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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP2355-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM FRANCIS KUEHN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN R. BROSTROM (JUDGMENT) AND THE HONORABLE JEFFREY A. WAGNER (ORDER), PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. Did Defendant-Appellant William F. Kuehn prove that his counsel was ineffective for failing to file a motion to introduce third-party liability evidence under *Denny*?[1]

The circuit court answered: No.

This Court should answer: No.

2. Wisconsin Stat. § 973.042(2) requires the circuit court to impose a child pornography surcharge for each image "associated with the crime." Did the circuit court err when it ordered Kuehn to pay a surcharge for the images associated with 10 counts that were dismissed but read in for sentencing?

The circuit court answered: No.

This Court should answer: No.

3. Did the circuit court err when it ordered, as a condition of extended supervision, that Kuehn have no contact with his girlfriend J.S., the mother of three children?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

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[1] *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

INTRODUCTION

The circuit court accepted Kuehn's guilty plea, finding him guilty of five counts of possession of child pornography. During his colloquy, Kuehn told the circuit court that the facts in the complaint were substantially true and collect. But now Kuehn claims that he is innocent and that his attorney was ineffective for failing to pursue a third-party defense under *Denny*.

Kuehn cannot prevail on this claim. By pleading guilty, he forfeited his right to challenge his counsel's decision not to file a motion to admit third-party liability evidence. Even if he did not forfeit this claim, Kuehn cannot prove that his counsel was ineffective based on his counsel's assessment of the evidence that a *Denny* defense would be "foolish" and "untenable."

Kuehn also claims that the circuit court erred when it ordered surcharges for the 10 dismissed, read-in counts because Wis. Stat. § 973.042(2) only allows the circuit court to order a child pornography surcharge for each conviction. The circuit court properly ordered a surcharge for each image associated with each read-in count because those counts were—in accordance with the surcharge statute—associated with his crime.

Finally, Kuehn argues that the circuit court erroneously exercised its sentencing discretion when it ordered as a condition of extended supervision that he not have contact with his girlfriend J.S., who is also a mother of three children, one of whom is Kuehn's son. Based on Kuehn's crime, his communications with others who were interested in having sex with children, his criminal history, his mental diagnosis, and risk of re-offense, the circuit court's no-contact order was a reasonable and appropriate condition of supervision and did not violate his constitutional rights.

STATEMENT OF THE CASE

The charges. In 2014, the State charged Kuehn with 10 counts of possession of child pornography, contrary to Wis. Stat. § 948.12(1m). (R. 1:1; 4:1.) It later filed an amended information, alleging 15 counts of possession of child pornography against Kuehn. (R. 34:1–2.)

According to the criminal complaint, Google, Inc. reported to the National Center for Missing and Exploited Children (NCMEC) that someone had uploaded a suspected image of child pornography through an account associated with the email address, "bigwill00778@gmail.com." (R. 1:2.) Milwaukee Police Detective Sean Lips identified Internet Protocol (IP) addresses that the user of this Gmail account used to login. (R. 1:2.) Lips linked these IP addresses to several locations, including Aurora Health Care, the Cudahy Public Library, and W.S.'s Cudahy's residence. (R. 1:3.)

Through a warrant, Lips obtained information from Google, Inc. associated with the "bigwill00778" account. (R. 1:4.) The account holder sent an email to another person that included an image of child pornography, and emails to other people asking to trade photos and videos. (R. 1:4.) Lips also observed that the account holder sent an image to another person showing a white male sitting in a vehicle. (R. 1:4.) Through his investigation, Lips identified the person in this photo as Kuehn. (R. 1:4.)

While conducting surveillance of W.S.'s residence, Lips saw Kuehn and W.S. together and also saw Kuehn drive W.S.'s truck. (R. 1:4–5.) Lips later searched a Samsung cellphone that had been seized from the truck and located 10 video files that showed children engaged in sexual activity. (R. 1:4–6.) Lips also located emails between a person Lips believed to be Kuehn and another individual who claimed to be in Germany seeking to exchange videos and pictures. (R. 1:8.)

The State's motion to admit context or other acts evidence. The State moved to admit context and other acts evidence for several purposes. These purposes included Kuehn's connection and control of the seized Samsung cellphone, his use of multiple email accounts to access and trade child pornography, and his sexual interest in children as a motive to commit the crime. (R. 9:1.) At a pretrial hearing, Detective Lips testified to the motion's factual basis. (R. 106:6–30.) The circuit court partially granted the motion, determining that the State's proffered evidence connected Kuehn "and this phone and the child pornography." (R. 106:31.)

The plea agreement. Under the plea agreement's terms, Kuehn agreed to plead guilty to five counts of possession of child pornography. (R. 108:3.) The State agreed that it would move to dismiss the other 10 counts, but that those counts would be read in for sentencing. (R. 108:6.) The parties would be free to argue at the sentencing hearing. (R. 108:6.) Kuehn executed a guilty plea questionnaire form that summarizes the plea agreement. (R. 36:1–2.)

The plea hearing. Kuehn pleaded guilty to five counts of possession of child pornography. (R. 108:8.) Kuehn acknowledged in his questionnaire and at the hearing, that he had read the criminal complaint and that his attorney read it to him. (R. 36:6; 108:11.)

Kuehn agreed that the facts in the complaint were "substantially true and correct." (R. 108:11.) Kuehn acknowledged that he was guilty of the five offenses. (R. 108:11.) Kuehn's trial counsel agreed that the facts contained in the complaint and amended information served as a factual basis for the plea. (R. 108:12.) During the colloquy, Kuehn acknowledged that he and his trial counsel "had pretty substantial conversations about whether to go to trial, how a trial might work out, pros and cons of that and whether to take this plea." (R. 108:12.)

The circuit court accepted Kuehn's guilty pleas to five counts of child pornography possession and granted the State's motion to dismiss and read in the other ten counts of child pornography possession. (R. 108:13.)

