COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2019

Sheila T. Reiff
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. 2018AP731-CR **Cir. Ct. No. 2016CF148**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN L. NASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard, and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kevin Nash appeals a judgment convicting him of second degree sexual assault of a child and an order denying his post-sentencing motion to withdraw his entry of an ***Alford*** plea on the ground of manifest injustice. *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970) (addressing the constitutionality of a plea of no contest, resulting in a conviction, when the accused affirmatively denies guilt). The manifest injustice occurred, Nash contends, because the circuit court "erred in finding a sufficient factual basis to accept" his ***Alford*** plea. We conclude that the plea-taking court did not erroneously exercise its discretion in denying Nash's post-sentencing plea withdrawal motion. This is because the court accepted the plea premised on a factual basis that, if proven at trial, would constitute "strong proof of guilt." Accordingly we affirm.

BACKGROUND

¶2 Nash was charged in an amended criminal complaint with two offenses against two of his younger sisters, C.W. and A.N., each of whom had been forensically interviewed. More specifically, the complaint alleged that, between November 1, 2011, and November 1, 2012, Nash committed: (1) first degree sexual assault of a child under age 12, based on an allegation that he had sexual intercourse with C.W., in violation of WIS. STAT. § 948.02(1)(b) (2017-18); and (2) repeated sexual assault of A.N., based on allegations that he sexually assaulted A.N. at least three times through conduct that qualified as first degree

sexual assault of a child, as defined in § 948.02(1)(am), (b), or (c), in violation of WIS. STAT. § 948.025(1)(b).[1]

¶3 With a trial date set for the following week, the parties appeared at a plea hearing that was conducted on two successive days. On the first day, the State filed an amended information to a single, lesser charge (sexual assault of a child under 16, contrary to WIS. STAT. § 948.02(2)). The defense filed a completed plea questionnaire and waiver of rights form. Nash's counsel explained that the plea "could be construed as" an ***Alford*** plea. The court took extensive steps toward potentially accepting Nash's plea of no contest to the amended charge. However, Nash made a series of conflicting statements that caused the court to explain that it was not prepared to accept a plea. The court left the case on the trial calendar and returned to the parties the amended information and completed plea questionnaire and waiver of rights form.

¶4 The next day, at the continued hearing, the parties made a second attempt at a negotiated plea. The parties refiled the same amended information and plea questionnaire and waiver of rights form. Again, defense counsel explained that Nash sought to enter an ***Alford*** plea. Nash told the court that his plea was no contest, and took the position that, while he had not in fact committed the charged offense, he understood that the State had sufficient evidence to obtain a guilty verdict at trial. The court accepted the negotiated plea offered by the parties.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

¶5 Following sentencing, Nash filed a motion arguing in pertinent part that "the court neglected to find that the record contains strong evidence of actual guilt as required under" ***Alford***. The court rejected Nash's argument, in part on the ground that the criminal complaint had provided the court, at the time of the plea, with details describing proof of Nash's alleged sexual intercourse with an identified underaged person. Nash appeals. Additional background is referenced as necessary in the following Discussion section.

DISCUSSION

¶6 A defendant who does not seek to withdraw a guilty or no-contest plea until after sentencing "must prove by clear and convincing evidence that refusing to allow plea withdrawal would result in a 'manifest injustice.'" ***State v. Finley***, 2016 WI 63, ¶58, 370 Wis. 2d 402, 882 N.W.2d 761 (quoted source omitted). Our supreme court has explained the manifest injustice analysis in the ***Alford*** plea context, as well as our standard of review, in the following passage:

> [O]ne type of manifest injustice is the failure of the trial court to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads. When the plea entered is an ***Alford*** plea, the factual basis is deemed sufficient only if there is strong proof of guilt that the defendant committed the crime to which the defendant pleads. However, in the context of a negotiated guilty plea, this court has held that a 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." The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous.

