STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP2429-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHANNON OLANCE HENDRICKS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID BOROWSKI AND THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts of the case. Accordingly, the State does not request oral argument. The case does not meet criteria for publication.

ARGUMENT

The circuit court correctly denied Hendricks' post-conviction motion to withdraw his guilty plea.

Shannon Olance Hendricks stands convicted on his guilty plea of child enticement in violation of Wis. Stat. § 948.07. (46.) As relevant to this appeal, Hendricks filed a postconviction motion seeking to withdraw his guilty plea to child enticement. (69.) He alleged that the circuit court's plea colloquy was defective because the circuit court failed to ensure Hendricks understood the meaning of sexual contact. (69:14.) The circuit court denied the motion without a hearing. (75.) Hendricks now appeals the circuit court's denial of his motion to withdraw his plea. (76.)

A defendant who seeks to withdraw a guilty or no-contest plea after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal of the plea is necessary to correct a "manifest injustice." *State v. Milanes*, 2006 WI App 259, ¶ 12, 297 Wis. 2d 684, 727 N.W.2d 94; *State v. Black*, 2001 WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363.

Where a defendant claims a manifest injustice entitles him or her to withdraw a plea, the motion to withdraw the plea can have two different bases. First, a defendant may claim he or she did not knowingly, intelligently and voluntarily enter the plea because the circuit court failed to perform one of the duties required by Wis. Stat. § 971.08 or *State v. Bangert*[1] and its progeny during the plea colloquy. Second, a defendant may claim, based on *Nelson v. State*[2] and *State v. Bentley*,[3] something extrinsic to the plea colloquy renders the plea not knowingly, intelligently and voluntarily entered. *See generally State v. Howell*, 2007 WI 75, ¶¶ 2-6, 301 Wis. 2d. 350, 734 N.W.2d 48.

Hendricks' motion to withdraw his plea relied on a defective plea colloquy. (69:13.) To establish a right to withdraw a plea under *Bangert*, the defendant has the initial burden to prove that an on-the-record colloquy did not occur or was inadequate for a specific reason and must allege he or she did not understand the information that should have been provided. *State v. Hoppe,* 2008 WI App 89, ¶ 12, 312 Wis. 2d 765, 754 N.W.2d 203. If the defendant establishes the first step, then the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly

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[1] *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

[2] *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)

[3] *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996)

and voluntarily entered. *Bangert,* 131 Wis. 2d at 274; *Hoppe,* 312 Wis. 2d 765, ¶ 12. To shift the burden to the State, the defendant seeking plea withdrawal must "point to a plea colloquy deficiency *evident in the plea colloquy transcript*." *State v. Negrete*, 2012 WI 92, ¶ 19, 343 Wis. 2d 1, 819 N.W.2d 749.

Whether a party has met its burden of proof is a question of law. *State v. Moederndorfer,* 141 Wis. 2d 823, 831, 416 N.W.2d 627 (Ct. App. 1987). Stated differently, "a reviewing court considers the sufficiency of the colloquy and the necessity of an evidentiary hearing as questions of law, subject to independent review." *Negrete*, 343 Wis. 2d 1, ¶ 19.

During the plea colloquy the circuit court addressed Hendricks and his trial counsel:

> **THE COURT:** Counsel, you discussed with your client the elements of this offense; you attached an element sheet, correct?
>
> **MR. STEINBERG:** Correct, Your Honor. We did go over the elements.
>
> **THE COURT:** And you're satisfied he understands the elements?
>
> **MR. STEINBERG:** Yes, Your Honor.

(56:7.) A few minutes later, after a side bar with the attorneys, the following occurred:

> **THE COURT:** I just discussed with the attorneys off the record, and I'll make it as clear as possible on the record, that the defendant is entering a plea, and I'll continue with the colloquy, the plea under 948.07 needs to be entered to child enticement but under a specific subsection.

