COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2387-CR **Cir. Ct. No. 2015CM251**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NOAH M. SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: DAVID J. WAMBACH, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Noah Sanders appeals a judgment convicting him of four misdemeanors: two counts of intimidation of a victim and two counts

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of contact with the same victim after a domestic abuse arrest. The judgment was entered after the circuit court accepted Sanders' guilty pleas to these charges, together with other charges in other cases, at a single hearing. Sanders also appeals the order denying his post-conviction request to withdraw the two pleas to intimidation of a victim, on the ground that the circuit court erred in determining that there was a sufficient factual basis to support these two pleas. I conclude that the court properly exercised its discretion in denying the post-conviction motion and accordingly affirm that decision and the judgment of conviction.

¶2 The criminal complaint in the instant case, issued in Jefferson County, contained nine counts, each alleging a misdemeanor offense against Sanders involving the same victim, all committed on June 16, 2015: five counts of intimidation of a victim, contrary to WIS. STAT. § 940.44(2),[2] and four counts of contact with the victim after Sanders' domestic abuse arrest, contrary to WIS. STAT. § 968.075(5)(a)1.[3] The complaint alleged that Sanders had appeared in Jefferson County circuit court on June 16, 2015, in a separate case, 2015CM206

[2] WISCONSIN STAT. § 940.44(2) provides:

> Except as provided in s. 940.45 [addressing felony conduct], whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade, another person who has been the victim of any crime or who is acting on behalf of the victim from doing any of the following is guilty of a Class A misdemeanor:
>
> ….
>
> (2) Causing a complaint, indictment, or information to be sought or prosecuted, or assisting in the prosecution thereof.

[3] WISCONSIN STAT. § 968.075(5)(a)1. provides that it is a misdemeanor offense for a person arrested for a domestic abuse incident to intentionally contact the alleged victim within 72 hours of arrest, unless the victim has waived this protection.

("Case 206"), on a charge of misdemeanor battery-domestic abuse for allegedly victimizing KL.[4] In Case 206, the circuit court authorized Sanders' release on a signature bond and conditions that would have included no contact with KL. However, Sanders declined to sign the bond in Case 206, and therefore remained in jail but not subject to bond conditions. Nevertheless, he was subject to the 72-hour no contact provision under § 968.075 throughout the day on June 16, because KL at least initially opted for enforcement.

¶3 The criminal complaint in the instant case further alleged that police had reviewed recordings of 13 phone calls that Sanders made to KL, placed from jail, starting at 2:05 p.m. on June 16, and ending the next day. The complaint contained the following summary regarding the first call, and alleged that its contents supported count one of the complaint, intimidation of a victim:

> [Sanders] starts the conversation by stating, "Baby, you said I hit you. I didn't hit you." [KL] responds to [Sanders] that he did hit her. [Sanders] tells [KL] that he pushed her off of him and that is how her lip was busted. [Sanders] tells [KL] she bit him and she bit her own lip in the process. [KL] tells [him] "I did not bite you. You hit my mouth, which in turn made your hand hit my tooth. I did not bite down on you." [Sanders] went on to analyze what happened between them that night. [Sanders] asks [KL] why she had to go and call the police. [KL] reminds [Sanders] that he had been threatening to call the police on her and he was using his cell phone to call someone during the altercation so this other person could listen to their drama. [KL] told [Sanders] that he [had] call[ed] her a whore and a racist. [Sanders] told her that being upset did not give her the right to call the police and have him put in

[4] More specifically, the complaint in Case 206 alleged in part the following. KL told police that, on June 15, 2015, during a heated argument with Sanders in the apartment she then shared with Sanders, he had "struck her in the face with an open hand," hard enough to cause bleeding and to give her a fat lip and Sanders apparently cut his hand on KL's teeth. In contrast, Sanders told police that, "while he had his hands up in a defensive posture backing away from" KL, KL had bit him on a thumb, and that he had not struck her.

> jail. [Sanders] also told her that he has kids and is on parole. [Sanders] told [KL] that he was asked if he wanted to press charges against her for biting him. [KL] responded, "I did not fucking bite you. You pushed my face and I didn't bite down." [KL] told [Sanders] that she had been contacted by his probation agent about writing a statement. [Sanders] told [KL] not to tell his probation agent anything that will "fuck him" even more. [Sanders] begged [KL] and complained to her that this is going to mess up his parole. [KL] reiterated "You did make contact with me and you did push me and you did threaten me." [Sanders] responded that he told the police that he pushed her off of him.

