STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2018AP731-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN L. NASH,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Both Entered in the Waukesha County Circuit Court the Honorable Ralph M. Ramirez, Presiding.

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUE PRESENTED

In accepting Kevin L. Nash's ***Alford***[1] plea, did the circuit court erroneously conclude that strong evidence of guilt existed to meet the heightened factual basis requirement to accept his plea?

The circuit court denied Mr. Nash's motion for plea withdrawal concluding, in part, that it had made the required factual finding of strong evidence of guilt at the continued plea hearing based on the state's offer of proof as well as the criminal complaint and that the record did, in fact, contain strong evidence of guilt. (App. 102-104; 99:24-26).

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. Publication is not warranted because the issue raised involves the application of established legal principles to the facts of this case.

## STATEMENT OF THE CASE AND FACTS

In October 2015, eight-year-old C.L.W. told a teacher that her brother, Mr. Nash, had sexually assaulted her "a few years prior." (App. 106; 1:4).[2] Police then initiated an

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[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] Although Mr. Nash cites to the complaint filed February 4, 2016, he notes that the state filed an amended complaint March 3, 2016, which removed the mandatory minimum language that appeared in the original complaint. (1:3; 8:1). There appears to be no difference between the facts alleged in the complaint and amended complaint. (*See* App. 105-110; 1:4-5; 8:1-3).

investigation, spoke with C.L.W.'s mother, and determined that prior sexual assaults involving two of Mr. Nash's sisters, C.L.W. and A.T.N., occurred at the family's home in Pewaukee between November 2011 and November 2012. (*Id.*). During this time period, Mr. Nash was approximately 13 to 14 years old,[3] A.T.N. was 8 to 9 years old, and C.L.W. was 4 to 5 years old. (App. 105-106; *Id.* at 1-2). A third sister, M.K.N., also lived in the home during the 2011-2012 charging period and would have been 11 to 12 years old. (*Id.*).

According to the complaint, all three of the sisters were forensically interviewed shortly after C.L.W.'s initial report. (App. 106; *Id.* at 2). C.L.W. stated that Mr. Nash forced her mouth to have contact with his penis in the basement of the family's home in Pewaukee. (*Id.*). During her interview, A.T.N. reported that Mr. Nash had sexual intercourse with her in his room on multiple occasions and that he attempted to put his penis in her mouth on one occasion. (*Id.*). M.K.N's interview is not fully described in the complaint; however, the complaint indicates that A.T.N. and M.K.N. described "acts of sexual intercourse" that occurred in Milwaukee and that A.T.N. also reported that Mr. Nash attempted to sexually assault her at her grandmother's home in Georgia. (*Id.*). The complaint indicates that the state would present the acts reported by A.T.N. and M.K.N. that occurred outside of Waukesha County as "prior bad acts."[4] (App. 107; 1:5).

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[3] Mr. Nash's date of birth is November 26, 1997. (App. 105; 1:3).

[4] The court later granted the state's other acts motion seeking to introduce the sisters' reports of prior sexual contact with Mr. Nash occurring in Milwaukee and Georgia. (14; 91:16-18).

On February 4, 2016, the state charged Mr. Nash, now age 18, with first degree sexual assault of a child under age 12 related to C.L.W. (count 1) and repeated sexual assault of a child related to A.T.N. (count 2). (App. 105; 1:3).

Following a competency evaluation and determination, Mr. Nash appeared before the court for a scheduled plea hearing. (95:2-3; 89). Defense counsel explained to the court that Mr. Nash would plead no-contest to an amended count of second degree sexual assault of a child. (App. 113; 89:3). The amended Information to which Mr. Nash pled stated the charge as sexual assault of a child under 16 years of age as a domestic abuse incident related to the youngest sister, C.L.W. (32:1).

Defense counsel further explained the nature of the plea:

> I reviewed a no-contest plea with my client. The basis for that will be that he is not going to contest that the State could present witnesses or other evidence that if believed by a jury would be sufficient to convict my client of the amended charge in the complaint.
>
> My client is not saying that he committed the offense outright and in a way it could be construed as an Alford plea, but that is the basis of the no-contest plea and we would like to resolve the case in that matter and the State has no objection.

