

RECEIVED**12-10-2019****CLERK OF COURT OF APPEALS
OF WISCONSIN**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal Nos. 2019AP858-CR and 2019AP859-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JEFFREY T ZIEGLER,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 14, THE HONORABLE JOHN HYLAND, PRESIDING

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1037939Dane County District Attorney's Office
215 S. Hamilton St., Room 3000
Madison WI 53703-3297
Telephone: (608) 266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	iv
STATEMENT ON PUBLICATION AND ORAL ARGUMENT . . .	iv
ARGUMENT	1
CONCLUSION	9
CERTIFICATION	10
CERTIFICATE OF COMPLIANCE.	11

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE (S)</u>
<u>State v. Bangert</u> , 131 Wis. 2d 245, 274, 389 N.W.2d 12	2,3
<u>State v. Black</u> , 2001 WI 31, ¶9, ¶ 11-12, ¶ 16 242 Wis. 2d 126, 624 N.W.2d 363	2,4
<u>State v. Harrell</u> , 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994).	4
<u>State v. Higgs</u> , 230 Wis. 2d 1, 10-11, 601 N.W. 2d 653, 658 (Ct. App. 1999)	2,4
<u>State v. Hoppe</u> , 2008 WI App 89, ¶12, 312 Wis. 2d 765, 754 N.W.2d 203	3
<u>State v. Lackershire</u> , 2007 WI 74, ¶24, ¶33, ¶51,301 Wis. 2d 418, 734 N.W.2d 23	1-3
<u>State v. Milanes</u> , 2006 WI App 259, ¶ 12, 297 Wis. 2d 684, 727 N.W.2d 94.	2
<u>State v. Negrete</u> , 2012 WI 92, ¶ 19, 343 Wis. 2d 1, 819 N.W.2d 749	3
<u>State v. Rock</u> , 92 Wis. 2d 554, 558-59, 285 N.W.2d 739, 741-42 (1970)	2
<u>State v. Routon</u> , 2007 WI App 178, ¶ 21, 304 Wis. 2d 4800, 736 N.W.2d 178	7
<u>State v. Smith</u> , 202 Wis. 2d 21, 25, 549 N.W. 2d 232 (1996)	4
<u>State v. Thomas</u> , 2000 WI 13, ¶14, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836	3,5-6

STATUTES CITED**PAGE(S)**

Section 809.19(3)(a)2, Wis. Stats	iv
Section 942.08(2)(d), Wis. Stats.	1
Section 947.01(1), Wis. Stats	1
Section 971.08(1)(b), Wis. Stats	3,8

ISSUE PRESENTED

Did the circuit court comply with its obligation to ensure that Jeffrey T. Ziegler committed the crimes to which he pleaded?

The circuit court, on review, said yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

This case can be resolved on the briefs by applying well-established legal principles to the facts of the case. Accordingly, the State does not request oral argument. The case does not meet criteria for publication.

STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case See Wis. Stat. § 809.19(3)(a)2. The State will supplement the statement of the facts and case as appropriate in its argument.

ARGUMENT

The circuit court correctly denied Ziegler's motion to withdraw his guilty plea and for dismissal.

Jeffrey Ziegler stands convicted on his guilty pleas to two counts of Invasion of Privacy in violation of Wis. Stat. § 942.08(2)(d) and to one count of Disorderly Conduct in violation of Wis. Stat. § 947.01(1) (R1.21; R2.25)¹. As relevant to this appeal, Ziegler filed a postconviction motion seeking to withdraw his guilty pleas and have the trial court dismiss his cases (R1.28). The circuit court denied the motion without a hearing (R1.36). Ziegler now appeals.

1. Standard of Review

Whether a plea is knowingly, intelligently, and voluntarily entered is a question of constitutional fact. *State v. Lackershire*, 2007 WI 74, ¶ 24, 301 Wis. 2d 418, 734 N.W.2d 23. This Court accepts the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous. *Id.* But it determines independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary.

