STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP902-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

VICTORIA L. CONLEY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, HONORABLE NICHOLAS J. MCNAMARA, CIRCUIT COURT JUDGE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

David R. Karpe
Wisconsin State Bar No. 1005501
448 West Washington Avenue
Madison, Wisconsin 53703
Tel. (608) 255-2773

ATTORNEY FOR DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

Question Presented

Does it constitute manifest injustice not to permit the

appellant to withdraw her no contest plea to disorderly conduct where she lacked understanding of the elements of that offense?

The circuit court found that because the charge as written in the complaint was read to the appellant by trial counsel, the plea was knowing and intelligent.

The Court of Appeals should hold that merely reading the charge in the complaint does not always inform a defendant sufficiently of the elements of an offense.

Statement on Oral Argument And Publication

Ms. Conley would not oppose the Court's holding an oral argument, but because this is an appeal of a misdemeanor conviction, the decision is likely to be an unpublished one-judge decision under Wis. Stat. §752.31(2)(f). *See* Wis. Stat. § Rule 809.23(1)(b)4.

Relevant Statutory Provision

Wisconsin Stat. § 971.08 states, in relevant portion,

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 ...

Statement of the Case

The Defendant-Appellant, Victoria Conley, appeals a criminal conviction for a misdemeanor. On June 12, 2017, she entered a no contest plea to the charge of disorderly conduct, in violation of Wis. Stat. § 947.01. She signed a plea questionnaire, which included the averment, "I understand that the crime to which I am pleading has 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 my attorney or are as follows:" R11:2. The rest of that section was blank.

Ms. Conley averred by affidavit that neither her attorney or the judge explained to her at the time of her plea what "otherwise disorderly" conduct meant or what the State would have been required to prove at trial to conclude that the conduct was disorderly. R24. The Court's advisement as to the elements was, "the charge at Count 3 alleges on or about October 17, 2016, in the City of Madison, Dane County, Wisconsin, you engaged in disorderly conduct under circumstances in which such conduct tended to cause a disturbance." R33:3. The court did not define "disorderly conduct," or explain "otherwise disorderly."

The court imposed a fine of one hundred dollars, plus court costs and assessments of $479, for a total of $579. R33, R15.

On April 9, 2019, Ms. Conley filed a motion for postconviction relief requesting to withdraw her no contest

plea, averring that neither the plea colloquy nor the representations of counsel to the court were sufficient so that the court could meets its obligation under Wis. Stat. §971.08 to "determine that the plea is made voluntarily with understanding of the nature of the charge and ... make such inquiry as satisfies it that the defendant in fact committed the crime charged." R22:2-3. Ms. Conley complained that the elements of the offense of disorderly conduct per the jury instruction were never read or recited to her, and she did not know that the state would have to prove that her conduct had a tendency to disrupt good order and to provoke a disturbance, citing Wisconsin Jury Instructions – Criminal 1900 at 1 and n. 3, and *State v. Givens*, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965).

The circuit court held an evidentiary hearing on her motion for postconviction relief on July 10, 2018, at which hearing trial counsel testified that she did not review the jury instruction on disorderly conduct with Ms. Conley. R34:11. Trial counsel said she read the charge in the

complaint to the defendant. R34:10. The attorney agreed that the complaint was "speculative" as to the factual basis the State was relying on to support the charge of disorderly conduct. R34:12. Trial counsel also agreed that in the factual portion of the complaint multiple acts were alleged, any one of which might have formed the factual basis for the charge of disorderly conduct, but it was not clear from the complaint which act the State was relying on for this charge. R34:12. Trial counsel testified that she did not bring a motion to dismiss the charge for duplicity or vagueness, and she did not research the issue. R34:13.

The circuit court entered a written decision and order denying the motion for postconviction relief on April 23, 2019. R29. In that decision, the judge found "that the [plea] colloquy was adequate and shows that Ms. Conley entered her plea knowingly, voluntarily and intelligently; there is no manifest injustice that supports the relief she seeks." R29:2. The court went on to find,

There is no difference, practical or substantive,

> between reading a statute, a method expressly approved of in [*State v.*] *Bangert*, [131 Wis.2d 246, 274, 389 N.W.2d 12 (1986)] and reading the complaint, the method used in this case. Because the plea colloquy demonstrates that Ms. Conley understood the nature and consequences of her plea, Ms. Conley is not entitled to withdraw the plea. Ms. Conley argues that the colloquy was defective because Court did not define "disorderly conduct" or explain "otherwise disorderly conduct," and because the jury instruction was not read to her. The Court never used the phrase "otherwise disorderly conduct" in its colloquy with Ms. Conley, so it is unclear why that would have to be defined for the defendant. Moreover, the standard for determining whether the defendant understood the elements of the offense is not as stringent as Ms. Conley contends. A trial court is not required to "thoroughly ... explain or define every element of the offense to the defendant." *State v. Trochinski,* 2002 WI 56, ¶20, 253 Wis.2d 38, 644 N.W.2d 891.