(App. 113; 89:3).

The court, however, did not accept Mr. Nash's plea at the originally schedule plea hearing due to Mr. Nash's uncertainty in regard to entering a plea and his refusal to agree that the State had enough evidence to prove the charge to which he pled. (App. 114-115, 118-119, 122, 124-126;

89:4-5, 8-9, 12, 14-16). Specifically, Mr. Nash hesitated when the court asked whether he understood the nature of the plea agreement and stated: "Yes, sir. Yes[]" only after being instructed by trial counsel to answer affirmatively. (App. 114-115; 89:4-5). He also hesitated and then conferred with his attorney before agreeing that he was not forced to give up his rights to enter a plea. (App. 118-119; 89:8-9).

Later in the proceeding, the following exchange took place:

> The Court: All right. Do you acknowledge that State has enough evidence to prove this charge?
>
> [Mr. Nash]: No.
>
> The Court: Do you believe you are not guilty of these charges?
>
> [Mr. Nash]: Yes, I do.
>
> [Defense Counsel]: That was in essence the no-contest Alford part.

(App. 122; 89:12). The court then had defense counsel summarize the nature of his conversations with Mr. Nash about the plea process and the court again asked Mr. Nash if he believed the state had enough evidence to convict him. (App. 123-124; 89:13-14). Mr. Nash again stated that he did not believe there was enough evidence to convict him concluding: "I'm not saying I did it at all. I'm not going to say I did something that I didn't do, sir, at all. (App. 124; 89:14). Mr. Nash later reiterated: "Sir, I'm telling you right now I never did none of this and I don't want to keep going through it." (App. 126; 89:16).

The court indicated: "If Mr. Nash wishes to enter a plea of no-contest of an Alford type taking advantage of the

State's offer but indicating that he is not guilty of the offense, I don't have a clear indication from Mr. Nash that that's exactly what he wants to do and there is a great deal of difficulty here." (App. 126-127; 89:16-17). The court kept the trial date on its schedule and informed the parties that it would recall the case if needed. (App. 127; 89:17).

The following day, August 26, 2016, Mr. Nash entered a plea to the amended charge of second degree sexual assault of a child as a domestic abuse incident contrary to Wis. Stats. §§ 948.02(2) and 968.075(1). (App 137; 90:8). Before accepting Mr. Nash's plea, the court inquired of his understanding of an ***Alford*** plea. (App. 139-140; 90:10-11). Specifically, the court asked:

> Do you understand what it is when we say an Alford plea? It's a person's name but it's a plea that means I'm going to plead guilty or no-contest, I'm going to accept responsibility for the charge, I'm not necessarily admitting that those facts occurred but I understand that the State has got enough evidence where I could be found guilty at trial? Is that what is going on here?

Mr. Nash responded: "Yes, sir." (*Id.*).

The court also inquired of Mr. Nash as to whether he understood the charge to which he was pleading. (App. 135; 90:6). The court asked Mr. Nash if his attorney reviewed "the elements of the offense that the State would have to prove before you could be found guilty?" (*Id.*). Mr. Nash responded: "Yes, sir." (*Id.*). The plea questionnaire indicates that Mr. Nash was pleading to Wis. Stat. § 948.02(2) (second degree sexual assault of a child) and the elements of that offense are attached. (31:1, 3).

In regard to the factual basis requirement, the court had asked the state for an offer of proof at the originally

scheduled plea hearing. (App. 120; 89:10). At the August 25, 2016, plea hearing, the state provided:

> Last fall I believe the defendant's three sisters, who are here in court, made outcries to the Village of Pewaukee Police Department, that between the dates roughly of November 1st, 2011, and November 1st, 2012, when the four of them and their mother and stepfather lived . . . in the Village of Pewaukee, that the defendant had engaged in sexual intercourse with two of the three sisters.
>
> All three sisters were under the age of sixteen at the time. In fact, even though we have just alleged one act of sexual assault, sexual intercourse of a child under the age of sixteen, and that is C[.L.W.], there were multiple acts of sexual intercourse, penis to vagina, at that address all in Waukesha County, State of Wisconsin, sir.

