COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2017

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 No. 2016AP2114-CR **Cir. Ct. No. 2015CM1439**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CYNTHIA A. HANSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARK A. FRANKEL and JODI L. MEIER, Judges. *Affirmed*.

¶1 GUNDRUM, J.[1] Cynthia Hansen appeals from a judgment of conviction for criminal damage to property of another, in violation of WIS. STAT.

[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.

§ 943.01(1), entered upon her guilty plea and the denial of her postconviction motion.[2] She contends her conviction in this case should be dismissed or her plea should be vacated because "the record" of her guilty plea fails to demonstrate she was "aware of the essential elements of the crime of criminal damage to marital property." She further asserts there was an insufficient factual basis for her plea. We disagree with her on both fronts and affirm.

Background

¶2 Pursuant to a plea bargain dismissing a disorderly conduct charge in this case, as well as a charge of knowingly violating a domestic abuse order in a separate case, Hansen pled to a single count of criminal damage to property related to an incident in which she damaged a vehicle described in the criminal complaint as "[A.H.'s] car." Five months after Hansen was sentenced, she filed a postconviction motion alleging, inter alia, the issues we address in this appeal. The postconviction court denied the motion as it relates to the issues in this appeal, and Hansen appeals.

Discussion

¶3 Hansen first argues the circuit court failed to comply with the requirement of WIS. STAT. § 971.08(1)(a) that before accepting her plea it "determine … that the plea is made 'voluntarily with understanding of the nature of the charge.'" Citing ***State v. Brandt***, 226 Wis. 2d 610, 619, 594 N.W.2d 759

[2] Reserve Judge Mark A. Frankel entered the judgment of conviction and Judge Jodi L. Meier presided over the postconviction motion and entered an amended judgment of conviction.

(1999), Hansen adds that "[t]his has been described as a requirement going to the defendant's 'awareness of the essential elements of the crime.'"

¶4 As we have stated:

> A defendant seeking to withdraw a plea on the ground that it was accepted without the circuit court's conformance with WIS. STAT. § 971.08(1) bears the initial burden of making a prima facie showing of a deficiency. Whether a defendant has made such a showing is a question of law we review de novo.

State v. Robles, 2013 WI App 76, ¶3, 348 Wis. 2d 325, 833 N.W.2d 184 (citations omitted). Here, Hansen failed to meet her burden of making a prima facie showing that the plea colloquy was deficient.

¶5 WISCONSIN STAT. § 943.01(1)—the offense with which the State charged Hansen and to which she pled—provides: "Whoever intentionally causes damage to any physical property of another without the person's consent is guilty of a Class A misdemeanor." Hansen asserted before the circuit court and in her brief-in-chief on appeal that while the circuit court properly informed her of the elements of § 943.01(1), it did not inform her of the WIS. STAT. § 939.22(28) definition of "property of another," which states that "'property of another' means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property." Specifically, Hansen argued that the subsec. (28) "which the actor has no right to defeat or impair" language was an additional *element* of the crime of criminal damage to property, of which the circuit court was obliged to inform her prior to her plea.

¶6 In her reply brief, Hansen changes course and concedes the State's argument in its response brief that WIS. STAT. § 939.22(28) merely "clarifies" the

"property of another" element. She acknowledges in her reply brief that subsec. (28) "does not add an element to the offense of criminal damage to property under WIS. STAT. § 943.01." She modifies her appellate claim to now state that "the error here was the trial court's failure to *clarify* the 'property of another' element of the offense, when the prosecution alleged that marital property had been damaged." She asserts that the circuit court erred in its plea colloquy because the court did "not sufficiently explain[]" the "property of another element" "so that the court could have been assured that [Hansen] was aware of how that element may or may not exist in that context."

