STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

STATE OF WISCONSIN,

Plaintiff - Respondent,

vs.

Appeal No. 17AP940 CR

LARON HENRY,

Defendant - Appellant.

BRIEF AND APPENDIX OF APPELLANT/DEFENDANT

ON APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JANET PROTASIEWICZ PRESIDING

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II. **Whether the Circuit Court erred when it determined that there was a factual basis for Henry's plea because the prosecution never filed a criminal complaint for the intimidation of a witness charge and Henry's answers to the plea colloquy were insufficient to establish a factual basis;**

III. **Whether the Circuit Court erred in denying Henry's request for a *Bangert* hearing because Henry made a *prima facie* showing that he did not understand that malicious intent was a necessary element to the intimidation of a witness charge.**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Henry submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of record.

STATEMENT OF THE CASE

Procedural History

On May 22, 2015, the State of Wisconsin filed a criminal complaint in Milwaukee County Circuit Court case number 15-CF-2272 charging Laron Henry with three felonies and five misdemeanors. App 1. The three felony counts included two counts of strangulation and suffocation and one count of false imprisonment. *Id.* The five misdemeanor charges included two counts of battery, two counts of disorderly conduct, and one count of bail jumping. *Id.* About ten months later, in March 2016, the State filed

a criminal complaint in Milwaukee County Circuit Court case number 16-CF-1161 charging Mr. Henry with one count of felony bail jumping based on his failure to appear for a court date in 15-CF-2272. App 8. The cases were then joined, and the trial began on August 1, 2016. On August 2, 2017, the prosecution added the charge of intimidation of a witness under Wis. Stat. § 940.43(7) (2015-16). App 10.

On August 2, 2017, Henry entered a change of plea. He entered a guilty plea to the charges of intimidation of a witness under Wis. State § 940.43(7), one count of battery under 940.19(1), and bail jumping under Wis. Stat. § 946.49. App 36. The Circuit Court dismissed and read in all of the remaining charges in the two cases. App 35.

On April 27, 2017, Henry filed a post-conviction motion in the Circuit Court to withdraw the guilty plea. App 19. Henry argued that there was a manifest injustice because 1) he failed to ratify his plea, 2) there was no factual basis for a plea, and 3) he requested a *Bangert* hearing on the basis that he did not understand what the elements to intimidation of a witness were. App 19-21. In an order dated May 2, 2017, the Circuit Court denied Henry's post-conviction motion. *Id.* Henry now appeals the Circuit Court's May 2, 2017 Decision and Order on all three issues.

Factual Background

At the outset of the second day of trial, the prosecutor informed the Circuit Court that the parties had reached a plea agreement based on new developments in the case that arose the previous night:

> The Prosecutor: Also, further developments, last night detective -- I guess this morning, actually, Detective Emanuelson listened to some jail calls that Mr. Henry placed last night. In several

> of the -- it's a series of calls. In one of them, Mr. Henry is explaining to a third party what happened in court, says if they don't come back tomorrow the whole case will be dismissed. He asked that person to contact -I believe he uses the term "them." But then you hear on the jail call this third party get on speakerphone and speak to Ms. Turpin essentially relaying that to them, saying if you guys don't come back to court tomorrow the whole case will be dismissed. Ms. Turpin explains that they are worried about potential body attachments and her mother's probation status. But that person does relay Mr. Henry's thought, and along with that thought, wish that they not come back to court today. So based on that, I made a new offer to defense counsel this morning to plead to one count of felony bail jumping as charged in 16-CF-1161; an additional count on that case, I have amended information for felony intimidation of a witness with a domestic abuse assessment, and one of the battery counts in the 15-CF case as a repeater. At sentencing both sides would be free to argue. It's my understanding that Mr. Henry wishes to accept that offer.

App 26-27.

During the plea colloquy, the following exchange between Henry and the Circuit Court occurred.

The Court:	Sir, did you read the criminal complaints and go through the informations in your cases?
The Defendant:	Yes.
The Court:	Are the facts stated in those complaints true?
The Defendant:	Yes.
. . . .	
The Court:	What did you do last night that was the felony intimidation, sir?

The Defendant:	Made a call to somebody and they made a call to somebody else.
The Court:	And was that call -- were you making those phone calls with the attempts and hopes that the witnesses wouldn't show up for court today?
The Defendant:	No. (Additional unintelligible speaking).
The Court:	Pardon?
The Defendant:	No.
The Court:	Well, what were you doing that was the crime? You can make phone calls.
The Defendant:	Talking to - basically talking [sic] third party.
The Court:	Were you talking to the third party that the case would stop if the witnesses didn't show up?
The Defendant:	Yes.

