STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2018AP002326-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

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 OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did Judge Kuhnmuench err as a matter of law by finding that Judge Kremers met the requirements set forth in *State v Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 2 (1986) when Mr. Davis entered his plea, regardless of whether or not Judge Kremers specifically went into the elements listed on the Jury Instructions filed with the court that Atty. Gaertner testified he discussed with Mr. Davis and that Mr. Davis had indicating in writing that he had discussed?

Circuit court decision: No.

This Court should decide: No.

2. Did Judge Kuhnmuench err as a matter of law by indirectly finding that the State had met its burden to demonstrate that Mr. Davis entered his plea knowingly, voluntarily, and intelligently, even though Judge Kuhnmuench in her final ruling stated Mr. Davis had not met his burden, despite repeatedly stating the correct standard?

Circuit court decision: No.

This Court should rule: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On July 19, 2017, Mr. Davis was present in Judge Kremers's courtroom for jury trial, represented by Attorney Kevin Gaertner. Mr. Davis had been charged with the following charges:

1. Felony Intimidation of a Victim, contrary to Wisconsin Statute section 940.44(1), Habitual Criminality, Domestic Abuse;
2. Knowingly Violate a Domestic Abuse Order – Injunction contrary to Wisconsin Statute section 813.12(8)(a), Habitual Criminality, Domestic Abuse;
3. Criminal Trespass to Dwelling, contrary to Wisconsin Statute section 943.14(2), Habitual Criminality, Domestic Abuse;

4. Criminal Damage to Property, contrary to Wisconsin Statute section 943.01(1), Habitual Criminality, Domestic Abuse;
5. Disorderly Conduct, contrary to Wisconsin Statute section 947.01, Habitual Criminality, Domestic Abuse;

(R1).

Instead of going to trial, Mr. Davis accepted a day-of-trial negotiation from the State, and pleaded guilty to the following charges:

1. Misdemeanor Intimidation of a Victim, Habitual Criminality, Domestic Abuse (Amended from a Felony);
2. Violation of a Domestic Abuse Injunction, Habitual Criminality, Domestic Abuse;
3. Criminal Trespass to Dwelling; Habitual Criminality, Domestic Abuse;

(R19).

A Plea Questionnaire Waiver of Rights Addendum (R13) and Jury Instructions for Criminal Trespass to Dwelling and Violating a Temporary Restraining Order or an Injunction (R14) were filed. Notably, the Questionnaire contains Mr. Davis's signature and the date of the trial (now plea), 7/19/19. (R13:2). Above that signature was a block of text that states:

> I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney []. I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty.

(R13:2).

Similarly, underneath Mr. Davis's signature is a block of text written for a defense Attorney to sign in which Atty. Gaertner has done the same. (R13:2).

The attached addendum contained a checked box stating that the complaint was read and that Mr. Davis was giving up certain constitutional rights, including the right to challenge the sufficiency of the complaint, and the "right to make the state

prove me guilty beyond a reasonable doubt as to each of the elements of each crime charged." (R13:3). Mr. Davis's signature was at the bottom of that page. (R13:3)

Based on the documents and Mr. Davis/Atty. Gaertner's statements, Mr. Davis was convicted and sentenced by Judge Kremers on that same day, to two years prison as to each court, consecutive to one another. (R19). During sentencing, Mr. Davis made a statement indicating numerous times that he was sorry, that he head mental health issues, had grown up around abuse, and was suicidal. (R49:18-23).

Post-conviction motion

Nearly a year later, on June 8, 2018, Mr. Davis filed a post-conviction motion alleging under *Bangert* that his plea colloquy was defective because the court allegedly failed to ensure that Mr. Davis understood the elements of the offenses in which he was pleading to. (R28).

Specifically, Mr. Davis alleged he did not understand certain elements within each of the three charges to which he pleaded. (R28:2). The State did not respond, as there was never a briefing schedule set. (R50:15).

Hearing on post-conviction motion

On November 8, 2018, Judge Kremers's successor, Judge Kuhnmuench, held a hearing on Mr. Davis's motion. (R50).

Mr. Davis's testimony at the post-conviction hearing

In that hearing, Mr. Davis testified to the following facts:

- A Preliminary Hearing was held on this case and Mr. Davis recalled the officer testifying during the hearing. (R50:40).
- Mr. Davis had previously pleaded guilty in several criminal cases before, including Bail Jumping, Carrying a Concealed Weapon, and Child Neglect. (R50:40-41).
- Mr. Davis has a college degree, specifically a Bachelor's Degree in Business management. (R50:42, 62).

- Mr. Davis signed the portion of the Plea Questionnaire Waiver of Rights Addendum that states "I have reviewed and understand this entire document and my attachments. I have reviewed it with my attorney who represented I have answered all questions truthfully, and either I or my attorney have checked the box because I'm asking the Court to accept my plea of finding guilty." (R50:43).
- Mr. Davis didn't understand the documents but didn't tell anyone – his attorney, the court or anybody else. (R50:44).
- Despite not understanding, Mr. Davis told the judge that he understood the charge and maximum penalties. (R50:44).
- Despite not understanding, Mr. Davis told the judge that he understood the charges of Knowingly Violating a Domestic Abuse Injunction as a Habitual Criminal. (R50:44).
- Despite not understanding, Mr. Davis told the judge that he understood the charge of Criminal Trespass to Dwelling as a Habitual Criminal. (R50:44).
- Despite not understanding, Mr. Davis told the judge that he understood what the State would have to prove to find him guilty as to each of the charges. (R50:47).
- Despite not understanding, Mr. Davis told the judge that he had spoken with his attorney about what the elements of each charge are and the evidence the State would have to prove as to each of those elements. (R50:47).
- Mr. Davis read the Criminal Complaint. (R50:48).
- Mr. Davis told the court that he read the Criminal Complaint. (R50:48).
- Mr. Davis was going through bipolar depression during the plea hearing and was just "going with the flow." (R50:49).
- Mr. Davis didn't understand the elements but understood that if he did the crimes, he was guilty. (R50:49-50).
- Mr. Davis signed the portion of the plea forms that states "I understand that the crimes to which I am pleading have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by an attorney as follows: See the

attached sheet," and does not recall what statements his attorney made. (R50:53-54).

