STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

STATE OF WISCONSIN,

Plaintiff - Respondent,

vs.

Appeal No. 17AP940 CR

17AP939-CR

LARON HENRY,

Defendant - Appellant.

REPLY BRIEF OF APPELLANT/DEFENDANT

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

Respectfully Submitted this 20th day of December, 2017

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ARGUMENT

In its brief, the State seems to misunderstand the nature of Henry's arguments in this case. *See generally* Sate's Br. To be clear, Henry is arguing that: (1) There was not a sufficient factual basis for the plea; (2) During the plea colloquy Henry expressly denied that he attempted to convince any witness from coming to court and therefore did not ratify the plea; and (3) Henry's denial of attempting to convince witnesses not to come to court implies that Henry did not understand the knowing and malicious or dissuasion elements of the offense. If Henry failed to ratify his plea or if there was an insufficient factual basis for the plea, then "manifest injustice" exists and the United States Constitution compels this Court to reverse the decision of the circuit court and allow Henry to withdraw his plea. *See State v. Cain*, 2012 WI 68, ¶ 26, 342 Wis. 2d 1, 816 N.W.2d 177 (ratification); and *see State v. Thomas*, 2000 WI 13, ¶¶ 14-18, 232 Wis. 2d 714, 605 N.W.2d 836 (factual basis). If Henry established a *prima facie* showing that he did not understand elements of the offense, then he is entitled to an evidentiary hearing before the circuit court to determine whether the plea was entered into voluntarily. *See State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

I. A manifest injustice exists because there was an insufficient factual basis for Henry's plea.

The State's argument that the prosecutor's summary of the allegations at the plea and sentencing hearings provided a factual basis is plainly wrong. *See* State's

Br. 16; *Thomas*, 2000 WI 13, ¶ 17. Henry's argument that there was an insufficient factual basis for his plea is premised on the rule that "if a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, a manifest injustice has occurred." *See* Brief of Appellant, p. 13; *Thomas*, 2000 WI 13, ¶ 17. The State is correct in pointing out that the Court may look to the entirety of the record to find a factual basis to support the plea. *Id.* However, the Court may only use facts in the record "that the defendant admits constitutes the offense pleaded to." *See id.* Here, the only facts that either the defendant or his attorney admitted to were those admitted in the plea colloquy. Although defense counsel did agree that the court could use the criminal complaint to establish a factual basis, no criminal complaint was filed for the intimidation of a witness charge, so defense counsel's stipulation to the factual allegations in the complaint was not a valid stipulation. *State v. Howell*, 2007 WI 75, ¶ 62, 301 Wis. 2d 350, 734 N.W.2d 48. Moreover, neither Henry nor his attorney ever consented to the court using the prosecutor's recitation of the facts at either the plea hearing or sentencing hearing as a factual basis for the plea. Therefore, the prosecutor's summary of the allegations at the plea and sentencing hearings did not provide a factual basis for the plea.

II. A manifest injustice exists because Hanry failed to personally ratify his plea.

The most crucial fact in this case is that when Henry was expressly asked whether he made the phone calls "with the attempts and hopes that the witnesses wouldn't show up for court" he unequivocally stated, "No." App. 40. Henry's answer was the only time in the lower court proceedings that Henry was asked to state on the record whether his conduct met the "knowing and malicious" and dissuasion elements of the offense.

The State does not develop an argument in response to Henry's claim that he refused to ratify his plea by refusing to admit that his conduct satisfied each element of felony intimidation of a witness. Absent from the State's brief is the word "ratify," or any variation of it. Instead, most of the State's argument is based on whether Henry understood the elements of the offense. State's Br. 11-14. However, whether Henry understood the elements is irrelevant to the question of whether Henry personally ratified his plea. Even if the defendant understands the charge, a court may not accept a plea if the defendant refuses to personally ratify his plea by denying an element of the offense. *See Cain*, 2012 WI 68, ¶¶ 36-37.

