STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CASE NO. 2016AP2114 CR

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State of Wisconsin,
Plaintiff-Respondent,

v.

Case No. 2015CM001439
(Kenosha County)

Cynthia A. Hansen,
Defendant-Appellant.

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# BRIEF OF PLAINTIFF-RESPONDENT

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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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BY:

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## ISSUES

1. Has the Defendant met her initial burden of making a prima facie showing that the trial court failed to comply with Wis. Stat. § 971.08 or other mandatory procedures described in *Bangert* when it accepted her guilty plea? The circuit court ruled that the plea hearing was sufficient.
2. Was there a sufficient factual basis to support the Defendant's guilty plea at the time the plea was entered? The circuit court ruled that there was a sufficient factual basis to support the plea.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting oral argument or publication.

## STATEMENT OF THE CASE AND FACTS

The State does not dispute the Statement of the Case and Statement of Facts prepared by the Defendant in any significant way.

## ARGUMENT

### I. The Defendant has Failed to Carry her Burden to Make a Prima Facie Showing that the Plea Colloquy was Deficient.

Wisconsin Statute Section 971.08(1) provides in relevant part that, before accepting a guilty or no contest plea, the trial court must "address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge."

In *State v. Bangert*, the Wisconsin Supreme Court held, "we now make it mandatory upon the trial judge to determine a defendant's understanding of the nature of the charge at the plea hearing by following any one or a combination of the following methods." 131 Wis. 2d 246, 267 (1986).

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, or from the applicable statute. Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant

> and request him to summarize the extent of the explanation, including a recitation of the elements, at the plea hearing. Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing.

*Id.* at 268 (internal citations omitted).

When a defendant challenges the sufficiency of the plea hearing, "The initial burden rests with the defendant to make a *prima facie* showing that his plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures (described in the *Bangert* decision)." *Id.* at 274.

The Defendant claims that the plea colloquy was deficient, that it fails to demonstrate that her plea was made "voluntarily with understanding of the nature of the charge." Appellant's Brief at 7. She claims that the colloquy was deficient because the trial court did not review with the Defendant the statutory definition of "property of another" found at Wis. Stat. § 939.22(28). *Id.* at 8-11. She claims that this definition creates an additional element of the criminal damage to property offense that was not covered at the plea colloquy. *Id.*

However, the trial court covered all of the elements found in the relevant statute (Wis. Stat. § 943.01) and jury instruction (WIS JI-Criminal 1400).

The Defendant is not content with the elements enumerated in the jury instruction and the statute and proposes a radical alteration to those elements. The Defendant proposes adding an element to the offense based on its reading of the definitions section of the Wisconsin Criminal Code.

In support of this argument, the Defendant relies upon *State v. Jipson*, 267 Wis. 2d 467 (App. 2003). In *Jipson*, the appellate court recognized that the meaning of sexual contact found in the definitions section (Wis. Stat. § 948.01(5)) was, in fact, an element of the crime of second degree sexual assault of a child (Wis. Stat. § 948.02(2)). *Id.* at 470, 473. In discussing this holding, the *Jipson* Court noted that it was following previously established judicial precedent. *Id.* at 473 ("[T]he *courts* have nevertheless crafted this to be an element of the offense." (emphasis added).

The specific precedent on this issue was apparently established in *State v. Nichelson*, 220 Wis.2d 214 (Ct. App. 1998). In Footnote 4 of the *Jipson* decision, that court noted, "The [*Nichelson*] court concluded, with little explanation because the State agreed, that sexual gratification is an element of sexual assault." 267 Wis.2d at 473.

*Nichelson* appears to be a rather unique case. At Nichelson's plea hearing, the trial court failed to engage Nichelson in a colloquy about his "understanding of the nature of the charges against him," but instead seemed to rely upon a short, poorly developed discussion on the record between Nichelson and his trial counsel. 220 Wis.2d at 219-20. It appears that Nichelson's trial counsel did not summarize on the record in any real detail the conversation with Nichelson in which the elements of the offense were explained or recite the elements at the plea hearing. *Id.* Therefore, it appears that the plea hearing in *Nichelson* did not comply with the *Bangert* holding.

Furthermore, the appellate court made note of the fact that Nichelson had a mental handicap and had given statements to the police "that his defense was based on the allegedly accidental nature of the contact." *Id.*

*Nichelson* is a unique case that established a unique legal precedent that an element of a crime could be found in the definitions section rather than in the statute which defined the crime. The State is not aware of any other line of Wisconsin cases where an element of a crime is found in the definitions section.

