STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP2429-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHANNON OLANCE HENDRICKS,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I/IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. The nature of the charge has been defined by this Court as the essential elements of the crime and the range of punishment. In accepting a plea to child enticement, does Wis. Stat. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), require the circuit court to explain the meaning of "sexual contact" even though "sexual contact" is not an element of the offense of child enticement?

The circuit court answered the question no.

The court of appeals answered the question no but criticized that result.

This Court should answer the question no.

2. Should this Court modify the language in *State v. Bangert* to conform to the United States constitutional requirement of not requiring defense counsel to summarize the extent of the explanation of the elements of the charge, including a reiteration of the elements?

The circuit court did not address this issue.

Because the circuit court did not have defense counsel reiterate his explanation of the elements of child enticement on the record, the court of appeals, relying on *Bangert*'s language rejected the State's argument that defense counsel's representation that he explained the elements of child enticement demonstrated Hendricks full understanding of the nature of the charges.

This Court should modify the language in *State v. Bangert* to conform to the United States constitutional requirement.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Supreme Court sets all cases for argument and publishes all of its decisions. This case should not be an exception.

INTRODUCTION

Shannon O. Hendricks pled guilty to an amended charge of child enticement in violation of Wis. Stat. § 948.07. The circuit court addressed Hendricks during the plea colloquy, explained the elements of child enticement by stating "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 asked Hendricks, if he understood he was admitting guilt to that crime. Hendricks said he understood.

Hendricks now claims the plea colloquy did not comply with Wis. Stat. § 971.08(1) and *State v. Bangert* because the circuit court did not explain the meaning of sexual contact to him. Hendricks relies on cases involving sexual assault to argue that an explanation of the definition of sexual contact is necessary for an adequate colloquy in a plea to child enticement.

It is the State's position that the phase "nature of the charge" as used in Wis. Stat. § 971.08(1) and *State v. Bangert* means the essential elements of the crime to which a defendant pleads. Sexual contact is not an essential element of child enticement. The various intents the statute lists are modes of commission, not essential elements of the crime. Since the circuit court explained to Hendricks that the crime required he enticed the victim to a secluded place for the purpose of potentially having sexual contact, the court explained the essential element of child enticement.

The State also asks this Court to conform Wisconsin practice to the requirements of the United States Constitution by withdrawing the requirement of defense counsel summarizing his explanation of the elements of the crime on the record. *State v. Bangert* listed alternative methods of meeting the "nature of the charge" requirement in the plea colloquy one of which was asking defense counsel if he or she explained the essential elements. The court of appeals rejected reliance on Hendricks' counsels' on the record affirmative answer because, *Bangert* requires counsel to summarize his explanation on the record. Since the *Bangert* decision, the United States Supreme Court has held that a trial court accepting a guilty plea can usually rely on defense counsel's representation, without more, that counsel explained the essential elements of the crime. This Court should modify *Bangert*'s language to conform to the Supreme Court's holding.

STATEMENT OF THE CASE

The State charged Shannon O. Hendricks with one count of second-degree sexual assault of a child under sixteen. (R. 2.) The complaint alleged that Hendricks touched the breast and buttocks of T.B., his girlfriend's then fourteen-year-old niece. (R. 2:1.)

At the preliminary hearing, the victim testified Hendricks "was grabbing on my legs and then toward my chest area." (R. 50:8.) She testified he touched or rubbed her thighs to mid-thigh and "toward my chest area and ended right there—." (R. 50:9.) The assistant district attorney then stated: "For the court record, you're touching the top portion of your breasts on your chest?" (R. 50:9.) The victim replied, "Yes." (R. 50:9.) The victim also testified Hendricks touched the side of her buttocks over her clothing. (R. 50:10.)

During the incident, Hendricks had asked the victim "please." (R. 50:9.) When the assistant district attorney asked the victim 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." (R. 50:9.)

Hendricks and the State reached a plea agreement. (R. 56:3.) In exchange for his plea to an amended charge of child enticement, the State agreed to recommend concurrent prison time equal to a reconfinement sentence on an unrelated revocation. (R. 56:4–6.)