State v. Smith, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996) (citations omitted); *see also* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 644-45, 579 N.W.2d 698 (1998) (before accepting ***Alford*** plea, court "must determine that the summary

of the evidence the state would offer at trial constitutes 'strong proof of guilt'") (citing authority that includes ***Alford***, 400 U.S. at 37). This "strong proof of guilt" standard requires some unspecified "strong[er]" amount of proof than the non-***Alford*** standard requiring proof that satisfies the court "that the defendant in fact committed the crime charged." *See* WIS. STAT. § 971.08(1)(b); ***State v. Black***, 2001 WI 31, ¶¶11-12, 242 Wis. 2d 126, 624 N.W.2d 363. "[S]trong proof of guilt is less than proof beyond a reasonable doubt, [but] it is clearly greater than what is needed to meet the factual basis requirement under a guilty plea." ***Smith***, 202 Wis. 2d at 27 (citation omitted).

¶7 We now provide more detailed background information, and then explain why we reject Nash's sole argument that the circuit court erroneously exercised its discretion in accepting the factual basis offered by the State.

¶8 Nash appeared at a plea hearing the week before a scheduled trial. The State filed the amended information, which, as pertinent to this appeal, charged that, between November 1, 2011, and November 1, 2012, Nash had sexual intercourse with C.W., which was a sexual assault of a child under age 16, in violation of WIS. STAT. § 948.02(2). Defense counsel tendered a plea questionnaire and waiver of rights form, addressing the amended charge. The defendant had initialed an attachment to the form setting forth the elements of the offense, which stated, when read in the context of the amended charge, that Nash had had sexual intercourse with a person who was then under 16 years old.

¶9 Before the court was an amended complaint that included the following allegations. During a forensic interview arranged by police in October 2015, C.W. said that when she was 5, while she sat on a couch in the basement of her residence in Pewaukee, Nash approached her and exposed his penis. C.W.

further said that he forced his penis inside her mouth, before she pushed him away and ran upstairs.

¶10 The complaint further alleged that, during a separate forensic interview, A.N. said that, when she was 9, living in the same residence as C.W., Nash "would repeatedly have sexual intercourse with her in the basement," penis to vaginal intercourse. A.N. also said that "on at least one occasion" Nash "attempted to put his 'private part' into her mouth." In addition, A.N. "described an act of attempted sexual assault that occurred at their maternal grandmother's house in Covington, Georgia," which "was broken up when a family member walked in on" it. In a separate forensic interview, M.N., a third sister, who was two years older than A.N., "described acts of sexual intercourse" at a residence in Milwaukee, before the move to Pewaukee.[2]

¶11 Defense counsel explained that Nash would be entering a no-contest plea and that he "is not going to contest that the State could present witnesses or other evidence that if believed by a jury would be sufficient to convict my client of the amended charge in the complaint." Counsel elaborated that Nash "is not saying that he committed the offense outright and in a way it could be construed as an ***Alford*** plea, but that is the basis of the no-contest plea and we would like to resolve the case in that [manner] and the State has no objection."

[2] Before Nash entered the plea that he now seeks to withdraw, the court granted the State's other-acts motion to introduce at trial the reports of alleged prior sexual conduct by Nash in Milwaukee and Georgia. The court explained in part that this evidence would be admissible for the permissible purpose of providing jurors with an explanation of how the alleged assaults could have occurred, despite whatever caregiving from adults the children were receiving between November 1, 2011, and November 1, 2012. Nash does not challenge the court's other-acts ruling in this appeal.

¶12 Pertinent to the issue in this appeal, the court read aloud from the amended information, which alleged that Nash had sexual intercourse during the charged time period with the underaged C.W. The court then called on the prosecutor to state a factual basis for the plea, and the prosecutor said:

> Last fall[,] I believe[,] the defendant's three sisters, who are here in court, made outcries to the Village of Pewaukee Police Department, that between the dates roughly of November 1st, 2011, and November 1st, 2012, when the four of them [Nash and his three sisters] and their mother and stepfather lived at the address of 807 Ridgeway Drive, in the Village of Pewaukee, that the defendant had engaged in sexual intercourse with two of the three sisters.
>
> All three sisters were under the age of sixteen at the time. In fact, even though we have just alleged one act of sexual assault, sexual intercourse of a child under the age of sixteen, and that is [first name given and spelled]…. [T]here were multiple acts of sexual intercourse, penis to vagina, at that address ….