(App. 120-121; 89:10-11). The court confirmed with the state at the August 26, 2016, plea hearing that it intended to rely on its prior offer of proof as well as the complaint and amended complaint in regard to factual basis. (App. 139; 90:10). The court indicated: "I will find a sufficient factual basis based on the contents of the complaint and the offer of proof." (App. 144-145; 90:15-16). After accepting Mr. Nash's plea and finding him guilty, the court ordered a presentence investigation and scheduled sentencing. (App. 145; 90:16).

On October 24, 2016, the court, the Honorable Ralph M. Ramirez, presiding, imposed and stayed an eight-year sentence comprised of three years initial confinement followed by five years extended supervision and ordered a five-year probationary period with a period of

conditional jail time. (92:27-28).[5] In reaching this sentencing determination, the court indicated that it had considered Mr. Nash's cognitive limitations set forth in the presentence investigation and by his family members at sentencing. (*Id.* at 24). In fact, both the state and defense had acknowledged Mr. Nash's cognitive limitations during their respective sentencing arguments. (*Id.* at 5-6, 15). Those limitations included developmental and physical delays especially apparent from birth to three years old. (34:3). Mr. Nash also participated in an individualized educational program (IEP) to address difficulties with reading, writing, mathematics, and behavior and received supplemental security income (SSI) benefits, which evidenced that his cognitive disabilities continued to affect him later in life. (34:11-12). Furthermore, Mr. Nash's mother and grandmother explained that Mr. Nash has received several mental health diagnoses including bipolar disorder and post-traumatic stress disorder. (34:3-4).

Following sentencing, Mr. Nash filed a notice of intent to pursue postconviction relief made timely by order of this Court. (47:1-2; 46:1).

Postconviction, Mr. Nash sought plea withdrawal on two alternative grounds. (69:1). First, Mr. Nash asserted that the circuit court did not find strong proof of guilt as required under ***North Carolina v. Alford***[6] before accepting his plea and that the record does not contain strong evidence of guilt as to either the second degree sexual assault of a child charge or the domestic abuse modifier to which Mr. Nash pled. (*Id.* at 5-9). Second, Mr. Nash argued that the court did not

[5] Mr. Nash's probation was subsequently revoked and he is currently serving the eight-year sentence imposed by the court. (*See* 63:1).

[6] *Supra* note 1.

ascertain Mr. Nash's understanding of the elements of the domestic abuse modifier to which he pled and that under ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2000), Mr. Nash had to knowingly, intelligently, and voluntarily waive his right to have the state prove the elements of the modifier. (*Id.* at 9-14).

The court, the Honorable Ralph M. Ramirez, presiding, held a hearing on the motion and agreed that the elements of the domestic abuse modifier did not apply to Mr. Nash's case. (App. 102, 104; 99:10, 17, 24, 26). As a result, the court ordered the removal of the domestic abuse modifier from Mr. Nash's judgment of conviction, entered a corresponding order, and Mr. Nash's judgment was subsequently amended. (99:10-11; 80:1; 81:1).

The court; however, denied Mr. Nash's plea withdrawal claims reasoning that he had failed to set forth a prima facie showing of a deficiency in the plea colloquy under ***State v. Bangert***.[7] (App. 102; 99:24). The court explained that the state had set forth strong proof of guilt on the record as to the second degree sexual assault of a child to which Mr. Nash pled. (App. 104; 99:26). Specifically, the court reasoned:

> There is a strong proof of guilt set out on the record in this Court's estimation. I did not look just at the complaint or say, hey, you guys agree that there is enough in the complaint[?] I said, give me a factual basis.
>
> The record is abundantly clear that I took time. Efforts were made to give the knowledge that we had about Mr. Nash and his deficiencies to make sure that the plea was done in an appropriate basis. There wasn't

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

> any hurrying through anything here. Two days were taken. The Court asked and there was a recitation of the facts.
>
> Again, we are looking at the nature of this offense and it was made clear on the record before I accepted the plea of what the allegations were, who was involved, and what was done.
>
> We didn't just say, there was some sort of facts. There was something sexual going on or some sort of touching. It was stated on the record that there was sexual intercourse and the nature, the specific nature of the sexual intercourse. The people involved. The ages. The location. Using as well the information set out in the complaint.

