STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2024AP000519-CR

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ZACHARY CHRISTOPHER GOTH,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN ROCK COUNTY CIRCUIT COURT, THE HONORABLE BARBARA W. MCCRORY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Goth pleaded guilty to one count of third-degree sexual assault (sexual contact) for cornering nine-year-old P.B.P.[1] in her bed and with his fingers, underneath her underwear, rubbing her vagina. The charge arose after P.B.P. ran to her father's room screaming that Goth had touched her.

Postconviction, Goth asked for plea withdrawal and alleged he did not understand the State was required to prove the purpose of his sexual contact with P.B.P. was for his sexual gratification or P.B.P.'s humiliation. At the *Bangert* hearing, the State proved that Goth was aware the State had to prove he intended his sexual contact with P.B.P. for his sexual gratification or P.B.P.'s humiliation. The circuit court concluded that Goth was clearly aware of what the State was required to prove and therefore denied his motion.

This Court should likewise conclude that Goth was aware that the State was required to prove that his purpose in having sexual contact with P.B.P. was for his sexual gratification, or alternatively, P.B.P.'s humiliation. Thus, this Court should affirm the circuit court's decision.

ISSUE PRESENTED

Did the State meet its burden to prove that Goth was aware of an essential element of the offense, namely that his sexual contact with the minor victim was either for his sexual gratification or P.B.P's humiliation?

The circuit court answered, "yes."

This Court should also answer, "yes."

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[1] Victim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issue will be fully presented in the briefs. Publication is unwarranted because the issue can be decided by applying established legal principles to the facts of this case.

STATEMENT OF THE CASE

Zachary Christopher Goth entered a plea of guilty to the third-degree sexual assault (sexual contact) of P.B.P., a nine-year-old, on September 14, 2022. (R. 97.) At the plea hearing, the circuit court inquired from the parties if the facts set forth in the criminal complaint were sufficient for the court to "find [Goth] guilty of third degree sexual assault [(sexual contact)] of P.B.P." Goth, his attorney, and the State, all answered in the affirmative. (R. 97:12.)

According to the complaint, on or about August 28, 2020, J.P. contacted the Janesville Police Department. (R. 2:1.) J.P. alleged that P.B.P. entered his room crying and stated, "Zach touched me." (R. 2:1.) "P.B.P. described laying on the bottom bunk in a bedroom" when Goth "sat down on the bed next to P.B.P. and with his hand he rubbed her foot and leg" and ultimately, the "top of her [vagina] with his fingers." (R. 2:1–2.)

A. Preliminary Hearing

Goth had a preliminary hearing, which he attended on October 6, 2020. (R. 107:2.) Following witness testimony, the State moved the circuit court to have Goth bound over for trial. (R. 107:13–14.) Goth's attorney objected. (R. 107:14.) Relevant here, Goth's attorney noted there was no proof or evidence of sexual contact. (R. 107:14–15.) Goth's attorney

discussed "Wisconsin Jury Instructions 2101[2] [and the definition of sexual contact] as requiring not just the touching of a private or sexual area but also that the touching be done with the intent to become sexually aroused or gratified or to sexually degrade or humiliate." (R. 107:14–15.) In its rebuttal, the State directed the court to Wis. Stat. § 948.01(5) and how it defined sexual contact to include "intentional touching, whether direct or through clothing if intentional [touching] is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." (R. 107:15–16.) The court bound Goth over for trial. (R. 107:16.)

B. Plea Hearing

Years after the charge and extensive plea negotiations, Goth pled guilty to the third-degree sexual assault of P.B.P. on September 14, 2022. (R. 96:2–5; 97:13–14; 101:2–5.) Goth's attorney informed the circuit court they had an arrangement with the State to have Goth plead to one count of third-degree sexual assault. (R. 97:2.) The court turned to Goth and inquired:

> So Mr. Goth, first of all, you have heard the agreement that has been reached in your case; is that correct?
>
> [GOTH]: Yes, ma'am.
>
> THE COURT: And is that what you thought the agreement was?
>
> [GOTH]: Yes, ma'am.
>
> THE COURT: And have you had enough time to talk with Mr. Murphy about your case?
>
> [GOTH]: Yes, I have.
>
> THE COURT: And has he been able to explain everything to you to your satisfaction?

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[2] Wis. JI–Criminal 2101A (2006).

