STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs. Appeal No. 2019AP000858 CR
2019AP000859 CR

JEFFREY T. ZIEGLER,
Defendant-Appellant.

DEFENDANT-APPELLANT JEFFREY T. ZIEGLER'S PETITON FOR REVIEW AND APPENDIX

Petition for review from the Decision of the Court of Appeals, District IV, affirming the judgments and an order of the circuit court for Dane County, the Honorable John D. Hyland, judge.

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ISSUE PRESENTED

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

The circuit court and the court of appeals said no.

CRITERIA FOR REVIEW

A decision by the supreme court will help clarify the law and the question presented is a question of law that is likely to recur.

STATEMENT OF THE CASE

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.

This case is about a few instances of a man looking into people's windows. In only one of the instances was there any arguable evidence that Ziegler was looking in the window for purposes of sexual gratification, as required by the statute, WIS. STAT. § 942.08(2)(d)1. There, Ziegler was not caught masturbating, he did not have his penis out of his pants, he was not even fondling himself outside his clothing. Rather, Ziegler was caught on a different block from the complainant's house, getting in to his car, "sweating profusely … breathing deeply, [with] the zipper on his pants … down." R.1:2. The circuit court found that these facts were sufficient to infer an intent of sexual gratification. R.39:5.

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.

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.

Court of Appeals

The Court of Appeals, likewise, denied Ziegler's appeal.

ARGUMENT

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. The circuit court found that these facts were sufficient to infer an intent of sexual gratification. R.39:5.

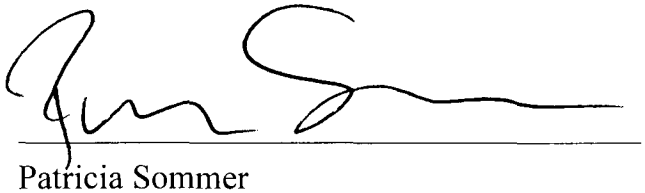
The circuit court's conclusion renders the sexual gratification prong of the statute superfluous. *See NCR Corp. v. DOR*, 128 Wis. 2d 442, 456, 384 N.W.2d 355 (Ct. App. 1986) (construe statute so as to avoid superfluous language). If every time someone looks into a bedroom window we can infer sexual 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

Ziegler is entitled to withdraw his guilty plea, as the State did not prove all the elements of the crime. Ziegler respectfully requests that this Court review the Court of Appeals decision.

Dated this 21th day of August, 2020.

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.

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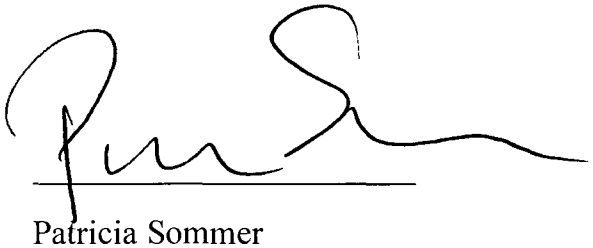
Dated: August 21, 2020



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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.

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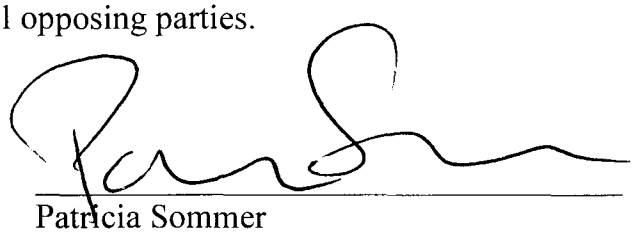

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FILED
04-17-2019
CIRCUIT COURT
DANE COUNTY, WI
2017CM001583

BY THE COURT:

DATE SIGNED: April 17, 2019

Electronically signed by Judge John D Hyland
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 14

STATE OF WISCONSIN,

Plaintiff,

v. Case Nos. 17CM1583
17CM1664

JEFFREY T. ZIEGLER,

Defendant.

DECISION AND ORDER DENYING DEFENDANT'S POSTCONVICTION MOTION FOR AN EVIDENTIARY HEARING

INTRODUCTION

Defendant Jeffrey T. Ziegler, by his attorney, moves for a postconviction evidentiary hearing. He alleges there was an insufficient factual basis to support his guilty pleas, and seeks withdrawal of those pleas on that basis. For the following reasons, **IT IS HEREBY ORDERED** that Mr. Ziegler's motion for a postconviction evidentiary hearing is **DENIED**.

