COURT OF APPEALS DECISION DATED AND FILED

September 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2012AP2234-CR
2012AP2235-CR

Cir. Ct. Nos. 2010CF706
2011CF231

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. ZIMBAL,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Edward Zimbal appeals judgments convicting him of stalking and felony bail jumping. He also appeals an order denying his motion to withdraw his no contest pleas for both counts. Because we conclude the pleas

were not knowingly, voluntarily and intelligently entered, we reverse the judgments and order and remand the matter with directions to vacate the judgments of conviction and grant Zimbal's motion to withdraw his pleas.

BACKGROUND

¶2 The initial complaint charged Zimbal with stalking Pamela J. He was released on bond with a condition that he spend no time in Pulaski, Wisconsin, where the victim resided, except on the most direct route to and from his workplace. A second complaint was filed, charging Zimbal with three offenses: (1) stalking Jessica J.; (2) bail jumping for committing the additional offense of stalking Jessica J.; and (3) bail jumping for violating the prohibition from stopping in Pulaski.

¶3 Zimbal ultimately entered no contest pleas to the charges of stalking Pamela J. and count two of the second complaint, bail jumping for committing the additional offense of stalking Jessica J. The stalking charge involving Jessica J. was dismissed outright and the bail-jumping charge for stopping in Pulaski was dismissed and read in for sentencing purposes.

¶4 During the plea colloquy, the court noted that WIS JI—CRIMINAL 1284-B was attached to the plea questionnaire. That jury instruction applies when the defendant was convicted of sexual assault or domestic abuse of the stalking victim. Because there was no allegation that Pamela J. was the victim of Zimbal's sexual assault or domestic abuse, that jury instruction was not appropriate. Nonetheless, Zimbal's attorney informed the court that he gave Zimbal copies of the jury instruction and Zimbal stated he committed each of the elements listed in the jury instruction. The instruction also left blank the portion where the specific acts that constitute stalking should have been inserted.

¶5 The colloquy involving the bail-jumping charge focused on count three, the charge involving Zimbal's stop at a Pulaski restaurant. There was no discussion of the facts relating to count two, the count to which Zimbal actually pled no contest.

¶6 Zimbal filed a motion to withdraw his no contest pleas, arguing they were not knowingly, voluntarily and intelligently entered. Zimbal testified that his attorney did not go over the elements of stalking with him prior to the plea hearing and he did not understand the elements. Zimbal's trial counsel, John Fiske, acknowledged giving Zimbal the incorrect jury instruction and could not remember whether he went over the elements listed in that instruction with Zimbal. Zimbal also testified that he believed he was pleading no contest to count three in the second complaint, the bail-jumping charge involving the stop in Pulaski. He said he would not have pled no contest to count two in that complaint, the bail jumping for committing an additional offense of stalking Jessica J., because he did not believe he committed that offense.

¶7 The State admitted an error had occurred with the bail-jumping plea, but argued the error could be remedied by amending the judgment of conviction. It argued the error was merely "technical." The court denied Zimbal's postconviction motion, finding his testimony was not credible and Fiske's testimony was credible. The court stated its belief that Zimbal understood the elements of stalking. The court also stated it knew Zimbal was pleading to count two rather than count three of the second complaint. It concluded the discussion about the facts relating to count three was proper because that count was read in and would be considered at sentencing.

DISCUSSION

¶8 Whether a no contest plea was knowingly, voluntarily and intelligently entered is a question of constitutional fact. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). We give deference to the circuit court's findings of historical fact, but independently determine whether the facts constitute a constitutional violation that entitles a defendant to withdraw his plea. ***Id.*** The defendant has the burden of making a prima facie showing that the court did not comply with WIS. STAT. § 971.08(1)[1] or other court-mandated duties, and must allege he did not know or understand the information that should have been provided at the plea hearing. ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906. If the defendant meets these obligations, the burden shifts to the State to establish by clear and convincing evidence that the plea was knowing, intelligent and voluntary despite the identified inadequacy of the plea colloquy. ***Id.***, ¶40.

