

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 7, 2008**

David R. Schanker  
Clerk of Court of Appeals

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**Appeal Nos. 2007AP107-CR  
2007AP512-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2004CF1377

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ERIC PLETZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Eric Pletz appeals from a judgment convicting him of attempted child enticement contrary to WIS. STAT. § 948.07(1) (2003-04)<sup>1</sup> and from an order denying his postconviction motion seeking a new trial. We conclude that the criminal complaint was legally sufficient, the circuit court correctly denied Pletz’s motion to suppress his inculpatory statement because Pletz gave the statement voluntarily before he was in custody, Pletz waived his challenge to allegedly improper closing argument by the prosecutor, and Pletz’s trial counsel did not render ineffective assistance with regard to seeking a change in venue and alleged juror bias. Therefore, we affirm.

#### Sufficiency of the Criminal Complaint

¶2 The criminal complaint alleged that on the morning of November 22, 2004, Pletz approached a ten-year-old boy waiting for the school bus, greeted him and introduced himself as “Eric.” Pletz asked the boy, A.P., if he liked video games and if he wanted to come to Pletz’s house after school. Pletz also asked what time A.P. was dismissed from school. A.P., who was alone at the bus stop, refused to tell Pletz anything. Pletz then walked away and entered a room at a nearby motel.

¶3 The complaint further alleged that the next day, Deputy Madrigal of the Racine County Sheriff’s Department found Pletz in the motel room while investigating A.P.’s complaint about Pletz’s behavior at the bus stop. While interviewing Pletz in the motel room, the deputy noticed a video game station.

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Pletz admitted that he approached A.P., but contended he did so because he thought A.P. had missed the bus. Pletz denied asking A.P. to his motel room.

¶4 The complaint recounts that Pletz voluntarily accompanied Deputy Madrigal to a sheriff's substation for questioning. Pletz was not given *Miranda*<sup>2</sup> warnings prior to the interview with various investigators. During the interview, Pletz took an unaccompanied cigarette break outside. The investigator discussed with Pletz why he invited A.P. to play video games, and Pletz nodded in agreement when the investigator suggested that Pletz was more interested in A.P. than in playing video games. In response to a question from the investigator as to whether Pletz thought about A.P. in a sexual way, Pletz stated "it's his chest." The investigator then asked Pletz if he was attracted to A.P.'s chest, and Pletz responded, "Yes, but I have not had a hard on since 1998." The complaint recounts that Pletz then admitted that he had a sexual fantasy about A.P. Pletz and the investigator discussed what Pletz would have done if A.P. had accompanied him to his motel room and that the encounter might have been sexual. They also discussed whether Pletz could achieve an erection. Pletz then requested a lawyer, and he was arrested. Pletz protested that he was being arrested for his fantasies.

¶5 The complaint alleged that Pletz had been released from a WIS. STAT. ch. 980 (2005-06) sexually violent person commitment ten days before he approached A.P. at the bus stop. According to the sentencing transcript, Pletz had two prior convictions for child sexual assault.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶6 At the postconviction motion hearing, Pletz argued that his trial counsel was ineffective for failing to seek dismissal of the allegedly insufficient complaint. The circuit court found that Pletz’s trial counsel did not perform deficiently<sup>3</sup> because the complaint was sufficient.

¶7 We agree with the circuit court that the complaint was sufficient, and that counsel did not render ineffective assistance. “There are two components to a claim of ineffective trial counsel: a demonstration that counsel’s performance was deficient, and a demonstration that such deficient performance prejudiced the defendant.” *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Trial counsel cannot be faulted for not bringing a motion that would have failed. *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶8 Whether a criminal complaint sets forth probable cause to justify a criminal charge is a legal determination we decide *de novo*. *State v. Reed*, 2005 WI 53, ¶11, 280 Wis. 2d 68, 695 N.W.2d 315. To determine the sufficiency of the complaint, we examine the complaint to determine whether it sets forth facts or reasonable inferences “sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it.” *Id.*, ¶12. “Where reasonable inferences may be drawn establishing probable cause and equally reasonable inferences may be drawn to the contrary, the criminal