¶7 Hansen places much reliance on her contention that "given [that] the damaged property was marital property," the court should have known to discuss WIS. STAT. § 939.22(28) with Hansen during the plea portion of the plea and sentencing hearing. Hansen emphasizes "[t]he Court was aware that Cynthia Hansen and [A.H.] were marital partners" and states that "although the court knew that [Hansen] and [A.H.] were married at the time of the incident, it did not ask Hansen during the plea colloquy whether she believed she had an ownership interest in the car because of their marriage or Wisconsin's marital property law." Significantly, we must point out that Hansen's citations to the record in support of her assertion that the court "was aware" and "knew" she and A.H. were married at the time of the offense are citations to the *sentencing* portion of the plea and sentencing hearing, which was conducted after the court had already accepted Hansen's plea. She directs us to no place in the plea and sentencing hearing transcript, and we are able to find none, suggesting the court was aware at the time

Hansen entered her plea that she and A.H. were legally married at the time of the offense.[3]

¶8 In addition to Hansen's heavy but unfounded reliance upon the circuit court's "knowledge" at the time of the plea of the alleged joint ownership nature of the car Hansen damaged, Hansen's appellate argument largely rises and falls on her assertion that she could not be found guilty of WIS. STAT. § 943.01(1) because the property she damaged was marital property. As the circuit court recognized at the postconviction hearing, however, Hansen's argument fails in light of our holding in ***State v. Sevelin***, 204 Wis. 2d 127, 554 N.W.2d 521 (Ct. App. 1996).

¶9 Sevelin was convicted of criminal damage to property under the same statute as Hansen, WIS. STAT. § 943.01, for causing damage to several rooms in his marital home in which both he and his wife had an ownership interest. ***Sevelin***, 204 Wis. 2d at 130-31. On appeal, he argued he could not be convicted "of damaging property in which he has an ownership interest." ***Id.*** at 131. We specifically considered WIS. STAT. § 939.22(28)—the definitional provision Hansen relies on here—and noted that this section

> defines "property of another" for purposes of [WIS. STAT.] chs. 939 to 948 and 951, as "property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property."

[3] We recognize that the probable cause section of the criminal complaint indicated that Hansen and A.H. were married. However, the record shows that the plea hearing was the only hearing in this case in which Reserve Judge Mark Frankel participated and the transcript from the plea hearing provides no indication he had read the probable cause section or was otherwise aware Hansen and A.H. were married at the time of the offense. We further note that Hansen failed to bring to the circuit court's attention during the plea process that WIS. STAT. § 939.22(28) might have any specific importance to this case.

Sevelin, 204 Wis. 2d at 131. We then stated, "This section unambiguously means that a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest." ***Id.*** We affirmed Sevelin's conviction because the property of his marital home "was, in part, the property of another," his wife. ***Id.*** at 135.

¶10 In light of ***Sevelin*** and because it is undisputed the vehicle Hansen damaged "was, in part, the property of another," here A.H., we conclude that Hansen was properly convicted under WIS. STAT. § 943.01, despite the fact that she also may have "ha[d] an ownership interest" in the vehicle. The circuit court did not err in failing to inform Hansen of the WIS. STAT. § 939.22(28) definition of "property of another" where we already considered that definition in ***Sevelin*** and held that subsec. (28) "unambiguously means that a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest." ***Sevelin***, 204 Wis. 2d at 131.

¶11 Hansen also asserts that the circuit court failed to fulfill the WIS. STAT. § 971.08(1)(b) plea hearing requirement that the court "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." This is essentially an inquiry into "whether there is a factual basis for the offense." *See* ***State v. Black***, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363. As our supreme court explained in ***Black***:

> [T]he plain language of the statute merely requires the circuit judge to make such inquiry as satisfies "it"—meaning the circuit court—"that the defendant in fact committed the crime charged."… [T]he circuit court is not required to satisfy the defendant that he or she committed the crime charged. Indeed, the defendant evidenced his or her own satisfaction by entering a plea and thereby waiving his or her right to a jury trial.

Id., ¶12. Our case law does not "require a judge to make a factual basis determination in one particular manner." ***Id.***, ¶11. Furthermore,

> [w]here the trial court has concluded that the evidence did provide a sufficient factual basis to support the plea, this court will not upset these factual findings unless they are contrary to the great weight and clear preponderance of the evidence. Where as here, the guilty plea is pursuant to a plea bargain, the court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea.