FACTUAL BACKGROUND

On August 24, 2017, Mr. Ziegler was charged with one count of misdemeanor invasion of privacy and one count of disorderly conduct in Dane County Case No. 17CM1583. On September 7, 2017, Mr. Ziegler was subsequently charged with one count of misdemeanor invasion of privacy, two counts of attempted invasion of privacy, and one count of disorderly conduct in Dane County Case No. 17CM1664.

In January 2018, Mr. Ziegler moved to dismiss the one count of misdemeanor invasion of privacy in Case No. 17CM1583, and the one count of misdemeanor invasion of privacy and two counts of attempted invasion of privacy in Case No. 17CM1664.[1] At the February 2018 hearing on the motion, the Court indicated the first count of attempted invasion of privacy in Case No. 17CM1664 should likely be dismissed; in response, the State said it would amend that count to disorderly conduct. (Mot. Hr'g Tr. 5:13-6:13, 13:11-14, Feb. 27, 2018). With regard to the other challenged counts, the Court denied Mr. Ziegler's motion to dismiss. (Mot. Hr'g Tr. 3:25-4:7, 4:23-5:9, 13:11-15).

On May 17, 2018, Mr. Ziegler pleaded guilty to one count of misdemeanor invasion of privacy in Case No. 17CM1583, with the one count of disorderly conduct being dismissed but read-in at sentencing. Mr. Ziegler also pleaded guilty to one count of misdemeanor invasion of privacy and one count of disorderly conduct in Case No. 17CM1664, with the two counts of attempted invasion of privacy being dismissed but read-in at sentencing. On each count, the Court withheld sentence and placed Mr. Ziegler on probation for a period of two years, to be served concurrently to one another.

[1] While Mr. Ziegler's motion to dismiss did not explicitly seek dismissal of the one count of misdemeanor invasion of privacy in Case No. 17CM1664, his attorney clarified at the February 2018 hearing on the motion that Mr. Ziegler was also seeking dismissal of this count. (*See* Mot. Hr'g Tr. 3:10-24, Feb. 27, 2018).

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On December 10, 2018, Mr. Ziegler moved for a postconviction evidentiary hearing, asserting there was an insufficient factual basis to support his guilty pleas. He seeks withdrawal of those pleas on that basis.

STANDARD OF REVIEW

When a defendant moves to withdraw a plea after sentencing, "the defendant 'carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a manifest injustice.'" *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836 (quoting *State v. Washington*, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993)) (internal quotation marks omitted). "[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.* ¶ 17 (citing *White v. State*, 85 Wis. 2d 485, 488, 271 N.W.2d 97 (1978)).

When a defendant seeks to withdraw a plea on the basis of an alleged deficiency in the plea colloquy, the defendant "must first make a prima facie showing of a violation of [Wis. Stat.] § 971.08(1) or other mandatory procedure and allege that [the defendant] did not know or understand information that should have been provided at the colloquy." *State v. Lackershire*, 2007 WI 74, ¶ 47, 301 Wis. 2d 418, 734 N.W.2d 23 (citing *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986)). "If the defendant fulfills these requirements, the court must hold an evidentiary hearing at which the state has the opportunity to show by clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent." *Id.* (citing cases). Whether a plea colloquy conforms to the statutory requirements presents the Court with a question of law. *Id.* ¶ 25 (citing *State v. Brown*, 2006 WI 100, ¶ 21, 293 Wis. 2d 594, 716 N.W.2d 906).

DISCUSSION

"Wisconsin Stat. § 971.08(1)(b) provides that before a circuit court accepts a defendant's guilty plea, it must 'make such inquiry as satisfies it that the defendant in fact committed the crime charged.'" *Id.* ¶ 33. Under the statute, the circuit court must ensure that the defendant assents—personally or through counsel—to facts in the record which, if true, constitute the crime charged for which the defendant seeks to enter a plea. *See id.* ¶¶ 33, 48-50; *Thomas*, 232 Wis. 2d 714, ¶¶ 18-24.