- Mr. Davis briefly read through the Wisconsin Jury Instruction for Criminal Trespass to Dwelling, but doesn't remember talking about it with his attorney. (R50:54).
- Mr. Davis didn't remember talking about the elements for Violation of a Restraining order. (R50:54).
- At the time of his plea, Mr. Davis didn't know what an "element" was. (R50:57).
- At the time of his plea, Mr. Davis did not know that the State would have to prove that he did "more" than just something intimidating to the victim, prove that he knew he was violating the Restraining Order, and prove that when he trespassed he had to do so under circumstances that would breach the peace. (R50:57-59).
- In the other three cases Mr. Davis plead guilty to, he did not know what an "element" was. (R50:62).
- That a 6 year prison sentence did not influence his opinion on what an element was. (R50:63).

Mr. Davis's attorney's testimony at the post-conviction hearing

After Mr. Davis testified, Atty. Gaertner testified. Atty. Gaertner stated that this case was initially on the trial route but that he had discussed plea options with Mr. Davis several times in the County Jail. (R50:80). Atty. Gaertner stated that during these discussions he discussed the elements of the charges numerous times with Mr. Davis. (R50:81). Atty. Gaertner also stated that it is his standard practice to discuss charges before a Preliminary Hearing and what the State has to prove, and that at the Preliminary Hearing in this case, he would have done so with Mr. Davis. (R50:82) Atty. Gaertner also testified that he went over the discovery with Mr. Davis and the criminal complaint with Mr. Davis. (R:50:83).

Atty. Gaertner stated that during the negotiations the focus was on getting the charges reduced to misdemeanors, and on the day of trial, the State gave a new offer allowing that to happen. (R50:80). Atty. Gaertner stated that before the plea was entered, he went over the elements in the criminal

complaint with Mr. Davis. (R50:83). He discussed the elements with Mr. Davis as to all the charges on the plea date, and that he "went over multiple times this particular case because [Atty. Gaertner] had filed a motion just after the Preliminary Hearing." (R50:83). Additionally as to the discussions Atty. Gaertner spoke with Mr. Davis "specifically, as to the intimidation, we discussed that numerous times and also the violating the restraining order. That was really the focus of a lot of our discussions." (R50:83-84). Atty. Gaertner sat down with Mr. Davis to fill out the Plea Questionnaire and went over the form in its entirety with Mr. Davis. (R50:85). Atty. Gaertner answered any questions Mr. Davis had, and stated that Mr. Davis did not appear confused about any of the charges, and believed that Mr. Davis had an understanding of the charges. (R50:85). Atty. Gaertner observed Mr. Davis sign the forms, and also went over the Jury Instructions with Mr. Davis, specifically recalling that he went over the felony intimidation instruction but advised Mr. Davis that the 4th element did not apply, but the first three elements did apply. (R50:86-87). Mr. Davis did not have any questions, and Atty. Gaertner had no reason to believe that Mr. Davis didn't understand the plea. (R50:87-88). It was Atty. Gaertner's standard practice that he would not proceed with the plea if there were any problems, and would ask for more time or proceed in other manners. (R50:88).

On cross-examination, Atty. Gaertner stated that he went over the forms in the courtroom, and that although doing forms in the courtroom was not ideal, he believed his trial was the only trial set that day, and was able to go through the forms in the same amount of time that it normally would take. (R50:89-92). Atty. Gaertner also testified that he recalled specifically discussing the charge of Violating a Restraining Order numerous times and what the State would have to prove because of a potential motion issue, relating to whether Mr. Davis had been served. (R50:92-93). That motion was not filed because the State had provided him a copy of an affidavit of service. (R50:98-99).

Atty. Gaertner also testified that even before most courts required jury instructions to be filed along with the plea forms, it was always his standard practice to do so because "quite frankly, when these issues come up, I have also worked on

appellate cases as well, so I see these issues popping up a lot, so I try to prevent having these issues come up." (R50:93). The court asked Atty. Gaertner what kinds of issues, and Atty. Gaertner stated issues with plea withdrawal and standard issues with appeals. (R50:94). The court asked Atty. Gaertner how a jury instruction helps, and Atty. Gaertner responded:

> Issues with whether people understood the elements of the crime. I think it's a very common appellate issue that happens quite a lot. There's a lot of litigation involving that. There's a lot of litigation involving whether there's a factual basis. So those are issues that I try to be cognizant of whenever I'm handling a case to make sure a client understands first there's a factual basis and certainly understands the elements of the plea.

(R50:95-96).

Atty. Gaertner stated he did not have Mr. Davis initial the instructions, and that it was probably due to time constraints. (R50:96).

Closing arguments at the post-conviction hearing

After testimony was taken, closing arguments were made. The State argued that the totality of the circumstances present clearly showed manifest injustice would not occur if Mr. Davis was not allowed to withdraw his plea. (R50:103). Specifically the State pointed to several crucial factors showing that Mr. Davis's plea was made freely, voluntarily, and intelligently, including:

(1) That during the plea hearing, Judge Kremers made seven different inquiries of Mr. Davis related to his understanding of the charges he was pleading guilty to. (R50:104). During those inquiries, Mr. Davis had numerous opportunities to tell Judge Kremers that he did not understand the elements, but didn't.
(2) Mr. Davis has a bachelor's degree in business management and has a high level of education. (R50:105).
(3) This case was not the first criminal case in which Mr. Davis has plead guilty to. In fact, Mr. Davis had plead guilty in three separate criminal cases before

the current case. (R50:105). While Mr. Davis testified that he did not understand what an "element" was in the current case, or, in his previous three cases, the State argued that his claim was not credible and was contrary to common sense, as Mr. Davis is alleging that not only did Atty. Gaertner fail to explain one of the most basic concepts in criminal law, but so did all of his other attorneys. (R50:105).

