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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP002429-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHANNON OLANCE HENDRICKS,

Defendant-Appellant-Petitioner.

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-PETITIONER

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ARGUMENT

This Court Should Hold That: (1) a Circuit Court Accepting a Guilty Plea to Child Enticement with Intent to Have Sexual Contact Must Verify that the Defendant Understands the Meaning of "Sexual Contact", and (2) Mr. Hendricks Is Entitled to an Evidentiary Hearing on His Post-Conviction Motion under ***Bangert***.

Lost throughout the State's arguments is consideration for the purpose of the components of Wisconsin Statute § 971.08 and ***Bangert***[1] at issue here: ensuring that the *defendant* understands what he is pleading guilty to in exchange for giving up his constitutional rights. Only then can a defendant's plea be knowingly, voluntarily, and intelligently entered. If a defendant's plea is not so knowingly entered, it violates due process. ***State v. Bollig***, 2000 WI 6, ¶47, 232 Wis. 2d 561, 605 N.W.2d 199.

The question is not whether Mr. Hendricks is guilty of the offense to which he pled. The question is not whether the court was satisfied that there were sufficient facts to support a guilty plea to the charge. The question is whether the court engaged in an adequate colloquy at the plea hearing to ensure that (a) it sufficiently explained the nature of the offense to Mr. Hendricks and (b) Mr. Hendricks understood the nature of the offense.

The State asks this Court to adopt a rule that a court satisfies its burden to ensure that a defendant understands the "nature of the charge" by advising the defendant of only those

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

elements upon which a jury must unanimously agree at trial. (Response Brief at 8-19).

If the State is correct, all a circuit court would have to do to ensure that a defendant understands the nature of the offense of child enticement would be to say: "You caused a child under eighteen years to go into a secluded place with intent to…"

But how does this in any way ensure that the defendant understands the nature of the offense? The explanation of the very thing that makes enticement a crime would be left out.

Indeed, though a jury may not have to unanimously agree about which of the alternative intentions a defendant had to find a defendant guilty of child enticement, a jury *would* need to be given more of an explanation than the one provided above to evaluate the defendant's guilt. A defendant waiving his constitutional rights and pleading guilty should not be entitled to less.

Part of the confusion which perhaps led to the improper conflation of ***Bangert*** case law with jury unanimity case law in ***Steele***[2], and which the State tries to advance here, is with the use of the term "essential element." The term is used in both jury unanimity case law and ***Bangert*** case law.

What is "essential," however, depends on the context in which elements are being discussed. In a jury unanimity analysis, if a defendant may have had alternative modes of committing the same element, the jury need not unanimously agree on the alternative mode to find the defendant guilty.

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[2] ***State v. Steele***, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595.

Thus, in a jury unanimity situation, a particular alternative mode of commission is not necessarily an "essential element."

But, in the ***Bangert*** context, "[u]nderstanding must have knowledge as its antecedent." 131 Wis. 2d at 269. Here, where the attorneys and court agreed that Mr. Hendricks would plead guilty to child enticement with the intent to have "sexual contact," knowledge of what "sexual contact" meant was an antecedent to his understanding of the offense of child enticement to which he pled guilty. To understand the "essential element" of enticing a child with the intent to have sexual contact, he had to understand the meaning of "sexual contact." *See* Wis. Stat. § 948.07(1).

The State's arguments about jury unanimity case law elevate form over substance. This Court rejected the use of form over substance in ***Bangert*** and should do the same here. *See* ***Bangert***, 131 Wis. 2d at 269. This Court did so—and should do so again—because the entire purpose is to make sure the defendant understands the nature of the offense.

Here, of course, unlike the example above, the circuit court did advise Mr. Hendricks that he was pleading guilty to enticing a child "for the purpose of potentially having sexual contact with that child". (56:11;Initial App.165).

But ***Bollig***, ***Jipson***[3], and ***Nichelson***[4] all hold that Wisconsin Statute § 971.08 and ***Bangert*** required the court to go one simple step further and explain that "sexual contact" means "intentional touching for the purpose of sexually

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[3] ***State v. Jipson***, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18.

[4] ***State v. Nichelson***, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App. 1998).

degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." *See, e.g.*, ***Jipson***, 267 Wis. 2d 467, ¶ 13; *see also* Wis. Stat. § 948.01(5)(a).

The State asserts that Mr. Hendricks' request "would place additional burdens on circuit courts." (Response Brief at 15). But explaining the meaning of "sexual contact" is not a new requirement; it is already mandated by ***Bollig***, ***Jipson***, and ***Nichelson***.

The jury instructions also make clear that an understanding of "sexual contact" is necessary to an understanding of the offense of child enticement with intent to have "sexual contact". *See* Wis. JI-CRIM 2134, n.5.

In discussing the jury instructions, the State correctly notes that Wisconsin Statute § 948.07(1) provides that a person is guilty of child enticement if they bring a child to a secluded place with the intent of "[h]aving sexual contact or sexual intercourse with the child in violation of s. 948.02 [sexual assault of a child], 948.085 [sexual assault of a child placed in substitute care], or 948.095 [sexual assault of a child by a school staff person or a person who works or volunteers with children]". (Response Brief at 18); *see also* Wis. Stat. § 948.07(1).

