STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2326-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ORLANDO C. DAVIS,

Defendant-Appellant.

On Appeal From a Judgment of Conviction, the Honorable Jeffrey A. Kremers Presiding, and From an Order Denying Postconviction Relief, the Honorable Mary Kuhnmuench Presiding, Entered in the Milwaukee County Circuit Court.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the postconviction court err as a matter of law when it ruled that the plea colloquy met the requirements of *Bangert*[1] even though the judge did not summarize the elements of the crimes to which Mr. Davis was pleading guilty or ascertain that he understood those elements in any other way contemplated in *Bangert*?

Circuit court decision: The State conceded that there was a *Bangert* violation. The circuit court initially agreed, but then reversed its decision.

2. Did the postconviction court err as a matter of law when it assigned the burden of proof to Mr. Davis on the question whether the pleas were nonetheless knowing and voluntary?

Circuit court decision: The circuit court ruled that Mr. Davis had not proved that his pleas were involuntary by clear and convincing evidence.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case involves the application of settled law to a singular set of facts. Neither publication nor oral argument is requested.

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[1] *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

STATEMENT OF FACTS

Mr. Davis pled guilty to one count of misdemeanor intimidation of a victim, one count of violation of a domestic abuse injunction, and one count of criminal trespass to dwelling, all with penalty enhancers for habitual criminality. (19). A plea questionnaire and waiver of rights form was filed, which did not list the elements of the offenses. The box indicating "see attached sheet" was checked. (13). Attached to the plea form were jury instructions for the criminal trespass to dwelling and violation of injunction offenses, but not the victim intimidation offense. (14).

At the plea hearing, the circuit court, the Honorable Jeffrey A. Kremers, inquired of Mr. Davis: "Did you talk to Mr. Gaertner about what the elements of each charge are and the evidence the state would have to prove each of those elements?" Mr. Davis responded, "yes." (49: 5). The Court did not explain the elements of the offenses or inquire whether defense counsel had read the jury instructions to Mr. Davis.

The court sentenced Mr. Davis to a total of six years in prison divided equally between initial confinement and extended supervision. (19). Mr. Davis subsequently filed a postconviction motion to withdraw his plea on the ground that the circuit court failed to ensure that he understood the elements of the offenses to which he was pleading as required by *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). (28). The motion alleged that Mr. Davis' attorney did not read the jury instructions

to him or have him read them and that he did not know that the offense of criminal trespass to dwelling under Wis. Stat. §943.14 included an element of "circumstances tending to create or provoke a breach of the peace." (28: 2). Further, the motion alleged that Mr. Davis did not know that the offense of violating a domestic abuse injunction under Wis. Stat. §813.12(4) and (8) included the element that he knew his conduct violated the injunction. Finally, the motion alleged that Mr. Davis was unaware of the elements of the offense of intimidation of victim under Wis. Stat. §940.45(1) at the time of the plea. (28: 2).

The postconviction court, the Honorable Mary Kuhnmuench, held a hearing on the postconviction motion, which lasted an entire day.

The court addressed the question whether the plea colloquy met the requirements of *Bangert*. The State conceded that the requirements of *Bangert* were not met and that under *Bangert*, the burden shifted to the State to show that Mr. Davis' plea was nonetheless knowing and voluntary. (50: 17, 19, 22). The postconviction court ruled accordingly. (50: 21-22).

The State called Mr. Davis and Attorney Gaertner as witnesses. The following is a summary of their testimony as relevant to the issues in this appeal:

Orlando Davis:

Mr. Davis confirmed that he wanted to withdraw his pleas because he "did not understand

everything that was related to the plea." (50: 25). He correctly identified the charges he was initially facing. (50: 25). Mr. Davis acknowledged that he had previously entered guilty pleas in other cases to charges of bail jumping, carrying a concealed weapon, and child neglect. (50: 40-41).

When asked what he and his attorney had done to prepare to enter the pleas in this case, Mr. Davis indicated, "I guess we went over the necessary documents that he felt I needed to be aware of." He said, "I'm not sure every document. It was a lot of paperwork just thrown at me at one time." (50: 41-42). He acknowledged signing the plea questionnaire and waiver of rights form. (50: 42).