¶13 The court asked Nash if he understood that this is "what the State would intend to prove if this matter went to trial." The court confirmed with Nash that, in pleading no contest as he said he intended to do, he would be acknowledging that the State had "enough evidence" to prove its case. However, shortly thereafter, Nash contradicted this position. He answered "no" when the court asked him again if he would "acknowledge [that] the State has enough evidence to prove this charge?"

¶14 Defense counsel represented to the court that he had explained to Nash what the prosecutor had just stated: if the case went to trial, the State would call as witnesses "the three sisters," who "were going to say that he had sexual contact with them and/or sexual intercourse," and also perhaps call staff of the child advocacy center where interviews with the victims had occurred.

¶15 When the court made multiple additional attempts to further engage with Nash on the issue of whether he was prepared to acknowledge that the State had enough evidence to prove his guilt to the amended charge, Nash made a series of statements. These included that he believed that the State could not prove its case and that he wanted to go to trial. Nash asserted that he was innocent, but did not articulate any sort of defense theory in his statements. He asserted that the case against him is "basically a hearsay case …. It's all this hearsay." He asserted that the victims merely "feel like I did something," but that "I never did none of this and I don't want to keep going through it."

¶16 The court determined that, in the absence of "a clear indication from Mr. Nash" what he "exactly … wants to do," the court would leave the case on the trial calendar, and returned the amended information and plea questionnaire and waiver of rights form to the parties.

¶17 At the continued hearing the next day, defense counsel and Nash indicated to the court that, after "[i]n depth" discussion between the two, Nash wanted to proceed with an ***Alford*** plea, based on the same amended information and plea questionnaire and waiver of rights form. The court confirmed with Nash, multiple times, that Nash's position was that he was "not admitting" to the crime alleged in the amended information, but that he wanted "to take advantage of the State's plea offer and recommendation and the amended charge," and that he believed, based on his review of the evidence, "that the State has evidence that could result in [his] conviction."

¶18 Nash and his attorney confirmed that Nash had reviewed the complaint and "all the police reports" with his attorney. The prosecutor indicated

that he stood on the evidence recited the day before as well as the amended complaint as a factual basis for the plea.

¶19 The court accepted Nash's plea of no contest, explicitly addressed as an ***Alford*** plea, based in part on a finding that there was "a sufficient factual basis based on the contents of the complaint and the offer of proof" by the prosecution.

¶20 In denying Nash's post-sentencing motion for plea withdrawal, the court determined in pertinent part that, at the time of the plea:

> We didn't just say, ["T]here was some sort of facts. There was something sexual going on or some sort of touching. We are not able to be definite about it.["] It was stated on the record that there was sexual intercourse and the nature, the specific nature of the sexual intercourse. The people involved. The ages. The location. Using as well the information set out in the complaint.

¶21 We conclude that the amended complaint and the representations of the prosecutor easily describe "strong evidence of guilt" on each of the two elements of the offense: sexual intercourse and age of the victim. *See* ***Smith***, 202 Wis. 2d at 28 (strong proof is required on each element of the charged crime). The penis-to-mouth contact that C.W. is quoted reporting in the amended complaint qualifies as sexual intercourse. *See* WIS. STAT. § 948.01(6) (defining "sexual intercourse"). The prosecutor represented that three witnesses would all testify that Nash committed sexual assaults in a particular place during a particular time period, including the specific sexual assault that is the subject of the amended information. *See* ***Warren***, 219 Wis. 2d at 622-24, 646 (citing disclosures of sexual assault by victim as "strong proof of guilt"). It only adds to the strength of the State's case that the court would have admitted at trial the State's proposed other-acts evidence involving alleged sexual assaults of the two other victims. According to the State's offer of proof, consistent with the court's pretrial other-

acts ruling, the jury would have heard testimony that Nash engaged in sexual intercourse not only with C.W. but also with A.N.

