STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP002429-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHANNON OLANCE HENDRICKS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, Entered in the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding, and Order Denying Postconviction Relief, Entered in the Milwaukee County Circuit Court, the Honorable M. Joseph Donald, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Circuit Court Erred When it Denied Mr. Hendricks' Post-Conviction Motion for Plea Withdrawal Without an Evidentiary Hearing.

First and foremost, it is worth noting that the State below conceded that Mr. Hendricks was entitled to an evidentiary hearing on his post-conviction motion. (71; Hendricks Initial App.127-133). The State has now changed course. In so doing, the State relies on inapplicable case law, ignores the fundamental reasons for and requirements of Wisconsin Statute § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and overlooks the specific factual circumstances in this case.

A. Mr. Hendricks alleged a deficiency in the plea colloquy, as the court did not ensure as required that he understood the meaning of "sexual contact."

i. The circuit court was required to ensure that Mr. Hendricks understood the meaning of "sexual contact."

The heart of the State's argument is that "sexual contact" is not an essential element of child enticement. (Response at 5-12). Therefore, in the eyes of the State, the circuit court was not required to ensure that Mr. Hendricks understood the meaning of "sexual contact" before accepting Mr. Hendricks' plea. (Response at 5-12). The State concludes: "For child enticement, actual sexual contact is not necessary; merely the *intent* to have sexual contact." (Response at 12)(emphasis added).

The State's conclusion begs the question: how can a defendant understand that he intended to do "x" if he does not need to understand what "x" is? And here, the "x" is "sexual contact"—a complicated term which both the Wisconsin Supreme Court and this Court have recognized requires explanation. ***State v. Nichelson***, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998); ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199; ***State v. Jipson***, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18.

The State's argument rests on its application of case law concerning jury unanimity. But jury unanimity presents a much different legal question than what a court must explain to a defendant in order for the defendant's plea to be knowingly entered. In ***State v. Derango***, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, this Court concluded that due process did not require a jury to unanimously agree as to which of a few alternative reasons a defendant may have had to cause a child to go to a secluded place. ***Id.***, ¶ 25. [1] Importantly, the Court made clear that a jury *does* have to find that the State proved one of these alternative modes of commitment beyond a reasonable doubt. *See* ***id.***

This is where the State's analogy to jury unanimity case law falters when applied to a question of whether a circuit court complied with Wisconsin Statute § 971.08 and ***Bangert***: Unlike at trial, when a defendant enters a plea, he waives his constitutional trial rights and in so doing waives his opportunity to hold the State to its burden of proof. As such, the law requires that the Court ensure, among other things, that "the plea is made voluntarily with understanding

[1] It is worth noting that in ***Derango*** only a few of the six alternative "acts" in the child enticement statute were at issue; only modes of committing sexually-related offenses were involved. Thus, the Court concluded that the offenses were not so "conceptually distinct" as to require unanimity. ***Id.***, ¶ 24-25.

of the nature of the charge". Wis. Stat. § 971.08. Thus, where jury unanimity case law concerns whether all jurors have to agree to one particular mode of committing a crime among alternative options to *find the defendant guilty* of the offense beyond a reasonable doubt, ***Bangert*** case law and Wisconsin Statute § 971.08 concerns what a circuit court must explain to a defendant to ensure that he *knowingly enters a plea*.

Mr. Hendricks recognizes that—as the State points out—this Court used a jury unanimity holding in ***State v. Steele***, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595, when analyzing whether a court's colloquy satisfied Wisconsin Statute § 971.08's requirements. In ***Steele***, the defendant entered a plea to burglary under Wisconsin Statute § 943.10(2)(a), which—in his case—required that he entered a dwelling with "the intent to commit a felony." ***Id.***, ¶¶ 1-10; *see also* Wis. Stat. § 943.10(2)(a). The defendant argued that the Court had an obligation under Wisconsin Statute § 971.08 and ***Bangert*** to inform him at the plea hearing which specific "underlying felony" was alleged in his case. ***Id.***, ¶ 8.

In ***Steele***, this Court noted that in ***State v. Hammer***, 216 Wis. 2d 214, 576 N.W.2d 285 (Ct. App. 1997), it held that a jury in a burglary with the intent to commit a felony does not have to unanimously agree as to what felony the defendant intended to commit. ***Id.***, ¶ 9. This Court in ***Steele*** concluded that its holding in ***Hammer*** reflected that the nature of the particular felony was not an "essential element of the burglary charge" and therefore did not have to be explained by the court to comply with Wisconsin Statute § 971.08(1)(a). ***Id.***

While Mr. Hendricks does not agree with this Court's application of a decision concerning jury unanimity at a trial to a court's obligation to ensure that a defendant enters a knowing plea, ultimately there are key differences between

Steele and this case such that this Court may recognize that Mr. Hendricks is entitled to a hearing without issuing a decision in conflict with ***Steele*** or ***Derango***: first, unlike burglary with intent to commit a felony, child enticement contains six statutorily drafted "acts", one of which must be specified at the plea; second, "sexual contact" is a complicated legal term which mandates explanation to ensure a defendant's understanding.

First, Wisconsin Statute § 943.10(2)(a) provides that whoever "intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony" is guilty of burglary. Wis. Stat. § 943.10(2)(a). In ***Steele***, the defendant was charged with burglary with having the intent to commit a felony; thus, the circuit court stated when explaining the elements at the plea hearing: "at the time you entered you *intended to commit a felony* therein". ***Steele***, 2001 WI App 34, ¶3 (emphasis added).