¹ R1 refers to the Record for 2019AP858 and R2 refers to the Record for 2019AP859.

Id. This Court reviews whether the plea colloquy met the statutory requirements independently of the circuit court. *Id.* at ¶ 25.

2. Legal Principles

A defendant who seeks to withdraw a guilty or no-contest plea after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal of the plea is necessary to correct a “manifest injustice.” *State v. Milanes*, 2006 WI App 259, ¶ 12, 297 Wis. 2d 684, 727 N.W.2d 94; *State v. Black*, 2001 WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363. Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice. *See State v. Higgs*, 230 Wis. 2d 1, 10, 601 N.W.2d 653, 658 (Ct. App. 1999) (citing *State v. Rock*, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739, 741-42 (1970)).

In cases where a defendant has alleged lack of factual basis to support the plea, reviewing courts have conducted an analysis under *State v. Bangert* to determine whether the lack of factual basis entitles the defendant to withdraw his plea. *See State v. Lackershire*, 2007 WI 74, ¶ 51, 301 Wis. 2d 418, 734 N.W.2d 23 (citations omitted). To establish a right to withdraw a plea under *Bangert*, the

defendant has the initial burden to prove that an on-the-record colloquy did not occur or was inadequate for a specific reason and must allege he did not understand the information that should have been provided. See *State v. Hoppe*, 2008 WI App 89, ¶12, 312 Wis. 2d 765, 754 N.W.2d 203. If the defendant establishes the first step, then the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. See *State v. Bangert*, 131 Wis. 2d 245, 274, 389 N.W.2d 12; *Hoppe*, 312 Wis. 2d 765, ¶ 12. To shift the burden to the State, the defendant seeking plea withdrawal must "point to a plea colloquy deficiency evident in the plea colloquy transcript." *State v. Negrete*, 2012 WI 92, ¶19, 343 Wis. 2d 1, 819 N.W.2d 749.

Wisconsin Stats. Sec. 971.08(1)(b) directs that before accepting a guilty plea, the trial court must ascertain "that the defendant in fact committed the crime charged." This is known as the factual basis requirement. See *State v. Thomas*, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. "[E]stablishing a sufficient factual basis requires a showing that 'the conduct which the defendant admits constitutes the offense charged...'" *Lackershire*, 301 Wis. 2d 418, ¶ 33, 734 N.W.2d 23 (quoted source omitted). The

court's inquiry into whether the defendant committed the crime charged need only be sufficient to satisfy the court that the defendant did in fact commit the crime charged. See *State v. Black*, 2001 WI 31, ¶¶11-12, 242 Wis. 2d 126, 624 N.W.2d 363. "[W]hen a plea is pursuant to a plea bargain, the trial court is not required to go to the same length to determine whether the facts would sustain the charge as it would if there was no plea bargain." *State v. Harrell*, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994). "[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant..." *Black*, 242 Wis. 2d 126, ¶16. If no factual basis for the crimes existed at the time of the plea, the defendant will have satisfied the manifest injustice requirement. See *Higgs*, 230 Wis. 2d at 10-11. "The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996) (cited source omitted).

**3. The circuit court complied with Wis. Stat. § 971.08(1)
and found a factual basis for the charges**

Ziegler, through his counsel, agreed at the plea hearing that the criminal complaint could be relied on as the factual basis for his plea (R1.40:14). The trial court specifically inquired as to whether there was an adequate factual basis to support each element of the offenses (R1.40:14). In *State v. Thomas*, the Wisconsin Supreme Court stated that when counsel stipulates on the record to facts in the criminal complaint, a factual basis is established. See *State v. Thomas*, 2000 WI 13, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836. A stipulation means that defense counsel agrees that the circuit court may look to facts in a criminal complaint and that such facts, if true, constitute the crime. Here, the Court also conducted its own review of the factual basis. The court stated, "I'm also satisfied having reviewed the complaints that there's a factual basis..." (R1.40:14). Additionally, the court advised Ziegler that "if you plead guilty to charges, you relieve the State of the burden of proving to the jury's satisfaction beyond a reasonable doubt every element of the charge" (R1.40:11). The court further asked Ziegler if he had reviewed the elements for the charges of invasion of

privacy and disorderly conduct, to which Ziegler answered affirmatively (R1.40:11).