¶4 Fifteen minutes after the first call, according to the criminal complaint, Sanders called KL again from the jail. The complaint alleged the following regarding this second call, in support of count three, also a charge of intimidation of a victim:

> The conversation starts with [KL] telling [Sanders] that she was not trying to get him revoked or anything and that she just wanted him out of the house. The parties continued to argue about what really happened that night…. [T]he argument was heated. [KL] then asks [Sanders] if he wants her to call his probation agent for him. [Sanders] reminded [KL] that she kept telling him that he should hit her. [KL] told [Sanders] that she wasn't supposed to be having contact with [Sanders] because of the 72 hr. no contact provision that she signed upon his arrest. [Sanders] tells [KL] that she can have contact with him: "Listen, I'm very familiar with the law and very good with the law. That only applies when I get released from custody. When I'm in custody, I can contact you as much as I want and they cannot do anything." [Sanders] tells [KL] to go "down there right now and tell them you want the 72 [hour] no contact removed." [KL] reminded [Sanders] that he had threatened her on June 15th and [Sanders] admits he threatened her because she kept hitting him.

¶5 Having summarized the basics of the complaint in the instant case, I move forward in the chronology. On March 4, 2016, the court held a plea hearing on four cases against Sanders, who was then represented by counsel: the instant case; Case 206; a 2015 case charging him with ten misdemeanor bail jumping

charges; and a 2016 case charging him with one misdemeanor bail jumping charge. Based in part on a plea questionnaire and waiver of rights that Sanders and his counsel signed, Sanders entered guilty pleas to the following, accepted by the court: in the instant case, two counts of misdemeanor intimidation of a victim and two counts of misdemeanor contact after domestic abuse arrest (with three other counts of misdemeanor intimidation of a victim dismissed but read in, and two other counts of misdemeanor contact after domestic abuse arrest dismissed but read in); in Case 206, an amended charge of disorderly conduct; and in the 2015 bail jumping case, five counts of misdemeanor bail jumping (with five additional counts dismissed but read in). In the 2016 bail jumping case, the sole charge of misdemeanor bail jumping was dismissed but read in.

¶6 Before accepting the pleas, the circuit court engaged in a colloquy that included the court asking Sanders' counsel if he thought that "the factual portion[s] of the Complaints in which Mr. Sanders will be entering pleas to one or more counts … provide an adequate factual basis for the Court to accept pleas from Mr. Sanders and find him guilty?" Sanders' counsel answered yes. The court then asked Sanders personally "if the facts from these different criminal complaints … were presented to a jury, do you believe that the jury could find from those facts all of the elements of the offenses you're charged with and find you guilty beyond a reasonable doubt?" After apparently conferring briefly with counsel, Sanders replied, "Yes, [y]our Honor."

¶7 Following sentencing, Sanders filed a post-conviction motion seeking to withdraw his pleas to count one and count three in the instant case, on the ground that the circuit court failed to ascertain that a factual basis existed for those two counts, and therefore failure to allow plea withdrawal would constitute a "manifest injustice." *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714,

605 N.W.2d 836 (if defendant shows "manifest injustice" in allowing plea to stand by clear and convincing evidence, defendant may withdraw guilty plea after sentencing). After further briefing from the parties and argument at a hearing, the court denied the motion.

¶8 "Before accepting a guilty plea, the circuit court must determine that a sufficient factual basis exists for the guilty plea, namely that a crime has been committed and it is probable that the defendant committed it. WIS. STAT. § 971.08(1)(b)." *See* ***State v. Payette***, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423. In the only argument that I address, Sanders contends that the court erred in concluding that the factual basis for the two challenged pleas constituted the crime of intimidation of a victim.

¶9 I now explain why this is the only argument that I address, based on a position that Sanders took before and at the post-conviction hearing. In his post-conviction motion and in a reply to the State's response to the motion, Sanders did not request an evidentiary hearing on his post-conviction motion, but instead took the apparent position that the record as it then existed established that he is entitled to plea withdrawal. In addition, when the circuit court explicitly invited Sanders' counsel at the hearing to explain whether an evidentiary hearing was needed, counsel responded that there was no point in taking evidence.