> There are six subsections. Subsection (1) is the person, the defendant, enticing a child under 18 to go to a vehicle, room, building or secluded place for one of -- and there are alternate purposes. Subsection (1) is having sexual contact or intercourse with a child; subsection (2) is for the purpose of prostitution; subsection (3) is exposing a sex organ; subsection (4) is making a recording of a child engaged in explicit conduct; subsection (5) is causing bodily or mental harm to the child; subsection (6) is giving or selling the child a controlled substance.
>
> Obviously, in this case, according to the complaint and the information, and what I just discussed with the attorneys, what applies, correct me if I'm wrong, is Subsection (1), the enticement was for the purpose of, at a minimum, sexual contact, correct, counsel?
>
> **MR. STEINBERG:** Correct, Your Honor.
>
> **BY THE COURT:**
>
> Q And, Mr. Hendricks, do you understand that's what you're admitting to; you're admitting to child enticement? You were bringing this child under 18 to, in this case, a secluded area for the purpose of potentially having sexual contact with that child, and that's indicated in the complaint, indicated in this case; is that correct, sir?
>
> A Yes, it is, Your Honor.
>
> Q. And, again, Mr. Hendricks, you're pleading guilty because you are guilty; is that correct?
>
> A Yes, I am, Your Honor.

(56:10-12.)

Hendricks, claims as a defect in his colloquy, the circuit court's failure to explain that sexual contact must be for his sexual gratification or the victim's humiliation. As he did in the circuit court, he relies on cases involving plea colloquies for sexual assault. Hendricks' Br. 9-10. He reasons

that *State v. Bollig*, 2000 WI 6, ¶ 50, 232 Wis. 2d 561, 605 N.W.2d 199 establishes that "one of the essential elements of attempted sexual contact with a child was that the alleged contact was for the purpose of the defendant's sexual gratification or the victim's humiliation." Hendricks' Br. 9-10. He points out that in *State v. Jipson*, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18, this Court found a plea colloquy to second-degree sexual assault of a child based on sexual contact, defective for want of ensuring Jipson understood the meaning of sexual contact. The *Jipson* Court opined that

> To understand the nature of the charge, the defendant must be aware of all the essential elements of the crime. While it is true the purpose of the sexual contact is not an element of the crime listed under Wis. Stat. § 948.02(2), but rather is a definition of the element "sexual contact" found in Wis. Stat. § 948.01(5), the courts have nevertheless crafted this to be an element of the offense.

Id. ¶ 9, citations omitted. The *Jipson* Court relied on *State v. Nichelson*, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), also a sexual assault of a child. *Jipson*, 267 Wis. 2d 467, ¶ 9 n.4 (citing *Nichelson*, 220 Wis. 2d at 220).

Those cases do not control here. In *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, the Wisconsin Supreme Court considered Wis. Stat. § 948.07, the child enticement statute, in the context of a claim of jury unanimity. "The principal justification for the unanimity requirement is that it ensures that each juror is convinced

beyond a reasonable doubt that the prosecution has proved each *essential element* of the offense." *Derango*, 236 Wis. 2d 721, ¶ 13 (citing *State v. Lomagro*, 113 Wis. 2d 582, 591, 335 N.W.2d 583 (1983)) (emphasis added). To resolve Derango's jury unanimity claim, then, the Supreme Court had to decide what the jury had to be unanimous about. *See Schad v. Arizona*, 501 U.S. 624, 630 (1991) (plurality opinion) ("Even assuming a requirement of jury unanimity *arguendo,* that assumption would fail to address the issue of what the jury must be unanimous about."); *State v. Johnson*, 2001 WI 52, ¶ 11, 243 Wis. 2d 365, 627 N.W.2d 455 ("To say that the jury must be unanimous, however, does not explain what the jury must be unanimous about."). Stated differently, the *Derango* Court had to decide the *essential elements* of child enticement.

The *Derango* Court interpreted Wis. Stat. § 948.07 to:

> create[] one offense with multiple modes of commission. It criminalizes the act of causing or attempting to cause a child to go into a vehicle, building, room or other secluded place with any of six possible prohibited intents. The act of enticement is the crime, not the underlying intended sexual or other misconduct.