> [GOTH]: Yes, ma'am.
>
> . . .
>
> THE COURT: And he's been able to answer all of your questions?
>
> [GOTH]: Yes.
>
> THE COURT: And have you been satisfied with his representation of you up to this point?
>
> [GOTH]: Yes.
>
> . . .
>
> THE COURT: So it's my understanding that you are going to be entering a plea to the sole count in the Amended Information of third degree sexual assault; is that correct?
>
> [GOTH]: Yes, ma'am.
>
> THE COURT: And do you understand by entering your plea to that count that you are waiving your right to have the [S]tate prove the elements of that offense beyond a reasonable doubt?
>
> [GOTH]: Yes, ma'am.
>
> THE COURT: And do you understand that the elements that the [S]tate would have to prove are that you did have sexual intercourse with P.[B.P.] and you did so without that person's consent? Do you understand those elements?
>
> [GOTH]: I believe it was contact, ma'am, but yes from --

(R. 97:4–7.) At that point, Goth was interrupted by his attorney.

After a brief discussion between the parties and the circuit court, the State informed everyone that it would file a "second Amended Information" because the first Amended Information included the language for sexual intercourse and

not sexual contact.[3] (R. 97:7–8.) Goth informed the court he understood the State would file a proper information and the elements associated with the sexual contact of P.B.P. (R. 97:8.) The court inquired from Goth's attorney if he had explained the elements of the offense "as if [Goth] was charged under [Wis. Stat. §] 940.225(3)(b)," and the attorney answered, "That's correct." (R. 97:9.)

The last Amended Information was filed on September 14, 2022, the same day as the plea hearing. (R. 64.) The information read as follows:

> Count 1: THIRD DEGREE SEXUAL ASSAULT
>
> The above-named defendant on or about Friday, August 28, 2020, in the City of Janesville, Rock County, Wisconsin, did have sexual contact with P.B.P., without that person's 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 or for the purpose of sexually arousing or gratifying the defendant, contrary to sec. 940.225(3)(b)&(5)(b)2, 939.50(3)(g) Wis. Stats., a **Class G Felony**, and upon conviction may be fined not more than Twenty Five Thousand Dollars ($25,000), or imprisoned not more than ten (10) years, or both.

(R. 64.) This information was filed during the hearing. (R. 122:10.) Goth entered a plea of guilty to this last Amended Information. (R. 97:13.) Further relevant details as to what occurred during Goth's plea hearing are discussed in the Argument section below.

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[3] The circuit court refers to the last filed Information as the "Third Amended Information." (R. 97:8.) Throughout this brief, the State will refer to the Information as "the last Amended Information."

C. Pre-sentence Request for Plea Withdrawal

Months later, prior to his sentence, Goth sought to withdraw his plea at a January 11, 2023, motion hearing. (R. 106.) Goth sought to withdraw his plea because he "just [did not] feel he [was] guilty." (R. 106:3.) The circuit court denied Goth's motion. (R. 106:7.) The court reasoned that although it "should freely allow a defendant to withdraw their plea before sentencing for any fair and just reason -- freely [did] not mean automatically -- and a showing of some adequate reason for the defendant's change of heart other than a desire to have a trial [was necessary]." (R. 106:4.) The court opined Goth's motion was "basically a change of heart" because he wanted a trial. (R.106:4.)

D. Postconviction Motion and Hearing

After sentencing, Goth filed a postconviction motion for plea withdrawal. (R. 112.) Now represented by a different attorney, Goth argued that he had not entered his plea knowingly, intelligently, and voluntarily because the circuit court failed to inform him of all the essential elements of third-degree sexual assault. (R. 112:4.) Specifically, Goth argued "he was not informed what sexual contact meant" and "he did not know the actual nature of the offense." (R. 112:4.)

The circuit court held a motion hearing on March 7, 2024. (R. 122.) The court identified the elements of the offense Goth had pled to as "sexual contact with the victim" and "that the victim did not consent to the sexual contact." (R. 122:7.) The court added "definitions in and of themselves, in this Court's opinion, are not necessarily an element that has to be proven." (R. 122:8.) Goth argued that "neither the Court nor [Mr. Murphy] explained to [Goth] this essential element," that the purpose of sexual contact was for either his sexual gratification or the victim's humiliation. (R. 122:8.) However, the court pointed out the definition of sexual contact was included in the "amended Criminal

Complaint."[4] (R. 122:9–10.) The court noted the last Amended Information had been filed during the plea hearing. (R. 122:10.) It also found that Goth was clearly aware of the proper elements of the offense, as he was the one to bring to the court's attention that he would be pleading to contact, not sexual intercourse, with a minor child, when he was asked if he understood all elements of the offense the State would have to prove. (R. 122:12–13.) The court denied Goth's motion. (R. 122:13.)