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.

(R. 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.

(R. 56:10–12.)

The circuit court inquired whether the parties stipulated to the facts in the complaint. (R. 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.

(R. 56:13.)

Hendricks filed a postconviction motion seeking to withdraw his guilty plea to child enticement based on a defective plea colloquy.[1] (R. 69.) He alleged that the circuit court's colloquy was defective because the court failed to ensure Hendricks understood the meaning of sexual contact. (R. 69:14.) The circuit court denied the motion without a hearing. (R. 75.) Hendricks appealed the circuit court's denial of his plea withdrawal motion. (76.) The court of appeals affirmed in an unpublished, authored decision. *State v. Hendricks*, No. 2015AP2429-CR, 2016 WL 7322798, ¶ 1 (Wis. Ct. App. Dec. 15, 2016) (unpublished) (Lundsten, J.).

The court of appeals relied on *State v. Steele*, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595. *Steele* considered a claim that a plea colloquy to burglary violated *Bangert* because, in accepting the plea, the circuit court did not ascertain which felony the defendant intended to commit when he entered a dwelling. *Id.* ¶¶ 19–20. The *Steele* court relied on *State v. Hammer*, 216 Wis. 2d 214, 219, 221, 576 N.W.2d 285 (Ct. App. 1997), a jury unanimity case holding the intended felony was not an essential element of burglary. *Id.* ¶ 21 (citing *Steele*, 241 Wis. 2d 269, ¶ 9). The *Steele* court had concluded, "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.]" *Hendricks*, 2016 WL 7322798, ¶ 23 (quoting *Steele*, 241 Wis. 2d 269, ¶ 9).

[1] Hendricks initially filed a no-merit appeal of only the judgment of conviction. (R. 47.) After the court of appeals ordered a supplemental no-merit report, Hendricks requested a dismissal of his no merit appeal in order to file this postconviction motion. (R. 66:1.)

Since *State v. Derango*, 2000 WI 89, ¶ 17, 236 Wis. 2d 721, 613 N.W.2d 833, held that the child enticement statute, Wis. Stat. § 948.07, created one offense with multiple modes of commission (the six listed intents), the court of appeals was bound by *Steele* to affirm the denial of Hendricks' plea withdrawal motion. Therefore, the court of appeals held the circuit court's inquiry of whether Hendricks' understanding that the State would have to prove he enticed the child victim to a secluded place with the intent to have sexual contact was sufficient to satisfy Wis. Stat. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *Hendricks*, 2016 WL 7322798, ¶ 28.

In dicta the court of appeals criticized the reasoning in *Steele*. *Id.* ¶¶ 30–31. The court of appeals questioned why jury unanimity cases (*Hammer* and *Derango*) should resolve a plea withdrawal question. According to the court of appeals, it does not "seem to logically follow" that a defendant's understanding of the nature of the charge equates to the essential elements of the crime. *Id.* ¶ 30.

STANDARD OF REVIEW

Whether a defendant has established a plea colloquy defect is a question of law that this Court reviews de novo. *State v. Brown*, 2006 WI 100, ¶ 21, 293 Wis. 2d 594, 716 N.W.2d 906.

ARGUMENT

I. The circuit court was not required to explain "sexual contact" to Hendricks because "sexual contact" is not an essential element of child enticement.

A. Understanding the nature of the charge requires only understanding the essential elements of the crime charged.

Both this Court and the United States Supreme Court have stated that the nature of the charge or offense consists of the essential elements of the crime.[2] The Constitution and Wis. Stat. § 971.08(1)(a) require the circuit court to assure that a pleading defendant understands the essential elements of the crime to which he or she pleads.

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 and voluntarily entered. *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986); *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. Here Hendricks claims that the circuit court's plea colloquy was defective

[2] The nature of the crime also includes the range of punishment, an aspect not at issue in this case.

because the circuit court failed to ensure Hendricks understood the meaning of "sexual contact." (R. 69:14.) Hendricks argues that without an explanation of "sexual contact" the circuit court did not explain the nature of the charge as required by Wis. Stat. § 971.08(1)(a) and *Bangert*. (Hendricks' Br. 11–13.)

