**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 5, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP2089** **Cir. Ct. No. 2002CF119**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KATHLEEN A. BENOIT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Jackson County: GERALD W. LAABS, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Kathleen Benoit was convicted of conspiracy to commit arson contrary to WIS. STAT. §§ 939.31 and 943.02(1)(a)[1] after pleading guilty pursuant to a plea agreement. She appeals the judgment of conviction and the circuit court's order denying her postconviction motion to withdraw her plea. She contends there was no factual basis to support a plea of guilty to the charge. She also contends her plea was not knowingly, voluntarily, and intelligently entered because she did not know what the elements of the charge were and the court did not ascertain whether she understood them. We conclude there was a factual basis and her plea was knowingly, voluntarily, and intelligently entered. We therefore affirm.

## BACKGROUND

¶2 The criminal complaint alleged two counts of arson, the first relating to a fire at Benoit's residence in 1996 and the second relating to a fire at her residence on September 30, 2001. Both counts alleged violations of WIS. STAT. § 943.02(1)(b) (damage to building with intent to defraud insurer), with the second count alleging a conspiracy to commit that crime. It is the charge relating to the 2001 fire to which Benoit eventually entered a guilty plea. The factual allegations in the complaint regarding that fire include the following.

¶3 On September 30, 2001, Gabrielle, Benoit's daughter, called 911 and reported there had been an explosion inside the house where she lived with her mother and it was now on fire. The complaint alleged that Gabrielle gave the following report to an officer on the same day:

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> [S]he and her mother were home alone on the morning of September 30, 2001. Between 10:00-10:30 am she saw a small puddle on the basement floor at the bottom of the steps into the basement. The puddle covered an area of approximately two square feet and it smelled like gasoline. She said that in June of 2001 there had been a container of gasoline stored in the basement but that someone had removed it from the basement and she did not know where this gasoline had come from. Gabrielle stated that at approximately 11:00 am she was in a car with her mother parked at the rear of the residence because they were preparing to drive to Eau Claire. She stated her mother went back into the residence to get a screw driver to switch the license plates on the car. Gabrielle stated she watched her mother as she walked inside the house and saw her in the hallway through the sliding glass door on the rear of the house. Gabrielle stated she watched as her mother lit a cigarette. Within approximately three seconds after her mother lit the cigarette, Gabrielle saw the two bedroom windows explode outward. She saw black smoke and flames in the area where the windows had exploded. Gabrielle stated she ran back into the house to check on her mother and saw black smoke filling the house. Gabrielle reported that as her mother drove from the residence, Gabrielle called 911 on the cellular telephone.

¶4 According to the complaint, Benoit gave the following statement in an interview a few days after the fire. She and Gabrielle were in the car about 11:00-11:30 a.m. on the morning of September 30, planning to go to Eau Claire to shop, when she re-entered the house to get socks so her feet would not get sore from walking around the mall. In the spare bedroom, when she was leaning down to pick up a scarf, she lit a cigarette and there were flames. It happened so fast she did not know what to do. There would not have been any gasoline in the house other than what might have been inside the snow blower, which was stored in the kitchen. She might have had the oven on if it was cold outside; she avoided using the furnace because it was cheaper to use the oven for heat. The car she was driving that morning contained a duffle bag and a plastic laundry bag containing dirty laundry. Although she had a washer and dryer, it was faster to do laundry at

the laundromat. A day or two earlier Gabrielle had smelled gasoline in the basement area, but she (Benoit) knew there was no gasoline in the basement.

¶5 The complaint also alleged that the report of a special investigator opined that the fire was the result of an open flame igniting ignitable liquid vapors that had accumulated inside the house from an ignitable liquid being poured at various locations inside the structure. A report from the State Crime Laboratory stated that samples of carpet and foam padding from the house revealed the presence of a volatile mix consistent with gasoline; certain clothing worn by Benoit at the time of the fire was also found to contain a volatile mixture consistent with gasoline. Finally, the complaint alleged, a bank had a security interest in Benoit's house.

¶6 At the preliminary hearing, the special investigator testified, elaborating on his investigation of the 2001 fire. His report and the crime lab report were admitted into evidence. The information subsequently filed contained two counts: arson in violation of WIS. STAT. § 943.02(1)(a)[2] regarding the 1996

[2] WISCONSIN STAT. § 943.02(1)(a) provides:

> **Arson of buildings; damage of property by explosives.** **(1)** Whoever does any of the following is guilty of a Class C felony:
>
> (a) By means of fire, intentionally damages any building of another without the other's consent; or

WISCONSIN STAT. § 939.31 provides:

> **Conspiracy**. Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the

(continued)

fire, and conspiracy to commit arson in violation of § 943.02(1)(a) and WIS. STAT. § 939.31 regarding the 2001 fire.