Goth appeals.

STANDARD OF REVIEW

"A decision to grant or deny a motion to withdraw [a plea] is within the discretion of the [circuit] court." *State v. Rhodes*, 2008 WI App 32, ¶ 7, 307 Wis. 2d 350, 746 N.W.2d 599. "[E]ven if the [ ] court misapplies the law or inadequately explains the reasons for its decision, [this Court] must independently review the record to find support for the [ ] court's decision if the justification is there." *State v. Jenkins*, 2007 WI 96, ¶ 46, 303 Wis. 2d 157, 736 N.W.2d 24. In determining whether a court must allow plea withdrawal, this Court "accept[s] the [ ] court's findings of historical and evidentiary facts unless they are clearly erroneous but . . . determine[s] [de novo] whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary."[5] *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906.

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[4] There is no amended Criminal Complaint in the record. Instead, there is the last Amended Information. (R. 64.)

[5] "A finding is clearly erroneous if 'it is against the great weight and clear preponderance of the evidence.'"

(continues)

ARGUMENT

Goth is not entitled to plea withdrawal based on his *Bangert* claim because the record clearly shows he knowingly, intelligently, and voluntarily entered his plea.

The essential elements of third-degree sexual assault include sexual contact by the defendant of the victim without the victim's consent for the "purpose of the defendant's sexual gratification or the victim's humiliation." *State v. Jipson*, 2003 WI App 222, ¶ 9, 267 Wis. 2d 467, 671 N.W.2d 18 (citation omitted). The record does not clearly indicate that the circuit court discussed the last element with Goth during the plea colloquy. Therefore, the State will assume a prima facie showing under *Bangert*. *See State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

The critical inquiry for this Court is whether there is evidence in the record that Goth was aware that the State was required to prove that the purpose of his sexual contact with P.B.P. was for his sexual gratification or P.B.P.'s humiliation. The record contains ample evidence of Goth's awareness. Thus, this Court should affirm.

State v. Arias, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted). "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417. Like factual findings, a court's credibility determinations are accepted on appeal, unless clearly erroneous. *State v. Kivioja*, 225 Wis. 2d 271, 289, 592 N.W.2d 220 (1999) ("[T]his [C]ourt has consistently accepted [the] court[s] evaluations of the credibility of evidence when they consider plea withdrawals.").

A. Principles of plea withdrawal after sentencing.

The rationales for plea withdrawal in Wisconsin derive from two lines of cases, one flowing from *Bangert*, 131 Wis. 2d 246, the other from *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). *See State v. Howell*, 2007 WI 75, ¶¶ 73–74, 301 Wis. 2d 350, 734 N.W.2d 48 (discussing dual-purpose *Bangert* and *Nelson*/*Bentley* motions). The *Bangert* analysis addresses defects in the plea colloquy. *State v. Hoppe*, 2009 WI 41, ¶ 3, 317 Wis. 2d 161, 765 N.W.2d 794, *aff'g Hoppe*, 2008 WI App 89, 312 Wis. 2d 765, 754 N.W.2d 203.

"To withdraw a [ ] plea after sentencing, [a defendant must establish] by clear and convincing evidence, that a refusal to allow withdrawal . . . would result in a 'manifest injustice.'" *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482 (citations omitted).

> The clear and convincing standard for plea withdrawal after sentencing, which is higher than the 'fair and just' standard before sentencing, 'reflects the State's interest in the finality of convictions and reflects the fact that the presumption of innocence no longer exists.' The higher burden 'is deterrent to defendants testing the waters for possible punishments.'

Id. ¶ 48 (citations omitted). A defendant can show a manifest injustice by demonstrating that he did not enter his plea knowingly, voluntarily, and intelligently. *Id.* ¶ 49; *see also State v. Trochinski*, 2002 WI 56, ¶ 15, 253 Wis. 2d 38, 644 N.W.2d 891.

