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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP731-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN L. NASH,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE RALPH M. RAMIREZ PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**

## ISSUE PRESENTED

Is Kevin L. Nash entitled to withdraw on manifest injustice grounds his *Alford*[1] plea to one count of second-degree sexual assault of a child under 16 when the record evidences a sufficient factual basis to support that plea?

The circuit court denied Nash's plea withdrawal motion after it determined that the record reflected strong proof of Nash's guilt, and that the plea was otherwise valid.

This Court should affirm the circuit court.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. This case involves the application of established legal principles to the facts, which the briefs should adequately address.

## INTRODUCTION

Nash asks this Court to reverse the circuit court's denial of his postconviction motion to withdraw his *Alford* plea on manifest injustice grounds. An *Alford* plea must be supported by strong proof of guilt, and Nash contends that such proof did not exist for the sexual intercourse element of second-degree sexual assault of a child under 16.

This Court should reject that argument. The circuit court's conclusion that a sufficient factual basis existed to support Nash's plea was not clearly erroneous because the record collaborates that finding. Nash has therefore not

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970). The Wisconsin Supreme Court has defined an *Alford* plea as "a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime." *State v. Multaler*, 2002 WI 35, ¶ 4 n.4, 252 Wis. 2d 54, 643 N.W.2d 437. There is no dispute that Nash entered an *Alford* plea.

proven by clear and convincing evidence that the withdrawal of his plea is necessary to correct a manifest injustice.

## STATEMENT OF THE CASE

### I. Nash's sisters report that he sexually assaulted each of them.

In October 2015, Nash's three younger sisters disclosed that he had sexually assaulted each of them. (R. 8:2.) C.L.W. made the first report, telling a teacher that Nash assaulted her several years earlier. (R. 8:2.) Waukesha police opened an investigation and determined that Nash had assaulted both C.L.W. and A.T.N. in the family's Pewaukee home between November 2011 and November 2012. (R. 8:1.) At that time, Nash was approximately 14 to 15 years old. (*See* R. 8:1.) A.T.N. was approximately 8 to 9 years old, and C.L.W. was 4 to 5 years old. (*See* R. 8:1.) The third sister, M.K.N., was 11 to 12 years old, but reported that Nash assaulted her in Milwaukee, before the family moved to Pewaukee. (*See* R. 8:1–2.)

All three girls were forensically interviewed. (R. 8:2.) During her interview, C.L.W. described how Nash once approached her while she was sitting on a couch in the basement of their Pewaukee home. (R. 8:2.) He exposed his penis and forced it into her mouth. (R. 8:2.) C.L.W. said she pushed him away and ran upstairs. (R. 8:2.)

A.T.N. recounted how Nash assaulted her almost daily in the same Pewaukee basement. (R. 8:2.) She stated that Nash would lay on top of her, pin her down with his body weight, and cover her mouth with his hand. (R. 8:2.) A.T.N. described how Nash's "private part" then made contact with her "private part," often painfully. (R. 8:2.) At least once, according to A.T.N., Nash tried to pry her mouth open and insert his penis. (R. 8:2.)

In addition to the Pewaukee assaults of C.L.W. and A.T.N., the amended complaint indicates that assaults occurred in Milwaukee and at a grandmother's home in Georgia. (R. 8:2.) After a hearing, the circuit court granted the State's motion to admit evidence of those prior bad acts. (R. 14:1; 91:18.) Among that evidence were C.L.W.'s and A.T.N.'s accounts of Nash having penis-to-vagina sexual contact and intercourse with them while the family was living in Milwaukee. (R. 91:5; 14:6.) M.K.N. had divulged having sexual contact with Nash, also in the basement of the Milwaukee home. (R. 91:5–6; 14:7.) As for Georgia, A.T.N. had recounted an incident in her grandmother's garage during which Nash forced her to lie down, put his hand over her mouth, and then "touched her private part with his private part." (R. 91:7; 14:6.) Their uncle, according to A.T.N., interrupted that assault. (R. 91:7; 14:6.)