Mr. Ziegler seeks to withdraw his guilty pleas in Case No. 17CM1583 and Case No. 17CM1664. He asserts that the Court failed to establish a factual basis for his guilty pleas and, as a result, is entitled to a postconviction evidentiary hearing. In addressing Mr. Ziegler's motion, this Court has reviewed the criminal complaints and the findings and basis for the Court's earlier decision denying the motion to dismiss. The basis for that decision, including the review conducted by the Court of the facts alleged in the criminal complaints, and the determinations made by the court in response to Mr. Ziegler's pretrial motions to dismiss the two cases, are not overturned by the decision here. Rather, the Court holds that the same bases for denial of the motions to dismiss inform the denial of the motions to withdraw pleas.

I. Case No. 17CM1583

In Case No. 17CM1583, Mr. Ziegler pleaded guilty to one count of misdemeanor invasion of privacy. He contends the Court failed to establish a factual basis for his guilty plea on this charge because, in his view, the factual allegations contained in the criminal complaint fail to constitute misdemeanor invasion of privacy. *See Lackershire*, 301 Wis. 2d 418, ¶ 48 ("Factual basis cases typically involve the question of whether undisputed facts actually constitute the crime charged."). More specifically, he contends the factual allegations contained in the criminal

complaint fail to establish he looked into a dwelling unit for the purpose of sexual arousal or gratification. *See* Wis JI-Criminal 1395.

According to the criminal complaint in Case No. 17CM1583, the victim observed an individual, later identified to be Mr. Ziegler, looking through the front window of her residence during the afternoon of August 19, 2017. (*See* Compl. 1-2, No. 17CM1583). During the early hours of the next day, the victim's fiancé observed the same individual looking into the windows of residences across the street. (Compl. 2, No. 17CM1583). When police officers arrived at the scene, they observed Mr. Ziegler trying to unlock his vehicle; the officers observed Mr. Ziegler was "sweating profusely," "breathing deeply," and that "the zipper on his pants was down." (Compl. 2, No. 17CM1583). In response to the officers informing Mr. Ziegler of the tentative charges against him, Mr. Ziegler characterized his actions as "peeping" and referred to the people inside the residences as "recipients," not as "victims." (Compl. 2, 17CM1583). These factual allegations, coupled with the reasonable inferences to which they give rise, establish that Mr. Ziegler looked into the victim's dwelling unit for the purpose of sexual arousal or gratification—as his intent may be inferred from his conduct. *See, e.g.*, *State v. Routon*, 2007 WI App 178, ¶ 21, 304 Wis. 480, 736 N.W.2d 178 (noting that a defendant's "intent to commit [a] crime may be inferred from the [defendant's] conduct").

II. Case No. 17CM1664

In Case No. 17CM1664, Mr. Ziegler pleaded guilty to one count of misdemeanor invasion of privacy and one count of disorderly conduct. He contends the Court failed to establish a factual basis for his guilty plea on the misdemeanor invasion of privacy charge because, in his view, the factual allegations contained in the criminal complaint fail to constitute this charge. *See Lackershire*, 301 Wis. 2d 418, ¶ 48. More specifically, he contends the factual

allegations contained in the criminal complaint fail to establish he looked into a dwelling unit for the purpose of sexual arousal or gratification. *See* Wis JI-Criminal 1395.

According to the criminal complaint in Case No. 17CM1664, the victim's neighbor observed an individual, later identified to be Mr. Ziegler, looking through one of the windows of the victim's residence during the evening of June 11, 2017, while the victim was in her bedroom studying. (*See* Compl. 3, No. 17CM1664). These factual allegations, coupled with the reasonable inferences to which they give rise based upon the nature of the room the victim was in when studying, establish that Mr. Ziegler looked into the victim's dwelling unit for the purpose of sexual arousal or gratification as, again, his intent may be inferred from his conduct. *See Routon*, 304 Wis. 480, ¶ 21.

Mr. Ziegler argues that permitting a factfinder to infer from a defendant's conduct of looking through the window of another person's residence, that the defendant's purpose for doing so was for sexual arousal or gratification, renders superfluous the portion of the statute defining misdemeanor invasion of privacy as requiring that the defendant had "looked into a dwelling unit for the purpose of sexual arousal or gratification." Wis. Stat. § 942.08(2)(d)1. He contends that "[i]f looking into someone's window is always an invasion of privacy, then Wis. Stat. § 942.08(2)(d) is a strict liability crime, and the legislature would not have included an element of intent."