¶7 The trial began on August 13, 2003, and there was one day of testimony. There was testimony on both fires, but we summarize only the testimony on the September 30, 2001 fire that is relevant to this appeal. Gabrielle, who was eighteen at the time of that fire, gave testimony that was consistent with the statements attributed to her in the complaint, with these exceptions. She testified she did not actually see her mother light a cigarette: she saw that her mother had a cigarette in her hand and had a lighter; then she could not see her mother because her mother was walking down the hall. She also testified that her mother went back into the house to get socks and a screwdriver. With respect to the gasoline in the basement, she testified that she smelled it but did not see a puddle or anything. When asked whether she remembered telling the 911 dispatcher and Deputy Sheriff Scott Bowe that she had actually seen gasoline there, she responded that she did not remember that, but maybe she did.

¶8 Gabrielle gave the following additional testimony. Before getting into the car the morning of the fire, she was in her bedroom, her bathroom, her mother's bedroom, and the hallway and did not smell any gasoline; she might have been in the spare bedroom, but she did not think so. When her mother went back into the house to get the screwdriver and socks, Gabrielle saw her turn into the spare bedroom, not her (mother's) own bedroom. Gabrielle explained this by saying: she (Gabrielle) kept some of her clothes in that room (earlier she had

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> penalty is life imprisonment, the actor is guilty of a Class B felony.

testified that she kept clothes there she "wasn't really wearing") and they shared clothes; the screwdriver might have been in there because the tool box was sometimes there or in the kitchen; and maybe her mother was going to her own bedroom or Gabrielle's to get socks after she got the screwdriver. Her mother told her at some point about a scarf that she (her mother) saw on the floor in the spare bedroom; it was Gabrielle's and was wet and should not have been there so her mother picked it up. Gabrielle acknowledged that she had told the investigators that that scarf had been over the door to her (Gabrielle's) room; that was the last time she saw it. She did not know how it got to the spare bedroom.

¶9 After the explosion and after bringing her mother out to the car, she went back into the house to get her animals, four dogs and two cats. It was a few minutes after that that she called 911.

¶10 When asked what things they took in the car for the trip to Eau Claire, Gabrielle testified that either she or her mother put clothes in the car because they were going to do laundry. She said that the washer acted up sometimes, but at a later point said they had never had the washer fixed because "it wasn't that big of a deal because it didn't happen all the time." Gabrielle appeared to concede that there were clothes in the car with new tags attached. She also acknowledged that there was a camera in the car with about ten rolls of undeveloped film. Her explanation for this was that her mother had taken the camera to work the day before to sell it to someone who never showed up, and Gabrielle was supposed to take it out of the car, but she did not always listen and was a procrastinator. Initially, Gabrielle testified that she was not planning to do anything with the camera on that day. However, when asked the question whether her mother's statement to investigators that the camera was in the car because they were going to the zoo to take pictures was untrue, Gabrielle said no, maybe that

was true—she and her mother do not make plans, they just do things. Earlier Gabrielle had testified that the only specific plans they had for the day was to go shopping in Eau Claire.

¶11 James Campbell, an investigator with the Wisconsin Division of Criminal Investigation, Arson Bureau, went to Benoit's home the day after the fire. He took the carpet samples that were tested at the crime laboratory. The samples that he testified as having gasoline or a volatile mixture consistent with gasoline were the samples from the closet in Benoit's bedroom, the areas in front of that closet, and the closet in the spare bedroom. He had smelled what he believed to be gasoline when he was investigating those locations. A dog used by the investigators indicated the possible presence of liquid accelerants in these areas: the closets in Benoit's bedroom and the spare bedroom; the common hallway in front of Gabrielle's bedroom; the floor into the common bathroom; the base of the basement stairs; the drywall directly above the base of the basement stairs. Campbell's report, admitted into evidence, concluded that "the cause of this fire was incendiary."

¶12 Deputy Bowe testified to the statement Gabrielle had given him, contained in the complaint, and Susan Reshel, a detective with the Jackson County Sheriff's Department, testified to her interview with Benoit, which had been summarized in the complaint, and to two interviews with Gabrielle.

