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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1171-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIONTE J. NOWELS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD AND THE HONORABLE CAROLINA M. STARK, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## ISSUE PRESENTED

Following a *Bangert* hearing, the circuit court found that Defendant-Appellant Dionte J. Nowels's trial attorney reviewed the jury instructions for hit and run, resulting in death, with Nowels prior to his guilty plea. Were the circuit court's fact-findings clearly erroneous?

The circuit court denied Nowels's postconviction motion for plea withdrawal.

This Court should affirm.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not seek oral argument. Publication is unwarranted as this case involves the application of settled law to the facts.

## INTRODUCTION

Nowels only challenges the circuit court's fact-findings following the *Bangert* hearing. Nowels makes no argument that, under the facts as found by the circuit court, he unknowingly entered his plea to hit and run, resulting in death. Instead, he argues the circuit court's fact-findings—specifically, that his attorney reviewed the jury instructions with him prior to his guilty plea—are clearly erroneous.

Nowels's argument fails. His trial attorney's testimony, the plea questionnaire form and attached jury instructions, the plea hearing transcript, and reasonable inferences therefrom, all support the circuit court's fact-findings. This Court should affirm.

## STATEMENT OF THE CASE

*Complaint and guilty pleas.* The State charged Nowels with three counts: (1) armed robbery as party to a crime, (2)

second-degree reckless homicide, and (3) hit and run, resulting in death. (R. 1.) This appeal only concerns Nowels's understanding of Count 3: hit and run, resulting in death, in violation of Wis. Stat. § 346.67(1).

As set forth in the complaint, on April 28, 2015, Nowels participated in an armed robbery, fled police, crashed into another car—killing the driver—fled the scene, tried to enter someone's car, tried to enter someone's apartment, and was then arrested. (R. 1:1–2.)

Nowels pled guilty to an amended Count 1 (operating a motor vehicle without the owner's consent) as well as the original Counts 2 and 3, second-degree reckless homicide and hit and run, resulting in death, respectively. (R. 14; 63.)

The circuit court, the Honorable M. Joseph Donald presiding, accepted Nowels's guilty pleas on February 26, 2016. (R. 63:17, A-App. 116.) The court verified with counsel that she reviewed "the elements of each of the offenses" with Nowels. (R. 63:17, A-App. 116.)

The court verified with Nowels that he reviewed with counsel, signed, and understood the plea questionnaire form. (R. 63:8–9, A-App. 107–08.) The plea questionnaire was signed the same day as the plea hearing. (R. 15:2.)

The plea questionnaire indicated that Nowels was not receiving any treatment for a mental illness or disorder. (R. 15:1.)

As to the elements, the plea questionnaire form listed jury instruction numbers for each offense and checked the box to "[s]ee attached sheet." (R. 15:1.) Above Nowels's signature on the plea questionnaire form reads: "I have reviewed and understood this entire document and any attachments." (R. 15:2.)

In addition to jury instructions for Counts 1 and 2, the jury instructions included, for Count 3, Wisconsin Criminal

Jury Instruction 2670, "Failure to Give Information or Render Aid Following an Accident—§ 346.67." (R. 16:5–8.) Different portions of the printed instruction are crossed out or circled, specifying portions that do or do not apply to Nowels. (R. 16:5–6.)

When discussing Counts 1 and 2 during the hearing, the court referenced the jury instructions attached to the plea questionnaire form. (R. 63:11–13, A-App. 110–12.) The court, however, did not do so when discussing Count 3. (R. 63:11–15, A-App. 110–14.)

As to Count 3, the court explained to Nowels that the State would have to prove he operated a car involved in an accident resulting in the death of the victim, failed to stop at the scene, and failed to remain at the scene until he gave his license and information to the person struck and rendered reasonable assistance. (R. 63:13–14, A-App. 112–13.)

The court did not, however, specifically verify that Nowels understood the second and fifth elements of hit and run, resulting in death, as set out in the jury instruction. (*See generally* R. 63); Wis. JI–Criminal 2670 (2014). Those elements were (2) that he knew his car was involved in an accident with an attended car before leaving the scene, and (5) he was physically capable of providing the information and assistance required. *Id.*

*Sentencing letter*. Before sentencing, Nowels submitted a *pro se* apology letter to the court. (R. 19.) He stated: "This is still all my fault because I not only panicked, drove dangerously and caused this crash, but afterwards, I got out of the car and fled on foot. And to be truthful, Your Honor, that act of selfishness is what I regret the most . . . ." (R. 19:2.) "If I would have directed the attention where it needed to be by running towards [the victim's] car instead of the other way, I honestly believe, in my heart, that we could

have saved his life." (R. 19:2.) The court sentenced him to prison. (R. 65:44–45.)