R29:3.

Ms. Conley filed a notice of appeal on May 10, 2019, which was timely. *See* Wis. Stat. § Rule 809.30(2)(j).

Argument

The Appellant Should Be Permitted to Withdraw Her No Contest Plea Because the State Did Not Meets its Burden to Show That She Did Understood What Conduct She Was Admitting or What Defenses She Was Waiving

A defendant seeking to withdraw a no contest plea after sentencing has the burden to show by clear and convincing evidence that failing to allow her to do so would constitute a manifest injustice. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis.2d 714, 605 N.W.2d 839. A defendant meets this burden if she can establish that her plea was not knowingly, voluntarily and intelligently entered. *State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis.2d 38, 644 N.W.2d 891.

Wisconsin Stat. § 971.08 specifies that before a court may accept a no contest plea, the court shall, *inter alia,* "determine that the plea is made voluntarily with understanding of the nature of the charge and ... make such inquiry as satisfies it that the defendant in fact committed the crime charged."

When a guilty plea is not knowing, intelligent and voluntary, a defendant is entitled to withdraw her plea as a matter of right, because such a plea violates fundamental due process. *See State v. Brown*, 2006 WI 100, ¶19, 293 Wis.2d 594, 716 N.W.2d 906.

Whether a defendant has established that there are deficiencies in a plea colloquy showing violations of Wis. Stat. § 971.08 or other mandatary duties of the court is a question of law that the Court of Appeals reviews *de novo*. *See Brown*, 2006 WI 100 at ¶20.

Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. *Brown*, 2006 WI 100 at ¶19. The reviewing court accepts the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but determines independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *Id.*

Under *State v. Bangert*, 131 Wis.2d 246, 274, 389 N.W.2d 12 (1986), if a defendant files a plea withdrawal

motion that identifies a failure by the circuit court to comply with Wis. Stat. § 971.08 or a court-mandated plea hearing procedure, and alleges that the defendant did not understand the information at issue, then the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. *Bangert,* 131 Wis.2d at 274-275 The two *Bangert* prongs constitute a *prima facie* showing that the plea was unknowingly entered. *See State v. Plank*, 2005 WI App 109, ¶ 6, 282 Wis.2d 522, 699 N.W.2d 235. If a defendant's motion makes this *prima facie Bangert* showing, the circuit court must hold an evidentiary hearing at which the burden shifts to the State to prove by clear and convincing evidence that the plea was knowingly entered. *Brown,* 2006 WI 100 at ¶¶ 36, 40, *Bangert*, 131 Wis.2d at 274-275. To meet its burden, the State may use the existing record and may "examine the defendant or defendant's counsel to shed light on the defendant's understanding or knowledge." *Bangert,* 131 Wis.2d at 275 If the State fails to meet this burden, plea

withdrawal is required.

Plea withdrawal is required under the *Bangert* standard, because even though a court need not "thoroughly ... explain or define every element of the offense to the defendant, *State v. Trochinksi,* 2002 WI 56, ¶20, 253 Wis.2d 38, 644 N.W.2d 891, a court is nonetheless obliged to explain enough about the charge so the defendant knows what she is pleading no contest to and what she is admitting, and what she did to be guilty of the crime charged. A defendant has to understand what her potential defenses would be to the charge if she went to trial. In this case, Ms. Conley did not have that understanding. The plea questionnaire in this case did not indicate that Ms. Conley knew she had a defense to the charge of disorderly conduct and that she was waiving those defenses, although defense counsel represented to the court that she understood those defenses. *Cf. Trochinski,* 2002 WI 56 at ¶10.