The presentence investigation report. The circuit court ordered a presentence investigation report. (108:13.) The agent recommended a 30-year term of imprisonment consisting of a 15-year term of initial confinement and 15-year term of extended supervision. (R. 39:33–34.) The agent requested several conditions of supervision, including sex offender treatment and "No contact with anyone under the age of 17 without the presence of a DOC approved chaperone and prior approval of the agent." (R. 39:34.)

The sentencing recommendations and sentence. The State asked the circuit court to impose a series of consecutive sentences that would effectively result in a 40-year term of imprisonment, consisting of a 20-year term of initial confinement and 20-year term of extended supervision. (R. 103:6.) Kuehn asked the circuit court to impose a 14-year term of imprisonment, consisting of a nine-year term of initial confinement and five-year term of extended supervision. (R. 103:33.) The circuit court imposed a 40-year term of imprisonment, consisting of five consecutive eight-year terms of imprisonment, each consisting of a four-year term of initial confinement and four-year term of extended supervision on each count. (R. 103:47–48.)

The condition of no contact with J.S. The State requested several conditions of supervision, including that Kuehn have "no contact with [J.S.]." (R. 103:26–27.) J.S. was Kuehn's girlfriend and the mother of three children, one of whom is Kuehn's son. (R. 9:16; 39:30, 42–43.) Through his counsel, Kuehn said that he wanted to maintain his relationship with J.S. (R. 103:29, 33.) The circuit court ordered Kuehn to comply with several conditions of

supervision, including "that he have no contact with [J.S.]." (R. 103:45–46.)

The child pornography surcharge. The State requested the circuit court to assess the $500 child pornography surcharge based on the seizure of 462 images. (R. 40:1–2; 103:6–8.) Kuehn argued that he should only be assessed the $500 surcharge for each of his five convictions. (R. 103:8.) The circuit court decided that it could assess the $500 surcharge for each conviction and for the ten dismissed and read-in counts. (R. 103:8–9, 49.)

Kuehn's postconviction motion. Kuehn moved for postconviction relief. (R. 71:1.) He sought plea withdrawal on ineffective assistance grounds, asserting that his counsel should have filed a *Denny* motion alleging that "[W.S.] was the true perpetrator." (R. 71:6.)[2] Both Kuehn and trial counsel testified at an evidentiary hearing. (R. 111:2.)

The circuit court adopted the State's proposed findings of fact when it denied Kuehn's ineffective assistance of counsel claim. (R. 95.) According to the findings of fact,

> 1. In conversations regarding possible defenses at trial, [Kuehn] provided [counsel] with information about [W.S.] and his belief that [W.S.] was the person who possessed child pornography at the times the State alleged [Kuehn] did. [111:9, 12.];
>
> 2. [Counsel] reviewed discovery material containing information about [W.S.] and discussed filing a *Denny* motion with the Defendant. [R. 111:21–23.] [Counsel] also obtained additional information

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[2] Kuehn also claimed that his counsel was ineffective because his counsel improperly promised him that the circuit court would impose the mandatory minimum sentence. (R. 71:11.) The circuit court denied this claim after an evidentiary hearing. (R. 95.) The circuit court determined that trial counsel "did not assure [Kuehn] a specific sentencing outcome." (R. 95.) Kuehn does not appeal this decision. (Kuehn's Br. 6.)

regarding [W.S.]'s possible culpability from [Kuehn]. [R. 111:26–27.];

3. [Counsel] ultimately found that a *Denny* motion would not be successful based on the particular facts of the case and that it would be a "foolish" and "untenable defense." [R. 111:23–26.]

(R. 93:2.) Based on these findings, the circuit court determined that "Trial counsel's assessment that a *Denny* defense would not be successful and could actually reflect poorly on [Kuehn] was a reasonable conclusion based on the evidence, and therefore, [Kuehn] has not demonstrated that counsel was deficient for failing to pursue this defense." (R. 95.)

Kuehn also moved to vacate 10 child pornography surcharges associated with the 10 dismissed, read-in charges. (R. 71:1.) The circuit court denied the motion. (R. 87:3.) It determined that Wis. Stat. § 973.042(2)'s "plain language does not limit the court's authority to impose the surcharge to the counts of conviction." (R. 87:3.) It found "that the sentencing court appropriately exercised its discretion when it imposed the surcharge on the dismissed and read in counts." (R. 87:3.)

Finally, Kuehn moved to vacate the condition of supervision that he not have any contact with J.S. (R. 71:1.) The circuit court denied this motion. (R. 87:3.) It noted that "information in the record indicates that [J.S.] is the mother of children that the defendant appeared to use in an email with another person in an effort to obtain child pornography." (R. 87:3.) Based on the sentencing court's assessment of Kuehn's treatment needs, the postconviction court deemed the no contact provision "reasonable and necessary." (R. 87:4.)

Kuehn appeals.

ARGUMENT

I. Kuehn has not proved that his counsel was ineffective for failing to file a *Denny* motion.

By pleading guilty, Kuehn forfeited his right to argue that his trial counsel was ineffective for failing to file a *Denny* motion. But even if Kuehn did not forfeit this claim, it would still fail because counsel's decision not to file a *Denny* motion was reasonably based on his assessment of the case. Further, even if counsel performed deficiently, Kuehn cannot demonstrate prejudice.

A. Standard of review and legal principles

1. Standards of review

This Court reviews the circuit court's exercise of its discretion to grant or deny a plea-withdrawal motion under an erroneous exercise of discretion standard. *State v. Cain*, 2012 WI 68, ¶ 20, 342 Wis. 2d 1, 816 N.W.2d 177. A circuit court erroneously exercises its discretion "as a matter of law" when it does not allow plea withdrawal after a defendant has proved a denial of a constitutional right. *Id.* ¶ 21.

Whether counsel was ineffective is a question of constitutional fact, which this Court analyzes under a mixed standard of review. *State v. Dillard*, 2014 WI 123, ¶ 86, 358 Wis. 2d 543, 859 N.W.2d 44. The Court "upholds the circuit court's findings of fact unless they are clearly erroneous." *Id.* But this Court independently reviews whether those facts constitute ineffective assistance. *Id.*

2. Post-sentencing plea withdrawal

Plea withdrawal generally. A defendant who seeks to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. *State v.*

Taylor, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482. A manifest injustice may be shown by a claim of ineffective assistance of counsel. *Dillard*, 358 Wis. 2d 543, ¶ 84.

