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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The state failed to prove that Mr. Goth's plea was knowingly, intelligently, and voluntarily entered despite the defect in the plea colloquy.

The state now acknowledges that in order to understand the nature of the offense to which he pled, Mr. Goth needed to understand that his alleged sexual contact with the victim was for the purpose of his sexual gratification or the victim's humiliation. It argues, however, that it met its burden of proving that Mr. Goth understood this essential element despite the circuit court's failure to mention it during the plea colloquy. The state's argument—though altered from that made at the postconviction hearing—continues to miss the mark.

First, the state relies on cases involving review of the circuit court's denial of a presentence plea withdrawal claim to imply that the circuit court's denial of Mr. Goth's postconviction motion was a discretionary decision to which this court owes deference. (Response 11, 21). That is plainly not the case. Rather, "[w]hen a defendant establishes a denial of a relevant constitutional right…withdrawal of the plea is a matter of right" and "the trial court reviewing the motion to withdraw…has no discretion in the matter." *State v. Van Camp*, 213 Wis.2d 131, ¶13, 569 N.W.2d 577 (1997).

"When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the

plea as a matter of right because such a plea 'violates fundamental due process.'" *State v. Brown*, 2006 WI 100, ¶19, 293 Wis.2d 594, 716 N.W.2d 906. If the defendant makes a prima facie case, and the state fails to meet its burden of proving that the defendant's plea was knowingly, intelligently, and voluntarily made, the circuit court *must* grant his motion for plea withdrawal; there is no discretion involved. *Id.*, ¶¶36, 39-40. Further, the issue of whether Mr. Goth's plea was knowingly, intelligently, and voluntarily entered is a question of constitutional fact which this court reviews de novo. *Van Camp*, 213 Wis.2d 131, ¶15.

Next, the state asserts that, despite the inadequacy of the plea colloquy, the "record contains ample evidence" of Mr. Goth's knowledge of the offense to which he pled. (Response 12). In support, it states that Mr. Goth must have been aware of the purpose of his sexual contact and points to discussions held at the preliminary hearing and plea hearing, as well as the plea questionnaire and waiver of rights form. The state's reliance on these items falls far short of meeting its burden of proving Mr. Goth's understanding of the offense by clear and convincing evidence.

A. Defendant's "awareness."

Clearly a defendant's supposed awareness "of the purpose for [his] sexual contact," is not sufficient to establish that he was aware of all of the essential elements of the crime to which he pled. (Response 15). The state cites no case that stands for such a

proposition. Further, if that were actually the case, this court would not have stated that, in order to knowingly plead to a sexual assault involving sexual contact, the defendant must know that the state had a duty to prove beyond a reasonable doubt that the contact was 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; *State v. Nichelson*, 220 Wis.2d 214, 225, 582 N.W.2d 460 (Ct. App. 1998).

In other words, it is not simply the purpose of his or her conduct the defendant must be aware of—a fact which itself is often disputed—it is the fact that the state is required to prove that the conduct was engaged in for that purpose. The defendant must know that the state has the burden of proving, beyond a reasonable doubt, that the alleged sexual contact (sometimes simply touching over the clothes) was done for purposes of sexual gratification or humiliation. If the defendant's own "knowledge" of the purpose of his act was sufficient, the purpose of sexual contact would not be an essential element that the court has a duty to ensure the defendant is aware of. *See Id*.

B. Preliminary hearing.

The state's reliance on the discussion at the preliminary hearing to meet its burden is similarly misguided. To begin, the *Bollig*[1] court did not hold that Bollig's attendance at the other act's hearing alone

[1] *State v. Bollig*, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199.

was sufficient to prove that he understood the nature of the offense to which he was pleading. Rather, the court ruled that attendance at the other acts hearing, along with the signed plea questionnaire containing all of the essential elements, was sufficient to prove the defendant's knowledge. *Bollig*, 2000 WI 6, ¶55. As discussed in more detail below, the plea questionnaire does not aid the state in this case. Further, the discussion at the preliminary hearing does nothing to prove Mr. Goth's knowledge of the essential elements of the offense to which he pled at the time he entered his plea.

The preliminary hearing in this case was held on October 6, 2020—nearly two years before Mr. Goth entered his guilty plea on September 14, 2022. (97; 107). Further, at the time of his preliminary hearing, Mr. Goth was charged with sexual assault of a child under 16 years of age. (2:1). As argued by his attorney at the preliminary hearing, that charge required the state to prove "not just the touching of a private or sexual area but also that the touching be done with intent to become sexually aroused or gratified or to sexually degrade or humiliate." (107:14-15). That, however, is not the offense to which Mr. Goth pled. He pled to a completely different charge: third-degree sexual assault involving bodily fluids.

