STATE OF WISCONSIN

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

DISTRICT II

Case No. 2020AP616-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY M. SCHMIDT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE PHILLIP A. KOSS PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes

Page

ISSUES PRESENTED

1. Wisconsin Stat. § 973.042(2) requires the circuit court to impose a child pornography surcharge for each image "associated with the crime." Is the surcharge punishment, which would require courts to inform the defendant that a guilty plea may subject him to the surcharge?

The circuit court answered: No.

This Court should answer: No.

2. Did the court properly impose the $500 surcharge against Schmidt pursuant to Wis. Stat. § 973.042(2) for each of the eight child pornography images that were dismissed but read in?

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT

Oral argument is unnecessary because the facts are not disputed, and the issues presented will be adequately addressed in the briefs. Publication would be appropriate, however. There are no Wisconsin cases addressing whether the surcharge required by Wis. Stat. § 973.042(2) is nonpunitive.

INTRODUCTION

States routinely impose statutory fees or surcharges on criminal defendants to offset burdens related to the administration of the criminal justice system. One example is the child pornography surcharge, Wis. Stat. § 973.042, which requires courts to impose a $500 surcharge on each image associated with the crimes of possession of child pornography (section 948.12) and sexual exploitation of a child (section

948.05[1]). The proceeds from the surcharge go toward funding criminal investigations of child pornography possession and sexual exploitation of a child, and toward providing treatment, educational, and advocacy services for sexual assault victims.

Schmidt was charged with 14 counts of possession of child pornography. (R. 13.) He pled guilty to six of those counts. (R. 27.) The remaining eight counts were dismissed but read in at sentencing. (R. 27:3.) The court found that all 14 charged images were associated with Schmidt's crimes. (R. 40:25.) Thus, the court imposed a $500 surcharge on each image, totaling $7,000. (R. 27:2; 40:25.)

On appeal, Schmidt argues that the child pornography surcharge is punitive and, therefore, must be included in the plea colloquy. (Schmidt's Br. 4–11.) He also argues that section 973.042 allows the surcharge to be imposed only on the image that forms the basis of the conviction. (Schmidt's Br. 14–17.) Because Schmidt's convictions were each based on a single image, he argues that the surcharge should be reduced to $3,000.

Schmidt is wrong. The child pornography surcharge is purely remedial and, thus, does not need to be included in the plea colloquy. Imposing the surcharge on each associated image requires those who are most responsible for the increased costs of combating child pornography and treating sexual assault victims to make a substantial contribution towards offsetting those costs. That is a remedial, not a punitive, purpose.

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[1] Sexual exploitation of a child addresses the creation and dissemination of child pornography. It prohibits, *inter alia*, recording a child engaged in sexually explicit conduct as well as distributing, or possessing with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct. Wis. Stat. § 948.05(1)(b), 948.05(1m).

And, the circuit court properly ordered the surcharge for all 14 images. Each of those images was—in accordance with the surcharge statute—associated with his crime of possession of child pornography.

STATEMENT OF THE CASE

Background and investigation. On December 3, 2014, Schmidt was convicted of one count of possession of child pornography in Walworth County Circuit Court Case No. 2014CF106. (R. 22:8, 15.) He was sentenced to six years, consisting of three years' confinement and three years' extended supervision. (R. 22:8.)

On November 28, 2017, Schmidt was released to extended supervision. (R. 22:6.) A little more than a month after his release, Schmidt began downloading child pornography. (R. 22:6.) The downloaded images involved children as young as four years old engaging in sexual contact, and children as young as seven years old engaging in sexual intercourse. (R. 22:5–6.) He also uploaded some of the images to his Google Cloud account. (R. 22:6.)

In October 2018, Google contacted Wisconsin authorities informing them that an account linked to Schmidt had been used to upload images that appeared to contain child pornography. (R. 22:3.) Based on that tip, the Walworth County Sheriff's Department began an investigation. (R. 22:3–4.)

In November 2018, officers went to Schmidt's place of employment to interview him. (R. 11:4.) During the interview, Schmidt admitted that he used his cell phone to look at child pornography. (R. 11:5.) He told the officers that he hid the phone in the bathroom stall at work. (R. 11:5.) When officers searched the bathroom stall, they found Schmidt's phone stuffed behind a toilet paper roll. (R. 11:5.) A preliminary

search of the phone revealed approximately 4,500 images that appeared to be child pornography. (R. 11:5.)