Due process requires that a plea be knowing, voluntary, and intelligent. *State v. Bollig*, 2000 WI 6, ¶ 47, 232 Wis. 2d 561, 605 N.W.2d 199. "A plea violates due process unless the defendant has a full understanding of the nature of the charges." *State v. Lange*, 2003 WI App 2, ¶ 17, 259 Wis. 2d 774, 656 N.W.2d 480. Apart from constitutional requirements, Wis. Stat. § 971.08 sets forth information that circuit courts must convey to defendants during plea colloquies. The statute requires circuit courts to "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. § 971.08(1)(a). Wisconsin Stat. § 971.08 does not define "nature of the charge."

Former Rule 11, Fed. R. Crim. P., provided the model for the adoption of Wis. Stat. § 971.08. *Bangert*, 131 Wis. 2d at 260. *McCarthy v. United States*, 394 U.S. 459 (1969), discussed Rule 11 as it existed at the time section 971.08 was enacted. *Bangert*, 131 Wis. 2d at 261. The *McCarthy* Court stated that "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466. The *McCarthy* court explained in a footnote, "[P]ersonally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge." *McCarthy*, 394 U.S. at 467 n.20. *See also Henderson v. Morgan*, 426 U.S. 637,

651 (1976) ("The constitutional rule relevant to this case is that the defendant's guilt is not deemed established by entry of a guilty plea, unless he either admits that he committed the crime charged, or enters his plea knowing what the elements of the crime charged are.") (White, J. concurring). More recently, the Supreme Court has described satisfying the constitutional standard for a voluntary plea as "satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea," *Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

This Court has also referred to the essential elements when describing the "nature of the charge." In *Bangert*, the court stated, "[a]n understanding of the nature of the charge must include an awareness of the essential elements of the crime." *Bangert*, 131 Wis. 2d at 267. When setting out the alternative methods a circuit court can use to fulfill its obligation to communicate the "nature of the charge," the court twice referred to the elements of the crime: "the trial court may summarize the *elements of the crime* charged by reading from the appropriate jury instructions," *id.* at 268 (emphasis added); and "request [defense counsel] to summarize the extent of [his/her] explanation, including a reiteration of the *elements*." *Id.* The other alternatives recite only to the "nature of the charge" without further elaboration. *Id.* And finally, the court, in emphasizing the defendant must understand the "nature of the crime" at the taking of the plea, stressed that the "trial court communicate[] the elements of the crime." *Id.* at 269.

Subsequent to *Bangert*, this Court has specifically stated (albeit in a three judge dissent), "[u]nderstanding of the nature of the charge and the potential punishment, as addressed in § 971.08(1)(a), has been interpreted as requiring an awareness of the essential elements of the crime." *State v.*

Lackershire, 2007 WI 74, ¶ 78 n.1, 301 Wis. 2d 418, 734 N.W.2d 23 (internal quotation marks omitted) (Wilcox, J. dissenting). The court of appeals has repeatedly cited the *Bangert* language referring to the essential elements of the crime when discussing the nature of the charge. *See State v. Brandt*, 226 Wis. 2d 610, 619, 594 N.W.2d 759 (1999) (citing *Bangert*, 131 Wis. 2d at 267); *State v. Lange*, 2003 WI App 2, ¶ 17, 259 Wis. 2d 774, 656 N.W.2d 480 (citing *Brandt*); *State v. Robles*, 2013 WI App 76, ¶ 9, 348 Wis. 2d 325, 833 N.W.2d 184 (citing *Bangert*, 131 Wis. 2d at 267–68).

These cases lead to the conclusion a defendant has an understanding of the nature of the charge as used in Wis. Stat. § 971.08 and *Bangert*, if the defendant understands the essential elements of the crime charged. The statute and *Bangert* require no more of the circuit court than assuring the defendant's understanding of the essential elements of the charge to which the defendant pleads.