(App. 103; 99:25).

The court also reasoned that removal of the domestic abuse modifier from Mr. Nash's judgment of conviction was the appropriate remedy rather than plea withdrawal. (App. 104; 99:26). This appeal follows.[8] (82:1).

## ARGUMENT

> Considering the heightened factual finding requirement of strong evidence of guilt, the circuit court erred in finding a sufficient factual basis to accept Mr. Nash's ***Alford*** plea; therefore, a manifest injustice occurred and Mr. Nash is entitled to withdraw his plea.

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[8] Considering that the court removed the domestic abuse modifier from Mr. Nash's judgment of conviction, he does not renew his plea withdrawal arguments based on the domestic abuse modifier on appeal.

A. Introduction, general legal principles, and standard of review.

At the originally scheduled plea hearing, Mr. Nash, an 18-year-old with cognitive disabilities, reluctantly agreed that he understood the plea agreement and that he was voluntarily entering his plea. (App. 114-115, 118-119; 89:4-5, 8-9). He refused to acknowledge that the state had enough evidence to prove the charge against him and he strongly asserted that he was innocent. (App. 122, 124, 126; 89:12, 14, 16). As a result of Mr. Nash's uncertainty about entering a plea, the court became concerned and stopped the proceeding indicating that the parties could return before the scheduled trial date to enter a plea. (App. 126; 89:16).

The parties returned the following day and defense counsel explained that Mr. Nash did have some confusion, that his confusion related to sentencing, and that he wanted to enter a "an Alford type plea." (App. 132; 90:3). Counsel further explained: "He is not admitting that he did this offense but he is admitting that the State could present evidence that a jury could believe and convict him." (*Id.*). When asked whether he believed the state had evidence that could result in his conviction at the continued plea hearing, Mr. Nash now answered: "Yes, sir." (App. 134; 90:5).

At the conclusion of the continued plea hearing the court accepted Mr. Nash's ***Alford*** plea to second degree sexual assault of a child as a domestic abuse incident.[9] In

[9] Although Mr. Nash stated his plea as "no contest" and "no contest" is recorded on his judgment of conviction, a full reading of the August 25, 2016, and August 26, 2016, plea hearing transcripts indicate that Mr. Nash entered an ***Alford*** plea. (App. 111, 130; 89; 90). *See* ***State v. Salentine***, 206 Wis. 2d 419, 427, 557 N.W.2d 439 (Ct. App. 1996) (indicating that whether the defendant knowingly entered an

doing so, the court did not explicitly make a finding of strong proof of guilt, a requirement for acceptance of an ***Alford*** plea. Moreover, the record does not contain strong evidence of Mr. Nash's guilt to overcome his protestations of innocence.

* * *

A defendant can withdraw his or her plea after sentencing if the defendant proves by clear and convincing evidence that plea withdrawal is necessary to correct a "manifest injustice." ***State v. Finley***, 2016 WI 63, ¶58, 370 Wis. 2d 402, 882 N.W.2d 761. "Historically, one type of manifest injustice is the failure of the trial court to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads. ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). In the context of ***Alford*** pleas, discussed in depth below, a sufficient factual basis exists "only if there is strong proof of guilt that the defendant committed the crime to which the defendant pleads." ***Id.*** (citing ***Alford***, 400 U.S. at 37-38). This heightened factual finding standard for acceptance of an ***Alford*** plea stands in contrast to the lesser factual finding requirement in a traditional negotiated plea context. *See* ***id.***

Whether a sufficient factual basis exists for the acceptance of a plea is a discretionary determination by the circuit court and a reviewing court will not overturn it unless clearly erroneous. ***Id.***

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***Alford*** plea does not hinge on the specific terms used in entering the plea). Moreover, there was no dispute during postconviction proceedings that Mr. Nash entered an ***Alford*** plea. (*See generally* 99).

