COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1996

No. 95-3014

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

PERVIS MERRITT,

Defendant-Appellant.

APPEAL from an order of the circuit court for Racine County: NANCY E. WHEELER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Pervis Merritt appeals from an order denying his motion under § 974.06, STATS., to withdraw his plea.[1] On appeal he contends

[1] This is not an appeal under § 809.30, STATS. By an order of November 3, 1995, we extended to October 27, 1995, the time for filing a notice of appeal from an order denying a postconviction motion. The court incorrectly assumed that the postconviction motion had been filed pursuant to RULE 809.30. The postconviction motion was filed pursuant to § 974.06, STATS., and was a civil proceeding for which we may not extend the time for filing the notice of appeal. Section 974.06(6); RULE 809.82(2)(b), STATS. The record establishes that the appellant was incarcerated when the

that the charges were multiplicitous and one charge lacked a sufficient factual basis.[2] We affirm the order.

On July 19, 1992, Merritt caused a violent confrontation with Yolanda Pedrosa, Merritt's former girlfriend and the mother of his children. The confrontation occurred in Pedrosa's home and also involved Michael Young, Pedrosa's then current boyfriend, and her sister, Andrea Garcia. Merritt sought admittance to the house and Garcia refused. Merritt came in by using a key. Garcia saw that he had a handgun. Merritt shot and kicked in the door of the bedroom where Pedrosa and Young slept. They had locked themselves in the bathroom. Merritt kicked in the bathroom door and shot Young in the chest. Merritt grabbed Pedrosa and dragged her about before fleeing the house.

The information charged Merritt with attempted first-degree intentional homicide while armed, first-degree recklessly endangering safety while armed, and armed burglary. He entered a no contest plea and was convicted of amended charges of aggravated battery while armed, first-degree endangering safety, and second-degree endangering safety.

Merritt seeks to withdraw his plea. Ordinarily the question of withdrawal of a plea is addressed to the discretion of the trial court. ***State v. Rock***, 92 Wis.2d 554, 559, 285 N.W.2d 739, 742 (1979). However, an exception exists where withdrawal is permitted as a matter of right because of the denial of a constitutional right. ***Id.*** The defendant must show: "(1) that a violation of a constitutional right has occurred; (2) that this violation caused him to enter a plea of guilty or of no contest; and (3) that at the time of his plea, he was

(..continued)
order was entered on July 18, 1995. He had 120 days to file a notice of appeal. Section 808.04(5), STATS. The notice of appeal filed on October 27, 1995, was timely.

[2] The general rule is that a guilty or no contest plea waives the right to raise nonjurisdictional defects and defenses, including claims of constitutional dimension. ***State v. Olson***, 127 Wis.2d 412, 418, 380 N.W.2d 375, 378 (Ct. App. 1985). A plea of no contest does not waive the right to challenge on multiplicity grounds, a double jeopardy issue. ***State v. Hartnek***, 146 Wis.2d 188, 192 n.2, 430 N.W.2d 361, 362 (Ct. App. 1988). Similarly, the failure to establish a factual basis for the plea is not waived by the entry of the plea. *See* ***State v. Meado***, 163 Wis.2d 789, 794 n.1, 472 N.W.2d 567, 569 (Ct. App. 1991).

unaware of the potential constitutional challenges to the case against him because of the violation." ***Id.***

Merritt argues that the recklessly endangering safety charges are multiplicitous to the aggravated battery charge and that the second-degree endangerment charge is multiplicitous to first-degree endangerment. Multiplicity is defined as the charging of a single offense in more than one count. ***Harrell v. State,*** 88 Wis.2d 546, 555, 277 N.W.2d 462, 464-65 (Ct. App. 1979). Multiple convictions for the same offense violate the double jeopardy protections of the state and federal constitutions. ***State v. Selmon,*** 175 Wis.2d 155, 161, 498 N.W.2d 876, 878 (Ct. App. 1993). This is a question of law which is reviewed de novo. ***Id.***

A two-pronged test is used to analyze questions of multiplicity. ***Id.*** The first step is to apply the "elements only" test as outlined in ***Blockburger v. United States,*** 284 U.S. 299 (1932). ***State v. Sauceda,*** 168 Wis.2d 486, 493, 485 N.W.2d 1, 4 (1992). The second component of the multiplicity test involves an inquiry into whether the legislature has evinced a contrary intent to the charging of separate offenses. *See* ***id.*** at 495, 485 N.W.2d at 5.

