STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP940-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARON HENRY,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION TO WITHDRAW GUILTY PLEA, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JANET C. PROTASIEWICZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

The State reframes the issue presented as follows:

Did the trial court properly exercise its discretion in denying Defendant-Appellant Laron Henry's motion to withdraw his guilty plea without an evidentiary hearing?

The trial court denied Henry's plea withdrawal motion after holding that he failed to prove a manifest injustice and that the record conclusively showed he understood the elements of the witness intimidation offense.

This Court should uphold that discretionary decision.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State agrees with Henry that this appeal does not merit oral argument or publication. This case is appropriate for summary affirmance. Wis. Stat. § (Rule) 809.21.

INTRODUCTION

Henry is not entitled to withdraw his guilty plea to felony intimidation of a witness. The record in its entirety establishes conclusively that the elements of the offense were explained to Henry, and he understood them. The conduct Henry admitted to committing, as summarized by the prosecutor at the plea and sentencing hearings, satisfied those elements and provided a sufficient factual basis for his plea. The plea colloquy, as supplemented by the plea questionnaire and pattern jury instructions for intimidation of a witness, satisfied the requirements of Wis. Stat. § 971.08(1) and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), for a prima facie valid plea. The trial court properly denied Henry's plea withdrawal motion without an evidentiary hearing because he failed to prove a manifest injustice by clear and convincing evidence.

This Court should affirm.

STATEMENT OF THE CASE

Laron Henry went to trial on August 1, 2016, on nine felony and misdemeanor charges arising out of domestic violence incidents involving the same victim, T.T., alleged to have occurred on November 24, 2014, January 24, 2015, and November 16, 2015. (R. 1; 2; 28:13–17.) The prosecutor intended to call T.T. to the stand at the close of the first day of trial right after opening statements. (R. 29:60–61.) The jury was selected, and the court took a short recess before opening statements. After the recess, the prosecutor told the court that T.T. and her mother, N.M. (R. 30:25), both of whom were present earlier, left without notice and could not be reached. (R. 29:62–63.) At the prosecutor's request, the court issued body attachments for both witnesses, and the trial was adjourned to the next day. (R. 29:63–64.)

The two witnesses were produced on the body attachments the next morning, August 2, 2016. (R. 30:3.) The prosecutor revealed that Henry made several telephone calls from the jail the previous evening to third parties directing them to let T.T. and N. M. know that, if they fail to show up for trial, the charges against him would be dismissed. (R. 30:4.) Based on that development, the prosecutor made a plea offer whereby Henry would plead guilty to one of the charged counts of felony bail jumping, to one of the charged battery counts as a repeat offender, and to felony intimidation of a witness based on his telephone calls from the jail. The remaining charges would be dismissed and read into the record for sentencing purposes. Both sides would be free to argue for whatever sentence they deemed appropriate. (R. 30:4–5.) Part of the motivation for this plea deal, from the prosecutor's point of view, was to spare T.T. the "trauma" of having to testify after having been "body attached twice." (R. 30:5.)

Henry accepted the plea deal, and the prosecutor filed an amended information containing the new witness intimidation charge and the bail jumping charge, as well as the battery charge in the original information. (R. 4; 30:6.) The trial court then engaged Henry in the plea colloquy required by Wis. Stat. § 971.08 to ensure that his decision to plead guilty and waive his right to a jury trial was voluntary and intelligent. (R. 30:9–19.) Henry and his attorney also filled out a guilty plea questionnaire and waiver form, acknowledging in writing Henry's understanding of the charges, the penalties, and the constitutional rights he was waiving. (R. 5.)

Henry told the court he understood that the maximum penalty for felony intimidation of a witness is ten years in prison and a $25,000 fine. (R. 30:10.) Henry's attorney attached jury instructions to the plea questionnaire containing the elements for all three offenses including felony intimidation of a witness. (R. 6:3–4.) Henry told the court that he went through those jury instructions with his attorney, and he had no questions about them. (R. 30:12.) Henry also told the court that he went through the guilty plea questionnaire and waiver form with his attorney before he signed it. (R. 30:13.) Defense counsel told the court that he went over the plea form "and the elements of these offenses with Mr. Henry and explain[ed] them to him[.]" (R. 30:14.) Henry assured the court that he had enough time to discuss the case with counsel, and he was satisfied with counsel's representation of him. (R. 30:16.) Henry assured the court that he read the criminal complaints, along with the original and amended informations, and admitted that the facts alleged in those documents were true. (R. 30:16.)