¶13 The morning after the first day of trial, Benoit appeared with her counsel, who informed the court that she wished to accept the original plea offer. Counsel presented a written plea questionnaire to the court, which Benoit said she had signed that morning. In response to the court's question, Benoit stated that she pleaded guilty to Count 2 of the information. The plea questionnaire described

the charge to which she was pleading as "943.02(1)(a), 939.31." The questionnaire also stated that elements of the crime to which she was pleading guilty "[had] been explained to [her] by [her] attorney or are as follows: above named defendant on or about Sunday, Septem. 30th,- 01, did conspire by means of fire to damage a building in which another had a valid mortgage interest." Attached to the plea questionnaire were the jury instructions for arson under WIS. STAT. § 943.02(1)(a). The terms of the plea agreement, as related on the questionnaire and confirmed by Benoit's counsel, were: Benoit would plead guilty to Count 2; Count 1 and the felony bail jumping charge would be read in for sentencing; there would be a PSI; and both sides would be free to argue.

¶14 The court ascertained that Benoit had completed twelve years of schooling. The court also ascertained that, although the plea questionnaire stated Benoit was receiving treatment for depression, neither the depression nor the prescription medications she had taken that morning for its treatment affected her ability to understand the proceedings. The court then went over the constitutional rights Benoit was giving up and established that no one had made any threats or promises to her to get her to make the plea and that Benoit understood the court was not bound by the agreement.

¶15 The court described the elements of the charge to which she was pleading guilty in this way:

> [F]irst, that the defendant, yourself, damaged a building by means of fire.… [T]hat you did so intentionally[.]… [T]hat the building belonged to another person[.]… [T]hat the defendant damaged such building without the owner's consent[.]… And, fifth, that the defendant knew that the building belonged to another person and knew that the other person did not consent to the damage to the building[.]

After the court stated each element, Benoit stated that she understood each. At that point, her counsel stated, "May I interrupt? This charge is conspiracy and I've prepared the plea questionnaire to reflect that, I think." The court said "[o]kay" and went on to discuss the terms of the agreement—the dismissal and read-in of Count 1 and the felony bail jumping charge—and ascertained that Benoit understood those terms.

¶16 The court then asked counsel about his discussions with Benoit, including the question: "Are you satisfied that she understands the nature of the charge, the elements and the effects of the plea?" and counsel answered "[y]es." Benoit answered "[y]es" to the court's questions whether she had a chance to thoroughly discuss the case and plea with her attorney and whether she was satisfied with his representation. Counsel stipulated that the entire record, including the trial testimony, could be used as a factual basis for the plea, and that understanding was also expressed in the plea agreement.

¶17 After finding that Benoit had knowingly, voluntarily, and intelligently waived her constitutional rights and entered the plea, and that there was a factual basis for the plea, the court accepted the plea and found Benoit guilty of conspiracy to commit arson contrary to WIS. STAT. §§ 939.31 and 943.02(1)(a). On December 12, 2003, the court imposed a six-year sentence, with four years of initial confinement followed by two years of extended supervision.

¶18 In June 2004, Benoit moved for postconviction relief on the two grounds she pursues on this appeal: (1) there was no factual basis to support the charge of conspiracy to commit arson, and (2) she did not understand the elements of conspiracy. Benoit's motion was accompanied by her affidavit, which averred that, when she entered the plea, she was unaware of the elements of conspiracy

under WIS. STAT. § 939.31, she had never known those elements, and no one had ever tried to explain them to her.

¶19 At the hearing on the motion, Benoit's trial counsel testified that he was sure he reviewed the criminal complaint and the information with her, and he explained that she was being charged with arson regarding the earlier fire and a conspiracy to commit arson for the second fire. With respect to the conspiracy charge, he told her that he was mystified as to how the State was going to prove a conspiracy, but that it was the State's burden to do so, and in that context he had explained to her what a conspiracy was. He also discussed with her what a conspiracy was on the day of her plea.

