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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2024AP000519-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ZACHARY CHRISTOPHER GOTH,

Defendant-Appellant.

Appeal from a Judgment of Conviction and
an Order Denying Postconviction Relief,
Entered in the Rock County Circuit Court,
the Honorable Barbara W. McCrory, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Mr. Goth was initially charged with one count of sexual assault of a child under 16 years of age. Pursuant to a plea agreement, he entered a plea to an amended charge of third-degree sexual assault. The amended information initially alleged that Mr. Goth had sexual intercourse with the victim, without consent, contrary to § 940.225(3)(a). After some back and forth during the plea colloquy, the state agreed to amend the charge again, this time to third-degree sexual assault involving sexual contact, contrary to § 940.225(3)(b). The circuit court then informed Mr. Goth that the elements of the offense required the state to prove that he had sexual contact with the victim without the victim's consent. At no point did anyone inform Mr. Goth of the definition of sexual contact, and, postconviction, he alleged that he did not know that the state would be required to prove that the sexual contact was for the purpose of degradation, humiliation, arousal, or gratification.

Was Mr. Goth's plea knowingly, intelligently, and voluntarily entered?

The circuit court answered yes, denying Mr. Goth's postconviction motion for plea withdrawal.

This court should reverse.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The briefs should adequately set forth the arguments and publication will likely be unwarranted as the issue presented can be decided on the basis of well-established law.

STATEMENT OF THE CASE AND FACTS

In a complaint filed on September 25, 2020, the state charged Zachary Christopher Goth with one count of sexual assault of a child under 16 years of age. (2:1). The complaint alleged that a month earlier, on August 28, 2020, Mr. Goth had sexual contact with P.B.P., whose date of birth was March 15, 2011. (2:1). Specifically, it alleged that Mr. Goth had sat down next to P.B.P. and rubbed her foot and leg, as well as her vagina, under her clothes. (2:1-2).

The parties eventually entered into a plea agreement, pursuant to which Mr. Goth agreed to enter a plea to an amended charge of third-degree sexual assault, a separate case would be dismissed and read-in, and the parties would be free to argue sentencing. (67:2; 97:2)(App.7).

As contemplated by the agreement, an amended information was filed on September 14, 2022. (63). That document charged Mr. Goth with third-degree sexual assault and alleged that he had sexual

intercourse with P.B.P., without her consent, contrary to Wis. Stat. § 940.225(3)(a). (63).

A plea questionnaire and waiver of rights form was also filed prior to the plea hearing. On that document, in the space provided for the elements of the offense, Attorney Murphy wrote: "1) △ had sexual contact w/vic (PBP) 2) vic did not consent." (67:1).

The discrepancy in the parties' understanding of the charge to which Mr. Goth was pleading, as demonstrated by these two documents, came to light during the plea hearing on September 14, 2022. The following exchange occurred between the circuit court, Mr. Goth, and the attorneys during the circuit court's plea colloquy with Mr. Goth:

THE COURT:	And do you understand that the elements that the state would have to prove are that you did have sexual intercourse with P.P.B. [sic] and you did so without that person's consent? Do you understand those elements?
THE DEFENDANT:	I believe it was contact, ma'am, but yes from --
MR. MURPHY:	Do you have the Amended Information?
THE COURT:	The Amended Information says sexual intercourse.

MR. MURPHY: What statute is this being charged under?

THE COURT: It has charged under 940.225(3)(a).

MR. MURPHY: May I just have one moment, Judge?

THE COURT: Yes. I was going to say, Mr. --

MR. MURPHY: Yes, Judge.

THE COURT: Mr. Goulart, there is third degree sexual assault can be whoever had sexual intercourse with a person or whoever has sexual contact in the manner described in (5)(b).

MR. GOULART: Yes, Your Honor. I do understand that.

THE COURT: And is that -- I mean I'm just looking at it right now.

MR. MURPHY: That's what I set forth in the Plea Questionnaire as elements.

MR. GOULART: Sexual contact?

MR. MURPHY: Yes.

MR. GOULART: That would be fine. I'll file a second Amended Information alleging that subsection.

MR. MURPHY: Thank you.

THE COURT:	Okay. So let me go back then. You understand then that there is going to be a third Amended Information -- or a third Information filed and it's going to have Count 1, which is third degree sexual contact with P.B. -- P.P.B. [sic] You understand that?
THE DEFENDANT:	Yes, ma'am.
THE COURT:	And in order for the state to convict you of that, they would have to prove that you did have sexual contact with P.P.B. [sic] and you had that sexual contact without P.P.B.'s [sic] consent. Do you understand that?
THE DEFENDANT:	Yes, ma'am.

(97:7-8)(App. 12-13).