The court asked Henry specifically what he did the night before that amounted to felony intimidation of a witness. (R. 30:17–18.) Henry responded: "Made a call to somebody and they made a call to somebody else." (R. 30:18.)

The court then asked whether he made those calls in hopes that the witnesses would not show up for trial. Henry answered; "No." The court then asked: "Well, what were you doing that was the crime?" Henry answered: "Talking to – basically talking [sic] third party." The court then asked the following clarification question: "Were you talking to the third party that the case would stop if the witnesses didn't show up?" Henry answered: "Yes." (R. 30:18.) Defense counsel agreed that there was a sufficient factual basis for each plea. (R. 30:19.) The court found that Henry entered each plea "freely, voluntarily, and intelligently," that Henry "understands the charges," and that there is "a factual basis for each plea." It then accepted Henry's pleas and found him guilty. (R. 30:19.)

Against the advice of his attorney and the court, Henry insisted that he be sentenced immediately after he pled guilty. (R. 30:7–9.) Sentencing took place later that same day, August 2, 2016. In her remarks, T.T. asked for a no-contact order for the rest of her life. (R. 30:24–25.) In his sentencing remarks, the prosecutor described in great detail how Henry terrorized and intimidated both T.T. and her mother over the years. (R. 31:7–13.) He noted that the case was initially set for trial on November 16, 2015, but when Henry saw that both T.T. and N.M. showed up, he fled, and the trial could not proceed. (R. 31:13.) After Henry was arrested, the case was rescheduled for trial and T.T. and her mother again appeared. Once again the trial was adjourned, this time due to issues regarding Henry's competency to proceed. (R. 31:14.)

The prosecutor then summarized what happened the day before, August 1, 2016. He noted that both T.T. and N.M. were present for trial "throughout most of the day" but due to "frustration" over how long they had to wait, and given "the relationship [T.T.] and [N.M.] both had with Mr. Henry," they left. (R. 31:14.) The prosecutor then

summarized the telephone calls made by Henry from the jail to third parties after the trial was adjourned for the day. (R. 31:14–17.)

The first call was at 5:07 p.m. Henry told the third party that T.T. and N.M. "left the court, and if they didn't come back together, the State was going to drop his case." (R. 31:15.)

The second call was at 5:21 p.m. Henry told a different third party about "everything that happened . . . that [N.M.] and [T.T.] had left, that they did not want to be here, and that if they didn't come tomorrow, they would dismiss the case." (R. 31:15.) Henry told the third party, "just tell her when you talk to her, if they don't come to court tomorrow, they are going to dismiss the case. Do you hear me?" (R. 31:16.) This third party then called T.T. on speaker phone with Henry still on the line. Henry heard the third party tell T.T.: "Laron says, if you guys don't come to court tomorrow, the case is going to get dismissed." (R. 31:16.) When T.T. voiced concerns about warrants and N.M.'s status on probation, the third party repeated what Henry had said: "if they don't come back the case will be dismissed." (R. 31:16.) Henry added: "all they have is the 911 call from the 2014 incident and the bloody shirt. Without you guys, they don't have anything else." (R. 31:16–17.)

The prosecutor described Henry's efforts to intimidate the witnesses as "aggravated" because he knew they were "conflicted" and "susceptible to . . . any kind of intimidation on Mr. Henry's part." (R. 31:17.) Henry also "in mid-trial gets on the phone to do anything he can to obstruct the process, to make sure they don't come back, so the jury can't hear the evidence and determine his guilt or innocence." (R. 31:17.) The prosecutor noted that T.T, despite saying she was no longer afraid of Henry, asked for a lifetime no-contact order. He added that when she came to court the day before, T.T. was apprehensive, teared up several times and

"was afraid to get on the stand in the same room as Mr. Henry." (R. 31:18–19.) Henry did not then, and does not now, dispute any of this.