¶9 Zimbal has established the circuit court's failure to ensure that he understood the nature of the charge before accepting the plea to the stalking count, and the State has not met its burden of proving Zimbal's plea was knowing and intelligent. The court did not utilize any of the methods identified in ***Bangert*** for establishing Zimbal's understanding of the nature of the offense. *See* ***Bangert***, 131 Wis. 2d at 268. The elements were not recited at the plea hearing. The wrong jury instruction was attached to the plea questionnaire and Zimbal's attorney could not recall reviewing the correct elements with Zimbal. Zimbal's assurance that he understood the elements was contradicted by his agreement that he committed

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

each of the elements, even those found in jury instruction 1284-B that clearly do not apply in this case. Zimbal's statement that he understood the charges is not sufficient. *See* ***Brown***, 293 Wis. 2d 594, ¶¶50-51. Although the complaint served as factual basis for the charge and the plea, it did not state that Zimbal must have committed two of ten specific behaviors required under WIS. STAT. § 940.32(1)(a) to constitute a "course of conduct," an element of stalking. The jury instruction attached to the plea questionnaire failed to address them as well. Regardless of whether those acts technically constitute elements of the offense, a defendant cannot plead to a charge and fully understand the proof required without knowing the prohibited acts that would constitute a course of conduct under the stalking statute. The court's perfunctory discussions with Zimbal were not sufficient to establish his understanding of what the State would have to prove beyond a reasonable doubt.

¶10 The State attempts to establish Zimbal's knowing and intelligent plea in two ways. First, it notes attorney Fiske testified at the postconviction hearing that he discussed the elements of stalking with Zimbal several times in the weeks before the plea. The court found this testimony more believable than Zimbal's denial that these conversations occurred. However, Fiske did not confirm that they discussed all of the elements, stating they primarily discussed the element of causing emotional distress or fear. As in ***Brown***, there is nothing in the record to indicate what was discussed and whether it was accurate. The plea colloquy did not refer to the complaint or the preliminary hearing, and a discussion of the elements at the preliminary hearing that occurred months earlier does not establish Zimbal's knowledge on the day of the plea hearing.

¶11 Second, the State relies on Zimbal's description of stalking at the postconviction hearing. Although Zimbal's testimony could show an

understanding of some of the activities that might constitute stalking, his knowledge at the postconviction hearing is irrelevant. The question is whether he understood the nature of the offense at the time of the plea hearing. Because the State failed to establish Zimbal's knowledge of the elements of stalking, it has not met its burden of establishing the plea was knowing and voluntary at that time.

¶12 Zimbal also established his plea to bail jumping by committing an additional offense was not knowingly, voluntarily and intelligently made. At the postconviction hearing, Zimbal testified he believed he was pleading no contest to count three. The State concedes the error and agrees defense counsel and the district attorney also believed Zimbal was pleading to count three. A valid plea requires that the defendant is aware of the essential elements of the crime charged and their relationship to the facts of the particular case. ***State v. Minniecheske***, 127 Wis. 2d 234, 242-43, 378 N.W.2d 283 (1985). In ***Minniecheske***, the court quoted ***United States v. Punch***, 709 F.2d 889, 894 (5th Cir. 1983):

> We cannot over-emphasize the importance of meticulous attention to the details of taking a valid plea. [A] judge cannot personally assure himself that a defendant understands the nature of the offense with which he is charged without ensuring first-hand that both he and the defendant know what those charges consist of.

Minniecheske, 127 Wis. 2d at 246.

¶13 At the plea hearing there was no discussion of the relationship between count two and the facts to which Zimbal agreed. At the postconviction hearing, the court indicated it knew Zimbal was pleading to count two. But that is not the question. A valid plea depends on the defendant's understanding of the nexus between the facts and the crime to which he is giving up his right to a trial. The error is not merely "technical" or "harmless error." Zimbal has the right to

contest a conviction indicating that he has stalked two women. Because the plea to the wrong bail jumping charge was not knowingly and intelligently entered, Zimbal's due process right was violated and he is entitled to withdraw his no contest plea to that charge.

By the Court.—Judgments and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.