STATE OF WISCONSIN

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

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 18AP001461

v.

NOAH YANG,

Sheboygan County Case No. 17CF373

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF MOTION FOR POST-CONVICTION RELIEF ORDERED AND ENTERED IN SHEBOYGAN COUNTY CIRCUIT COURT BRANCH III, THE HONORABLE ANGELA W SUTKIEWICZ PRESIDING

# DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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# DEFENDANT-APPELLANT'S BRIEF

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## ISSUES PRESENTED

I. WAS A SUFFICIENT FACTUAL BASIS FOR THE DEFENDANT'S PLEA OF NO CONTEST TO THE AMENDED CHARGE OF INTIMIDATION OF A WITNESS LACKING IN THE COURT RECORD?

The trial court answered this question in the negative.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the defendant-appellant (hereinafter "Yang") anticipates that the briefs of the parties will fully meet and discuss the

issues on appeal. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

## STATEMENT OF THE CASE

The instant case commenced on April 11, 2017, with a probable cause determination and the filing of a criminal complaint, in which Yang was charged with one count: Physical Abuse of a Child, contrary to Wis. Stats. §§ 948.03(2)(b), 939.50(3)(h) (R1:1-2, App. 101-102).

According to the criminal complaint, on April 16, 2017, in the City of Sheboygan, Sheboygan County Wisconsin, C.B.Y. presented a phone video recording of various injuries to C.X. to the authorities via a child protective services investigation (R1:1-2, App. 101-102). The video was dated April 11, 2017. C.B.Y. had also indicated to the authorities that on April 11th she heard the defendant say he was going to get his belt and C.X. was then taken into his bedroom by the defendant (R1:1-2, App. 101-102). C.B.Y. then heard C.X. cry (R1:1-2, App. 101-102). Yang was bound over by an Information dated July 5, 2017 (R15:1-1).

The case was scheduled for jury trial, however, through plea negotiations, Yang entered pleas to two counts contained within an amended information dated October 5, 2017 (R40:1-2, App.103-104). Yang entered no contest pleas to an amended count 1: intimidation of a witness, and an amended count 2: disorderly conduct, both with an alleged offense date of April 11, 2017 (R42:1-4, App. 106-109). Through the negotiated plea the State agreed to request one year of initial confinement followed by one year extended supervision on each count to run concurrently with one another, the Defense was free to argue under the terms of the agreement (R42:1-4, App. 106-109).

On October 9, 2017 Yang was sentenced to one year initial confinement followed by one year of extended supervision on each count to be run consecutively to one another (R49:1-2, App. 110-111).

A Notice of Intent to Pursue Post-Conviction Relief was timely filed on October 19, 2017 (R50:1-1). The Post-Conviction Motion was filed on March 29, 2018 (R61:1-10, App. 112-121).

Yang's Post-Conviction Motion requested that the plea be withdrawn and the case be scheduled for further proceedings in the trial court (R61:1-10, App. 112-121). This request was based on a lack of factual basis for his plea to the amended count 1.

An evidentiary hearing was not required given the factual and legal argument presented was based on the record, but a hearing on the arguments was held on July 25, 2018 (R76:1-2). In an oral ruling, the circuit court denied Yang's request to withdraw his plea (R76:1-2). An Order Denying Post-Conviction Relief was filed July 27, 2018 (R80:1-1, App. 170). A Notice of Appeal was filed on August 1, 2018 (R83:1-1, App. 171).

**STANDARD OF REVIEW**

Whether a defendant is permitted to withdraw his plea under Bangert is a mixed question of law and fact. A reviewing court first determines as a matter of law whether a defendant's motion "has pointed to deficiencies in the plea colloquy that establish a violation of Wis. Stat. § 971.08 or other mandatory duties at a plea hearing." State v. Howell, 301 Wis. 2d 350, 369 (2007).

The reviewing court then determines as a matter of law whether a defendant "has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing...." Id.

**ARGUMENT**

I. THE CIRCUIT COURT ERRED WHEN IT FOUND A FACTUAL BASIS FOR THE DEFENDANT'S PLEA AND DENIED THE POST-CONVICTION MOTION.

Following a sentence, a defendant who seeks to withdraw a no contest plea must establish by clear and convincing evidence that withdrawal of the plea is necessary to correct "manifest injustice". State v. Booth, 142 Wis. 2d 232 (Ct. App. 1987) in agreement, State v. Duychak, 133 Wis. 2d 307 (Ct. App. 1986), State v. Washington, 176 Wis. 2d 205 (Ct. App. 1993). A post conviction motion for withdrawal of a guilty plea is a matter of trial court discretion, and should be granted when withdrawal of a guilty plea is necessary to correct manifest injustice. State v. Clement, 153 Wis. 2d 287, 292 (Ct. App. 1989).

