STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP000731-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,
Both Entered in Waukesha County Circuit Court,
Judge Ralph M. Ramirez, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The Circuit Court Erred in Finding a Sufficient Factual Basis to Accept Kevin Nash's Plea Because the Record is not Sufficient to Satisfy the Heightened Factual Basis Requirement Applicable to ***Alford*** Pleas.

When accepting a defendant's plea under ***North Carolina v. Alford***, 400 U.S. 25 (1970), the circuit court must determine that the evidence the state would offer at trial constitutes "strong proof of guilt" that the defendant committed the crime to which the he or she is pleading. ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996) (citing ***Alford***, 400 U.S. at 37-38); ***State v. Garcia***, 192 Wis. 2d 845, 859-60, 532 N.W.2d 111 (1995); ***State v. Johnson***, 105 Wis. 2d 657, 663, 314 N.W.2d 897 (Ct. App. 1981). As ***Johnson*** elaborated, there must be a "sufficient factual basis … established at the plea proceeding to substantially negate [the] defendant's claim of innocence." 105 Wis. 2d at 664.

While "strong proof of guilt" is not the equivalent of proof beyond a reasonable doubt, it is "clearly greater than what is needed to meet the factual basis requirement under a guilty plea." ***Smith***, 202 Wis. 2d at 27. Determining whether the more stringent factual basis standard for an ***Alford*** plea has been met requires the trial court to assess whether "the prosecutor's summary of the evidence the state would offer at trial is strong proof of guilt." ***Garcia***, 192 Wis. 2d at 857-58, *quoting* ***Johnson***, 105 Wis. 2d at 663.

As Nash argued in his brief-in-chief (at 15-16), there is no indication in the record of the plea hearings in this case that the circuit court and parties were aware of or applied the heightened factual basis requirement. As Nash also pointed

out (brief-in-chief at 16, 18, 20), the court was not given a summary of the evidence the state would have presented at trial—perhaps because of the lack of awareness of the heightened factual basis standard.[1] Instead, in finding a factual basis for Nash's plea the circuit court relied on the complaint and the prosecutor's "offer of proof" from the first plea hearing. (89:10-11; 90:15-16; A-Ap. 120-21, 144-45).

The complaint and offer of proof would be sufficient to establish a factual basis for a mine-run guilty plea. But for the following reasons, and contrary to the state's claims (brief at 11-14), it is not enough to establish a factual basis for Nash's ***Alford*** plea, and other parts of the record relied on by the state (brief at 12-13, 17) do not make up for the inadequacy of the record made at the plea hearings.

First, the complaint describes the genesis of the investigation into Nash (C.L.W.'s statement to a teacher in October 2015); gives the dates and locations of the alleged offenses (November 2011 to November 2012 in Pewaukee); and summarizes the pertinent content of the statements C.L.W. and A.T.N. gave during their forensic interview—namely, that C.L.W. alleged Nash forced her mouth to have contact with his penis and that A.T.N. alleged Nash had sexual intercourse with her on multiple occasions and attempted to put his penis in her mouth on one occasion. (1:4-5; A-Ap. 106-07). The complaint contains the basic content of the allegations and how they came to light, but it is a far cry from the kind of summary of the evidence that

[1] Contrary to the state (brief at 16-17), Nash has not forfeited his argument about the need for a summary of trial evidence. Nash's postconviction motion and argument stated the circuit court must determine factual basis using the summary of the evidence the state would offer at trial and noted that no such summary was given in this case. (69:5, 9; 99:4-6, 7-8).

would allow a court to determine the state will present strong proof of guilt.