Nor is the State aware of sound legal reasons to expand the *Nichelson* line of cases by holding that other

definitions sections also create elements of crimes. Extending the *Nichelson* line of cases by holding that other crimes also have additional elements not found in the statute which creates the crime but instead found in a definitions section would only serve to create unnecessary traps for insufficiently informed trial court judges conducting plea colloquys. Public policy favors clarity. Adopting the Defendant's argument that additional definitions statutes create additional elements to existing crimes does not promote clarity but a great deal of confusion instead.

Furthermore, unlike in *Nichelson*, the State is not here conceding that the trial court in the instant case failed to address an element of the crime.

Section 939.22(28) which defines "property of another" is the definitional statute at issue in this appeal. There does not appear to be any precedent for treating the language of that definition as a new element for any crime.

In reviewing the other thirty-six subsections to this statute, the State is not aware of any precedent where any of those definitions have been held to create a new element of a criminal offense.

For example, the definition of "Peace Officer" found in subsection 22 does not create new elements to the

offense of Battery to a Peace Officer. Rather, it clarifies who should be treated as a peace officer for purposes of the existing element of that offense.

Similarly, in a misdemeanor battery prosecution under Wis. Stat. § 940.19(1), the State is required to prove that bodily harm was caused. Bodily harm is an element of that offense. The definition of "bodily harm" found at Wis. Stat. § 939.22(4) does not create new elements of the offense. Rather, it clarifies what constitutes bodily harm under the existing element and what does not.

The State is not aware of any reason that the definition found in subsection twenty-eight should be treated differently than the other definition sections as the Defendant would have this court do.

In *State v. Sevelin*, the appellate court specifically considered whether a defendant could be found guilty of criminally damaging marital property. 204 Wis.2d 127 (1996). The court held that Sevelin's conviction was proper. *Id.*

The court specifically addressed Wis. Stat. § 939.22(28) in that decision. *Id.* at 131. The court held, "This section unambiguously means that a person can be convicted of criminal damage to property even though he or

she has an ownership interest if someone else also has an ownership interest." *Id.*

In reaching that conclusion, the court stated, "One of the elements the State must prove to sustain a conviction is that the property damaged was the 'property of another.'" *Id.* If, as the Defendant claims, Section 939.22(28) creates an additional "no right to defeat or impair" element for this offense, then the *Sevelin* decision would have been the perfect time for the appellate court to have announced this additional element. However, no such announcement was made.

Rather than creating a new element, the *Sevelin* Court appears to have asserted that Section 939.22(28) merely provides clarification of the 'property of another' element when such clarification is necessary or helpful.

This 'clarifying rather than creating' position is the same position taken by the Criminal Jury Instructions Committee. WIS JI-CRIMINAL 1400 lists five elements of the offense of Criminal Damage to Property under Wis. Stat. § 943.01. The third element in the list is that, "The property belonged to another person." *Id.* The Defendant's "no right to defeat or impair" language is not listed as an element. *Id.* Instead, this language is described in Footnote 3 as being part of the definition of "property of

another." *Id.* Nothing in the jury instruction supports the Defendant's claim that there is an additional element of the offense. *Id.*

Rather than creating a new element of the offense, the better reading of Wis. Stat. § 939.22(28) is that the statute clarifies an existing element or establishes a privilege defense in certain cases.

WIS JI-CRIMINAL 1400 provides a helpful example of the 'clarifying rather than creating' line of reasoning in Comment 4 which states, "If definition of 'without consent' is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48)." Comment 4 does not state that the definition language found in the statutes creates a new element of the offense that must be addressed at plea hearings. Rather, it states that, when the existing element of "without consent" needs to be further defined or clarified, further definition is available in the definitions section of the Criminal Code.

In addition to clarifying an element of the offense, § 939.22(28) may also elaborate a privilege defense that would be available to some defendants prosecuted for criminal damage to property. The relevant language of that subsection which the Defendant has focused on in this

appeal is "which the actor has no right to defeat or impair."

Wisconsin Statute § 939.54(6) recognizes a defense of privilege "When for any other reason the actor's conduct is privileged by the statutory or common law of this state." Section 939.22(28) recognizes that, in some cases, a joint owner may have a right to defeat or impair a co-owner's legal interest in property. In those cases, the defendant joint owner would have available an affirmative defense to the charge of criminal damage to property.

However, "It is well-established that a plea of guilty, knowingly and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights." *County of Racine v. Smith*, 122 Wis.2d 431, 434 (Ct. App. 1984).

Furthermore, the plea-taking court has no obligation to review all possible defenses with a defendant. *State v. Pohlhammer*, 82 Wis.2d 1, 3 (1978) ("this holding… is not to be read to create a duty upon trial courts to inform defendants of possible statutory defenses to the charges brought or to secure waivers of those defenses..."). For example, in *State v. Burton*, the Supreme Court of Wisconsin held,

> circuit courts engage in personal colloquies in order to protect defendants against violations of their fundamental constitutional rights. Because neither the federal constitution nor the Wisconsin Constitution confers a right to an insanity defense, a court has no obligation to personally address a defendant in regard to the withdrawal of an NGI plea.

