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STATE OF WISCONSIN **01-18-2017**

COURT OF APPEALS **CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

NO. 2016AP2114 CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

CYNTHIA A. HANSEN,

Defendant-Appellant.

APPELLANT'S BRIEF AND APPENDIX

**Appeal From Final Order
Signed and Entered October 17, 2016,
Kenosha County Circuit Court Case No. 2015CM001439,
The Honorable Jodi L. Meier, Presiding**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the circuit court's colloquy with Cynthia Hansen at her guilty plea hearing show that Hansen was not aware of the essential elements of the crime of criminal damage to property? The circuit court ruled that that the plea hearing was sufficient. (R. 36: 16-20; A. App. 137-141).
2. Did the record of the plea hearing show that there was an insufficient factual basis for her plea? The circuit court ruled that there was a sufficient factual basis for the plea. (R. 36: 16-20; A. App. 137-141).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case to the extent that appellant's arguments do not fall under Wis. Stat. (Rule) 809.22(2)(a); however, the briefs will likely fully develop the theories and legal authorities so that oral argument would be of marginal value.

Publication is not appropriate so long as this appeal is decided by one court of appeals judge under Wis. Stat. (Rule) 809.23.

STATEMENT OF THE CASE

On November 10, 2015 appellant Cynthia Hansen ("Hansen") was charged with two misdemeanors, criminal damage to property and disorderly conduct for

an incident between Hansen and her wife, Alexis Hansen. On March 16, 2016 Hansen entered a plea of guilty to the criminal damage charge and agreed to make restitution in exchange for the prosecution's agreement to move for dismissal of the disorderly conduct count and an earlier misdemeanor charge of violating a domestic abuse injunction in Case No. 16CM26, and to recommend probation. (R. 1:1-5; A. App. 107-110; R. 17: 2-3; A. App. 117-118). Reserve Circuit Judge Mark A. Frankel accepted the plea, entered a judgment of conviction, granted the prosecution's dismissal motions, and ordered that Hansen be placed on probation with conditions that included payment of restitution to Alexis Hansen and performance of community service. (R. 12, 14, 20: A. App. 102-103). Hansen sought to vacate her plea by a post-conviction motion and her supporting affidavit (R. 23, 24; A. App. 104-106, 111-115). The motion was heard before Circuit Judge Jodi L. Meier on October 14, 2016 (R. 37; A. App. 122-154) and a written order denying the post-conviction request to vacate the plea was filed on October 17, 2016 (R. 27: A. App. 101).

STATEMENT OF FACTS

Cynthia Hansen was accused by her wife, Alexis, of intentionally damaging a vehicle, which the criminal complaint described as "Alexis's car." The complaint noted that the damage resulted while the two were in a parking lot, just after they had started discussing paperwork for their divorce and got into an argument (R. 1:

1-2).

At the guilty plea hearing the court questioned Hansen about her own description of the offense that she “did some damage to a car and [that she would] have to pay for it.” Hansen, answered the court’s questions and stated that she damaged the car “without the consent of the owner” while knowing that she “didn’t have consent of the owner at the time the damage was done.” (R. 36: 4; A. App. 119). Later, she acknowledged that “the offense happened with regard to the property belonging to Alexis Hansen.” (R. 36: 6; A. App. 121). But, although the court knew that Cynthia and Alexis were married at the time of the incident (R. 36: 7, 10), it did not ask Hansen during the plea colloquy whether she believed she had an ownership interest in the car because of their marriage or Wisconsin’s marital property law.

At the post-conviction motion hearing, however, the prosecution stipulated (R. 37:15; A. App. 136) to the facts set out in Hansen’s affidavit about her understanding, at the time of her plea, that the damaged vehicle was property in the marital estate (which was later subject to a marital property settlement agreement in the divorce) (R. 24: 1; A. App. 111, ¶2). Hansen’s affidavit, which was received by the court lieu of post-conviction motion testimony by Hansen (R. 37:16; A. App. 137) also stated that she did not know that damaged marital “property of another,” as the term is defined under Wisconsin law, would not be a basis for a

criminal damage prosecution if the accused spouse had the right to defeat or impair the interest of the other spouse (R. 24: 2; A. App. 112, ¶4, 7).

ARGUMENT

I. THE RECORD OF DEFENDANT’S GUILTY PLEA FAILED TO SHOW THAT THE DEFENDANT WAS AWARE OF THE ESSENTIAL ELEMENTS OF THE CRIME OF CRIMINAL DAMAGE TO MARITAL PROPERTY.