In his sentencing remarks, defense counsel assured the court that Henry is "fully admitting to making phone calls to third parties yesterday in regards to the" witness intimidation charge. (R. 31:20–21.) In exercising his right of allocution, Henry assured the court, "I take full responsibility for what I pled guilty to." (R. 31:24.) Henry claimed that he and T.T. had "moved on," and he has not "talked to her or seen her" other than through "the third party call and stuff like that." (R. 31:24.)

In its sentencing remarks, the trial court referred to the "extraordinarily serious bail jumping" offense where Henry showed up for the previously-scheduled trial date and, when he saw that T.T. and N.M. were there to testify against him, fled "to circumvent the system." (R. 31:34–35.) The following exchange between the court and Henry then occurred:

> And then last night, Mr. Henry, I almost said to you after the two necessary witnesses for the State disappeared, I almost said to you, it would be in your best interest to not make any phone calls tonight, but I didn't because I figured you're going to do what you're going to do and why should I warn you?
>
> Right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Why should I warn you?
>
> THE DEFENDANT: (Nods head).
>
> THE COURT: Then what did you do? You made the exact kind of phone calls that I suspect your attorney warned you not to make, the kind of phone calls I was thinking you might make, but I was hoping you were smart enough not to make.

> And you know that those phone calls are being taped, and you know what witnesses have disappeared, and while [T.T.] comes in and shows a lot of kindness to you, she ended her comments by saying she wants a no-contact order with you for the rest of her life.

(R. 31:35.) The court added: "You tried to undermine the entire system with your behavior" by fleeing when the witnesses appeared for the initial trial date, and by making phone calls the night before to convince the witnesses not to appear in court. (R. 31:36.) Henry did not dispute anything the court said about the phone calls.

The court sentenced Henry to five years of initial confinement and four years of extended supervision for felony witness intimidation, a consecutive term of three years of initial confinement and three years of extended supervision for felony bail jumping, and a consecutive term of one year of initial confinement and one year of extended supervision for battery. (R. 31:39–40.)

On April 27, 2017, Henry filed a postconviction motion to withdraw his plea on the grounds that the court failed to adequately ascertain his understanding of the "malicious intent" element of the witness intimidation charge and failed to establish a factual basis for his plea to that charge. (R. 16.) The trial court denied the motion without an evidentiary hearing in a Decision and Order issued on May 2, 2017. The court held that Henry failed to prove a "manifest injustice" by clear and convincing evidence. (R. 17, A-App. 19–23.)

The court found that Henry's conduct satisfied the elements of witness intimidation when he admitted making the calls from the jail directing third parties to tell T.T. and N.M. that if they did not come to court the next day, the case would be dismissed. "The only reasonable inference that could be gleaned from" his admission in court to making

those calls was he acted "with malicious intent to dissuade the witnesses from coming to court." (R. 17:3, A-App. 21.)

The court held there was a sufficient factual basis for the plea in the form of the prosecutor's summary of the content of the jail calls and Henry's admission to making them at the plea hearing. (R. 17:3, A-App. 21.)

Finally, the court held that Henry failed to make the prima facie showing of a facially defective plea entitling him to a hearing under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The plea colloquy showed that Henry reviewed the elements of witness intimidation as set out in Wis. JI-Criminal 1292 (2010), a copy of which was attached to the plea questionnaire filled out and signed by both Henry and his attorney. (R. 5; 6:3–4; 17:4, A-App. 22.) This, the court held, showed that Henry acknowledged his understanding that the State would have to prove he "acted with the purpose to prevent" the witnesses from testifying. (R. 17:4–5, A-App. 22–23.) Henry's "statements at the plea hearing established unequivocally that he had reviewed the elements of intimidation of a witness with his attorney, that he understood them, and that he had no question about them . . . The defendant's allegations to the contrary are negated by the record." (R. 17:5, A-App. 23.)

Henry appeals. (R. 20.)

STANDARD OF REVIEW

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this court de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

The issue of whether Henry proved a "manifest injustice" entitling him to withdraw his guilty plea is left to the sound discretion of the trial court. *State v. Taylor*, 2013

WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482; *State v. Roou*, 2007 WI App 193, ¶ 15, 305 Wis. 2d 164, 738 N.W.2d 173.

ARGUMENT

The trial court properly exercised its discretion to deny Henry's plea withdrawal motion without an evidentiary hearing.