B. Sexual contact is not an essential element of child enticement.

Unanimity cases are important to determining whether a plea colloquy addresses a defendant's understanding of the nature of the charge — essential elements of the crime charged — because in unanimity cases the reviewing court must consider the essential elements of the crime to resolve the unanimity issue. This Court has held, in a unanimity case, that in Wis. Stat. § 948.07, the Legislature created a single crime with alternative modes of commission. The intents listed in Wis. Stat. § 948.07(1–6) are not essential elements of the crime.

The unanimity requirement ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense. *State v. Lomagro*, 113 Wis. 2d 582, 591, 335 N.W.2d 583 (1983). It

follows that to resolve a jury unanimity claim, the reviewing court decides what essential elements of the crime at issue the State must prove in order to determine what the jury must be unanimous about. *See 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.").

This becomes apparent when one considers the analysis for unanimity claims this Court adopted in *Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981). A reviewing court must determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the actus reus element of one crime. If the State presents evidence of more than one crime, unanimity is required as to each. If there is only one crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. *Id.* at 419. In determining whether a defendant understood the nature of the charge — the essential elements — a reviewing court can rely on unanimity cases to determine the essential elements of the offense at issue because the unanimity analysis requires a determination of the essential elements to resolve whether there is evidence of one or multiple crimes.

In *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, this Court considered Wis. Stat. § 948.07, the child enticement statute, in the context of a claim of jury unanimity. To resolve Derango's jury unanimity claim, the *Derango* Court had to decide the *essential elements* of child enticement. The court emphasized that the Legislature sought to address the enticement of the child regardless of the specific motive causing the perpetrator to act. The Court concluded that the statute "criminalizes the act of causing . . . a child to go into a . . . secluded place with *any* of six possible prohibited intents. The act of enticement is the crime, not the underlying intended sexual or other misconduct." *Id.* ¶ 17.

The six intents listed in Wis. Stat. § 948.07(1–6) are alternative means of committing the crime. The Court concluded the jury did not have to be unanimous about which of the six possible intents Derango had. *Id.* ¶ 25.

The court of appeals has relied on this same approach to the nature of the charge in the case of burglary, where 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), the court of appeals held that a defendant is not entitled to jury unanimity on the underlying felony in a burglary charge. This Court cited *Hammer* in deciding the unanimity question in *Derango*. *Derango*, 236 Wis. 2d 721, ¶¶ 14–15.

In *State v. Steele*, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595, the court of appeals addressed a denial of a motion to withdraw a plea based on an alleged colloquy defect that the circuit court had not ascertained which felony the movant intended to commit when it accepted his guilty plea to burglary. The court of appeals 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." *Steele*, 241 Wis. 2d 269, ¶ 9.

Since Wis. Stat. § 971.08(1)(a) requires only the essential elements of the offense and *Derango* holds the six intents that statute lists are not essential elements, the particular intent or combination of intents for child enticement need not be explained to a defendant as an understanding of the nature of the offense.

C. None of Hendricks' arguments should persuade this Court to require an explanation of sexual contact for a child enticement plea.

Hendricks' primary argument that the court must explain sexual contact when accepting a child enticement plea rests on cases involving plea colloquies for sexual assault. (Hendricks' Br. 8, 11–17.) For instance, in *State v. Jipson*, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18,[3] the court of appeals found a plea colloquy for 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 while the purpose of the sexual contact is not an element of second-degree sexual assault, but rather a definition of an element, "the courts have nevertheless crafted this to be an element of the offense." *Id.* ¶ 9.

That statement is not quite right. The definition is not an element and Wisconsin courts have not made it one.[4] Sexual contact or sexual intercourse with the victim is the actus reus of sexual assault. Wis. Stat. § 940.225. Therefore, a defendant must understand that the physical acts he or she actually committed are, in fact, the prohibited actus reus of the crime. Here, the sexual contact or sexual intercourse forms the purpose or mens rea for committing the prohibited

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[3] The "Jipson line of cases" also includes *State v. Nichelson*, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998), and *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199.