The Wisconsin Supreme Court did adopt six factual scenarios, which could indicate manifest injustice. State v. Cain, 342 Wis. 2d 1, 16 (2012). Those factual

scenarios include: the ineffective assistance of counsel; the defendant did not personally enter or ratify the plea; the plea was involuntary; the prosecutor failed to fulfill the plea agreement; the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told the court no longer concurred in the agreement; or the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement. Id. The situation where a "defendant does not personally enter or ratify a plea" is the precise problem with the defendant's plea in this case.

The ultimate inquiry is to what extent a defendant must admit the facts of a crime charged in order to accept the factual basis underlying a guilty plea. State v. Thomas, 232 Wis. 2d 714, 727 (2000). It is the Court's duty to determine that the conduct which the defendant admits constitutes the offense charged in the information and if a court fails to establish a sufficient factual basis, a manifest injustice has occurred. Id. (quoting White v. State, 85 Wis. 2d 485, 488 (1978); see also State v. West, 214 Wis. 2d 468, 474 (1997). A sufficient

factual basis for a guilty plea requires a showing that "the conduct which the defendant admits constitutes the offense charged." State v. Tourville, 367 Wis. 2d 285, 305 (2016) (quoting State v. Lackershire, 301 Wis. 2d 418 (2007). The remedy for a failure to establish a sufficient factual basis is plea withdrawal. Id.

The Supreme Court of Wisconsin, in the seminal case of Bangert set forth the test to determine whether a defendant has entered a plea that is constitutionally infirm. State v. Bangert, 131 Wis. 2d at 274. "First, a defendant must show that the trial court failed to comply with the procedural requirements included in Wis. Stat. § 971.08." Id. "Then, the defendant must properly allege that he did not understand or know the information that should have been provided at the plea hearing." Id. "Once the defendant has made a prima facie showing that his plea was accepted without compliance with the procedures set forth in Wis. Stat. § 971.08 and has also properly alleged that he did not understand or know the information that should have been provided at the plea hearing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly,

voluntarily and intelligently entered." State v. Bollig, 232 Wis. 2d 561 (2000), citing State v. Bangert, Id.

Before accepting any plea, the Court must make such inquiry as satisfies it that the defendant in fact committed the crime charged. Wis. Stat. § 971.08(1)(b). If a court fails to establish a factual basis that what the defendant admits in his or her guilty plea constitutes the offense pleaded to, manifest injustice has occurred. Wis. Stat. § 971.08(1)(b). The factual basis requirement is separate and distinct from the "voluntariness" requirement for guilty pleas. White v. State, 85 Wis. 2d 485, 491 (1978). The factual basis requirement "protect[s] a defendant who is 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." Id. (quoting McCarthy v. U.S., 394 U.S. 459, 467 (1969)). A defendant's failure to realize that the conduct to which he or she pleads guilty does not fall within the offense charged is incompatible with the principles that the plea is "knowing" and "intelligent". State v. Lackershire, 301 Wis. 2d 418, 438 (2007).

In a number of cases subsequent to Bangert, courts have reiterated that the failure to fulfill the statutory factual basis requirement entitles the defendant to the Bangert procedure. State v. Lackershire, 301 Wis. 2d 418, 446 (2007), see also State v. Trochinski, 253 Wis. 2d 38 (2002); State v. Bollig, 232 Wis. 2d 561 (2000); State v. Van Camp, 213 Wis. 2d 131 (1997). If a court fails to establish a sufficient factual basis for a plea, the first condition necessary for plea withdrawal is met; a prima facie showing has been made by showing the plea was defective. State v. Lackershire, 301 Wis. 2d 418, 447 (2007). The second requirement for allowing plea withdrawal is to show a lack of understanding for the information that the court should have provided at the plea hearing, in this case with respect to the basis for the plea. Id. Once these requirements are met, the court must hold a postconviction evidentiary hearing at which the State is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defect with the plea. State v. Brown, 293 Wis. 2d 594 (2006) (citing Bangert, 131 Wis. 2d at 274).

"The facts and reasonable inferences from the facts in a complaint must allow a reasonable person to conclude that a crime was probably committed by the defendant. If reasonable inferences support probable cause and also support a contrary inference, the complaint is sufficient." State v. Payette, 313 Wis. 2d 39, 56 (2008). A factual basis to accept a defendant's guilty plea is established when counsel stipulates on the record to the facts in the criminal complaint. Wis. Stat. § 971.08(1)(b). However, when there is no criminal complaint for both counsel to stipulate to, a sufficient factual basis needs to be stipulated to on the record. State v. Thomas, 232 Wis. 2d 714, 728-729 (2000). The court may look at the totality of the circumstances when reviewing a defendant's motion to withdraw a guilty plea to determine whether a defendant has agreed to the factual basis underlying the guilty plea; the totality of the circumstances includes the plea hearing record, the sentence hearing record, as well as the defense counsel's statements concerning the factual basis presented by the state, among other portions of the record. Wis. Stat. §971.08(1)(b). All that is required

is for the factual basis to be developed on the record- several sources can supply the facts. State v. Thomas, 232 Wis. 2d 714, 728-729 (2000).

