STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP2321-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN N. REIHER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN WAUPACA COUNTY, THE HONORABLE VICKI L. CLUSSMAN, PRESIDING

BIREF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Jonathan N. Reiher pled no contest to two counts of second-degree recklessly endangering safety. After sentencing, Reiher sought to withdraw his pleas, arguing that the record did not establish a factual basis. After a hearing, the trial court denied his motion. It was convinced after reviewing the plea colloquy, the complaint, and the testimony at the preliminary hearing that a sufficient factual basis exists for the plea.

Does the record establish that a sufficient factual basis exists for Reiher's two no-contest pleas of second-degree recklessly endangering safety?

The trial court held, Yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the issue presented involves the application of well-established principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

The complaint

The State initially charged Reiher with three counts of first-degree recklessly endangering safety. (R. 5.) According to the complaint, in June of 2016, ARR, who was Reiher's ex-girlfriend and mother of their children, filed an eviction action against Reiher from the residence. (R. 5:9, 11.)

A hearing was held on June 9, 2016. (R. 5:9, 11.) The court ordered Reiher to vacate the residence by June 19, 2016. (*Id.*) The court also ordered that ARR could not go onto the premises until *after* June 19, 2016, as Reiher objected to her presence. (*Id.*)

On June 12, 2016, the police were called to the residence regarding a vandalism complaint that a neighbor made. (R. 5:11.) When police arrived, police observed that a window had been "smashed out" of a door. (*Id.*) Police found no one inside, but they did observe that the kitchen cabinets and appliances had been damaged. (*Id.*) A bathroom sustained severe damage, as did a washer and dryer. (*Id.*) Doorways were damaged, and several holes were punched in the drywall throughout the residence. (*Id.*) With respect to the basement, police observed "the outer metal shell of the furnace to be severely dented in. There were also pieces of PVC pipe, white in color, torn off of the furnace (vent piping for furnace)." (R. 5:12.) Reiher "never made a complaint" about the damages to the house. (*Id.*)

On July 22, 2016, witness reported that a large explosion had occurred at the house. (R. 5:12.) When the police, the fire department, and EMS arrived, two male victims—ADG and DRR—were severely burned. (*Id.*) "The skin on their arms was hanging off and [Deputy Kraeger] could see their faces were also severely burned." (*Id.*)

Deputy Kraeger questioned two witnesses, SJA and BLB. (*Id.*) They stated that the house had been trashed inside, and that they had been working on cleaning it up and renovating. (*Id.*) On that day, they decided to cook some brats, and ADG and DRR turned the gas on to the residence. (*Id.*) The gas was propane, and there was a large 500 gallon tank on the west side of the residence. (*Id.*) When they began to smell gas, they immediately shut the gas off, and ADG and DRR told them not to light anything. (*Id.*) ADG and DRR then went downstairs. (*Id.*) A short time later, the large explosion occurred. (*Id.*)

Deputy Kraeger talked to DRR inside the ambulance prior to his transport, who told Kraeger that they turned the gas on to cook brats. (R. 5:12.) When they smelled the gas, they immediately shut it off. (*Id.*) They then went to the

basement "to try to figure out where the source of where the gas was coming from and while they were in the basement, the explosion happened." (*Id.*) DRR provided that "there had been damage done to the furnace and that was the source location for the gas leak." (*Id.*)

ARR told police that all persons present on the day of the explosion had permission to be there. They had been renovating the property for the last few weeks, "due to a large amount of damage that, according to ARR, had been caused by . . . Reiher." (R. 5:12.) Reiher had damaged the front door and the screen door, and ARR believed that "a sawzall was used to damage the kitchen cabinet doors and the appliances. She also advised the mirror was ripped off the wall and the toilet was ripped out of the floor." (R. 5:12.) ARR informed Deputy Kraeger that Reiher told ARR "the electricity and gas were shut off when he had moved out." (R. 5:13.)

Special Agent Kevin Heimerl, of the State Fire Marshal's Office/Arson Bureau, believed that the furnace had been damaged by something other than the blast. According to Heimerl, "[t]here was a fan that was damaged, and appeared to have been damaged by some other means of force, such has a hammer or other tool. Looking closer at the furnace, there was also a gas regulator next to that fan. There were some dents in that." (R. 5:13.) Also, "[l]ooking to the side of the regulator, it was discovered that is where the propane gas came in and the pipe was actually was broken completely off of the pipe from the regulator. The pipe coming into the regulator had been struck with so much force that it had spun back into the insulation behind the regulator."[1] (*Id.*)

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[1] Additional damages to her home included: the sink and mirror were torn from the wall; the washing machine door was pulled off and wrecked; the oven handle was broken; the dishwasher door was kicked in; the doors "were either cut with a knife, punched through or possibly it looked like an axe was used on them, along with cupboard doors, sink and tub had tool marks on them causing damage." (R. 5:13.)