To help ensure that a defendant enters a knowing, voluntary and intelligent plea, the circuit court must perform certain statutory and court-mandated duties on the record during the plea hearing. *Taylor*, 347 Wis. 2d 30, ¶¶ 30–31. One of these requirements includes that before accepting a

guilty plea, a court must ensure that the defendant is aware of the nature of the charge he is pleading to. Wis. Stat. § 971.08(1)(a); *Brown*, 293 Wis. 2d 594, ¶ 35. To understand the nature of the charge, a defendant must be aware of all the essential elements of the crime. *State v. Nichelson*, 220 Wis. 2d 214, 218, 582 N.W.2d 460 (Ct. App. 1998).

The essential elements of third-degree sexual assault include 1) sexual contact by the defendant of the victim 2) without the victim's consent. Wis. Stat. § 940.225(3)(b). However, this Court has found a third element having to do with sexual contact charges: that "the [ ] [sexual] contact [must be] for the purpose of [the] defendant's sexual gratification or the victim's humiliation." *Jipson*, 267 Wis. 2d 467, ¶ 9. If the defendant believes the court did not fulfill its duties, the defendant may, in accord with *Bangert*, seek plea withdrawal based on the alleged deficiencies in the colloquy. *Taylor*, 347 Wis. 2d 30, ¶ 32.

A defendant moving for plea withdrawal pursuant to *Bangert* must both make a prima facie showing that the circuit court conducted a defective plea colloquy by failing to fulfill its duties and "allege that [they] did not, in fact, know or understand the information that should have been provided during the plea colloquy." *Id.* If the defendant makes a proper *Bangert* motion, the burden then shifts to the State "to prove by clear and convincing evidence that the defendant's plea, despite the inadequacy of the plea colloquy, was knowing, intelligent, and voluntary." *Id.* "In meeting its burden, the [S]tate may rely 'on the totality of the evidence, much of which will be found outside the plea hearing record' . . . testimony of the defendant and defense counsel to establish the defendant's [knowledge] . . . the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden." *Brown*, 293 Wis. 2d 594, ¶ 40 (citation omitted).

B. The record contains ample evidence to show Goth was aware of all elements of the offense.

Assuming without arguing that the burden shifted to the State, the State clearly met its burden in this case. To start, this Court may reasonably infer from the record that a defendant is aware of the purpose for their sexual contact with a victim. *See State v. Bollig*, 2000 WI 6, ¶ 55, 232 Wis. 2d 561, 605 N.W.2d 199 (concluding a defendant's awareness of the sexual gratification element was demonstrated, in part, by his attendance at the other acts hearing). In doing so, this Court looks at the totality of the record, analyzing evidence collectively and in context, to decide whether a defendant is aware of the nature of his offense. *See, e.g.*, *id.* ¶¶ 53–55 (accepting the State's proffer of defendant's attendance at the other acts hearing and the signed plea questionnaire as sufficient to meet its burden).

Here, like in *Bollig*, Goth attended a pre-trial hearing, his preliminary hearing. (R. 107:2.) Of relevance, toward the end of the preliminary hearing Goth's attorney stated:

> And this is what I do think is essential. For this to be charged, filed today we need to have sexual contact. Sexual contact is defined in the Wisconsin Jury Instructions 2101 as requiring not just the touching of a private or sexual area but also that the touching be done with the intent to become sexually aroused or gratified or to sexually degrade or humiliate.

(R. 107:14–15.) The State then argued that Wis. Stat. § 948.01(5)(a) recognized sexual contact to include the "intentional touching, whether direct or through clothing if intentional [touching] is either for the purpose of sexually degrading or sexually humiliating the [victim] or sexually arousing or gratifying the defendant." (R. 107:15.) The fact that Goth was present at the preliminary hearing and heard the above statements is evidence that Goth was aware of the meaning of sexual contact and its purpose.

Also, as previously noted, common law makes it permissible for the State to rely on the entirety of the court record to meet its burden. *See Brown*, 293 Wis. 2d 594, ¶ 40. At the postconviction hearing, the State highlighted for the circuit court that it amended the Information to lay out the elements of the crime and how Goth had it prior to entering the plea. (R. 122:5.) The Plea Hearing transcript supports this assertion. The exchange between Mr. Murphy, Goth, and the court, clearly demonstrates that Goth understood the nature of the charge against him, as detailed in the last Amended Information. (R. 97:13–14.) The last Amended Information was filed the same day and during the plea hearing. (R. 64; 122:10.) The relevant exchange during the plea hearing between Mr. Murphy, Goth, and the court included:

> MR. MURPHY: Judge, the defense is willing to proceed on the representation from the [S]tate that they filed an Amended Information charging that offense.
>
> THE COURT: Okay. All right. So based upon the oral amendment that has been made by the [S]tate that is going to be followed up with a second Amended Information, how do you plead to the third degree sexual assault which is considered a sexual -- sexual contact?
>
> [GOTH]: Guilty
>
> THE COURT: And Mr. Murphy, do you believe he is entering his plea today freely, voluntarily, knowingly, and intelligently?
>
> MR. MURPHY: I do, Your Honor.

