COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1497-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL BARE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed*.

¶1 SCHUDSON, J.[1] Michael Bare appeals from the judgment of conviction for lewd and lascivious behavior, habitual criminality, and for disorderly conduct, habitual criminality, following his guilty pleas, and from the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

order denying his motion for postconviction relief. He argues that the convictions are multiplicitous and that the circuit court erroneously exercised discretion in sentencing him to consecutive maximum prison terms totaling six years. This court affirms.

I. BACKGROUND

¶2 The State charged Bare with three crimes: lewd and lascivious behavior, disorderly conduct, and exposing genitals to a child, all with the habitual criminality penalty enhancer. With respect to all three charges, the complaint alleged that on November 7, 1997, school bus driver Colleen Crowley was "tending to the loading" of children onto a school bus in front of the Tippecanoe Elementary School when she observed Bare "in a car directly alongside the school bus and in the immediate vicinity of numerous school children and she noticed that his pants and underpants were below his waist and his penis was exposed and he was masturbating with his seat pushed all the way back." The complaint alleged that Crowley "reported that when she yelled at him to put his clothes on because there were children present, he covered his genital area and drove away."

¶3 Focusing only on the charges of lewd and lascivious behavior and disorderly conduct, Bare moved to dismiss "those counts that are multiplicitous." His motion contended, in part:

> Here, the lewd and lascivious behavior is an included offense of the disorderly conduct. The disorderly conduct involves indecent conduct which includes indecently exposing genitals, the same element as the lewd and lascivious behavior. Further, the disorderly conduct is alleged to have occurred in a public place and not a private place. This satisfies the element of publicly for lewd and lascivious behavior. Thus, the elements of lewd and lascivious behavior are all included in the offense of disorderly conduct.
>
> Therefore, these charges are multiplicitous ….

Focusing only on the charges of exposing genitals to a child and disorderly conduct, Bare also moved to dismiss for failure to state probable cause. On March 4, 1998, the circuit court denied his motions. Following a change of counsel, Bare brought a "renewed" motion to dismiss, based on the same multiplicity argument presented in the original motion. On June 11, 1998, the court also denied that renewed motion.[2]

¶4 On November 20, 1998, pursuant to a plea agreement, Bare pled guilty to lewd and lascivious behavior and disorderly conduct, and the court granted the State's motion to dismiss the charge of exposing genitals to a child. Noting that Bare faced up to six years' imprisonment for these two misdemeanor convictions but that, under WIS. STAT. § 972.15,[3] it was unable to order a presentence investigation, the court entered an "Order on Sentencing Memorandum" explaining that it needed "more information [about Mr. Bare and his background] than is typically available in a misdemeanor case." Thus, the court ordered: (1) the unsealing and production of a presentence report on Bare prepared in 1988; (2) an evaluation of Bare by Dr. Robert Rawski, of the Forensic Unit of the Milwaukee County Mental Health Complex, and Dr. Rawski's report "on whether Mr. Bare's history of sexual offenses renders it probable that Mr. Bare would sexually assault a child in the future"; and (3) sentencing memoranda from the State and the defense. The court also requested that the Department of Corrections prepare a presentence report.

[2] The motions to dismiss were denied by Judge Jean W. DiMotto who presided over many of the pre-plea stages of this case.

[3] WISCONSIN STAT. § 972.15(1) states, "After a conviction the court may order a presentence investigation, except that the court may order an employe[e] of the department [of corrections] to conduct a presentence investigation only after a conviction for a felony.

¶5 On January 15, 1999, the prosecutor wrote to the trial court recommending that in preparation for sentencing, the "'best practice'" would be for Bare to have "a complete sexual risk evaluation" consisting of the Rapid Risk Assessment for Sex Offense Recidivism (RRASOR), the Minnesota Sex Offender Screening Tool (MnSOST), the Violence Risk Appraisal Guide (VRAG), Dr. Robert Hare's Psychopathy Checklist-Revised (PCL-R), and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). The prosecutor also recommended that sentencing information for the court include: an analysis of "the specific behaviors and characteristics" involved in Bare's previous sexual offenses, regardless of whether they were charged; an evaluation of Bare for "drug/alcohol issues" and "personality disorders and/or paraphiliac behaviors"; and "a family-social history, a recitation of any juvenile offenses, truancy issues, past diagnoses and psychological evaluation results, if any."