Misdemeanor invasion of privacy is not a strict liability crime—it requires the defendant to look into another person's dwelling unit *for the purpose of sexual arousal or gratification. See* Wis JI-Criminal 1395. And contrary to Mr. Ziegler's argument, the Court 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. Although a factfinder *may* find a

defendant's conduct—such as looking through the window of another person's residence—evinces the defendant's criminal intent or purpose for engaging in the conduct, *see Routon*, 304 Wis. 480, ¶ 21, the factfinder may likewise find the defendant's conduct does *not* establish the defendant's criminal intent or purpose for engaging in the conduct. This does not render superfluous the challenged portion of the misdemeanor invasion of privacy statute. As here, the inference must be supported by the facts, and must flow reasonably from those facts. Here, the surrounding circumstances establish the reasonableness of the inference.

Finally, Mr. Ziegler argues that two counts of attempted invasion of privacy in Case No. 17CM1664 should be dismissed. Mr. Ziegler references counts 1 and 4 of the criminal complaint. Originally, Count 1 did charge attempted invasion of privacy. However, at the hearing on Mr. Ziegler's motion to dismiss, the State conceded that the facts did not support the charge. Instead of dismissing, however, the State amended the count to disorderly conduct. Confusion seems to have arisen from the language used by the prosecutor at the time. "Your Honor, as it relates to Count 1, the State would be looking to obviously amend that. After I looked at the reports again, one element is that the person be home and the person was not home as it relates to Count 1, so we would be looking to amend that count to disorderly conduct." Mot. Hr'g Tr. 5:24-6:5.

The prosecutor did not make it clear whether the amendment was being done at that time or was anticipated for a future date. According to the transcript, the Court's response recognized that Mr. Ziegler's motion as to Count 1 was rendered moot. However, the transcript does not identify whether the amendment actually was accomplished by the State on that date. There are other records which do clear up the confusion. The record, specifically the clerk's minutes, show that the Court believed the formal amendment of Count 1 had occurred as a result of the

prosecutor's statements. The minutes prepared for the plea hearing identify Count 1 as disorderly conduct, amended from the attempted invasion of privacy. A review of the transcript of the plea hearing shows that the amendment of Count 1 was not specifically mentioned by the State or by the Court. Instead, the prosecutor stated that counts 1 and 4 would be dismissed but read-in, and the court did just that, without specifically stating what those counts were. However, the court minutes reflect that Count 1 was a disorderly conduct.

The record does not demonstrate with certainty that Mr. Ziegler understood that Count 1, while dismissed but read-in, was a disorderly conduct charge and not attempted invasion of privacy. Certainly, dismissal either way was essential to the plea agreement, and the State had asserted at a prior hearing that it would proceed with a disorderly conduct charge as to that count. However, this Court believes that the 'read-in' action taken as to Count 1 should be reopened and removed so as to not prejudice Mr. Ziegler should his probation ever be revoked. The count shall stand as dismissed and the conduct upon which it was based may not be considered were Mr. Ziegler to be returned to court on a future date for sentencing after revocation.[2]

Finally, Mr. Ziegler contends that the factual allegations contained in the criminal complaint supporting Count 4 failed to establish that he looked into a dwelling unit for the purpose of sexual arousal or gratification. *See* Wis JI-Criminal 1395. He seeks to have that count reopened and dismissed. However, Mr. Ziegler did not plead guilty to Count 4—the count was dismissed but read-in. He agreed to this at the plea hearing, with the understanding of its import and effect. Therefore, the Court declines to address his argument that there was an insufficient factual basis to support this counts. *See Lackershire*, 301 Wis. 2d 418, ¶¶ 12-15, 30-32, 38-43

[2] This amendment to the judgment of conviction in Case No. 17CM1664 does not change the Court's sentencing decision—that is, to withhold sentence and place Mr. Ziegler on probation for a period of two years. As sentence was withheld, there was no punishment aspect which might be impacted by the straight dismissal of the previously dismissed but read-in count. Further, the length of probation upon the withheld sentence would not be any difference in this Court's view with or without the read-in charge.