(R. 97:13.) Mr. Murphy's acknowledgment that Goth was entering his plea freely, voluntarily, knowingly, and intelligently, reinforces that Goth was fully aware of the Amended Information and its contents. The State also reminded the court of how Mr. Murphy confirmed he went over the elements of the last Amended Information with Goth. (R. 97:9–10.) Specifically, the State noted during the postconviction hearing:

> And, again, further we go beyond the plea colloquy to find knowing and voluntarily. And if you look at the -- the [A]mended Information, which the defendant had, which defense counsel had, and went through because if you recall we -- once I had the [A]mended Information we had to recess briefly to get it pulled through and what not.

(R. 122:9.)

Additionally, the State argued that Goth was apprised of the differences in charges between the second-degree sexual assault of a child and the third-degree sexual assault of a child and the differences between sexual assault and sexual contact. (R. 122:5.) This too is supported by the Plea Hearing transcript. Mr. Murphy noted the arrangement between the State and Goth was for Goth to plea to "one count of third-degree sexual assault." (R. 97:2.) Goth informed the court he heard the agreement that was reached in his case. (R. 97:4.) Goth noted he had enough time to talk to his attorney about the case. (R. 97:4.) He made the court aware that his attorney had explained everything to his satisfaction. (R. 97:4.) As the plea progressed, the court inquired from Goth if he understood "the elements [ ] the [S]tate would have to prove [included] that [he] did have sexual intercourse with P.[B.P.] and [that he] did so without [her] consent." (R. 97:7.) Goth responded, "I believe it was contact, ma'am, but yes from --." (R. 97:7.)

The subsequent exchange noted in the Statement of the Case confirms that Goth was fully informed of the charge against him and the distinctions between the different degrees of sexual assault and the nature of the conduct involved. (R. 97:4–7.) Goth's affirmative responses to the circuit court's questions demonstrate that he was fully aware of the agreement, the essential elements of the crime he was pleading to, and the consequences of his plea. If he were not, he would not have been able to point out the differences between sexual intercourse and contact. (R. 97:7.) This too,

the circuit court highlighted. (R. 122:12–13.) Thus, his guilty plea was entered with a comprehensive understanding of the charge and its implications.

It is also worth noting that the circuit court informed Goth that the last Amended Information during the Plea Hearing, which it referred to as the "third Amended Information," was going to be filed. (R. 97:8.) Goth acknowledged he understood the additional Information would be filed. (R. 97:8.) The court then went on to inquire from Goth if he understood that "in order for the [S]tate to convict [him] of that [(referring to the third-degree sexual assault (sexual contact)], [the State] would have to prove that [he] did have sexual contact with [P.B.P.] and [that he] had that sexual contact without [P.B.P.]'s consent. (R. 97:8.) Goth answered "Yes, ma'am." (R. 97:8.)

The circuit court added:

> And Mr. Goulart is going to be filling an Amended Information that would change it to a violation of subsection -- or of [9]40.225(3)(b)[6]; is that correct?
>
> MR. MURPHY: Yes, Judge.
>
> THE COURT: And those are the elements that you explained to [ ] Goth?
>
> MR. MURPHY: Correct, Judge.
>
> THE COURT: And you believe he understands the elements?
>
> MR. MURPHY: I do.

(R. 97:9–10.) Later, the court inquired from Goth if he would "stipulate . . . that there [was] a factual basis in the Criminal Complaint . . . [from which it] could find [him] guilty of the third degree sexual assault of P.[B.P.], with the understanding that [it was] sexual contact." Goth answer

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[6] Although the circuit court referenced Wis. Stat. § 340.225(3)(b), it was in fact referencing Wis. Stat. § 940.225(3)(b). (R. 97:9.)

"Yes, ma'am." (R. 97:12.) Mr. Murphy's explanation of what he and Goth had discussed and Goth's acknowledgments undoubtably substantiate Goth's understanding of all the essential elements of the crime he was pleading to.