[4] The sovereign alone can create a crime. *State ex rel. Keefe v. Schmiege*, 251 Wis. 79, 84–85, 28 N.W.2d 345 (1947). That power is vested in the Legislature. *See State v. Lambert*, 68 Wis. 2d 523, 527–28, 229 N.W.2d 622 (1975) (holding statute delegating authority to impose criminal penalties upon violation of Department of Agriculture rules not an unconstitutional delegation of legislative power).

act. Mens rea differs from the actus reus in that it is not susceptible to direct proof and it is possible to maintain at the same time multiple purposes for a single act. Take for example section 948.07(6). A defendant may entice a child into a secluded place to give the child substances both controlled and uncontrolled under ch. 961. In addition, the Legislature may designate a mens rea which is not precise, such as the case of burglary where the felony intended is unspecified.

Hendricks also appears to argue that the plea colloquy should be limited to the allegation of intent the State alleged in the criminal complaint. He claims "it is seemingly more important for a court to ensure that a defendant who is pleading guilty to a crime of intending to commit another act (instead of committing the act itself) understands exactly what it is the State would have to prove he was intending to do." (Hendricks' Br. 17.) But the State faces no such limitation at trial. *Derango* illustrates this point. At the close of the evidence, the circuit court permitted the State to amend the information to conform to the proof by adding two additional prohibited intents to the one previously alleged. *Derango*, 236 Wis. 2d 721, ¶ 11. Why should the plea colloquy be any different? Here the victim's preliminary hearing testimony inferred Hendricks intended, in addition to sexual contact, to have sexual intercourse with the victim when he caused the victim to go to a secluded park. (R. 50:9.)

Based on his reliance on the sexual assault cases, Hendricks asks this Court to overrule *Steele*. Doing so would place additional burdens on circuit courts. Moreover, in the State's view, *Steele* was correctly decided. The nature of the charge consists of the essential elements of the crime to which the defendant pleads and the potential penalty the crime carries. *Steele* does no more than recognize that a court deciding a unanimity claim necessarily decides the essential elements of the crime. For this same reason, this Court should

make clear that reliance on unanimity cases constitutes a logical and correct approach to determining the essential elements of a crime in the context of evaluating a *Bangert* claim.

Hendricks' claim here more closely fits the function of the factual basis for the plea. Immediately after the *McCarthy* Court stated a defendant pleading guilty must "possesses an understanding of the law in relation to the facts," *McCarthy*, 394 U.S. at 466, the Court pointed to the additional requirement that Rule 11 required the judge to "satisfy himself that there is a factual basis for the plea." *Id.* at 467. The purpose of the factual basis requirement is to "determine 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information [or a lesser included offense.]'" *Id.* "Requiring this examination of the relation between the law and the acts the defendant admits having committed . . . 'protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *Id*; *Lackershire*, 301 Wis. 2d 418, ¶ 35 (citing *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 605 N.W.2d 836). This Court has determined that "a sufficient factual basis requires a showing that 'the conduct which the defendant admits constitutes the offense charged.'" *Lackershire*, 301 Wis. 2d 418, ¶ 33 (citation omitted).

In support of his argument, Hendricks points to how party-to-a-crime liability is treated for purposes of a guilty plea. He claims that party to the crime is not an element, but this Court has required an understanding of party to the crime for a valid plea. (Hendricks' Br. 25.) It is true that Wisconsin courts have required an explanation of party-to-the-crime liability as necessary to a valid plea when party to the crime is an issue. But it is not clear that party to the crime falls under the nature of the charge.

In the State's view, party to the crime is more properly classified under the factual basis for the plea. The elements of the crime charged and the factual basis significantly overlap and are sometimes conflated as illustrated by the *Lackershire* opinion. *See Lackershire*, 301 Wis. 2d 418, ¶¶ 30–34 & n.9. And both are necessary for a valid plea. *See White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978) (allowing plea withdrawal after White pled voluntarily with an understanding of the nature of the charge but without realizing that his conduct did not actually fall within the charge).