(4) Mr. Davis read and signed a substantial amount of paperwork demonstrating he did make his plea knowingly, voluntarily and intelligently, yet testified that he didn't recognize the documentation and that he just signed it because he thought he was supposed to. (R50:105).

(5) Atty. Gaertner, with over 10+ years' experience as an attorney practicing at the trial and appellate level goes over jury instructions in his usual practice. (R50:105-106). He testified that he did so in multiple instances as to every offense Mr. Davis was charged with. (R50:106).

(6) Mr. Davis's testimony was contradicted by the record with regard to knowing about his injunction, and the fact that defense had considered filing a motion and did not, further demonstrating Atty. Gaertner went over the elements with Mr. Davis. (R50:107).

Mr. Davis argued that a "yes" is not enough in colloquy. (R50:109, 115). He also argued that Atty. Gaertner's testimony wasn't specific enough as to what he remembered, and that the plea forms were done in a hurry. (R50:110-111). Counsel argued that she believed Atty. Gaertner when he testified that he wouldn't have gone through with the plea if he thought something was wrong, and argued that Mr. Davis was essentially the only person to know what he did or didn't understand. (R50:112). Mr. Davis further argued he didn't understand certain portions of the crimes. (R50:113-115)

The State, in rebuttal, pointed out that this was more than a "perfunctory yes" colloquy and that testimony from Atty. Gaertner was specific as to not only his general practice in this field, but very specific as to numerous instances in which he spoke with Mr. Davis, including in-custody visits,

preparation related to motions, and several discussions of the elements. (R50:116). During all these instances, there was not one time Mr. Davis appeared confused regarding the subject matter discussed, nor were there and instances to give Atty. Gaertner reason to believe that Mr. Davis had a misunderstanding of what he was charged with or what the State had to prove. (R50:116).

The State also argued the public policy as to plea withdrawal as well and noted that the integrity of the entire plea process would be questioned if defendants in general were allowed to come back after a prison sentence and claim they didn't understand what is going on, when the record, a defendant makes specific answers to a court, and sworn testimony are all contrary to that claim. (R50:117).

The post-conviction court's ruling

Pursuant to testimony and the arguments made, Judge Kuhnmuench ruled Mr. Davis did not meet his burden.

Judge Kuhnmuench's ruling was lengthy. In her ruling, Judge Kuhnmuench first examined Wisconsin Statute section 971.08(1), which says, notably, a court must determine that a plea is made voluntarily with an understanding of the nature of the charge and the potential punishments if convicted, pursuant to a plea. (R50:118-119). Judge Kuhnmuench examined *Nelson* and *Birts*, and, finally *Bangert*, and noted the importance of the rights waived when a guilty plea is entered. (R50:119-121).

Judge Kuhnmuench noted that while Mr. Davis waived his rights, he was getting the offer and ultimately the resolution that he asked for and had wanted the whole time – a non-felony conviction, which is why Mr. Davis's case had been set for trial. (R50:121). Judge Kuhnmuench notes this was "very clear." (R50:121).

Judge Kuhnmuench then examined *Bangert*, and conducted an analysis of the case looking at the colloquy that the judge in that case had with a defendant pleading guilty. (R50:124-126). The court noted that in *Bangert* the judge had a relatively short and vague colloquy; he asked the defendant if he understood that a no-contest plea is a guilty plea, whether

the defendant was pleading of his own free will, whether any threats or promises were made to the defendant, warns the defendant that the court is not bound to any specific recommendations, asked the defendant's attorney if he discussed his rights and believes he understands them, advises him of the maximum penalty, and then asked if there has been anything omitted. (R50:126-128). After being alerted that there has been an omission, the court in *Bangert* (on its own) made another inquiry about threats and ignores the prosecutor. Both parties in that case agreed the colloquy was not adequate; there was no question about specific rights, no reference to the complaint or question if it was read, no reference to elements or jury instructions or possible motions. (R50:128-131). The court added that while those specific questions are missing from *Bangert*, they all present in Judge Kremers's plea and that the Mr. Davis is suggesting that Judge Kremers should do even more. (R50:131).

Judge Kuhnmuench then turned to look at the circumstances surrounding Mr. Davis's plea and went through the facts of what happened. She noted that Judge Kremers went through the charges and asked about the amendment of the Felony Intimidation to a Misdemeanor. (R50:137). While doing so, Judge Kuhnmuench paused to talk about how Atty. Gaertner testified "very convincingly" about explaining the difference between the amendment of the intimidation count from a Felony to a Misdemeanor, and notes his recollection is "very detailed." (R50:137-138). Judge Kuhnmuench stated that in her reasoning, she juxtaposed Atty. Gaertner's testimony with Mr. Davis's testimony, when Mr. Davis flatly stated "he never went over jury instructions with me." (R50:138). The court says Atty Gaertner was "very clear" and had a "very specific recollection affirming that he did go over the jury instructions" despite no initials, which the court says is not required under the law and is simply "a belt-and-suspenders approach." (R50:139). The court stated that Atty. Gaertner's testimony was "very deliberate and careful" instead of Mr. Davis's statement of, "'No he did not go over the jury instructions with me,'" as the Judge Kuhnmuench noted "with no other corroborating or reasonable evidence in the record that would support this allegation." (R50:140).