Ineffective assistance of counsel. A defendant alleging ineffective assistance of trial counsel has the burden of proving both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Strickland*, 466 U.S. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. A court should presume that counsel rendered adequate assistance. *Id.*

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

To satisfy the prejudice prong in the plea withdrawal context, the defendant must allege "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted). "As a general matter . . . a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing

prejudice from accepting a guilty plea." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

As the Supreme Court explained, "A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." *Lee*, 137 S. Ct. at 1966. Further, the Supreme Court cautioned that courts assessing prejudice "should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at 1967. Instead, courts should consider "contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

3. The guilty plea waiver rule and forfeiture of ineffective assistance claims unrelated to the plea itself.

In Wisconsin, a knowing and voluntarily guilty plea "constitutes a waiver of non-jurisdictional defects and defenses, including claims of violations of constitutional rights prior to the plea." *Foster v. State*, 70 Wis. 2d 12, 19–20, 233 N.W.2d 411 (1975) (identifying constitutional claims forfeited through a guilty plea).[3] Ineffective assistance of counsel therefore may provide an "exception" to the guilty-plea waiver rule "when the alleged ineffectiveness is put forward as grounds for plea withdrawal." *State v Villegas*, 2018 WI App 9, ¶ 47, 380 Wis. 2d 246, 908 N.W.2d 198. "This is so because . . . a valid guilty plea 'represents a break in the chain of events which has preceded it in the criminal process.'" *Id.* (*citing Tollett v. Henderson*, 411 U.S. 258, 267 (1973)).

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[3] Wisconsin Stat. § 971.31(10) creates a limited statutory exception to the guilty-plea waiver rule. A defendant who pleads guilty may appeal the denial of a motion to suppress evidence or motion challenge the admissibility of a defendant's statement. *Id.*

Both the Supreme Court and Wisconsin courts have limited the types of ineffective assistance claims that a defendant may raise after a guilty plea. When the defendant admits his guilt through a plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to* the entry of the guilty plea." *Tollett*, 411 U.S. at 267 (emphasis added); *Villegas*, 380 Wis. 2d 246, ¶ 47 n.19 (and cases cited therein). Rather, the defendant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*."[4] *Tollett*, 411 U.S. at 267 (cited with approval in *State v. Pohlhammer*, 82 Wis. 2d 1, 4, 260 N.W.2d 678 (1978) (per curiam)).

Thus, when a defendant pleads guilty, a claim of ineffective assistance of counsel is limited to whether counsel ensured that the defendant understood the consequences of a guilty plea, including an understanding of the constitutional rights that he or she waives through the plea. *See State v. Bangert*, 131 Wis. 2d 246, 270–72, 389 N.W.2d 12 (1986) (discussing rights generally). To this end, "defense counsel, too, is obligated to inform the defendant of the nature of the charge, of his constitutional rights which will be waived by virtue of the plea, and of the general legal effect of the guilty or no contest plea." *Id*. at 279.

4. A third-party *Denny* defense

A defendant seeking to admit evidence that a known third party could have committed the crime must satisfy all three prongs of *Denny*'s "legitimate tendency" test. *State v. Wilson*, 2015 WI 48, ¶¶ 52, 65, 362 Wis. 2d 193, 864 N.W.2d 52. First, the motive prong asks, "[D]id the alleged third-party perpetrator have a plausible reason to commit the crime?" *Id*.

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[4] *McMann v. Richardson*, 397 U.S. 759 (1970).

¶ 57. Second, the opportunity prong asks, "[D]oes the evidence create a practical possibility that the third party committed the crime?" *Id.* ¶ 58. Third, the direct-connection prong asks, "[I]s there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?" *Id.* ¶ 59. The defendant must satisfy all three criteria; it is not a balancing test, in which one prong can make up for a defendant's failure to establish another. *Id.* ¶ 64.

A defendant has a constitutional right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). A court may apply the rules of evidence, including rules that exclude *Denny*-type evidence, without violating the defendant's right to present a defense. *Wilson*, 362 Wis. 2d 193, ¶ 102–03 (citing *Holmes*, 547 U.S. at 327). But a court's application of *Denny*'s legitimate tendency test violates a defendant's right to present a defense when it excludes third-party liability evidence based on the "overwhelming evidence against the defendant." *Wilson*, 362 Wis. 2d 193, ¶ 69 (citing *Holmes*, 547 U.S. at 331).

B. By pleading guilty, Kuehn forfeited his right to argue that his trial counsel was ineffective for failing to file a *Denny* motion.

Kuehn pleaded guilty to five counts of possession of child pornography. (R. 108:10.) Despite his admissions of guilt during the plea colloquy (R. 108:11), Kuehn now claims that he is innocent and that his counsel was ineffective for failing to file a *Denny* motion before his pleas (Kuehn's Br. 11–25).

By pleading guilty, Kuehn forfeited his right to challenge a deprivation of his constitutional rights that occurred *before* he pleaded guilty. *See Tollett*, 411 U.S. at 267. Kuehn's claim that his counsel was ineffective for failing to file a *Denny* motion relates to a deprivation that occurred *before* he pleaded guilty. It is not an "attack" on "the voluntary

and intelligent character of his plea." *See Tollett*, 411 U.S. at 267; *Villegas*, 380 Wis. 2d 246, ¶ 47.[5]

Kuehn's guilty plea triggered the guilty plea waiver rule, foreclosing him from subsequently challenging his counsel's effectiveness based on his counsel's decision not to file a *Denny* motion. Kuehn has forfeited his right to assert that his trial counsel was ineffective for failing to file a *Denny* motion. This Court need not consider his plea withdrawal claim further.

C. Based on his guilty pleas, Kuehn cannot prove that counsel's failure to file a *Denny* motion constituted deficient performance.