The rest of the State's response to Henry's ratification argument seems to be focused on whether Henry actually committed the underlying offense. *See* State's Br. 14-15. Yet whether Henry committed the offense is irrelevant to determining

whether Henry ratified his plea. The question in this case is whether Henry *admitted* that his conduct met the elements of the offense, not whether the conduct in fact met the elements of the offense. Regardless of the apparent strength of a case against a defendant, a court may not accept a plea when the defendant refuses to personally ratify his plea by denying an element of the offense. *Cain*, 2012 WI 68, ¶¶ 36-37. This makes sense because a conviction obtained via a guilty plea is based on the defendant's admission that he committed the criminal act, not a finding of guilt by a neutral fact-finder based on an assessment of evidence after it has been tested by the adversarial process at trial. The State attempts to paint the picture that the allegations against Henry provide overwhelming evidence of guilt. In reality, the allegations are entirely untested and therefore do not support the State's position before this Court.

The only relevant questions here are: (1) Did Henry deny that he knowing and maliciously attempted to dissuade or prevent a witness from appearing in court; and (2) If so, did he later recant that denial. The answer to each question is straightforward. First, when asked whether he acted with the required mental state Henry answered "No." The circuit court never asked Henry or his attorney another question regarding the purpose of Henry's phone call. The closest the court came was when it asked "[w]ere you talking to the third-party that the case would stop if the witness didn't show up?" App. 40. However, that question only

goes to the contents of the phone call and not to the purpose of the call. Ultimately, Henry refused to admit that the purpose of the phone call was to knowingly attempt to dissuade the witnesses from coming to court and therefore never ratified his plea.

III. Henry made a *prima facie* showing that he did not understand the elements of felony intimidation of a witness under Wis. Stat. § 940.43(7) and therefore was entitled to a *Bangert* hearing.

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

The State essentially advances two reasons why Henry failed to make the necessary *prima facie* showing that would entitle him to an evidentiary hearing under *Bangert*. State's Br. 17-19. First, "Henry and his attorney went over the plea questionnaire and attached pattern jury instructions listing and describing those elements." *Id.* at 17-18. Second, "[b]oth Henry and his attorney assured the court during the plea colloquy that they discussed those elements and Henry understood them." *Id.* at 18.

Both reasons fail. This is an unusual case. Laron Henry was charged, plead guilty to, and was sentenced for felony intimidation of a witness all before 11:15 a.m. on August 2, 2016. Relative to the usual case, Henry's decision to plead guilty was rushed and the time he had to consult with his attorney about his decision was limited. While it is true that Henry and his attorney told the circuit court that they reviewed the plea questionnaire and jury instructions and provided assurances that Henry understood those elements, even the circuit court was unwilling to accept these claims at face value. Instead, the circuit court attempted to confirm Henry's claim that he understood the charges by asking him to explain the crimes he committed in his own words. App 38-39. Henry was able to convey and accurate understanding of the bail jumping and battery charges. App 39-41. In contrast, his attempt to explain the intimidation of a witness charge demonstrated that he did not understand the offense. When asked, "What'd you do last night that was the felony intimidation?" Henry replied, "Made a call to somebody and they made a call to somebody else." App 39-40. Apparently unsatisfied with Henry's answer, the court followed up by asking whether he made the phone calls "with the attempts and hopes that the witnesses wouldn't show up for court." Henry responded, "No." App 40. This answer was an express denial that his actions satisfied the dissuasion and mental state elements of the crime. The court then asked, "Were you talking to the third party that the case

would stop if the witness didn't show up?" *Id.* Henry answered, "Yes." *Id.* However, the court's final question asked Henry about what he said, not why he said it. Yet Henry's guilt hinged on his reason for making the statements, not their contents. Thus, Henry's admission that he told the third party that the cases would stop if the witnesses did not come to court was not a retraction of his denial that he made the statements for the purpose of dissuading the witnesses from coming to court. In short, Henry's answers to the two questions were consistent.

Henry's outright denial that his purpose in making the phone calls was to convince the witnesses not to come to court negated his earlier claim that he understood the elements of intimidation of a witness. The plea colloquy would have been sufficient under Wis. Stat. § 971.08 if Henry never contradicted his original responses when asked to explain the criminal acts he committed. However, when Henry denied that he made the phone calls in an attempt to dissuade a witness from appearing in court, the veracity of all of his previous answers became suspect. The court's single follow up question to Henry's denial of the element was insufficient to correct the inconsistency in the colloquy. At this point one is left guessing at the accuracy of Henry's testimony during the colloquy. The purpose of a *Bangert* evidentiary hearing is to solve these exact situations - where the record is unclear on whether the plea was entered into voluntarily.

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.

Respectfully Submitted this 20th day of December 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 1,837 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.

Taylor Rens