Police also executed several search warrants. (R. 8; 9; 10.) They seized numerous items including a laptop computer, flash drives, and SD cards.[2] (R. 8; 9; 10; 22:4.) A preliminary search of the laptop revealed numerous images of young girls in lewd poses. (R. 22:4.) A search of one of the SD cards revealed various images of a young girl sleeping. (R. 22:7.) The images focused on the young girl's buttocks, feet, and face. (R. 22:7.) The metadata showed the images were taken with Schmidt's phone. (R. 22:3.) Schmidt admitted that the girl in the photos was his girlfriend's 12-year-old relative, and that he took the photos for his own sexual pleasure. (R. 22:7.)

Charges. As a result of the 2018 investigation, Schmidt was charged with 14 counts of possession of child pornography in violation of Wis. Stat. § 948.12. (R. 13:1–5.) He was also charged with one count of violating the sex offender registry stemming from his 2014 possession of child pornography conviction. (R. 13:6; 22:8.)

Plea and sentence. Schmidt pled guilty to six counts of child pornography. (R. 27.) The remaining eight counts of child pornography, as well as the count of violating the sex offender registry, were dismissed but read in at sentencing. (R. 27:3.)

At the sentencing hearing, the prosecutor recommended that Schmidt be sentenced to 15 years' confinement followed by 15 years of extended supervision. (R. 40:9.) The prosecutor's recommendation was based, in part, on the fact that Schmidt had been previously convicted of possessing child pornography. (R. 40:9.) The prosecutor also recommended that the court impose the child pornography

[2] A Secure Digital or "SD" card, is a non-proprietary memory card format for use in portable devices.

surcharge on "each of the 14 [images] charged in this case." (R. 40:10.) Neither Schmidt nor Schmidt's attorney addressed the child pornography surcharge.

The court sentenced Schmidt to 10 years on all six counts, consisting of five years' confinement and five years' extended supervision. (R. 27:1.) Counts 1, 2, and 3 were consecutive to each other. (R. 27:2; 40:26.) Counts 4, 5, and 6 were also consecutive to each other, but concurrent with counts 1, 2, and 3. (R. 27:2; 40:26.) All six counts were consecutive to his 2014 possession of child pornography conviction. (R. 27:2; 40:26.)

The court also found that all 14 charged images were associated with Schmidt's crimes and, therefore, imposed the $500 surcharge on each image. (R. 40:25.) After imposing sentence, the court asked defense counsel if "any clarifications" were needed. (R. 40:26.) The attorney responded, "No." (R. 40:26.)

Schmidt subsequently filed a postconviction petition alleging that the circuit court failed to inform him of a punishment, i.e., the child pornography surcharge, that stemmed from his guilty plea. (R. 42:3–8.) Schmidt requested "an order: 1) allowing him to withdraw his guilty pleas; 2) vacating the child pornography surcharges; and 3) granting a hearing on [both issues]." (R. 42.)

The circuit court denied the motion without a hearing based on its conclusion that the child pornography surcharge is not a punishment. Specifically, the circuit court agreed with Schmidt's concession that the surcharge is not punitive in intent. (R. 30:2.) The court then applied the seven factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and found that the surcharge is not punitive in effect. (R. 30:2–3.) Thus, the court concluded that the surcharge need not be included in the plea colloquy. (R. 30: 2–3.)

The court also concluded that the surcharge was properly imposed on the dismissed but read-in charges. In reaching that conclusion, the court first noted that, "[h]ad the Legislature wished to contain the parameters of the surcharge [to the images forming the basis of the conviction as Schmidt contends,] they could have easily done so." (R. 30:5.) "[H]owever, they chose not to construct the statute is such a fashion." (R. 30:5.) The court also noted that, "had the Legislature wished to keep the surcharge only available for the number of convictions, there would be no conceivable reason to have the Court determine the number of images associated with the crime by a preponderance of the evidence." (R. 30:5.) That's because "[c]ounting the number of charges convicted of is not a complicated process that requires a separate determination by the Court." (R. 30:5.)