The State then asserts that "Hendricks does not explain why the [jury instruction] notes do not suggest a definition for sexual contact when the intent is in violation of Wis. Stat. §§ 948.085 or 948.095." (Response Brief at 18).

The explanation is simple: they do. The jury instruction note starts by explaining that a court should identify which subsection applies. "Care should be taken to provide a complete description of what the conduct requires, including a definition of terms where necessary." Wis. JI-

CRIM 2134, n.5. "The Committee suggests the following…" ***Id.*** The note then provides a definition for sexual intercourse, as well as the definition of sexual contact the court needed to explain to Mr. Hendricks here. *See* ***id.***

The note then continues on to provide *additional* explanatory language for the particular violations of §§ 948.085 and 948.095. *See* ***id.*** For example, it further instructs that if the defendant is charged with enticing his foster child, the court should explain: "Section 948.085(1) is violated by a person who has sexual [contact] [intercourse] with a child for whom the person is a (foster parent) (treatment foster parent)." ***Id.***

The State simply misreads the jury instructions.

To say that a defendant who pleads guilty to actually having "sexual contact" must be told and understand the meaning of "sexual contact" to enter a knowing plea, but a defendant who pleads guilty to *intending* to have "sexual contact" need not, elevates form over substance. It ignores the fact that the purpose is to ensure that a defendant understands the offense to which he pleads guilty.

To be clear, to adopt the State's proposal would require this Court to overturn ***Bollig***, ***Jipson***, ***Nichelson***, ***Brown***[5], and ***Howell***[6]. The definition of "sexual contact" is not a listed element of sexual assault under Wisconsin Statute § 948.02(2). Thus, under the State's position, ***Bollig***, ***Jipson***, and ***Nichelson*** must all fall. Similarly, the method of complicity in a party-to-a-crime case does not require jury

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[5] ***State v. Brown***, 2006 WI 10, 293 Wis. 2d 594, 716 N.W.2d 906.

[6] ***State v. Howell***, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48.

unanimity, *see., e.g.*, ***May v. State***, 97 Wis. 2d 175, 293 N.W.2d 478 (1980), so under the State's theory, the cornerstone holdings requiring a court to ensure that a defendant understands party-to-a-crime liability in ***Howell*** and ***Brown*** must also fall.

The State's failure to consider the need to ensure a defendant's understanding is also where its factual basis arguments fall short.

Though the inquiries may in part overlap, the requirements address two different concerns. At issue here is the court's failure to ensure that Mr. Hendricks understood the offense to which he pled guilty; the factual basis analysis asks the separate question of whether sufficient facts in the record exist to satisfy the court that the defendant's actions actually constituted the crime charged. Wis. Stat. § 971.08(1)(b).

In addition to ensuring that a defendant enters a plea "with understanding of the nature of the charge," Wisconsin Statute § 971.08 also requires a court to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b).

As such "[f]actual basis cases typically involve the question of whether undisputed facts actually constitute the crime charged." ***State v. Lackershire***, 2007 WI 74, ¶48, 301 Wis. 2d 418, 734 N.W.2d 23.

While an explanation of the nature of the offense serves to ensure that the defendant understands the offense to which he is pleading guilty, the factual basis inquiry serves to ensure that his conduct does indeed "fall within the offense charged". ***Id.***, ¶35.

A defendant's failure to understand that the conduct to which he pleads guilty to falls within the offense charged is thus—like a defendant's failure to understand the nature of the charge—"incompatible with that plea being 'knowing' and 'intelligent'", but for a different reason. *See* ***id.***

As is often the case, a court may therefore simply ask whether the attorneys agree that it may use the criminal complaint as the factual basis. *See* ***State v. Black***, 2001 WI 31, 242 Wis. 2d 126, 624 N.W.2d 363 ("[i]f the facts as set forth in the complaint meet the elements of the crime charged, they may form the factual basis for the plea").

But establishing a factual basis does not alone establish that a defendant understood the offense. As the State recognizes, *both* must be present to comply with ***Bangert***. (*See* Response Brief at 17). And indeed, the fact that the court must do both explains why a circuit court need not in every child enticement case ensure that the defendant understands all six of the potential subsections; rather, the court's inquiry into the factual basis for the plea sets the parameters for which subsection or subsections need to be explained to the defendant to ensure his understanding of the nature of the charge.

The heart of the ***Jipson*** line of cases addressing "sexual contact" as well as ***Howell*** and ***Brown***'s requirements concerning party-to-a-crime liability is that these are complex legal terms which must be explained to ensure that a defendant enters a knowing plea. *See e.g.* ***Howell***, 301 Wis. 2d 350, ¶48 ("[s]imply stating that the State would have to prove that Howell 'assisted' or 'intentionally assisted' the shooter was not sufficient to explain to Howell aider and abettor party-to-a-crime liability, either generally or in the context of first degree reckless injury").

That necessary explanation did not happen here. The plea colloquy was deficient.