The state must prove by clear and convincing evidence that, at the time of his plea, Mr. Goth understood the essential elements of the offense to which he pled. Specifically, that he understood that the state had the burden of proving beyond a

reasonable doubt that he either intentionally ejaculated or emitted urine or feces on the victim, or caused the victim to do the same to him, and did so with intent to become sexually aroused or gratified or to sexually degrade or humiliate the victim. *See* WIS JI-CRIMINAL 1218B. His knowledge (if any) of the elements of sexual assault of a child two years prior does not establish his knowledge of the essential elements of third-degree sexual assault involving bodily fluids at the time of his plea. To begin, the alleged contact was different–touching versus bodily fluids. But even putting that aside, the state has presented no affirmative evidence demonstrating that Mr. Goth would have known that the same definition of sexual contact applied to both offenses, that he would have remembered that brief discussion between the attorneys two years prior, or that he even understood that concept to begin with.

The transcript of the preliminary hearing does not reflect Mr. Goth's knowledge at the time—it reflects that of his attorney. Mr. Goth was appearing by Zoom from the jail during the preliminary hearing and the record reflects that there was difficulty with the technology—the video froze and cut out on at least one occasion. (107:2-3). More importantly, at no point did the court or attorneys explain sexual contact to Mr. Goth or confirm his understanding of it. *See State v. Bangert*, 131 Wis.2d 246, 269, 389 N.W.2d 12 (1986)("it is not enough merely to inform the defendant or point to a portion of the transcript or other evidence which indicates that the defendant possesses knowledge of the nature of the charge; the

court must also ascertain the defendant's understanding of that information."). The discussion on which the state relies is an argument between the attorneys. The state, however, is required to prove Mr. Goth's knowledge of the essential elements, not that of his attorney. Mr. Goth did not express an understanding of sexual contact during the preliminary hearing or at any other point during the proceedings in this case.

C. Plea hearing & questionnaire.

Finally, the state points to the transcript of the plea hearing and the plea questionnaire to support its claim that Mr. Goth's plea was knowingly, intelligently, and voluntarily entered. In doing so, it misrepresents and ignores key facts, and again misstates the standard of review this court is to apply.

Contrary to the state's assertion, Mr. Goth did not have a copy of the second amended information—reflecting the correct charge—before entering his plea. Nor did the circuit court make such a finding. To the contrary, the record on the matter is clear. While the state e-filed the second amended information during the plea hearing, neither Mr. Goth nor his attorney had seen it prior to the court accepting Mr. Goth's guilty plea.

The second amended information had not yet been filed when the circuit court discussed the elements of the offense with Mr. Goth and his attorney:

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. 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. and you had that sexual contact without P.P.B.'s consent. Do you understand that?

THE DEFENDANT: Yes, ma'am.

...

THE COURT: And then did you also explain to him the elements of the offense?

MR. MURPHY: I did, Your Honor.

THE COURT: And you explained to him the elements of the offense as if he was charged under 940.225(3)(b); is that correct?

MR. MURPHY: That's correct, Judge.

THE COURT: And Mr. Goulart ***is going to be filing*** an Amended Information that would change it to a violation of

> subsection--or of 340.225(3)(b); is that correct?
>
> MR. MURPHY: Yes, Judge.

(97:8-9)(***emphasis added***). In fact, the record shows that it wasn't filed until just prior to Mr. Goth pleading guilty:

> THE COURT: And I've had an opportunity to review the Criminal Complaint, and I do believe it sets forth a basis upon which I could receive the plea. Do we have the Amended Information, Mr. Goulart?
>
> MR. GOULART: ***I am just about to sign and send.***
>
> THE COURT: Just wait for a second.
>
> MR. GOULART: ***I just sent it***.
>
> THE COURT: Okay.
>
> MR. MURPHY: Judge, ***the defense is willing to proceed on the representation from the state 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

> state 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?
>
> THE DEFENDANT: Guilty.

(97:12-13)(***emphasis added***). This exchange demonstrates that neither Mr. Goth, nor his attorney, had received the second amended information during the plea hearing. The state indicated that it had just e-filed the document and the court then immediately proceeded to take a plea and find Mr. Goth guilty.[2] (97:13).

As the record indicates that Mr. Goth had not seen the second amended information prior to entering his plea, the state's reliance on that document to prove Mr. Goth's understanding of the essential elements of the offense fails. As does its reliance on the circuit court's exchange with Attorney Murphy and the plea questionnaire and waiver of rights form.[3]

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[2] The prosecutor's assertion during the postconviction hearing that a recess was taken in order to "pull through" the second amended information is not reflected in the record and the circuit court did not make a factual finding that such a recess occurred.