Before the plea hearing, the State filed notice of its intent to offer into evidence at trial the sisters' video-recorded interviews. (R. 17.) Copies were provided to the defense. (R. 22.) The State also filed a witness list, notice of its intent to call the forensic interviewer as an expert witness, and a summary of her anticipated testimony. (R. 16; 28.) Finally, the State disclosed its intent to use in its case-in-chief a Mirandized statement Nash gave while in custody in Georgia and to call the detective who took the statement as a trial witness. (R. 24.) The State filed a video recording of the statement prior to the plea hearing and a police-prepared transcript of the statement before sentencing. (R. 30; 35.) In that statement, Nash admitted he and his sisters played "house" and to having a sexual encounter with A.T.N. (R. 35:1, 3–5.)

## II. The charges against Nash and his plea

The State charged Nash with first-degree sexual assault of a child under age 12 (C.L.W.), and repeated sexual

assault of a child (A.T.N.). (R. 1:3; 8:1.) [2] After his initial appearance, Nash was found competent to proceed, and he waived his right to a preliminary hearing. (R. 95:2–3; 96:5.)

Nash then appeared at a plea hearing that the court continued over two days. (R. 89:1; 90:1.) On the first day, the parties informed the court that they had reached an agreement. (R. 89:3–4.) Nash would plead to one count of second-degree sexual assault of a child under 16 as a domestic abuse incident, and the State would decline to make a sentencing recommendation. (R. 89:3–4; 31:1–2; 32.)

Pursuant to the agreement, the State filed an amended information alleging that Nash had sexual intercourse with C.L.W. in Pewaukee between November 1, 2011 and November 1, 2012. (R. 32.) Nash submitted a plea questionnaire and waiver of rights form indicating that he would plead no contest, and he initialed next to the elements of the sexual assault charge. (R. 31:1, 3.) Defense counsel explained to the court that Nash would not admit "he committed the offense outright and in a way [his plea] could be construed as an Alford plea." (R. 89:3.)

Although the circuit court ultimately did not accept Nash's plea that day, it discussed several plea-related matters with the parties. (R. 89:16–17.) First, the court confirmed that Nash understood the nature of the charge to which he was pleading and what the State would have to prove to support a guilty verdict. (R. 89:6.) Nash also confirmed that he was voluntarily relinquishing certain constitutional rights. (R. 89:6–9.) After Nash hesitated before answering some of the

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[2] The State filed a complaint against Nash on February 4, 2016. (R. 1:3.) That complaint, however, erroneously alleged that Nash was at least 18 years old at the time of the offenses. (R. 1:3–4.) Accordingly, the State filed an amended complaint on March 3, 2016, without that allegation. (R. 8:1.) That is the only substantive difference between the complaint and amended complaint.

court's questions, the court reminded him that he could discuss any concerns with his lawyer before proceeding. (R. 89:9.)

Second, the court reviewed the amended information and asked the State for an offer of proof. (R. 89:10.) The prosecution related how the three sisters had reported being assaulted, and that Nash "had engaged in sexual intercourse" with two of them while the family was living in Pewaukee. (R. 89:10–11.) The prosecution added that although the State had alleged only one act of sexual intercourse involving C.L.W., all three sisters were under 16 at the time, and "there were multiple acts of sexual intercourse, penis to vagina, at" the Pewaukee address. (R. 89:11.)

Third, the court explained to Nash that his plea meant he was not disputing the allegations against him or that the State could prove them to be true. (R. 89:11.) Nash asserted his innocence in response. (R. 89:12.) Defense counsel interjected, noting that Nash's statements were "in essence the no-contest Alford part" of the plea. (R. 89:12.) Defense counsel explained that over the course of three meetings the week prior, he discussed with Nash how the State would call his three sisters as witnesses to testify at trial that Nash had sexual contact and sexual intercourse with them. (R. 89:13.) He had also told Nash that the State could call the forensic interviewer as well as police officers. (R. 89:13.) Defense counsel asserted that Nash understood the implications of his plea and wanted to accept the State's offer to minimize his sentence exposure. (R. 89:13.)