Reiher never outright admitted to ARR that he did the damage. (R. 5:13.) But what ARR "gathered from Reiher was that she would be punished for evicting him out of the house." (*Id.*)

The preliminary hearing

At the September 7, 2016 preliminary hearing, Detective Cameron Durrant testified about the damage to the house. With respect to damage to the basement, he testified: "Deputy Santiago stated that there were pipes broken off of the furnace, which would be the venting pipes, and that there was some damage to the face of the furnace, some dents in the furnace itself." (R. 86:10.) He further testified that Special Agent Heimerl determined that the explosion occurred as a result of damage to "the LP or the gas pipe [that] comes into the furnace and connects to the regulator." (R. 86:11–12.) Durrant testified, "[i]t had been damaged by somebody other than the explosion. It appeared to have been done by either a tool of some kind, possible hammer, or crow bar, something in that aspect." (R. 86:12.) He testified that if the LP gas was turned on, then "[i]t would have free flow out into the air, it was not stopped." (*Id.*) Durrant then testified about the explosion and the severe burns to the victims that required treatment at a burn center:

> Q. And did they use the propane while they were there?
>
> A. They had filled it just prior to that, and they were going to cook some brats or something that day.
>
> Q. What happened when they attempted to cook the brats?
>
> A. They turned the gas on, they immediately -- or recent to when they got in there, they could smell gas. And they turned the gas off out at the LP tank, and went down in the basement to see where the possible leak was coming from.

> Q. And at that time was there an explosion?
>
> A. Yes.
>
> Q. Were at least the two individuals in the basement severely injured?
>
> A. Yes.[2]
>
> Q. And do you recall where they were taken for treatment?
>
> A. Initially one went to ThedaCare Waupaca, the other one went to ThedaCare Neenah. And in turn, both were flighted down to St. Mary's Burn Center in Milwaukee.
>
> Q. And in fact, were they both hospitalized until about the last week?
>
> A. Correct.

(R. 86:12–13.)

Durrant then testified that on August 25, 2016, he believed that Reiher admitted to causing the damage. (R. 86:13–14.) Also, that Reiher "knew that there was a gas leak there, he actually shut the gas off." (R. 86:14.)

The plea questionnaire and plea colloquy

Reiher pled guilty on April 10, 2018 to two counts of second-degree recklessly endangering safety.[3] (R. 24.) Importantly, the plea questionnaire provided that Reiher understood that "if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court." (R. 24:2.)

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[2] There were also five children present during the explosion who were on the first floor of the house. (R. 86:14.)

[3] This was pursuant to charges in the amended information. (R. 23.)

And, attached to the plea was the jury instruction showing what the State would have to prove to satisfy the crime of second-degree recklessly endangering safety. (R. 24:5–6.)

During the plea colloquy, Reiher pled no contest to the two counts of recklessly endangering the safety of ADG and DRR. (R. 90:3.) He stated that he went over the plea questionnaire with his attorney, including "the elements of each of those offenses." (R. 90:4, 6.) The court also asked Reiher's attorney if he believed that Reiher "understands the nature of the charges against him, the elements of the offenses, and the possible penalties he's facing." (R. 90:7.) His attorney replied that he did. (*Id.*)

The sentencing hearing

At the sentencing hearing, Reiher said that he "took every step possible after the damage had occurred to make sure that nothing would happen. I shut off everything I could." (R. 91:40.) He continued, "I didn't realize what I guess could occur during it, but shortly after, I realized I could smell gas in the house and I took the steps to make sure that it didn't blow up right then and there." (R. 91:40–41.) Reiher claimed that he "absolutely took steps to make sure that would not happen." (R. 91:41.) He then stated, "I deserve something," and that the court "should punish me, there's no doubt about that." (*Id.*) He claimed that he was not a violent person, but then admitted, "I know that may be hard to believe." (*Id.*) Reiher also admitted, "I am the snowball that started the avalanche, and I understand that," and that "I understand that what happened was terrible and I'm actually the person that's culpable." (R. 91:41, 42.)