App 38-40.

Henry later testified, in the affidavit attached to his motion for post-conviction relief, that at the time he entered his plea he did not in fact know that the State was required to prove the mental state element of the intimidation of a witness offense.

Following this exchange with Henry, the Court questioned defense counsel regarding the factual basis for Henry's plea:

The Court:	All right, sir. Counsel, are you satisfied that there's a factual basis for each plea?
Mr. Canfield:	Yes, Judge.
The Court:	May I use the complaints for the bases?
Mr. Canfield:	Yes.
The Court:	The Court will find that Mr. Henry is entering each plea freely, voluntarily, and intelligently. I find that he understands the charges, the maximum possible penalties, and all of the rights he is giving up. I find there's a factual basis for each plea and I will accept the pleas.

Plea Hearing Transcript, p. 18.

Despite the court and defense counsel's references to a criminal complaint, the State never filed an amended criminal complaint that included the intimidation of a witness charge.

After accepting Mr. Henry's plea, the Court imposed the maximum sentence of nine years of initial confinement followed by eight years of extended supervision. App 51.

Disposition of the Trial Court

In a Decision and Order dated May 2, 2017, the Circuit Court denied Henry's post-conviction motion. App 19.

ARGUMENT

I. The Circuit Court erred in when it determined that Henry personally ratified his plea because Henry never admitted and expressly denied a necessary element to the intimidation of a witness charge.

Laron Henry should be allowed to withdraw his guilty pleas because he failed to personally enter or ratify his guilty plea to felony intimidation of a witness, which is a manifest injustice that can only be remedied by allowing Henry to withdraw his pleas. *See State v. Thomas*, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. The decision whether to allow a defendant to withdraw a guilty plea is generally within the sound discretion of the trial court. *Thomas*, Wis. 2d at 716. However, when a defendant is denied a constitutional right relevant to the plea proceedings, he is entitled to withdraw his plea as a matter of right; in such a case, the trial court ruling on the motion to withdraw has no discretion to deny the motion. *State v. Cain*, 2012 WI 68, ¶21, 342 Wis. 2d 1, 816 N.W.2d

177. The legal standard that applies to a motion to withdraw a guilty plea depends on whether the motion is brought before sentencing or after. *Id.* at 14. A defendant who seeks to withdraw a guilty plea after sentencing—as Henry does here—bears the burden to establish by clear and convincing evidence that withdrawal of the plea is necessary to correct a "manifest injustice." *Thomas*, 232 Wis. 2d at 726.

Wisconsin appellate courts have identified a number of situations that lead to a manifest injustice if the defendant is not allowed to withdraw his plea after sentencing, including situations where the defendant did not personally enter or ratify the plea.[1] *Cain*, 342 Wis. 2d at 19 n. 7. A defendant's personal ratification of a plea is lacking when the defendant denies at the plea hearing that his conduct constituted commission of the crime to which he is pleading guilty. *See Cain*, 342 Wis. 2d at 19 n. 7. In evaluating a motion to withdraw premised on a claim that the defendant failure to personally enter or ratify a plea, the presiding court may consider the entire record of the proceedings, not just the plea hearing record. *Cain*, 342 Wis. 2d at 19-21. This is because "the issue is no longer whether the . . . plea should have been accepted" but rather whether withdrawal of the plea is necessary to correct a manifest injustice. *State v. White*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978); *Cain*, 342 Wis. 2d at 20. Thus, for example, the court may consider

[1] Examples of situations that Wisconsin courts have found to result in a manifest injustice include situations where the defendant was provided ineffective assistance of counsel, the plea was involuntary, or the prosecutor failed to fulfill the plea agreement. *Cain*, 342 Wis. 2d at 17, *citing State v. Daley*, 2006 WI App 81, ¶ 20, n. 3, 293 Wis. 2d 594, 716 N.W.2d 906.

statements made by the defendant and defense counsel at the sentencing hearing alongside statements made at the plea hearing. *See e.g., Thomas,* 232 Wis. 2d at 730.