When the court asked Nash to confirm that he wanted to take advantage of the plea offer, Nash again stressed his innocence. Nash stated he was "not going to say [he] did something that [he] didn't do" and he "never did none of this." (R. 89:14, 16.) He also expressed that he had "several concerns. . . . about this case," and that this was "basically a hearsay case." (R. 89:14–15.) The court concluded that

because it did not "have a clear indication from" Nash that he wanted "to enter a plea of no-contest of an Alford type," it could not "move forward" with Nash's plea that day. (R. 89:16–17.)

The parties returned to court the next day. (R. 90:2.) The court again confirmed the information in the plea questionnaire and waiver form, and again read the amended information. (R. 90:5–8.) Defense counsel stated he had met with Nash twice more, and Nash wanted to enter "an Alford type plea." (R. 90:2–3.) Nash and his counsel had reviewed the implications of an *Alford* plea "[i]n depth." (R. 90:11.) The prosecution stood by its offer of proof and the contents of the complaint and amended complaint as a factual basis, to which defense counsel did not object and assured the court he had reviewed with Nash. (R. 90:10.) Defense counsel further stated that he and Nash had again reviewed the elements of the charged offense, the potential penalties, and the sentencing options. (R. 90:6, 14–15.)

Nash repeatedly affirmed that although he would not admit guilt, there was enough evidence to find him guilty of the alleged conduct. (R. 90:3, 5, 10–11.) The court then explained the concept of an *Alford* plea, and asked Nash whether "that" was "what [was] going on here." (R. 90:11.) Nash replied: "Yes, sir." (R. 90:11.) Satisfied, the court found Nash guilty. (R. 90:16.) The court clarified that it had considered "the proceedings yesterday," the lawyers' statements, the documents it had received, and "the proceedings and the information that [had] been set out on the record," among other evidence. (R. 90:15.) It then found "a sufficient factual basis based on the contents of the complaint and the offer of proof" to support Nash's plea. (R. 90:15–16.)

## III. Nash's sentencing

Nash was sentenced two months later. In their presentations to the court, the attorneys debated the

appropriate weight to afford Nash's cognitive limitations and his young age at the time of the offenses. (R. 92:5, 15–16.) The prosecution emphasized that Nash had not acknowledged the impact of his conduct on the victims' lives. (R. 92:8–10.)

Although Nash's sisters indicated in a letter to the court that their brother had been punished enough, they did not recant or revise their accounts of the sexual assaults. (R. 92:3–4; 36.) Their mother told the court that Nash had apologized "for what he did to the girls." (R. 92:12.) And their grandmother stated that she was "sorry" for what happened to the sisters "from the grandmother in [her]." (R. 92:19.) Nash also apologized to his sisters during his allocution, although he did not expressly admit to wrongdoing. (R. 92:20.)

The court imposed and then stayed an eight-year sentence comprised of three years' initial confinement followed by five years' extended supervision. (R. 92:27.) Nash was initially placed on probation with one year of conditional jail time. (R. 92:27–28.) In crafting Nash's sentence, the court characterized his behavior as "inappropriate and disturbing," and requiring supervision, but gave countervailing weight to Nash's cognitive limitations, his familial support, his age, and his lack of prior criminal history. (R. 92:24–27.)

Nash's probation has since been revoked and he is now serving the eight-year sentence the court imposed. (R. 63.)

## IV. Nash's plea withdrawal motion and hearing

Following sentencing, Nash moved to withdraw his plea on two alternative grounds. (R. 69:4; 99:3–4.) Relevant on appeal is Nash's request to withdraw his *Alford* plea on manifest injustice grounds because the circuit court had neglected to find, and the record did not reflect, strong proof

of guilt as required under *North Carolina v. Alford*.[3] (R. 69:5–9; 99:3–4, 7.)