349 Wis.2d 1, 42-43 (2013) (internal quotations omitted).

At the time that the Defendant pled guilty to Criminal Damage to Property, the trial court engaged her in a colloquy, discussing each of the elements of the offense. R. 36:1-6. Specifically, the trial court discussed with the Defendant each of the five elements listed in WIS JI-CRIMINAL 1400. *Id.* After this colloquy, the court found that the Defendant made a "free, voluntary and intelligent plea to the charge." *Id.* at 6:12-13. Thus, the trial court satisfied the colloquy requirement set forth in *Bangert*.

Since the trial court followed the procedure required by *Bangert*, this Court should hold that the Defendant has failed to make her required prima facie showing that the plea colloquy was deficient.

At best, the definition statute which the Defendant relies upon in her appeal created for her a possible privilege defense which she could have pursued at trial.

However, her privilege to defeat or impair a co-owner's interest in property is not a fundamental right

found in either the federal or state constitution. If she had the privilege, it would have been statutory and not constitutional. Therefore, by entering a plea of guilty to the offense, she waived this privilege defense.

Nor does this waiver of her privilege defense work a manifest injustice in the Defendant's case. In fact, she has admitted that she discussed this possible defense with her trial counsel before making a decision to enter a guilty plea. R. 24:1-2. In her affidavit, the Defendant swore,

> I discussed my belief, that I should have had *a defense* to the charge because the vehicle was marital property, with my attorney, Cassi Baumgardner, on March 16, 2016, prior to my plea. She advised me that the law in Wisconsin permitted criminal damage convictions against spouses for intentionally damaging marital property and that I did not have a marital property defense. Based on that explanation, I agreed to plead guilty.

(Emphasis added.)

Despite the fact that the Defendant may now once again believe that she should have had "a defense" to the charge, the record is clear that she pled guilty, waiving her right to present this defense. At no point in her post-conviction motion or appeal has she alleged that her trial counsel provided her ineffective assistance. Therefore, she is not entitled to withdraw her plea merely because she

now believes the law may afford her a defense that her trial counsel did not think was viable.

Based on all of the above rationale, this Court should find that a legally sufficient plea colloquy was conducted.

## II. Contrary to the Defendant's Assertions, a Sufficient Factual Basis for the Defendant's Plea was Established at the Plea Hearing.

Pursuant to Wis. Stat. § 971.08, when a court accepts a guilty plea it should determine that there is a sufficient factual basis to support that plea. The Wisconsin Supreme Court has held that, when a trial court determines that there is a sufficient factual basis to support the conviction, an appellate court should "not upset these factual findings unless they are contrary to the great weight and clear preponderance of the evidence." *Broadie v. State*, 68 Wis.2d 420, 423 (1975). The *Broadie* Court also held, "Where as here, the guilty plea is pursuant to a plea bargain, the court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." *Id.* at 423-24.

A judge is not required to establish a factual basis in any one particular manner. *State v. Thomas*, 232 Wis.2d

714, 729-30 (2000). "It makes sense for a court to view the record in its totality when a judge's initial inquiry into the factual basis may be satisfied by multiple sources spanning the entirety of the record." *Id.* at 730. The Wisconsin Supreme Court has also held, "We decline to rewrite § 971.08(1)(b) as requiring the circuit judge to conduct a mini-trial at every plea hearing to establish that the defendant committed the crime charged beyond a reasonable doubt." *State v. Black*, 242 Wis.2d 126, 138-39 (2001).

When a Defendant enters a guilty plea she admits all facts alleged in the charging document. *State v. Rachwal*, 159 Wis.2d 494, 506 (1991).

In *State v. Merryfield*, the defendant plead guilty to two counts of felony bail jumping. 229 Wis.2d 52, 60 (Ct. App. 1999). However, he later sought to withdraw the guilty pleas, arguing that a sufficient factual basis had not been established at the plea hearing. *Id.* Specifically, he argued that, he was only on bond for a misdemeanor, not for a felony, at the time of the offenses. *Id.* at 58.

However, the appellate court noted that Merryfield was asking the court decide an issue of fact. *Id.* at 61. The court held, "That type of evidentiary inquiry would be well

beyond the purpose of the statutory 'factual basis' inquiry…" *Id.* at 60. The court elaborated on this holding by saying,

> The purpose of requiring a trial court inquiry into the factual basis for a crime to which a plea of guilty or no contest is tendered, however, is *not* to resolve factual disputes about what did or did not happen at or before the time of the alleged offense – that is the function of a trial, which a defendant who pleads other than not guilty expressly waives.