(addressing the single criminal charge to which the defendant pleaded guilty when determining whether a sufficient factual basis existed for the defendant's guilty plea, while ignoring the criminal charges that were dismissed as part of the plea deal); *Thomas*, 232 Wis. 2d 714, ¶¶ 2, 6-10, 17-18, 25-27 (addressing the single criminal charge to which the defendant pleaded guilty when determining whether a sufficient factual basis existed for the defendant's guilty plea, while ignoring the criminal charge that was dismissed).

CONCLUSION

Mr. Zeigler has failed to demonstrate that there was an insufficient factual basis for his guilty pleas in these two cases. Therefore, **IT IS HEREBY ORDERED** that Mr. Ziegler's motion for a postconviction evidentiary hearing is **DENIED**. The Judgment of Conviction in 17CM1664 shall be amended to reflect that Count 1 is dismissed and not read-in. The judgments in both cases shall otherwise stand as originally entered.

This order is final for purposes of appeal.

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COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2020

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2019AP858-CR
2019AP859-CR

Cir. Ct. Nos. 2017CM1583
2017CM1664

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY T. ZIEGLER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Dane County: JOHN D. HYLAND, Judge. *Affirmed.*

¶1 NASHOLD, J.[1] Jeffrey Ziegler appeals judgments of conviction, based on his guilty pleas, for two counts of invasion of privacy. He also appeals

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

an order denying his motion to withdraw his guilty pleas. Ziegler argues that the circuit court erred in denying his motion to withdraw because there was no factual basis for the guilty pleas. Specifically, he asserts that the facts are insufficient to show that he looked into the victims' windows "for the purpose of sexual arousal or gratification," an element of invasion of privacy under WIS. STAT. § 942.08(2)(d). The judgments and order are affirmed.

BACKGROUND

¶2 Pertinent to this appeal, Ziegler was convicted on negotiated guilty pleas of two counts of invasion of privacy.[2] The facts constituting the basis for the pleas derive from the criminal complaints filed in each of the two cases below.[3] The relevant facts, taken from the criminal complaints, are as follows.

¶3 In Dane County Case No. 2017CM1664, a police officer made contact with a man who reported that, on the evening of June 11, 2017, he saw a man, later identified as Ziegler, "spying" on his neighbor, C.P. The officer interviewed C.P., who stated that the neighbor had informed her that he saw a man staring into her window while C.P. was in her bedroom studying. She stated that she lives on the lower level of an apartment building and that her bedroom has two windows, one of which is easily accessible from the back parking lot.

¶4 In Dane County Case No. 2017CM1583, an officer was dispatched to a residence to investigate a report of a man looking into a window on

[2] In Dane County Case No. 2017CM1664, Ziegler also pled guilty to, and was convicted of, disorderly conduct. That conviction is not at issue in this appeal.

[3] The two cases were consolidated on appeal.

August 19, 2017. The officer interviewed M.S.V., who stated that, prior to calling police, she had observed a man, later identified as Ziegler, looking through her front window.

¶5 Shortly after midnight on August 20, the officer was informed that Ziegler had returned to the area and was looking into windows of a residence across the street from M.S.V. When officers arrived at the scene and arrested Ziegler, Ziegler was "sweating profusely, was breathing deeply, and the zipper on his pants was down." In reference to the charges being brought against him, Ziegler stated that "it's called peeping ... that's what the judge called it." Ziegler also explained to the officers that the people whose windows he was looking into "aren't victims they are recipients."

¶6 Ziegler initially moved to dismiss the counts related to invasion of privacy, arguing that the facts alleged in the complaints were insufficient to establish that, when he looked into the women's windows, he did so with the purpose of sexual arousal or gratification as required under WIS. STAT. § 942.08(2)(d). Following a hearing, the circuit court denied his motion. Ziegler subsequently entered guilty pleas and, relevant to this appeal, was convicted of two counts of invasion of privacy in violation of § 942.08(2)(d).[4]

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[4] An additional count of disorderly conduct and a count of attempted invasion of privacy were dismissed and read in. For reasons that are not germane to this appeal, in the circuit court's order denying Ziegler's motion to withdraw his guilty pleas, the court stated that it was amending the judgment of conviction to reflect that an additional dismissed and read-in disorderly conduct count in Case No. 2017CM1664 would be dismissed but not read in. The court further concluded that this change did not affect the sentence.