This Court should affirm. The trial court properly exercised its discretion to deny Henry's plea withdrawal motion. The record conclusively shows that Henry was advised of and understood the intent element of felony witness intimidation, and there was a sufficient factual basis for his plea to that charge.

A. The law applicable to the denial of a motion to withdraw a guilty plea for failure to sufficiently allege a "manifest injustice"

1. The sufficiency of the factual allegations to require an evidentiary hearing

The trial court had the discretion to summarily deny Henry's plea withdrawal motion without an evidentiary hearing if the motion failed to allege sufficient facts, presented only conclusory allegations, or even if it was sufficient on its face the record conclusively showed that Henry was not entitled to relief. *Balliette*, 336 Wis. 2d 358, ¶¶ 50, 56–59; *State v. Bentley*, 201 Wis. 2d 303, 309–11 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972).

To warrant further evidentiary inquiry, the motion had to allege material facts; those facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. *See State v. Love*, 2005 WI 116, ¶¶ 26–28, 284 Wis. 2d 111, 700 N.W.2d

62. The motion had to specifically allege within its four corners material facts answering the questions who, what, when, where, why, and how Henry would successfully prove at an evidentiary hearing that he is entitled to withdraw his plea: "the five 'w's' and one 'h'" test. *Balliette*, 336 Wis. 2d 358, ¶ 59; *Allen*, 274 Wis. 2d 568, ¶ 23.

This specificity requirement promotes "the policy favoring finality, the pleading and proof burdens that have shifted to the defendant in most situations after conviction, and the need to minimize time–consuming postconviction hearings unless there is a clearly articulated justification for them." *Balliette*, 336 Wis. 2d 358, ¶ 58.

2. The "manifest injustice" test required to be met for post-sentencing plea withdrawal

A defendant who seeks to withdraw his guilty plea after sentencing bears the heavy burden of proving by clear and convincing evidence that there was a "manifest injustice" entitling him to withdraw the plea. *Taylor*, 347 Wis. 2d 30, ¶ 24; *State v. Brown*, 2006 WI 100, ¶¶ 18–19, 293 Wis. 2d 594, 716 N.W.2d 906; *Bentley*, 201 Wis. 2d at 311. To prevail, Henry had to prove there was a serious flaw in the fundamental integrity of his plea; not just disappointment in a lengthier than expected sentence. *Taylor*, 347 Wis. 2d 30, ¶ 49. This stiff burden of proof is imposed on Henry, and deference is owed to the trial court's determination that he failed to prove a "manifest injustice," to protect the State's strong interest in preserving the finality of criminal convictions once the plea has been accepted and sentence has been imposed. *Id.* ¶ 48. *See State v. Cain*, 2012 WI 68, ¶¶ 25–26, 342 Wis. 2d 1, 816 N.W.2d 177; *Roou*, 305 Wis. 2d 164, ¶ 15 (same).

This Court's review is not limited to the plea hearing; it encompasses "the entire record, including the sentencing

hearing." *Cain*, 342 Wis. 2d 1, ¶ 29. This Court must consider "the totality of the circumstances," including the plea and sentencing hearings, the statements of defense counsel and other portions of the record. *Id.* ¶ 31. "The reviewing court looks at the entirety of the record to determine whether, considered as a whole, the record supports the assertion that manifest injustice will occur if the plea is not withdrawn." *Id.* This broad scope of review is proper because "it would simply not make sense to vacate a conviction as the result of an error at a plea hearing when later proceedings unambiguously demonstrate that the error did not give rise to a manifest injustice and that the plea was valid." *Id.* *See also* cases cited at *id.* ¶ 49 n.8 (Abrahamson, J., concurring).

B. Henry failed to prove a manifest injustice because the record conclusively shows that he was advised of and understood the malicious intent element of intimidation of a witness.

The entire record conclusively shows that Henry was properly advised of, said he understood, and in fact understood the malicious intent element of intimidation of a witness.