B. A circuit court must exercise special care before accepting an ***Alford*** plea considering the tension that exists in allowing a defendant who maintains his or her innocence to enter a plea that results in a conviction.

In ***Alford***, the United States Supreme Court addressed the question of whether a circuit court could accept a plea from a defendant who agreed to waive his or her right to trial, but refused to admit guilt. ***Alford***, 400 U.S. at 33. The court held: "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." ***Id.*** at 38.

In ***State v. Johnson***, 105 Wis. 2d 657, 662-63, 314 N.W.2d 897 (Ct. App. 1981), this Court rejected the defendant's argument that Wisconsin requires a higher standard for acceptance of pleas than that set forth in ***Alford*** concluding that ***Alford*** pleas are valid in Wisconsin so long as "the trial court determines that the prosecutor's summary of the evidence the state would offer at trial is strong proof of guilt." ***Johnson***, 105 Wis. 2d at 663.

Our supreme court later held that circuit courts may accept ***Alford*** pleas and confirmed the validity of this special plea by adopting this Court's reasoning in ***Johnson***:

> We conclude that in Wisconsin a trial court can accept an *Alford* plea of guilty without violating the factual basis rule of *Ernst v. State* where, despite defendant's protestations of innocence, the trial court determines that the prosecutor's summary of the evidence the state would offer at trial is strong proof of guilt.

***State v. Garcia***, 192 Wis. 2d 845, 857-58, 532 N.W.2d 111 (1995) (quoting ***Johnson***, 105 Wis. 2d at 663). The Wisconsin Supreme Court further indicated "that where an adequate record of the 'strong proof of guilt' behind the *Alford* plea has been made . . . the procedural safeguards in sec. 971.08, Stats., with applicable review if the statute is not followed, are sufficient to assure that an *Alford* plea is entered in a constitutionally adequate manner." ***Garcia***, 192 Wis. 2d at 859-60 (internal citation omitted). The court concluded by urging trial courts to utilize the Wisconsin Jury Instructions when taking ***Alford*** pleas. ***Garcia***, 192 Wis. 2d at 860.

The ***Garcia*** decision drew two concurrences both of which emphasized the need to carefully scrutinize pleas. ***Id.*** at 867 (Abrahamson, J., concurring) (emphasizing long-standing law to ensure proper acceptance of pleas); ***id.*** at 868 (Wilcox, J., concurring). Justice Wilcox's concurrence expressed great concern "that a defendant may plead guilty to a charge while continuing to protest his innocence" and recommended that circuit courts "act with great reticence when confronted with an ***Alford*** plea." ***Garcia***, 192 Wis. 2d at 868-60 (Wilcox, J., concurring).

These concerns are addressed, in part, through the requirement that a court find strong proof of guilt before accepting an ***Alford*** plea as this requirement ensures that a sufficient factual basis exists and that the defendant's plea is taken in accordance with the procedural safeguards set forth in Wis. Stat. § 971.08. "Although *Alford* pleas are not mentioned in the statute, [the Wisconsin Supreme Court] has specifically made the procedural safeguards of Wis. Stat. § 971.08 applicable to such pleas." ***Smith***, 202 Wis. 2d at 25-26 (citing ***Garcia***, 192 Wis. 2d at 856).