In *State v. Howell*, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48, this Court treated a claim of plea withdrawal for not understanding party-to-a-crime liability as both a failure to inform Howell of the nature of the charge and a lack of a factual basis for the plea. *Id.* ¶¶ 53–59. The *Howell* court, after setting out portions of the plea colloquy stated, "[a]lthough the circuit court, the State, and Howell's trial counsel were discussing the factual bases for the crime charged, these parts of the plea colloquy have bearing on the court's obligation to inform Howell of the nature of the charge." *Id.* ¶ 43.

These cases explain the relationship between the "nature of the charge" and the factual basis. Together they assure the court that the defendant understands the elements of the crime and that the acts a defendant admits he or she committed fulfill all of the essential elements of the crime. Here, the assurance that Hendricks had the intent to have sexual contact or intercourse is best treated under the factual basis. And as demonstrated below, the circuit court did just that.

Hendricks also refers to the jury instruction for child enticement, Wis. JI-Criminal 2134. (Hendricks' Br. 15–16.) The instruction itself instructs the jury that the second

element is "[t]he defendant caused [name of victim] to go into a secluded place with the intent to [have sexual contact.]" Wis. JI–Criminal 2134 (2016). The circuit court addressed Hendricks asking, "[y]ou were bringing this child under 18 to, in this case, a secluded area for the purpose of potentially having sexual contact with that child." (56:11.) So the circuit court advised Hendricks of the second element of child enticement.

Hendricks relies on the notes to the jury instruction that suggest that a definition of sexual contact be included. The intent to have sexual intercourse or sexual contact specified in section 948.07(1) includes that the sexual intercourse or sexual contact be a violation of Wis. Stat. §§ 948.02, 948.085, or 948.095. Hendricks does not explain why the notes do not suggest a definition for sexual contact when the intent is in violation of Wis. Stat. §§ 948.085 or 948.095.

If this Court rejects his request to overrule *Steele*, Hendricks attempts to distinguish it on two related bases. First, he claims that the intent element of burglary is broad so the intent to commit a felony is not limited to any particular felony while the intent element of child enticement is limited to one of the six enumerated intents. Second, in a somewhat contrary argument, he claims that the term "felony" is generally understood while "sexual contact" is an obscure legal term with a particular definition. In his view, these are distinctions that counsel against applying *Steele*'s reasoning to a child enticement plea. (Hendricks' Br. 26–28.)

This Court should reject both arguments. Regarding the first, as the court of appeals observed, the argument that the term "felony" is less specific than the enumerated acts in subsections 1–6 "does not line up with what happened" here. *Hendricks*, 2016 WL 7322798, ¶ 34. The circuit court specifically identified sexual contact "at a minimum" as the

purpose Hendricks had for causing the victim to go to a secluded place. (R. 56:11.) Again, after the reference to the victim's preliminary hearing testimony, the circuit court asked Hendricks, "[y]ou're admitting to the contact . . . you're admitting that it was sexual contact." (R. 56:13.) There was no doubt about which subsection Hendricks intended.

As to the argument that sexual contact is an obscure legal term, sexual contact is at least as generally understood as is a felony of being a serious crime. And here the circumstances — Hendricks repeatedly pleading "please" as he touched the victim's breasts — leave little doubt that his intent in this case constituted the requisite intent of subsection one.

Moreover, these arguments miss the important synergy between the nature of the charge and the factual basis requirements for voluntary pleas. The purpose of the court's inquiry and colloquy with the defendant is to insure both that the defendant is informed of and understands the elements that constitute the crime to which he or she is pleading and that the acts the defendant performed actually constitute the commission of that crime under the circumstances of the particular case. That is why the nature of the charge focuses on the essential elements of the crime and the factual basis assures that the circumstances of the case satisfy those elements.

D. Hendricks did not establish his prima facie burden under *Bangert*.

Hendricks claims that he established a prima facie case under *Bangert* that his plea colloquy was defective. (Hendricks' Br. 28–32.) Hendricks' argument is premised on his view that the circuit court was required to explain the meaning of sexual contact in order to establish he understood the nature of the charge. The plea colloquy establishes that

the circuit court informed Hendricks he had to cause the victim to go to a secluded place "for the purpose of potentially having sexual contact." (R. 56:11.) So the circuit court specifically addressed the intent element of child enticement.