At the motion hearing, postconviction counsel acknowledged that the court did not need to use the phrase "strong proof of guilt" when it made its factual basis finding. (R. 99:19–20.) Counsel noted, however, that it was not clear during the plea proceeding whether everyone was "operating under the heightened standard" for *Alford* pleas. (R. 99:19–20.)

The State countered that no manifest injustice had occurred. (R. 99:3.) The State underscored that the court did not rely solely on the complaint in establishing the factual basis, but also asked for an offer of proof. (R. 99:14.) After reviewing that evidence for the postconviction court, the State concluded that it had "absolutely and positively satisfied this Alford requirement of strong evidence of guilt." (R. 99:14–17.)

The court denied Nash's motion. (R. 77; 99:26.) It agreed with the prosecution that there was "a strong proof of guilt set out on the record" between the information in the complaint and the offer of proof. (R. 99:25–26.) And the court detailed its efforts to ensure, in light of Nash's cognitive limitations, that the plea was otherwise valid. (R. 99:25.) The court noted, for example, that it afforded Nash a two-day hearing, and had made clear on the record the nature of the allegations, the elements of the crime, and the parties and conduct involved. (R. 99:25, 28.) Accordingly, the circuit court concluded that Nash was not entitled to any relief. (R. 99:26.)

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[3] Alternatively, Nash argued that the circuit court did not confirm his understanding of the elements of the domestic abuse modifier to which he also pled. (R. 69:9–14.) The postconviction court agreed with Nash on this point and removed the domestic abuse modifier from the judgment of conviction. (R. 99:10–11.) Nash does not appeal the issue, so the State will not address it in its brief. (Nash's Br. 9 n.8.)

Nash appeals. (R. 82:1).

## STANDARD OF REVIEW

"The circuit court has discretion to determine whether a plea should be withdrawn." *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482. Whether a sufficient factual basis exists to support an *Alford* plea is a determination that also "lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

## ARGUMENT

### The circuit court did not erroneously exercise its discretion in denying Nash's postsentence plea withdrawal motion.

#### A. A defendant seeking to withdraw his plea postsentence must prove by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice.

Because Nash makes his plea withdrawal request postsentence, it must be held to a stringent standard. A defendant is entitled to withdraw his *Alford* plea after sentencing only if he proves by clear and convincing evidence that a manifest injustice would otherwise result. *State v. Johnson*, 105 Wis. 2d 657, 666, 314 N.W.2d 897 (Ct. App. 1981). This heavy burden "reflects the State's interest in the finality of convictions, and reflects the fact that the presumption of innocence no longer exists." *State v. Cross*, 2010 WI 70, ¶ 42, 326 Wis. 2d 492, 786 N.W.2d 64.

When applying the manifest injustice test, the reviewing court is not limited to the plea record but can consider the "totality of the circumstances," including the sentencing record, defense counsel's statements, and other portions of the record. *State v. Cain*, 2012 WI 68, ¶ 31, 342

Wis. 2d 1, 816 N.W.2d 177; *State v. Scott*, 2017 WI App 40, ¶ 30, 376 Wis. 2d 430, 899 N.W.2d 728.

### B. Before accepting an *Alford* plea, the circuit court must satisfy itself that strong proof of guilt exists as to each element of the crime charged.

Before accepting a plea, the circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b).[4] This factual basis requirement protects "a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted).

A court's failure to establish a sufficient factual basis "is one type of manifest injustice that justifies plea withdrawal." *Scott*, 376 Wis. 2d 430, ¶ 30; *see also State v. Higgs*, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999). In the *Alford* context, the judge must determine whether "the evidence the state would offer at trial is strong proof of guilt." *Johnson*, 105 Wis. 2d at 663; *see also North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (no constitutional error where "the record before the judge contains strong evidence of actual guilt."). Strong proof is required "as to each element of the crime" charged. *Smith*, 202 Wis. 2d at 28. But it is not the equivalent of proof beyond a reasonable doubt; rather, the factual basis must be sufficient "to substantially negate [the] defendant's [protestations] of innocence." *State ex rel. Warren*

[4] Although the statute does not mention *Alford* pleas, its procedural safeguards apply nonetheless. *State v. Smith*, 202 Wis. 2d 21, 26, 549 N.W.2d 232 (1996).

