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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2019AP000902-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

VICTORIA L CONLEY,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 5, THE HONORABLE NICHOLAS J MCNAMARA, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

As respondent, the State exercises its option not to present a full statement of the case. *See* Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

On June 12, 2017, appellant-defendant Victoria Conley entered a no contest plea to the charge of disorderly conduct pursuant to Wis. Stat. § 947.01. The appellant's plea to disorderly conduct, which was Count 3 in the criminal complaint, resulted in the State's dismissal in to Counts 1 and 2. During the plea hearing, at which time she was also sentenced to pay a $200 fine, the appellant was asked by the trial court judge whether he could use the

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2017-18 edition.

facts in the criminal complaint to accept her plea to the disorderly conduct charge. According to the transcript from the plea hearing, both her attorney and the appellant stated yes:

> THE COURT: May I use the facts as alleged in the complaint as a factual basis for accepting the plea to Count 3?
>
> MS. LENCIONI: Yes, to the disorderly conduct, yes.
>
> THE COURT: Right.
>
> And do you agree I can use those facts to accept your plea today, Ms. Conley?
>
> MS. CONLEY: Yes.
>
> THE COURT: Thank you.
>
> I find the defendant understands these proceedings and she understands her constitutional rights. I find she's entered her plea and has waived her constitutional rights knowingly, intelligently, and voluntarily.
>
> I find from the record a factual basis exists for this plea, that the defendant has, in fact, committed the crime to which she has pled. accept the plea, and I'll find the defendant guilty of Count 3, disorderly

conduct. On motion from the State, Counts 1 and 2 are now dismissed.

According to the criminal complaint, police were dispatched reports on October 17, 2016, at approximately 7:52 p.m., in reference to an accident in a residential parking lot that included an active disturbance. On route to the reported incident, officers were given additional information that the two vehicles crashed into each other at the nearby Pedro's Restaurant at 3555 E Washington Ave, Madison, WI 53704. Officers were also notified that a female had entered the restaurant after being attacked outside of it, and then was attacked again inside of the restaurant.

In the criminal complaint, a young woman named Chralestina Washington reported being in a relationship with a man named Henry M. Stevenson III who was married to the appellant. As Mr. Stevenson was giving her a ride to her residence at 3009 Darbo Drive in Madison, Wisconsin, he pulled into the building's parking lot. That is when the appellant drove her car into the parking lot, with cars eventually situated side by side. According to surveillance footage from the Darbo Drive property parking lot, the Appellant's car pulled into the lot at 7:39 PM. According

to Ms. Washington, Mr. Stevenson attempted to turn around and exit the driveway but the Appellant got behind the vehicle and started to rear end it. The Appellant rear ended the vehicle into a grassy area. Mr. Stevenson responded by driving away from the area and until they reached Pedro's, which is a restaurant located at 3555 E Washington Ave, Madison, WI 53704. Throughout the drive from the parking lot of her residence to Pedro's, the complaint states that Appellant repeatedly read ended Mr. Stevenson's car.

Upon arrival at the restaurant, which is only about four minute drive and 1.3 miles away from the Darbo Drive address, both Mr. Stevenson and the Appellant parked their vehicles. Immediately thereafter, Ms. Washington reported seeing the Appellant attack Mr. Stevenson with closed fists.

According to the criminal complaint, the Appellant then directed her attention towards Ms. Washington and yelled "Want to fight me, are you scared?" The Appellant maneuvered around Mr. Stevenson and into the driver's side door. She began to attack Ms. Washington who was still seated in the front passenger seat. According to Ms. Washington, the Appellant "started punching me and pulling

my hair, pulled my pony tail out." Ms. Washington reported that the Appellant used a closed fist and hit her in her face while trying to pull her into the back seat of the car. Eventually, the Appellant successfully pulled Ms. Washington into the back seat where she continued to attack Ms. Washington. Ms. Washington reported trying to push the appellant away from her and is able to exit the vehicle. As she is stepping out of the car, the Appellant continues to grab at her leg.

Ms. Washington reported throwing up outside the car and then went into the Pedro's bathroom and threw up again as she attempted to get away from the appellant.

Ms. Washington then sat in the dining area for about five minutes, when the appellant and several other young women entered. According to the complaint, Ms. Washington asked these women whether they were going to jump her. The other women then pushed Ms. Washington into a corner near a dining room table and under a booth. Ms. Washington recalled being attacked again with at least one woman hitting her on the top of the head and another woman holding her down with a hand on her chest.