Henry pled guilty to felony intimidation of a witness in violation of Wis. Stat. §§ 940.42 and 940.43. Henry is guilty if, in pertinent part, he "knowingly and maliciously prevents or dissuades, or [he] attempts to so prevent or dissuade any witness from attending or giving testimony at any trial," Wis. Stat. § 940.42, and he "is charged with a felony in connection with a trial." Wis. Stat. § 940.43(7). There are four elements to felony witness intimidation as applied to Henry's actions: (1) T.T. and N.M. were witnesses called or expected to testify at trial; (2) Henry prevented or dissuaded, or attempted to prevent or dissuade, those witnesses from testifying at trial; (3) Henry acted "knowingly and

maliciously," meaning that he "acted with the purpose to prevent" the witnesses from testifying; and (4) he did so in connection with a trial in a felony case in which he was charged. Wis. JI-Criminal 1292 (2010) at 1–2. *See State v. Moore*, 2006 WI App 61, ¶ 10, 292 Wis. 2d 101, 713 N.W.2d 131 (discussing the first three elements).

As shown above, Henry was on trial for several charged felonies and misdemeanors. He telephoned third parties from his jail cell after the first day of his jury trial to convince them to dissuade prosecution witnesses T.T. and N.M. from coming to court to testify against him the next day. There can be no serious dispute that Henry's telephone calls satisfied the first, second, and fourth elements. Henry contends only that the plea hearing record failed to show his understanding of the third element: that he acted "knowingly and maliciously." The record in its entirety shows that he understood fully.

Henry and his attorney went over the elements of felony witness intimidation together. They used a copy of the pattern jury instruction attached to the plea questionnaire and waiver form listing those elements. (R. 6:3–4.) Henry does not dispute this.

Plea questionnaire and waiver forms such as this are useful tools for assessing the voluntary and intelligent nature of a guilty or "no contest" plea on appellate review. *State v. Garcia*, 192 Wis. 2d 845, 866, 532 N.W.2d 111 (1995); *State v. Moederndorfer*, 141 Wis. 2d 823, 827–28, 416 N.W.2d 627 (Ct. App. 1987). *See Bangert*, 131 Wis. 2d at 268 ("the trial judge may expressly refer to the record or other evidence of a defendant's knowledge of the nature of the charge established prior to the plea hearing"). "A circuit court has significant discretion in how it conducts a plea hearing. Within its discretion, a circuit court may incorporate into the plea colloquy the information contained in the plea questionnaire, relying substantially on that

questionnaire to establish the defendant's understanding of the crime." *State v. Brandt*, 226 Wis. 2d 610, 621, 594 N.W.2d 759 (1999). *Compare Brown*, 293 Wis. 2d 594, ¶ 54 ("The fact that there was no plea questionnaire at hand should have warned the court that special steps were imperative to ensure, on the record, that the defendant was fully apprised and understood the charge.")

With respect to the "knowingly and maliciously" element, the pattern instruction explained to Henry that he is guilty if he knew that T.T. and N.M. were witnesses at his trial and he "acted with the purpose to prevent" them from testifying the next day. Wis. JI-Criminal 1292 (2010) at 1–2. The instruction also explained to Henry that his knowledge and purpose would be found from his "acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose." *Id.*

In the Comment to Wis. JI-Criminal 1292 (2010), the instructions committee explained that the concept of "knowingly and maliciously" is unique to this statute. The committee applied the definition of "malice" or "maliciously" adopted by the Legislature at Wis. Stat. § 940.41(1r), which includes, as is pertinent here, "an intent to . . . thwart or interfere in any manner with the orderly administration of justice." *Id.* Wis. JI-Criminal 1292 (2010), comment at ¶ 5. "This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice." *Id. See also Moore*, 292 Wis. 2d 101, ¶ 1 n.2. (although it employs the term "intimidation," the statute "actually proscribes preventing or dissuading a witness from testifying"). Henry does not disagree with how the jury instructions committee has interpreted or phrased the malicious intent element.

Henry did not dispute the prosecutor's summary of the nature and content of his telephone calls at the plea hearing. (R. 30:4.) Henry telephoned third parties after the first day of trial from jail and told them to contact T.T. and N.M. to let them know the charges against him will be dropped if they do not show up. In the context of his having fled from the initially-scheduled trial when he saw that T.T. and N.M. came to testify, and in the context of his controlling and abusive conduct towards T.T. and her mother over the years, Henry's actions undeniably satisfied the malicious intent element in that he used third parties to dissuade T.T. and N.M. from testifying the next day. *See Moore*, 292 Wis. 2d 101, ¶¶ 2–6, 10–13 (defendant guilty of witness intimidation for writing letters to a witness and indirectly to her witness-daughter telling them that the battery charges against him would be dismissed if they did not show up for trial).