Derango, 236 Wis. 2d 721, ¶ 17.

The *Derango* Court relied for support on cases from this Court, prior Supreme Court interpretation and the legislative history of § 948.07. *Id.* ¶¶ 18-20. The Court concluded the jury did not have to be unanimous about

which of the six possible intents Derango had when he lured his victim into a secluded place.

> The circuit court properly instructed the jury that they could find Derango guilty of child enticement if they found beyond a reasonable doubt that he attempted to cause [the victim] to go into a secluded place with the intent to "have sexual contact with [the victim], expose a sex organ to [the victim], cause [the victim] to expose a sex organ, or take pictures of [the victim] engaging in sexually explicit conduct.

Id. ¶ 25. Since the intent to have sexual contact is not an essential element of child enticement, the circuit court did not have to explain the meaning of sexual contact.

A similar situation has arisen in plea withdraw from a burglary conviction. In the case of burglary, a defendant must have the intent to commit a felony when entering a statutorily designated place without the owner's consent. Wis. Stat. § 943.10(1m). In *State v. Hammer,* 216 Wis. 2d 214, 219, 221, 576 N.W.2d 285 (Ct. App. 1997), this Court held that a defendant is not entitled to jury unanimity on the underlying felony in a burglary charge. Addressing a denial of a motion to withdraw a plea based on the alleged colloquy defect that the circuit court had not ascertained which felony the movant committed, this Court stated: "It follows from our conclusion in *Hammer* that the nature of the particular underlying felony is not an essential element of a burglary charge and therefore need not be explained during colloquy in order to fulfill Wis. Stat. § 971.08(1)(a)

requirements." *State v. Steele*, 2001 WI App 34, ¶ 9, 241 Wis. 2d 269, 625 N.W.2d 595. So too here. Given *Derango*, the particular intent or combination of intents for child enticement need not be explained.

Hendricks relies on a statement in *State ex rel Patel v. State*, 2012 WI App 117, 344 Wis. 2d 405, 824 N.W.2d 862. There, in deciding whether a writ of error *coram nobis* was available to address Patel's claim that his plea colloquy to child enticement was defective because the circuit court had not explained the definition of sexual contact, this Court stated, "The trial court did not, however, determine that Patel acted with the purpose of sexually degrading or humiliating the victim, or for the purpose of sexually arousing or gratifying himself—*an essential element of the offense pursuant to Wis. Stat. § 948.07(1)3* and Wis. Stat. § 948.01(5)." *Id.* ¶ 5 (emphasis added).

In *Patel,* the question at issue involved whether a defendant who no longer met the custody requirement of Wis. Stat. § 974.06(1) could use *coram nobis* to attack an alleged defect in a guilty plea colloquy. The answer to that question turned on whether a *Bangert* claim presents a question of law (it does, *Negrete*, 343 Wis. 2d 1, ¶ 19) and whether the error appeared on the record (it must or a defendant cannot establish a defect in the plea, *id.*). Since *coram nobis* only addresses "an error of fact which was unknown at the time," *Patel*, 344 Wis. 2d 405, ¶ 13, the

defect Patel alleged did not matter since no *Bangert* claim can meet the *coram nobis* criteria.

If *Patel* stands for the proposition that sexual contact is an essential element of child enticement, the *Patel* Court's statement stands in direct contradiction to the Supreme Court's holding in *Derango*. The intent to have sexual contact is a means of committing child enticement, not an essential element of the offense. This Court does not have the power to "overrule, modify or withdraw language from a published opinion" of the Supreme Court and the Court of Appeals. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). This Court must follow the Supreme Court's precedent. *State v. Matke*, 2005 WI App 4, ¶ 15, 278 Wis. 2d 403, 692 N.W.2d 265. Ultimately, "because the language [Hendricks] relies on is inconsistent with controlling supreme court precedent, [this Court is] not obligated to apply it here, [but] must, instead, 'reiterate the law under previous supreme court ... precedent.'" *Matke*, 278 Wis. 2d 403, ¶ 15 (quoting *State v. Noll,* 2002 WI App 273, ¶ 16 n.4, 258 Wis. 2d 573, 653 N.W.2d 895).