Unlike burglary with intent to commit a felony, the child enticement statute has six *specifically* listed "acts," one of which a defendant has to have intended to be guilty of child enticement: 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…" Wis. Stat. § 948.07. One of these six, specific acts set forth in the statute is "[h]aving sexual contact or sexual intercourse with the child". Wis. Stat. § 948.07(1). As an example, another is "[g]iving or selling to the child a controlled substance analog in violation of ch. 961." Wis. Stat. § 948.07(6).

The subsections of child enticement present considerably different acts—and therefore, ensuring a defendant's understanding of the nature of the offense of

child enticement requires an explanation of the specific subsection at issue in the defendant's case. Thus, whereas a court who explains to a defendant that the State would have to prove that he "committed a burglary with intent to commit a felony" has communicated the nature of the offense to the defendant, the same would not be true for a court who simply states: "the State would have to prove that you, with the intent to commit any of the following acts, caused or attempted to cause a child under 18 to go into any vehicle, building or secluded place", without explaining which of the subsections of child enticement was alleged. The circuit court in this case acknowledged as much: "the plea under 948.07 needs to be entered to child enticement but under a specific subsection." (56:10; Initial App.145).[2]

Second, unlike the term "felony," "sexual contact" is an obscure legal term of art. Indeed, in ***Jipson***, 2003 WI App 222, this Court acknowledged that while the meaning of sexual contact is not in fact "an element of the crime [of child sexual assault] 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.

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[2] The State asserts that "the instruction committee is aware that sexual contact is not an essential element of child enticement" and cites to Wis. JI-Criminal 2134 n.1 (4/2015). (Response at 10). However, what that note lists are the six alternative acts set forth in the enticement statute. Wis. JI-CRIM 2134 n.1. And indeed, the Instruction notes that not all of the acts are fully defined in the child enticement statute, but are defined elsewhere; it instructs that when the second element of child enticement (the defendant caused (victim) to go into (vehicle)(building)(room)(secluded place) with intent to do ___) is explained, "*all the aspects of the underlying conduct should be identified*." Wis. JI-CRIM 2134 n.1 (emphasis added).

While, as this Court noted in ***Jipson***, the rationale behind this crafting was given "little explanation because the State agreed", this line of cases reflects the complex nature of the term "sexual contact" and the need for circuit courts to explain it its meaning to ensure that a defendant has entered a knowing plea. As the Wisconsin Supreme Court emphasized in ***Bangert***: "This court cannot overemphasize the importance of the trial court's taking great care in ascertaining the defendant's understanding of the nature of the charge." 131 Wis. 2d at 266.

Thus, while a decision holding that Mr. Hendricks is entitled to an evidentiary hearing would not conflict with ***Steele*** or ***Derango***, a decision holding that he is *not* entitled to a hearing would indeed conflict with ***Nichelson***, ***Bollig***, and ***Jipson***, as well ***Bangert*** and Wisconsin Statute § 971.08.

ii. The circuit court failed to ensure that Mr. Hendricks understood the meaning of "sexual contact."

In arguing why this Court should disregard the applicable jury instruction as reflective of the need for a court to explain the meaning of "sexual contact" at a plea hearing for child enticement, the State asserts: "it is good practice on the part of the trial court to explain to a jury what the terms in the instruction mean. Unlike a trial judge or *counseled defendant,* a trial court would not expect a jury to be aware of such a legal term." (Response at 10)(emphasis added). Regardless, however, of whether the defendant had an attorney, it is the court's obligation under ***Bangert*** to ensure that the defendant understood the nature of the offense. The simple fact that a defendant has an attorney does not relieve the court of this responsibility.

The State first argues that the court satisfied ***Bangert*** because it asked trial counsel if he explained the elements of child enticement. (Response at 11)(56:7). This argument ignores what actually happened at the hearing: the court asked defense counsel whether he "discussed with [his] client the elements of the offense; you attached an element sheet, correct?" (56:7; Initial App.142). Counsel answered yes. (56:7; App.142). The attached jury instructions, however, did not specify which subsection of child enticement applied, and the area where that information would have been specified was left completely blank. (12). It was not until later in the plea hearing that the court itself realized that the parties had not agreed upon a specific subsection of child enticement, and after that point the court did not again ask defense counsel whether he reviewed the particular elements of the offense—namely, intent to have "sexual contact"—with Mr. Hendricks. *See generally* (56).

Second, the State argues that the Court satisfied ***Bangert*** by inquiring about a factual basis for the charge. (Response at 11-12). The State notes testimony from the preliminary hearing which, the State asserts "leads to a reasonable inference that Hendricks intended to have sexual contact for his gratification at a minimum." (Response at 12). Defense counsel stating at the plea hearing that the defense agreed "to what the victim testified to at the preliminary hearing" as "support for the plea" does not establish that Mr. Hendricks personally understood the legal meaning of "sexual contact" when he entered his plea.

The circuit court failed as required to ensure that Mr. Hendricks understood the meaning of "sexual contact." Mr. Hendricks' post-conviction motion satisfied his *prima facie* burden, and he is therefore entitled to an evidentiary hearing.

CONCLUSION

For these reasons, and those set forth in his Initial Brief, Mr. Hendricks respectfully requests that this Court reverse the circuit court's ruling denying his post-conviction motion and remand this matter for an evidentiary hearing on Mr. Hendricks' post-conviction motion for plea withdrawal.

Dated this 9th day of June, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,145 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of June, 2016.

Signed:

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