Despite saying "No" when the court asked Henry whether he made those calls with the hope that the witnesses would not show up, Henry admitted seconds earlier that he made those calls, and admitted seconds later to "talking third party" so that, agreeing with the court's understanding of the calls' purpose, "the case would stop if the witnesses didn't show up." (R. 30:18.) Henry also did not dispute the prosecutor's more detailed summary of the nature and content of his phone calls at sentencing shortly after his plea (R. 31:14–17), or the court's observations about his conduct in its colloquy with him at sentencing (R. 31:35).

Henry seems to be arguing that his "No" at the plea hearing indicates either that he did not understand the intent element, or that he never actually admitted that element. But, as shown above, the entire record defeats his claim. Unlike Henry, this Court cannot ignore the rest of the record. *Cain*, 342 Wis. 2d 1, ¶¶ 29, 31. Henry's admissions during the colloquy immediately before and after the "No"; his acquiescence in the prosecutor's detailed summary of the

content of the calls both at the plea hearing and at sentencing a short while later; the plea questionnaire with the attached pattern jury instruction explaining the malicious intent element; and the assurances by both Henry and defense counsel that they discussed the elements, had enough time to do so, and Henry understood them, firmly support the trial court's determination that Henry failed to prove a manifest injustice by clear and convincing evidence.

Henry made these phone calls with the specific "purpose to prevent" T.T. and N.M. from testifying at his felony trial. What other purpose, after all, would there have been for Henry to make those mid-trial phone calls from jail other than to encourage the third parties to dissuade T.T. and N.M. from coming to court? This is especially true with regard to the call where the third party called T.T. and put her on speaker phone while Henry listened and the third party told T.T. that Henry wanted her to know that the case would be dismissed if she did not show up the next day. (R. 31:17.) This was "knowing and malicious" intimidation of T.T. and N.M. that was understandable by any layman and, the record shows, understood by Henry with the assistance of counsel.

C. There was a factual basis for the plea.

Before accepting a plea, the trial court must inquire into the factual basis for the plea to make sure that the facts supporting the charge actually do constitute the offense to which the defendant is about to plead. *Bangert*, 131 Wis. 2d at 262; Wis. Stat. § 971.08(1)(b). A sufficient factual basis exists if an inculpatory inference can reasonably be drawn by the fact-finder from the facts, even if an exculpatory inference can also be drawn and the defendant insists that the exculpatory one is the correct inference. *State v. Black*, 2001 WI 31, ¶ 16, 242 Wis. 2d 126, 624 N.W.2d 363; *State v. Spears*, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App.

1988). When the guilty plea is the product of a negotiated plea agreement, the trial court need not go to the same lengths in assessing whether the facts would sustain the charge as it would if there had been no negotiated plea agreement. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 645–46, 579 N.W.2d 698 (1998).

Henry seems to be arguing that he is not guilty of witness intimidation despite his guilty plea to that offense. The requirement that there be a sufficient factual basis for the plea is not, however, the same as convincing the defendant that he is in fact guilty of the charge to which he is about to plead. "Under § 971.08(1)(b), the circuit court is not required to satisfy the defendant that he or she committed the crime charged. Indeed, the defendant evidenced his or her own satisfaction by entering a plea and thereby waiving his or her right to a jury trial." *Black*, 242 Wis. 2d 126, ¶ 12.

Once again, Henry asks this Court to ignore anything in the record outside of the plea hearing. This Court must, however, review the entire record and the totality of the circumstances when determining whether he proved a manifest injustice. *Cain*, 342 Wis. 2d 1, ¶¶ 29, 31. Henry admitted to making the calls. The prosecutor provided the factual basis for the plea in his summary of the substance of Henry's phone calls just before he pled guilty. (R. 30:4.) The prosecutor described in greater detail the factual basis at sentencing shortly after his plea. (R. 31:14–19.) Henry did not then and does not now challenge the accuracy of those factual summaries. Henry reviewed the elements of the offense with counsel that were laid out in the jury instruction attached to the plea questionnaire before the plea hearing.