According to the criminal complaint, Mr. Stevenson closely corroborated Ms. Washington's account of this

incident. He confirmed that the appellant rear-ended his vehicle when he was in the parking lot of the Darbo Drive building. He then drove away, with the appellant in close pursuit and repeatedly read-ending his car, until he reached Pedro's. Mr. Stevenson saw the appellant enter his car through the driver seat and engage in a fight with Ms. Washington. He confirmed that Ms. Washington did not appear to want to fight as she was sitting inside his vehicle with the doors locked. Mr. Stevenson stated that he did not himself want to get into any trouble, so he left the scene and did not witness any further altercations Ms. Washington and the defendant that evening.

Based on the surveillance camera footage showing the Appellant's car entering the Darbo Drive property parking lot at 7:39 p.m. and police being dispatched at 7:52 p.m. and receiving updates about the Appellant's continued attack while on route to the incident, the entire series of conduct occurred over an approximately fifteen to twenty minute period of time.

ARGUMENT

I. The Trial Court Properly Advised the Appellant to What She was Pleading Guilty. Therefore the Appellant Fails to Make a Prima Facie Showing That Her Plea Was Not Knowing, Intelligent, and Voluntary. She Should Not Be Permitted to Withdraw Her No Contest Plea.

To withdraw a plea after sentencing, a defendant must establish via clear and convincing evidence that disallowing withdrawal would constitute a manifest injustice. *State v. Thomas,* 2000 WI 13, ¶ 16, 232 Wis.2d 714, 605 N.W.2d 836. To do so, defendants must "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)). Under Wis. State. § 971.08 and *State v. Bangert*, the trial court has a duty only to "inform the defendant of the charge's nature or, instead, to ascertain that the defendant in fact possesses such information." 131 Wis.2d at 269, 389 N.W.2d 12 (1986).

The Appellant appears to argue that she should be permitted to withdraw her no contact plea entered in this matter because the trial court failed to ensure that her plea was knowing, voluntary, and intelligent. Because the plea was not knowing, voluntary, and intelligent, the appellant states that this plea violated fundamental due

process. The defendant argues therefore that withdrawing her plea is a matter of right. *State v. Brown*, 2006 WI 100 ¶19, 293 Wis.2d 594, 716 N.w.2d 906.

The State agrees that under *Bangert*, defendants are permitted to withdraw their guilty or no contest pleas if they identify a failure by the trial court to comply with Wis. State. § 971.08 and then allege that the defendant did not understand the information at issue. If the defendant establishes that the plea colloquy was deficient and the trial court failed to meet its responsibility, and subsequently makes a prima facie argument that her plea was not knowing, intelligent, or voluntary, then the burden shifts to the State. The State must then prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary. *Bangert*, 121 Wis.2d at 274-275.

a. **The Trail Court's Colloquy Was Not Deficient Under Wis. State. § 971.08 and Controlling Case Law.**

According to the Wisconsin Supreme Court, the trial court must ensure a defendant confirms "knowledge of the elements of the offense" while "knowledge of the nuances and descriptions of the elements" is not required. *State*

v. Trochinski, 2002 WI 56, ¶29, 253 Wis.2d 38, 644 N.W.2d 891. Trial courts are not required to "thoroughly… explain or define every element of the offense to the defendant." *Id.* at ¶ 20.

The Appellant argues that the colloquy was defective because the trial court did not define the term "disorderly conduct" or explain what "otherwise disorderly conduct" meant. The Appellant further claims she did not understand that the State would need to prove her conduct had a tendency to disrupt good order and to provoke a disturbance. Additionally, the Appellant contends that the plea colloquy was defective because the trial court did not read the jury instructions to her.

Here, the Appellant has manufactured a standard that does not exist in law. The precedent in *Bangert* and *Trochinski* appears to directly contradict the Appellant's position. In *Trochinski*, the defendant pled no contest to one count of exposing minors to harmful materials in violation of Wis. State. § 948.11(2). *Trochinski* at ¶¶ 1-2. Like in the immediate case, defendant Trochinski then filed a request for postconviction relief arguing that he did not understand an element of the defense, specifically the term "harmful to children." *Id.* Again like the

immediate case, *Trochinski* pointed to the lack of confirmation in the written plea questionnaire or the plea colloquy that he specifically understood the elements of the offense to which he was pleading. *Id*.