Broadie v. State, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975) (citations omitted); *see also* ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

¶12 At the plea hearing in this case, Hansen pled guilty to the charge of criminal damage to property. Her counsel provided the court with "the plea form," which appears to bear Hansen's signature and date of the plea hearing and indicates she reviewed and understood "this entire document and any attachments." The record indicates an "Elements of Common Criminal Offenses" sheet was attached, which bears a checkmark next to "Criminal Damage to Property" "[WIS. STAT.] § 943.01" and includes the following "Elements": "I caused damage to the *physical property* of another," "I intended to cause such damage," "I did not have the consent of the owner to damage the property," and "I knew that I did not have consent of the owner to damage the property." At the plea hearing, the circuit court engaged in a direct colloquy with Hansen by which she admitted she intentionally damaged "a car" "without the consent of the owner"—the victim, A.H.—and that she knew she "didn't have consent of the owner at the time the damage was done." She also acknowledged "that on August 17th of [2015] in the City of Kenosha, that offense happened with regard to the property belonging to [A.H.]… Specifically a 2011 black Ford Focus

belonging to" A.H. With that, the court found "an adequate factual basis exist[ed]" for accepting Hansen's plea.

¶13 Hansen contends:

> Because … the criminal damage statute borrows from the concept of "property of another" in the definition's provisions of [WIS. STAT. ch.] 939, the court should have extended the inquiry to determine the facts in light of that definition. Had it done so, the factual determination necessarily would have led to an assessment of whether Cynthia Hansen, under any circumstance, had a right to defeat or impair [A.H.'s] marital property interest in the vehicle. That inquiry was not conducted, and the defendant's guilty plea is defective for that additional reason.

She adds that "a sufficient factual inquiry would have revealed that no offense was committed at all."

¶14 To answer Hansen's contention, we again look to our decision in ***Sevelin***. In holding that WIS. STAT. § 939.22(28) "unambiguously means that a person can be convicted of criminal damage to property even though he or she has an ownership interest if someone else also has an ownership interest," ***Sevelin***, 204 Wis. 2d at 131, we rejected the same type of argument Hansen makes here—that she could not violate WIS. STAT. § 943.01(1) because of the definition of "property of another" in subsec. (28) and her marital status at the time of the offense. We held in ***Sevelin*** that a defendant's own marital ownership interest in the damaged property does not preclude the defendant from being found guilty of § 943.01, so long as the victim also had an ownership interest in the property. ***Sevelin***, 204 Wis. 2d at 131.

¶15 A circuit court is not required to "conduct a mini-trial at every plea hearing to establish that the defendant committed the crime charged beyond a

reasonable doubt." *See* ***Black***, 242 Wis. 2d 126, ¶14. Further, Hansen has directed us to no case law indicating a court taking a plea is required to make a legal interpretation and ruling, or engage in discussion with the defendant, with regard to the potential applicability of every word or phrase that could possibly be litigated due to a related definitional section.[4] Instead of pleading and waiving rights by doing so, Hansen could have brought a pre-plea challenge to the charge, raising the issue she raises post-plea and sentencing relating to the appropriate legal interpretation and application of WIS. STAT. § 939.22(28). She did not do so, but instead accepted the benefit of a plea bargain, which dismissed two other charges against her.

¶16 "[E]stablishing a sufficient factual basis requires a showing that 'the conduct which the defendant admits constitutes the offense charged.'" ***State v. Lackershire***, 2007 WI 74, ¶33, 301 Wis. 2d 418, 734 N.W.2d 23 (citation omitted). In light of WIS. STAT. § 943.01(1), ***Sevelin***, and the record in this case, we conclude such a showing was properly made to the circuit court here and the court did not err in finding a sufficient factual basis for Hansen's plea.

By the Court.—Judgment and order affirmed.

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

[4] Hansen cites to ***State v. Jipson***, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18, as providing support for her contention that her plea should be vacated because the circuit court failed to inform her of the WIS. STAT. § 939.22(28) definition of "property of another." We find ***Jipson*** distinguishable in one very key respect: in ***Jipson***, the circuit court failed to inform the defendant of "an essential element" of the offense. *See* ***Jipson***, 267 Wis. 2d 467, ¶16. Here, as Hansen concedes in her reply brief, the court did not fail to inform her of an element of the offense.