With regard to the meaning of "strong proof of guilt," the Wisconsin Supreme Court explained that in the context of an ***Alford*** plea, a court cannot find strong evidence of guilt in situations where it is legally impossible for the defendant to have committed the crime to which he pled. ***Smith***, 202 Wis. 2d at 23 (holding that an ***Alford*** plea to an amended charge of child enticement could not stand because the victim's age did not meet one element of the crime). Outside of a situation of a legal impossibility, the measurement of "strong proof of guilt is less than proof beyond a reasonable doubt, . . . [but] it is clearly greater than what is needed to meet the factual basis requirement under a guilty plea." ***Smith***, 202 Wis. 2d at 27 (internal citation omitted).

Finally, the Wisconsin Jury Instructions caution that special care must be taken in regard to ***Alford*** pleas and that the record "must be clear that the defendant fully understands the charge and the effect of the plea; and there must be strong evidence of guilt." Wis. JI-Criminal SM-32A at 11-12. The instructions advise that a court should explore a defendant's hesitation in regard to admitting guilt or statements of innocence "to assure that the defendant in fact understands what he or she is doing." *Id.* The instructions further recommend that a court utilize special questions to make sure a defendant understands that acceptance of an ***Alford*** plea will result in a criminal conviction and the associated penalties. *Id.* This special care makes sense considering the tension inherent in the acceptance of a plea resulting in a conviction and the defendant's protestations of innocence. *See* ***Garcia***, 192 Wis. 2d at 868 (Wilcox, J., concurring) (expressing concern between a basic premise of our legal system—"that guilt shall not escape or innocence suffer"—and the concept of ***Alford*** pleas). As such, with any type of plea, a court is not required to accept a defendant's ***Alford*** plea. *See* Wis. JI-Criminal SM-32A at 16.

C. The circuit court failed to make a finding of strong evidence of guilt before accepting Mr. Nash's ***Alford*** plea.

Here, the circuit court did not make an explicit finding of strong proof of guilt before accepting Mr. Nash's ***Alford*** plea. At the originally scheduled August 25, 2016, plea hearing, the court asked the state to provide "a factual basis, an offer of proof." (App. 120; 89:10). As previously indicated, the state informed the court that Mr. Nash's sisters had reported that Mr. Nash had engaged in sexual intercourse with them and that all three sisters were under the age of 16. (App. 120-121; 89:10-11). The state's brief recitation of the allegations essentially provided a summary of the information contained in the complaint and amended complaint.

The following day at the continued plea hearing, the court addressed Mr. Nash explaining: "My understanding from [trial counsel] is that your position is you are not admitting that you did these things. That you believe you wish to take advantage of the State's plea offer and recommendation and the amended charge. That you believe based on your review of the evidence, that the State has evidence that could result in your conviction." (App. 134; 90:5). The court then confirmed with the state that it intended to rely on its offer of proof, the complaint, and the amended complaint "as a factual basis." (App. 139; 90:10). The court later stated: "I will find a sufficient factual basis based on the contents of the complaint and the offer of proof. . . .I will find that given the circumstances and the offer of proof, that it is a domestic abuse incident as well under the statute." (App. 144-145; 90:15-16).

The record does not indicate that the court or the parties were operating with an understanding of the

heightened factual basis requirement for ***Alford*** pleas. Although not a requirement, there is also no indication that the court referred to the jury instructions in ensuring the type of special care necessary to accept an ***Alford*** plea. Moreover, the fact that the court asked the state to provide an offer of proof does not indicate that the court was ensuring that strong proof of guilt existed in this case. The state's brief recitation of the allegations against Mr. Nash contains no specificity beyond what is contained in the complaint. Additionally, a recitation of the allegations contained in the complaint does not reasonably inform the court of what evidence the state would submit at trial. In sum, the record does not indicate that the court found "strong proof of guilt" before accepting Mr. Nash's ***Alford*** plea.

D. The record does not contain strong evidence of guilt; therefore, the circuit court erred in its factual finding determination resulting in a manifest injustice, which entitles Mr. Nash to withdraw his plea.

The record does not contain strong evidence of guilt. As previously indicated, the court asked the state for an offer of proof, the state very briefly summarized the allegations contained in the complaint, and the court relied on both the offer of proof and the complaint to find a sufficient factual basis. This brief summary of the allegations and reliance on the complaint stands in sharp contrast to the procedure used to find strong evidence of guilt in other ***Alford*** plea cases.