¶6 Although not all the prosecutor requested was accomplished, the record includes the following documents: a presentence report dated June 29, 1988; a presentence report dated January 4, 1999; a letter from Bare's attorney filed January 14, 1999, informing the court of "any additions and/or corrections to either the new presentence report … or the presentence generated in [Bare's] old case"; the prosecutor's January 28, 1999 "Response to Defendant's Objections to the Presentence Investigation"; the State Public Defender's February 2, 1999 "Sentencing Memorandum"; the February 6, 1999 letter from Dr. Rawski to the court, recounting the miscommunication that resulted in his failure to complete the court-ordered psychiatric evaluation; and the State's February 11, 1999 "Sentencing Memorandum" and February 12, 1999 "Amended Sentencing Memorandum," relying on: (1) the most recent presentence report prepared by the

Department of Corrections, (2) a report by Dr. Kotkin, and (3) the results of Bare's RRASOR evaluation.

¶7 On February 5, 1999, in a hearing devoted almost entirely to the review of the January 4, 1999 presentence report, the trial court considered the parties' comments on the report's information and accuracy. Additionally, defense counsel advised the court of a defense presentence report, a final copy of which would be submitted before sentencing, discussing "the type of tests that are used in sexual predator cases." Defense counsel further explained, "While you have some questions regarding the accuracy and validity of the tests themselves, they are the tests that are used now; and I think in some ways it gives the Court or tries to answer the concerns that this Court has regarding possible and future dangerousness and recidivism."

¶8 Near the end of the February 5 hearing, the trial court commented that when, in November 1998, it had ordered the additional information in preparation for sentencing, it had "anticipated … that Dr. Rawski's report would be the only source of information." Further, the court explained that although it had not received the court-ordered report from Dr. Rawski, it had both the 1988 and 1999 presentence reports providing "much of the information that [it] was hoping to get through Dr. Rawski." Neither party objected to the court proceeding to sentencing without Dr. Rawski's report.

¶9 On February 15, 1999, the court sentenced Bare. Before doing so, however, the court considered additional, lengthy presentations from the parties and Bare, and heard extensive testimony from Ana Maria Guzman, a client services specialist employed by the State Public Defender's office, who had prepared the February 2, 1999 "Sentencing Memorandum" at defense counsel's

request. Ms. Guzman's testimony addressed, among other things, Dr. Kotkin's report and the PCL-R, RRASOR, and VRAG measures of Bare.

¶10 At the sentencing hearing, the court stated that it had read, in addition to the 1988 and 1999 presentence reports, Ms. Guzman's report, "the social science projections which Ms. Guzman and [the prosecutor] … submitted about the case," and the police reports from a previous incident involving Bare. Sentencing Bare to the maximum consecutive prison terms, totaling six years, the court carefully and thoughtfully detailed the bases for the sentences, emphasizing that it deemed "the key issue" to be "trying to structure a sentence which protects our children."

¶11 Bare moved to modify his sentence "because of abuse of discretion." Specifically, the motion maintained: (1) that the court had "discounted" the very "psychological analysis" it had requested, and had "improperly dr[awn] inferences that were not based upon facts appearing in the record"; (2) that "without any evidence that would have suggested that Mr[.] Bare might kidnap a child, the court claimed that '…it is just a short leap to masturbating in your automobile outside of an elementary school and luring young children into your car[']"; (3) that "without any evidence to support the conclusion, the court concluded that if children on the bus had seen Mr. Bare masturbating, they would have been traumatized and they would have been condemned to a life of sexual deviancy"; (4) that the court "never considered the gravity or nature of the offenses for which Mr. Bare was convicted"; (5) that the court "improperly relied on inaccurate information, the RRASOR instrument used by [the prosecutor] to determine Mr. Bare's potential dangerousness to the public in violation of Mr. Bare's due process rights"; and (6) that the six-year sentence was "unduly harsh and unconscionable because it is so disproportionate to the offense as to 'shock the public sentiment and violate the

judgment of reasonable people concerning what is right and proper under the circumstances.'" On appeal, Bare renews these six claims.