In *Trochinski*, The Court held that the defendant knew and understood elements of offense even though the meaning of "harmful to children" was not explained to him at the plea hearing. *Trochinski* at ¶¶ 3, 20-24. The Court found that the defendant, who was convicted in the circuit court of exposing minors to harmful materials, failed to establish a prima facie case that his plea was not knowing, intelligent, and voluntary. *Id*. This was for several reasons that mirror the immediate case. As the Court noted, Trochnski "indicated that he was giving up his right to present any defense to the charge, and that he was satisfied with the legal advice and assistance he received from his attorney." *Id*. at ¶ 47. In addition to filling out the plea questionnaire, Trochinski engaged in a colloquy from the trial court where he confirmed that he "understood all of the matters on the form, including the elements of the offense, that the information communicated by the form was truthful, and that he understood the various rights he was waiving." *Id*. at ¶¶ 48-49.

In *State v. Brown*, this state's Supreme Court identified three possible methods for a trial court to ensure that the defendant understands the essential elements of the charged crime:

- "'[S]ummarize the elements of the crime charged by reading from the appropriate jury instructions…or from the applicable statute,'" 2006 WI 100, ¶ 46, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted);
- "'[A]sk defendant's counsel whether [counsel] explained the nature of the charge to the defendant and request [counsel] to summarize the extent of the explanation, including a reiteration of the elements,'" *Id.*, ¶ 47 (citation omitted); or
- "'[E]xpressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the [plea] hearing'"—such as a signed statement of the defendant or a reading of the complaint, accompanied by asking if the defendant understands the charge based on such document. *Id.*, ¶ 48 (citation omitted).

However, these methods are not "exhaustive" of the possible methods a court may employ to ensure that a defendant has sufficient understanding of the elements of an offense to enter a knowing and intelligent guilty plea. *See Bangert*, 131 Wis. 2d at 268.

The Wisconsin Supreme Court has held that a formalistic application of the *Bangert* requirements is not required. This state's highest judicial body stated the following in *State v. Cross*, 2010 WI 70, ¶ 32, 326 Wis. 2d 492, 786 N.W.2d 64:

> "[R]equiring an evidentiary hearing for every small deviation from the circuit court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights. The *Bangert* requirements exist as a framework to ensure that a defendant knowingly, voluntarily, and intelligently enters his plea. We do not embrace a formalistic application of the *Bangert* requirements that would result in the abjuring of a defendant's representations in open court for insubstantial defects."

In the immediate case, the State met the standard set in *Trochinksi*. The Appellant has therefore failed to

demonstrate how the circuit court's plea colloquy was insufficient.

The Appellant additionally insists in her brief that the trial court failed to explain that the State was required to prove her conduct disrupted good order. We are unclear as to where the language the Appellant cites originates. Jury Instruction 1900 does not state that the State must prove that a person charged with disorderly conduct disrupted good order. To the best of our knowledge, there is no case law suggesting those specific words are necessary for a knowing, voluntary, and intelligent plea to disorderly conduct.

b. **The State Never Claimed the Appellant's Conduct "Provoked" a Disturbance. Thus, the Trial Court's Non-Use of the That Term is Irrelevant.**

The Appellant claims that the trial court erred because it did not explain that the State claimed her conduct had a tendency to disrupt good order and *provoke* a disturbance. Appellant claims she had no knowledge of her specific conduct that the charge targeted. The Appellant appears to be confused about the language of the disorderly conduct statute and what the State is required to prove.

The State is not required to prove that the defendant caused *and* provoked a disturbance. Rather, the State is required to prove that the defendant either caused *or* provoked a disturbance.

In the immediate case, the complaint states that the conduct happened "under circumstances in which such conduct tended to cause a disturbance." Therefore, the Appellant was on notice as to what the State alleged. At no relevant time did the State suggest it claimed that the Appellant also or instead *provoked* a disturbance. The Appellant's insistence to the contrary is confounding.

II. Appellant's Trial Counsel Was Not Deficient. Therefore the Appellant Should Not Be Permitted to Withdraw Her No Contest Plea.

According to the criminal complaint, the Appellant was alleged to have engaged in a continuous act of disorderly conduct from when she first read-ended Mr. Stevenson's vehicle in the Darbo Drive property parking lot to when she and several other women beat Ms. Washington inside the Pedro's restaurant. The Appellant pled guilty, but now claims that her assistances from counsel was insufficient. In support of her positon, the Appellant argues that her

trial counsel read the charges to her but failed to go into further discussion as to what "otherwise disorderly conduct" meant and failed to properly advised her of potential defense to the allegation of disorderly conduct (Count 3.)

a. **Even if the Appellant's Trial Counsel Did Not Explain the Meaning of the Phrase "Otherwise Disorderly Conduct," This Does Not Rise to an Error Constituting Ineffective Assistance of Counsel.**

In the criminal complaint, the State wrote that the Appellant "while in a public place, did engage in violent, abusive, indecent, profane, boisterous, unreasonably loud and/or otherwise disorderly conduct, under circumstances in which such conduct tended to cause a disturbance, contrary to sec. 947.01(1), 939.51(3)(b) Wis. Stats."