Although defense counsel's statements may suffice and the defendant does not need to personally admit to the factual basis, the record needs to support that the defendant evidently assented to the facts as counsel has stipulated to them. State v. Thomas, 232 Wis. 2d 714, 732. If the defendant denies an element of the crime after pleading guilty, the court is required to reject the plea and set the case for trial. Johnson v. State, 53 Wis. 2d 787, 790 (1972). The basic principles of justice should not permit a conviction in which a defendant can plead guilty to an offense which was not committed. State v. Mendez, 157 Wis. 2d 289 (1990).

As a result of plea negotiations, the defendant entered no contest pleas to two misdemeanor counts contained in the amended information (count 1: Intimidation of a Witness as a repeater, and Count 2: Disorderly Conduct as a repeater) (R40:1-2, App. 103-104). The count lacking any factual basis in this case is Count 1: Intimidation of a Witness. In order to commit

intimidation of witness pursuant to Wis. Stat. 940.44, the following elements need to be present:

> 1. (Name of victim) was a witness.
> "Witness" means any person who has been called to testify or who is expected to be called to testify.
>
> 2. The defendant (prevented) (dissuaded) (attempted to prevent) (attempted to dissuade) (name of victim) from attending or giving testimony at a proceeding authorized by law.
> (A (name of proceeding) is a proceeding authorized by law.)
>
> 3. The defendant acted knowingly and maliciously. This requires that the defendant knew (name of victim) was a witness and that the defendant acted with the purpose to prevent (name of victim) from (attending) (testifying).

In this case, the facts relating to the defendant's conduct remain in dispute because the circuit court failed to establish whether the underlying conduct actually constituted the crime to which the defendant pled guilty. Because there was no amended criminal complaint or new criminal complaint charging the defendant with intimidation of a witness, the record needs to be sufficient enough to establish a stipulated factual basis by the state and the defendant. The only document in this case that contains any mention of such a charge is the amended information which contains a factual defect in listing the incorrect date of the

alleged conduct (the date of the violation is April 11, 2017-the date of the original charge). So not only is there no criminal complaint, there is no possibility that the amended Count 1 occurred on the date of the original charge; a witness can't be intimidated if they aren't a witness at the time. Counsel and the defendant have reviewed the discovery materials the State is presumably relying upon to support Count 1 and those materials are dated approximately July through September.

Besides the error with the date of violation, the factual basis established on the record is at best questionable. The question presented is whether the court record is sufficient enough to establish a factual basis for the intimidation of a witness charge.

This case was scheduled for a Jury Trial on September 27, 2017. The trial did not proceed because one of the State's key witnesses, C.B.Y, did not appear in accordance with her subpoena. The reasons put on the record that date for her failure to appear are a result of a meeting the witness and her mother had with Attorney Haasch to prepare for trial:

> The Court: I know we put on the record already she was subpoenaed to be here and she didn't come. There

was mention on Facebook about her feelings about how she was afraid to be here; what do you propose?

Attorney Haasch: I propose, first of all, basically it was on mom's Facebook account, mom was upset about things being excised by me out of a tape based upon the rules of evidence. Despite that, I told her I had to do those things and mom was not happy.

The Court: She disagreed with the decision that some things would be deleted from the video that would be shown to the jury?

Attorney Haasch: Correct.

The Court: This is a minor and the minor's mother?

Attorney Haasch: Correct. She was bringing the minor, that's the problem. Under the circumstances, when we do set a date I may have to do a material witness warrant for both mom and daughter to be sure they are here.
….

Attorney Jaeger: I wanted to state for the record that I don't think the Court's characterization of the witness being afraid to be here is accurate.

Attorney Haasch: No, that wasn't the gist that I got. What I got from this was mom is the driving force behind this.

The Court: It is not that mom is afraid, it's that mom is displeased that something will not be, as she perceives it, the right way. Meaning, she wants the whole recording to be played for the jury.

Attorney Haasch: That is correct.

The Court: Are there any other reasons she had concerns or was that the only information you have at this point?

> Attorney Haasch: That was the only information. Directly talking to her face to face when she was in when I did trial prep with C.B.Y, she was informed that certain sections pertaining to not wanting to see her father go back to jail would be – I told her those would have to be excised. Mom got upset about that and said if we're going to swear my daughter to tell the truth and went into a lengthy discussion as to the rules of evidence that I and everyone has to live by. I tried to impart those on her. She left not in the happiest of moods and it is still affecting them to be here today. I think mom was the driving force behind this (R59:7-9, App. 128-130).