But the circuit court did establish Hendricks understood the meaning of sexual contact. The *Bangert* Court enumerated three non-exhaustive methods of ascertaining a defendant's understanding of the nature of the charge: (1) "summarize the elements of the crime charged by reading from the appropriate jury instructions or from the applicable statute"; (2) "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"; and (3) "expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing". *Bangert*, 131 Wis. 2d at 268 (citation omitted); *see also State v. Brown*, 2006 WI 100, ¶¶ 46–48, 293 Wis. 2d 594, 716 N.W.2d 906.

The circuit court here fulfilled the third option the *Bangert* Court provided. It referred to evidence of Hendricks' specific acts constituting sexual contact within the meaning of that term in Wis. Stat. § 948.02, and assured that Hendricks understood that those acts satisfied the intent element of child enticement. The circuit court inquired whether the parties stipulated to the facts in the complaint. (R. 56:13.) Hendricks' trial counsel told the court that Hendricks specifically agreed to what the victim testified to at the preliminary hearing. (R. 56:13.) At the preliminary hearing, the victim testified Hendricks touched or rubbed her chest area indicating the top portion of her breasts. (R. 50:9.) She also testified Hendricks touched the side of her buttocks over her clothing. (R. 50:10.) During this incident Hendricks said "please" and "[b]asically that he hasn't had it in a while." (R. 50:9.) And after the circuit court heard from trial counsel

that Hendricks agreed with the preliminary hearing testimony, the court again asked him: "You're admitting to the contact, again, with a child who was under 18, . . . and you're admitting that it was sexual contact, correct, sir?" (R. 56:13.) Hendricks answered, "Yes." (R. 56:14.)

Since Hendricks admitted to touching the victim's breast and buttocks while pleading to have sex with her, (R. 50:9–10), the evidence establishes that he was aware of and admitted to the acts from which a fact finder could infer the necessary intent. Only if the circuit court was required to explain the definition of sexual contact to the exclusion of all else can Hendricks credibly claim to have made a prima facie case.

This plea colloquy also illustrates why it is difficult to separate the nature of the charge and the factual basis when different modes of committing the offense are important. The same is true of party-to-the-crime liability. These are best explained as part of the factual basis where the actual circumstances of the particular case can be explored.

II. This Court should conform Wisconsin practice to the United States constitutional requirement by withdrawing *Bangert*'s requirement that defense counsel summarize his or her explanation of the elements of the crime on the record.

The State also asks this Court to conform Wisconsin practice to the requirements of the United States Constitution. The Constitution does not require defense counsel to summarize on the record his or her explanation of the essential elements of the charge. The Supreme Court has held that a trial court may rely on an explicit statement from defense counsel that he or she explained the essential elements. This Court should withdraw the *Bangert* requirement that defense counsel summarize the explanation.

In *Ernst v. State*, 43 Wis. 2d 661, 674–75, 170 N.W.2d 713 (1969), this Court held that prior to accepting a guilty or no contest plea, a circuit court was required to establish, among other things, that the accused understood the nature of the crime with which he or she is charged and a factual basis for the plea. In *State v. Cecchini*, 124 Wis. 2d 200, 368 N.W.2d 830 (1985), the court of appeals certified that appeal to this Court because it was unsure as to how much of the record a reviewing court was permitted to examine to determine whether a defendant possessed the requisite understanding of the nature of the charge. *Id.* at 206–07. This Court "conclude[d] that in reviewing the constitutional validity of a guilty plea, the reviewing court may only look to the plea hearing transcript itself to determine whether the defendant possessed a constitutionally sufficient understanding of the nature of the charge." *Id.* at 210.