Henry was satisfied with the plea agreement and decided to waive his right to a jury trial in favor of a guilty plea, in exchange for the dismissal of several other charges.

He did so after admitting to making the telephone calls from the jail in which he solicited third parties to tell T.T. and N.M. not to come to court. There was a sufficient factual basis as described by the prosecutor at the plea hearing and at sentencing, coupled with Henry's admissions at both hearings, to making the third-party calls. The prosecutor's summaries of the content of the calls render specious Henry's claim, at page 15 of his brief, that "the record fails to provide any facts to establish the malicious intent element." The record in its entirety conclusively proves those essential facts. The phone calls that Henry has always admitted making had no purpose other than to dissuade the witnesses from testifying. Henry did not then, and does not now, claim that they had any other purpose.

D. Henry failed to make the requisite prima facie showing that would entitle him to a *Bangert* hearing.

In *Bangert*, the supreme court set forth mandatory procedures to be followed by trial courts when accepting a guilty or no contest plea to ensure that the record reflects the voluntary and intelligent nature of the plea. 131 Wis. 2d at 260–62, 266–72. *See* Wis. Stat. § 971.08. Those mandatory procedures help to ascertain the defendant's understanding of the elements of the offense to which he is about to plead, his understanding of the constitutional trial rights being waived by the plea, and his assurance that no threats or promises were made to coerce the plea. The court must also inquire into the factual basis for the plea to make sure that the facts supporting the charge actually constitute the offense to which the defendant is about to plead. *Bangert*, 131 Wis. 2d at 262.

As discussed above, Henry was made fully aware of the nature of the charge of witness intimidation and its elements. Henry and his attorney went over the plea

questionnaire and attached pattern jury instructions listing and describing those elements. Both Henry and his attorney assured the court during the colloquy that they discussed those elements and Henry understood them. Henry does not dispute that he and counsel went over the elements before the plea. The plea questionnaire Henry and his attorney signed, with its addendum containing the jury instruction describing the elements for witness intimidation, confirm this. Henry did not challenge the prosecutor's detailed summary of the substance of his phone calls either at the plea hearing or at sentencing. The conduct Henry admitted to committing satisfied the intent element. The plea colloquy satisfied *Bangert*. *See Brandt*, 226 Wis. 2d at 621; *Garcia*, 192 Wis. 2d at 866; *Moederndorfer*, 141 Wis. 2d at 827–28.

It is of great significance that the plea satisfied the mandatory procedures set forth in Wis. Stat. § 971.08 as interpreted and applied in *Bangert*, for accepting a voluntary and intelligent plea. The antiseptic plea colloquy raises a strong presumption that the plea is binding, and the defendant "bears a heavy burden" to show that some alleged misunderstanding outside the record of the plea colloquy requires this Court to "disregard the solemn answers" he gave during the plea colloquy with the trial court. *State v. Jenkins*, 2007 WI 96, ¶¶ 60, 62, 303 Wis. 2d 157, 736 N.W.2d 24. *See United States v. Collins*, 796 F.3d 829, 834–35 (7th Cir. 2015) (defendant's statements in open court during the colloquy are not mere trifles and are presumed true); *United States v. Abdul*, 75 F.3d 327, 329 (7th Cir. 1996), *cert. denied*, 518 U.S. 1027 (1996) (the defendant "faces a heavy burden" even when he protests his innocence if the record at the plea hearing demonstrates that the plea was voluntarily and intelligently entered); *United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) ("[A] defendant who fails to show some error under Rule 11 [the federal counterpart to

§ 971.08] has to shoulder an extremely heavy burden if he is ultimately to prevail.")

Henry assured the court that he understood the elements after discussing them with counsel and going through the jury instructions. Henry does not allege that his attorney did anything wrong or that some misunderstanding outside the record of the plea hearing caused him not to grasp the malicious intent element.

Henry has fallen short of proving a prima facie defective plea. The trial court properly denied his plea withdrawal motion without an evidentiary hearing.

CONCLUSION

This Court should affirm the trial court's order denying Henry's motion to withdraw his guilty plea.

Dated this 30th day of November, 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) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,710 words.

_____
DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 30th day of November, 2017.

_____
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