Ziegler was well aware that one of the elements for the charges of invasion of privacy was that the looking into the dwelling unit was for the purpose of sexual arousal or gratification. See JI-Crim 1395. Ziegler was present at the motion hearing on February 27, 2018, when his "Motion to Dismiss for Failing to State Sufficient Facts Within the Criminal Complaint" was heard (R1.39:1). Ziegler heard his attorney argue that "there is nothing here establishing a sexual gratification or arousal element" (R1.39:4). The court held otherwise (R1.39:4-5, 9-10). Ziegler knew that sexual gratification or arousal was a part of an element of the offenses, and he knowingly, intelligently and voluntarily entered pleas of "Guilty" to the two charges of invasion of privacy (R1.40:13).

A court's decision to accept a guilty plea involves findings of fact. See *Thomas*, 232 Wis. 2d 714, fn.7. The circuit court found the defendant guilty and thus determined there was a factual basis for the guilty plea. Reviewing courts do not disturb a circuit court's factual findings, unless the findings are contrary to the great

weight and clear preponderance of the evidence. *See id.* (citations omitted).

The circuit court was given a chance to review its findings when Ziegler filed a postconviction motion (R1.28). The circuit court did so by reviewing the criminal complaints, along with the findings from the court's earlier decision denying the motion to dismiss (R1.36:4). The court again found that the factual allegations in the complaint, coupled with the reasonable inferences to which they give rise, establish that Ziegler looked into the victims' dwellings for the purpose of sexual arousal or gratification (R1.36:5). The court found that Ziegler's intent may be inferred from his conduct (R1.36:5, citing e.g., *State v. Routon*, 2007 WI App 178, ¶ 21, 304 Wis. 2d 4800, 736 N.W.2d 178).

Ziegler claims that the circuit court's ruling renders the sexual gratification prong of the statute superfluous (Defendant-Appellant's Brief, p. 4). However, the circuit court specifically pointed out that it was not assuming that any defendant who looks through the window of another person's residence is presumed to have done so for the purpose of sexual arousal or gratification (R1.36:6). The circuit court correctly held that the defendant's intent

can be inferred by the facts, and that the inference must flow reasonably from the facts (R1.36:7). The circuit court ruled that the surrounding circumstances of the cases established the reasonable of the inference, that the defendant's intent in looking through the windows was for the purpose of sexual arousal or gratification (R1.36:7). The intent portion of the statute is not superfluous, nor did the circuit court treat it as such. Instead, the court made a specific factual finding in both cases that Ziegler's intent could be inferred from his conduct.

Ziegler's claims do not rise to the level of a prima facie showing that the circuit court failed to find a factual basis for his plea. The circuit court properly denied Ziegler's motion without an evidentiary hearing (R1.36:9). This court should conclude that the circuit court complied with Wis. Stat. § 971.08(1)(b).

CONCLUSION

For these reasons, the State requests that this Court affirm the circuit court's decision concluding that there was a sufficient factual basis for Ziegler's pleas and that his pleas were thus knowingly, voluntarily, and intelligently entered.

Dated this ____ day of December, 2019.

Respectfully submitted,

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1037939

Dane County District Attorney's Office
215 S. Hamilton St., Room 3000
Madison WI 53703-3297
Telephone: (608) 266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 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 9 pages.

Dated: _____.

Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of December, 2019.

Erin Hanson
Assistant District Attorney
Dane County, Wisconsin