Continuing to examine the colloquy, Judge Kuhnmuench noted that Judge Kremers, unlike the court in *Bangert*, addressed the charges and maximum possible penalty in detail, and also wryly pointed out Judge Kremers remembered to make sure the defendant actually entered a plea, unlike the judge in *Bangert* who forgot to actually get a plea from the defendant. (R50:140-142).

The court pointed next pointed out that the post-*Bangert* case law examines the education levels of individuals entering pleas, and while there was no inquiry as to education in *Bangert*, there was with Mr. Davis, who indicated that he is a college graduate. (R50:142). The court suggested that Mr. Davis was also trying to sneak in a competency claim via testimony about depression, but then also testified that we was just "going along" with the plea. (R50:142-143). Judge Kuhnmuench noted that this is not what *Bangert* was meant to address, and that the summary of Mr. Davis's post-conviction claims are based on hindsight after he was given a sentence that he was not expecting. (R50:143). The court also pointed out that Mr. Davis's answer structure was the same during his post-conviction testimony as it was during his plea colloquy consisting of "yes" and "no" without providing any indicia, despite being given multiple opportunities. (R50:144).

Judge Kuhnmuench also noted that during the plea Judge Kremers actually stopped and realized that he had missed a question, which showed Judge Kremers was paying attention to what's going on. (R50:144-145).

Judge Kuhnmuench stated that next, for a third time, Judge Kremers "spelled out" the names and titles of the crimes, along with the enhancers, assessments, and maximums, then asked Mr. Davis if he understood them and understood the charges, then examined the Plea Questionnaire, just as the court in *Bangert* has instructed judges to do. (R50:145-147). Judge Kremers addressed Mr. Davis is guaranteed and what he is giving up. (R50: 148). Judge Kremers again asked if his waiver of these rights is being done freely and voluntarily and asked Mr. Davis if he spoke with "Mr. Gaertner about what the elements of each charge are and the evidence that the State would have to prove each of those elements" to which Mr. Davis stated "yes." (R50:147-148). Judge Kremers then spoke

with Atty. Gaertner, and Judge Kuhnmuench again juxtaposed Judge Kremers's questions to Atty. Gaertner with the judge's colloquy in *Bangert*, noting that the judge in *Bangert* never referenced the criminal complaint or had any line of questioning as to whether counsel did any of things Atty. Gaertner had done to inform his client of the nature of the offense, the penalties or the rights being waived. (R50:149). Judge Kuhnmuench also noted that the offense in *Bangert* was a homicide versus the misdemeanor offenses Mr. Davis, a college educated man, was pleading to. (R50:149).

Next, Judge Kuhnmuench noted that when Judge Kremer's examined the criminal complaint, Mr. Davis had ample opportunity to speak up, and could have said "I haven't read the complaint. I don't know what the heck you're talking about," but did not. (R50:150-151). She also noted that Judge Kremers also stopped and caught himself, making sure Mr. Davis admitted to the habitual criminality portion of the offenses, which again showed that Judge Kremers was paying attention and demonstrated that Mr. Davis had yet another opportunity to say "Boy, I've got to put the skids on this." (R50: 151-152).

During the plea, the State also moved to correct an error in the complaint and Atty. Gaertner indicated he also wanted to address it. (R50:152). Judge Kuhnmuench noted that this also showed that the lawyers were paying attention to the plea, and not just "going through the motions.' (R50:152-153).

Judge Kuhnmuench ended her analysis by stating that Atty. Gaertner's testimony completely rebutted Mr. Davis's testimony. (R50:154-156). She explained "this was not a slam-bam-than-you-ma'am sort of perfunctory representation of this gentleman or a plea colloquy like we see in the *Bangert* case." (R50:156). She also, again, stated that she believes Atty. Gaertner because of the details, and his testimony was "incredibly credible" (R50:156-157).

Based on the record, Judge Kuhnmuench concluded:

> Mr. Davis's testimony is akin to buyer's remorse. It is exactly why the standard is so high on asking a judge to allow you to withdraw your plea because of the obvious.

> All of a sudden now you do get the meaning of what Judge Kremers asked him.

(R50:157).

Judge Kuhnmuench said to Mr. Davis:

> You had buyer's remorse. Now you get what you weren't expecting, what you weren't hoping for, what your lawyer was clearly arguing for probation, and you didn't get that. And so now you come in and you say, "I wasn't competent. He never told me any of those things," and instead of saying and answering the prosecutor's questions, "Well, what was it you didn't understand?" "Well, he just never told me." That's just a very convenient memory. We have convenience of memory. We have convenience of morals. That's a convenience of memory…."

(R50:157-158).

Judge Kuhnmuench emphasized that Atty Gaertner was the one she believed, stating:

> Mr. Gaertner is saying in great detail, "This is what I did." Your answers today were, "Nope. He never went over any of those things with me. Nobody did, and I only said, 'Yes' to Judge Kremers because I'm not competent." He didn't use the word "not competent." He said, "Because I was suffering from depression. I have a long history of this and that." Your lawyer's motion does not say that. Your lawyer's motion says, "The judge did not ascertain the way he's required to under *Bangert* whether or not the defendant had a good understanding, a full understanding, a full appreciation of the nature of the charge." That's the language in *Bangert* and the court -- the *Bangert* court goes on to say how we, as trial judges, can ascertain that.

(R50:158).

As to the form of the plea itself, Judge Kuhnmuench found that Judge Kremers followed the law and did everything he was supposed to do:

> And Judge Kremers followed one of those processes. I believe that he did it through his inquiry with Mr. Gaertner, and that's actually one of the inquiries that the court in *Bangert* says you can do. The judge can ask the

> lawyer, "Did you do it?" In this case that's exactly what Judge Kremers did, and he buttressed it by asking the defendant very specific questions about the complaint. "Did you read it? Did you go over it with your lawyer? And Mr. Davis said, 'Yes.'" Today he says "No."
>
> (R50:158-159).