In *State v. Givens*, the Court found that the words "otherwise disorderly conduct" means conduct not specifically listed in the statute but similar to the six other types of conduct enumerated in the statute: "violent, abusive, indecent, profane, boisterous, [or] unreasonably loud that disrupts good order and provokes a disturbance." 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965)(holding that § 947.01(1)'s inclusion of a catchall phrase of "otherwise disorderly conduct" did not deem the statute

unconstitutionally vague). All of this conduct is similar as types of acts have a "tendency to disrupt good order" and cause or provoke a disturbance. *Id.*

The Appellant has failed to explain why a failure of trial counsel to explain what "otherwise disorderly conduct" meant (if it happened at all, an important point because trial counsel never conceded or admitted this point) – is germane to her situation and would constitute a fatal error. The State never argued that the Appellant's actions were anything other than conduct that was "violent, abusive, indecent, profane, boisterous, [or] unreasonably loud." In fact, a reasonable person would conclude that a person repeatedly driving a car into another car, then following that car while repeatedly crashing into it, and then engaging in multiple fights in a single location over a short period of time with the passenger of that car would constitute violent, abusive, and indecent behavior. There is simply no other reasonable interpretation of the Appellant's behavior as alleged.

There was no reason for trial counsel to explain what "otherwise disorderly conduct" meant. These words are not relevant to the nature of the charges. This language was not used by the trial judge, nor was it implied to be the

operative language in the criminal complaint. The Appellant failed to assert any meaningful reason as to why the words "otherwise disorderly conduct" should have been explained by counsel.

There is no legal standard or precedent requiring an explicit explanation of every aspect of a statute by trial counsel, particularly when certain aspects of a law are inapplicable. Doing so would risk additional confusion and make it more difficult for trial counsel to be effective in their representation. Rather, a plea is valid (and therefore there is no fatal issue with trial counsel's legal representation) if the defendant knew and understood the elements of the offense. *Trochinski*, 2002 WI 56 at ¶¶ 29, 2-3. The trial counsel confirmed at the evidentiary hearing that she reviewed the plea questionnaire, the complaint, and all of the relevant elements of the charge to the Appellant.

b. **There Is No Issue of Duplicity. Therefore, the Appellant's Trial Counsel Did Not Fail to Notify Her of Potential Defenses.**

Because her trial counsel did not communicate to her that the State's allegation of disorderly conduct was unconstitutionally duplicitous, the Appellant argues that

she was not notified of at least one potential defense. The Appellant argues that this failure to be advised of a proper defense inherently makes her plea not knowing, intelligent, and voluntary. Thus the appellant pled guilty in reliance of "deficient advice."

The Appellant's argument rests on a false premise. The State charged two counts of battery separately because one allegedly took place in the parking lot and another took place inside the restaurant. The battery in the parking lot involved only the Appellant striking Ms. Washington while both were inside of a car, while the incident in the restaurant involved the Appellant and several accomplices attack Ms. Washington after she fled for safety. In contrast, the State's position regarding Count 3 is that the Appellant's conduct throughout her interactions with Ms. Washington constituted a continuous series of acts that were disorderly. The Appellant's entire argument rests on the incorrect assertion that her collective behavior towards Ms. Washington on October 17, 2016 could not be the basis for a single charge of disorderly conduct.

Duplicity is the joining in a single count of two or more separate offenses. The Wisconsin Supreme Court deemed

the practice of duplicity prohibited in order "(1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity." *State v. Lomagro*, 113 Wis. 2d 582, 586–87, 335 N.W.2d 583, 587 (1983).

The Appellant cites the *Lomagro* case, in which the Court found that the State's charges were not duplicitous. That case involved five different acts of sexual assault to which the defendant was party to a crime: three different periods of forced penis-vagina intercourse with gaps of nonsexual activity in between, followed by two separate periods of forced fellatio by the defendant. *Lomagro*, 113 Wis. 2d at 586. These acts of sexual assault took place over two hours. The defendant was charged with one count of first-degree sexual assault, party to a crime. *Id.* In *Lomagro*, which appears to be the primary case upon which the Appellant relies in support of her claim of duplicity, the Wisconsin Supreme Court held that the defendant's five acts of sexual assault over a two hour period of time was "one continuing criminal episode and properly chargeable as

one offense." *Id.* The Court even rejected the defendant's claim that since "penis-vagina intercourse and fellatio are separate and distinct crimes which could be separately charged since penis-vagina intercourse and fellatio separate and distinct crimes which could be separately." *Id.* at 597. Instead, the Court found these different forms of sexual assault that took place over many hours were "conceptually similar" and properly charged as one offense. *Id.* at 598.