1. Had Kuehn proceeded to trial, counsel's strategic decision not to file a *Denny* motion would not have constitute deficient performance.

The circuit court determined that trial counsel's performance was not deficient because counsel assessed the evidence and reasonably concluded "that a *Denny* defense would not be successful and could actually reflect poorly on his client." (R. 95:1.) The circuit court's determination regarding the reasonableness of counsel's strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93. The record supports the circuit court's decision.

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[5] In the circuit court, Kuehn asserted that counsel was ineffective because counsel promised him that he would receive the minimum sentence. (R. 71:11.) Had Kuehn appealed the circuit court's denial of this claim (R. 95), the State would not argue that this claim was forfeited because, unlike his *Denny* claim, counsel's alleged misrepresentations about the anticipated sentenced constituted an attack on the voluntary and intelligent nature of the plea itself. *See Pohlhammer*, 82 Wis. 2d at 4 (citation omitted).

Counsel did not perform deficiently because he strategically declined to pursue a *Denny* defense based on a reasonable assessment of the evidence. Counsel testified that he assessed the viability of a *Denny* defense in consultation with Kuehn and after an investigation. (R. 111:22, 31.) Counsel knew that Kuehn claimed that W.S. was present at the library and the health care facility when the Samsung phone was used to access child pornography. (R. 111:26–27.) But according to counsel, the evidence, including Detective Lips's surveillance of Kuehn at the library and records showing Kuehn was treated at the health care facility, did not support the defense. (R. 111:23, 26–27, 33.)

The State's detailed, pretrial proffer demonstrating Kuehn's connection to the Samsung phone informed counsel's assessment of the viability of a *Denny* defense. The State identified the evidence that established Kuehn's connection to the Samsung phone:

- Evidence showed that the Samsung phone was last used as a cellphone in 2013; that Kuehn's ex-girlfriend was listed as the phone's subscriber; and that the billing address belonged to Kuehn's father. (R. 9:9; 106:12–13.)

- Evidence recovered from the Samsung phone showed Facebook exchanges between Kuehn and his ex-girlfriend, whose name appeared on a contact list in the phone. (R. 106:13–14.)

- Call detail for the Samsung phone showed calls between the phone and Kuehn's father, Kuehn's employer W.S., and attorneys who represented Kuehn in several matters. (R. 9:9–10.)

- The Samsung phone was used to access several listed email accounts, which each included the name "will" in the email address. (R. 9:10.) One email address,

"bigwill00778@gmail.com," appeared in the original cybertip.[6] (R. 9:10; 106:14.) Another email address, "100ironwill@gmail.com," linked to a Facebook account associated with the Alcatel phone police seized from Kuehn. (R. 9:10.) The Alcatel phone was "clean" but included links to two email addresses: "bigwilliamk.1978@gmail.com" and "100ironwill@gmail.com." (R. 9:2.)

- Analysis of the Samsung phone showed a Skype account on the Samsung phone under the name, "williamkuehn," along with several accounts under the name "willgood" for a Russian search engine used to share child pornography. (R. 9:10.) "Will" is not a shortened version of W.S.'s first name. (R. 1:3.)

- The "bigwill" email address was used to access IP accounts associated with a fast food restaurant and a library, places where Kuehn admitted using the free wireless. (R. 9:11.) In addition, the "will" email accounts were accessed through a health care facility when Kuehn was being treated there, at his father's residence, and at W.S.'s residence. (R. 9:12; 106:15–16.)

- Lips found email exchanges under the "will" email address in which Kuehn's photographs were shared with other people. (R. 9:17; 106:26–27.) A person using a "will" email also provided an address to another person, an address where Kuehn lived until he was evicted. (R. 9:17.) In another email exchange, a person

[6] This Court has previously described how an Internet Service Provider initiates a cybertip through a referral to NCMEC, which then forwards it to a state or local law enforcement agency for investigation. *See State v. Silverstein*, 2017 WI App 64, ¶¶ 5–6, 378 Wis. 2d 42, 902 N.W.2d 550.

using a "will" email address provided Kuehn's ex-girlfriend's phone number, which was the number assigned to the Samsung phone. (R. 9:18.)

- Call records associated with the Samsung phone also showed calls to Kuehn's attorney-of-record and a guardian ad litem for his children. (R. 9:10.)

Detective Lips's investigation offered further proof that Kuehn was using the phone for child pornography-related purposes:

- Based on the MAC address associated with the Samsung phone, Lips determined that the Samsung phone was used to surf a Russian website used to share child pornography through the Cudahy Public Library's website at the same time that Lips saw Kuehn was parked outside the library. (R. 9:13; 106:17–23.)

- Lips determined that the "will" email accounts found on the Samsung phone were used to send and receive hundreds of images of child pornography and that images found on these email accounts were also found on this phone. (R. 9:15; 106:25.)

- Lips recovered an email exchange between someone using a "will" email address and a person using another email address that showed an intent to exchange photographs of boys. (R. 9:16–17.)

In addition to the extensive circumstantial evidence connecting Kuehn and not W.S. to the Samsung phone's contents, the State also proffered other acts evidence alleging Kuehn's longstanding sexual interests in prepubescent children and evidence that several images depicting naked children were torn from library books that Kuehn had checked out. (R. 9:19–22.)

The compelling circumstantial evidence against Kuehn stood in stark contrast to the evidence that he proffered in support of his theory that W.S. possessed the phone. To establish motive, Kuehn relied on W.S.'s 1985 prosecution for sexual assault of a 14-year-old girl. (Kuehn's Br. 15–16.) To establish W.S.'s opportunity and a direct connection to the Samsung phone used to access child pornography, Kuehn relied on W.S.'s listing as the subscriber for one IP address used to access child pornography, W.S.'s alleged presence with Kuehn at other locations where the phone was used to download child pornography, W.S.'s ownership of the truck, and W.S.'s purported access to the phone. (Kuehn Br. 16–20.) Unlike the evidence linking Kuehn to the accounts on the phone, he has not identified any account activity, lawful or otherwise, that suggested W.S. used this phone.