Judge Kuhnmuench then denied Mr. Davis's motion, ruling that she did "not believe he has come close to the clear and convincing evidence that is required to allow him to withdraw his plea post-sentencing." (R50:159).

Mr. Davis now appeals.

STANDARD OF REVIEW

The process of, and standard of review, for a motion to withdraw a guilty plea has been set forth in *State v. Plank*, 282 Wis. 2d 522, 699 N.W.2d 235:

> A defendant may withdraw a no contest plea after sentencing by establishing by clear and convincing evidence that the plea was not knowingly, voluntarily and intelligently entered. *Bangert* sets forth the procedure to determine whether a defendant's plea was knowingly, intelligently and voluntarily entered. First, a defendant must make a prima facie showing that his or her no contest plea was accepted without complying with Wis. Stat. § 971.08 or another court-mandated duty. A prima facie showing must also include a defendant's assertion that he or she did not know or understand the information the court failed to provide. *Id.* We accept the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. However, whether a defendant has established a prima facie case presents a question of law that we review independently.
>
> If a defendant makes this initial showing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered, despite the inadequacy of the colloquy at the time of the plea's acceptance.
>
> The State may use the entire record to demonstrate that the defendant's plea was knowing and voluntary and may

examine the defendant or his or her counsel to shed light on the defendant's understanding and knowledge. *Id.* We defer to the circuit court's determination on this prong, reversing if the circuit court erroneously exercised its discretion.

State v. Plank, 282 Wis. 2d 522, 528-529, 699 N.S.2d 235, 238-239 (internal citations omitted).

ARGUMENT

I. Mr. Davis is not entitled to withdraw his plea.

A defendant seeking plea withdrawal under *Bangert* has two initial burdens. *See Brown*, 293 Wis. 2d 594, 39-40. First, he must "make a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court mandated duties by pointing to passages or gaps in the plea hearing transcript." *Id.* ¶ 39. Second, he must "allege that [he] did not know or understand the information that should have been provided at the plea hearing." *Id.*`

In this case, Judge Kuhnmuench held a hearing and the State conceded that the plea with Judge Kremers was "thin" enough to grant the hearing, but that testimony would fill in any gaps left by Judge Kremers. (R50:22). The State elicited testimony as outlined above, which led Judge Kuhnmuench to her ruling.

A. The circuit court correctly ruled that the circumstances and record of Judge Kremers's plea colloquy with Mr. Davis met the requirements set forth under the law.

Judge Kuhnmuench first examined Wis. Stat. § 971.08(1) and found that the requirements in the statute were met. (R50:118-119). In relevant part, that statute reads:

> 971.08 Pleas of guilty and no contest; withdrawal thereof.
>
> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:

> **(a)** Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> **(b)** Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

The *Bangert* case and its progeny illustrate how a court **may** do this:

> First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions, or from the applicable statute. 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

State v. Bangert, 131 Wis. 2d 246, 268, 389 N.W.2d 12, 23–24 (1986) (internal citations omitted).

However, as Mr. Davis concedes, this list is "not necessarily exhaustive of the methods which a trial judge may exercise in satisfying the antecedent step to its statutory obligation to personally determine the defendant's understanding." (Brief of Defendant-Appellant, pp. 15-16, *citing Bangert*, 131 Wis. 2d 246, 268, 389 N.W.2d 12, 24 (1986)).

The key word is "understanding." A plea will not be voluntary unless the defendant understands the nature of the constitutional rights he is waiving. *Bangert,* 131 Wis. 2d at 265, 389 N.W.2d 12. "If a defendant does not understand the nature of the charge and the implications of the plea, he should

not be entering the plea, and the court should not be accepting the plea." *State v. Brown*, 2006 WI 100, ¶ 37, 293 Wis. 2d 594, 618, 716 N.W.2d 906, 918. On the other hand, if a defendant does understand the charge and the effects of his plea, he should not be permitted to game the system by taking advantage of judicial mistakes. *Id.*

A court cannot just ask if a defendant understands his charges, there needs to be questions into the circumstances around a defendant's answers:

> "[I]t 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 sec. 971.08, Stats."

Bangert, 131 Wis.2d at 268-69, 389 N.W.2d 12 (emphasis added).

As such, the true procedural purpose of *Bangert* and its progeny is to eliminate perfunctory questioning. For instance, the *Brown* case, decided some twenty years after *Bangert*, sought to expand *Bangert*, stating "This opinion is intended to revitalize *Bangert*, which allows a court to tailor a plea colloquy to the individual defendant." *State v. Brown*, 2006 WI 100, ¶ 58, 293 Wis. 2d 594, 627, 716 N.W.2d 906, 922.

Brown reinforces the idea that a colloquy can be – and should be – tailored to the individual defendant when measuring his or her understanding. For example, one factor the court in *Brown* considered in a *Bangert* analysis was that the defendant in *Brown* had maturity, literacy, and education issues at the time of the offense:

> "Brown was a 17-year-old high-school dropout. He had completed ninth grade but was illiterate and had been diagnosed with reading and mathematics disorders. At the sentencing hearing, Brown's attorney told the court: "Mr. Brown is not a slow reader. He's not a poor reader. He is a

> nonreader. He's as deficient in this regard as anybody I've ever represented in 20-some years."

State v. Brown, 2006 WI 100, ¶ 9, 293 Wis. 2d 594, 606, 716 N.W.2d 906, 912

The court in *Brown* also made noted that the defendant's deficiencies were coupled with a lack of effort from both is attorney and the circuit court. The Brown court notes procedurally, pursuant to only being orally told about the charges at the initial appearance and a pre-hearsay preliminary hearing waiver, "Neither the criminal complaint nor the information was ever read to Brown in court before the plea hearing." *Id.*

What's crucial here, and what can be seen in *Brown* and *Bangert,* is that the plea colloquy must be tailored to the individual defendant; there is no one-size-fits-all.