Mr. Davis said he had a college degree. (50: 42). He said that he did not read the plea form, but his attorney read it to him. (50: 43). He said that he did not fully understand everything in the document, but he signed it. (50: 44). Mr. Davis said he did not understand everything. He said he was in a "state of depression" at the time and "just went along with the flow." (50: 46). He pointed out that he never told the judge that he understood the elements of the offenses. (50: 46). Mr. Davis acknowledged that he answered "yes" when asked, "Do you understand what the district attorney would have to prove to find you guilty of each of these charges if we had a trial?" (50: 47). He also acknowledged that he answered "yes" when asked, "Did you talk to Mr. Gaertner about what the elements of each charge are and what the State would have to prove each (sic) of those elements?" (50: 47).

Mr. Davis clarified that although he knew what he was being charged with, he did not understand "what had to be proved for me to be charged with those crimes." (50: 49). When the State asked him what he understood about the victim intimidation charge, he indicated that he thought "as long as I intimidated her that I was guilty." (50: 49). With regard to the charge of violating a domestic abuse injunction, Mr. Davis indicated that his understanding was that "as long as I violated that, I was guilty . . . I guess it was about me just being in her presence is violating it" (50: 50).

Mr. Davis testified that he did not remember what his attorney told him about the elements of the offenses. (50: 53). He said that he did not recognize the jury instructions that were attached to the plea questionnaire. (50: 54). He did not recall discussing them with his attorney. (50: 54-55).

Mr. Davis testified that when he pled guilty, he did not know what the term "elements" or the phrase "elements of the offense" meant. (50: 56-57). He became aware of the meaning of these legal terms when postconviction counsel explained them to him. (50: 57). He indicated that when he told the judge during the plea colloquy that he understood what the State would have to prove as to each of the offenses, he did so because he thought he did understand. (50: 57-58).

Mr. Davis testified that he understood at the time of the motion hearing that to prove him guilty of intimidating a victim, the State would have to prove more than that he did something intimidating toward

her. He said that he did not understand that when he pled guilty but became aware of it when postconviction counsel explained it to him. (50: 58). Similarly, regarding the charge of violation of a domestic abuse injunction, Mr. Davis testified that he understood at the time of the motion hearing that the State would have to prove that he knew that he was violating the injunction. However, he did not know that when he pled guilty but became aware of it when postconviction counsel explained it to him. (50: 58). Finally, regarding the charge of criminal trespass to dwelling, he testified that at the time of the motion hearing, he understood that the State would have to prove circumstances tending to cause a breach of the peace. However, he did not understand that when he pled guilty; he became aware of it when postconviction counsel explained it to him. (50: 59).

Mr. Davis explained that he and his attorney went over the plea form on the scheduled trial date at counsel table in the courtroom. (50: 60). He did not recall the jury instructions being part of what was presented to him. (50: 60). When asked why he told the judge at the plea hearing that he understood the charges he was pleading guilty to, he answered, "I told the court I understood because I thought that they meant understood what I'm pleading guilty to, not exactly the gray areas involved within the charges itself." (50: 61).

Attorney Kevin Gaertner:

Attorney Gaertner testified that initially, the plan was to have a trial. (50: 80). He and Mr. Davis "discussed potentially entering pleas at several times

. . . in the county jail." (50: 80). On the day the trial was scheduled to proceed, the State presented a new plea offer, which involved amending the felony victim intimidation charge to a misdemeanor. (50: 80). Mr. Davis was sitting at counsel table. Mr. Gaertner discussed the new offer with him, and Mr, Davis decided to accept it. (50: 80). In his prior discussions with Mr. Davis regarding different plea offers and options, Attorney Gaertner said he discussed with Mr. Davis the elements of the charges he was facing at the time "numerous times." (50: 81).

Attorney Gaertner testified that he went over the complaint with Mr. Davis and that he discussed the elements of the offenses in the complaint. (50: 83). He said there were multiple times prior to the plea when they discussed the elements of the offenses. (50: 84). Attorney Gaertner testified that the victim intimidation and violation of injunction charges were the "focus of a lot of [their] discussions." (50: 84).