After the adjournment was granted and the case was rescheduled for trial, the State pulled some jail calls to use against the defendant as leverage:

> Attorney Haasch: There is a proposed amended information I have put before the Court and I will put a basis for that on the record. As the Court knows, the State showed up with its witnesses on September 27 for a jury trial to prepare—to try this case. We discovered during the morning even though the individual was swerved and in fact had been in my office the Monday before, that being the 25th, that being one C.B.Y, she did not show up for court. I indicated to the Court on that date and time that I was prepared, if necessary, to file a material witness warrant. In that period of time I have learned through intercepting and going back and forth and having a person in my office listen to recorded phone calls out of the jail that the defendant had contacted his mother on at least one occasion and indicated that if the minor child, C.B.Y, was not present at court for a hearing, that the State would have to drop the charges (R60:2-3, App. 142-143).

The State seems to believe that this information is a sufficient factual basis. The Court inquired further:

> The Court: Can the Court use the information in the criminal complaint as a factual basis for these two convictions?
>
> Attorney Jaeger: With the understanding, Judge, that the original criminal complaint—that the charge in there is being dismissed outright and it is not to be read in.
>
> The Court: Of course.

(R60:11, App. 151). The Court continues with the plea colloquy, the issue of the factual basis never being dealt with. The original criminal complaint may provide a basis for disorderly conduct, but the original criminal complaint cannot serve as a basis for the intimidation charge for reasons previously stated. Since there's no factual basis in the court documents, what is presented on the record needs to provide a sufficient enough basis. The Court Minutes from the plea hearing on October 5, 2017 indicate the State put on the record the reasons for the counts in the amended information (R41:1-2; R58:1-1, App. 105). Those reasons are both the visit with the District Attorney's Office that the witnesses' mother found displeasing and also a phone call where the defendant discussed the procedure of hearings with his mother. These facts do not support the elements for the intimidation charge as set forth above. Particularly,

there are no facts, contained anywhere in the record, that indicate the defendant knowingly and maliciously acted to prevent a witness from testifying. The witness failed to show up; the record contains a number of reasons why that might be the case, none of which clearly support an intimidation charge against the defendant.

At sentencing on October 9, 2017, the defendant, through his counsel, denied that his conduct met the elements of the offense:

> Attorney Jaeger: I would also like to point out that there is no proof that Mr. Yang, Noah Yang, thwarted justice. I listened to the jail phone calls, and visits with his mother, Olivia Yang, there were maybe two hours of conversations, they were not specific of Olivia Yang saying you need to contact Sarah Garcia the mother or you need to contact C.B.Y. and tell her not to come to Court. There was none of that. There was just a general comment that if C.B.Y. doesn't come to court, the District Attorney will drop the case. That's not intimidation of a witness…That was not thwarting justice or authority. As we know, from the State when the jury was here this was a decision made by Sarah Garcia…the mother of C.B.Y., the District Attorney's office advised you and the rest of us that it was her decision not to come to court. She had been in court prepping with the District Attorney's Office the day before that and didn't like the fact that her daughter wouldn't be able to say everything in front of the jury and that certain parts of the tape were going to be excluded in evidence and she decided not to come to court. Mr. Noah Yang was not in touch with Sarah Garcia and I don't see how we make the stretch and get over the bridge that says Noah Yang thwarted

> justice by his comment to his mother…That's a stretch.

(R56:7-8, App. 161-162). Pursuant to Johnson v. State, the Court had a duty to reject the plea at that time and reschedule the matter for a trial. The defendant, through his counsel, adamantly denied that his conduct could meet the elements for the intimidation charge.

After the plea colloquy conducted by the Court, and the arguments made by defense counsel, there still leaves a substantial question as to whether the facts that formed the basis for the plea actually constituted the offense charged. The defendant would not have entered his plea had he known that his conduct does not actually meet the elements of the offense he ultimately pled to.

**CONCLUSION**

There was not a sufficient factual basis for the defendant's plea with respect to the amended charge of intimidation of a witness contained within the court record. The defense believes both elements for plea withdrawal on this basis have been met. Accordingly, the plea should be withdrawn and the case should be remanded to the circuit court for the scheduling of further proceedings.

Dated this _____ day of September, 2018.

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**CERTIFICATION**

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of September, 2018.

_____
Britteny M. LaFond

**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has twenty-one (21) pages.

Dated this _____ day of September, 2018.

_____
Britteny M. LaFond

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 _____ day of September, 2018.

_____
Britteny M. LaFond