This appeal follows.

ARGUMENT

I. The surcharge required by Section 973.042(2) is not punishment and, thus, it need not be included in a plea colloquy.

A. Standards of review.

In determining whether a surcharge is punitive in effect and thus a punishment that must be included in a plea colloquy, this Court applies de novo review. *State v. Muldrow*, 2018 WI 52, ¶ 25, 381 Wis. 2d 492, 912 N.W.2d 74.

This Court determines the sufficiency of the plea colloquy and the necessity of an evidentiary hearing independently of the circuit court but benefiting from its analysis. *State v. Hoppe*, 2009 WI 41, ¶ 17, 317 Wis. 2d 161, 765 N.W.2d 794.

B. Legal principles.

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 include "a video recording, a visual representation, a positive or negative image on exposed film, and data representing a visual image."

A defendant who enters a guilty plea waives numerous constitutional rights. *State v. Bangert*, 131 Wis. 2d 246, 270, 389 N.W.2d 12 (1986). Accordingly, a circuit court may accept a guilty plea only when it has been made knowingly, voluntarily, and intelligently. *Id.* at 257–61. However, once convicted, a defendant carries a "heavy burden" for post-sentencing plea withdrawal even when the claim is that the plea was not knowingly, voluntarily, and intelligently entered. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. "[O]nce the guilty plea is finalized, the presumption of innocence no longer exists" and the "state's interest in finality of convictions requires a high standard of proof to disturb that plea." *Id.* (citation omitted). As such, plea withdrawal is limited to circumstances where there is "a serious flaw in the fundamental integrity of the plea." *Id.* (citation omitted).

In the *Bangert* context, a serious flaw is established by a prima facie showing that the circuit court violated Wis. Stat. § 971.08 or other mandatory duty set forth by law and the defendant did not know or understand the information that the court should have provided. *State v. James Brown*, 2006

WI 100, ¶ 36, 293 Wis. 2d 594, 716 N.W.2d 906.[3] As relevant here, a court must inform a defendant of the range of punishments to which he is subjecting himself by entering a plea. *Id*. ¶ 35.

The intent-effects test is used to determine whether a sanction rises to the level of punishment. *State v. Fugere*, 2019 WI 33, ¶ 37, 386 Wis. 2d 76, 924 N.W.2d 469. Under the intent-effects test, the court first looks to the statute's primary function to determine the intent of the statute. *Id*. ¶ 38. "If the law's intent is not punitive, the court considers whether it is nonetheless punitive in effect." *Id*. Courts consider whether the statute's effect is "penal or regulatory in character." *Id*. (citation omitted).

To aid in the determination of the statute's effect, courts consider the seven factors outlined in *Mendoza-Martinez*, 372 U.S. at 168–69. Those factors are whether: 1) the sanction involves an affirmative disability or restraint; 2) the sanction has historically been regarded as a punishment; 3) the sanction comes into play only on a finding of scienter; 4) the sanction's operation will promote the traditional aims of punishment-retribution and deterrence; 5) the behavior to which the sanction applies is already a crime; 6) an alternative purpose to which the sanction may rationally be connected is assignable for it; and 7) the sanction appears excessive in relation to the alternative purpose assigned. *Id*.

"[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated

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[3] The statute requires the court to "determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted," and to advise the defendant of the possible deportation and related consequences of the plea. Wis. Stat. § 971.08(1). In *Brown*, the supreme court set forth a list of additional topics that must be covered in a plea colloquy. *State v. Brown*, 2006 WI 100, ¶¶ 34–35, 293 Wis. 2d 594,716 N.W.2d 906. .

a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997).

C. The child pornography surcharge is not punishment.

Section 973.042 imposes a surcharge on defendants convicted of either the crime of possession of child pornography or the sexual exploitation of a child. The number of surcharges imposed depends on the number of images the court determines to be associated with the crime. Wis. Stat. § 973.042(2). Once the number of images associated with the crime is determined, a surcharge of $500 per image is imposed. *Id*.