However, when asked whether he could specifically recall any of the prior occasions when he discussed the elements of the offenses with Mr. Davis, Attorney Gaertner only recalled specifically discussing the violation of injunction charge because there were "numerous conversations about what the State was going to have to prove on that particular charge." (50: 92). This was because Attorney Gaertner had drafted a motion to dismiss that charge because he did not believe that Mr. Davis had been served with the injunction. (50: 92-93). He recalled meeting with Mr. Davis numerous times to discuss that motion. (50: 93). When asked what he

specifically recalled discussing with Mr. Davis, he recalled that they specifically discussed the issue of whether Mr. Davis knew this order was in place and whether he had been served with it. (50: 96-97). He ultimately did not litigate the motion because the State provided him with an affidavit of service. (50: 99). He did not recall any other specific instance of discussing the elements of the offenses with Mr. Davis. (50: 96). He did not believe he took notes during the discussions. (50: 97).

Attorney Gaertner said that he went over the plea form with Mr. Davis. He did not recall if Mr. Davis had questions. (50: 85). He testified that Mr. Davis did not seem confused about any of the charges. He believed that Mr. Davis understood the elements of the offenses. (50: 85).

When Mr. Gaertner went over the plea form with Mr. Davis, they were at counsel table, and a jury panel was waiting to be brought in. (50: 89). They were either lined up outside or on the way. (50: 89). He acknowledged that the situation was atypical and not ideal. (50: 90). He believed that the process took "probably the average amount of time it would take me to read the entire form and ask all the questions of whether he understood like I normally do." (50: 92). He acknowledged that the plea form did not contain the elements of the offenses. (50: 92).

Attorney Gaertner was shown the jury instructions that were attached to the plea form that was filed with the court—the instructions relating to the violation of injunction charge and the criminal trespass charge. Regarding those, he testified "I did

go over these two with the Court." (50: 86). He indicated that he typically would have his client initial the jury instructions after reading them to him. He did not do that in this case, and he did not recall why. He said, "It might have been due to time constraints." (50: 96). He said "I was cognizant that the judge had us on a clock." (50: 96).

He recalled that he did not have the instruction for the misdemeanor victim intimidation charge, but he had the felony jury instruction with him. He specifically recalled that he read that instruction to Mr. Davis and explained that the fourth element of that instruction would not apply because Mr. Davis was pleading to a misdemeanor charge. (50: 87). He did not recall Mr. Davis having any questions. (50: 88). Attorney Gaertner indicated that if he had believed that Mr. Davis did not understand the elements, he would not have proceeded with the plea. (50: 88).

Attorney Gaertner acknowledged having had the experience of explaining something to a client, believing that he had a good grasp of it, and then at some later time having the client ask a question that led him to believe that client did not have a good grasp of it at all. (50: 91). He did not recall that happening with Mr. Davis as far as he was aware. (50: 98). Attorney Gaertner said that in his previous discussions with Mr. Davis about the previous plea offers, he did not go over the plea form with Mr. Davis. (50: 91).

Attorney Gaertner testified that he typically would read the criminal complaint to his client at the

preliminary hearing, but could not specifically recall what happened at the preliminary hearing in Mr. Davis' case. (50: 94). It was not his standard practice to re-read the complaint to his client at any point after the preliminary hearing, and he did not recall doing so in this case. (50: 94).

The Ruling of the Postconviction Court:

The postconviction court recessed for lunch and then returned to issue a ruling on the motion. The court's ruling took up 44 pages of transcript. (50: 117-161; App. 103-170). Although the State had conceded that there was a *Bangert* violation, and the court had ruled accordingly, after lunch the court announced that it would examine the plea colloquy in *Bangert* and the one in this case and compare them. (50: 118). The court read long passages from the *Bangert* decision into the record, including the entire plea colloquy from that case. (50: 124-129, 133-136; App. 134-139, 143-146). The court then read the entire plea colloquy from the plea hearing transcript from this case into the record. (50: 136-139, 140-142, 145-152; App. 146-149, 150-152, 155-162). The court stopped at various points to comment on the deficiencies in the *Bangert* plea colloquy that were not present in this case. (50: 130-31, 141, 142 149, 154, 156; App. 140-141, 151, 152, 159, 164, 166). The court repeatedly characterized the plea colloquy in this case as more "nuanced" than the one in *Bangert* in various ways. (50: 156; App. 166).

Ultimately, the court reversed itself on the question whether there was a *Bangert* violation in the first instance, noting that the *Bangert* decision

set forth the procedures by which a judge could ascertain the defendant's understanding of the elements of the offense, and saying that "Judge Kremers followed one of those processes. (50: 158; App. 168). The court found that Judge Kremers asked Attorney Gaertner "Did you do it" and asked Mr. Davis if he had read the complaint and gone over it with his lawyer, and Mr. Davis said "yes." (50: 159; App. 169). The court ruled that this was sufficient to satisfy *Bangert*. (50: 159; App. 169). In actuality, Judge Kremers never asked Mr. Davis if he had read the complaint and gone over it with his lawyer.