To the extent that Ziegler suggests that he is also challenging the factual basis for the dismissed but read-in attempted invasion of privacy charge, he presents no authority or argument to support the proposition that a dismissed but read-in charge may be challenged in a motion for plea withdrawal. In denying Ziegler's postconviction motion, the circuit court concluded that it (continued)

¶7 Following sentencing, Ziegler filed a postconviction motion to withdraw his guilty pleas, arguing that there was no factual basis to support the conclusion that he looked into the victims' windows for the purpose of sexual arousal or gratification. The circuit court denied the motion without a hearing, concluding that the facts, coupled with the reasonable inferences to which they gave rise, established a factual basis for Ziegler's guilty pleas. This appeal follows.

DISCUSSION

¶8 In order to withdraw a guilty plea after sentencing, a defendant "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (quoting ***State v. Washington***, 176 Wis. 2d 205, 213, 500 N.W.2d 331 (Ct. App. 1993) (internal quotation marks omitted)). The manifest injustice test requires a defendant to show "'a serious flaw in the fundamental integrity of the plea.'" ***Id.*** (quoting ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995)). "[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.***, ¶17 (citing ***White v. State***, 85 Wis. 2d 485, 488, 271 N.W.2d 97 (1978)). When a plea is the product of a negotiated plea agreement, the circuit

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would not address Ziegler's argument that there was an insufficient factual basis for a dismissed but read-in charge because Ziegler did not plead to that charge and the charge was in fact dismissed. Ziegler does not specifically address the court's conclusion on that point. Therefore, to the extent that Ziegler's briefs can be read as also challenging the dismissed but read-in charge, I decline to consider such arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court need not address inadequately developed arguments).

court is not required to go to "'the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea.'" ***State v. Sutton***, 2006 WI App 118, ¶16, 294 Wis. 2d 330, 718 N.W.2d 146 (quoting ***Broadie v. State***, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975)).

¶9 Whether a factual basis exists for Ziegler's pleas is a question of law that is reviewed de novo. *See* ***State v. Peralta***, 2011 WI App 81, ¶16, 334 Wis. 2d 159, 800 N.W.2d 512 ("[W]hen the factual basis for the plea derives solely from a document in the record, we do not give deference to the findings made by the trial court, and instead review the issue *de novo*.").[5]

¶10 Ziegler argues that the circuit court erred in denying his motion to withdraw his guilty pleas because there was no factual basis for a finding of the sexual arousal or gratification element of WIS. STAT. § 942.08(2)(d). In support of

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[5] In ***State v. Peralta***, 2011 WI App 81, 334 Wis. 2d 159, 800 N.W.2d 512, this court rejected the State's argument that a circuit court's ruling regarding the factual basis for a plea may be overturned only if it is clearly erroneous. ***Id.***, ¶16. Instead, the ***Peralta*** court concluded:

> [T]he underlying question as to whether a factual basis for the plea exists is subject to different standards of review depending on how the factual basis is presented to the trial court. When the State presents testimony to support the factual basis, this court applies the clearly erroneous test. However, when the factual basis for the plea derives solely from a document in the record, we do not give deference to the findings made by the trial court, and instead review the issue *de novo*.

Id. (citations omitted). However, in ***State v. Tourville***, 2016 WI 17, 367 Wis. 2d 285, 876 N.W.2d 735, a case decided after ***Peralta***, our supreme court applied the clearly erroneous standard in reviewing the factual basis for a plea, without making the distinction articulated in ***Peralta***. *See* ***Tourville***, 367 Wis. 2d 285, ¶18. In at least one case decided after ***Tourville***, however, this court has continued to use the de novo standard of review set forth in ***Peralta***. *See* ***State v. Stewart***, 2018 WI App 41, ¶15, 383 Wis. 2d 546, 916 N.W.2d 188. I need not address whether ***Peralta*** and ***Stewart*** are consistent with ***Tourville*** because the parties do not address this issue and, although I apply the de novo standard, I would also affirm the circuit court under a clearly erroneous standard of review.

his argument, Ziegler claims that neither complaint alleged any fact demonstrating that his actions were for the purpose of sexual arousal or gratification. Ziegler also argues that the circuit court's conclusion renders the sexual arousal or gratification element of § 942.08(2)(d) superfluous.