Contrasting the strength of the evidence against Kuehn and the relative lack of evidence against W.S. reinforced counsel's assessment that a *Denny* defense was not viable.

Kuehn asserts that counsel's unfamiliarity with *Holmes*, including its holding that strong evidence of a defendant's guilt does not foreclose a third-party liability defense, demonstrates his counsel's deficient performance. (Kuehn's Br. 21.) *Holmes* simply holds that a court may not exclude third-party defense because the State has overwhelming evidence of guilt. *Holmes*, 547 U.S. at 331; *Wilson*, 362 Wis. 2d 193, ¶ 69. Neither *Holmes* nor *Wilson* compelled counsel to pursue a third-party defense following an investigation and reasoned assessment of its viability. Counsel testified even if he had been aware of *Holmes*, he would have still decided not to file a *Denny* motion based on the evidence against Kuehn. (R. 111:24–25.)

Counsel made a reasoned decision based on a reasoned assessment of the evidence not to pursue a *Denny* defense. *See State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) ("[S]trategic or tactical decisions must be based upon

rationality founded on the facts and the law."). Kuehn has not overcome the strong presumption that counsel acted reasonably within professional norms. *See Strickland*, 466 U.S. at 690. He has not proved that counsel's decision not to pursue a *Denny* defense constituted deficient performance.

2. Counsel was not deficient for failing to bring a *Denny* motion that would not have succeeded.

"Counsel does not perform deficiently by failing to bring a meritless motion." *State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16. Thus, even if counsel did not have sound strategic reasons for failing to file a *Denny* motion, his performance was not deficient because Kuehn cannot show a reasonable probability that his *Denny* motion would have succeeded. *See*, *e.g.*, *State v. Wheat*, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441. Contrary to his assertion (Kuehn's Br. 15–20), Kuehn cannot satisfy *Denny*'s three prongs for the admission of third-party liability evidence related to his theory that W.S. possessed the child pornography (Kuehn's Br. 15–20).

Kuehn did not demonstrate that W.S. had a plausible reason, i.e., motive, to possess child pornography. *Wilson*, 362 Wis. 2d 193, ¶ 57. Kuehn's proof of W.S.'s motive rests on W.S.'s status as a registered sex offender that resulted from his conviction for sexual-assault involving a 14-year old child in a 1985 prosecution. (Kuehn's Br. 15.) Kuehn's claim of W.S.'s motive is nothing more than a broad assertion grounded in stale propensity evidence, i.e., because W.S. sexually assaulted a 14-year old girl in 1985, he was motivated to possess child pornography depicting younger, prepubescent children almost 30 years later. Standing alone, W.S.'s past sexual assault conviction does not establish that W.S. was motivated to possess child pornography years later.

Kuehn's suggestion that W.S. had the opportunity to commit the crime was marginal at best. (Kuehn's Br. 16–18.) *Wilson*, 362 Wis. 2d 193, ¶ 58. The Samsung phone was found in W.S.'s truck, a truck that Lips saw Kuehn operating. (R. 1:3, 5.) The Samsung phone was used to access the internet at W.S.'s residence. (R. 1:5.) Finally, Kuehn alleged that W.S. was present when the phone was used to access the library's and a health care facility's internet connection when child pornography was downloaded. (R. 111:12.)

Kuehn suggests that because the phone was no longer in active service, it was no longer password protected. (Kuehn's Br. 17–18.) Kuehn's assertion that anyone could access this phone and download child pornography is based on conjecture. (R. 111:37.) But Kuehn has offered no evidence contradicting the State's assertion that the Samsung phone was password protected. (R. 9:2; 106:36.)

But even assuming that Kuehn proved that W.S. had motive and opportunity to possess child pornography, he cannot show a direct connection between W.S. and the crime, i.e., possession of child pornography on the Samsung phone. *Wilson*, 362 Wis. 2d 193, ¶ 59. The State's forensic examination of the phone, as detailed in the complaint and at the pretrial evidentiary hearing, included compelling circumstantial evidence linking Kuehn to the Samsung phone and the accounts used to access and exchange child pornography on the phone. *See* Section I.C.2., *supra*. (R. 1; 9:2–5, 9–18; 106:7–30.) Kuehn has not identified any accounts or other activity on this phone, lawful or otherwise, linked to W.S. Kuehn accordingly cannot show a direct connection between W.S. and the child pornography seized or accessed or transmitted through the Samsung phone.

Because Kuehn cannot show a reasonable probability that his *Denny* motion would have succeeded, he cannot show that counsel performed deficiently for declining to pursue it.

D. Kuehn did not prove that counsel's failure to file a Denny motion prejudiced him.

Kuehn cannot show prejudice because he did not prove that he would not have pleaded guilty and would have gone to trial but for counsel's deficient performance. *Bentley*, 201 Wis. 2d at 312.

Even if Kuehn could satisfy *Denny*'s requirements for introducing third-party liability evidence against W.S., this defense was not viable based on the State's strong evidence linking Kuehn to the Samsung phone. Section I.C., *supra*. Because Kuehn had "no realistic defense" to the child pornography charges, he cannot "show prejudice from accepting a guilty plea that offer[ed] him a better resolution than would be likely after trial." *Lee*, 137 S.Ct. at 1966.

The State was prepared to prosecute Kuehn for 15 counts of possession of child pornography. (R. 34:1–3.) Kuehn's pleas reduced his maximum exposure from a 350-year term of imprisonment to a maximum 125-year term of imprisonment. At the sentencing hearing, the circuit court noted that Kuehn's pleas, albeit on the eve of trial, demonstrated acceptance of responsibility and benefited him through a reduction in his exposure. (R. 103:43.) While the circuit court imposed a 40-year term of imprisonment, 10 years more than the presentence report recommended, Kuehn's pleas provided a better resolution than had he exercised his right to trial. (R. 103:9, 47.)