The second amended information, filed during the plea hearing, charged Mr. Goth with third-degree sexual assault and alleged that Mr. Goth had sexual contact with P.B.P., without consent, "to wit: intentionally ejaculated or intentionally emitted urine or feces onto the clothed or unclothed body of the complainant, for the purpose of sexually degrading or humiliating the complaint [sic] or for the purpose of sexually arousing or gratifying the defendant," contrary to §§ 940.225(3)(b)&(5)(b)2.. (64).

The circuit court ultimately found that Mr. Goth's plea was freely, voluntarily, and knowingly entered, found him guilty, and set the matter over for sentencing. (76:4-13).

Mr. Goth moved to withdraw his plea prior to sentencing, but that motion was denied. (68; 106). During the hearing on that motion, Attorney Murphy informed the circuit court that, "[t]he State is taking more literal view recently of that section 945.225(3)(b) [sic], which requires not only that the victim didn't consent and there was sexual contact but that there was sexual contact as set forth in section (b)2 of that statute requires additional elements. And I don't think the defendant can satisfy that part, Judge." (106:6). In response, the circuit court stated that it would check the transcript, but it believed that it had used the amended information and gone over those elements with Mr. Goth during the plea hearing. (106:6-7).

The case proceeded to sentencing on April 5, 2023 and, after hearing from the parties, the circuit court sentenced Mr. Goth to three years of initial confinement and five years of extended supervision. (81:1)(App. 3).

Mr. Goth subsequently filed a postconviction motion for plea withdrawal alleging that his plea was not knowingly, intelligently, and voluntarily entered. (112). Specifically, he pointed out that the circuit court had failed to fulfill its duties by failing to ensure that he understood the nature of the charge to which he was pleading and asserted that he did not know that

in order to be convicted of the charge the state would have to prove that he either intentionally ejaculated/emitted urine or feces upon the victim or caused the victim to ejaculate/emit urine or feces on him, and that he did so with intent to become sexually aroused or gratified or to sexually degrade or humiliate the victim. (112:4-6).

Mr. Goth's postconviction motion was set to be heard on February 29, 2024, but was continued. (121:3-4). When the parties reconvened on March 7, 2024, the state opposed the motion, arguing that Mr. Goth had not met his burden of "showing by clear and convincing evidence that the plea was not voluntarily and knowingly made," and that Mr. Goth "got the benefit of the bargain in this case," because the charges were reduced. (122:4-5)(App. 26-27). The state elected not to call any witnesses and, after hearing additional argument, the circuit court denied Mr. Goth's motion.

The circuit court first noted its belief that the purpose of sexual contact is not an element that needs to be proven or which needs to be covered by the court during a plea colloquy, and then found that Mr. Goth did know the nature of the offense to which he pled. (122:8-12)(App. 30-34). Specifically, the circuit court stated that by reading through the two elements in the jury instruction, and asking Mr. Goth whether he understood them, it did what it was "required to do." (122:12-13)(App. 34-35). Further, it found that the fact that Mr. Goth interrupted the court to clarify that the charge involved contact and not intercourse shows

that he understood the offense he was pleading to. (122:12-13)(App. 34-35).

A written order denying Mr. Goth's motion was filed. (117)(App.5).

This appeal follows.

ARGUMENT

Mr. Goth is entitled to plea withdrawal as his plea was not knowingly, intelligently, or voluntarily entered.

The circuit court failed to meet its obligations under Wis. Stat. § 971.08(1)(a) and *Bangert*[1] when it failed to ensure that Mr. Goth understood what the term sexual contact meant in terms of what the state was required to prove in his case. Further, the state failed to prove by clear and convincing evidence that Mr. Goth's plea was knowingly, intelligently, and voluntarily entered despite the circuit court's failure. As a result, Mr. Goth was entitled to plea withdrawal as a matter of right and the circuit court's order denying his postconviction motion must be reversed.

A. Legal principles and standard of review.

A defendant seeking to withdraw a plea after sentencing must prove, by clear and convincing evidence, that refusal to allow plea withdrawal would result in a "manifest injustice." *State v. Brown*,

[1] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. One way a defendant may establish a manifest injustice is to show that his plea was not knowingly, intelligently, and voluntarily entered. *Id*. "A plea that was 'not entered knowingly, voluntarily, and intelligently violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right.'" *State v. Dillard*, 2014 WI 123, ¶37, 358 Wis. 2d 543, 859 N.W.2d 44 (quoting *State v. Cross*, 2010 WI 70, ¶14, 326 Wis. 2d 492, 786 N.W.2d 64.).

To ensure that a defendant's plea is knowing, intelligent, and voluntary, the circuit court must "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." Wis. Stat. § 971.08(1)(a).