*Postconviction litigation.* Nowels filed a postconviction motion seeking plea withdrawal on Count 3. (R. 42.) He argued that the court failed to verify he understood the second and fifth elements of hit and run, resulting in death. (R. 42:3–6.)[1]

The circuit court, the Honorable Carolina M. Stark now presiding, held a *Bangert* hearing on his motion. (R. 66.)

Nowels's trial attorney testified that she could see from her time log that she prepared an 83-page document for Nowels on January 22, 2016, which included all of the jury instructions. (R. 66:8.) She met with Nowels on January 25 and 26. (R. 66:8.) Though her time log did not reflect that she went through the jury instructions with him at that point, and she had no independent recollection of it, she believed she did do so based on her normal practice. (R. 66:8.)

She testified to additional conferences with Nowels—focused on the plea questionnaire—on February 25, and again on the morning of February 26, before the plea hearing. (R. 66:9.) "I am positive that I went through the jury instructions with him in February; I believe I also went through the jury instructions in January, but I have no documentation of that." (R. 66:9, 19.)

Counsel explained that the instructions she provided to Nowels in the 83-page document do not contain any markings on them, but the ones attached to the filed plea questionnaire do. (R. 66:9.) Those are her "regular markings as [she's] going through the jury instructions with the

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[1] He also moved for resentencing, but he does not renew that request on appeal.

client." (R. 66:9.) That, she explained, "is precisely" what made her "very confident" that she "went through the particular jury instructions to which he'd be entering pleas with him in person." (R. 66:17.)

Trial counsel explained that she would have also asked Nowels to explain how his conduct fulfilled the elements. (R. 66:10.) She initially expected the case to go to trial; she discussed potential defenses with Nowels, including that he did not know that he hit an attended car. (R. 66:10, 13–14.) Therefore, "in anticipation of the plea, we had to discuss that specific element and take his acknowledgement that he did know that he hit an attended vehicle." (R. 66:11, 13–14.)

She had no independent recollection of talking with Nowels about any defenses to the fifth element (whether he was physically capable of providing information and assisting). (R. 66:11.) She explained, however, that it was her routine practice to make her clients recite to her "what happened" and "acknowledge each element," in anticipation of clients being "grilled" at the plea hearing. (R. 66:14.) She ultimately confirmed that she talked with Nowels about the fifth element and had him explain why that element factually existed in his case. (R. 66:18.)

Counsel testified that Nowels did not appear to have any mental health issues affecting his understanding. (R. 66:18.)

Nowels also testified at the hearing. He stated he was "hearing voices," "couldn't sleep," and was depressed at the time he pled, but did not tell his attorney. (R. 66:24.)

He testified he did not remember signing the plea questionnaire or reading it, but he vaguely remembered his attorney reading it to him. (R. 66:25–26.) He said he did not remember going over the attached elements/jury instructions with her. (R. 66:26, 29.) He stated: "I don't know what the elements were" when he pled guilty. (R. 66:26.)

He said he "was led to believe" that because he had two "death charges" for killing one person, his attorney made it seem that him leaving the scene "was the only thing that was different." (R. 66:26.) He testified he thought he hit a stop sign and only later learned he killed someone. (R. 66:26–27.) He stated he did not remember talking with counsel about a defense on that element. (R. 66:29–30.)

With respect to physical capability, he stated he broke his foot and sustained other injuries. (R. 66:28.) He, however, acknowledged that he fled the accident on foot and tried to climb a fence. (R. 66:32–33.)

When the State confronted Nowels about the apology letter he wrote for sentencing, he testified he had someone else write it; he also noted it was written after the plea hearing. (R. 66:30, 34.)

The circuit court held that Nowels knowingly entered his plea. (R. 66:41–49, A-App. 119–27.) The court first made fact-findings. It found that the court failed to review the second and fifth elements of the hit and run offense at the plea hearing. (R. 66:41–42, A-App. 119–20.)

It also found the following: trial counsel prepared an 83-page document that included Wisconsin Criminal Jury Instruction 2670; she gave that to Nowels on January 25, 2016, but she did not at that point specifically review the five elements with him. (R. 66:42–43, A-App. 110–21.) On February 25, 2016, she met with him to prepare for the plea hearing the next day; during that meeting, she did specifically review all five elements of Wisconsin Criminal Jury Instruction 2670 with him. (R. 66:43, A-App. 121.)

The court further found that when she met with Nowels on February 26, before the plea hearing, she read the elements out loud and "having him tell her in his own words how conduct he admitted to satisfied element number 2 and element number 5." (R. 66:43–44, A-App. 121–22.) The court

found that they also discussed a potential defense with regard to the second element. (R. 66:44, A-App. 122.)