Hendricks also relies on the jury instruction for child enticement, Wis. JI-Criminal 2134 (4/2015). He notes that the instruction committee cautions that "[c]are should be taken to provide a complete description of what the conduct requires, including definition where necessary." Wis. JI-Criminal 2134 n.5 (4/2015). Hendricks' reliance is misplaced.

First, the Jury Instruction Committee determinations do not carry independent force of law, although they do have persuasive value of what the law is. *State v. Quintana*, 2008 WI 33, ¶ 70 n.33, 308 Wis. 2d 615, 748 N.W.2d 447. The State notes that the instruction committee is aware that sexual contact is not an essential element of child enticement. Wis. JI-Criminal 2134 n.1 (4/2015).

Second, the instructions "suggests" the definition be included but that does not make it necessary in a plea colloquy. Moreover, it is good practice on the part of the trial court to explain to a jury what the terms in the instruction mean. Unlike the trial judge or a counseled defendant, a trial court would not expect a jury to be aware of such a legal term.

Finally, the *Bangert* Court enumerated three non-exhaustive methods of ascertaining a defendant's understanding of the nature of the charges.

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute.
>
> Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing.
>
> Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing.

State v. Brown, 2006 WI 100, ¶¶ 46-48, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *Bangert*, 131 Wis. 2d at 268) (italics removed).

Here, the circuit court used the second and third of the enumerated methods. The circuit court asked Hendrick's trial counsel if he had explained the elements of child enticement. (56:7.) This complies with the second suggestion in *Bangert*. *Bangert*, 131 Wis. 2d at 268.

As to referring to other evidence in the record, the circuit court inquired whether the parties stipulated to the facts in the complaint. (56:13.) Hendricks' trial counsel responded:

> **MR. STEINBERG:** Your Honor, we are agreeing to the complaint. As far as what the contact was, we're agreeing to what the victim testified to at the preliminary hearing, which, you know, which would also support the plea.
>
> **THE COURT:** Well, it was certainly enough on this case.
>
> **BY THE COURT:**
>
> Q You're admitting to that, Mr. Hendricks; is that correct?
>
> A Yes, Your Honor.

(56:13.)

At the preliminary hearing, the victim testified Hendricks touched her legs and chest: "He was grabbing on my legs and then toward my chest area." (50:8.) She testified he touched or rubbed her thighs to mid-thigh and "toward my chest area and ended right there—." (50:9.) The assistant district attorney then stated: "For the court record, you're touching the top portion of your breasts on your chest?"

(50:9.) After the victim replied "yes" the circuit court stated: "The record may so reflect." (50:9.)

The victim also testified that during the incident, Hendricks had asked her "please." (50:9.) When the assistant district attorney asked her to explain what Hendricks meant, she replied "Basically that he hasn't had it in a while, and then I kept telling him no and he kept saying sorry." (50:9.)

For child enticement, actual sexual contact is not necessary; merely the intent to have sexual contact. Wis. Stat. § 948.07. "The act of enticement is the crime, not the underlying intended sexual or other misconduct." *Derango*, 236 Wis. 2d at 734. The victim's testimony certainly leads to a reasonable inference that Hendricks intended to have sexual contact for his gratification at a minimum. And, what is more important for this case, when coupled with his answers to the circuit court during the plea colloquy, it demonstrates that Hendricks knew that sexual contact meant contact for his sexual gratification.

The circuit court correctly denied Hendricks' postconviction motion to withdraw his guilty plea based on a defective plea colloquy.

CONCLUSION

For the reasons given above, this Court should affirm the circuit court's denial of Hendricks' postconviction motion to withdraw his guilty plea based on a defective plea colloquy without a hearing.

Dated: May 25th, 2016

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,920 words.

_____
WARREN D. WEINSTEIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of May, 2016.

_____
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