STATE OF WISCONSIN

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

DISTRICT I

Case No. 2022AP2228-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEITH C. KENYON,

Defendant-Respondent.

STATE'S APPEAL FROM AN ORDER GRANTING A MOTION TO DISMISS THE INFORMATION, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Keith Kenyon asks this Court to do an extraordinary thing for which he cites no direct precedent: Uphold the dismissal of a criminal charge for which probable cause exists because the prosecutor did not charge a different, related offense carrying a lesser penalty instead.

The decision to prosecute and what charges to file "generally rests entirely in [the prosecutor's] discretion." *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). But Kenyon persuaded the circuit court to dismiss on constitutional grounds his charge under Wis. Stat. § 948.02(1)(b), prohibiting sexual intercourse with a child under the age of 12, and carrying a 25-year mandatory minimum sentence. The court did so because, in essence, the prosecutor could have instead charged Kenyon under an overlapping provision, Wis. Stat. § 948.02(1)(e), prohibiting sexual contact or intercourse with a child under the age of 13, carrying no mandatory minimum sentence.

The circuit court's order should be reversed. Kenyon fails to prove Wis. Stat. § 948.02(1)(b) unconstitutional beyond a reasonable doubt on any of the three grounds on which the circuit court granted relief. First, section 948.02(1) is not unconstitutionally vague; the theory of vagueness Kenyon argues—the overlap between sections (1)(b) and (1)(e) and their respective, different criminal penalties renders the scheme unconstitutionally vague—was squarely rejected by the U.S. Supreme Court in *United States v. Batchelder*, 442 U.S. 114 (1979). Second, section 948.02(1) does not violate Wisconsin's established, flexible approach to separation of powers under the state constitution. And third, the State's decision to charge Kenyon under section 948.02(1)(b) instead of (1)(e) did not deny his due process right to be sentenced by a neutral tribunal. Because Kenyon has not met his burden, this Court should reverse and order the charge reinstated.

ARGUMENT

I. Kenyon fails to show beyond a reasonable doubt that the statute is unconstitutionally vague.

A. The beyond a reasonable doubt standard applies to Kenyon's as applied challenge.

In the opening brief, the State addressed whether Kenyon had made a facial or an as applied challenge to the statutory scheme. (Op. Br. 18.) Noting that Kenyon's three constitutional arguments would be available to anyone charged under Wis. Stat. § 948.02(1)(b), the State took Kenyon's challenge to be a facial challenge. (Op. Br. 18.) But it acknowledged that Kenyon had characterized his claim as an as applied challenge, and the circuit court declared the statute to be unconstitutional as applied to him. (Op. Br. 18.) And the State argued that no matter whether the claim was viewed as an as applied or facial challenge, Kenyon failed to meet his burden, and for the same reasons under each test.[1] (Op. Br. 18–32.)

To be clear, the effect of a published decision holding Wis. Stat. § 948.02(1)(b) to be unconstitutional as applied to Kenyon *for the reasons Kenyon reasserts here* would be the same as one determining the statute to be unconstitutional on its face: No prosecutor would ever charge Wis. Stat. § 948.02(1)(b). That's because, under Kenyon's analysis, no matter the facts of the case, the statutory scheme would still be unconstitutionally vague and violate separation of powers,

[1] In its "as applied" section, the State expressly reasserted the reasons set forth in the facial challenge section for why Kenyon's claims fail. (Op. Br. 31–32.) Its arguments in the facial challenge section *did not* focus on hypotheticals relevant only to a defense against a facial challenge. *See State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63.

and a section 948.02(1)(b) charge would still amount to "sentencing by charging."

But, as Kenyon argues, the circuit court's remedy of dismissing the Information treated the claim as an as applied challenge, technically invalidating the statute only as to Kenyon. *See State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 (discussing differences between as applied and facial challenges). Accordingly, the State takes Kenyon's point that his challenge is as applied to him, and it should be analyzed as such, despite his claims' breadth and potential impact.