Kuehn's assertion that he was innocent and would not have pleaded guilty, without more, is insufficient to demonstrate prejudice. (Kuehn's Br. 23–24.) While legal innocence may justify withdraw of a guilty plea, "a defendant's bare protestations of innocence—especially after a knowing and voluntary guilty plea . . . will not suffice . . . The defendant must proffer some credible evidence." *United States v. Hodges,* 259 F.3d 655, 661 (7th Cir. 2001).

Indeed, even before sentencing, a mere assertion of innocence alone is insufficient to warrant plea withdrawal. The defendant must demonstrate a fair and just reason for plea withdrawal by either relying on factors outside of the record or explaining "why it is fair and just to disregard the solemn answers the defendant gave in the colloquy." *State v. Jenkins*, 2007 WI 96, ¶ 62, 303 Wis. 2d 157, 736 N.W.2d 24. Because of the State's interest in the finality of convictions and preventing defendants from testing the waters of possible punishments, these principles should apply with even greater force when a defendant seeks to withdraw a plea postconviction under the manifest injustice standard. *See State v. Cross*, 2010 WI 70, ¶ 42, 326 Wis. 2d 492, 786 N.W.2d 64.

Kuehn ignores the solemn answers he gave during his plea colloquy, including his admission that he was guilty and the facts in the complaint were substantially true and correct. (R. 108:10–11.) While Kuehn has suggested that W.S. is guilty of the crimes, he has not asserted that the allegations in the complaint, including those connecting him to accounts and activity on the phone, are untrue. Nor has Kuehn offered credible evidence that undermines the complaint's allegations.

Kuehn did not prove that, but for counsel's decision not to file a *Denny* motion, that he would not have pleaded guilty and would have gone to trial. *Bentley*, 201 Wis. 2d at 312. Therefore, he has not proved prejudice, and this court should reject his ineffective assistance of counsel claim.

II. Section 973.042(2) permitted the circuit court to assess a child pornography surcharge for dismissed and read-in counts because those counts are "associated with the crime."

A. Standard of review and legal principles

Whether section 973.042(2) allowed the circuit court to assess a surcharge for each image related to each dismissed count presents a question of statutory interpretation that this Court reviews independently. *State v. Grandberry*, 2018 WI 29, ¶ 11, 380 Wis. 2d 541, 910 N.W.2d 214.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* ¶ 45. Both a statute's context and the structure "in which [its] operative language appears" is important to its meaning. *Id.* ¶ 46. "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

Wisconsin Stat. § 973.042(2) provides in relevant part, "If a court imposes a sentence . . . for a crime under . . . [s.] 948.12 . . . the court shall impose a child pornography surcharge of $500 for each image or each copy of an image associated with the crime." The circuit court "shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury." *Id*. Section 973.042(1) defines an image to includes "a video recording, a visual representation, a positive or negative image on exposed film, and data representing a visual image."

B. Section 973.042(2) authorized the circuit court to order a surcharge for each image associated with Kuehn's crimes, including the images that formed the basis for the 10 read-in counts.

Section 973.042(2)'s plain language expressly contemplates that the surcharge is based on the number of images, not convictions. By requiring a surcharge "for each image associated with the crime," the Legislature expressly contemplated that courts would assess the surcharge based on the total number of images, not convictions. The only issue is whether a particular image is "associated with the crime." "Crime" does not refer to any crime under the code. Rather, it refers to the crimes referenced in section 973.042(2): sexual exploitation of a child, contrary to Wis. Stat. § 948.05, and possession of child pornography, contrary to Wis. Stat. § 973.042.

Section 973.042(2)'s second sentence confirms the interpretation that the surcharge is assessed based on a per image and not per conviction basis. It requires the court to "determine the number of images" "associated with the crime by a preponderance of the evidence." *Id* (the court "shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury."). Kuehn's suggestion that the court may only impose a surcharge for each conviction would render this second sentence superfluous. *See Meyer v. Meyer*, 2000 WI 132, ¶ 22, 239 Wis. 2d 731, 620 N.W.2d 382 (courts interpret statutes to avoid a construction that results in rendering statutory language superfluous). There would be no reason for a court to conduct a hearing "to determine the number of images" "by a preponderance of the evidence" if the court based the surcharge on the number of convictions.

Had the Legislature intended to limit the court's authority to impose a surcharge on a per conviction basis as

Kuehn advocates, it would have drafted section 973.042(2) differently. It would have tracked the language of other surcharge statutes in Chapter 973 that direct circuit courts to assess a surcharge on a per conviction or per count basis.[7] *See Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 36, 341 Wis. 2d 607, 815 N.W.2d 367 ("[I]f the legislature had intended to accomplish what a party is urging on the court . . . the legislature knew how to draft the language and could have done so had it wished.") The Legislature has demonstrated its ability to impose other surcharges under Chapter 973 on a per conviction basis. Its deliberate choice of different language when it drafted section 973.042(2) demonstrates that it did not intend to limit the court's authority to impose a surcharge on a per conviction basis. Instead, it intended to authorize courts to order surcharges based on the number of images associated with a defendant's conviction for possession of child pornography.

Kuehn asserts that if the Legislature had intended to allow a surcharge for dismissed but read-in counts, it would have drafted the statute like the restitution statute, Wis. Stat. § 973.20. (Kuehn's Br. 28–29.) Under section 973.20(1r), a court shall order restitution for "a crime considered at sentencing." A "crime considered at sentencing" includes "any read-in crime," which includes offenses that were either uncharged or dismissed as part of a plea agreement. Wis. Stat. § 973.20(1g). Thus, when a court orders restitution at

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[7] *See, e.g.*, Wis. Stat. § 973.043(1) (drug offender diversion surcharge imposed "for each conviction"); Wis. Stat. § 973.045(1)(a) (victim/witness surcharge imposed for "each misdemeanor count on which a conviction occurred"); Wis. Stat. § 973.045(1)(b) (victim/witness surcharge imposed for "each felony count on which a conviction occurred"); Wis. Stat. § 973.0455(1) (crime prevention funding board surcharge calculated by "adding up, for each misdemeanor or felony count on which a conviction occurred"); and Wis. Stat. § 973.046(1r)(a)–(b) (DNA surcharge imposed for "each conviction for a felony" and "each conviction for a misdemeanor").

sentencing, it may order restitution for any read-in offense, including crimes that were neither legally nor factually connected to the crime of conviction.