Defendants are entitled to post-sentencing plea withdrawal if they can show by clear and convincing

evidence that their plea was not knowingly or voluntarily entered. *See State v. Reppin* 35 Wis.2d 377, 384-386, 151 N.W.2d 9 (1997). Regardless whether courts comply with mandated plea hearing requirements, defendants are entitled to plea withdrawal if they can prove that their plea was unknowingly or involuntarily entered. Here, neither the plea colloquy nor the representations of counsel to the court were sufficient so that the court could meet its obligations. Ms. Conley averred that the elements per the jury instruction were never read or recited to her, and she did not know that the State would have to prove that her conduct had a tendency to disrupt good order and to provoke a disturbance. *See* Wisconsin Jury Instructions – Criminal 1900 at 1 and n. 3, citing *State v. Givens*, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965). The complaint contains language that the conduct happened "under circumstances in which such conduct tended to cause a disturbance," but it was not explained to her that her conduct had a tendency to disrupt good order and to provoke a disturbance, and she

had no knowledge of her specific conduct that the charge targeted.

The State would have had to prove that her conduct had a tendency both to disrupt good order and to provoke a disturbance. In *Givens,* the appellants argued that the disorderly conduct statute was unconstitutionally vague, a claim the Wisconsin Supreme Court rejected, finding that the conduct of the appellants in conducting a sit-in protest in an office was within the purview of the statute. *Givens*, 28 Wis.2d at 119. In the case at bar, there were several acts alleged in the complaint, including two counts of battery to a victim, CDW, but the complaint does not specify what act is a disorderly conduct.

When a statute, after the specific enumerations, in a catchall clause proscribes "otherwise disorderly conduct" which tends to "provoke a disturbance," "this must mean conduct of a type not previously enumerated but similar thereto in having a tendency to disrupt good order and to provoke a disturbance." *Givens*, 28 Wis.2d at 120. The

judge did not read the words, "otherwise disorderly conduct" to Ms. Conley, and her lawyer said she read the charge but did not go into a further discussion as to what "otherwise disorderly conduct" meant.

A defendant makes a *prima facie* showing of a violation of Wis. Stat. §971.08(1) or other court-mandated duties when she points to passages or gaps in the plea hearing transcript and when she alleges that she did not know or understand the information that should have been provided at the plea hearing. *See Bangert*, 131 Wis.2d at 274. The mandatory duty placed on a trial court to ascertain a defendant's understanding of the nature of charges. *Id.* at 267. *See* Wis. Stat. §971.08(1)(a). In addition, the Wisconsin Supreme Court established a mandatory obligation on the trial court to first inform the defendant of the charge's nature or, instead, to ascertain that the defendant in fact possesses such information. *Bangert*, 131 Wis.2d at 274.

A defendant's understanding of the nature of the

charge is to be measured at the time that the plea is entered. *State v. Cecchini,* 124 Wis.2d 200, 210, 368 N.W.2d 830 (1985). The inquiry should address whether the defendant received real notice of the nature of the charge. *Henderson v. Morgan*, 426 U.S. 637, 644 (1976). S*ee also Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629 (1972).

Ms. Conley did not receive proper notice of the charge, because the charge was duplicitous. Duplicity is the joining in a single count of two or more separate offenses. *See State v. Lomagro,* 113 Wis.2d 582, 586, 335 N.W.2d 583 (1983). Although counts one and two, which counts were dismissed, specified where those particular acts allegedly occurred ("parking lot" and "inside"), count three contains no such specifier, so there is no way Ms. Conley could have known what conduct she was admitting was disorderly conduct and why it met the definition of disorderly conduct. Was she admitting that she had been disorderly in the parking lot or inside the restaurant (or both)? Count three was unconstitutionally vague, failing to

give Ms. Conley notice of what she was accused of doing that constituted the disorderly conduct. While trial counsel told the circuit court judge at the plea hearing that she was satisfied that Ms. Conley understood the possible defenses R33:5-6, it appears that in reality Ms. Conley did not understand that she was pleading to a charge that was duplicitous, so counsel's representation about Ms. Conley's knowledge of her defenses is not definitive. While duplicity can be waived, the State did not prove that such waiver was made knowing, voluntarily and intelligently. A plea is not knowing and voluntarily if it is entered as a result of deficient advice. *State v. Kelty*, 2006 WI 101, ¶43, 294 Wis.2d 62, 716 N.W.2d 886.

"The determination of whether a group of acts represents a single, continuing scheme or a set of separate and distinct offenses is a difficult one that must be left at least initially to the discretion of the prosecution. This discretion, however, is not without limits." *Lomagro,* 113 Wis.2d at 588. The complaint "must be measured in terms

of whether it exposes the defendant to any of the inherent dangers of a duplicitous" charging document which "include the possibility that the defendant may not be properly notified of the charges against him [sic], that he [sic] may be subjected to double jeopardy, that he [sic] may be prejudiced by evidentiary rulings during the trial, and that he [sic] may be convicted by a less than unanimous verdict. If any of these dangers are present, the acts of the defendant should be separated into different counts even though they may represent a single, continuing scheme." *Id.*

Because trial counsel did not object to the duplicity of the disorderly conduct charge, trial counsel provided ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel the defendant must demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This was prejudicial to Ms. Conley, as this count should have been dismissed.