Kenyon does not acknowledge in his brief his burden to prove the statute unconstitutional beyond a reasonable doubt. Of course, "the party raising the constitutional claim . . . must prove that the challenged statute is unconstitutional beyond a reasonable doubt." *Wood*, 323 Wis. 2d 321, ¶ 15. This "burden appl[ies] to facial as well as to as-applied constitutional challenges." *Id.*; *see also Soc'y Ins. v. Lab. & Indus. Rev. Comm'n*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385 (while government's *application* of a statute is not entitled to presumption of constitutionality, the party making an as applied challenge still must prove the statute unconstitutional beyond a reasonable doubt).

B. Kenyon does not show that the statute is unconstitutionally vague, and the U.S. Supreme Court has rejected the vagueness argument Keyon makes here.

Kenyon maintains that Wis. Stat. § 948.02(1) as applied to him is unconstitutionally vague because the statute "encourage[s] arbitrary and discriminatory enforcement." (Kenyon's Br. 22–28.) As argued, the statute is plain on its face, and the United States Supreme Court has expressly rejected Kenyon's particular vagueness argument.

A statute is void for vagueness if (1) it is not "sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair notice of the conduct required or prohibited"; or (2) it does not "provide [objective] standards for those who enforce the laws and adjudicate guilt." *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989).

Here, the relevant statutes are plain and thus satisfy the first prong's fair notice requirement. Wisconsin Stat. § 948.02(1)(b) proscribes "sexual intercourse with a person who has not attained the age of 12 years." Wisconsin Stat. § 948.02(1)(e) proscribes "sexual contact . . . with a person who has not attained the age of 13 years." Both are Class B felonies carrying 60-year maximum prison terms with no more than 40 years of initial confinement. Wis. Stat. §§ 939.50(3)(b); 948.02(1)(b) and (e); 973.01(2)(b)1. A conviction for violating (1)(b) carries a 25-year mandatory minimum term of confinement, but a conviction under (1)(e) carries no mandatory minimum penalty. *See* Wis. Stat. § 939.616(1r).

Kenyon appears to concede that Wis. Stat. § 948.02(1) provides fair notice as required by the first prong. (Kenyon's Br. 22.) Instead, he argues that the statute is vague under the second prong because it does not provide objective standards for prosecutors. (Kenyon's Br. 22–28.) Kenyon is mistaken.

The same provisions in Wis. Stat. § 948.02(1) that satisfy the notice requirement also provide prosecutors with objective standards to enforce the laws. These provisions make the following plain to the prosecutor: When a person has sexual contact with a child under the age of 13, the State may charge a violation of section (1)(e). When a person has sexual intercourse with a 12-year-old, the State may charge a violation of section (1)(e). When a person has sexual intercourse with a child *under* the age of 12, the State may charge a violation of *either* section (1)(b) *or* section (1)(e).

Kenyon argues that Wis. Stat. § 948.02(1) is unconstitutionally vague because it does not provide guidance for when the State should bring a charge under section (1)(b) versus section (1)(e) when a person's conduct violates both provisions. The United States Supreme Court rejected this vagueness argument in *Batchelder*.

There, the Supreme Court held that a statutory scheme with overlapping criminal statutes and different penalties was not unconstitutionally vague for not providing guidance to prosecutors on which offense to charge. *Batchelder*, 442 U.S. at 123–24. "[W]hen an act violates more than one criminal statute, the Government may prosecute[ ] under either," provided it does not base the charging decision on the defendant's race, religion, or other arbitrary classification. *Id.* at 123–24, 125 n.9. "[O]verlapping criminal statutes with different penalty schemes do not violate constitutional principles . . . ." *State v. Cissell*, 127 Wis. 2d 205, 215, 378 N.W.2d 691 (1985) (discussing *Batchelder*, 442 U.S at 125 n.9).

Batchelder further held that the charging discretion afforded the State by overlapping criminal provisions with different penalties does not offend the constitution. "[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements," the Supreme Court explained, "and the discretion he exercises when choosing one of two statutes with identical elements." *Batchelder*, 442 U.S. at 125.