*v. Schwarz*, 219 Wis. 2d 615, 645, 579 N.W.2d 698 (1998) (citation omitted).

### C. A sufficient factual basis exists to support Nash's *Alford* plea.

The record corroborates the circuit court's conclusion that a sufficient factual basis existed to support Nash's plea to second-degree sexual assault of a child under 16. That crime consists of two elements: (1) sexual contact or intercourse with (2) a person under age 16. Wis. Stat. § 948.02(2). Nash pled to one count of sexual intercourse with C.L.W. (R. 32:1; 90:8.)

Nash does not contest the second element; he argues that there was an insufficient factual basis for the sexual intercourse element. (Nash's Br. 15–21.) "Sexual intercourse" for purposes of Wis. Stat. § 948.02(2) is defined in relevant part as:

> vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body . . . .

Wis. Stat. § 948.01(6); *see also* Wis. JI–Criminal 2101B (2010).

As the circuit court noted, Nash did not plead to "a nuanced charge." (R. 99:21.) If the State's evidence can prove the elements of that charge, and that evidence negates Nash's protestation of innocence, there is a sufficient factual basis for his *Alford* plea. *Johnson*, 105 Wis. 2d at 665. That is undoubtedly the case here.

At the plea hearing, the circuit court based its factual basis finding on the information in the complaint, amended complaint, and the State's offer of proof. (R. 90:10, 15–16.) Defense counsel did not object. (R. 90:10.) Nash now takes issue with the fact that the State's offer of proof did not contain details specific to Nash's assault of C.L.W. in Pewaukee. (Nash's Br. 20.) But the complaint and the

amended complaint included C.L.W.'s account of how Nash had forcible penis-to-mouth intercourse with her there when she was five years old. (R. 8:2.) That description of Nash's specific conduct was more than sufficient to fall within the statutory definition of sexual intercourse necessary for a second-degree sexual assault conviction under Wis. Stat. § 948.02(2). Moreover, Nash acknowledged that he understood the charge and its elements, and that the State had sufficient evidence to prove his guilt at trial. (R. 90:6, 8, 10–11.) And he does not allege otherwise on appeal. Accordingly, this case is not one in which remand is required because a substantial question remains as to whether the facts that form the basis of the plea constitute the offense charged. *E.g.*, *State v. Lackershire*, 2007 WI 74, ¶ 38, 301 Wis. 2d 418, 734 N.W.2d 23. Nor is it the case that the facts cannot constitute the crime charged as a matter of law. *E.g.*, *Smith*, 202 Wis. 2d at 25.

And as the prosecution emphasized in its offer of proof, C.L.W. did not stand alone. All three sisters "made outcries" to Pewaukee police about the assaults they were suffering, and the prosecution specified that "there were multiple acts of sexual intercourse" alleged even though the amended information charged Nash with only one count in the second degree. (R. 89:10–11.) The amended complaint, for example, includes A.T.N.'s account of Nash's almost daily assaults, also occurring in the Pewaukee basement, during which her brother would pin her down, cover her mouth, and touch her "private part" with his "private part." (R. 8:2.) Like C.L.W., A.T.N. also divulged that Nash once tried to force his penis into her mouth. (R. 8:2.)