¶20 Benoit's trial counsel described the following events leading to Benoit's entry of the plea. After the first day of trial, he discussed with Benoit the evidence regarding both fires that he viewed as "pretty devastating," highlighting the reaction of the judge and jury to the testimony of a fireman involved in the 1996 fire, and, with respect to the 2001 fire, mentioning the evidence of the investigators that it was arson and the testimony of Gabrielle that her mother went back into the house before the fire occurred for no apparent reason. The next morning, after having talked it over with her daughter, Benoit said she wanted to accept the plea offer, which they had discussed some time previously. Counsel then went over the plea questionnaire with Benoit. His invariable practice is to read the plea questionnaire word for word to his clients, and, before he checks each box where there are questions, he stops and asks for a response from his client. He read the elements of the charge to which she was pleading as stated in the plea questionnaire—"above named defendant on or about Sunday, Septem. 30th,- 01, did conspire by means of fire to damage a building in which another had a valid mortgage interest." He explained to her that conspiracy in lay terms meant

she planned or plotted with someone else to commit arson. He also explained to her that he believed in this case they had enough evidence for "[t]he arson per say [sic]." He believed from her response that she understood; he had never had any difficulty with her understanding things. When told that Benoit had averred that she had never known the elements of conspiracy and that no on had tried to explain them to her, he said he believed that statement to be false. Counsel acknowledged he did not go over the statutory language regarding conspiracy with Benoit or the jury instructions for conspiracy.

¶21 Benoit's counsel answered as follows when asked whether he believed there was a factual basis for the count of conspiracy to commit arson. He had an ongoing question how the State was going to prove a conspiracy and suspected it might try to establish a conspiracy between Benoit and her daughter. At the time Benoit entered the plea, he was certain there was a factual basis for the underlying arson, but he had questions whether there was a factual basis for a conspiracy. He told Benoit this. The point was that he and Benoit were making a tactical decision to gain the benefit of the plea offer: it did not matter to them which of the two crimes she pleaded to.

¶22 The court denied Benoit's motion, concluding that Benoit "did admit to the elements of the arson and the facts to support the plea were agreed upon during the plea hearing." The court also observed that, while the evidence was not overwhelming, Gabrielle was with Benoit and did see the act take place.[3]

[3] In its decision, the circuit court also stated that the reference to WIS. STAT. § 939.31 was a "harmless error" because that statute refers to inchoate offenses, and the crime of arson was completed in this case. In the court's view, WIS. STAT. § 939.05(2), "Parties to crime," was the statute that applied in this case, because Benoit was a person "concerned in the commission of the crime of arson," and the precise nature of her participation did not need to be established because (continued)

## DISCUSSION

¶23 On appeal, Benoit renews her arguments that: (1) there was no factual basis to support the charge of conspiracy to commit arson, and (2) she did not understand the elements of conspiracy.

¶24 In order to withdraw a plea after sentencing, the defendant carries the heavy burden of establishing by clear and convincing evidence that the circuit court should permit the defendant to withdraw the plea to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 726, 605 N.W.2d 836. The "manifest injustice" standard requires a defendant to show "'a serious flaw in the fundamental integrity of the plea.'" ***Id.***, ¶16 (citations omitted). One situation in which plea withdrawal is necessary to correct a manifest injustice is when the circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to. ***Id.***, ¶19. Another is when the plea was not knowingly, voluntarily, and intelligently entered. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891.

### I. Factual Basis

¶25 We consider first Benoit's challenge to the factual basis for the plea. Before a circuit court may accept a guilty plea, it must personally determine that the conduct the defendant admits constitutes the offense to which the defendant is pleading guilty. ***Thomas***, 232 Wis. 2d 714, ¶17. This requirement "'protect[s] the defendant who is in the position of pleading voluntarily with an understanding of

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Benoit admitted that she participated in the act of arson. The State does not pursue this theory on appeal and we do not address it.

the nature of the charge but without realizing that his conduct does not actually fall within the [statutory definition of the] charge.'" ***Id.***, ¶14 (citations omitted). When, as here, there is a negotiated plea, the court need not go to the same length to determine whether the facts would sustain the charge as when there is no negotiated plea. ***State v. Harrell***, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994). This different standard reflects the reality that "often in the context of a plea bargain, a plea is offered to a crime that does not clearly match the conduct that the factual basis establishes." ***Id.***

¶26 A circuit court's decision that there is a factual basis for a plea involves findings of fact, which we do not disturb unless they are clearly erroneous. ***Thomas***, 232 Wis. 2d 714, ¶13 n.7. However, on this appeal we are reviewing the circuit court's decision not to permit withdrawal of Benoit's guilty plea, and that decision is a matter for the circuit court's discretion; as such, we do not reverse unless the circuit court erroneously exercised its discretion. ***Id.***, ¶13.