II. DISCUSSION

A. Multiplicity

¶12 Bare argues that the charges of disorderly conduct and lewd and lascivious behavior are multiplicitous and, therefore, that the convictions violate his double jeopardy rights. Essentially, he contends that because the form of disorderly conduct for which he was prosecuted was "indecent conduct"—exposing his genitals, and because the lewd and lascivious behavior for which he was prosecuted consisted of that same conduct, the facts necessary to prove both offenses were the same. Thus, on appeal, Bare seems to maintain, as he explicitly did in his circuit court motion, that because the only additional fact necessary to establish disorderly conduct was that his behavior tended to cause or provoke a disturbance, lewd and lascivious behavior, in this case, despite having more elements than disorderly conduct, is a lesser-included offense of disorderly conduct. *See* ***State v. Lechner***, 217 Wis. 2d 392, 404, 576 N.W.2d 912 (1998).

¶13 The double jeopardy clauses of both the federal and state constitutions protect against multiplicitous punishments for the same offense. ***State v. Derango***, 2000 WI 89, ¶¶26-28, 236 Wis. 2d 721, 613 N.W.2d 833. In ***Derango***, the supreme court reiterated the standards that guide this court's review of a challenge such as Bare's:

> Multiplicity challenges … usually arise in two different situations: 1) when a single course of conduct is charged in multiple counts of the same statutory offense (the "continuous offense" cases), and 2) when a single criminal act encompasses the elements of more than one

distinct statutory crime. This case presents the second situation.

Multiplicity (and therefore double jeopardy) is implicated only to the extent of preventing a court from imposing a greater penalty than the legislature intended. In other words, because double jeopardy protection prohibits double punishment for the "same offense," the focus of the inquiry is whether the "same offense" is actually being punished twice, or whether the legislature indeed intended to establish separate offenses subjecting an offender to separate, although cumulative, punishments for the same act.

> The United States Supreme Court has determined that where a court imposes multiple punishment in a single trial for violations of two or more criminal statutes arising from the same criminal conduct, the constitutionality of the multiple punishment depends on whether the state legislature intended that the violations constitute a single offense or two offenses, that is whether the legislature intended one punishment or multiple punishment.

We have established a two-part test for analyzing multiplicity challenges. The first part consists of an analysis under ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), to determine whether the offenses are identical in law and fact. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." The second part, which we reach if the offenses are not identical in law and fact, is an inquiry into legislative intent.

The ***Blockburger*** test requires us to consider whether each of the offenses in this case requires proof of an element or fact that the other does not. If, under this test, the offenses are identical in law and fact, then charging both is multiplicitous and therefore unconstitutional. If under the ***Blockburger*** test the offenses are different in law or fact, a presumption arises that the legislature intended to permit cumulative punishments for both offenses. This presumption can only be rebutted by clear legislative intent to the contrary.

Derango, 2000 WI 89 at ¶¶27-30 (citations omitted).

¶14 Therefore, this court first applies the ***Blockburger*** test to determine "whether each of the offenses in this case requires proof of an element or fact that the other does not." ***Id.*** Bare concedes that disorderly conduct requires proof of an additional element or fact: that his behavior tended to cause or provoke a disturbance. Thus, this court need only examine whether lewd and lascivious behavior requires proof of an additional element or fact, beyond that required for disorderly conduct.

¶15 In this case, lewd and lascivious behavior, under WIS. STAT. § 944.20(1)(b), consists of three elements:

> The first element requires that the defendant exposed genitals. "Expose" means to exhibit to the view of another person or persons.
>
> The second element requires that the defendant exposed genitals publicly, that is, not in a hidden manner, but open to view.
>
> ["Publicly" means in such a place or manner that the person knows or has reason to know that the conduct is observable by or in the presence of other persons.]
>
> The third element requires that the defendant exposed genitals indecently.