Moreover, the court had heard additional factual evidence during the prior other acts motion hearing, including that Nash had penis-to-vagina contact and intercourse with C.L.W. and A.T.N. while the family was living in Milwaukee. (R. 91:5.) M.K.N. had described similar sexual contact with

Nash, also in the basement of the Milwaukee home. (R. 91:5–6.) And A.T.N. had recounted an incident in her grandmother's garage in Georgia during which Nash forced her to lie down, put his hand over her mouth, and then "touched her private part with his private part." (R. 91:7.) Taken together, the sisters' accounts are corroborative and credible in that they similarly describe the nature and circumstances of the assaults, and Nash's method of isolating his young victims in specific locations. They speak for themselves as strong proof of guilt. *Cf. Warren*, 219 Wis. 2d at 622–24, 646 (child victim's account of sexual assault constituted strong proof of guilt).

The circuit court found at the postconviction hearing that the record evidence indeed reflected "strong proof of guilt." (R. 99:25.) Nash correctly notes that the court did not use that phrase during the plea proceeding itself. (Nash's Br. 15–16.) Yet those magic words are not a statutory requirement for a valid *Alford* plea. Wis. Stat. § 971.08; *cf. State v. Hampton*, 2004 WI 107, ¶ 43, 274 Wis. 2d 379, 683 N.W.2d 14 ("magic words or an inflexible script" are not requisites of a valid plea colloquy.). The judge's failure to use them here was therefore not fatal. In *Johnson*, for example, a defendant entered an *Alford* plea after his trial ended in a hung jury. 105 Wis. 2d at 664. In accepting that plea, the circuit court stated "that there is [a] reason" for it. *Id.* This Court affirmed based on its independent review of the record, holding that the circuit court's finding was a factual basis finding "equivalent to a finding that the proof of guilt was strong." *Id.* at 664–65. This Court reached that conclusion after reasoning that "a sufficient factual basis was established at the plea proceeding to substantially negate [the] defendant's claim of innocence" and the evidence adduced at trial was "strong proof of guilt" that corroborated the circuit court's conclusion. *Id.* at 664.

In Nash's case, the circuit court, in full awareness that Nash was entering an *Alford* plea, found "a sufficient factual basis" to support that plea in reliance on the complaint, amended complaint, and the State's offer of proof. (R. 90:10, 15–16.) As in *Johnson*, that factual basis was sufficient to substantially negate Nash's claim of innocence, which was based solely on his statements that he "never did none of this" and would not admit he "did something that [he] didn't do," and his lawyer's confirmation that Nash denied committing the offense. (R. 89:13–14, 16.) Also as in *Johnson*, evidence outside the plea record, such as the other acts motion record, corroborated the circuit court's conclusion. The circuit court's determination of a sufficient factual basis at Nash's plea hearing was therefore "equivalent to a finding that the proof of guilt was strong." *Johnson*, 105 Wis. 2d at 664.

### D. Nash's arguments directed at the sufficiency of the factual basis are without merit.

Nash challenges the adequacy of the factual basis for his plea to the second-degree sexual assault charge on several grounds. (Nash's Br. 15–21.) His arguments lack merit.

At the plea hearing, Nash confirmed that he understood what the State would attempt to prove at trial, and repeatedly acknowledged that the State could meet its burden of proof at trial. (R. 90:3, 5–6, 10–11.) Nash now suggests that his victims' accounts cannot overcome his protestations of innocence without more, such as corroborating physical evidence or witnesses. (Nash's Br. 20–21.) The State disagrees for two reasons.

First, strong proof of guilt may be found if an inculpatory inference can reasonably be drawn by a jury from the facts, even if an exculpatory inference could also be drawn. *State v. Spears*, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988). A jury could reasonably draw an inculpatory

inference from the victims' accounts, which they never recanted or revised, not even after acknowledging to the sentencing court that they wanted their brother to be released. (R. 92:3–4.) Only Nash ever called his sisters' accounts into doubt, and only by means of his general protestation of innocence. (R. 89:14–16.) This protestation was undercut at sentencing by his mother's statement that Nash had apologized "for what he did to the girls," his grandmother's acknowledgment of Nash's conduct, and Nash's own apology to the victims. (R. 92:12, 19–20.) Simply put, Nash is not entitled to withdraw his plea because the circuit court gave greater weight to his victims' reliable accounts. *Cf. Ernst v. State*, 43 Wis. 2d 661, 668, 170 N.W.2d 713 (1969) (circuit court "is not obligated to accept the defendant's statements as verities" in determining whether plea withdrawal is warranted), *overruled in part on other grounds by State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