In this case, Henry did not personally ratify his plea to the felony intimidation of a witness charge. Instead, during his plea colloquy with the Court, Henry denied that his conduct satisfied the mental state element of the crime. Under Wis. Stat. § 940.42-43, the crime of felony intimidation of a witness has four elements: (1) knowingly and maliciously (2) prevents or dissuades, or attempts to prevent or dissuade (3) any witness from attending or giving testimony at a trial, proceeding, or inquiry (4) in a criminal case involving a felony charge. *See* Wis. Stat. § 940.42-43. Henry admitted to contacting potential witnesses through a third party, but he denied that he did so with malicious intent.

The Court:	And was that call -- were you making those phone calls with the attempts and hopes that the witnesses wouldn't show up for court today?
The Defendant:	No. (Additional unintelligible speaking).
The Court:	Pardon?
The Defendant:	No.
The Court:	Well, what were you doing that was the crime? You can make phone calls.
The Defendant:	Talking to - basically talking [sic] third party.
The Court:	Were you talking to the third party that the case would stop if the witnesses didn't show up?
The Defendant:	Yes.

App 39-40.

The Circuit Court's first question above asks specifically about the mental state element of the offense, and Henry responded by denying guilt; he refused to admit that

he acted with the requisite mental state. In contrast, Henry answered yes to the court's last question, but that question was not about the mental state element of the crime. By answering yes to the Circuit Court's last question, Henry admitted that he was the person who made the statements on the recordings, not that he did so with a malicious intent. Because Henry denied that his conduct satisfied all the elements of intimidation of a witness under Wis. Stat. § 940.43(7), he failed to personally ratify his guilty plea to that charge. *See Cain*, 342 Wis. 2d at 19 n.7. As a result, the Circuit Court erred in accepting the plea. *See Id.* Moreover, although the Circuit Court's review of the record is not limited to the plea hearing, nothing that was said at the sentencing hearing is relevant to the question of whether Henry personally ratified his plea. *Cf. Cain*, 342 Wis. 2d at 22; *Thomas*, 232 Wis. 2d 731. Henry's only statement on the record regarding the State's allegations that he acted maliciously was a flat-out denial of guilt.

In addition, Henry's answers to the plea colloquy indicated that he believed the criminal act he was admitting to was simply making the phone calls to the third party, not that he had malicious intent. For example, when the court asked Henry "What'd you do last night that was felony intimidation, sir?" Henry responded by saying "Made a phone call to somebody and they made a call to somebody else." App 39-40. Further, when the court asked Henry if he was making the phone calls in an attempt to dissuade the witness from showing up at court Henry said "No." *Id.* Finally, when the court specifically asked Henry what the crime was that he committed, Henry responded that the crime was "[t]alking to - basically talking third party." *Id.* All of Henry's responses demonstrate that he was only admitting to talking to an outside party, not that he had

the intention of preventing or dissuading the party from attending court. In fact, nowhere in the record is there any indication that Henry admitted to the malicious intent element of the offense.

In denying Henry's post-conviction motion, the Circuit Court relied entirely on Henry's responses to the plea colloquy. App 20-21. Specifically, the Circuit Court relied on the question and answer where the court asked "Were you talking to the third party [sic] that the case would stop if the witnesses didn't show up?" and Henry answered "Yes." App 21. The Circuit Court directly inferred from this sentence that Henry admitted to the malicious intent element of the offense. *Id.* The court reasoned that Henry's affirmative response "confirmed that [Henry] contacted the third party *so that* the case would stop if the witness did not show up." *Id.* (emphasis added)

However, the Circuit Court's reasoning here is flawed. Nothing in Henry's response to the Circuit Court's question implies that he contacted the third party for the purpose of dissuading the witness from attending the hearing. In fact, when directly confronted with the question "And was that call - were you making those phone calls with the attempts and hopes that the witnesses wouldn't show up for court today?" Henry responded "No." App 40. The court mistakenly concluded that the question Henry affirmatively responded to was materially indistinguishable from the question Henry denied. App 21. In fact, the former question explicitly asked about Henry's intent, while the latter question did not. The latter question did not say anything about Henry's purpose for making the phone calls. Therefore, nowhere in the plea colloquy did Henry

admit that he had malicious intent while making the phone calls and he did not ratify an essential element of the offense.

II. The Circuit Court erred when it determined that there was a factual basis for Henry's plea because the prosecution never filed a criminal complaint for the intimidation of a witness charge and Henry's answers to the plea colloquy were insufficient to establish a factual basis.