The State's factual basis arguments also ring of a harmless error analysis: that because there was testimony at the preliminary hearing concerning Mr. Hendricks touching the victim, and that because at the plea he "admitted to touching the victim's breast and buttocks while pleading to have sex with her," "the evidence establishes that he was aware of and admitted to the acts from which a fact finder could infer the necessary intent." (Response Brief at 21).

Because of this, the State argues, Mr. Hendricks is not entitled to an evidentiary hearing on his motion. (Response Brief at 21). If Mr. Hendricks argued that there was an insufficient factual basis for the charge, the State would be correct.

But that is not the question. The State itself ultimately seems to acknowledge as much, recognizing that Mr. Hendricks may "credibly claim to have made a prima facie burden" if the circuit court was required to explain the definition of "sexual contact." (*See* Response Brief at 21).

That is precisely what the circuit court—pursuant to Wisconsin Statute § 971.08, ***Bangert***, ***Bollig***, ***Nichelson***, and ***Jipson***—was required to do.

Thus, by discussing the record to establish a factual basis for the charge, the circuit court here did not also, as the State suggests, satisfy the third ***Bangert*** option—to "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 (emphasis added); *see also* (State's Response at 20). The record here does not demonstrate either an explanation from the court or an

understanding from Mr. Hendricks of the meaning of "sexual contact."

The State's arguments also ignore the ***Bangert*** framework. If the State believes that it can use the testimony from the preliminary hearing or other means to prove that, contrary to his assertion in his post-conviction motion, Mr. Hendricks did understand the meaning of "sexual contact," the State will have an opportunity to do that—at the evidentiary hearing.

Notably, this is exactly what the State asserted and asked for when it agreed post-conviction that Mr. Hendricks met his *prima facie* burden entitling him to a hearing: "an evidentiary hearing is required on this issue so that the State will have an opportunity to present evidence that the Defendant in fact knew the nature of the charge to which he pled, despite the single deficiency in the plea hearing." (71:6-7;Initial App.151-152).

Lastly, the State now asks that ***Bangert*** be altered to no longer require that if a court relies on defense counsel's assertion that he explained the nature of the offense to the defendant, that counsel also summarize that explanation. (State's Response at 21-24).

This Court should reject consideration of this request to revise the ***Bangert*** requirements because (a) the State has never before raised this argument in this appeal and has thus forfeited it; and (b) it does not apply here and would not alter the outcome of this case.

First, the State forfeited consideration of this new request. It never raised it below. *See* ***McKee Family I, LLC v. City of Fitchburg***, 2017 WI 34, ¶32, 374 Wis. 2d 487, 893 N.W.2d 12 (explaining the general rule that "issues not raised or considered by the circuit court will not be considered for the first time on appeal").

Even further, it never raised it in either a cross petition for review or in its Court-ordered response to Mr. Hendricks' petition for review. As such, it cannot raise this argument now. ***State v. Smith***, 2016 WI 23, ¶41, 367 Wis. 2d 483, 878 N.W.2d 135; ***State v. Sulla***, 2016 WI 46, ¶7, n.5, 369 Wis. 2d 225, 880 N.W.2d 659.

Further, even if this Court were to alter that ***Bangert*** requirement, it would not affect the outcome of this case. Neither the plea questionnaire form nor the attached jury instructions submitted to the court explained the meaning of sexual contact. (12;Initial App.171-175). The form and instructions did not even mention the words "sexual contact." (12;Initial App.171-175). The particular intent was left blank. (12;Initial App.171-175).

Early in the plea hearing, the court asked defense counsel whether he "discussed with [his] client the elements of this offense; you attached an element sheet, correct?" (56:7;Initial App.161). Counsel answered affirmatively, that they did "go over the elements" and that he was satisfied that Mr. Hendricks understood. (56:7;Initial App.161).

However, it was not until well later in the plea hearing that the circuit court realized that they needed to agree upon which of the six subsections of child enticement would apply. (*See* 56:10-11;Initial App.164-165). The court indicated that it just had a sidebar "with the attorneys" and then stated that

"the enticement was for the purpose of, at a minimum, sexual contact". (*See* 56:11;Initial App.165).

Thus, in this particular case, it was not until well after counsel advised the court that he had gone over the elements with his client that the attorneys and court even agreed that Mr. Hendricks would plead guilty to enticement with intent to have sexual contact. Here, therefore, the "express representation on the record by competent counsel" would *not* have been sufficient, *cf.* (State's Response Brief at 23), because the parties had not yet agreed as to which subsection of child enticement applied.

Indeed, the State itself makes no attempt to argue that the second ***Bangert*** option (the court asking counsel whether he explained the nature of the charge and requesting a summary of the extent of the explanation from counsel) applies here. (*See generally* State's Response Brief).

This Court should not address the State's dramatic request to undercut ***Bangert*** where the State never before raised the argument and where it would not affect the outcome of this case.

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

CONCLUSION

For these reasons and those set forth in his Initial Brief, Mr. Hendricks respectfully requests that this Court enter an order reversing the decision of the Court of Appeals and remanding this matter for an evidentiary hearing on his ***Bangert*** post-conviction motion.

Dated this 18th day of August, 2017.

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 2,944 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 18th day of August, 2017.

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