¶27 The elements of a conspiracy under WIS. STAT. § 939.31 are: (1) an agreement between the defendant and at least one other person to commit a crime; (2) intent on the part of the conspirators to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the crime. ***State v. West***, 214 Wis. 2d 468, 476, 571 N.W.2d 196 (Ct. App. 1997).[4] The agreement required

[4] After we decided ***State v. West***, 214 Wis. 2d 468, 571 N.W.2d 196 (Ct. App. 1997), the supreme court held that WIS. STAT. § 939.31 embraces unilateral as well as bilateral conspiracies; under the former, the person with whom the defendant conspires need not have true criminal intent because the focus of § 939.31 is on the subjective behavior of the individuals. ***State v. Sample***, 215 Wis. 2d 487, 496-97, 502, 505, 573 N.W.2d 187 (1998). That case, as well as the cases on which the court relied there, concerned defendants who conspired with undercover police officers or with persons cooperating with the police. Whether a unilateral conspiracy theory might apply in this case is not necessary to resolve in order to decide the two issues presented on this appeal.

may be demonstrated by circumstantial evidence and need not be an express agreement; rather, a mere tacit understanding of a shared goal is sufficient. ***State v. Hecht***, 116 Wis. 2d 605, 625, 342 N.W.2d 721 (1984) (citations omitted); ***State v. Cavallari***, 214 Wis. 2d 42, 51-52; 571 N.W.2d 176 (Ct. App. 1997). The elements of arson under WIS. STAT. § 943.02(1)(a) are set forth in paragraph 15 above.

¶28 Benoit does not dispute there was a factual basis that she committed arson on or about September 30, 2001. Nor does she dispute that there is evidence to satisfy the third element of conspiracy—that she performed an act in furtherance of arson. Her argument is there is no evidence showing that she entered into an agreement with anyone to commit arson.

¶29 We conclude the circuit court did not erroneously exercise its discretion in declining to permit Benoit to withdraw her plea on the ground there was no factual basis for her plea of conspiracy to commit arson. First, there is evidence that Gabrielle knew that there was gasoline spilled in areas of the house on the morning of September 30. The complaint alleges that in her statement to Deputy Bowe, made on the day of the fire, she said she saw a puddle in the basement that smelled like gasoline. In addition, there was evidence that gasoline was in areas of the house where she had been that morning before getting into the car—the common hallway in front of her bedroom, the floor into the common bathroom, and her mother's room. Because Gabrielle testified that three-to-five seconds after she lost sight of her mother in the house the explosion occurred, it is reasonable to infer that her mother did not have time to pour gasoline around then; thus it is reasonable to infer that the gasoline was there while Gabrielle was still in the house, and, therefore, reasonable to infer she smelled it. From the inference that Gabrielle knew there was gasoline at various places in the house, and from the

evidence that no one else was in the house besides herself and her mother (and evidence that no one else had been in the house the day before, either), it is reasonable to infer that Gabrielle knew her mother had poured the gasoline around the house.

¶30 Gabrielle's testimony at trial also provides a reasonable basis for inferring that she helped her mother put things in the car that her mother wanted to save from destruction. Her explanation that the clothes were in the car because her mother wanted to do her laundry because the washer did not work very well is suspect given her testimony that "it wasn't that big of a deal because it didn't happen all the time." The tags on clothes is not consistent with taking clothes to the laundromat, and Gabrielle's explanation of why the camera was in the car is convoluted and contains inconsistencies.

¶31 Taken together, the evidence and inferences from the evidence recounted in paragraphs 29 and 30 are sufficient to show that Gabrielle knew her mother was intending to set fire to the house and tacitly agreed to aid her by doing nothing about the gasoline around the house and by helping her put things in the car to save from the fire.

¶32 Benoit points to evidence that, she asserts, shows that Gabrielle could not have known about any plans she (Benoit) may have had to commit arson: Gabrielle's testimony that her animals were in the house and that she was working on interior painting and repairs the day before the fire. However, this evidence is not necessarily inconsistent with Gabrielle's knowledge of a plan to commit arson. The inference that Gabrielle would not want her animals to be destroyed means only that she did not know her mother was going to set fire to the house at the moment she did. It is reasonable to infer from the injuries to Benoit

that she did not expect the fire to occur exactly when it did and in the way it did. Thus, Gabrielle may not have expected the fire to occur exactly when it did, but may nonetheless have known that it was going to occur sometime that day. Similarly Gabrielle's efforts to improve the house the preceding day were not inconsistent with her learning of the gasoline in the house on the morning of September 30.