Under Wis. Stat. § 971.08(1)(b), a circuit court presiding over a plea hearing must make a determination on the record that the conduct to which the defendant admits constitutes the offense to which the defendant is pleading. *Id.* ¶17. In *Thomas*, the Wisconsin Supreme Court considered the extent to which a "defendant must admit the facts of a crime charged in order to accept the factual basis underlying a guilty plea." *Id.* ¶18. The court concluded that "a defendant does not need to admit to the factual basis in his or her own words; defense counsel's statements suffice." *Id.* When a defendant or his attorney stipulates to the facts in a criminal complaint, the trial court may rely on the complaint as a factual basis for the defendant's plea, as long as the criminal complaint alleges sufficient facts to establish probable cause that the defendant committed the crime(s) to which he is pleading. *State v. Payette*, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423; *Thomas*, 232 Wis. 2d at ¶18.

In this case, the Court failed to establish a sufficient factual record to support Henry's plea to felony intimidation of a witness because neither Henry nor his attorney admitted or stipulated to the conduct that the Court relied upon to find a factual basis for the plea. At the plea hearing, defense counsel agreed to stipulate to the facts stated in the criminal complaint as a factual basis for the plea, and the Court appears to have relied on

the criminal complaint in finding a sufficient factual basis existed. App 41. However, the State never filed an amended criminal complaint, it only filed an amended information that included the intimidation of a witness charge. *See* App 11.

The Court:	Counsel, are you satisfied that there's a factual basis for each plea?
Mr. Canfield:	Yes, Judge.
The Court:	May I use the complaints for the bases?
Mr. Canfield:	Yes.
The Court:	The Court will find that Mr. Henry is entering each plea freely, voluntarily, and intelligently. I find that he understands the charges, the maximum possible penalties, and all of the rights he is giving up. I find there's a factual basis for each plea and I will accept the pleas.

App 41.

Here, there was no criminal complaint, so defense counsel's stipulation to the facts stated in the complaint as a factual basis for Henry's plea was not a valid stipulation. *State v. Howell*, 2007 WI 75, ¶ 62, 301 Wis. 2d 350, 734 N.W.2d 48 ("Because the complaint was not amended to reflect party-to-a-crime liability . . . defense counsel's stipulation to the factual basis in the complaint is insufficient to fulfill the circuit court's duty to personally ascertain that a factual basis exists for the crime charge.") Likewise, the Court's reliance on the complaint as a factual basis for the plea was clearly erroneous. *Id.*

In its order denying Henry's post-conviction motion, the Circuit Court wholly relied Henry's statements during the plea colloquy. App 21. The Circuit Court said, "The defendant's statements on the record during the plea colloquy were sufficient to establish a factual basis for the intimidation charge. *Id.* The Circuit Court gave no further

explanation as to why it felt that Henry's testimony was sufficient to establish a basis for the elements of the crime. *Id.*

However, the Circuit Court's assertion is flawed because during the plea colloquy Henry never admitted and expressly denied attempting to dissuade anyone from attending court. App 40-41. Although Henry admitted to making phone calls to a third party, he never gave any indication that his purpose was to dissuade the person or anyone else from coming to court. In fact, the record fails to provide any facts to establish the malicious intent element of the charge, and therefore there was no factual basis for the plea.

In sum, neither Mr. Henry nor his attorney ever admitted or stipulated to a valid factual basis upon which the Court could appropriately rely in accepting Henry's guilty pleas. As a result, no factual basis was established, and a manifest injustice will continue to exist if Mr. Henry is not allowed to withdraw his guilty plea. Therefore, this Court should reverse the decision of the Circuit Court.

III. The Circuit Court erred in denying Henry's request for a *Bangert* hearing because Henry made a *prima facie* showing that he did not understand that malicious intent was a necessary element to the intimidation of a witness charge.

A circuit court presiding over a plea hearing must fulfill the duties imposed by Wis. Stat. § 971.08(1) prior to accepting the defendant's plea. One requirement in section 971.08(1) the duty to establish the defendant's understanding of the nature of the crime(s) to which the defendant is pleading guilty. Wis. Stat. § 971.08(1)(a). A defendant's claim that the court failed to satisfy its obligations under section 971.08(a)(1) is governed by

State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) and its progeny. Under *Bangert*, a defendant is entitled to an evidentiary hearing to determine the voluntariness of his plea if the defendant files a motion for postconviction relief that: "(1) makes a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) alleges that the defendant did not know or understand the information that should have been provided." *State v. Brown*, 2006 WI 100, ¶ 39, 293 Wis. 2d 594, 716 N.W.2d 906. When the defendant files a motion that satisfies these two criteria, the burden shifts to the State to prove at the evidentiary hearing that the defendant's plea was knowing and voluntary. *Bangert*, 131 Wis. 2d at 274.