In contrast, when a court calculates the applicable surcharge under section 973.042(2), it does so based on the total number of images associated with the crime. It does not matter whether the images that formed the basis for either separate counts that were dismissed and read in or additional counts that were never charged. The only requirement is that the images must be "associated with" the crime of sexual exploitation of a child or possession of child pornography. Wis. Stat. § 973.042(2).

Here, the record demonstrates that the court ordered surcharges for images associated with Kuehn's crime of possession of child pornography. Kuehn pleaded guilty to Counts 1, 11, 12, 14, and 15 of the amended information. (R. 34:1–3; 108:6.) The court dismissed and read-in Counts 2 through 10 and Count 13 for sentencing. (R. 108:13.) At sentencing, the court determined that the images associated with the 10 dismissed and read-in counts were associated with child pornography. (R. 103:9.)

The record supports the circuit court's determination. Based on the criminal complaint, the circuit court could reasonably determine that the images identified in Counts 2 through 10 constituted child pornography and, therefore, were associated with Kuehn's convictions for the crime of possession of child pornography. (R. 1:6–7.) Similarly, based on the amended information's description of the image associated with the Count 13, the other dismissed and read-in count, the circuit court could reasonably determine that this image constituted child pornography and, therefore, was

associated with Kuehn's convictions for possession of child pornography. (R. 34:2.)[8]

The circuit court did not err when it ordered Kuehn to pay a $500 surcharge for each image identified in the complaint and amended information that constituted child pornography.

III. The circuit court soundly exercised its discretion when it ordered Kuehn to have no contact with his girlfriend J.S. as a condition of extended supervision.

As a condition of extended supervision, the circuit court ordered Kuehn to have no contact with his girlfriend J.S. (R. 103:46.) For the following reasons, the no-contact condition is neither unreasonable nor unconstitutional because it is reasonably related to the objectives of Kuehn's sentence.

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[8] The court declined the State's request to order surcharges for all 462 images that officers seized. (R. 40:2; 103:9.) But if it had granted this request, Kuehn might well argue that any interpretation of section 973.042(2) that permits a court to assess a surcharge based on the total number of images seized in an investigation could lead to astronomical assessments. If the surcharges imposed in a particular case were "grossly disproportionate to the gravity of an offense," the Eighth Amendment's Excessive Fines Clause might well limit a court's authority to impose a surcharge for each image. *See Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019). But this issue is not before the court because Kuehn has not raised an Eighth Amendment challenge.

A. Standard of review and legal principles

1. Reasonable and appropriate conditions of supervision

This Court reviews conditions of extended supervision "under the erroneous exercise of discretion standard to determine their validity and reasonableness measured by how well they serve their objectives: rehabilitation and protection of the state and community interest." *State v. Stewart*, 2006 WI App 67, ¶ 11, 291 Wis. 2d 480, 713 N.W.2d 165 (citations omitted).

Wisconsin Stat. § 973.01(5) authorizes a court to "impose conditions upon a term of extended supervision." Courts possess "broad, undefined discretion" to impose conditions of extended supervision, subject only to the requirement that the conditions are "reasonable and appropriate." *State v. Galvan*, 2007 WI App 173, ¶ 8, 304 Wis. 2d 466, 736 N.W.2d 890 (citations omitted). Conditions of supervision are "reasonable and appropriate" if they serve the goals of supervision, including the rehabilitation of the defendant and protecting the society and potential victims from the defendant. *State v. Koenig*, 2003 WI App 12, ¶ 7, 259 Wis. 2d 833, 656 N.W.2d 499. "A condition reasonably relates to the goal of rehabilitation when it assists the offender in conforming his or her behavior to the law." *State v. Fisher*, 2005 WI App 175, ¶ 17, 285 Wis. 2d 433, 702 N.W.2d 56 (citation omitted.)

2. Constitutionally overbroad conditions of supervision

The constitutionality of a condition of extended supervision presents a legal question that this Court reviews independently. *State v. Oakley*, 2001 WI 103, ¶ 8, 245 Wis. 2d 447, 629 N.W.2d 200 (challenge to probation condition) *modified on other grounds*, 2001 WI 123, 248 Wis. 2d 654, 635

N.W.2d 760; *see also State v. Rowan*, 2012 WI 60, ¶ 10, 341 Wis. 2d 281, 814 N.W.2d 854 (analyzing challenge to constitutionality of extended supervision under same test used to analyze condition of probation).

"[C]onvicted individuals do not enjoy the same degree of liberty as citizens who have not violated the law." *Oakley*, 245 Wis. 2d 447, ¶ 17. Therefore, conditions of supervision "may impinge upon constitutional rights as long as they [1.] are not overly broad and [2.] are reasonably related to the person's rehabilitation." *Rowan*, 341 Wis. 2d 281, ¶ 10 (citation omitted). "A condition is reasonably related to the person's rehabilitation if it assists the convicted individual in conforming his or her conduct to the law." *Id.* (citation omitted). Further, "when determining what individualized [supervision] conditions are appropriate," circuit courts may consider "an end result of encouraging lawful conduct," which increases the public's protection. *Id.* (citation omitted). Thus, in determining whether a condition of supervision is overbroad a court does not apply strict scrutiny. *Oakley*, 245 Wis. 2d 447, ¶ 16 n.23.

B. The circuit court's no-contact condition was a reasonable condition of supervision.

The circuit court reasonably prohibited Kuehn from having contact with J.S. as a condition of supervision. (R. 103:46.) The circuit court did not detail its reason for this no-contact condition, but this Court may search the record to determine whether it can sustain the circuit court's exercise of sentencing discretion. *State v. Young*, 2009 WI App 22, ¶ 29, 316 Wis. 2d 114, 762 N.W.2d 736. The record supports the circuit court's imposition of the supervision condition prohibiting Kuehn from having contact with J.S.