Woven through its comparison between the two plea colloquies, the court also commented on the testimony that had been presented at the motion hearing. The court noted the testimony about the last-minute change of plea and the time constraints that resulted. The court concluded this alone was not enough to render the plea involuntary. (50: 123). The court found that Mr. Gaertner testified "very convincingly" about how he recalled going over the felony victim intimidation jury instruction with Mr. Davis because he did not have the misdemeanor instruction and how he explained that the fourth element did not apply. (50: 137, 157; App. 147, 167). The court noted that Mr. Davis did not give this kind of detail, but merely testified that Attorney Gaertner did not go over the jury instructions with him, "with no other corroborating or reasonable evidence in the record that would support that allegation." (50: 140; App. 150). The court said that this went to "credibility on this specific point." (50: 138). In this regard, the court believed Attorney Gaertner to be

more credible than Mr. Davis. (50: 139, 157; App. 149, 167).

The court further indicated that it believed Attorney Gaertner's detailed testimony about the service of the injunction being an issue in the case and the motion they discussed. (50: 155; App. 165).

The court declared that Mr. Davis made his claims "in hindsight after a sentence he wasn't expecting and didn't want." The court said, "We know that because Ms. Lewand asked him today and he said "Yeah. I was not happy with the sentence." (50: 143; App. 153). Actually, that never happened. The prosecutor did ask Mr. Davis, "Did the fact that the court sentenced you to six years in prison have any influence on your position about knowing what the elements are?" *He answered, "No."* (50: 63). Relying on its own mischaracterization of the testimony, the court repeatedly described Mr. Davis' testimony as "buyer's remorse," accusing him of fabricating his lack of understanding because his attorney argued for probation, and he did not get it. (50: 157-158; App. 167-168). The court also repeatedly accused Mr. Davis of testifying that he had not been competent when he entered the plea, although he never said anything like that. (50: 142, 143, 158; App. 152, 153, 168). The court also accused Mr. Davis of falsely claiming that his attorney never went over the complaint with him. (50: 159; App. 169). He never said that either.

Ultimately, the court declared "I don't believe that he [Mr. Davis] has come close to the clear and convincing evidence that is required to allow him to

withdraw his plea post-sentencing. His motion is denied." (50: 159; App. 169).

This appeal follows.

ARGUMENT

I. Introduction and standard of review.

A defendant who seeks to withdraw a guilty plea after sentencing "must show that a manifest injustice would result if the withdrawal were not permitted." *State v. Booth*, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987), *citing State v. Reppin*, 35 Wis. 2d 377, 385-86, 151 N.W.2d (1967). One example of such a manifest injustice is where the plea is not knowing and voluntary. *Reppin*, 35 Wis. 2d at 385. "A plea of no contest that is not voluntarily, knowingly, and intelligently entered violates fundamental due process." *State v. Van Camp*, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997), *citing State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

Bangert established a two-step process to determine whether a defendant voluntarily, knowingly and intelligently entered a guilty plea. The defendant bears the initial burden for plea withdrawal. In order to make a prima facie case for plea withdrawal, the defendant must show his plea was accepted without the trial court's conformance with Wis. Stat. § 971.08 or other mandatory procedures. *Bangert*, 131 Wis. 2d at 274. The defendant must also allege he "in fact did not know or understand the information which should have been

provided at the plea hearing." *Id.* Once the defendant makes a prima facie case, the burden then shifts to the state to prove by clear and convincing evidence that the defendant's plea was knowing, voluntary and intelligently entered despite the inadequacy of the record at the plea hearing. *Id.*

Whether there are deficiencies in the plea colloquy that establish a violation of Wis. Stat. § 971.08 or other mandatory duties at a plea hearing is a question of law that is reviewed de novo. *See State v. Brandt,* 226 Wis.2d 610, 618, 594 N.W.2d 759 (1999). Likewise, whether the motion for plea withdrawal has sufficiently alleged that the defendant did not know or understand information that should have been provided at the plea hearing is a question of law. *See State v. Bentley,* 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996).