Judge Kremers's plea colloquy with Mr. Davis fulfilled the law. Judge Kremers met the requirements as outlined above, and his questions of Mr. Davis measured Mr. Davis's ability to understand and appreciate what he was doing when he entered his plea. Judge Kuhnmuench noted this in her ruling, also took into account the circumstances of Mr. Davis's plea which were testified to at the post-conviction hearing.

Upon hearing that Mr. Davis was going to plead, Judge Kremers first informed Mr. Davis of the amendment to the first count which was a amending the felony charge to a misdemeanor. (R49:3) Judge Kremers also mentioned the statute, date, and the location of the incident, along with the maximum penalty Mr. Davis was facing, then asked Mr. Davis if he understood what he was charged with in that count and the maximum possible penalty. (R49:3). Mr. Davis indicated he did. (R49:3)

Judge Kremers moved to the next count for Violating a Domestic Abuse injunction and informed him of the date of the incident and maximum penalty and asked if Mr. Davis if he understood the charge and maximum penalty. (R49:4). Mr. Davis indicated he did. (R49:4).

Judge Kremers moved to the last count of Criminal Trespass and informed Mr. Davis of the date of the incident and maximum possible penalty, then asked Mr. Davis if he understood the charge and maximum possible penalty. (R49:4). Mr. Davis indicated yes. (R49:4).

Judge Kremers confirmed that there were no threats or promises made to Mr. Davis to change his plea, and then referred to the plea form and verified that Mr. Davis signed the form, went over the form with his attorney before he signed it, and understood that by signing it he is giving up all the constitutionally rights listed on the form and plead guilty to the three charges. (R49:4-5). Judge Kremers then asked Mr. Davis if that was done freely and voluntarily, to which Mr. Davis said yes. (R49:5). Judge Kremers asked Mr. Davis if he understood what the district attorney would have to prove to find him guilty of each of the charges if there was a trial, and if he had talked to his attorney about what elements of each charge are, and the evidence that the state would have to prove as to each of those elements. (R49:5). Mr. Davis stated he did. (R49:6). Judge Kremers also warned Mr. Davis that the court was not bound by any agreement and was able to sentence him up to the maximum of 6 years, to which Mr. Davis said yes. (R49:6).

Judge Kremers then turned to Mr. Davis's attorney and asked him if he was satisfied that Mr. Davis was entering his pleas freely, voluntarily, and intelligently, with a full understanding of the charges, penalties, and rights being given up, and if the court may use the complaint as a factual basis to which his attorney stated yes. (R49:6).

Judge Kremers turned back to Mr. Davis and asked him if he read the criminal complaint. (R49:6). Mr. Davis said yes. (R49:6). The court asked him if it was accurate, and Mr. Davis said yes. (R49:6). The court then explained read-ins. (R49:6-7). Just before wrapping up, the court caught itself, as noted by Judge Kuhnmuench, and then confirmed that Mr. Davis agrees to the factual basis of repeater status. (R49:7).

Judge Kremers did what was required under the law, and this record demonstrates that Mr. Davis, in fact, did understand what he was doing. This colloquy, combined with the Plea Questionnaire and Waiver of Rights Addendum, and the Jury

Instructions, are a far cry from the shaky colloquy in *Bangert*, or the failure to take into account any deficiency that Mr. Davis may have similar to the man in *Brown*. Judge Kuhnmuench noted that Mr. Davis's appeal is attempting to hold the court to a higher standard than what *Bangert et. al*. calls for, and that the record clearly demonstrates that this was not a wham-bam-thank-you-ma'am.

Furthermore, while the State conceded initially at the hearing that the colloquy was thin, Atty. Gaertner filled in the gaps. Atty. Gaertner explained what was talked about with Mr. Davis and what happened procedurally with the case; providing more light on what the plea colloquy and questionnaire demonstrate what Mr. Davis knew at the time he plead. Mr. Davis also expanded the record as well by talking about his state of mind.

Accordingly, Judge Kuhnmuench properly found that Judge Kremers did what was required of him. Judge Kuhnmuench made a very detailed record and pointed to numerous specific instances that show Mr. Davis's plea was not a mindless droning of perfunctory questions. She also noted that Mr. Davis is both well-educated, and his prior experience in the criminal justice system lead her to believe that his current claims are contradictory to what the record demonstrates.

B. The record demonstrates that Judge Kuhnmuench correctly applied the burdens of proof.

Mr. Davis's second argument comes from Judge Kuhnmuench stating that based on the testimony in the post-conviction hearing, Mr. Davis had not "come close to the clear and convincing evidence that is required to allow him to withdraw his plea post-sentencing." (R50:159).

The *Cross* case is instructive as to the burdens in a *Bangert* hearing.

> A defendant establishes that the circuit court failed at one of its duties by filing a motion (a "*Bangert* motion") that: (1) makes a prima facie showing of a violation of § 971.08(1) or other court-mandated duties; and (2) alleges that "the defendant did not know or understand the

> information that should have been provided at the plea hearing." A defendant attempting to make this prima facie showing must point to deficiencies in the plea hearing transcript; conclusory allegations are not sufficient.
>
> Upon making this showing, the defendant is entitled to an evidentiary hearing (known as a "*Bangert* hearing") at which the State must prove by clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent despite the deficiencies in the plea hearing. If the State cannot meet its burden, the defendant is entitled to withdraw his plea as a matter of right. **However, if a defendant seeking to withdraw his guilty plea cannot show that the circuit court failed in its duties during the plea hearing, or if the State meets its burden of proving the plea was knowing, voluntary, and intelligent, withdrawal of the plea is left to the discretion of the circuit court and will not be disturbed unless the defendant demonstrates a manifest injustice will result from the court's refusal to allow the plea to be withdrawn.**

State v. Cross, 2010 WI 70, ¶¶ 19-21, 326 Wis. 2d 492, 504–05, 786 N.W.2d 64, 70–71 (internal citations omitted) (emphasis added).