¶22 Further, during the plea hearing, Nash merely gave a flat denial of guilt and failed to provide a supported theory of defense. That is, he did not provide any reason for the plea-taking court to doubt that the State had strong evidence of guilt. He made an unsupported objection to "hearsay," presumably referring to the allegations made by the three victims. In sum, the record shows that "'a sufficient factual basis was established at the plea proceeding to *substantially negate* [the] defendant's claim of innocence.'" *See* ***id.*** at 645 (emphasis added) (quoting ***State v. Johnson***, 105 Wis. 2d 657, 664, 314 N.W.2d 897 (Ct. App. 1981)).

¶23 Moreover, this was a negotiated guilty plea. Therefore, as noted above, the circuit court was not required to make the same level of inquiry as if each party were free to argue for any legal sentence. *See* ***Smith***, 202 Wis. 2d at 25. And, the record reflects that defense counsel assured the court multiple times during the extended plea hearing that counsel had carefully and repeatedly gone over the evidence and legal issues with Nash.

¶24 We now turn to Nash's arguments. Nash initially suggests an argument that a court taking an ***Alford*** plea is obligated to explicitly find, in so many words, that there is "strong proof of guilt," and that we must reverse because the court did use these words in taking the plea. However, by the reply brief, he disavows, as he should, an argument that magic words are required, recognizing that this is not a tenable argument. *See* ***Johnson***, 105 Wis. 2d at 664 (circuit court determination of adequate factual basis for ***Alford*** plea "was equivalent to a finding that the proof of guilt was strong").

¶25 Nash asserts that "a recitation [by the prosecutor] of the allegations contained in the complaint does not reasonably inform the court of what evidence the state would submit at trial." However, Nash undercuts whatever argument he intends to make along these lines by acknowledging, as he must, that "Wisconsin law does not currently require the use of sworn testimony to meet the strong evidence of guilt factual finding standard in ***Alford*** plea cases." Without citing on-point authority, Nash apparently asks us to expand the strong-evidence-of-guilt standard to require the State to elicit testimony, submit exhibits, updated witness lists, or otherwise offer evidence in a trial-like mode as part of the plea process, and to apply this new rule retroactively in this case. However, Nash provides us with no authority that supports such an expansion. As we have explained, the test is whether the State has explained to the court that it can introduce evidence at trial that is sufficient to support a factual basis which substantially negates the defendant's claim of innocence. That occurred here, through the allegations in the complaint and the representations of the prosecutor, which highlighted key allegations in the complaint.

¶26 Nash asserts, as part of this argument, that "the court was not given a summary of the evidence the state would have presented at trial" and that the State "did not specify the witnesses the state would call at trial." As should be clear by this point, these assertions are inaccurate in that they ignore the State's representation at the plea hearing that the three sisters were prepared to testify at trial to the allegations of sexual assault that they had already made during interviews.

¶27 Nash argues that the record does not contain strong proof of sexual intercourse in particular, and suggests that strong proof of sexual intercourse could have been shown only through representations by the State regarding "physical

evidence or witnesses to the alleged conduct" other than the victims. However, it is self-evident that an unqualified representation that an alleged victim would unambiguously testify that Nash intentionally put his penis in her mouth in a particular location during a particular time period constitutes strong proof of sexual intercourse. Indeed, if believed, this potential testimony would in itself provide proof beyond a reasonable doubt. The alleged conduct is not complicated or subtle. Nash does not persuade us that "a far more specific narrative" of sexual intercourse was required, or that, as a general matter, accounts given by children about traumatic events when they were younger cannot be strong proof of guilt.

CONCLUSION

¶28 For all of these reasons, we affirm the circuit court's denial of the post-sentencing motion for plea withdrawal.

By the Court.—Judgment and order affirmed.

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