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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs. Appeal No. 2019AP000858 CR
2019AP000859 CR

JEFFREY T. ZIEGLER,
Defendant-Appellant.

DEFENDANT-APPELLANT JEFFREY T. ZIEGLER'S BRIEF AND
APPENDIX

Appeals from judgments and an order of the circuit court for Dane
County,
the Honorable John D. Hyland, judge.

Electronically signed by Patricia Sommer

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ISSUE PRESENTED

Did the State fail to present evidence on all elements of the charged statute?

The circuit court said no.

STATEMENTS ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not warranted as oral argument would be of marginal value. Publication is warranted as the cases apply an established rule of law to a factual situation significantly different from that in published opinions.

STATEMENT OF THE CASE AND THE FACTS

These cases were consolidated on appeal. *See* Order dated May 17, 2019. Where issues were dealt with together in the trial court, reference is made to the record in 2019 AP 858-CR alone. Where issues were dealt with separately, references are to R1, record on 2019 AP 858-CR, and R2, record on 2019 AP 859-CR.

2017 CM 1583

On August 19, 2017, at 3:22 p.m., City of Madison police responded to a call that a man had looked through a window of the caller's residence. R1:1; A1. Later that night, at 12:24 a.m. on August 20, 2017, police responded to the same address, with the caller saying that the same man was across the street, looking in the windows of another house. R1:2; A2. Police found Ziegler on that block getting in to his car, "sweating profusely ... breathing deeply, [with] the zipper on his pants ... down." *Id.* The police arrested Ziegler. *Id.* The circuit court found that these facts were sufficient to infer an intent of sexual gratification. R.39:5; A12.

2017 CM 1664

Count 1: Disorderly Conduct at 1110 E. Mifflin St.¹

Here, Ziegler was allegedly on the complainant's porch and activated her door bell, which can be activated by motion sensor or by someone pressing the doorbell. R2.4:3; A6.

Count 2 and Count 3: Disorderly Conduct and Invasion of Privacy at 939 E. Gorham St.

On June 11, 2017, a neighbor reported that he saw Ziegler staring into his neighbor's window. *Id.*

¹ Ziegler was charged with Attempted Invasion of Privacy on Count 1 of 2017 CM 1664, R2.4; A4, but the district attorney indicated at the February 27, 2018 hearing on Ziegler's Motion to Dismiss that the state would amend the complaint to disorderly conduct. R.39:5-6; A12-13. This amendment is reflected on the judgment of conviction in the dismissed but read in charged. R2.25.

*Count 4: Attempted Invasion of Privacy at 924 E. Dayton St.*²

This last count involves a report that, on April 26, 2017, Ziegler was looking into the window of a studio apartment from a shrub-filling area outside. R2.4:2; A5.

Circuit Court’s Decision on Motion to Dismiss

Predisposition, Ziegler moved to dismiss Count 1 in 2017 CM 1583 and Counts 1 and 4 in 2017 CM 1664 as alleging insufficient facts from which to infer that Ziegler had committed the charged crimes. R.12:1. Ziegler alleged that the facts were not sufficient to support a charge of invasion of privacy, as that offense is described in WIS. STAT. § 942.08(2)(d). R.12:2. That statute requires that the actor “[e]nters another person’s private property without that person’s consent or enters an enclosed or unenclosed common area of a multiunit dwelling or condominium and looks into any individual dwelling unit” if four factors apply. The first requirement listed is that the actor looks into the unit “for the purpose of sexual arousal or gratification.” Sec. 942.08(2)(d)1. The third is that the individual has a reasonable expectation of privacy in “that part of the dwelling unit.” Sec. 942.08(2)(d)3.

The circuit court denied the motion to dismiss on all counts. Regarding 2019 AP 858, the circuit court found that the facts were sufficient to infer an intent of sexual gratification. R39:5. In 2019 AP 859, on Count 1, the circuit court did not address the sexual gratification element, as the state indicated it would amend the count to disorderly conduct. R.39:6. On Count 4, the circuit court found that the facts were sufficient to infer an intent of sexual gratification. R.39:10; A17.