For example, in ***Alford***, before the circuit court accepted the defendant's plea, a police officer testified under oath as to the state's evidence. ***Alford***, 400 U.S. at 28. The court also heard from two additional witnesses who indicated that the defendant had taken his gun, stated that he was going

to kill the victim, and then returned stating that he had murdered the victim. ***Id.*** at 28-29. The defendant also provided sworn testimony before the court accepted his plea over his protestations of innocence. ***Id.*** at 28. This sworn testimony and the defendant's clear intention to enter a plea was critical to the Court's ultimate holding: "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it. ***Id.*** at 38.

The same type of procedure has been utilized in Wisconsin. For example, in ***State v. Spears***, 147 Wis. 2d 429, 433 N.W.2d 595 (Ct. App. 1988), before accepting the defendant's ***Alford*** plea, the court heard from two witnesses to the defendant's conduct as well as a summary from the state as to what it believed other witnesses would have testified to at trial. As a result of this testimony and the state's recitation of additional evidence it would present at trial, the circuit court found strong evidence of guilt and accepted the defendant's ***Alford*** plea. ***Spears***, 147 Wis. 2d at 438-440. The Wisconsin Supreme Court agreed stating: "The trial court heard the testimony in this case and ruled that it provided 'strong evidence' of a factual basis . . . . Our own review of the evidence . . . has led us to conclude that the court was correct in so ruling." ***Id.*** at 444.

Likewise, in ***State v. Annina***, 2006 WI App 202, ¶¶16-17, 296 Wis. 2d 599, 723 N.W.2d 708, the state read a portion of a police report into the record to evidence strong proof of guilt as to the charge of resisting an officer. This narrative provided the court with the officer's specific description of the defendant's conduct during her arrest. ***Id.***, ¶16.

Finally, in ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 622-23, 579 N.W.2d 698 (1998), a case involving sexual assault of a child, the court heard testimony from the child-victim during the preliminary hearing. During her testimony, the victim specifically described the defendant's conduct that led to the charge. ***Id.*** at 622-23. The court also heard the sworn testimony of a police officer who testified to the victim's interview statements. ***Id.*** at 624. At the later plea hearing, the circuit court "concluded that the testimony at the preliminary hearing . . . was sufficient to constitute strong proof of guilt as required by an *Alford* plea. ***Id.*** at 625.

Granted, Wisconsin law does not currently require the use of sworn testimony to meet the strong evidence of guilt factual finding standard in ***Alford*** plea cases. That said, the above-cases demonstrate the type of careful scrutiny required in ***Alford*** plea cases, which is absent from Mr. Nash's case.

Moreover, what the law does require in Wisconsin is that the circuit court "determines that the prosecutor's summary of the evidence the state would offer at trial is strong proof of guilt." ***Johnson***, 105 Wis. 2d at 663 (quoted approvingly by ***Spears***, 147 Wis. 2d at 435). The state offered no summary of the evidence it intended to present at trial to prove the elements of second degree sexual assault of a child at Mr. Nash's plea hearings. Rather, as previously stated, it recited the allegations contained in the complaint. To emphasize, a recitation of the allegations provides no indication of what evidence the state intends to present at trial. To make a finding of strong evidence of guilt based on the allegations against a defendant alone renders the heightened factual finding requirement of strong evidence of guilt meaningless. This is troubling considering that "*Alford* pleas are treated differently from guilty pleas in regard to the

factual basis requirement because *Alford* pleas allow a defendant to be convicted of a crime even though the defendant continues to assert his innocence." ***Smith***, 202 Wis. 2d at 27.