WIS JI—CRIMINAL 1544 (footnote omitted).

¶16 In this case, disorderly conduct, under WIS. STAT. § 947.01, consists of two elements:

> The defendant engaged in indecent conduct.[4]
>
> The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WIS JI—CRIMINAL 1900 (footnote added).

[4] Disorderly conduct may consist of conduct that is "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly." WIS. STAT. § 947.01. In this case, however, the disorderly conduct charge against Bare was only for "indecent conduct."

¶17 Lewd and lascivious behavior may include facts or elements that are not involved in a prosecution for "indecent" disorderly conduct. For example, one engaging in indecent disorderly conduct might not actually or necessarily be exposing genitals. As the State explains, "it is possible to envision an indecent disorderly conduct which does not include lewd and lascivious[, that is, public exposure of genitals,] behavior[;] for example[,] a patron at a large gathering, such as a baseball game, waving a large banner [depicting] a person's genitalia."

¶18 Thus, although Bare's intriguing theory causes this court to ponder and pause,[5] it fails to establish that lewd and lascivious behavior and indecent disorderly conduct are identical in law and fact. Thus, this court must presume that "the legislature intended to permit cumulative punishments for both offenses." ***Derango***, 2000 WI 89 at ¶30. "This presumption can only be rebutted by clear legislative intent to the contrary." ***Id.*** Bare has not directed this court to any authority suggesting any legislative intent to the contrary; indeed, Bare has not even asserted that the legislature intended anything to the contrary. This court's independent research reveals no contrary legislative intent. *See* ***State v. Kanarowski***, 170 Wis. 2d 504, 513, 489 N.W.2d 660 (Ct. App. 1992) (where appellant failed to raise issue of legislative intent, to rebut presumption that legislature intended to permit multiple charges for same act, court undertook independent research).

¶19 Accordingly, this court concludes that, in this case, the charges of lewd and lascivious behavior and disorderly conduct are not multiplicitous and,

[5] Indeed, this court sees considerable merit in Bare's theory and would welcome supreme court review.

therefore, the convictions do not violate Bare's constitutional protection against double jeopardy.

B. Sentence

¶20 Bare challenges his sentences on six bases. This court, having carefully examined the record, reviewed the submissions, and considered the court's sentencing rationale, rejects Bare's arguments.

¶21 Sentencing is within the circuit court's discretion, and this court's review is limited to determining whether the court erroneously exercised discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992).

> Indeed, "[t]here is a strong policy against interfering with the trial court's sentencing discretion." Further, the trial court is presumed to have acted reasonably, and the burden is on the appellant to "show some unreasonable or unjustifiable basis in the record for the sentence complained of."
>
> ….
>
> A trial court [erroneously exercises] its sentencing discretion when it fails to state the relevant and material factors that influenced its decision, relies on immaterial factors, or gives too much weight to one sentencing factor in the face of other contravening considerations. The weight given to each sentencing factor, however, is left to the trial court's broad discretion. A trial court exceeds its discretion as to the length of the sentence imposed "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."
>
> When imposing sentence, a trial court must consider: the gravity of the offense, the offender's character, and the public's need for protection. The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character

> and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; and, the needs and rights of the public.

Id. at 263-65 (citations omitted).

¶22 In this case, the court carefully considered all the required criteria, and virtually all the additional permissible criteria. In fact, the court took unusual and commendable steps to gain information, not generally available in misdemeanor sentencings, in order to more carefully evaluate specific factors bearing on Bare's potential for rehabilitation and the community's need for protection. Although Bare fairly argues for different interpretations of some of the information provided to the court, he fails to establish that the court's interpretations, inferences, and conclusions were improper.

¶23 Given several factors including Bare's substantial and lengthy history of sex offenses, the court ultimately, and understandably, gave the greatest weight to the protection of children who could be endangered by Bare's conduct should he not be incarcerated for as long as possible. The record supports the court's conclusion, and this court sees nothing in the sentences that would "shock public sentiment" or "violate the judgment of reasonable people."

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.