The *Bangert* Court "overrule[d] that part of . . . *State v. Cecchini*, . . . which restricted a trial court's review of a defendant's understanding of the nature of a charge to the plea hearing transcript." *Bangert*, 131 Wis. 2d at 252. In *Bangert*, the State also asked this Court to "modify the holding of *Cecchini* which states that a trial court violates a defendant's right to *due process* when it fails to ascertain the defendant's understanding of the nature of the charge on the record at the plea hearing." *Id.* at 255–56. Based on *Henderson v. Morgan*, 426 U.S. 637 (1976), and *Marshall v. Lonberger*, 459 U.S. 422 (1983), the *Bangert* court "withdr[e]w . . . language from *Ernst* and from subsequent cases" indicating federal Rule 11 procedures are constitutionally required to be followed. *Bangert*, 131 Wis. 2d at 260.

In *Henderson*, the United States Supreme Court observed that the record normally contains "an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Henderson*, 426 U.S. at 647. The

Court then stated, "[E]ven without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id.*

In *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), the Supreme Court again held that an express representation by competent counsel on the record satisfied the constitutional requirement that the accused understand the nature of the offense in order to validly plead guilty. The Court observed, "[T]he constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Id.* at 183. The Court when on, "[w]here a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." *Id.*

The State renews here the request it made in *Bangert* that this Court require of circuit courts only that they conform to constitutional requirements. Judges must assure that the record affirmatively shows that a defendant who pleads guilty understands the nature of the offense to which he or she pleads and that the facts admitted satisfy all of the elements of that offense. An express representation on the record by competent counsel is sufficient. *Id.*

This Court acknowledged *Stumpf* in a footnote in *State v. Brown*, 2006 WI 100, ¶ 56 n.26, 293 Wis. 2d 594, 716 N.W.2d 906. The *Brown* court stated, "[t]he admission by Brown's original attorney that he may not have fully prepared Brown to plead guilty to the sexual assault charge . . . explain[s] why a court cannot rely very heavily upon mere statements from defense counsel that he or she has reviewed

the nature of the charges with a defendant." *Brown*, 293 Wis. 2d 594, ¶ 56. In the State's view, the original attorney's admission demonstrates an example of the unusual case when a court may not rely on counsel's assurance. But in the usual case, the unequivocal assurance on the record that counsel explained the elements of the offense should be sufficient to demonstrate a valid plea.

Wisconsin generally conforms its practices to the Supreme Court's dictates of what the Constitution requires. *State v. Scull*, 2015 WI 22, ¶ 18 n.3, 361 Wis. 2d 288, 862 N.W.2d 562 ("Ordinarily, we interpret Article I, Section 11 of the Wisconsin Constitution consistent with the Fourth Amendment of the United States Constitution."); *State v. Gonzalez*, 2014 WI 124, ¶ 6 n.6, 359 Wis. 2d 1, 856 N.W.2d 580 ("Our interpretation of Article I, Section 8 of the Wisconsin Constitution has generally been consistent with the United States Supreme Court's interpretation of the Fifth Amendment to the federal Constitution.") (citation omitted); *State v. Nieves*, 2017 WI 69, ¶ 15, ___ Wis. 2d ___, 897 N.W.2d 363 ("'We generally apply United States Supreme Court precedents when interpreting' the Sixth Amendment and the analogous Article 1, Section 7 of the Wisconsin Constitution.") (citation omitted); *State v. Davison*, 2003 WI 89, ¶ 18, 263 Wis. 2d 145, 666 N.W.2d 1 ("Our tradition is to view [the state and federal double jeopardy] provisions as identical in scope and purpose."); *State v. Scruggs*, 2017 WI 15, ¶ 14 n.4, 373 Wis. 2d 312, 891 N.W.2d 786 ("[T]his court generally looks to United States Supreme Court decisions construing the Ex Post Facto Clause of the United States Constitution as a guide to construing the Ex Post Facto Clause of the Wisconsin Constitution."); *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶ 35 n.18, 366 Wis. 2d 1, 878 N.W.2d 109 ("In general, the United States Constitution and the Wisconsin Constitution provide substantively similar due process guarantees."). It should do so here.

CONCLUSION

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

Dated at Madison, Wisconsin this 4th day of August, 2017.

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 7,300 words.

Dated this 4th day of August, 2017.

_____
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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 4th day of August, 2017.

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