¶11 The circuit court found that the factual allegations in both criminal complaints, coupled with the reasonable inferences to which they gave rise, established that Ziegler looked into the victims' windows for the purpose of sexual arousal or gratification. *See* ***State v. Routon***, 2007 WI App 178, ¶21, 304 Wis. 2d 480, 736 N.W.2d 530 (noting that a defendant's "intent to commit [a] crime may be inferred from the [defendant's] conduct"); *see also* ***State v. Payette***, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423 (in upholding the factual basis for a guilty plea, "[i]t is not necessary that guilt be the only inference that can be drawn from the facts in the complaint, nor that the inference of guilt is established beyond a reasonable doubt").

¶12 Specifically, in Case No. 2017CM1583, the complaint alleged that, upon his arrest for recently looking into M.S.V.'s and other residents' windows, Ziegler was sweating profusely, breathing deeply, and the zipper on his pants was down. In his interactions with police, Ziegler characterized his actions as "peeping" and stated that the people inside the residences "aren't victims they are recipients." The court inferred, based on these facts, that Ziegler looked into the victim's window for the purpose of sexual arousal or gratification. Similarly, in Case No. 2017CM1664, the complaint alleged that Ziegler was looking through a woman's windows during the evening while she was in her bedroom studying. The court found that, based on these facts, including the nature of the room the victim was in, Ziegler looked into the victim's window for the purpose of sexual arousal or gratification.

¶13 The court's colloquy with Ziegler and his counsel at the plea hearing further supports a factual basis for the pleas. The court asked Ziegler if he had reviewed the elements for the charges of invasion of privacy, to which Ziegler answered affirmatively. The court asked defense counsel: "Are you satisfied there's an adequate factual basis within each complaint to support the elements of the offenses?" Defense counsel responded that he was. The court further stated that, based on its review of the criminal complaints, the court was also satisfied that there was a factual basis for the pleas.

¶14 The record shows that Ziegler was well aware that one of the elements for invasion of privacy is that the conduct was for the purpose of sexual arousal or gratification and that he agreed there was a factual basis for that element. Ziegler was present at the hearing on his motion to dismiss the invasion of privacy counts, where his attorney argued that "there is nothing here establishing a sexual gratification or arousal element." The court rejected that argument, after which Ziegler pled guilty to the two charges of invasion of privacy.

¶15 Accordingly, the circuit court did not err in finding that there was a factual basis to support that Ziegler looked into the victims' windows for the purpose of sexual arousal or gratification.

¶16 Ziegler also argues in his opening brief that the circuit court's decision renders the sexual gratification element of WIS. STAT. § 942.08(2)(d) superfluous. Specifically, Ziegler argues that the sexual gratification element of the statute would become unnecessary if a court makes an inference of sexual gratification every time someone looks into another person's window. The State, in its brief, responds that the court did not infer sexual gratification based solely

on the fact that Ziegler looked through the victims' windows. Because Ziegler does not respond to the State's argument in his reply brief, he has conceded this argument. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.").[6]

CONCLUSION

¶17 For the reasons stated, the judgments and order are affirmed.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[6] Even considering the merits of Ziegler's argument, Ziegler's argument fails. Ziegler has not shown that the circuit court established a factual basis for the sexual arousal or gratification element based solely on the fact that Ziegler looked through the victims' windows. In its decision denying Ziegler's postconviction motion, the court referenced additional facts, and the reasonable inferences therefrom, that supported the conclusion that Ziegler looked into the windows for the purpose of sexual arousal or gratification.

Certification of 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 WIS. STAT. s. 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 WIS. STAT. s. 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.

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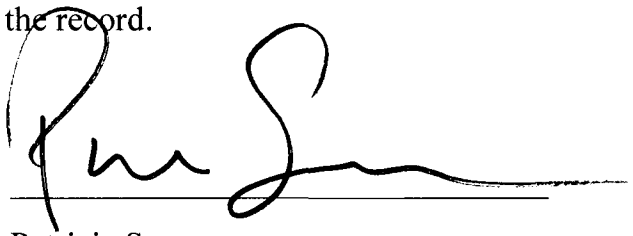

Patricia Sommer