In this case, the Circuit Court failed to satisfy its duty to establish Henry's understanding of the nature of the intimidation of a witness charge. Toward the beginning of the plea colloquy, the Circuit Court inquired into Henry's understanding of the nature of the charges to which he was pleading guilty by asking questions formulated to elicit one-word responses of yes or no.

The Court:	Your attorney has provided me with the jury instructions for battery along with the jury instructions for bail jumping and the jury instructions for intimidation of a witness. Those jury instructions have the elements the State would be required to prove in order to convict you. Did you go over those jury instructions with your attorney?
The Defendant:	Yes.
The Court:	Do you understand them?
The Defendant:	Yes.
The Court:	Do you have any questions about them?
The Defendant:	No.

App 34.

Although Henry's responded to the Court's yes or no questions by indicating that he did understand the nature of the charges, the Wisconsin Supreme Court has explained that "[a] defendant's mere affirmative response that he understands the nature of the charge, without establishing his knowledge of the nature of the charge, submits more to a perfunctory procedure rather than to the constitutional standard that a plea be affirmatively shown to be voluntarily and intelligently made." *Howell*, 301 Wis. 2d at 364, *quoting Bangert*, 131 Wis. 2d at 255. Consistent with this directive, the Court revisited the issue of Henry's understanding of the nature of the charges with open ended questions that invited Henry to demonstrate that he understood what he was admitting to have done toward the end of the plea hearing:

The Court:	And was that call -- were you making those phone calls with the attempts and hopes that the witnesses wouldn't show up for court today?
The Defendant:	No. (Additional unintelligible speaking).
The Court:	Pardon?
The Defendant:	No.
The Court:	Well, what were you doing that was the crime? You can make phone calls.
The Defendant:	Talking to - basically talking [sic] third party.
The Court:	Were you talking to the third party that [sic] the case would stop if the witnesses didn't show up?
The Defendant:	Yes.

App 39-40.

Henry's responses to the Court's questions above demonstrate that the Court did not adequately establish that Henry understood the nature of the charge of intimidation

of a witness, namely that the crime includes a mental state element. That is, Henry's responses evidence his belief that he could be convicted of intimidation of a witness for simply providing information to the potential witnesses through a third party, regardless of his reasons for doing so. That belief directly contradicts the statutory requirement that the State prove the mental state beyond a reasonable doubt. Upon hearing Henry's answers, the Circuit Court should have inquired further into Henry's understanding of the elements of intimidation of a witness by personally going over each element of the offense with Henry to ensure that he was entering his plea with an accurate understanding of the nature of the charge. By failing to provide Henry with an explanation of each element of the offense following Henry's denial of guilt, the Circuit Court failed to satisfy its duty under Wis. Stat. § 971.08 to "address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge."

Moreover, as Henry averred in requesting a *Bangert* hearing, at the time he entered his plea he did not in fact know that the State was required to prove the mental state element of the offense. As such, Henry did not know or understand the information that the Circuit Court should have provided prior to accepting Henry's plea: that a conviction for intimidation of a witness would require proof that Henry acted maliciously. Therefore, Mr. Henry has made a *prima facie* showing of the elements in *Bangert*, and is therefore entitled to a *Bangert* hearing for further inquiry. *See Bangert*, 131 Wis. 2d at 274.

CONCLUSION

For the foregoing reasons, Laron Henry respectfully requests that this Court REVERSE the Circuit Court's May 2, 2017 Decision and Order, and REMAND the case to the Circuit Court for further proceedings consistent with this Court's decision.

Dated this 14th day of September, 2017.

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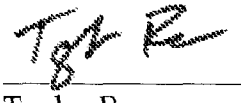
CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 4,256 words. See WIS. STAT. § 809.19(8)(c).

Taylor Rens

CERTIFICATION OF COMPLIANCE WITH RULE 809.19

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 the opposing party.



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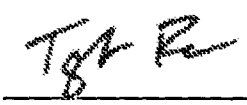

Taylor Rens

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decisions 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with annotation that the portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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