Given his attorney's testimony, and the "documentation and handwriting on the plea forms . . . including the jury instructions," the court did not find Nowels's testimony to be more credible than his lawyer's. (R. 66:47, A-App. 125.) The court also found Nowels's testimony about mental health problems incredible. (R. 66:46, A-App. 124.)

The court did not factor Nowels's sentencing letter into its decision, though it did not find it unreasonable for the State to argue it. (R. 66:48, A-App. 126.) Based on the testimony, plea hearing transcript, and plea questionnaire form with attached jury instructions, the court concluded Nowels understood the elements of his hit and run offense when he pled guilty. (R. 66:41–49, A-App. 119–27.) The court denied his motion. (R. 49, A-App. 104.)

Nowels appeals.

## STANDARD OF REVIEW

Whether a defendant knowingly, intelligently, and voluntarily entered his guilty plea is a question of constitutional fact. *State v. Bangert*, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). This Court accepts the circuit court's findings of historical and evidentiary facts unless clearly erroneous, but independently determines whether those facts demonstrate that the defendant's plea was unknowingly entered. *State v. Trochinski*, 2002 WI 56, ¶ 16, 253 Wis. 2d 38, 644 N.W.2d 891.

## ARGUMENT

### Nowels knowingly, intelligently, and voluntarily entered his guilty plea to hit and run, resulting in death.

#### A. Legal principles

Wisconsin Stat. § 346.67(1) makes it a crime for a person to leave the scene of a car accident before providing information and reasonable assistance, where the accident resulted in injury or death. Wisconsin Criminal Jury Instruction 2670 sets out five elements for this offense.

The second element states: "The defendant knew that the vehicle (he) (she) was operating was involved in an accident involving (a person) (an attended vehicle). This requires that the defendant knew, before leaving the scene, that the accident involved (a person) (an attended vehicle)." Wis. JI–Criminal 2670.

The fifth element, which follows an element requiring the State to prove the defendant did not remain at the scene until he had provided personal information and reasonable assistance, states: "The defendant was physically capable of complying with the requirements I have just recited." Wis. JI–Criminal 2670.[2]

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[2] Effective April 1, 2016—after Nowels's offense and guilty plea—the Legislature amended the hit and run statute. It added language to section 346.67(1), to clarify, as the second jury instruction element already explained, that a person must comply if he "knows or has reason to know" the accident caused injury or death. 2015 Wis. Act. 319, § 1. The Legislature also added section 346.67(3), which provides that a "prosecutor is not required to allege or prove that an operator knew that he or she collided with a person or a vehicle driven or attended by a person in a prosecution under this section." 2015 Wis. Act. 319, § 3.

Where a defendant seeks plea withdrawal based on a defect in the plea colloquy (a *Bangert* claim), the defendant must make a *prima facie* showing in his postconviction motion that the court (a) violated one of the requirements of Wis. Stat. § 971.08 (a court's obligations at a plea hearing) and (b) the defendant did not understand the information that should have been provided. *Trochinski*, 253 Wis. 2d 38, ¶ 17.

If the defendant meets that burden, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was nevertheless knowingly, intelligently, and voluntarily entered. *Bangert*, 131 Wis. 2d at 274. A circuit court may consider any evidence in the entirety of the record to determine whether the State met this burden. *Id.* at 274–75.

A fact-finding is clearly erroneous if it is "against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted). "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417.

Put more bluntly, a fact-finding is clearly erroneous if it "strikes [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *In re Disciplinary Proceedings Against Boyle*, 2015 WI 110, ¶ 41, 365 Wis. 2d 649, 872 N.W.2d 637 (citation omitted).

Moreover, fact-finders "may draw reasonable inferences from credible evidence, and the reviewing court must accept those inferences unless they are against the great weight and clear preponderance of the evidence." *State ex rel. N.A.C. v. W.T.D.*, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988) (citation omitted). "An inference is reasonable if it can be fairly drawn from the facts in evidence." *Id.*

### B. The circuit court's fact-findings were not clearly erroneous.

Nowels's entire argument concerns fact-findings. He does not argue that, under the facts as found by the circuit court, his plea was unknowingly entered.

His arguments fail. The dispositive factual question was: did trial counsel review with Nowels, and verify he understood, the second and fifth elements of hit and run, resulting in death, prior to his guilty plea?

The circuit court found the answer to be "yes." The record more than supports this finding. First, counsel submitted Wisconsin Criminal Jury Instruction 2670 with the plea questionnaire form. (R. 16:5.) Nowels acknowledged reviewing and signing the form at the plea hearing, and the form itself acknowledged that he reviewed any attachments. (R. 15:1–2.) The jury instruction is covered with hand-written circles and strikeouts. (R. 16:5–6.)

