IN THE COURT OF APPEALS OF IOWA

No. 3-413 / 12-1673
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HAROLD LEE WULF,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge.

A defendant contends that the sentencing court improperly considered an unproven charge. **SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Lucas J. Richardson of Terrill, Richardson, Hostetter & Madson Law Offices, Ames, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Stephen Holmes, County Attorney, and Jordan Roling, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VAITHESWARAN, J.

Harold Wulf admitted to planting a camera and microphone in the common wall of a duplex and intercepting his neighbors' conversations. Wulf pled guilty to unlawfully intercepting a communication. *See* Iowa Code § 808B.2(1)(a) (2009) (stating a person commits a class "D" felony if the person "[w]illfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, a wire, oral, or electronic communication"). At sentencing, the prosecutor recommended a suspended five-year prison term and probation. The defense attorney agreed with the recommendation, as did the preparer of a presentence investigation report.

The district court declined to suspend the prison term, as recommended, reasoning as follows:

> [Y]ou've now pled guilty to audio and videotaping the son, the five-year-old son of your neighbors, and to say that causes the Court some concern is to put things mildly.
>
> Mr. Wulf, you might have a great deal of support in the community, but the Court cannot ignore the danger that you pose to the community, especially to the victim of this offense, and I cannot imagine anything more invasive and intrusive to a five-year-old than what you did, and I am not convinced that a suspended prison term is going to protect our community from further offenses from you.

The court imposed a five-year indeterminate prison term.

On appeal, Wulf contends he never admitted "to videotaping visual images or to specifically recording [the neighbors'] five year old child." He argues that, in citing this information, the district court impermissibly considered an unproven or unadmitted charge. *See State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002) ("It is a well-established rule that a sentencing court may not rely upon additional, unproven, and unprosecuted charges unless the defendant admits to the charges

or there are facts presented to show the defendant committed the offenses."). We agree.

The district court's reference to videotaping of the neighbors' five-year-old son may have borne on an invasion of privacy count that was included in the trial information, but it had no bearing on the interception count to which Wulf pled guilty. On that count, the court explained the elements as follows:

> [T]here are some different ways that this crime can be committed, but I think the ones that apply to you are that, first of all you willfully intercepted a communication, and I believe that the allegation is that it was an oral communication. So the act that you did first of all would have had to be done willfully, in other words you had to know you were doing it and not doing it by mistake, and secondly that you—that the communication was an oral communication, and well that you—secondly that you intercepted that communication, and thirdly that the communication was an oral communication.

Wulf admitted he used a device to intercept an oral communication; while he also admitted to planting a camera in the wall, he did not admit to videotaping the neighbors' five-year-old son, the individual characterized by the court as the victim of the offense.

The State attempts to surmount this hurdle by citing the minutes of testimony and, specifically, the neighbors' handwritten statements referring to Wulf's apologies for his conduct. Those statements do not amount to an admission by Wulf that he "knowingly . . . filmed another person, for the purpose of arousing or gratifying his sexual desire," as charged in the invasion-of-privacy count. Additionally, Wulf did not reaffirm the substance of those handwritten statements in his plea colloquy with the court or in his interview with the preparer of the presentence investigation report. *See* Iowa Code § 901.2 ("The purpose of the report by the judicial district department of correctional services is to provide

the court pertinent information for purposes of sentencing."). *Cf*. *State v*. *Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998) (stating sentencing court was free to consider unchallenged portions of PSI report which contained the defendant's admission to his participation in a crime). Finally, the statements attached to the minutes were not necessary to establish the factual basis for the plea and, for that reason, were deemed denied. *See id.*

We conclude the district court considered an unproven charge in sentencing Wulf. In light of our conclusion, we find it unnecessary to address a second argument Wulf raises, concerning whether the district court abused its discretion in declining to suspend his sentence. We vacate Wulf's sentence and remand for resentencing. *See id.*

SENTENCE VACATED AND REMANDED FOR RESENTENCING.