The prejudice element is highlighted by trial counsel's testimony during cross-examination at the evidentiary hearing: "My memory of the events in my conversations with Ms. Conley is that she agreed that she engaged in a mutual fight and that that was what she was prepared to stipulate to as far as forming the factual basis for disorderly conduct." R34:14.

Ms. Conley believed that she had a defense to the battery charges because the fighting was mutual, that is, consensual, but she was led to believe that she lacked a defense to the disorderly conduct charge. However, if the disorderly conduct was unconstitutionally vague by failing to give her notice, she should have succeeded on a motion to dismiss that count. Ms. Conley knew how to maintain a defense against the battery charges, because she was informed by the complaint as to what conduct was being proscribed and against whom. The disorderly conduct charge is just all over the place, so how could she even know if she had a defense to it?

While a jury instruction need not be read to a defendant in all cases, in this particular case, it was crucial to do so, because it would made it clear to Ms. Conley that she had a defense to the charge in that she did not believe her conduct the state would have to prove that her conduct had a tendency to disrupt good order and to provoke a disturbance. Wisconsin Jury Instructions – Criminal 1900 at 1. The circuit court found that reading the statute and/or the complaint is a good enough advisement, which is might be depending on the charge. *Bangert* says "the trial court may summarize the elements of the crime charged by reading from the appropriate jury instructions ... or from the applicable statute." *Bangert*, 131 Wis.2d at 268. That does not mean that one or the other is always good enough to inform a person as to what the accusation is and whether they have a defense to the charge. Further, "A statement from defense counsel that he has reviewed the elements of the charge, without some summary of the elements or detailed description of the conversation, cannot constitute an

affirmative showing that the nature of the crime has been communicated." *Id.* at 268. Not all the elements that need to be proven are contained in a statute or in a charging document. That is the case with many disorderly conduct charges, including the one at bar. It is also true, for example, of prosecutions under Wis. Stat. § 946.47, the harboring a felon statute, where the State has to prove, *inter alia*, that the person doing the harboring knew the harbored person was a felon. *See* Wisconsin JI – Crim. 1790 ("The third element requires that the defendant knew that ((name of person aided)) had engaged in conduct which constitutes _____. [This requires that the defendant knew that (name person aided): (repeat facts necessary to constitute the felony.]"). Just reading a charge that tracks the statute would not suffice, because the statute, Wis. Stat. § 946.47, just reads,

> Harboring or aiding felons. (1) Whoever does either of the following may be penalized as provided in sub. (2m): (a) With intent to prevent the apprehension of a felon, harbors or aids him or her; or (b) With intent to

> prevent the apprehension, prosecution or conviction of a felon, destroys, alters, hides, or disguises physical evidence or places false evidence.

The "manifest injustice" test is also met if the defendant was denied the effective assistance of counsel. *State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50 (1996). Here, the manifest injustice test is met in two ways: by the failure to advise the defendant as to the meaning of disorderly conduct and by the failure to raise the issue of the duplicity of this charge of disorderly conduct.

A plea is not knowing if the defendant did not understand something essential to the "knowledge" requirement. *See State v. Howell,* 2006 WI App 182, ¶20 n. 8, 296 Wis.2d 380, 722 N.W.2d 567 (understanding as a distinct concept from mere knowledge).

The State did not meet its burden of establishing that the plea was knowing and voluntary, therefore Ms. Conley is entitled to withdraw her no contest plea.

Conclusion

For the reasons stated above, the Court should reverse the order denying Ms. Conley's motion to withdraw her no contest plea.

Respectfully submitted this 11th day of February, 2020.

_____
David R. Karpe
Wisconsin State Bar #1005501
448 West Washington Avenue
Madison, Wisconsin 53703
Tel. (608) 255-2773

ATTORNEY FOR DEFENDANT-APPELLANT

SECTION 809.19 (2) CERTIFICATE

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 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; and (3) 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 first names and last initials 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.

Signed,

_____

David R. Karpe

SECTION 809.19(8) CERTIFICATE

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,075 words.

Signed,

_____
David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief 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.

Signed,

_____
David R. Karpe