By statute, all of the money received from the surcharge is used to fund two things: 1) investigations of possession of child pornography and sexual exploitation of a child offenses; and 2) grants to eligible public agencies or nonprofits that provide counseling services to victims of sexual assault. Wis. Stat. §§ 20.455(5)(gj), 165.93(2)(a). Thus, the surcharge serves the purely remedial purposes of reimbursing the State for funds expended to combat child pornography, and of funding the treatment of sexual assault victims.

Schmidt acknowledges that the intent of the child pornography surcharge is remedial. (Schmidt's Br. 5.) However, he argues that the effect of the surcharge is punitive. (Schmidt's Br. 8–11.) Schmidt is wrong. Six of the seven *Mendoza-Martinez* factors weigh heavily in favor of a finding that the sanction has a non-punitive effect.

First, the surcharge does not impose an affirmative disability or restraint. Schmidt contends that the surcharge imposes an affirmative disability or restraint due to the "high level of financial harm" it causes. (Schmidt's Br. 8.) However, contrary to Schmidt's contention, the surcharge does not impose a "high level of financial harm." Instead, it is set at a fixed rate of $500. And, while such a surcharge will

undoubtedly have a negative impact on a defendant's financial resources, Schmidt fails to explain how financial harm qualifies as an affirmative disability or restraint for purposes of the intents-effects test. *See Hudson*, 522 U.S. at 104 (the sanctions imposed must involve "an 'affirmative disability or restraint' *as that term is normally understood*") (emphasis added). Nonetheless, the surcharge does not impose an affirmative disability or restraint. For example, it does not involve physical restraint, "which is the paradigmatic affirmative disability or restraint." *Smith v. Doe*, 538 U.S. 84, 100 (2003). Nor does it restrict employment opportunities, housing opportunities, or travel.

Second, surcharges have historically been regarded as non-punitive in nature. The child pornography surcharge is explicitly set forth in Wis. Stat. § 814.76(1j). That provision sets out a list of 26 "[s]urcharges in criminal actions." *Id.* Section 814.76 makes a clear distinction between "a *fine* imposed in a criminal action" and a *surcharge* imposed in that action. That the Legislature has historically regarded a "surcharge" as being separate from a "fine" supports the conclusion that the section 973.042 surcharge does not have a punitive effect. *See State v. Scruggs*, 2017 WI 15, ¶ 21, 373 Wis. 2d 312, 891 N.W.2d 786 (noting the distinction between a fine versus a surcharge in concluding that the DNA surcharge is not punitive).

Third, the surcharge does not have a scienter requirement. The surcharge is contingent upon the conviction of either the crime of possession of child pornography or sexual exploitation of a child. Wis. Stat. § 973.042(2). However, no scienter is required for the imposition of the surcharge. The defendant's state of mind is irrelevant. As such, this factor weighs in favor of a finding that the surcharge has a non-punitive effect. *See Scruggs*, 373 Wis. 2d 312, ¶ 42 (finding the DNA surcharge not punitive, in part, because it lacks scienter requirement given that it is "imposed

against any person convicted of a felony, without regard to the defendant's state of mind"); *see Muldrow*, 381 Wis. 2d 492, ¶ 53 (noting that, although lifetime GPS tracking and Ch. 980 civil commitments are both contingent upon criminal convictions, no scienter is required for either the imposition of lifetime GPS tracking or civil commitment.).

Admittedly, the fourth factor does not support a non-punitive effect because the behavior to which the surcharge applies – sexual exploitation of a child and possession of child pornography – is already a crime. *See* Wis. Stat. §§ 948.05, 948.12. However, that single factor is "insufficient to render a monetary penalty criminally punitive." *See Scruggs*, 373 Wis. 2d 312, ¶ 43 (expressly noting that the DNA surcharge is non-punitive despite that the surcharge "applies to behavior that is already a crime").

Fifth, the child pornography surcharge does not serve the "traditional aims of punishment – retribution and deterrence." *Id*. ¶ 41. Possession of child pornography is a Class D felony. Wis. Stat. § 948.12(3)(a). The maximum penalty for a possession of child pornography conviction is a fine up to $100,000 and up to 25 years imprisonment, or both. Wis. Stat. § 939.50(3)(d). Thus, the relatively small surcharge of $500 is further evidence that it is not retributive or a deterrent. *See Scruggs*, 373 Wis. 2d 312, ¶ 45 ("relatively small size" of the "surcharge indicates that it does not serve the traditional aims of punishment").