The State asked the circuit court to order several conditions of extended supervision, including no contact with children generally and "no contact with [J.S.]." (R. 103:26–27.)

When Kuehn committed the offense, his girlfriend J.S., had two boys, a 10-year-old and a 2-year-old, and a third son with Kuehn. (R. 9:17; 39:25, 30.) He also had two boys with his ex-wife, including an 11-year-old and a 9-year-old. (R. 9:17; 39:24–25.) Although there was no evidence to suggest that Kuehn had offended against J.S.'s boys (R. 103:29), the circuit court could reasonably determine that Kuehn posed a danger to those boys based on an email exchange between Kuehn and an unnamed individual (R. 1:8; 41; 103:37).

According to the complaint, Kuehn asked the unnamed individual if he was interested in "boys or girls[.] I have three sons." (R. 1:8.) When the other individual asked Kuehn the ages of his boys, Kuehn replied, "3, 6 1/2, & 10." (R. 1:8.) Later, Kuehn told the other individual, "[Y]ou can have my boys[,] how much will you pay[?]" (R. 1:8.) The unnamed person replied, "400 for both?" (R. 1:8.)

The circuit court was reasonably troubled by this email exchange, commenting, noting "I don't know what you were intending with those e-mails with your stepchildren." (R. 1:8; 41; 103:37.) And based on J.S.'s apparent interest in maintaining a relationship with Kuehn (R. 103:29), the circuit court was very concerned about the danger that Kuehn posed. "I can tell you that if I were the mother of those boys, I would not let you anywhere near them." (R. 103:37.)

Kuehn's email exchange, in conjunction with his past offense history, his pedophilia diagnosis, and his significant treatment needs, reinforced the circuit court's assessment that Kuehn posed "a grave danger to society," including to J.S.'s children. (R. 103:16–20, 24, 37, 45.) Further, because of J.S.'s apparent interest in maintaining a relationship with Kuehn based on her appearance at his sentencing hearing (R. 103:29, 33), the circuit court could reasonably determine that it was necessary to protect J.S.'s children from Kuehn by prohibiting him from contacting J.S.

Recognizing the reasonableness of the no-contact condition, Kuehn did not object to it at sentencing. Instead, his counsel acknowledged Kuehn "wants to have a relationship with [J.S.] in the future, but he understands that he needs to go through treatment, which is going to take some time before that can happen." (R. 103:33.)

Relying on the sentencing court's assessment of Kuehn's significant treatment needs, the postconviction court reaffirmed the sentencing court's condition prohibiting contact with J.S. (R. 87:4; 103:46.) Based on its review of the record, the postconviction court reasonably determined that Kuehn had "virtually no chance of successful rehabilitation and no chance of being a suitable companion for [J.S.] or a stepfather for her children" unless he devoted his full attention to "address[ing] his deviant sexual behavior." (R. 87:4.) The postconviction court did not permanently etch the no-contact provision in stone. Rather, it expressed a willingness to reconsider it based on the supervising agent's recommendation. (R. 87:4.)

The circuit court's no-contact provision prohibiting Kuehn from having contact with J.S. reasonably related to Kuehn's rehabilitation and the protection of the public, including J.S. and her children. Therefore, the circuit court did not erroneously exercise its discretion when it imposed this condition.

C. The circuit court's no-contact condition does not violate Kuehn's constitutional rights.

The no-contact provision does not violate Kuehn's constitutional rights because it is not overly broad and reasonably relates to his rehabilitation. *See Rowan*, 341 Wis. 2d 281, ¶ 10. Kuehn's acknowledgment that he needs treatment before he can have a relationship with J.S. and the circuit court's independent determination that Kuehn had

significant treatment needs demonstrates the reasonableness of the no-contact provision. *See* Section III.B., *supra*. These conditions are reasonable because they will assist Kuehn in conforming his conduct to the law and, therefore, will increase public protection. *See Rowan*, 341 Wis. 2d 281, ¶ 10.

The challenged no-contact provision was neither overbroad nor unduly restrictive. The circuit court did not prohibit Kuehn from having contact with any adult females. Rather, it only prohibited him from having contact with J.S., the mother of two boys whom Kuehn appeared to offer to an unnamed person for $400. Section III.B., *supra*.

The circuit court had a strong interest in protecting J.S.'s boys from Kuehn's predatory behavior in light of J.S.'s apparent unwillingness to terminate her relationship with Kuehn. And based on Kuehn's recognition that he needed to go through treatment before he could have a relationship with J.S. (R. 103:32–33), the circuit court's decision to prohibit Kuehn from having contact with her was reasonably related to Kuehn's rehabilitation. The no-contact condition did not violate Kuehn's constitutional rights.

Nonetheless, relying on *Stewart*, Kuehn argues that the no-contact with J.S. condition violates his constitutional rights. (Kuhn's Br. 33–34.) In *Stewart*, this Court struck down a broad geographic ban that prohibited Stewart from entering an entire township because other more narrowly drawn conditions, including no contact with his victims, protected the victims and aided his rehabilitation. *Stewart*, 291 Wis. 2d 480, ¶ 2, 16–17. Unlike *Stewart*, the circuit court's no-contact condition here does not impose a broad geographic ban. Rather, like the no-contact provisions that this Court upheld in *Stewart, id*. ¶ 17, the no-contact condition here is more narrowly tailored to achieving the goals of supervision, including protection of J.S.'s children and Kuehn's rehabilitation. Indeed, Kuehn himself recognized that he

needed treatment before he could have a relationship with J.S. (R. 103:33.)

The circuit court reasonably exercised its discretion when it prohibited Kuehn from having any contact with J.S. as a condition of supervision. The condition was narrowly tailored based on the underlying facts of the case and furthered Kuehn's rehabilitation. It was not overly broad and not unduly restrictive of his liberties.

CONCLUSION

This Court should affirm Kuehn's judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 26th day of June 2019.

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 8,716 words.

____
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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 26th day of June 2019.

____
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