In the immediate case, the Appellant's disorderly conduct began a short time after 7:39 p.m. when she pulled up behind the car driven by Mr. Stevenson and in which Ms. Washington was a passenger in the Darbo Drive property parking lot. According to the criminal complaint, the series of conduct began when the Appellant crashed her car into Mr. Stevenson's car in the parking lot. She then followed Mr. Stevenson and Ms. Washington as they drove away, crashing into them several times until they reached Pedro's, a restaurant located about one and a half miles away. By 7:52 p.m., police were dispatched for a report of a crash at the Darbo Drive address. As the officers from the Madison Police Department drove to the Darbo Drive parking lot, they learned from dispatch that the incident

had continued to Pedro's, both outside and inside the restaurant. At the restaurant, Ms. Washington reported being attacked by the Appellant first in the car outside of the restaurant. After Ms. Washington fled into the restaurant, she was again attacked by the Appellant who was now joined by several other women. By the time police arrived, the Appellant and the other women had left the restaurant. The entire incident took place within twenty minutes.

As in *Lomagro*, in which the series of sexual assaults lasted two hours, the conduct in the immediate case was "one continuous, unlawful event and chargeable as one count." *Lomagro*, 113 Wis. 2d at 594. There is no conceptual distinction between quickly successive acts of disorderly conduct from the Appellant when, over a twenty minute period of time, she 1). crashed her car into another occupied and operating vehicle 2). then followed and continued to crash that car as it fled; 3). upon arrival at the new location, she attacked a passenger in the car she had targeted for the previous several minute; 4). and then finally followed that passenger into the restaurant and attacked her again. See *Id.*, citing *State v. Giwosky*, 109 Wis. 2d 446, 458, 326 N.W.2d 232 (1982) (holding that

"there is no more of a conceptual distinction between being injured by a thrown log, a punch or a kick, than being sexually assaulted by penetration into different orifices. In this case unanimity was achieved, since the jury agreed that a sexual assault was committed.")

If the Wisconsin Supreme Court found no issue with duplicity in *State v. Lomagro*, with its five distinct acts of sexual assault over a two hour period of time, then there is no duplicity issue with the State charging one count of disorderly conduct based on the Appellant's conduct targeted at Ms. Washington over a continuous twenty minute period of time. She repeatedly crashed her car into the car in which Ms. Washington was the passenger, then after both cars parked, she repeatedly attacked Ms. Washington with her hands and feet. The Appellant has failed to provide even one single case contradicting *Lomagro*'s holding. In fact the Appellant appears to primarily rely on *Lomagro* as the controlling case law. We agree.

CONCLUSION

Plea withdrawal is appropriate only to correct a manifest injustice when the plea was involuntary, or was entered without knowledge of the charge. A valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements.

There is no manifest injustice in this case, as the Appellant fails to show that the trial court failed to meet its responsibilities or that her trial counsel was ineffective.

The Appellant plea was knowing, voluntary, and intelligent, as her arguments to the contrary are unpersuasive. The trial court was under no obligation to define the term "disorderly conduct" or explain what "otherwise disorderly conduct" meant. The Appellant asserts a standard that directly contradicts the Court's holding in *Trochinski*. Furthermore, the trial court had no duty to explain that the Appellant's conduct had a tendency to disrupt good order and to provoke a disturbance. Additionally, the Appellant fails to provide any precedent finding that a trial court is required to read the jury instructions to a defendant.

The Appellant fails to demonstrate how her trial counsel was deficient. Counsel's failure to raise the issue of duplicity of the disorderly conduct charge does not constitute ineffective assistance because duplicity is not an issue here. According to the cases cited by the Appellant, the State is permitted to charge a continuous series of disorderly acts involving the same parties in a relatively compact location in a short period of time under a single charge of disorderly conduct. Moreover, trial counsel was under no obligation to explain the term "otherwise disorderly conduct" because it was not germane to the charge.

The Court should deny the Appellant's motion in full.

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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 18 pages.

Dated: July 14, 2020

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 14th day of July, 2020.

_____
Awais M. Khaleel
Assistant District Attorney
Dane County, Wisconsin