The sixth factor, whether the surcharge may be rationally connected to an alternative, non-punitive purpose, is the "'the most significant factor' in determining whether the effect of a sanction is punitive." *Muldrow*, 381 Wis. 2d 492, ¶ 57 (citation omitted). And, as Schmidt concedes, the surcharge clearly is connected to a non-punitive purpose. (Schmidt's Br. 10–11.) As explained on pages 8–9 above, the surcharge is intended to defray the State's costs associated with combatting child pornography and treating victims of

sexual assault. By linking the surcharge to the two offenses that involve child pornography, the State is merely placing the cost on those who are responsible for those expenses.

Schmidt contends that the seventh factor weighs in favor of finding that the statute has a punitive effect by arguing that the $500 sanction is excessive in relation to its purpose. (Schmidt's Br. 10–11.) However, Schmidt does not provide any explanation or evidence that the amount is excessive. Instead, he merely concludes that "there is not a rational connection between the large amounts of revenue that may be collected pursuant to the statute and those objectives the legislature has funded with those monies." (Schmidt's Br. 11.) By failing to provide any factual support for his claim, Schmidt fails to meet his burden of establishing that the amount of the surcharge is excessive in relation to its purpose. *See Scruggs*, 373 Wis. 2d 312, ¶ 48 (finding that Scruggs failed to meet his burden of proving that the DNA surcharge was a fine because he "offered nothing to suggest that [the DNA surcharge] is excessive or that it bears no relation to the costs it is intended to compensate.") Regardless, Schmidt is wrong.

The market for child pornography is "intrinsically related" to the sexual abuse of children. *United States v. Stevens*, 559 U.S. 460, 471 (2010). And, the sexual abuse of children can cause lifelong harm. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) ("the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child"). That harm is not just limited to the children but extends to the rest of society. *New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982) ("[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole."). Thus, assessing the surcharge on each image associated with the crime reflects the increased costs associated with multiple images of child pornography. As the number of victims and

incidents of harm increase, the investigation costs, as well as the cost for treating sexual assault, similarly increase. Therefore, the $500 surcharge is reasonably related to the costs it is meant to defray. *See Scruggs*, 373 Wis. 2d 312, ¶ 46 (surcharge need bear "only an approximate relation to the cost it is meant to offset") (citation omitted).

The child pornography surcharge does not have a punitive intent or effect. Consequently, Schmidt did not have a right to be informed that his guilty plea would result in the imposition of the surcharge.

D. The circuit court did not err by denying Schmidt's postconviction motion without an evidentiary hearing.

"A defendant is entitled to an evidentiary hearing on a motion to withdraw a guilty plea when: 1) the defendant makes a prima facie showing that the circuit court's plea colloquy did not conform with § 971.08 or other procedures mandated at a plea hearing; and 2) the defendant alleges he did not know or understand the information that should have been provided at the plea hearing." *Brown*, 293 Wis. 2d 594, ¶ 2. If the defendant's postconviction motion fails to satisfy these requirements, the circuit court may deny the motion without an evidentiary hearing. *See State v. Calvin L. Brown*, 2012 WI App 139, 345 Wis. 2d 333, 824 N.W.2d 916.

Here, Schmidt contends that the circuit court violated Wis. Stat. § 971.08(1) because it failed to inform him of the range of punishments his guilty plea would subject him to. Specifically, he contends that the child pornography surcharge is punishment, and because the surcharge was not included in the colloquy, Wis. Stat. § 971.08(1) was violated. (Schmidt's Br. 11–14.) However, this argument is fundamentally flawed because, as explained above, the child pornography surcharge is not punishment. Therefore, Schmidt has failed to point to a plea colloquy deficiency that

establishes a violation of Wis. Stat. § 971.08 or other mandatory duty at a plea hearing. *See* Wis. Stat § 971.08(1)(a); *Brown*, 293 Wis. 2d 594, ¶¶ 34–35.

However, even if the surcharge were punishment, Schmidt's contention would still fail. Prior to accepting Schmidt's plea, the circuit court asked Schmidt if he understood that, on each of his six counts, he was "potentially facing up to $100,000 fine and imprisonment not more than 25 years or both?" (R. 39:6.) In response, Schmidt responded, "Yes, your honor." (R. 39:6.)