Whether a plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact that is reviewed independently. *State v. Cross*, 2010 WI 70, ¶ 14, 326 Wis. 2d 492, 786 N.W.2d 64. In making this determination, the appellate court accepts the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. *Id.*

II. The circuit court failed to meet the requirements of *Bangert* for a valid plea.

In *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906, the supreme court listed the trial court's mandatory duties when taking a defendant's guilty or no contest plea. Among those duties is that the court must establish the defendant

understands the nature of the crime with which he is charged. *Id.* at ¶ 35. In *Bangert*, the Court made it clear that a trial court is required to "do more than merely record the defendant's affirmation of understanding pursuant to Section 971.08(1)(a)." *Bangert*, 131 Wis. 2d at 267. The Court made it "mandatory upon the trial judge" to use one or a combination of the following methods to establish the defendant's understanding of the nature of the charge at the plea hearing:

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, *see,* Wis. JI-Criminal SM-32, Part IV (1985), or from the applicable statute. *See, e.g., Cecchini,* 124 Wis.2d at 213, 368 N.W.2d 830. Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing. Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing. For example, when a criminal complaint has been read to the defendant at a preliminary hearing, the trial judge may inquire whether the defendant understands the nature of the charge based on that reading. A trial judge may also specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge.

Id., at 268. Here, the Court did none of those things.

While the Court in *Bangert* allowed that the above list was not exhaustive, the Court declared:

> But it is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant that he understands the nature of the offense, without an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the requirement of Section 971.08, Stats.

Id.

Despite *Bangert*'s admonishment against it, perfunctory questioning is exactly what happened here. The Court asked Mr. Davis, "Do you understand what the district attorney would have to prove to find you guilty of each of these charges if we had a trial?" The court further asked whether Mr. Davis talked with Mr. Gaertner about the elements of the offenses. The court accepted Mr. Davis' perfunctory "yes" answers. (49: 5). The Court did not ask defense counsel what explanation of the elements he gave or refer to any document that established that Mr. Davis understood the elements.

Further, Mr. Davis alleged in his motion that he would testify at a hearing that he did not understand the elements of the three offenses to which he pled. (28: 2).

At the hearing on the postconviction motion, the State conceded a violation of *Bangert*, and the

court ruled that Mr. Davis had established a defect in the plea colloquy under *Bangert* and sufficiently alleged that he did not understand the elements of the offenses. (50: 17, 19, 21-22; App. 119, 121, 123-124). Thus, the State conceded and the court ruled that the burden shifted to the State under *Bangert* to prove by clear and convincing evidence that the plea was knowingly, intelligently, and voluntarily entered despite the inadequacy of the record at the plea hearing. (50: 21-22; App. 123-124). *Bangert*, 131 Wis. 2d at 274. The State presented testimony in an attempt to meet that burden.

However, after the testimony was concluded when the postconviction court announced its ruling, it reversed itself and decided that there was no deficiency in the plea colloquy. (50: 158; App. 168). The court's reasons were less than clear. The court relied heavily on an exhaustive comparison of the plea colloquies in *Bangert* and in this case, from which the court concluded that the *Bangert* colloquy was more flawed, and the colloquy in this case was more "nuanced." (50: 130-31, 141, 142 149, 154, 156; App. 140-141, 151, 152, 159, 164, 166). This was all completely beside the point, since the question was simply whether there was any defect in the colloquy in this case.

The court noted that the *Bangert* decision set forth the procedures by which a judge could ascertain the defendant's understanding of the elements of the offense, and said that "Judge Kremers followed one of those processes." (50: 158; App. 168). The court never quite said which one. The court found that Judge Kremers asked Attorney Gaertner "Did you do it?"

The court also found that Judge Kremers asked Mr. Davis if he had read the complaint and gone over it with his lawyer, and Mr. Davis said "yes." (50: 159; App. 169). The court ruled that this was sufficient to satisfy *Bangert*. (50: 159; App. 169).