In addition to that statutory requirement, the Wisconsin Supreme Court has established a list of things the circuit court must personally address with the defendant during a plea colloquy before accepting his plea, among which is the nature of the crime to which the defendant is pleading. *See Brown*, 2006 WI 100, ¶35. In order "[t]o understand the nature of the charge, the defendant must be aware of all the essential elements of the crime." *State v. Jipson*, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18; *See also State v. Nichelson*, 220 Wis. 2d 214, 218, 582 N.W.2d 460 (Ct. App. 1998)(" A plea is not voluntary if the defendant did not understand the essential

elements of the charged offense at the time the plea was entered.").

If a circuit court fails to fulfill these duties, and the defendant alleges that he did not know or understand the information that the circuit court should have provided, a *Bangert* hearing must be held at which the state has the opportunity to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary, despite the errors in the plea colloquy. *Cross*, 2010 WI 70, ¶¶19-20. "If the state cannot meet its burden, the defendant is entitled to withdraw his plea as a matter of right." *Id*., ¶20.

Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact reviewed independently of the circuit court's determination. *Brown*, 293 Wis. 2d 594, ¶19; *Nichelson*, 220 Wis. 2d 214, 217-218.

B. The circuit court failed to advise Mr. Goth of all essential elements of the offense to which he was pleading and the state failed to prove by clear and convincing evidence that Mr. Goth knew the nature of the offense despite the defect in the plea colloquy.

The circuit court's plea colloquy in this case was deficient as it failed to establish that Mr. Goth understood all of the essential elements of the offense to which he was pleading. As Mr. Goth alleged that he did not know the information that should have been

provided, the burden shifted to the state to prove by clear and convincing evidence that his plea was knowingly, intelligently, and voluntarily entered. The state failed to meet that burden in this case and, therefore, Mr. Goth's motion for plea withdrawal should have been granted.

Mr. Goth pled guilty to, and was convicted of, third-degree sexual assault contrary to §§ 940.225(3)(b)&(5)(b). In order to be convicted of that offense, the state would have had to prove: 1) that Mr. Goth either intentionally ejaculated/emitted urine or feces upon P.B.P. or caused P.B.P. to ejaculate/emit urine or feces on him, and that he did so with intent to become sexually aroused or gratified or to sexually degrade or humiliate P.B.P.; and, 2) that P.B.P. did not consent. *See* WIS JI-CRIMINAL 1218B.

The circuit court failed to ensure that Mr. Goth understood these essential elements. During its plea colloquy with Mr. Goth, the circuit court only advised him that, had he gone to trial, the state would have had to prove that he had sexual contact with P.B.P. and that P.B.P. did not consent to that sexual contact. (97:7-8)(App. 12-13).

Postconviction, there was no dispute that the circuit court did not discuss the meaning of sexual contact, or the fact that the state would have to prove that the contact was done with intent to become sexually aroused or gratified or to sexually degrade or humiliate the victim, during the plea colloquy. Instead, the state argued, and the circuit court

concluded, that the definition or purpose of sexual contact was not something that needed to be explained during the plea colloquy.

Contrary to the circuit court's ruling, however, it is well established that the purpose of sexual contact is an essential element of the offense to which Mr. Goth pled and one that the circuit court was required to advise him of. "While it is true the purpose of the sexual contact is not an element of the crime listed under Wis. Stat. § 948.02(2), but rather is a definition of the element 'sexual contact' found in Wis. Stat. § 948.01(5), the courts have nevertheless crafted this to be an element of the offense." *Jipson*, 2003 WI App 222, ¶9. It is an essential element of which the defendant must be aware before he can knowingly plead to the offense. *Id*. In other words, before entering a plea to a sexual assault involving sexual contact, the circuit court must ensure that the defendant knows that the state must prove that the alleged contact was for the purposes of sexual degradation, humiliation, arousal, or gratification. *See Id.*; *See also Nichelson*, 220 Wis. 2d at 225. The circuit court failed to do so in this case.

As Mr. Goth established that the circuit court accepted his plea without conforming to the requirements of § 971.08 and *Bangert*, and alleged that he did not understand the information that should have been provided, the burden rested with the state to prove by clear and convincing evidence that that Mr. Goth's plea was nonetheless knowingly, voluntarily, and intelligently made. *Jipson*, 2003 WI

App 222, ¶7. In other words, the state was required to "show that [Mr. Goth] in fact possessed the constitutionally required understanding and knowledge which the inadequate plea colloquy failed to afford him." *State v. Van Camp*, 213 Wis. 2d 131, ¶28, 569 N.W.2d 577 (1997).