Under §971.08(1), Wis. Stat., the trial court was required to determine, and demonstrate on the record, that her plea of guilty was made “voluntarily with understanding of the nature of the charge. . . .” This has been described as a requirement going to the defendant’s “awareness of the essential elements of the crime.” State v. Brandt, 226 Wis. 2d 610, 619, 594 N.W.2d 759 (1999). See also, State v. Lackershire, 2007 WI 74, ¶31, 34, 301 Wis. 2d 418, 437, 734 N.W.2d 23. The United States Supreme Court in McCarthy v. United States, 394 U.S. 459, 466-67, 89 S.Ct. 116, 622 L.Ed.2d 418 (1969), addressed this colloquy requirement (under the comparable Rule 11 in federal criminal procedure) stating:

Moreover, 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 Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to ‘protect 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.

The plea colloquy responsibilities of the trial court in this case were

complicated by the fact that the criminal damage to property of another statute does not, of itself, lay out all the elements of the offense. Rather, the statute, §943.01(1), Wis. Stats., borrows from a definition provision in Chapter 939 that clarifies the concept of “property of another.” §939.22(28) itself sets forth a definition that has two components. On the one hand, “property of another” means property in which another person, other than the criminal actor, has a legal interest, even though the criminal actor may also have a legal interest in the property. However, in those circumstances where there are joint interest-holders in the property, the definition establishes criminal liability only if the criminal actor has “no right to defeat or impair” the legal interest of the other party. The definition adds an element to the offense, when allegedly committed in a joint ownership context, that the actor be found not to have a “right to defeat or impair” the legal interest of the complaining party.

The two statutes must be read together to complete the definition of the offense of criminal damage to property. It may be unnecessary to consider this complication, in those instances where there is no factual context involving joint ownership of the allegedly damaged property. But where joint ownership is involved, and particularly where the property is jointly owned by reason of marriage, as was the case here, the trial court has the responsibility of assuring that the defendant is aware of the additional element of the crime: where the accused is

a joint owner by marriage of the property, or is the spouse of the complainant who asserts a legal interest in the damaged property, as was the case here, the court must be assured that the defendant understands that the crime exists only if the defendant had no right to defeat or impair the other joint owner's or spouse's legal interest.

At the post-conviction motion hearing the prosecution relied on State v. Sevelin, 204 Wis.2d 127, 554 NW2d 521 (1996) to counter Hansen's arguments. But Sevelin is not useful for analyzing the issue here because, for one, Sevelin was convicted following a trial, and the issue of whether §939.22(28) had an impact on defining the essential elements of criminal damage to property never arose. The Court's short, two-paragraph discussion of whether a spouse can be convicted of criminal damage to property in which the spouse has an ownership interest did not consider the complication presented for guilty plea colloquies by the definition of "property of another" found in §939.22(28). Moreover, no consideration appears to have been given to whether Mark Sevelin could have defended the accusation against him if he had asserted that his spousal, joint ownership interest could have legally impaired or defeated his wife's joint interest in any fashion.

The more relevant discussion of this statutory feature for offenses under § 943.01(1) appears in sexual assault cases where the courts have determined that guilty pleas were not knowingly made because the defendants were not advised of

the added elements of the offense found in the definitions section of Wis. Stat. § 948.01(5), even though the sexual assault offenses were otherwise described in separate provisions. The Court in State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18 stated:

WISCONSIN STAT. § 971.08(1) requires the trial court to determine a plea “is made voluntarily with understanding of the nature of the charge.” To understand the nature of the charge, the defendant must be aware of all the essential elements of the crime. State v. Nichelson, 220 Wis.2d 214, 218, 582 N.W.2d 460 (Ct.App.1998). 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. at 220–21, 582 N.W.2d 460.

The issue is very real in this case because, as the exhibit to the affidavit of defendant Cynthia Hansen showed (R. 24: 5; A. App. 115, Exhibit 3) the divorce proceedings commenced by Alexis Hansen declared that Cynthia had a legal interest in the automobile which sustained damage. Most importantly, Cynthia Hansen’s un rebutted post-conviction motion affidavit showed that she believed that her spousal interest in the automobile provided her with a right to impair Alexis Hansen’s joint ownership interest (R. 24: 2; A. App. 112) .

Cynthia’s legal authority to impair Alexis’s ownership interest is not beholden alone to marital property law. The Wisconsin legislature has excused a spouse from criminal liability for stealing, carrying away, using, transferring,

concealing, or retaining the property in which the other spouse has an interest without that spouse's consent and with intent to deprive that other spouse permanently of such property. The legislature conferred a right to defeat or impair the other joint property owner's interest by means of theft, in all its possible variations, in §943.20(2)(c), where the "property of another" that is the subject of alleged theft includes jointly owned property "unless the actor and the victim are husband." During their marriage Cynthia Hansen had a right to steal, carry away, use, transfer, conceal, or retain the Ford Focus in dispute, or any part of it (for example, the damage hood), without the consent of Alexis, which obviously would defeat or impair Alexis's interest.