Postconviction Motion

Postconviction, Ziegler renewed his arguments to the circuit court, arguing that the lack of factual basis entitled Ziegler to withdraw his pleas and that the cases should be dismissed. R.27. The circuit court denied the motion. R.36.

² Count 4 was ultimately read in and dismissed. R2.25.

ARGUMENT

A. The Decision to Allow Withdrawal of a Guilty Plea Is Within the Circuit Court's Discretion.

The circuit court's decision whether to allow withdrawal of a guilty plea is discretionary, and is therefore subject to the clearly erroneous standard on review. *State v. Thomas*, 232 Wis. 2d 714, 724, 605 N.W.2d 836 (1999).

B. The Circuit Court Erred in Denying Ziegler's Motion to Withdraw His Pleas Because There Was No Factual Basis for a Finding of Sexual Gratification, an Element of Wisconsin STAT. §942.08(2)(d).

Ziegler was convicted of invasion of privacy. *See* WIS. STAT. § 942.08(2)(d). That statute has requisite elements, the first of which is that the actor looks into a dwelling unit "for the purpose of sexual arousal or gratification." Sec. 942.08(2)(d)1. There was no fact alleged in the complaints to justify a finding of sexual gratification in this case.

In order for the circuit court to accept a guilty plea, there must be a showing that the plea was knowingly, voluntarily and intelligently made. *Thomas*, 232 Wis. at 725. The court must also find that there is a factual basis for the crime charged. *Id.* "This 'factual basis' requirement is distinct from the above-stated "voluntariness" requirement ... and "protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Id.* (quoting *McCarthy v. United States*, 394 U.S. 459 (1969)). The circuit court must determine that the conduct to which the defendant has admitted constitutes the offense charged. *Id.* at 727. "[I]f a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred," *id.*, and the circuit court should allow withdrawal of the plea, *see State v. Higgs*, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999). On a motion to

withdraw, the court may review the totality of the circumstances, and the entirety of the record, to determine whether the defendant has accepted the factual basis underpinning the guilty plea. *Thomas*, 232 Wis. 2d at 730.

Here, neither complaint alleged any fact demonstrating that Ziegler actions were for sexual arousal or gratification. As indicated above, the complaints alleged that Ziegler looked through a window. On that night, the complaint alleges, Ziegler was “sweating profusely ... breathing deeply, [with] the zipper on his pants ... down,” when the police confronted him. *Id.* The other complaint alleged that Zeigler was on the complainant’s porch, R2:4:3, was staring into a window, *id.*, and was looking into the window of a studio apartment from a shrub-filling area outside, R2:4:2;A5. The circuit court found that these facts were sufficient to infer an intent of sexual gratification. R.39:5;A12.

The circuit court’s conclusion renders the sexual gratification prong of the statute superfluous. *See NCR Corp. v. DOR*, 128 Wis. 2d 442, 456, 384 N.W.2d 355 (Ct. App. 1986) (construe statute so as to avoid superfluous language). If every time someone looks into a bedroom window we can infer sexual gratification or arousal, then the first requirement in the statute’s list is unnecessary. To read this section out of the statute would be contrary to the legislature’s intent. *See Voss v. City of Middleton*, 162 Wis. 2d 737, 749, 470 N.W.2d 625 (1991). The circuit court’s acceptance of Ziegler’s guilty plea to charges that had no basis in fact was a manifest injustice, and Ziegler must be allowed to withdraw his plea.

CONCLUSION

Dated this 28th day of August, 2019.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; 1.5-inch margin on left side and 1-inch margins on the other 3 sides. The length of this brief is __ pages.

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1465 words.

Dated: August 28, 2019

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CERTIFICATION OF COMPLIANCE WITH WIS STAT. § 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12)(f).

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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