Reiher also stated that he "do[es] not minimize the fact that I damaged the house. I understand that." (R. 91:43.) But, he said, he did not intend to "cause a gas leak or do anything other than I guess just release frustration, because I spent my

whole life – essentially my whole adult life remodeling that house." (*Id.*)

In imposing its sentencing, the court informed Reiher that he has not "been convicted of an intentional act, and I don't believe that you committed an act where you intended to cause harm to individuals, but you are convicted of recklessly causing harm to individuals." (R. 91:45.) It noted that because of Reiher's damage to the house which was caused by his anger, that damage "then led to this explosion." (R. 91:46.) The court told Reiher that his "reckless actions caused serious harm to the victims." (R. 91:51.)

The court imposed a sentence of four years of initial confinement followed by four years of extended supervision for each count, consecutive. (R. 91:51–52.)

The postconviction proceedings

Reiher moved for postconviction relief. (R. 70.) He argued that the trial court did not determine or establish that a factual basis exists for the pleas, and that the pleas were therefore not entered knowingly, voluntarily, and intelligently. (R. 70:1.) Therefore, "it would constitute a manifest injustice not to allow the defendant to withdraw his pleas." (R. 70:4.) He requested a hearing on his motion (R. 70:7), which the court granted.

At the hearing, the State argued that the complaint and testimony from the preliminary hearing shows a factual basis for the pleas: "It was determined that the gas connection to the furnace had been damaged by something other than an explosion, and most likely a tool, there were tool marks on that damage." (R. 92:8.) "According to the preliminary hearing, the defendant told A.R.R. from the county jail that there was a gas leak and he had shut off the gas. Well, at that time, the explosion had already occurred." (*Id.*) The State also argued that whether Reiher shut off the gas or not, a reasonable person would believe that at some point, the gas

would be turned back on. (R. 92:9.) And, "that's exactly what happened." (*Id*.) Finally, the State argued that it was foreseeable "that a gas leak like that into a home would cause great bodily harm." (R. 92:10.)

The court denied Reiher's motion. (R. 92:14.) It noted that it had reviewed the complaint and the testimony at the preliminary hearing, and that they provided sufficient facts. (*Id*.) It also noted that in the plea questionnaire, the court provided the jury instruction for second-degree recklessly endangering safety. (*Id*.) And, that during the plea colloquy, the court asked Reiher if he went over each of the elements of the offense with his attorney, and Reiher indicated that he had. (R. 92:15.) After hearing all of Reiher's answers to the court's questions, it "was certainly convinced that he understood the nature of the offenses against him [and] the elements of the offenses." (*Id*.)

The postconviction court was convinced that after reviewing the complaint, the testimony at the preliminary hearing, and the motions addressed throughout the case, "that there were factual bases that were presented to the Court that would satisfy the elements of the offenses." (R. 92:15–16.) The evidence, according to the court, showed that it was foreseeable that great bodily harm would occur from Reiher's actions:

> I recall testimony regarding the extreme amount of damage that was caused to the residence. And I agree that even if the gas was turned off, that it was reasonable to believe that it would be at some point turned back on. And that it was foreseeable that this event would take place. And that that event could cause great bodily harm, which in fact it did cause in this particular case. There was great bodily harm caused to the victims. And I, again, believe that the elements had been met.

(R. 92:16.)

The court determined there was no manifest injustice. (R. 92:14.) This appeal follows.

STANDARD OF REVIEW

The withdrawal of a plea under the manifest injustice standard rests with the circuit court's discretion; this Court will only reverse if the circuit court has failed to properly exercise its discretion. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

In assessing whether there was a sufficient factual basis for a plea, this Court examines the totality of the circumstances in the circuit court. *State v. Thomas,* 2000 WI 13, ¶ 23, 232 Wis. 2d 714, 605 N.W.2d 836.

ARGUMENT

The record establishes that a factual basis exists for Reiher's pleas.

Reiher submits that the facts of record do not establish a factual basis for his pleas to two counts of second-degree recklessly endangering safety. (Reiher's Br. 10.) According to Reiher, his conduct did "not create a substantial and unreasonable risk of death or great bodily harm to another human being." (Reiher's Br. 17.) Reiher is incorrect.

A. After sentencing, a defendant bears a high burden of showing that there was not a sufficient factual basis for his plea.

