to facilitate that effort. This Court should reverse the dismissal order, and remand the case to permit prosecution on all seven charges.

II. This Court should also decline to review Matthews' contention that Counts Two and Four of the amended complaint should be dismissed for failing to set forth a sufficient factual basis for the charges.

In a terse argument containing (1) no discussion of the relevant procedural history, (2) only one citation to record authority, and (3) no citations at all to legal authority, Matthews asks this Court to dismiss Counts Two and Four of the amended complaint for failing to set forth a sufficient factual basis for the charges. (Matthews' Br. 21–22.)

This Court should decline to review this contention for either of two reasons.

First, his appellate argument is patently inadequate. It lacks required citations to record and legal authority. It does not state the principles of law governing challenges to the factual adequacy of a criminal complaint. It does not apply those principles to the facts of record. This Court should not consider such an argument. *Pettit*, 171 Wis. 2d at 646–47.

Second, Matthews has failed to explain precisely where this Court's authority lies to review the factual sufficiency of the allegations in Counts Two and Four of the

amended complaint, given the procedural posture of the case.

Matthews' December 11, 2017, motion requested dismissal of Counts Two and Four of the original complaint. (R. 12:3–4.) It also requested dismissal of the six felony charges based on the absurdity doctrine. (*Id*. at 4–5.)

On January 23, 2018, a Kenosha County court commissioner considered and orally denied Matthews' challenge to the factual sufficiency of the amended complaint. (R. 28:4.) At that time, the commissioner also passed the absurdity doctrine issue to the circuit court for decision, and gave Matthews leave to renew his factual sufficiency challenge in the circuit court. (*Id*.)

But Matthews did not do so. (R. 29:2.) He made no effort to obtain a circuit court ruling regarding the factual sufficiency of Counts Two and Four. Not surprisingly, the circuit court order dismissing the six felony counts on grounds of absurdity made no mention of the court commissioner's earlier oral ruling denying the separate motion to dismiss Counts Two and Four based on facial insufficiency. (R. 21.)

And a written order denying Matthews' separate motion to dismiss Counts Two and Four has never been entered. The court commissioner's oral ruling was never reduced to writing, and an oral ruling must be reduced to writing and entered before an appeal can be taken from it. *Dumer v. State*, 64 Wis. 2d 590, 611, 219 N.W.2d 592 (1974). Absent a properly-perfected cross-appeal brought by Matthews under Wis. Stat. § (Rule) 809.10, the State sees no clear path leading to this Court's authority to review the factual sufficiency of Counts Two and Four in the amended complaint.

CONCLUSION

This Court should reverse the circuit court's March 19, 2018, dismissal order, and remand the case to permit prosecution on all seven charges. It should also decline to review the factual sufficiency of Counts Two and Four in the amended complaint.

Dated at Madison, Wisconsin, this 10th day of December, 2018.

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 brief produced with a proportional serif font. The length of this brief is 2,856 words.

Dated this 10th day of December, 2018.

_____
GREGORY M. WEBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 10th day of December, 2018.

_____
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