Even if these questions and answers would have been sufficient under *Bangert*, they never happened. The only questioning the judge ever did regarding the criminal complaint was when he was establishing the factual basis for the plea, and he asked Mr. Driver, "have your read the complaint where it says what happened?" Mr. Driver answered, "yes" to that. (49: 6; App. 108). There was no inquiry about the elements of the offenses as described in the complaint. The judge never asked Attorney Gaertner if he had read the complaint to Mr. Davis. At times, the postconviction court seemed to believe that Judge Kremers had confirmed with Attorney Gaertner that he read the *jury instructions* to Mr. Davis. That never happened either. (50: 140; App. 150). Judge Kremers never asked about the jury instructions or otherwise inquired into what Attorney Gaertner told Mr. Davis about the elements of the offenses or what documents, if any, he used for that purpose. The postconviction court's factual findings in this regard were clearly erroneous. And the court's conclusion that the requirements of *Bangert* were met was wrong as a matter of law.

III. The postconviction court misapplied the law when it concluded that Mr. Davis was not entitled to plea withdrawal.

Once the defendant has shown a *prima facie* violation of the Court's mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance. *Bangert*, 131 Wis. 2d at 274.

Here, Mr. Davis established a *Bangert* violation. He also alleged in his motion that he did not in fact fully understand the elements of the offenses. (28: 2). The burden shifted to the State to establish by clear and convincing evidence that the plea was nonetheless knowingly, intelligently and voluntarily entered. *Id*.

The State presented the testimony of Attorney Gaertner. He testified that prior to the plea date, he had discussed the elements of the offenses with Mr. Davis "numerous times." (50: 81). However, when asked for specific recollections of these discussions, he could only recall discussing the violation of injunction charge with Mr. Davis. He testified that he had drafted a motion to dismiss the charge because it appeared that Mr. Davis had not been served with the injunction. He recalled discussing with Mr. Davis the fact that the State would have to prove that Mr. Davis knew about the injunction. (50:

92). The postconviction court found this testimony to be credible. (50: 155; App. 165).

Attorney Gaertner also testified that he recalled going over the jury instruction for the felony offense of victim intimidation with Mr. Davis on the plea date. (50: 87). He specifically remembered that he did not have the misdemeanor instruction, so he used the felony instruction and explained to Mr. Davis that the fourth element of the felony offense would not apply to him. (50: 87). The postconviction court found this testimony to be "incredibly credible." (50: 157; App. 167).

Regarding the other two jury instructions that were attached to the plea form that was filed with the court, Attorney Gaertner said, "I did go over these two with the Court." (50: 86). It is not clear exactly what that meant. He indicated that he typically would have his client initial the jury instructions after reading them to him. He did not do that in this case, and he did not recall why. He said, "It might have been due to time constraints." (50: 96). He said "I was cognizant that the judge had us on a clock." (50: 96).

"The trial judge, when acting as the fact finder, is the ultimate arbiter of the credibility of a witness. His [or her] determination in that respect will not be questioned unless his finding is based upon caprice, an abuse of discretion, or an error of law." *Posnanski v. City of W. Allis*, 61 Wis. 2d 461, 465–66, 213 N.W.2d 51 (1973). Usually, credibility findings like the ones the postconviction court made here would

insulate the court's ruling from review. That is not the case here for a number of reasons.

First, the court's credibility findings do not dispose of the issue. Assuming that, as the court found, Attorney Gaertner truthfully testified about his discussions with Mr. Davis about the violation of injunction offense, that would only establish that he explained to Mr. Davis that the State would have to prove that he was aware of the injunction. It would not establish that he ever explained to Mr. Davis that he needed to be aware that his conduct was a violation of the injunction. That is the point upon which Mr. Davis testified to a lack of understanding. (50: 58). Attorney Gaertner did not recall any other specific discussions and was unable to say what he told Mr. Davis about the elements of the offenses prior to the plea date.

Similarly, assuming that, as the court found, Attorney Gaertner testified truthfully that he recalled going over the jury instruction regarding the victim intimidation charge in some manner with Mr. Davis and explaining that the fourth element did not apply to him, that does not establish that Mr. Davis understood the rest of the information in the instruction about the elements of the offense. And although Attorney Gaertner testified that he went over the other two instructions "with the court" it is unclear whether he was claiming to have reviewed them with Mr. Davis, let alone to what extent.

And there is ample reason to question the extent to which Mr. Davis understood the information that was imparted to him on the plea

date. His lawyer was forced to go over the plea documents at counsel table with a jury panel either lined up outside or on the way. (50: 89). Attorney Gaertner knew he was "on a clock." (50: 96). Although it was ordinarily his practice to have his client initial the jury instructions, he did not do that in this case. (50: 96). He also admitted what we all know—that sometimes a client seems to understand something when he doesn't. (50: 91).