¶10 While his briefing on appeal is sometimes difficult to track, in at least in one place in his principal brief Sanders states that he "was entitled to an evidentiary hearing on his motion for plea withdrawal," and he concludes his principal brief and his reply brief by requesting, as one form of alternative relief, that I remand for an evidentiary hearing. However, given his unambiguous position in the circuit court against an evidentiary hearing, I decline to blindside

the court with a reversal based on relief that Sanders explicitly rejected in that court. *See* ***State v. Anderson***, 2015 WI App 92, ¶7, 366 Wis. 2d 147, 873 N.W.2d 82 (quoted source omitted).

¶11 This disposes of whatever it is that Sanders intends to argue about his "not understand[ing]" that conduct in the criminal complaint in the instant case "did not actually constitute the offense[s] charged in counts one and three." On this topic, Sanders cites ***State v. Howell***, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48. However, the issue in ***Howell*** was whether the circuit court erred in failing *to hold an evidentiary hearing* on Howell's motion to withdraw his plea under either of the line of cases that includes ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), or the line that includes ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), or both lines of cases. *See* ***Howell***, ¶2. ***Howell*** has no application here for the simple reason that Sanders rejected the opportunity to request an evidentiary hearing.[5]

¶12 This leaves only an argument based entirely on the following principle: "Where undisputed facts cannot constitute the crime charged as a matter of law, the defendant is allowed to withdraw her plea to prevent a manifest injustice." *See* ***State v. Lackershire***, 2007 WI 74, ¶48, 301 Wis. 2d 418, 734

[5] I observe that in his reply brief, Sanders asserts that the circuit court did not personally ascertain from Sanders at the plea hearing whether a factual basis existed to support the pleas. First, even if this assertion were part of a preserved, developed argument, it would nevertheless fail to take into account that a personal colloquy is not necessary to establish a factual basis, and instead the circuit court is to make such inquiry as satisfies it that the defendant in fact committed the crime to which he or she is pleading guilty. *See* ***State v. Thomas***, 2000 WI 13, ¶¶20-21, 232 Wis. 2d 714, 605 N.W.2d 836, WIS. STAT. § 971.08(1)(b). Second, Sanders' assertion is not accurate. As summarized above, the court directly posed this question to both counsel and Sanders, and received affirmative answers from both.

N.W.2d 23 (citing ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996) (defendant entitled to withdraw plea to an offense that required the victim to be less than sixteen years old, when it was undisputed that victim was 16)); *see also* ***State v. Johnson***, 207 Wis. 2d 239, 242, 558 N.W.2d 375 (1997) (defendant entitled to withdraw plea to armed robbery, which required proof of "asportation," when "neither the complaint nor the plea hearing statements provide a factual predicate for the element of asportation."). Under this doctrine, a defendant does not argue that he or she did not understand the factual basis or the elements of the charged offense, but instead argues that a manifest injustice arises because a conviction is based on a plea supported by a factual basis that does not constitute the charged crime. *See* ***Lackershire***, at ¶¶48-50.

¶13 Expanding on this doctrine, the requirement of an affirmative showing that a plea is being made knowingly, voluntarily, and intelligently "is distinct" from the requirement in WIS. STAT. § 971.08(1)(b) that a circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." ***Thomas***, 232 Wis. 2d 714, ¶14. "The factual basis requirement 'protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" ***Id.*** (quoting ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978), in turn quoting ***McCarthy v. United States***, 394 U.S. 459, 467 (1969)).

¶14 Both sides here agree that the following is the definition of the crime to which Sanders entered his pleas: "WIS. STAT. § 940.44(2) prohibits knowingly or maliciously preventing or dissuading a crime victim from providing *any one or more* of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted;

or (3) assisting in the prosecution." *See* ***State v. Freer***, 2010 WI App 9, ¶24, 323 Wis. 2d 29, 779 N.W.2d 12 (2009) (emphasis in original). At issue here is the third basis for criminal liability, with the State arguing that the complaint in the instant case can be fairly read to allege that Sanders knowingly dissuaded KL from assisting in the prosecution of Case 206 through each of the phone conversations summarized in the complaint, as quoted above. I agree.

¶15 Sanders argues that his statements in these conversations do not have "anything to do with the actual prosecution of this case." It is unclear precisely what Sanders means by this, but it appears that this argument is based on the inaccurate and unsupported premise that the circuit court should have ignored significant context and all reasonable inferences in favor of guilt in interpreting the summaries of the recorded calls in the complaint.

¶16 I start with general context. As the circuit court noted in denying the post-conviction motion, it is significant that, in initiating these conversations with KL when he did, Sanders allegedly violated the 72-hour rule following his arrest in Case 206. I agree with the court that the allegation that Sanders was willing to commit repeated violations of the 72-hour rule provided support for "a reasonable inference" that Sanders was "trying to modify [KL's] behavior" so that she would not cooperate with authorities in Case 206. By itself this does not resolve the issue presented, but I conclude that it is significant context.