* * *

The elements of second degree sexual assault of a child are: (1) sexual contact or sexual intercourse and (2) with a child under age 16. *See* Wis. Stat. § 948.02(2); *see also* Wis. JI-Criminal 2104. At Mr. Nash's plea hearings, these elements were not explicitly stated on the record. Rather, the court inquired as to whether defense counsel had reviewed the elements with Mr. Nash. (App. 135, 144; 90:6, 15). The elements were also attached to the plea questionnaire and waiver form, but did not indicate which of the two options—sexual contact or sexual intercourse—applied. (31:3). It appears from the complaint and the state's recitation of the allegations contained in the complaint that it intended to prove "sexual intercourse" rather than "sexual contact." (*See* 8:1; *see also* 89:11; App. 121).

There is no dispute as to the second element regarding age as C.L.W., born April, 4, 2007, was under the age of 16 at the time of the alleged contact in 2011 and 2012. (App. 105-106; 1:3-4). However, as to the first element, sexual intercourse, strong proof of guilt does not exist in the record.

As to C.L.W., the complaint provides that in October 2015, she reported to a teacher that Mr. Nash had sexually assaulted her "a few years prior." (App. 106; 1:4). The time period of the alleged assaults was narrowed to November 2011 to November 2012. (*Id.*). At the time of her report, C.L.W. was eight years old and during the time period alleged in the complaint, C.L.W. was between four and five years old. (*See id.*).

The complaint also indicates that during a forensic interview, C.L.W. described an incident that occurred when she was five years old that involved Mr. Nash forcing her mouth to come in contact with his penis. (*Id.*). The complaint also indicated that the state intended to submit C.L.W. and A.T.N.'s recorded interviews at trial as well as other acts evidence involving similar allegations the sisters made against Mr. Nash that occurred outside of Waukesha County. (App. 107; 1:5).

The state's offer of proof did not focus on what testimony would be offered at trial. No witnesses testified and the state offered no summary of any expected testimony. Nor did the state introduce the recorded interviews into to the record or describe the interviews for the court. Rather, the state generally summarized the allegations.

In fact, in its offer of proof, the state was not specific as to the conduct that it intended to prove at trial related to the charge to which Mr. Nash pled involving C.L.W. Rather, it indicated "even though we have just alleged one act of sexual assault, sexual intercourse of a child under the age of sixteen, and that is C[.L.W.] . . . there were multiple acts of sexual intercourse, *penis to vagina*, at that address all in Waukesha County, State of Wisconsin, sir. (App. 120; 89:10) (emphasis added). The complaint does not describe any penis to vagina contact between Mr. Nash and C.L.W. (*See* App. 106-107; 1:4-5).

The record contains evidence that Mr. Nash's younger sisters, in particular two of his sisters, accused him of sexual assault. The case involved a delay in reporting of approximately four years and involved allegations made by young children including C.L.W. who would have been between four and five years old when the alleged conduct

occurred. There is no physical evidence or witnesses to the alleged conduct. Importantly, the state's offer of proof consisted of a recitation of the allegations against Mr. Nash with no specificity as to the evidence it intended to present at trial with regard to C.L.W. This cannot constitute "strong evidence of guilt" because a recitation of the allegations alone renders the heightened factual finding requirement and the special care necessary in accepting an ***Alford*** plea meaningless.

In addition, Mr. Nash, an 18-year-old young man with cognitive limitations, expressed great hesitation and concern with entering into a plea at the originally scheduled plea hearing and he has continuously maintained his innocence. This stands in sharp contrast to ***Alford*** itself where the United States Supreme Court emphasized that the acceptability of this type of plea hinged on both the state's demonstration of strong proof of guilt and an unwavering defendant. ***Alford***, 400 U.S. at 38.

Under these circumstances and considering the facts contained in the record, the circuit court erroneously concluded that strong proof of guilt exists. As such, a sufficient factual basis does not exist for Mr. Nash's ***Alford*** plea, a manifest injustice has occurred, and he respectfully requests that this Court allow him to withdraw his plea.

## CONCLUSION

For the reasons stated, Mr. Nash requests that this Court reverse the circuit court and remand with instructions to allow Mr. Nash to withdraw his plea.

Dated this 2nd day of July, 2018.

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 5,817 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 2nd day of July, 2018.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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