At sentencing, the court imposed the surcharge on all 14 charged crimes, totaling $7,000. (R. 27:2.) However, the court did not impose any other fines. (R. 27:2–3; 40:25–26.) Therefore, based on these facts, even if the circuit court did err by not informing Schmidt of the surcharge, the error is harmless. The case of *Brown*, 293 Wis. 2d 594, is instructive.

In *Brown*, the defendant was charged with four Class B felonies, each carrying a maximum penalty of 60 years pursuant to Wis. Stat. § 939.50(3)(b). *Brown*, 293 Wis. 2d 594, ¶ 8. At the plea hearing, the court explained that each charge carried a maximum sentence of 60 years. *Id.* ¶ 14. However, the court did not explain that each count could run consecutively. *Id.* ¶ 78. Brown pled guilty to three of the charges and was sentenced to a total of 50 years. *Id.* ¶ 15.

On appeal, Brown argued that the circuit court violated Wis. Stat. § 971.08(1) by failing to inform him that the punishment for each charge could run consecutively. In denying Brown's claim, this Court first noted that "[t]he circuit court stated that each charge was a Class B felony and that it could impose a 60-year sentence for each charge." *Brown*, 293 Wis. 2d 594, ¶ 78. This Court then noted that, "the better practice is to advise a defendant of the cumulative maximum sentence he could receive from consecutive sentences." *Id.* However, this Court concluded that, even if the

circuit court erred in not informing Brown that his sentences could run consecutively, "it would be harmless on these facts because Brown's total sentence [of 50 years] did not reach the maximum on even one of the Class B felonies." *Id*. In other words, because Brown's 50-year sentence did not exceed the 60-year maximum sentence that could have been imposed on a single conviction, the court's failure to inform Brown that his sentences could run consecutively was harmless.

In this case, prior to accepting Schmidt's plea, the circuit court asked Schmidt if he understood that, on each of his six counts, he was "potentially facing up to $100,000 fine." (R. 39:6.) Schmidt unequivocally responded, "Yes, your honor." (R. 39:6.) And, as noted above, the court imposed the surcharge on all 14 charged crimes, totaling $7,000. (R. 27:2.) However, the court did not impose any other fines. (R. 27:2–3; 40:25–26.) Therefore, because the cumulative surcharge did not exceed the maximum fine that could have been imposed on even one of his six convictions, any error was harmless. *Brown*, 293 Wis. 2d 594, ¶ 78. Therefore, Schmidt is not entitled to a hearing on his plea withdrawal motion.

II. Section 973.042(2) permitted the circuit court to assess a $500 child pornography surcharge for the dismissed and read-in counts because those images were "associated with the crime."

A. Standard of review.

Whether section 973.042(2) allowed the circuit court to assess a surcharge for each image related to dismissed counts presents a question of statutory interpretation that this Court reviews independently. *State v. Hinkle*, 2019 WI 96, ¶ 14, 389 Wis. 2d 1, 935 N.W.2d 271.

B. Applicable legal principles.

"[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. Thus, courts must avoid a construction that results in rendering statutory language superfluous. *Meyer v. Meyer*, 2000 WI 132, ¶ 22, 239 Wis. 2d 731, 620 N.W.2d 382. "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." *Kalal*, 271 Wis. 2d 633, ¶ 45. The common, ordinary and accepted meaning can be ascertained from the dictionary definition. *Id.* ¶ 53. 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 include "a video recording, a visual representation, a positive or negative image on exposed film, and data representing a visual image."

C. Section 973.042(2) authorized the circuit court to order a surcharge for each dismissed charge associated with Schmidt's crimes.

Section 973.042(2)'s plain language expressly contemplates that the aggregate surcharge will be based on the number of associated images, not convictions. This is clear in the first sentence of the subsection. By requiring a

surcharge "for each image associated with the crime," the Legislature expressly directed courts to assess the surcharge based on the total number of associated images, not convictions. The only issue is whether a particular image is "associated with the crime." Importantly, "crime" does not refer to just any crime under the code. Rather, it refers to the crimes referenced in section 973.042(2): sexual exploitation of a child (section 948.05) and possession of child pornography (section 948.12).