Prior to accepting a guilty plea, the circuit court must determine that a sufficient factual basis exists for the plea, that is, that "a crime has been committed and it is probable that the defendant committed it." *State v. Payette*, 2008 WI App 106, ¶ 7, 313 Wis. 2d 39, 756 N.W.2d 423. A sufficient factual basis exists "if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference

elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." *State v. Black*, 2001 WI 31, ¶ 16, 242 Wis. 2d 126, 624 N.W.2d 363; *see also Thomas*, 232 Wis. 2d 714, ¶ 18 ("a court may look at the totality of the circumstances when reviewing a defendant's motion to withdraw a guilty plea to determine whether a defendant has agreed to the factual basis underlying the guilty plea."). "The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well the defense counsel's statements concerning the factual basis presented by the state, among other portions of the record." *Thomas*, 232 Wis. 2d 714, ¶ 18. "All that is required is for the factual basis to be developed on the record--several sources can supply the facts." *Id.* ¶ 20.

"The failure to establish a sufficient factual basis for a guilty plea is one type of manifest injustice that justifies plea withdrawal." *State v. Scott*, 2017 WI App 40, ¶ 30, 376 Wis. 2d 430, 899 N.W.2d 728. "The defendant bears the burden of showing that there was an insufficient factual basis for the plea by clear and convincing proof." *Id.*

B. Several sources supply the factual basis for Reiher's pleas.

Reiher argues that the circuit court failed to find at the plea hearing that a factual basis exists for his pleas, and therefore, he is entitled to relief. (Reiher's Br. 15–16.) The State disagrees. In this case, the totality of the circumstances—*(Thomas*, 232 Wis. 2d 714, ¶ 18)—which in this case includes the complaint, testimony at the preliminary hearing, the plea questionnaire, the plea colloquy, and Reiher's statements at sentencing—establish that a factual basis exists for Reiher's pleas of second-degree recklessly endangering safety.

The complaint provided that ARR told police that the victims had been renovating the property due to damage to

the property that Reiher caused. (R. 5:12.) ARR also told police that what she "gathered from Reiher was that she would be punished for evicting him out of the house." (R. 5:13.) DRR told police that "there had been damage done to the furnace and that was the source location for the gas leak." (R. 5:12.)

At the preliminary hearing, Durrant testified another officer determined the explosion occurred as a result of damage to "the LP or the gas pipe [that] comes into the furnace and connects to the regulator." (R. 86:11–12.) And, that "[i]t had been damaged by somebody other than the explosion. It appeared to have been done by either a tool of some kind, possible hammer, or crow bar, something in that aspect." (R. 86:12.) Durrant also testified that Reiher "knew that there was a gas leak there, he actually shut the gas off." (R. 86:14.)

The plea questionnaire provided that "if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court." (R. 24:2.)

During the plea colloquy, the court asked Reiher's attorney if he believed that Reiher "understands the nature of the charges against him, the elements of the offenses, and he possible penalties he's facing." (R. 90:7.) His attorney replied that he did. (*Id.*) In *Thomas*, the court held "that a defendant does not need to admit to the factual basis in his or her own words; the defense counsel's statements suffice." 232 Wis. 2d 714, ¶ 18.

Finally, Reiher admitted at the sentencing hearing that "I am the snowball that started the avalanche, and I understand that," and that "I understand that what happened was terrible and I'm actually the person that's culpable." (R. 91:41, 42.)

The postconviction court (which was also the trial court) was convinced that after reviewing the complaint, the testimony at the preliminary hearing, and the motions addressed throughout the case, "that there were factual bases that were presented to the Court that would satisfy the elements of the offenses." (R. 92:15–16.) The evidence, according to the court, showed that it was foreseeable that great bodily harm would occur from Reiher's actions. (R. 92:16.) This is not clearly erroneous. The totality of the circumstances establishes a factual basis for Reiher's pleas.

But Reiher argues that his "conduct is inconsistent with the concept of recklessly endangering safety." (Reiher's Br. 11.) Reiher notes that second-degree recklessly endangering safety has two elements: (1) the defendant endangered the safety of another human being; and (2) the defendant endangered the safety of another by criminally reckless conduct.[4] (Wis. JI–Criminal 1347 (2015); R. 24:5–6.) "Criminally reckless conduct" is defined as conduct that creates a risk of death or great bodily harm to another person; the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm. (*Id.*) "Great bodily harm" is defined as serious bodily injury; injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment

[4] Under Wis. Stat. § 939.24(1), "criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." Under Wis. Stat. § 939.24(2), "if criminal recklessness is an element of a crime in chs. 939 to 951, the recklessness is indicated by the term "reckless" or "recklessly".

of the function of any bodily member or organ, or other serious bodily injury. (*Id*.)