Second, there is no requirement that scientific or medical evidence, or corroborating witness testimony, substantiate a victim's credible account to find strong proof of guilt. Wisconsin courts "have long accepted the testimony (if believed) of the complainant as sufficient to sustain a conviction of rape or sexual intercourse with a child." *Gauthier v. State*, 28 Wis. 2d 412, 418, 137 N.W.2d 101 (1965); *Syvock v. State*, 61 Wis. 2d 411, 413, 213 N.W.2d 11 (1973). Sex crime convictions often rest on such uncorroborated evidence. *Thomas v. State*, 92 Wis. 2d 372, 384, 284 N.W.2d 917 (1979). Corroboration would be necessary only where the complainant's version of events is patently incredible. *Id.* Nash makes no such assertion here.

Nash could have contested the credibility of his victims at trial but chose not to and pled. Their accounts, on their face, support the charge and would have been enough to convict him. If a victim's account alone can sustain a conviction,

which requires proof beyond a reasonable doubt, it is certainly within a circuit court's discretion to consider such evidence a sufficient factual basis for purposes of accepting an *Alford* plea. Otherwise, as the circuit court reasoned, "there could never be an Alford plea" in cases like this one, cases that the court "get[s] on a daily basis." (R. 99:22.)

To be sure, some circuit courts have relied on sworn testimony or police reports to support a finding of strong proof of guilt. *E.g.*, *Warren*, 219 Wis. 2d at 646–47 (testimony at a preliminary hearing); *State v. Annina*, 2006 WI App 202, ¶¶ 16–17, 296 Wis. 2d 599, 723 N.W.2d 708 (allegations in the complaint and a portion of a police report). Nash asserts that the court did not do so here, and moreover notes that the prosecution did not summarize at the plea hearing all the evidence it would have introduced at trial. (Nash's Br. 16–18, 20–21.) But neither point compels the conclusion that the circuit court erroneously based its factual basis finding on evidence insufficient to support an *Alford* plea.

As for the circuit court's reliance on certain sources of evidence as opposed to others, it was not required to base its factual basis finding on any one specific evidentiary source. *State v. Black*, 2001 WI 31, ¶ 14, 242 Wis. 2d 126, 624 N.W.2d 363. Nor was the court prohibited from using the complaint for that purpose. *Id.* ¶ 12; *State v. Ramage*, 2010 WI App 77, ¶ 1, 325 Wis. 2d 483, 784 N.W.2d 746 (complaint used as factual basis for *Alford* pleas). There is a difference between a hearing to accept an *Alford* plea and other plea hearings in that the former requires strong proof of guilt, but there is no difference in how the evidence of guilt may come into the record. What matters is that a sufficient factual basis is "developed on the record." *Thomas*, 232 Wis. 2d 714, ¶ 20.

Nash's contention that the State did not detail all its possible trial evidence during the plea hearing is equally unavailing if not forfeited. Nash noted in his plea withdrawal motion that "[t]he state's offer of proof did not focus on what

testimony would be offered at trial" but did not otherwise develop that argument before the circuit court. (R. 69:9; 99:4–8.) This Court does not "blindside trial courts with reversals based on theories which did not originate in their forum." *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).

That said, the circuit court had enough information about the State's evidence to make a valid factual basis finding. Before the plea hearing, the State filed its witness list, proposed jury instructions, and a copy of Nash's video-recorded Mirandized statement to Georgia police. (R. 24; 26; 28; 30.) It also filed notice of its intent to use the sisters' video-recorded forensic interviews at trial as well as a summary of the forensic interviewer's expert testimony. (R. 16; 17; 22.) And the court had heard and granted the State's other acts motion, admitting evidence of the Milwaukee and Georgia sexual assaults. (R. 91:18.)