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<sup>3</sup> The transcript of the postconviction motion hearing does not indicate that Pletz was prepared to preserve the testimony of trial counsel in support of his ineffective assistance of counsel claim. Such testimony is required to preserve an ineffective assistance claim. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The circuit court decided the ineffective assistance claim without a hearing by referring to the record of the case.

complaint is sufficient.” *State v. Manthey*, 169 Wis. 2d 673, 688-89, 487 N.W.2d 44 (Ct. App. 1992).

¶9 Pletz alleges that the complaint did not establish probable cause to believe that he committed the crime of attempted child enticement. WISCONSIN STAT. § 948.07(1), the child enticement statute, states:

Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

¶10 The complaint alleges that Pletz attempted to cause A.P., a child under eighteen, to accompany him to his motel room (a secluded place) by luring him with video games.<sup>4</sup> During his interview with investigators, Pletz admitted that he had a sexual interest in A.P. and that something sexual might have occurred had A.P. joined Pletz in his motel room. A reasonable inference from Pletz’s admission is that he intended to have sexual contact with A.P. in the motel room. The complaint was legally sufficient. Therefore, any motion challenging the complaint would not have been successful, and trial counsel did not perform deficiently in failing to bring such a motion.<sup>5</sup>

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<sup>4</sup> The child enticement statute, WIS. STAT. § 948.07, includes both the completed and attempted crime, i.e., causing and attempting to cause a child to enter a secluded place with the intent of committing illegal conduct. *State v. Koenck*, 2001 WI App 93, ¶¶14-15, 242 Wis. 2d 693, 626 N.W.2d 359.

<sup>5</sup> Because the record conclusively showed that Pletz was not entitled to relief on his challenge to the sufficiency of the complaint, the circuit court correctly denied his ineffective assistance of counsel motion without holding an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

¶11 Pletz argues that he did not commit any act on the day he approached A.P. at the bus stop, he was not at the bus stop after school, and the sexual interest component did not arise until the day after the bus stop incident. Under WIS. STAT. § 948.07, “an attempt is complete when the defendant, with intent to commit a crime, takes action in furtherance of such intent and the failure to accomplish the crime is due to a factor beyond his or her control or one unknown to him or her.” *State v. Koenck*, 2001 WI App 93, ¶28, 242 Wis. 2d 693, 626 N.W.2d 359. That the target of the enticement declined to participate does not relieve the enticer of liability for the attempted enticement. *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, ¶55, 613 N.W.2d 833. “[T]he focus of the child enticement statute—captured in its first element—is *not* the underlying sex crime itself but the act of removing or attempting to remove a child into a secluded place, whether a vehicle, a building a room or another place of seclusion, with the purpose of committing the underlying sex crime.” *Id.*, ¶33.

¶12 Pletz’s attempt was complete when he approached A.P. at the bus stop and asked him to come to his motel room after school. That A.P. refused to do so constituted the factor which precluded Pletz from completing the crime. Pletz’s subsequent revelation of a sexual interest in or sexual fantasy about A.P. supports an inference that Pletz had the requisite intent to have sexual contact when he approached A.P. at the bus stop.<sup>6</sup>

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<sup>6</sup> “Sexual contact” is one element of the child enticement statute. WIS. STAT. § 948.07(1). Sexual contact includes the intentional touching of the complainant’s intimate parts to sexually arouse or gratify the defendant. WIS. STAT. § 948.01(5)(a)1. A boy’s breast is an “intimate part” and falls within the definition of sexual contact as prohibited by the child enticement statute. *State v. Forster*, 2003 WI App 29, ¶18, 260 Wis. 2d 149, 659 N.W.2d 144.