In this case, Judge Kuhnmuench knew the burdens assigned and did not make the uninformed ruling Mr. Davis claims she made. For instance, at the post-conviction hearing, Judge Kuhnmuench was speaking to the attorneys on the record with regards to the procedure of the hearing and noted that the burden is on the State. (R50:10). Mr. Davis's counsel noted that everything Judge Kuhnmuench said was "absolutely correct." (R50:10).

The burdens were further discussed and the attorney for the State said:

> […] and as far as the burden, if the Court is making a finding that the defense has met their initial burden in establishing a prima facie case and there was a defect in the plea colloquy, and at this point, if the Court was relying on the motion itself or if the defense intends to question Mr. Davis about his actual understanding and the Court is going to make a finding that there was that defect and that he didn't understand, then the burden would shift to me to establish that based on the totality of the

> circumstances there's enough evidence in the record to support an upholding of the plea.

(R50:13).

The burdens were again discussed in more depth and Judge Kuhnmuench stated that the prima facie case had been met by Mr. Davis to warrant a hearing, stating:

> […] and you have met your burden, in establishing a prima facie showing for the plea withdrawal after sentencing at this time. That decision by this Court is based on, as I indicated to the parties earlier, my recent review or refreshment of the *Bangert* case, which I was more than willing to look at again and take a few minutes to look at, if the parties were going to disagree, particularly the State, with my analysis that there is nothing in *Bangert* that requires anything more in the motion than what Ms. Moorshead has done, which is that she has to make the allegations.

(R50:20)

Based on that, Judge Kuhnmuench said:

> […] because of that I find that they have met their initial burden in setting forth a prima facie showing for at least an initial burden showing a basis for a plea withdrawal post-sentencing. That, now, as I understand it, shifts the burden to the State to provide some evidence, in whatever form you choose to provide this court, and let me hear it and see it and review it to make the second piece of this decision, which is whether or not you've been able to successfully rebut the defense's initial prima facie showing by the other parts of the record that you wish to point out to this Court that demonstrate Mr. Davis's allegations, which is the second prong of his motion does not hold water, if the Court considers these other facts that were also a part of that plea colloquy.

(R50:21-22).

The State again confirmed that it is the State's burden and called both Mr. Davis and Atty Gaertner to testify. This was direct testimony, as someone who has the burden would elicit. Once the evidence was closed, the court took a brief break. After the break, Judge Kuhnmuench stated:

> I did use the intervening time to review a couple of cases, including, once again, what I think to be the relevant language of the *Bangert* case, *State versus Bangert*, 131 Wis. 2nd 274. The Court notes that I believe that it's a 1984 Supreme Court of Wisconsin case that is dispositive on the issue of the requirements, the mandatory requirements of trial judges under 971.08(1) also I wanted to make sure I reviewed the entire statute involving withdrawals of pleas and confer[sic] what the burden of proof is, what the shifting burdens are to understand whether clear and convincing evidence by the State to refute the allegations by the defendant as to why he should be allowed to withdraw his plea, that that was the correct standard.

(R50:102-103).

Judge Kuhnmuench then stated to the attorneys regarding closing arguments:

> So at this point I'm going to turn the floor over to the lawyers, and I'm going to ask that since it was your burden of proof you have the floor to begin with, Ms. Lewand. Then I'll hear from Ms. Moorshead, and because you have the burden of proof, you can have the final statement. Go ahead.

(R50:103).

This wholly demonstrates that Judge Kuhnmuench was looking at the State to prove its case, which based on the judge's ruling, it did.

In *Birts v. State,* the court said: "We have held that in determining whether to grant a motion to withdraw a guilty plea, 'the trial court is not obligated to accept the defendant's statements as verities.' " *Birts*, 68 Wis.2d 389, 394, 228 N.W.2d 351 (1975) (quoting *Ernst v. State*, 43 Wis. 2d 661, 668, 170 N.W.2d 713 (1969)). A court is not obligated to accept a defendant's statement if the record demonstrates that the statement is not credible. *State v. Taylor*, 2013 WI 34, ¶ 83, 347 Wis. 2d 30, 75, 829 N.W.2d 482, 504 (Justice Prosser, concurring).

To be clear, Mr. Davis does not have the burden at a *Bangert* hearing. As indicated *supra*, the State had the burden, and it met its burden. As further indicated, an involuntary plea is just **one** of the ways in which manifest injustice can be established. Because the State met its burden and showed that the plea was voluntary, Judge Kuhnmuench found that Mr. Davis did not prove any other way that a manifest injustice would occur.

C. The record demonstrates that the State proved Mr. Davis knew and understood the information that should have been provided at the plea hearing.

While it is the State's position that any gaps present in Mr. Davis's plea were filled in by credible testimony from Atty. Gaertner and Judge Kuhnmuench's analysis of the transcript based on Atty. Gaertner and Mr. Davis's testimony, it is the State's position that at the *Bangert* hearing the State proved that Mr. Davis's allegation that he did not know or understand any gap – in this case a lack of specificity as to the elements – was not credible.

Judge Kuhnmuench caught on to what Mr. Davis was trying to do. At the post-conviction hearing, testimony was elicited demonstrating that unlike the defendant in *Brown*, who was illiterate, Mr. Davis is not only literate, he is an adult that successfully completed a 4-year degree. This is a strong contrast to the 17-year-old in *Brown* who didn't finish high school.