¶33 Perhaps, more significantly, the evidence Benoit points to does not preclude a factual basis because a factual basis exists for a plea if an inculpatory inference can be drawn from the record, even though it may conflict with an exculpatory inference elsewhere in the record. ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. Thus, the existence of evidence, or inferences from the evidence, that Gabrielle did not have a tacit agreement with her mother to commit arson does not mean that a factual basis for a tacit agreement does not exist.

¶34 Benoit appears to argue in her reply brief that in ***West***, 214 Wis. 2d 468, we established a stricter test for determining whether there is a factual basis for a conspiracy than earlier cases suggest. She relies on this quotation: "Since there was no actual evidence that any of these individuals [the other individuals mentioned in the complaint] agreed with West to file the false [insurance] claim, we conclude there was no factual basis for West's plea of guilty to count one [conspiracy to commit insurance fraud]." ***Id.*** at 480. However, this statement is not a rejection either of the principle that an agreement for purposes of a conspiracy may be a tacit understanding of a shared goal and may be proved by circumstantial evidence, ***Hecht***, 116 Wis. 2d at 625, nor the principle that a factual basis may exist even if there are conflicting inculpatory and exculpatory inferences from the record, ***Black***, 242 Wis. 2d 126, ¶16. First, we are bound to

follow those supreme court decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Second, read in context, our quoted statement from ***West*** was expressing our conclusion that there was *nothing* in the complaint or preliminary hearing that provided *any* basis for inferring *any* connection between the other individuals mentioned and the insurance fraud committed by West. Notably, the State was not arguing, as it is in this case, that the complaint and preliminary hearing permitted reasonable inferences of a tacit understanding agreement, but, instead was arguing that a factual basis for a conspiracy was unnecessary because there was a factual basis that West committed insurance fraud.[5] ***West***, 214 Wis. 2d at 480.

¶35 We acknowledge, as did the circuit court, that the factual basis for a conspiracy between Benoit and Gabrielle to commit arson is thin, but we are satisfied it is sufficient in the context of a negotiated plea.

[5] The State's argument was based on ***State v. Harrell***, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994), in which we concluded that, in the context of a negotiated plea, the factual basis may be either for "the offense to which the plea is offered or to a more serious charge reasonably related to the offense to which the plea is offered. This is the case even when a true greater- and-lesser-included offense relationship does not exist." Our reasoning in ***Harrell*** was based on the reality "that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes." ***Id.*** In ***West*** we rejected the State's argument that this ruling in ***Harrell*** applied. We concluded it did not because the "reasonably related charge" in ***West***—the insurance fraud—was not *more* serious than conspiracy to commit insurance fraud, since the maximum penalties for both were the same. 214 Wis. 2d at 480. *See* WIS. STAT. § 939.31 (penalty for conspiracy to commit a crime has the same maximum as the completed crime). In ***West*** we did not explain why our reasoning in ***Harrell*** did not apply when the "reasonably related charge" had the same penalty, not a greater one. We can see merit to the position that the reasoning in ***Harrell*** should apply where the defendant pleads guilty to a charge of conspiracy to commit a particular crime, and there is a factual basis for the defendant having committed that particular crime. However, we are bound by ***West***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

II. Knowing, Voluntary, and Intelligent Plea.

¶36 In addition to determining whether there is a factual basis for a plea, before the circuit court may accept a guilty plea there must be an affirmative showing that that the plea is knowingly, voluntarily, and intelligently entered. ***Thomas***, 232 Wis. 2d 714, ¶14. This is a distinct requirement from the factual basis requirement. ***Id.*** A plea that is not knowingly, voluntarily, and intelligently entered violates due process. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997).

¶37 One of the ways in which a plea may be involuntary is if the defendant does not have a full understanding of the nature of the charges against him or her. ***Id.*** at 140. An understanding of the nature of the charge must include an awareness of the elements of the crime. ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986) (citing ***State v. Cecchini***, 124 Wis. 2d 200, 212, 368 N.W.2d 830 (1985)). The reason for requiring that the defendant know the elements of the charge against him or her before entering a plea is that the defendant cannot make a truly voluntary or intelligent admission that he or she committed the offense charged unless he or she is aware of the essential elements of the charge and their relationship to the facts of the particular case; "the defendant must be given 'notice of what he [or she] is being asked to admit.'" ***Cecchini***, 124 Wis. 2d at 212 (citations omitted).