¶13 *Derango* is instructive. In *Derango*, the defendant approached a fifteen-year-old in public with a request to model and obtained her home telephone number. *Id.*, ¶¶2-3. Two days later, the defendant called the fifteen-year-old at home. During the telephone call, the defendant offered the fifteen-year-old money to perform sexual acts on videotape, offered to pick her up to take her to the video location, and stated he would call the next day. *Id.*, ¶5. The fifteen-year-old told her mother about Derango’s offer, and the police became involved the next day. *Id.*, ¶6. These facts supported a child enticement conviction. *Id.*, ¶54.

¶14 Pletz argues that his fantasies about A.P. did not bring him within the child enticement statute. He cites *State v. Vonesh*, 135 Wis. 2d 477, 401 N.W.2d 170 (Ct. App. 1986), for the proposition that fantasies are not conduct. *Vonesh* does not apply to this case. In *Vonesh*, the issue was whether the sexual assault victim’s writings about sexual conduct constituted “prior sexual conduct” subject to exclusion under the Rape Shield Law. *Id.* at 478. The court held that the writings were not conduct. *Id.* at 490.

¶15 Here, in contrast, Pletz admitted to investigators that he had a sexual fantasy about A.P. Pletz’s fantasy permits a reasonable inference that he intended to have sexual contact with A.P. when he suggested that A.P. come to his motel room after school.

#### Suppression Motion

¶16 Pletz argues that the circuit court should have suppressed his statement that he had a sexual interest in or fantasy about A.P. because the statement arose from a custodial interrogation during which Pletz was not given *Miranda* warnings. *Miranda* warnings are required when a suspect is in custody. *State v. Morgan*, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23.

¶17 The test to determine whether someone is in custody is an objective one, *State v. Goetz*, 2001 WI App 294, ¶11, 249 Wis. 2d 380, 638 N.W.2d 386, and the court considers the totality of the circumstances to determine the custody question, *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). A person is in custody if he or she “is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest.” *Goetz*, 249 Wis. 2d 380, ¶11. Relevant considerations include the suspect’s freedom to leave the scene, the purpose, place and length of the interrogation, and the degree of restraint. *Gruen*, 218 Wis. 2d at 594.

¶18 We will affirm the circuit court’s findings of fact about the interrogation if they are not clearly erroneous. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). However, the ultimate conclusion as to whether a person is in custody for *Miranda* purposes presents a question of law that we decide independently of the circuit court. *Mosher*, 221 Wis. 2d at 211.

¶19 Pletz also argues that his statement was involuntary. A statement is involuntary in violation of the defendant’s Fifth Amendment rights if the statement was obtained by coercive police activity. *State v. Owen*, 202 Wis. 2d 620, 641-42, 551 N.W.2d 50 (Ct. App. 1996). “The inquiry focuses on whether the police used actual coercion or improper police practices to compel the statement.” *Id.* at 642. “If the defendant fails to establish that the police used actual coercive or improper pressures to compel the statement, the inquiry ends.” *Id.*

¶20 The court made the following findings at the conclusion of the suppression hearing. Pletz voluntarily accompanied a deputy from his motel room to the sheriff’s department substation for questioning. Pletz agreed to accompany

the deputy if he could receive a ride back to the motel. Pletz was not restrained in either the squad car or at the station. At the station, Pletz was told that he was not under arrest, his appearance was voluntary, he was free to leave at any time, and he did not have to answer questions. Pletz took an unaccompanied cigarette break outside the building, became locked out and required assistance to re-enter the building. Pletz's demeanor was appropriate. Before he was arrested, Pletz revealed a sexual interest in A.P. Pletz was not arrested until the conclusion of the interview. After he was arrested and not in response to any question, Pletz complained that there was no law against a fantasy. Pletz's contention that he asked to leave the station to return to his motel room for his medications was rebutted by an investigator who testified that Pletz never asked to retrieve his medications from his motel room. The court did not find credible Pletz's contention that he asked to leave the station.