That "[t]he prosecutor may be influenced by the penalties available upon conviction" when deciding upon overlapping offenses to charge "does not give rise to a violation of the Equal Protection or Due Process Clause." *Batchelder*, 442 U.S. at 125. "Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution

neither is he entitled to choose the penalty scheme under which he will be sentenced." *Id.*

Kenyon argues that *Batchelder* is distinguishable because it involved two provisions with different maximum penalties, not one carrying a stiff mandatory minimum penalty and the other carrying no minimum penalty. (Kenyon's Br. 26–28.) But, as shown, *Batchelder* is not so narrowly drawn; it states broad principles that are dispositive of Kenyon's particular vagueness claim. While "[s]electivity in the enforcement of criminal laws is, of course, subject to constitutional constraints," 442 U.S. at 125, *Batchelder* specifically rejected the particular constitutional constraint Kenyon proposes here.

Kenyon also quotes Professor LaFave at length on duplicative and overlapping statutes, italicizing the following: "Where statutes are identical except for punishment, the prosecutor finds not the slightest shred of guidance." 4 Wayne R. LaFave, *Criminal Procedure* § 13.7(a) (4th ed. 2004). But, of course, the provisions in Wis. Stat. § 948.02(1)(b) and (1)(e) are not "identical except for punishment," they merely overlap. Further, *Batchelder*, not LaFave, is controlling authority, and *Batchelder* in reversing the Court of Appeals specifically rejected as "factually and legally unsound" the view that, "when two statutes prohibit 'exactly the same conduct,' the prosecutor's 'selection of which of two penalties to apply' would be 'unfettered.'" *Batchelder*, 442 U.S. at 124 (citations omitted).

Finally, the State strongly disputes Kenyon's characterization of the prosecutor's decision to charge him under Wis. Stat. § 948.02(1)(b) as "arbitrary."[2] Kenyon's

[2] Kenyon also repeatedly asserts that constraints are necessary to prevent the "discriminatory" application of the 25-year penalty, but he does not allege that the charge against him was based on animus toward a protected class.

conduct plainly violated section 948.02(1)(b), as well as (1)(e) and other criminal provisions. The prosecutor had ample grounds on which to charge the provision carrying the mandatory minimum penalty. Kenyon's 10-year-old victim was in his care at the time. (R. 1:1.) The assault was an act of incest, and Kenyon abused the trust his family placed in him by assaulting his niece. Further, the deliberateness of the assault suggests that Kenyon had planned it out well in advance.[3] The prosecutor's decision to charge Kenyon under section 948.02(1)(b) was not arbitrary.

For these reasons and those set forth more fully in the opening brief, Kenyon fails to prove that Wis. Stat. § 948.02(1) is unconstitutional beyond a reasonable doubt as applied.

II. Kenyon does not show that Wis. Stat. § 948.02(1) violates separation of powers under the state constitution.

In the circuit court and now in this Court, Kenyon fails to meet his burden to prove that Wis. Stat. § 948.02(1) violates established separation of powers principles in Wisconsin.

Kenyon argues that Wis. Stat. § 948.02(1) abdicates a core Legislative function and unduly burdens the judicial branch by allowing the executive the charging discretion to choose between overlapping offenses, one carrying a lengthy mandatory minimum penalty and the other not. (Kenyon's Br. 35–44.) Like his argument in the circuit court (R. 45:2–8), Kenyon's argument here continues to rely on a more rigid,

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[3] In his Statement of the Case, Kenyon criticizes the State for "careless repetition of inaccuracies" by restating the account in the criminal complaint about how and when the victim came to disclose the assaults. (Kenyon's Br. 16–17.) Kenyon asserts that this account was later contradicted by the victim in the forensic interview. (Kenyon's Br. 16–17.) The transcript of this interview was sealed in the circuit court on Kenyon's motion, and the State did not have access to it on appeal. (R. 40; 42.)

segregated view of separation of powers than that long favored by the Wisconsin Supreme Court.