Mr. Davis testified that he did not recognize the jury instructions and did not recall them being explained to him on the plea date. (50: 53-55). He testified that when he entered his plea, he was unaware that: (1) to prove him guilty of intimidating a victim, the State would have to prove more than that he did something intimidating toward her; (2) regarding the charge of violation of a domestic abuse injunction, that the State would have to prove that he knew that his conduct violated the injunction; and (3) to prove criminal trespass to dwelling, the State would have to prove circumstances tending to cause a breach of the peace. (50: 58-59). He said that he became aware of those requirements only when postconviction counsel explained them to him. (50: 59).

The postconviction court never specifically found that Mr. Davis understood the elements of the offenses when he pled guilty. However, the court did question his credibility a number of times. The problem is that even if the court's statements are taken as implicitly finding that Mr. Davis was aware of the elements when he pled, that factual finding is tainted by other clearly erroneous factual findings

that the court made. For example, the court's repeated characterizations of Mr. Davis' claims as "buyer's remorse" were driven by the court's mistaken belief that he admitted that he was making his claim because he was dissatisfied with his sentence. (50: 143; App. 153). He actually said precisely the opposite. (50: 63). Similarly, the court found incredible Mr. Davis' statement that his lawyer never read the criminal complaint to him—a statement Mr. Davis never made. (50: 159; App. 169).

The court also repeatedly characterized Mr. Davis as saying "No, he did not go over the jury instructions with me. No, he did not do that." (50: 138, 140; App. 148, 150). The court said Mr. Davis said this "with no other corroborating or reasonable evidence in the record that would support that allegation." (50: 140; App. 150). The court did not explain what kind of corroboration or evidentiary support Mr. Davis could have been expected to produce for an event he said did not occur. Besides, Mr. Davis did not make the statements the court attributed to him. Rather, he said that he did not recognize those documents and did not recall reviewing them. (50:53, 55). Consistent with the rushed nature of the plea preparations, he said "I'm not sure every document. It was a lot of paperwork just thrown at me at one time." (50: 41-42). The court also repeatedly accused Mr. Davis of testifying that he had not been competent when he entered the plea, although he never said anything like that. (50: 142, 143, 158; App. 152, 153, 168).

Finally, the court's findings and conclusions were all hopelessly tangled up with the court's errors of law. The court ultimately concluded:

> I don't believe that he [Mr. Davis] has come close to the clear and convincing evidence that is required to allow him to withdraw his plea post-sentencing. His motion is denied.

(50: 159; App. 169). Having erroneously concluded that there was no *Bangert* violation, the court then erroneously assigned the burden of proof to Mr. Davis. Because the plea colloquy was defective, the burden shifted from Mr. Davis to the State to prove by clear and convincing evidence that he understood the elements of the offenses when he pled. *Bangert*, 131 Wis. 2d at 274. To the extent that the court implicitly found that Mr. Davis understood the elements of the offenses when he pled, that conclusion cannot be salvaged when it was based on a failure to recognize that the State had the burden of proof on that point. See, *State v. Whiteman*, 196 Wis. 472, 220 N.W.2d 929, 945 (1928) (holding that when fact-finding insurance commissioner assigned the burden of proof to the wrong party, this "put the presumption on the wrong side of the question, and it is impossible to say what the commissioner would have found from the evidence unaided by the presumption.").

Despite the postconviction court's stated intention to create a "bulletproof appellate record" (50: 74), the court's rulings were a hopeless tangle of legal errors and erroneous factual findings. If the burden of proof is assigned to the State as the law requires, the result is a conclusion that the State did

not show by clear and convincing evidence that Mr. Davis fully understood the elements of the offenses when he pled. Therefore, the State did not meet its burden to show that the plea was knowing, intelligent, and voluntary despite the defects in the plea colloquy. At the very least, a new hearing is necessary.

CONCLUSION

Mr. Davis asks that this Court reverse the circuit court's decision denying his postconviction motion and enter an order allowing him to withdraw his pleas. Failing that, he asks that the Court remand the case for a new postconviction motion hearing.

Dated this 1st day of March, 2019.

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,150 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 1st day of March, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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

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

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 one or more initials or other appropriate pseudonym or designation instead of full names of 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 1st day of March, 2019.

Signed:

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APPENDIX

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TO
APPENDIX