Further, testimony indicated that Mr. Davis had read the criminal complaint, which specifically states the elements of each charge underneath each count. (R50:48). Mr. Davis saw those elements. In addition to being exposed to the elements in black-and-white letters, Mr. Davis asserted his right to have a Preliminary Hearing and was in court were an officer testified as to the Date, Elements, Venue, and ID of each charge. Further, Mr. Davis had discussed this with his Atty. Gaertner. This can be contrasted with *Brown*, in which the defendant in that case could not physically read the complaint and did not hear testimony as to the elements, date, venue, and location. Nor, for that matter, did that defendant discuss motions with his

attorney, as Mr. Davis did – specifically a motion that would attack the element of Violating a Domestic Abuse Injunction that Mr. Davis currently claims not to understand.

Mr. Davis's lawyer testified, as Judge Kuhnmuench noted, in great detail. Atty. Gaertner indicated that the elements of the offenses were brought up pursuant to his standard practice, and more specifically, as to a motion regarding service of the injunction. This is yet another time, when Mr. Davis was exposed to the elements of the crimes in which he initially stated he discussed and is now backtracking after he was not sentenced to probation.

Mr. Davis also has experienced a plea colloquy before. Mr. Davis has plead guilty on three separate occasions before the current case. (R50:40-41). In those cases, colloquies and plea forms were completed. Mr. Davis wants this Court to believe that he didn't understand what an "element" was during any of those pleas, or the plea in the current case. (R50:62). However, Mr. Davis admitted that he had signed the Plea Questionnaire and Waiver of Rights Addendum. (R50:53-54). He admitted that he told the court he signed it and understood everything, yet after receiving his sentence he says that he was "just saying that" because he was "going with the flow." (R50:53-54). He even admitted to going through the jury instructions which indicated the elements the State must prove. (R50:54). The court in *Brown* specifically found that a defendant should not be permitted to game the system, and based on the defendant's claims, Judge Kuhnmuench properly found that the defendant was attempting to game the system.

Mr. Brown's statements during his colloquy should not be ignored. At the federal level, argued for persuasive value, the Seventh Circuit has ruled that statements made during a guilty plea are actually more credible than allegations made in a post-conviction motion. "Statements made by a defendant to a judge in open court at a guilty plea are not mere trifles that a defendant may elect to disregard." *United States v. Collins*, 796 F.3d 829, 834-835 (7th Cir. 2015); *United States v. Loutos*, 383 F.3d 615, 619 (7th Cir. 2004). When a district court conducts a plea colloquy, "it is not putting on a show for the defendant, the public, or anybody else." *Hutchings v. United States*, 618 F.3d 693, 699 (7th Cir. 2010). "The purpose of a plea colloquy "is

to expose coercion or mistake, and the district judge must be able to rely on the defendant's sworn testimony at that hearing." Id. (citing *United States v. Loutos*, 383 F.3d 615, 619 (7th Cir.2004)). Due to the nature of the plea hearing, there is a presumption of verity attaches to a defendant's statements when entering a guilty plea. *Hutchings*, 618 F.3d 693, 699 (7th Cir. 2010). Thus, "based on this presumption of verity, a defendant's statements made in open court during a guilty plea hearing control over later contradictory contentions in most situations." *Payne v. Brown*, 662 F.3d 825, 830 (7th Cir. 2011). Mr. Davis told Judge Kremers numerous times that he understood what he was doing when he pleaded, and Judge Kuhnmuench rightly believed those statements.

The record demonstrates that Atty. Gaertner's testimony discredits Mr. Davis's claims. Atty. Gaertner practices at the appellate level. (R50:94). He is familiar with common post-conviction and appellate litigation, and that's why, even before courts required it, it has been his practice to discuss jury instructions with his clients. (R50:94).

Furthermore, the circumstances of a day-of-trial plea should not be overlooked. Atty. Gaertner and Mr. Davis had discussed the case and developed a theory of how to proceed during a jury trial. Generally speaking, the morning of trial is when a lawyer is most familiar with his or her case. Accordingly, Atty. Gaertner had the jury instructions on his person in preparation for that trial. Based on his interactions with Mr. Davis and preparation of pre-trial motions and litigation, he saw no issues with Mr. Davis's understanding of the charges and elements. Atty. Gaertner had this basis of knowledge before even discussing a day-of-trial plea with Mr. Davis, where Atty. Gaertner testified that he saw no issues either, and testified that he wouldn't have gone through with the plea if he had. (R50:88).

Judge Kuhnmuench calculated these factors. She saw the facts and gauged the credibility of Mr. Davis and Atty. Gaertner, while looking at the totality of the circumstances. She was persuaded by the State's argument looked at what Mr. Davis had to gain with his current claims, and ruled they are buyer's remorse. The Wisconsin Supreme Court has ruled that in the context of the manifest injustice standard:

> "[…] we have explained that 'disappointment in the eventual punishment imposed is no ground for withdrawal of a guilty plea.' Basically, the higher burden is a deterrent to defendants testing the waters for possible punishments.

State v. Nawrocke, 193 Wis. 2d 373, 379–80, 534 N.W.2d 624, 626 (Ct. App. 1995) (internal citations omitted).

In her discretion, Judge Kuhnmuench considered the record before her and correctly found that the State met its burden.

CONCLUSION

This Court should affirm the circuit court. The record in this case demonstrates that Judge Kremers met the legal standard for accepting a plea and that in the post-conviction hearing examining the plea, the State proved that Mr. Davis's plea was knowing, voluntary, and intelligently made, based on his answers to Judge Kremers, his own testimony, and his attorney's testimony. Thus, no manifest injustice exists.

As Judge Kuhnmuench indicated, Mr. Davis's appeal is made from convenience of memory and buyer's remorse. Accordingly, the State asks this Court to AFFIRM the circuit court.

Dated this _____ day of May, 2019.

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 word count of this brief is 8,971.

_____ _____

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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 s. 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.

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