¶17 Turning to the substance of the conversations, one reasonable inference from both summaries is that Sanders was trying to convince KL to either change her account from accurately incriminating to inaccurately exculpatory, or else otherwise fail to cooperate with prosecution of Case 206. After KL protested that Sanders did hit her, Sanders repeatedly tried different angles, in multiple

phone calls, to get to her to say differently, providing various alternative versions, asking why she had to call police, trying to gain sympathy by referring to his children and his parole status, and instructing her not to share information about the incident with his probation agent, after she said that the agent had asked her for a written statement about the incident.

¶18 One possibility, based on these conversations, is that Sanders had *not* hit KL and he was imploring her to tell the truth. The other possibility is that he *had* hit her and he was trying to convince her to lie and to dissuade authorities, including his probation agent, from pursuing and presenting the facts as part of the prosecution of Case 206. The second possibility is a crime. Sanders' manipulation was particularly stark in the second call (potentially shedding light on his intentions in the first call), when he told KL falsely that he was allowed to have contact with her and that he knew this because he is "very good with the law." As the circuit court noted, one reasonable reading of these comments is that Sanders was trying to convince KL that the law cannot protect KL, because he knows how to circumvent it.

¶19 Sanders contends that his "begging" KL not to tell his probation agent about the incident could lend no weight to a charge that he knowingly dissuaded KL from assisting in the prosecution of Case 206. I disagree. It is true that probation agents are not police officers or prosecutors, and that in some circumstances there are limitations on the sharing of information between probation agents and police. *See* ***State v. Spaeth***, 2012 WI 95, 343 Wis. 2d 220, 819 N.W.2d 769 (addressing Fifth Amendment privilege against compelled self-incrimination in this context). However, there is no reason to suspect a limitation on information sharing among authorities in connection with Case 206. Moreover, Sanders did not make a stand-alone assertion to KL that she should not tell his

probation agent about the incident. When considered in the context of the circumstances alleged in the complaints and Sanders' other statements, there is a reasonable inference that his begging was part of an effort to convince KL that she should not provide accurate information to authorities in connection with the prosecution of Case 206. Considered in this context, there is a reasonable inference that Sanders believed that KL in turn believed that her giving a truthful account of the incident to the probation agent, particularly in the apparently requested written form, would at a minimum make her feel committed to giving a consistently truthful version of the incident in all settings, to all authorities.

¶20 Separately, Sanders argues that his statements lacked a "threat[]" of "specific consequences" to KL if she cooperated in the prosecution of Case 206. The first problem with this lack-of-threat argument is that Sanders fails to point to authority for the proposition that one cannot knowingly dissuade a victim from assisting in a prosecution contrary to WIS. STAT. § 940.44(2) absent a "threat[]" with "specific consequences." The sole authority cited by Sanders for this proposition is to quote, from ***Freer***, a portion of the defendant's statement that was not especially threatening and not in the least bit specific, at least when considered in isolation: if the victim was going to make "unjustified" allegations against "people," then the victim "will find … justified denunciation of [the victim's] … own [misconduct]." *See* ***Freer***, 323 Wis. 2d 29, ¶3.

¶21 Second, Sanders' lack-of-threat argument is not consistent. Sanders appears to acknowledge that a statement such as "take back what you said" could, depending on the circumstances, be "an overt[,] direct statement" sufficient to support a charge of intimidation of a victim, apparently failing to recognize that, according to the summaries in the complaint, Sanders repeatedly and clearly conveyed to KL the idea, "take back what you said."

¶22 Third, assuming without deciding that a threat of specific consequences must be made or implied: (1) there was a reasonable inference of a threat of a specific consequence in the allegations contained in the complaints that Sanders acknowledged that the court could rely for a factual basis, specifically allegations in the complaint in Case 206 that Sanders had, shortly before calling KL from jail, used physical violence in an attempt to control KL's behavior; and (2) on a related note, in the second conversation summarized above, KL reminded Sanders that he had threatened her the day before, and Sanders admitted that he had done so. One reasonable inference is that this admitted threat by Sanders would have involved a threat of physical violence.

¶23 For these reasons, I conclude that the circuit court properly exercised its discretion in denying the post-conviction motion and accordingly affirm that decision and the judgment of conviction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.