Reiher argues that "[b]y shutting off the gas and eliminating any active risk caused by a gas leak, his conduct was not criminally reckless." (Reiher's Br. 11.) And, therefore, his conduct did "not create a substantial and unreasonable risk of death or great bodily harm to another human being." (Reiher's Br. 17.) Reiher's argument continues that the postconviction court "erroneously applied the law" because it found that Reiher's conduct "could" cause great bodily harm, as opposed finding that his conduct "create[d] a risk that is substantial and unreasonable." (Reiher's Br. 18 (citing R. 92:16).)

But that is not an accurate description of the court's finding. The court found that even if the gas was turned off, "that it was reasonable to believe that it would be at some point turned back on." (R. 92:16.) The court found that it was foreseeable upon the gas being turned on "that that event could cause great bodily harm, which in fact it did cause in this particular case. There was great bodily harm caused to the victims." (*Id*.) Further, Reiher admitted at the sentencing hearing that "I am the snowball that started the avalanche, and I understand that," and that "I understand that what happened was terrible and I'm actually the person that's culpable." (R. 91:41, 42.) This is certainly an admission by Rieher that not only "was [he] aware that [his] conduct created the unreasonable and substantial risk of death or great bodily harm," Wis. JI–Criminal 1347 (2015), but that he should be held accountable for it.

But Reiher posits the following two questions to this Court: (1) "Did Mr. Reiher really create a substantial and unreasonable risk of death or great bodily harm when he damaged the furnace and caused a gas leak, but then turned off the gas (stopping the flow of gas)"; and (2) "Was it foreseeable that the propane tank would be refilled and that

the gas would be turned back on before the furnace and piping was repaired?" (Reiher's Br. 19.) The answers to these questions, are Yes.

As the sentencing court acknowledged, Reiher's damage to the house, which was caused by his anger, "then led to this explosion." (R. 91:46.) And that these "reckless actions caused serious harm to the victims." (R. 91:51.) As the State argued at the postconviction hearing, whether Reiher shut off the gas or not, a reasonable person would believe that at some point, the gas would be turned back on. (R. 92:9.) And, that it was foreseeable "that a gas leak like that into a home would cause great bodily harm." (R. 92:10.) Finally, as the postconviction court determined, "even if the gas was turned off, . . . it was reasonable to believe that it would be at some point turned back on. And that it was foreseeable that this event would take place." (R. 92:16.)

Reiher next argues that "there was *an intervening factor* which changed the nature and character of the situation that had been created by Mr. Reiher." (Reiher's Br. 21 (emphasis added).) And, the intervening factor—namely, the victims turning on the gas—was "not reasonably predictable or foreseeable." (Reiher's Br. 21.) But as argued above (1) Reiher admitted at sentencing that he was "the snowball that started the avalanche," and (2) as the State argued at the postconviction hearing and the court agreed, a reasonable person would believe that at some point, the gas would be turned back on and an event like this would occur. (R. 91:41; 92:9–10, 16.) Finally, a no contest plea "waives all nonjurisdictional defects, including constitutional claims." *State v. Multaler*, 2002 WI 35, ¶ 54, 252 Wis. 2d 54, 643 N.W.2d 437. By pleading no-contest and by admitting his conduct at the sentencing hearing, this argument is waived.

In this case, the complaint, testimony at the preliminary hearing, the plea questionnaire, the colloquy, and Reiher's statements at the sentencing hearing show that a

factual basis exists for Reiher's pleas. Under the totality of the circumstances and contrary to Reiher's argument (Reiher's Br. 20–21), his conduct *did* create an unreasonable and substantial risk of death or great bodily harm. *See Thomas*, 232 Wis. 2d 714, ¶¶ 18, 23; Wis. JI–Criminal 1347 (2015). Therefore, the circuit court's refusal to allow Reiher to withdraw his plea did not result in a manifest injustice.

CONCLUSION

This Court should affirm Reiher's judgment of conviction and order denying his motion for postconviction relief.

Dated this 10th day of April 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,254 words.

Dated this 10th day of April 2020.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 10th day of April 2020.

_____
SARA LYNN SHAEFFER
Assistant Attorney General