¶21 To these findings, the circuit court applied the legal standard of whether a person similarly situated would conclude that she or he was in custody such that *Miranda* warnings would have been required. The court concluded that Pletz was not in custody: he was repeatedly told he was there voluntarily, he had an unaccompanied cigarette break outside the building, he was not restrained in any fashion, the mode of transporting him in a squad car did not constitute custody, and he never asked to be returned to his motel. Pletz's refusal to answer further questions and his subsequent arrest did not mean he was in custody prior that point. Rather, these circumstances were evidence that by virtue of his inculpatory statement, Pletz created probable cause for his arrest. Pletz's remark about fantasy after his arrest was not made in response to any unlawful questioning. Therefore, the circuit court declined to suppress any of Pletz's inculpatory remarks.

¶22 On appeal, Pletz argues that the substation was remote and he was dependent upon the sheriff for transportation back to his motel. Therefore, he was in custody. This argument ignores the circuit court's findings that Pletz voluntarily accompanied the deputy for questioning, and he did not ask to return to his motel room prior to his arrest.

¶23 Pletz argues that the environment at the substation was coercive because he was dependent upon the sheriff for transportation. The record of the suppression hearing does not support this claim.

¶24 The circuit court's findings of fact are not clearly erroneous based upon the suppression hearing record. The court applied the correct legal standard to the facts. We agree that Pletz was not in custody such that *Miranda* warnings were required before he was questioned. Pletz made a voluntary, inculpatory statement. Therefore, the circuit court properly denied his motion to suppress his inculpatory statement.

#### Improper Argument

¶25 Pletz argues that the prosecutor improperly suggested to the jury during closing argument that he attempted to have sexual contact with A.P. on the morning he approached A.P. and that Pletz had a deviant sexual drive. Pletz did not object to these remarks at the time they were made. Therefore, these

arguments are waived. See *State v. Guzman*, 2001 WI App 54, ¶¶24-25, 241 Wis. 2d 310, 624 N.W.2d 717.<sup>7</sup>

### Venue and Juror Bias

¶26 Pletz argues that his trial counsel was ineffective with respect to seeking a change of venue and exploring the potential bias of jurors due to pretrial publicity. Pletz alleged that trial counsel failed to bring to the circuit court's attention the full scope of media coverage of Pletz's case, including broadcast and internet sources and articles that appeared in the local newspaper during the course of the trial.

¶27 Pre-trial, trial counsel sought a change of venue due to pretrial publicity. The circuit court found that the newspaper article cited in the motion was not an attempt to influence public opinion against Pletz and that one newspaper article did not preclude the possibility of a fair trial. The court took the venue motion under advisement in the expectation that the voir dire process would clarify the impact, if any, of pretrial publicity on the jury pool. Postconviction, the court found that the jurors were asked daily whether they had read or heard anything about the case.

¶28 Pletz asserts that the publicity surrounding his case hindered a fair trial. However, Pletz does not identify any juror who served on his case who was exposed to publicity or show that voir dire did not adequately explore this issue.

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<sup>7</sup> Pletz suggests in his reply brief that trial counsel's failure to object constituted ineffective assistance of counsel. However, Pletz did not litigate this issue in his postconviction motion. Therefore, it is not properly before this court. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (we do not address issues raised for the first time on appeal).

Pletz also fails to acknowledge what the record clearly demonstrates: the jurors were asked daily whether they had any outside exposure to Pletz's case. For example, on the second day of trial, the court inquired whether any juror had read or heard anything about the case since the end of court the previous day. No juror indicated that he or she had read or heard anything about the case. Therefore, in the absence of support in the record for Pletz's claim that the jurors were exposed to outside information about his case, the court need not have held an evidentiary hearing on this ineffective assistance claim relating to venue and alleged juror bias.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