Section 973.042(2)'s second sentence confirms the interpretation that the surcharge assessment is based on images, not convictions. It requires the court to "determine the number of images" "associated with the crime by a preponderance of the evidence." *Id*. Here, Schmidt was convicted of possession of child pornography under section 948.12, which contemplates a separate charge for each distinct pornographic image possessed. *State v. Multaler*, 2002 WI 35, ¶ 64, 252 Wis. 2d 54, 643 N.W.2d 437 (2002). In such a case, there would be no reason for a court to conduct a hearing "to determine the number of images" if the assessed surcharge were based on the number of convictions, because each conviction is based on a single image. Schmidt's suggestion that the court may only impose a surcharge for each conviction would render the second sentence of section 973.042(2) superfluous as applied to section 948.12. *See Meyer*, 239 Wis. 2d 731, ¶ 22.

Had the Legislature intended to limit the court's authority to impose a surcharge on a per conviction basis as Schmidt advocates, it would have drafted section 973.042(2) differently. It would have tracked the language of other surcharge statutes in Chapter 973 that do direct circuit courts

to assess a surcharge on a per conviction or per count basis.[4] The Legislature's 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. For this reason, Schmidt's argument obviously fails. *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."). This Court's recent decision in *State v. Kuehn*, No. 2018AP2355-CR, 2020 WL 4333793 (Wis. Ct. App. July 28, 2020) (unpublished), is directly on point and provides persuasive authority.[5]

Kuehn was charged with 15 counts of possession of child pornography. *Id.* ¶ 1. He pled guilty to five counts and the remaining 10 counts were dismissed but read in. *Id.* At sentencing, the trial court imposed a $500 child pornography surcharge against Kuehn for all 15 charged images, including the 10 dismissed but read-in images. *Id.*

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[4] *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").

[5] See Wis. Stat. § (Rule) 809.23(3)(b) ("an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel . . . may be cited for its persuasive value").

On appeal, Kuehn contested the surcharge imposed on the 10 dismissed charges by making the very same arguments made by Schmidt. That is, relying on the restitution statute, Kuehn first argued that, "because the legislature did not . . . explicitly state that a read-in crime can be the basis for this surcharge, the legislature meant to exclude read-in offenses from the phrase 'associated with the crime.'" *Id.* ¶ 46. This Court disagreed, noting that the two statutes have "separate aims" and, therefore, the different phrasing "does not foreclose the possibility that a read-in offense can be 'associated with the crime' under § 973.042(2)." *Id.* ¶ 47.

Kuehn also argued that the phrase contained in section 973.042(2), which states that a surcharge shall be imposed "'[i]f a court imposes a sentence or places a person on probation' will be rendered 'superfluous' if the phrase 'image ... associated with the crime' includes images which formed the basis for read-in offenses." *Id.* ¶ 48 (citing Wis. Stat. § 973.042(2)). This Court disagreed noting that "the phrase Kuehn refers to is not a definition of 'image ... associated with the crime.'" *Id.* ¶ 48 (citation omitted). Instead, "that phrase is one condition precedent to imposition of the child pornography surcharge." *Id.* Thus, this Court concluded that, "[w]e fail to see how that language becomes superfluous in this context." *Id.*

As noted above, Schmidt repeats the very same arguments made by Kuehn. That is, he first argues that the Legislature did not intend to include dismissed but read-in counts as evidenced by its decision not to draft the surcharge statute like the restitution statute. However, like Kuehn, Schmidt ignores the legislative intent behind both statutes.

Under section 973.20, a court is required to order restitution for a "crime considered at sentencing." The primary purpose is to compensate the victim for actual losses suffered as a result of the crime, which the victim should not have to shoulder if the defendant is capable of making

restitution. *State v. Wiskerchen*, 2019 WI 1, ¶ 25, 385 Wis. 2d 120, 921 N.W.2d 730; *State v. Gibson*, 2012 WI App 103, ¶¶ 10–11, 344 Wis. 2d 220, 822 N.W.2d 500. However, defendants are protected insofar as restitution awards must not exceed the damages or losses to the victim for which the defendant is actually responsible. *See* Wis. Stat. § 973.20(14)(a)). Thus, the victim must show that the defendant's criminal activity was a "'substantial factor in causing pecuniary' injury to the victim." *Gibson*, 344 Wis. 2d 220, ¶ 11 (citation omitted). In other words, the restitution statute is intended to compensate only those victims that can show that they suffered pecuniary loss as a result of the defendant's crime. Consideration must then be given to, inter alia, the defendant's financial resources and earning ability, which can justify reducing the amount of restitution owed by the defendant. Wis. Stat. § 973.20(13)(a).