To meet its burden, the state was allowed to "utilize any evidence which substantiate[d] that the plea was knowingly and voluntarily made." *Id.*, ¶29. Such evidence, however, had to be "affirmative evidence." *Jipson*, 2003 WI App 222, ¶11; *Nichelson*, 220 Wis. 2d at 223 ("The State can only meet its burden by providing affirmative evidence that the defendant's plea was voluntarily, knowingly, and intelligently entered.").

In this case, the state chose not to call Attorney Murphy, Mr. Goth, or any other witnesses to meet its burden and instead relied solely on the second amended information contained in the record to support its claim that Mr. Goth possessed the required knowledge. *See Van Camp*, 213 Wis. 2d 131, ¶29 ("The State may examine the defendant or defendant's counsel and may rely on the entire record to demonstrate that [the defendant] knew and understood the constitutional rights he would be waiving."). That document, however, does not establish that Mr. Goth knew that the state was required to prove that he engaged in specific sexual contact for purposes of sexual degradation, humiliation, arousal, or gratification.

While the second amended information does specifically contain the relevant description of sexual contact, as well as the purpose for which the conduct must have been engaged in, there is nothing in the record that proves that Mr. Goth had seen that document prior to entering his plea. The second amended information was filed on the date of the plea hearing - September 14, 2022. (64). It is clear from the plea hearing transcript that it was not filed before the confusion regarding the charge arose during the plea colloquy. (97:7-8)(App. 12-13). There is nothing in the transcript, however, that proves that the second amended information was filed during that hearing, or that Mr. Goth viewed the document prior to entering his plea. In fact, the transcript suggests otherwise.

After Mr. Goth interrupted the circuit court to state that he was charged with contact and not intercourse, the state agreed to amend the charge again, stating "I'll file a second Amended Information alleging that subsection." (97:8)(App. 13). The circuit court then informed Mr. Goth that "*there is going to be* a third Amended Information -- or a third information filed and *its going to have* Count 1, which is third degree sexual contact with P.B. – P.P.B. [sic]," before advising him of the two elements contained in the jury instruction. (97:8)(App. 13)(emphasis added). The language used by the circuit court indicates that the second amended information had not yet been filed and that Mr. Goth had not yet seen it when he entered his plea. Consequently, the existence of that document does not prove that Mr. Goth had the required knowledge at the time he pled guilty.

Nor is there anything else in the record that proves by clear and convincing evidence that Mr. Goth understood the state was required to prove that he engaged in specific sexual contact for the purposes of sexual degradation, humiliation, arousal, or gratification. The plea questionnaire completed by Mr. Goth's attorney did not contain that information. (67). Further, contrary to the circuit court's finding, the fact that Mr. Goth knew that he was pleading to an offense involving contact instead of intercourse does not prove that that he knew what sexual contact meant or that the state was required to prove the purpose of the contact he was alleged to have engaged in.

The complaint alleged that Mr. Goth had rubbed P.B.P.'s leg and vagina under her clothes, and his trial attorney had advised him that the state would have to prove that he had sexual contact with P.B.P. without her consent. (2; 67:1). Thus, it is not surprising that Mr. Goth understood he was being charged with engaging in sexual contact, not intercourse. Nothing in the complaint, however, alleged that the touching was done for the purpose of humiliating or degrading P.B.P., or for the purpose of sexual arousal or gratification. Nor was there any document, other than the late filed second amended information, that alleged that Mr. Goth intentionally ejaculated or emitted urine or feces onto P.B.P., for such purpose. The fact that Mr. Goth understood there is a difference between sexual contact and sexual intercourse is not affirmative proof that he understood that the state

would have had to prove that he engaged in specific sexual contact for a specific purpose.

In sum, the record does not prove by clear and convincing evidence that Mr. Goth knew what sexual contact under § 940.225(3)(b)&(5)(b) meant, or that the purpose of the sexual contact was an element which the state would have been required to prove at trial. Consequently, the state's reliance on the record to meet its burden fell short and Mr. Goth is entitled to plea withdrawal as a matter of right.

CONCLUSION

The circuit court failed to ensure that Mr. Goth understood the nature of the charge to which he was pleading and, in fact, Mr. Goth did not know that information. His plea was not knowingly, intelligently, or voluntarily entered and he is, therefore, entitled to plea withdrawal. For those reasons, Mr. Goth respectfully requests that this court reverse the circuit court's order denying his postconviction motion and remand the case to the circuit court with directions that it grant his motion for plea withdrawal.

Dated this 17th day of May, 2024.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,276 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with 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; (3) a copy of any unpublished opinion cited under 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 rules 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 or 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.

Dated this 17th day of May, 2024.

Signed:
Electronically signed by
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