Like the *Taylor* court,[7] for this Court to conclude that Goth was *not* aware that the State was required to prove that the purpose of his sexual contact with P.B.P. was for his sexual gratification or P.B.P.'s humiliation, this Court "would have to assume that [Goth's] trial counsel misrepresented, on the plea questionnaire form itself and to the [circuit] court, that he had read the form with [Goth] and that [Goth] understood it." *Taylor*, 347 Wis. 2d 30, ¶ 39; (R. 67; 97:9–10). Yet, Goth did not raise an ineffective assistance of counsel claim. This Court "would also have to assume that [Goth] misrepresented to the court that he had received, read, and understood the . . . plea questionnaire form." *Taylor*, 347 Wis. 2d 30, ¶ 39; (R. 97:5–6).

Goth argues that there was nothing in the record to support that he "knew that the [S]tate was required to prove that he engaged in specific sexual contact for purposes of sexual degradation, humiliation, arousal, or gratification." (Goth's Br. 17.) This is not correct. Goth was present at his preliminary hearing. (R. 107:2.) Goth's Preliminary Hearing transcript clearly showed at length discussions of sexual contact, its definition, and how the State would have to prove that it occurred for the purpose of sexual gratification or P.B.P's humiliation. (R. 107:13–15.) The Plea Hearing transcript also speaks to Goth's understanding of all the essential elements of the third-degree sexual assault (sexual contact) charge; in fact, he corrected the court when the court said sexual intercourse rather than sexual contact, and an

[7] *State v. Taylor*, 2013 WI 34, ¶ 39, 347 Wis. 2d 30, 829 N.W.2d 482.

Amended Information was filed that day with the relevant definition of sexual contact. (R. 97:7–8.)

Goth argues that there is nothing in the Plea Hearing transcript "that proves that the [last] [A]mended [I]nformation was filed during that hearing." (Goth's Br. 18.) However, Goth's own brief, under the "Statement of the Case and Facts," reads "the second [A]mended [I]nformation, filed during the plea hearing."[8] (Goth's Br. 9.) Regardless, as noted previously, there is evidence that the last Amended Information was filed during Goth's plea hearing and before he entered his plea. (R. 97:12–13; 122:9–10.) The record also supports that Goth saw the last Amended Information before entering his plea. (R. 122:9.) But even if he didn't, the record still supports the circuit court's finding that he was aware of all the elements before pleading guilty. The fact that he heard the definition of sexual contact explicitly recited at his preliminary hearing, and the fact that he corrected the court that he was pleading to sexual contact rather than sexual intercourse during the plea hearing, supports the court's finding that he was aware of the elements. (R. 97:7; 107:14–16.); *See Brown*, 293 Wis. 2d 594, ¶ 19 (noting that this Court accepts the court's findings unless they are clearly erroneous).

Lastly, Goth argues that the fact he "understood [the] difference between sexual contact and sexual intercourse is not affirmative proof that he understood that the [S]tate would have had to prove that he engaged in specific sexual contact for a specific purpose." (Goth's Br. 19.) However, Goth neither develops this argument, nor does he cite to case law in support of his argument. It is black letter law that "[a]rguments unsupported by references to legal authority will not be considered" by this Court. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[8] Goth was referring to the last Amended Information. (R. 64.)

Regardless, the record shows Goth understood the State would have to prove that he engaged in specific sexual contact for the specific purpose of his sexual gratification or P.B.P.'s humiliation. (R. 64; 67; 97; 107.)

"If a defendant does understand the charge and the effects of his plea, he should not be permitted to game the system by taking advantage of judicial mistakes." *Brown*, 293 Wis. 2d 594, ¶ 37. In the past, "[this Court has] not embrace[d] a formalistic application of the *Bangert* requirements that would result in the abjuring of a defendant's representations in open court for insubstantial defects." *State v. Cross*, 2010 WI 70, ¶ 32, 326 Wis. 2d 492, 786 N.W.2d 64. This Court should not start embracing such ideals today.

In summary, the record supports that Goth knowingly, intelligently, and voluntarily entered a guilty plea to the third-degree sexual assault (sexual contact) of P.B.P. The State, therefore, met its clear and convincing evidence burden, and Goth's *Bangert* claim fails. Thus, the circuit court properly exercised its discretion in denying Goth's motion to withdraw his guilty plea and this Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 15th day of July 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,532 words.

Dated this 15th day of July 2024.

Electronically signed by:

Rafael J. Torres
RAFAEL J. TORRES
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of July 2024.

Electronically signed by:

Rafael J. Torres
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Assistant Attorney General