*Id.* at 61.

In the present case, the Defendant argues that there was an insufficient factual basis to support her plea because the issue of whether she had a legal right to defeat or impair Alexis Hansen's interest in the vehicle was not addressed at the plea hearing. App. Brief at 13.

However, such inquiry was not necessary. As argued above, the State does not believe the "no right to defeat" language in Wis. Stat. § 939.22(28) is an element of the offense, but instead either clarifies an element or sets forth a privilege potentially available as a defense.

Had the plea-taking court thoroughly explored the factual issue of whether the Defendant's actions were privileged, it would have embarked upon what would have amounted to a "mini-trial" to resolve that issue. It is exactly this type of "mini-trial" which the *Black* Court and

the *Merryfield* Court held was unnecessary for a trial court to engage in at a plea colloquy.

A sufficient factual basis can be established without engaging in such a "mini-trial" and was, in fact, established in this case. By questioning the Defendant on each of the elements listed in WIS JI-CRIMINAL 1400 and securing her admission to the factual basis for each of those elements, the trial court established a solid factual basis for accepting the guilty plea.

Even if the colloquy itself had been deficient on the factual basis issue, pursuant to *Rachwal*, the court would have been entitled to rely upon the factual basis set forth in the criminal complaint.

In this case, the criminal complaint sets forth a factual basis for all of the necessary elements (R. 1).

Even if this Court should adopt the Defendant's argument and treat the "no right to defeat or impair" language of the definition statute as an element of the offense, the criminal complaint still establishes a sufficient factual basis. Specifically, the complaint provides, "When Alexis confronted the defendant, the defendant apologized and said that she would take care of it." (R. 1:2). The complaint also provides, "Alexis

texted the defendant, who replied, once again, that she would take care of the damage." *Id.*

As the Supreme Court of Wisconsin has previously held, "There must be facts in the written complaint which are themselves sufficient or give rise to reasonable inferences which are sufficient to establish probable cause." *State ex. rel. Evanow v. Seraphim*, 40 Wis.2d 223, 226 (1968).

In the criminal complaint filed in the present case, there are factual assertions that the Defendant apologized for causing the damage to Alexis' vehicle and agreed to "take care of it" (R. 1:2). The reasonable inference to be drawn from those assertions is that the Defendant agreed to pay for the damage she caused to the vehicle because she recognized that she had no right to defeat or impair Alexis' interest in the vehicle. Therefore, even if the court should adopt the Defendant's argument that the "no right to defeat or impair" language should be treated as an element, there is still a sufficient factual basis for the plea when the totality of the record is considered.

Finally, public policy dictates that this Court not adopt the Defendant's position requiring a new element in Criminal Damage to Property prosecutions. As a practical matter, if the Court adopted the Defendant's position, the State could no longer charge Criminal Damage to Property in

marital property cases. Prior to issuing charges, the State has no practical way to research and determine each spouse's "right to defeat or impair" the other spouse's legal interest in the marital property.

The Defendant's proposed change in the law, requiring a new element be included in all criminal damage to property complaints where marital property is at issue, would effectively strip the *Sevelin* holding of any real meaning. The *Sevelin* Court specifically held, "a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest." 204 Wis.2d at 131. However, the Defendant's proposal creating a new element that must be pled in the criminal complaint would, for all practical purposes, completely undermine the State's ability to charge criminal damage to property in marital property cases and would lead to a de facto reversal of the *Sevelin* decision.

Based on the above considerations, the Defendant's challenge to the factual basis for her conviction should fail. A sufficient factual basis was put on the record at the plea hearing because all of the elements in the jury instruction – all of the elements required by Wis. Stat. § 943.01(1) – were covered. Even if there was a deficiency

in the factual basis at the plea hearing, the facts alleged in the criminal complaint cure that deficiency.

## CONCLUSION

The decision and order of the circuit court denying the Defendant's post-conviction motion should be affirmed because the plea-taking judge complied with the requirements set forth in § 971.08(1) and in the *Bangert* decision. The Defendant has failed to carry her burden to establish a prima facie case on that issue.

Furthermore, she has failed to show that the factual basis supporting her conviction was deficient or that plea withdrawal is necessary to avoid a manifest injustice.

Therefore, the State respectfully asks that the Defendant's appeal be denied and that the circuit court's order denying relief from the conviction be affirmed.

Dated at Kenosha, Wisconsin, this 4th day of April, 2017.

Respectfully submitted,

By: _____

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## CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained within Section 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 22 pages.

Dated this 4th day of April, 2017.

_____
Andrew J Burgoyne
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**CERTIFICATION 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 s. 809.12(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 April, 2017.

_____

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