The trial court did not conduct any colloquy with Cynthia Hansen about this added element of the offense, where marital property was allegedly damaged. The transcript of the plea proceedings on March 16, 2016 shows that the Court covered Cynthia Hansen's understanding of the charge against her to the limited extent that it (1) involved damage to a car (2) without the consent of the owner (3) while knowing that the owner did not consent (R. 36: 4; A. App. 119). But there is no discussion or colloquy with regard to the fact that the Ford Focus was marital property, such that Cynthia Hansen was a co-owner, and that under certain circumstances she could defeat or impair Alexis's marital property interest. The Court was aware that Cynthia Hansen and Alexis Hansen were marital partners.

Moreover, the Court was advised that they were in the midst of a divorce when the incident occurred (R. 36; 6-7; A. App. 121-22), which the Court itself referenced (R. 36; 10-11).

Under these circumstances the plea could not be said to be knowingly, voluntarily, and intelligently made. Cynthia Hansen was not made aware of the essential elements of the offense in this context, where the property alleged to have been damaged was marital property in which she held a recognized-legal interest and in which her spouse's interest could be impaired.

II. THE RECORD OF THE GUILTY PLEA HEARING FAILED TO ESTABLISH A FACTUAL BASIS SUFFICIENT TO SATISFY A COURT THAT THE DEFENDANT IN FACT COMMITTED THE CRIME OF CRIMINAL DAMAGE TO MARITAL PROPERTY.

Section 971.08(1)(b) imposes an additional “factual basis requirement” that must be satisfied before the Court can accept a defendant's guilty plea. The Court must “make such inquiry as satisfies it that the defendant in fact committed the crime charged.” This requires a determination that the conduct which the defendant admits constitutes the offense charged. Ernst v. State, 43 Wis.2d 661,674, 170 NW2d 713 (1969). See also, State v. Lackershire, *supra*; White v. State, 85 Wis.2d 485, 271 NW2d 97 (1978). To satisfy the factual basis requirement, a judge must be satisfied that the facts, if proved, “constitute the offense charged and whether the defendant's conduct does not amount to a defense.” Edwards v. State, 51 Wis.2d 231, 236, 182 NW2d 183 (1971).

Here, as noted earlier, the plea colloquy did not involve a discussion or inquiry into the facts surrounding the Ford Focus as marital property, or the joint ownership status of the complainant and the defendant. Because, as noted above, the criminal damage statute borrows from the concept of “property of another” in the definition’s provisions of Chapter 939, the court should have extended the inquiry to determine the facts in light of that definition. Had it done so, the factual determination necessarily would have led to an assessment of whether Cynthia Hansen, under any circumstance, had a right to defeat or impair Alexis Hansen’s marital property interest in the vehicle. That inquiry was not conducted, and the defendant’s guilty plea is defective for that additional reason.

Second, had the court conducted the inquiry it would have been compelled to determine that, under the facts of this particular case, where the complainant and the defendant were married, and the Wisconsin legislature had in effect excused Cynthia Hansen from impairing or defeating Alexis’s interest in the vehicle, the charge of criminal damage to property could not have been committed *as a matter of law*. Accordingly, the trial court not only omitted the colloquy that satisfied the factual basis requirement, a sufficient factual inquiry would have revealed that no offense was committed at all. State v. Sevelin, 204 Wis.2d 127, 554 NW2d 521 (1996) simply does not consider the complication presented by the “defeat or impair” component of the definition of the offense found in §939.22(28), when

considered in conjunction with §943.20(2)(c)'s exception to criminal liability for thefts of marital property by a spouse.

Because an insufficient factual basis existed for the defendant's plea, and because a fuller examination of the underlying facts would have disclosed the fact that a crime was not committed, the defendant's plea should be invalidated. Cynthia Hansen's plea should have been vacated and the charge of criminal damage to property should have been dismissed.

CONCLUSION

For the foregoing reasons, appellant Hansen respectfully requests that the decision and order of the circuit court be reversed and this matter should be remanded either with instructions that the criminal damage to property offense be dismissed or that the plea be vacated.

Dated at Milwaukee, Wisconsin, January __, 2017.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,660 words.

James A. Walrath

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

James A. Walrath

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the ____ day of January, 2017, I caused ____ copies of the Brief and Appendix of Appellant Cynthia Hansen to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688 and that three copies were served by mail on opposing counsel of record, Charlotte Gibson, Assistant Attorney General, P.O. Box 7857, Madison, Wisconsin 53707-7857 and District Attorney Michael D. Graveley,, 912 56th Street, Kenosha, Wisconsin 53140-3747.

James A. Walrath