In contrast, the purpose of section 973.042 is to defray the State's costs of combating child pornography and treating sexual abuse victims. It is not intended to compensate actual victims because the victims of child pornography include both the children and society as a whole. *Ferber*, 458 U.S. at 758 n.9 ("[T]he use of children as ... subjects of pornographic materials is very harmful to both the children and the society as a whole."). The market for child pornography is "intrinsically related" to the sexual abuse of children. *Stevens*, 559 U.S. at 471. And, the harm caused by child pornography involves injury that is not readily ascertainable in pecuniary terms. *Ferber*, 458 U.S. at 758 ("[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."). Thus, as noted by this Court in *Kuehn*, the goals of the restitution statute and the child pornography statute are fundamentally different.

And, unlike the restitution statute, the defendant's financial resources and ability to pay are not required

considerations when imposing the child pornography surcharge. Instead, the surcharge is only limited by the number of images that are associated with the crime, i.e., how much harm the defendant has caused. As noted on pages 12–13 above, assessing the surcharge on each image associated with the crime reflects the increased costs associated with multiple images of child pornography. As the number of victims and incidents of harm increase, the investigation costs, as well as the cost for treating sexual assault, similarly increase.

Rather than focusing on language the Legislature chose not to use, it is helpful to analyze the language that the Legislature chose to include in the statute. As noted in footnote 4 above, the Legislature knew how to limit the child pornography surcharge to a per conviction or per count basis. It chose not to. And, the Legislature could have tracked the language contained in the restitution statute. Again, it chose not to. Instead, section 973.042 requires that the surcharge be imposed on each image "associated" with the crime. As noted by this Court in *Kuehn*, the Oxford English Dictionary defines "associated" as "[c]onnected in thought, mentally related." *Kuehn,* 2020 WL 4333793, ¶ 40. The choice of a word with this very broad definition makes clear that the Legislature intended that the surcharge be imposed for dismissed charges as well as convictions. The only limitation is that the images be "associated" with the crime of possession of child pornography or sexual exploitation of a child. Wis. Stat. § 973.042(2).

Here, the record demonstrates that the court ordered surcharges for the images associated with Schmidt's crime of possession of child pornography. Schmidt pleaded guilty to six counts of possession of child pornography. (R. 27.) The remaining eight counts were dismissed and read-in at sentencing. (R. 27:3.) At sentencing, the court determined

that the images underlying the eight dismissed counts were associated with Schmidt's crime. (R. 40:25.)

The record supports the circuit court's determination that the eight images were associated with Schmidt's crime. Both the criminal complaint and the pre-sentence investigation indicate that officers found approximately 4,500 images consistent with child pornography on Schmidt's phone. (R. 11:5; 22:5.) And, during the pre-sentence investigation, Schmidt admitted that he downloaded approximately 4,000 images of child pornography. (R. 22:6.) The simultaneous storage of these 4000 images on a phone that Schmidt hid at work, and which led to Schmidt's conviction, certainly suffices as being "associated with" Schmidt's conviction for possession of child pornography. *See Kuehn*, 2020 WL 4333793, ¶ 48.

The circuit court did not err when it ordered Schmidt to pay a $500 surcharge for each image identified in the complaint and information that were seized during the criminal investigation that constituted child pornography. The assessment of the surcharge on all 14 images is consistent with statutory intent.

CONCLUSION

This Court should affirm the circuit court's order denying postconviction relief.

Dated this 6th day of October 2020.

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 6,399 words.

Dated this 6th day of October 2020.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

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Supplemental Appendix
State of Wisconsin v. Anthony M. Schmidt
Case No. 2020AP616-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.

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