That the complaint does not provide a sufficient summary of the evidence is clear from comparing what happened here to the methods used to establish strong proof of guilt in other ***Alford*** plea cases. In ***Johnson*** the court found strong evidence of guilt based on the record of the trial that resulted in a hung jury. 105 Wis. 2d at 659-60, 664-65. To be sure, having that kind of detailed record of evidence will be rare, but there are other ways to make a record short of a trial. For instance, in ***State v. Spears***, 147 Wis. 2d 429, 438-40, 433 N.W.2d 595 (Ct. App. 1988), the state called witnesses to testify at the plea hearing and summarized the testimony of other witnesses. In ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 622-24, 646, 579 N.W.2d 698 (1998), the court referred to the sworn testimony from the victim and police presented at the preliminary hearing. In ***State v. Annina***, 2006 WI App 202, ¶¶7, 14-17, 296 Wis. 2d 599, 723 N.W.2d 708, at a pretrial hearing on the exclusion of evidence the prosecutor read from a police report that gave the officer's specific narrative of the criminal conduct.

While none of these methods of making a record is mandated, they are instructive regarding what it takes to establish strong proof of guilt. To approximate the detailed factual bases provided in ***Spears***, ***Warren***, and ***Annina*** the complaint in this case would have had to give a far more specific narrative of what each witnesses referred to in the complaint would say and provide additional information on the foundation for the witnesses' knowledge, the circumstances of their statements to authorities, and, if applicable, the presence of corroborating evidence or information. A criminal complaint does not ordinarily go into that level of detail because that is unnecessary to its purpose:

to state "the essential facts constituting the offense charged." Wis. Stat. § 968.01(2) (2015-16). That is why the typical criminal complaint, like the one here, will not be enough to establish the strong proof of guilt needed to support an ***Alford*** plea. A fuller presentation or summary of the evidence is needed.

The state, citing ***Spears***, argues strong proof of guilt may be found if inculpatory inferences can be drawn from the facts. (State's brief at 14-15). As just noted, ***Spears*** involved drawing inferences from facts established by the sworn testimony of witnesses presented at the plea hearing along with more details provided by the prosecutor, not just the basic allegations in the probable cause section of the complaint. 147 Wis. 2d at 438-40. Even apart from that, it cannot be enough to point to inculpatory inferences to establish strong proof of guilt. If the basic allegations in a complaint state probable cause they also support the drawing of inculpatory inferences. That means a sufficient complaint will always be enough to establish strong proof of guilt. This is inconsistent with the rule that strong proof of guilt is "clearly greater than what is needed to meet the factual basis requirement under a guilty plea." ***Smith***, 202 Wis. 2d at 27. Thus, the potential for drawing inculpatory inferences from the sisters' accounts in the complaint is not enough to show strong proof of guilt.

Next, the prosecutor's offer of proof did nothing to supplement the complaint's allegations. Indeed, "offer of proof" is a misnomer for the prosecutor's statement, as it is a slimmed-down version of the information in the complaint. (89:10-11; A-Ap. 120-210. It offered no additional detail or substance. It did not specify the witnesses the state would call at trial or the substance of the witnesses' testimony. And its repetition of the information contained in the complaint does

not make that information stronger. What makes information stronger is independent corroborating physical evidence or corroborating witness evidence or, absent that kind of corroboration, elaboration of details that tend to show the information has the weight and credibility and probative value that allows the circuit court to conclude the state's anticipated evidence "substantially negate[s]" the defendant's protestations of innocence. ***Johnson***, 105 Wis. 2d at 664.[2]

The state's reliance on other parts of the record to establish strong proof of guilt is unavailing. First, the state notes (brief at 3, 12-13, 17) that, in addition to the allegations by C.L.W. and A.T.N. cited in support of the original charges, there were allegations by C.L.W. and A.T.N. and a third sister, M.K.N., of further acts committed in Milwaukee and allegations by A.T.N. of acts committed in Georgia that the circuit court ruled would be admissible at trial under Wis. Stat. § 904.04. (14:5-7; 91:16-18). This matters, the state argues (brief at 12-13), because it shows C.L.W.'s allegations did not stand alone, and the accounts of her sisters are corroborative and make all the allegations credible. For the following reasons, the other-acts allegations do not add to the strength of the general allegations in the complaint.