"One of the canonical separation of powers decisions of the past half-century,"[4] *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), expresses the court's practical approach of shared powers balanced among the branches. "Wisconsin courts interpret the Wisconsin Constitution as requiring shared and merged powers of the branches of government rather than an absolute, rigid and segregated political design." *Martinez*, 165 Wis. 2d at 696 (citation omitted). "Thus, the separation of powers doctrine allows the sharing of powers and is not inherently violated in instances when one branch exercises powers normally associated with another branch." *Id.* (citation omitted).

With these principles in mind, the Legislature did not violate separation of powers by creating a statute with two overlapping criminal provisions, only one of which carries a 25-year mandatory minimum penalty. Here, the Legislature exercised its core function by creating the provisions in Wis. Stat. § 948.02(1)(b) and (1)(e) and setting the penalties for each. In our system, the executive decides in its discretion whether to bring charges, and which charges to pursue. *See Bordenkircher*, 434 U.S. at 364. By ascertaining that Kenyon's conduct violated section 948.02(1)(b) and charging him under this section instead of (1)(e), the prosecutor did not "prescribe" the penalty for the offense. She exercised her role in deciding the charge to file. And, as argued, she had ample grounds to determine within her discretion to charge section 948.02(1)(b) in this case. Further, Wis. Stat. § 948.02(1) does not unduly burden the judicial branch by limiting its

[4] Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 Marq. L. Rev. 845, 867 (2022).

discretion to set criminal penalties for those charged under section 948.02(1)(b) mandating the 25-year mandatory minimum. (Op. Br. 27–29.)

In the circuit court, Kenyon's argument relied in large part on his view that the supreme court had recently "signaled a return to the fundamental principles of separation of powers followed in the early years of the state," citing concurring opinions joined by only one other justice in two recent separation of powers cases. (R. 45:5–6.) Here, Kenyon disclaims reliance on anything but "long-established principles of the separation of powers doctrine in Wisconsin." (Kenyon's Br. 36.)

But his key assertion that the Legislature may not "abdicate"—i.e., share—its functions without violating separation of powers appears to be based on cases from 1896 and 1931—as well as, again, one of the two recent concurring opinions. (Kenyon's Br. 38, 40.) Of course, the State does not believe that the Legislature "abdicated" its power by enacting Wis. Stat. § 948.02(1). But, more importantly, the position that a branch violates separation of powers by "abdicating" its authority is inconsistent with modern Wisconsin separation of powers doctrine. It appears to be more consistent with the views of just one or two sitting state supreme justices and the version of the doctrine "followed in the early years of the state." (R. 45:5.)

Kenyon therefore has not shown beyond a reasonable doubt that Wis. Stat. § 948.02(1) violates separation of powers doctrine under the state constitution.

III. The prosecutor's decision to charge Wis. Stat. § 948.02(1)(b) did not violate due process by denying Kenyon his right to be sentenced by a neutral magistrate.

On appeal as in the circuit court, Kenyon cites no case—aside from the circuit court's decision (Kenyon's Br. 49)—that squarely supports the novel argument that a prosecutor denies a person's right to be sentenced by a neutral tribunal by bringing a charge carrying a lengthy mandatory minimum sentence when she could have charged an offense without a mandatory minimum sentence instead. The fact that "[t]he prosecutor may be influenced by the penalties available upon conviction" when deciding upon overlapping offenses to charge "does not give rise to a violation of the Equal Protection or Due Process Clause." *Batchelder*, 442 U.S. at 125.

The State opposes Kenyon's due process claim for the reasons fully argued in the opening brief. (Op. Br. 25–27, 31–32.) Kenyon fails to meet his burden to prove beyond a reasonable doubt that Wis. Stat. § 948.02(1) violates his right to be sentenced by a neutral magistrate.

CONCLUSION

Because Kenyon fails to meet his heavy burden to prove Wis. Stat. § 948.02(1) unconstitutional as applied, the circuit court's order to dismiss should be reversed and the case remanded to reinstate the Information.

Dated this 8th day of April 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,812 words.

Dated this 8th day of April 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 8th day of April 2024.

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