Merritt contends that the incident was one ongoing transaction which occurred rapidly. To determine whether the prosecution has legitimately broken down a single course of conduct into multiple offenses, we examine whether each charged offense requires proof of an element or fact which the other does not. ***State v. Kanarowski***, 170 Wis.2d 504, 510, 489 N.W.2d 660, 662 (Ct. App. 1992). We consider the alleged acts in terms of the nearness to each other in time, place and character. *See* ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980).

Battery requires the actual infliction of bodily harm to another with the intent to do so. Section 940.19(1m), STATS., 1991-92. Recklessly endangering safety does not require the actual infliction of harm. *See* § 941.30, STATS., 1991-92. The charges have different elements.

Moreover, the charges here required the proof of different facts. First, Merritt entered the house without permission and displayed a gun to

Garcia, making her feel threatened. Merritt then took the additional step of firing at the bedroom door knowing that Pedrosa and Young were in the bedroom. Finally, Merritt had to break through the bathroom door in order to shoot Young. The battery charge arose out of the intentional shooting of Young. The first-degree recklessly endangering safety charge was based on conduct toward Pedrosa consisting of firing the gun into a room in which she was present. The second-degree recklessness charge involved conduct of a less threatening nature towards Garcia. We conclude that the charges were different in law and fact.

Merritt claims that the mere presence of three individuals at the scene does not necessarily support three separate charges. However, ***State v. Hartnek***, 146 Wis.2d 188, 195, 430 N.W.2d 361, 363 (Ct. App. 1988), recognizes that "when different victims are involved, there are generally different offenses." It is particularly true when the offense is against persons rather than property. ***Id.*** That holds true here where the progression of Merritt's violence involved acts of different character and time against the three persons present in the house.

Having determined that the offenses are different in law and fact, we presume that the legislature intended to allow multiple charges for a course of conduct. ***Kanarowski***, 170 Wis.2d at 512-13, 489 N.W.2d at 663. The presumption may be overcome by showing a legislative intent to the contrary. ***Id.*** at 513, 489 N.W.2d at 663.

Nothing in the relevant statutes prohibits multiple charges for a single incident. The presumption is not overcome.

We turn to Merritt's claim that there was no factual basis for entry of his no contest plea to the second-degree reckless endangerment charge because there was no evidence of physical harm to Garcia, the sister who stood by helplessly during the altercation.[3] The trial court's determination that a sufficient factual basis existed for acceptance of a plea will not be upset unless

[3] Merritt's multiplicity argument spills over into this claim as well. Merritt contends that the two endangerment charges were not different in fact if there is no proof that Garcia was a victim.

clearly erroneous. ***State v. Mendez***, 157 Wis.2d 289, 295, 459 N.W.2d 578, 580 (Ct. App. 1990). The trial court is not required to find "strong proof of guilt" as argued by Merritt.[4] The trial court must determine that the conduct which the defendant admits constitutes the offense to which the defendant has pled guilty. ***Broadie v. State***, 68 Wis.2d 420, 423, 228 N.W.2d 687, 689 (1975). Where the plea is to amended charges as part of a plea bargain, the trial court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Id.*** at 423-24, 228 N.W.2d at 689. This rule "reflects the reality that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes." ***State v. Harrell***, 182 Wis.2d 408, 419, 513 N.W.2d 676, 680 (Ct. App.), *cert. denied*, 513 U.S. ___, 115 S. Ct. 167 (1994).

The complaint recites Garcia's statement that Merritt gained entrance despite her refusal to admit him and displayed a silver gun. It indicates that she wanted to call police but could not because Merritt, who had a gun, kept checking on her. Merritt was yelling threats to kill Pedrosa and Young. Garcia was present when Merritt began shooting at the bedroom door. Testimony at the preliminary hearing established that Merritt and Garcia argued.

From the complaint and preliminary hearing evidence, a reasonable inference arises that in Merritt's obviously agitated state, his possession of a loaded firearm in Garcia's presence and during an argument with her endangered Garcia. Additionally, the firing of the gun in her presence also endangered her. The finding that a sufficient factual basis existed is not clearly erroneous. No basis exists for permitting withdrawal of Merritt's plea.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[4] In the taking of an ***Alford*** plea, where a defendant maintains innocence of the charge while at the same time pleading guilty or no contest to it, the trial court must determine that the State's evidence is strong proof of guilt. ***State v. Spears***, 147 Wis.2d 429, 434-35, 433 N.W.2d 595, 598 (Ct. App. 1988).