Second, defense counsel testified she was "positive" she reviewed the jury instructions with Nowels prior to his guilty plea. (R. 66:9, 19.) Her confidence was supported by specific information: she provided Nowels with unmarked jury instructions as part of an 83-page document in January 2016. (R. 66:9.) This, juxtaposed with the marked jury instructions submitted with the plea questionnaire, and her normal practice of making such markings when reviewing elements with a client prior to a plea, established that she reviewed the elements with Nowels. (R. 66:9–17.)

Moreover, she (a) initially expected the case to go to trial and (b) once she knew he would instead be entering guilty pleas, had a routine practice to make her clients "acknowledge each element" to prepare for being "grilled" at the plea hearing. (R. 66:10, 13–14.) She testified she talked with Nowels about both the second and fifth elements of hit and run, resulting in death, and had him explain why those

elements existed in his case. (R. 66:11, 14, 18.) She also testified that Nowels did not appear to have any mental health issues. (R. 66:18.) All of this supports the circuit court's dispositive fact-findings.

Nowels argues the circuit court's fact-findings were clearly erroneous because the court found that trial counsel (a) reviewed the elements in the instruction with Nowels on February 25 and (b) asked him to explain how his conduct fit the second and fifth elements on February 26. (Nowels's Br. 12–13.) Nowels takes issue with the court's finding that those events occurred on those particular dates. (Nowels's Br. 12–13.)

These fact-findings were not clearly erroneous. Counsel was "positive" she went through the instructions with him in February 2016, and she testified she met with Nowels on February 25 and 26 to discuss his plea. (R. 66:9, 19.) She testified that she went through the jury instructions with him, and—in preparation for his plea—discussed how elements two and five existed. (R. 66:11, 14, 17–18.)

It was reasonable for the court to infer, based on counsel's testimony, that she would have first explained the instructions to Nowels and then, as preparation to be "grilled," asked Nowels to explain how his conduct fit the elements on the morning of the plea. (R. 66:14); *see State ex rel. N.A.C.*, 144 Wis. 2d at 636. Ultimately, whether each particular event occurred on February 25 or February 26 does not change the reasonableness of the fact-finding that counsel *did* verify—within one day of his guilty plea—that Nowels understood the elements.

Nowels argues "there is nothing" in the record concerning counsel's review of the fifth element of the offense. (Nowels's Br. 13.) On the contrary, the record includes the following exchange: "[E]lement number 5 is at the bottom, the defendant was physically capable of

complying with the requirements I have just recited . . . that is another element you talked to him about and had him explain why that element factually existed?" "Yes." (R. 66:18.)

Nowels tries to lean on trial counsel's lack of independent recollection as support for his arguments. (Nowels's Br. 13.) In so doing, Nowels overlooks the specific factual information counsel highlighted that led to her confidence in her actions, even without independent recollection. (*See* R. 66:8–18.) Moreover, as Nowels recognizes, it is by no means unusual that an attorney would not have specific independent recollections of every detail of representation, particularly where the guilty plea occurred over two years before trial counsel's testimony. (*See* Nowels's Br. 13.) Nowels may disagree with the court's fact-findings, but that does not make them clearly erroneous.

Nowels points to the three non-exhaustive methods a court may employ to ensure a defendant understands the nature of the charge at a plea hearing. (Nowels's Br. 10.) That case law, however, is inapposite here. It addresses what a court is supposed to do at the plea hearing, not the ways a reviewing court may determine whether the defendant entered a knowing plea despite a deficient colloquy. *See Bangert*, 131 Wis. 2d at 268.

Similarly, Nowels suggests that trial counsel's failure to alert the court at the plea hearing that it missed two of the elements of hit and run demonstrates that counsel failed to ensure Nowels's understanding. (Nowels's Br. 13.) We, however, are past the point of debating the adequacy of the plea colloquy. The question is whether the circuit court's fact-findings following the *Bangert* hearing were clearly erroneous. They were not.

Lastly, as Nowels is not entitled to reversal, this Court need not wade into the question of remedy upon reversal.

Nevertheless, should this Court disagree, it is important to note that—though Nowels only sought plea withdrawal on Count 3 in his postconviction motion—he entered one global agreement. Should reversal occur, the State may seek to vacate the entire plea agreement on remand. *See, e.g.*, *State v. Krawczyk,* 2003 WI App 6, ¶¶ 31–35, 259 Wis. 2d 843, 657 N.W.2d 77 (discussing the State's interests in plea withdrawal in various multi-count plea agreement cases).

## CONCLUSION

This Court should affirm the circuit court's order denying Nowels's postconviction motion.

Dated this 28th day of September, 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 3,446 words.

Dated this 28th day of September, 2018.

____________________________

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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 September, 2018.

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