To begin with, the other-acts allegations were already set out in the complaint along with a statement that the prosecution intended to seek admission of the evidence as other acts. (1:5; A-Ap. 107). The other-acts motion added only a few details about A.T.N.'s allegations regarding the incident in Georgia and added an allegation made by C.L.W. that Nash engaged in acts with her in Milwaukee that were similar to his alleged conduct in Pewaukee. (14:6). M.K.N.'s

[2] As the state notes (brief at 15, 16), there is no requirement that an ***Alford*** plea factual basis require such independent corroborating evidence, or that a specific source of evidence be used.

allegations lacked any specificity. (14:7). Further, there was no testimony or evidence presented at the other acts motion hearing that added any details or fleshed out any of the accusations. The only detail added was the prosecutor's representation that the complainants' mother could testify about the time period they lived in Milwaukee but would be less specific about when the children were in Georgia visiting their grandmother, other than to say it occurred in summer 2010. (91:9). Again, repeating the same basic information from the complaint once more does not serve to show the allegations are strong.

Next, the pretrial determination of admissibility under Wis. Stat. § 904.04 shed little light on the question of the reliability of the allegations. In deciding a pretrial motion to admit the evidence, the circuit court's analysis generally focuses—as it did here—on the legal question of whether the other acts evidence satisfies the three-part test articulated in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). But to be relevant, other-acts evidence must also be such that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act. ***State v. Landrum***, 191 Wis. 2d 107, 117, 528 N.W.2d 36 (Ct. App. 1995). Whether there was sufficient evidence to meet that conditional relevance requirement is ultimately determined by the evidence presented at trial, ***State v. Gray***, 225 Wis. 2d 39, 59-61, 590 N.W.2d 918 (1999); ***State v. Schindler***, 146 Wis. 2d 47, 54-56, 429 N.W.2d 110 (Ct. App. 1988), so the ruling that the allegations were admissible under ***Sullivan*** adds little on its own to the strength of C.L.W.'s allegation.

Further, while the state seeks the admission of other acts to bolster its case on the theory that multiple acts of sexual misconduct are corroborative and enhance credibility, the other-acts allegations here are fraught with the same

issues as the allegations underlying the criminal charges. Specifically, the other-acts allegations involve conduct that was supposed to have occurred three or four years earlier, when C.L.W. was as young as 4 or 5, A.T.N. was 8 to 9, and M.K.N. was 11 to 12. (1:1-2; A-Ap. 105-06). This is yet more delayed reporting of conduct by young witnesses purporting to recall something that happened when they were even younger. Nash also consistently denied the other-acts allegations, just as he did the allegations underlying the charges filed against him. (89:16; A-Ap. 126). Thus, the multiple allegations of the same kind of conduct are not so corroborative or credible that they "speak for themselves" as strong proof of guilt. (State's brief at 13).

Nor, of course, does the fact the allegations are made by children allow the conclusion that they "speak for themselves" as strong proof of guilt, as seemingly implied by the state's citation to ***Warren*** as part of its argument (brief at 13). ***Warren*** found strong proof of guilt based on the preliminary hearing testimony of the child victim and a police officer. 219 Wis. 2d at 622-24, 646. Nash waived a preliminary hearing (10; 96:2-5) and there was no other proceeding where similar factual basis evidence presented. Moreover, it cannot be the case that child victims' statements are always sufficient alone to establish strong proof of guilt. Children no less than adults can fail to remember accurately, or can misperceive events, or can even fabricate allegations, and a defendant entering an ***Alford*** plea is asserting just that there is just that kind of problem with the complaining witness's evidence.