At the plea hearing, the court asked the State for an offer of proof. (R. 89:10–11.) The State offered the complaint and amended complaint and summarized that Nash "had engaged in sexual intercourse with two of the three sisters" in Pewaukee when they were under 16. (R. 89:11; 90:10.) Nash acknowledged that he had reviewed all discovery materials with counsel. (R. 89:6; 90:9–10.) Defense counsel confirmed that he and Nash had discussed how the sisters would be the primary witnesses at trial and would likely testify that Nash had sexual contact and sexual intercourse with them. (R. 89:13.) Defense counsel and Nash had also discussed the possibility that the forensic interviewer would be called to testify along with certain police officers. (R. 89:13.) In finding Nash guilty, the circuit court acknowledged its familiarity with the record, stating that it had taken into consideration "the proceedings and the information that has been set out on the record," and "the documents [it had] received." (R. 90:15.)

The State's case against Nash was thus apparent and familiar to Nash and the court through the discovery materials, the complaint, amended complaint, and the attorneys' statements at the hearing. It is axiomatic that before accepting an *Alford* plea, the court must "determine whether the state's evidence of the defendant's guilt of the charged crime is strong." *Spears*, 147 Wis. 2d at 444. But a judge is not required "to make a factual basis determination in one particular manner" and its consideration is not limited to the State's proffer. *Thomas*, 232 Wis. 2d 714, ¶ 21; *United States v. Musa*, 946 F.2d 1297, 1302 (7th Cir. 1991) (a judge can rely on any record evidence, including the government's proffer). Nor must a judge "conduct a mini-trial at every plea hearing to establish that the defendant committed the crime charged beyond a reasonable doubt." *Black*, 242 Wis. 2d 126, ¶ 14.

At bottom, the question for this Court when applying the manifest injustice test is not whether Nash's plea should have been accepted in the first instance, but whether in view of the record as a whole the circuit court erroneously exercised its discretion in denying his motion to withdraw. *Cain*, 342 Wis. 2d 1, ¶¶ 30–31; *Thomas*, 232 Wis. 2d 714, ¶ 23; *White v. State,* 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978); *Spears*, 147 Wis. 2d at 434. Here, it was within the circuit court's discretion to deny Nash's withdrawal motion because the record supports its factual basis finding.

### E. Any argument that Nash's youth, mental health needs, or cognitive limitations affected the validity of his plea is underdeveloped and unavailing.

Finally, Nash makes brief reference to his youth, mental health needs, and cognitive limitations. (Nash's Br. 7, 21.) To the extent Nash is suggesting that these issues somehow rendered his plea invalid, he did not advance that argument below and does not develop it here. *Rogers*, 196

Wis. 2d at 827; *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.") But in any event, Nash was found competent well before the plea hearing and has never contested that finding. (R. 95:2–3.) Moreover, the circuit court confirmed that Nash was able to read and understand the plea and discovery documents, reminded him that he could seek clarity from his lawyer if there was any confusing aspect of the plea proceedings, and even continued the hearing over two days to ensure that Nash understood the ramifications of pleading to the charged offense. (R. 89:5–6, 9; 90:2–3, 5–6.) Nash's youth and health needs as he presents them here do not provide a substantial ground for questioning the validity of his plea.

In sum, Nash has not proven by clear and convincing evidence that he is entitled to withdraw his plea to prevent a manifest injustice. The record contains adequate evidence of strong proof of guilt. The circuit court therefore did not erroneously exercise its discretion in denying Nash's motion to withdraw his plea on the grounds that there was an insufficient factual basis for its acceptance.

## CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the circuit court's judgment of conviction and order denying Nash's postsentence motion to withdraw his plea.

Dated this 28th day of August, 2018.

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 5,696 words.

Dated this 28th day of August, 2018.

_____
COURTNEY K. LANZ
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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 28th day of August, 2018.

_____
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