[3] The state also seems to rely on the court's admittedly deficient plea colloquy to meet its burden. (Response 17-19). This is puzzling. The state fails to explain how Mr. Goth's

Attorney Murphy's exchange with the circuit court during the plea colloquy does not "reinforce[] that Goth was fully aware of the Amended Information and its contents." (Response 16). Attorney Murphy did nothing more than advise the court that he had gone over the elements of third-degree sexual assault involving sexual contact, with Mr. Goth. (97:9-10). He did not tell the court that he had gone over the second amended information with Mr. Goth, nor did he state on the record the specific elements that he discussed with Mr. Goth. This is important because the plea questionnaire and waiver of rights form did not contain all essential elements of the offense.

Attorney Murphy only listed two elements on the plea questionnaire: sexual contact with the victim and victim did not consent. (67:1). Though the state seems to ignore this fact, notably absent from the plea questionnaire is anything about the fact that the state would have to prove that Mr. Goth intentionally ejaculated or emitted urine or feces on the victim, or caused the victim to do the same to him, and did so with intent to become sexually aroused or gratified or to sexually degrade or humiliate the victim. This is the same essential element that the circuit court failed to discuss in its colloquy and that Mr. Goth affirmatively asserted he had no knowledge of.

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confirmation that he understood the two elements provided by the court, and stipulation to a factual basis, prove his knowledge of the missing element.

"*Bangert* requires verification, independent of defense counsel's assertion, that a defendant understands the nature of the charges." *Brown*, 2006 WI 100, ¶56. More specifically, it "requires a circuit court to summarize the elements of the offenses, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." *Id*. Attorney Murphy did not summarize the elements of the offense that he provided to Mr. Goth during the plea hearing, and the document he had Mr. Goth sign omitted the essential element at issue here. Neither the circuit court's colloquy with Attorney Murphy, nor the plea questionnaire, prove by clear and convincing evidence that Mr. Goth had the necessary understanding of the offense to which he pled.

Attorney Murphy's explanation at the plea hearing does not "substantiate Goth's understanding of all the essential elements of the crime he was pleading to." (Response 19). Nowhere in the exchange, or on the document signed by Mr. Goth, did Attorney Murphy assert that he had informed Mr. Goth of the specific acts and purpose of sexual contact the state would have to prove to convict him of the offense to which he was pleading. Thus, this court would not have to assume that either Attorney Murphy or Mr. Goth misrepresented anything in order to find that Mr. Goth did not possess the required knowledge. (*See* Response 19). Neither ever asserted that this information had been discussed.

Finally, both the circuit court and the state rely heavily on Mr. Goth's interruption and correction of the charge as proof of his understanding. This is perplexing. It requires no legal knowledge to possess an understanding that intercourse is different than contact. That is simply common sense. Contact is merely touching, while intercourse involves penetration. Certainly, any defendant would know whether the court was incorrectly stating that he was being charged with penetration and would want to correct such a misstatement. The state fails to explain how Mr. Goth's knowledge of this basic distinction establishes that he knew the state was required to prove that he intentionally ejaculated or emitted urine or feces on the victim, or had the victim do so to him, for the purposes of gratification or humiliation, in order to convict him of the crime to which he pled.

Mr. Goth's interaction with the circuit court does not establish his understanding of the charge. Yes, he understood that he was pleading to a charge involving contact instead of intercourse, but the record discloses nothing to support a finding that he understood the meaning or importance of that term in relation to his plea—that the state bore the burden of proving that he committed specific acts of sexual contact (ejaculation or emitting urine or feces) for the purpose of gratification or humiliation.

"[K]knowledge, like understanding, cannot be inferred or assumed on a silent record." *Bangert*, 131 Wis.2d 246, 269. It is well-settled that "it is no longer sufficient for a trial judge merely to

perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant that he understands the nature of the offense, with an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the requirement of Section 971.08, Stats." *Id*. at 268-269. At no time was Mr. Goth informed of all of the essential elements of the offense to which he pled, nor did he ever express his knowledge of those elements.

As Mr. Goth met his two burdens, the "burden of producing persuasive evidence" shifted to the state. *Brown*, 2006 WI 100, ¶40. It was required to meet this burden by "providing affirmative evidence that [Mr. Goth's] plea was voluntarily, knowingly, and intelligently entered." *Nichelson*, 220 Wis.2d at 223. As set forth above, the state's reliance on the record to meet its burden fell far short. Mr. Goth, therefore, is entitled to plea withdrawal as a matter of right.

CONCLUSION

For the reasons stated above, as well as those in the initial brief, 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 grants his motion for plea withdrawal.

Dated this 30th day of July, 2024.

Respectfully submitted,

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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 2,995 words.

Dated this 30th day of July, 2024.

Signed:
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