The state also cites to the videotaped forensic interviews the complaining witnesses gave. (State's brief at 3, 17). The state moved to admit the videos of the interviews under Wis. Stat. § 908.08. (17). It also moved to allow

testimony of the interviewer "about her knowledge of sexual assault and trauma on children, children's ability to recall traumatic events, and delayed disclosures as they relate to children who have been sexually assaulted" (16) without providing any detail about what the expert would say in this case. Unlike Nash's statement to a Georgia detective (30), there is no indication that copies of the recordings were filed with the circuit court or, if they were, that the circuit court reviewed the recordings. Further, and again unlike Nash's statement to the detective (35), no transcripts of the sisters' statements were provided to the circuit court. The fact there were recordings of the sisters' forensic interviews therefore provides no additional detail on which to find the evidence the state would provide at trial is strong enough to substantially negate Nash's protestations of innocence.

The state (brief at 3, 17) also relies on that statement Nash gave to the Georgia detective, a recording of which was filed a few days before the plea hearing (30) and a transcript of which was filed after Nash entered his ***Alford*** plea (35). But his statement adds very little to the evidence, certainly not enough to show strong proof of guilt of sexual intercourse or contact with C.L.W.[3] Nash admits to a single incident of sexual contact with A.T.N.—*not* C.L.W.—for which he was "whooped" and which punishment led him to desist in additional conduct. (35:3-4, 5, 12-13). Indeed, despite persistent questioning—not to say badgering—by the detective conducting the interrogation, Nash was firm in his denial of any of the other allegations of intercourse or of any

[3] Assuming the statement would be admissible. The prosecutor indicated the defense would be challenging the use of the statement at trial. (30). Because Nash entered an ***Alford*** plea the admissibility of the statement was never litigated.

sexual conduct with C.L.W. or M.K.N. (35:4-5, 9-11, 14-15, 16-17, 18, 19, 20, 22).

Finally, the state notes (brief at 12) Nash's acknowledgement that the state had evidence that "could" result in his conviction. (90:5; A-Ap. 134). This is not a concession that the state had strong proof of guilt. Moreover, it is the circuit court's responsibility to determine whether the applicable factual basis requirement has been met. ***Johnson***, 105 Wis. 2d at 663. Nor does Nash's general apology to his sisters at sentencing (92:20) undercut his protestation of innocence. (State's brief at 15). Given that Nash continued to deny the allegations in the presentence investigation (34:3) his regrets are an artifact of facing sentencing rather than a sudden, subtle about-face regarding his guilt.

Two final points. First, Nash's reference to his cognitive limitations and mental health issues (brief-in-chief at 7, 21) are not a separate argument about the validity of his plea. (State's brief at 18-19). The point of that information is this: A court must go above and beyond the usual factual basis inquiry when a defendant maintains his innocence and enters an ***Alford*** plea. ***Smith***, 202 Wis. 2d at 27; ***Garcia***, 192 Wis. 2d at 859-60. That requirement, *plus* the obvious additional concerns evident from Nash's hesitation to plead and his known cognitive issues, add to the imperative that his plea should not be accepted absent the required strong proof of guilt.

Second, a point about the failure of the parties and the circuit court to refer to the "strong proof of guilt" standard during the plea hearing. A circuit court need not use magic words or follow an inflexible script in accepting an ***Alford*** plea. (State's brief at 13). Nonetheless, determining the existence of a sufficient factual basis is within the discretion

of the circuit court, ***Smith***, 202 Wis. 2d at 25, and to properly exercise its discretion the court must apply the proper legal standard. ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis. 2d 85, 750 N.W.2d 780. The absence of any reference during the plea proceedings to the "strong proof of guilt" standard suggests the circuit court was not aware of—and thus did not apply—the standard when finding a factual basis for Nash's ***Alford*** plea. The circuit court was aware of and applied that standard at the postconviction hearing (99:24-26; A-Ap. 102-04), but for the reasons given above and in Nash's brief-in-chief, the court erred in concluding the record provides strong proof that Nash is guilty of sexually assaulting C.L.W.

CONCLUSION

This court should reverse the order denying postconviction relief and remand the case with instructions that Nash be allowed to withdraw his ***Alford*** plea.

Dated this 17th day of September, 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 2,933 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 17th day of September, 2018.

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