¶38 Although the decision whether a defendant may withdraw a plea is ordinarily within the discretion of the circuit court, when a defendant establishes a denial of a relevant constitutional right, withdrawal of the plea is a matter of right. ***Van Camp***, 213 Wis. 2d at 139. In reviewing a challenge to a plea as not knowingly, voluntarily, and intelligently entered, we accept the circuit court's

findings of historical fact unless they are clearly erroneous; but whether those facts meet the legal standard of a constitutionally valid plea presents a question of law, which we review de novo. ***Id.*** at 140.

¶39 In this case, the parties agree that the procedure established in ***Bangert***, 131 Wis. 2d at 283, is the proper procedure for determining if Benoit's plea was knowingly, voluntarily, and intelligently entered. Under ***Bangert***,

> [W]e employ a two-step process…. We must first determine (1) whether the defendant has made a prima facie showing that his plea was accepted without the trial court's conformance with WIS. STAT. § 971.08, and other mandatory duties imposed by this court, and (2) whether he has properly alleged that he in fact did not know or understand the information which should have been provided at the plea hearing. *See* ***Bangert***, 131 Wis. 2d at 274. If the defendant meets this initial burden, the burden then shifts to the State, and we must determine whether the State has demonstrated by clear and convincing evidence that the defendant's plea was voluntarily, knowingly, and intelligently entered at the time the court accepts the plea, despite the inadequacy of the record. *See* ***id.***

***Van Camp***, 213 Wis. 2d at 140-41 (footnote omitted).

¶40 When the burden shifts to the State,

> In essence, the state will be required to show that the defendant in fact possessed the constitutionally required understanding and knowledge which the defendant alleges the inadequate plea colloquy failed to afford him. The state may examine the defendant or defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary for him to enter a voluntary and intelligent plea. The state may also utilize the entire record to demonstrate by clear and convincing evidence that the defendant knew and understood the constitutional rights which he would be waiving.

***Bangert***, 131 Wis. 3d at 275 (citations omitted).

¶41 The State appears to concede that the court did not ascertain in the plea colloquy that Benoit understood the elements of conspiracy to commit arson. While the court did go over the elements of arson under WIS. STAT. § 943.02(1)(a) and ascertained that Benoit understood she was admitting each element and relieving the State from proving each, it did not go over the three elements of a conspiracy, which are stated above in paragraph 27. In addition, Benoit's affidavit averred she did not understand the elements of conspiracy. Thus, the burden shifts to the State to demonstrate by clear and convincing evidence that Benoit did understand the elements of conspiracy. The State contends that the entire record, and, in particular, the testimony of Benoit's counsel at the postconviction hearing, establishes that Benoit understood the elements of the conspiracy to the requisite standard of proof. We agree with the State's analysis.

¶42 The circuit court implicitly accepted the testimony of Benoit's trial counsel as credible, and we therefore do the same. His testimony established that he explained to Benoit that a conspiracy in layman's terms meant she planned or plotted with someone else to commit arson. This is an accurate and understandable explanation of the first two elements of conspiracy—a plan or plot with someone else is an agreement, and a plan or plot with someone else to commit arson adequately conveys that both parties intended to commit arson. As for the third element—an act performed by one of the conspirators in furtherance of the crime—we are satisfied that, accepting her counsel's testimony as credible, Benoit understood this element. In this case, the fire had already occurred and there was convincing evidence, based on the first day's trial testimony, that the cause was arson. This was the context in which counsel discussed the plea decision with Benoit. His explanation of the evidence and of his view that the evidence was sufficient to establish that she committed the crime of arson,

together with the elements of arson in the plea questionnaire and, in more detail, attached to the plea questionnaire and read by the court, convey that there was evidence that she committed not only an act in furtherance of arson, but the arson itself.

¶43 In summary, we are convinced the record establishes that Benoit did understand the elements of a conspiracy to commit arson, as well as the relation of those elements to the facts of her case, and did understand what she was being asked to admit. *See* ***Cecchini***, 124 Wis. 2d at 212. We therefore conclude that her plea to that charge was knowingly, voluntarily, and intelligently entered and there is no manifest injustice requiring the withdrawal of her plea.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.