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April 25, 2024

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Electronic Notice

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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2023AP167-CR

State of Wisconsin v. Kyle D. Nelson (L.C. #2021CF225)

Before Nashold, J.¹

Summary disposition orders 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).

Kyle Nelson was convicted, pursuant to a negotiated plea, of criminal damage to property as an act of domestic abuse. *See* WIS. STAT. §§ 943.01(1) and 968.075(1)(a). He challenges an order denying his postconviction motion to amend his judgment of conviction, arguing that there is no factual basis for the domestic abuse modifier or surcharge. Based upon my review of the briefs and record, I conclude that this case is appropriate for summary disposition, *see* WIS. STAT. RULE 809.21, and I summarily affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

According to the criminal complaint, police were dispatched to an apartment to “investigate a reported domestic incident.” Upon arriving at the apartment, a woman identified in the complaint as “Victim 1”² told an officer that Nelson “punched a hole in the wall and then punched the television.” The officer observed that the television in the apartment was “completely smashed.” Victim 1 told the officer that she and Nelson have a child in common and that Nelson was living at the apartment “on and off.” A second officer made contact with Nelson outside of the apartment. Nelson told the second officer that he “got ‘pissed’ and punched the television.” Nelson was on bond at the time.

Nelson was charged with felony bail jumping, disorderly conduct as an act of domestic abuse, and criminal damage to property as an act of domestic abuse. Regarding both the criminal damage to property and disorderly conduct counts, the criminal complaint specifically references the domestic abuse modifier WIS. STAT. § 968.075(1), which defines domestic abuse, and further states that “because this charge is an act of domestic abuse, costs upon conviction would include the domestic abuse assessment imposed under [WIS. STAT. §] 973.055(1).”

Pursuant to a negotiated plea agreement, Nelson pled no contest to the count of criminal damage to property as an act of domestic abuse, and the other two counts were dismissed and read in.³ At the plea hearing, both Nelson and his attorney agreed that the criminal complaint sets forth an “ample factual basis” for the plea. As part of Nelson’s sentence, a domestic abuse surcharge was imposed under WIS. STAT. § 973.055(1).

² For consistency, this opinion also refers to the victim in the complaint as “Victim 1.”

³ Nelson also pled to charges in another case, 2019CF479, which are not at issue in this appeal.

After sentencing, Nelson moved to amend his judgment of conviction, arguing that the domestic abuse modifier, WIS. STAT. § 968.075(1), and the related domestic abuse surcharge under WIS. STAT. § 973.055 should be removed from his judgment of conviction because there was not a factual basis for a finding of domestic abuse under § 968.075(1).⁴ The circuit court denied the motion and Nelson renews his arguments on appeal.

As a preliminary matter, I note that although Nelson's motion in the circuit court was for amendment of the judgment of conviction and not for plea withdrawal, his plea of no contest to the charge of criminal damage to property was specifically as an act of domestic abuse. This is consistent with the criminal complaint, which alleges that the criminal damage to property count is charged as an act of domestic abuse.

Thus, in addition to seeking to amend the judgment of conviction, it appears that Nelson either seeks, or was required to seek, withdrawal of his plea. Regardless, as discussed below, because Nelson has failed to show that there is an insufficient factual basis for his plea, he cannot prevail on either a motion to amend the judgment of conviction or for plea withdrawal.

⁴ In the circuit court, Nelson argued that both the domestic abuse modifier, WIS. STAT. § 968.075(1), and the domestic abuse surcharge under WIS. STAT. § 973.055 should be removed from the judgment of conviction. Nelson did not offer a separate basis for challenging the surcharge; instead, his argument appears to have been that, because the modifier was improper, the surcharge was likewise improper. In his brief-in-chief on appeal, Nelson appears to abandon any challenge related to the surcharge. Nevertheless, in its response brief, the State argues that both the domestic abuse modifier and the domestic abuse surcharge are properly included in the judgment of conviction. Despite not doing so in his brief-in-chief, in his reply brief, Nelson offers a separate argument as to why the surcharge should also be removed. Although this court does not normally address arguments made for the first time in reply, *see State v. Marquardt*, 2001 WI App 219, ¶39, 247 Wis. 2d 765, 635 N.W.2d 188, here I address Nelson's argument related to the surcharge because Nelson challenged the surcharge in the circuit court and because the State addresses the topic in its response brief on appeal.

WISCONSIN STAT. § 971.08(1)(b) provides that before a circuit court accepts a defendant's guilty plea, the court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." This is known as the factual basis requirement. *See State v. Thomas*, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. 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.*, ¶14 (alteration in original; quoted source omitted). A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *Id.*, ¶16. If a court fails to establish that a sufficient factual basis exists as to the charge to which the defendant enters a guilty plea, a manifest injustice occurs. *Id.*, ¶17.

Establishing a sufficient factual basis requires a showing that "the conduct which the defendant admits constitutes the offense charged." *White v. State*, 85 Wis. 2d 485, 488, 271 N.W.2d 97 (1978). The circuit court's inquiry into whether the defendant committed the crime charged need only be sufficient to satisfy the court that the defendant did in fact commit the crime charged. *State v. Black*, 2001 WI 31, ¶¶11-12, 242 Wis. 2d 126, 624 N.W.2d 363. In the context of a negotiated plea, as occurred here, 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." *See State v. Sutton*, 2006 WI App 118, ¶16, 294 Wis. 2d 330, 718 N.W.2d 146 (quoted source omitted).

When, as here, the factual basis for the plea derives solely from the criminal complaint, this court reviews the circuit court's ruling de novo. *See State v. Peralta*, 2011 WI App 81, ¶16, 334 Wis. 2d 159, 800 N.W.2d 512.

Nelson argues that there is no factual basis for the domestic abuse modifier under WIS.

STAT. § 968.075(1). This provision defines domestic abuse as follows:

(a) “Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of [WIS. STAT. §] 940.225 (1), (2) or (3). [sexual assault]
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Sec. 968.075(1). Nelson contends that the facts alleged in the criminal complaint do not satisfy the requisite criteria under § 968.075(1). He asserts:

[N]o facts were alleged that he struck or touched Victim 1, or threatened to harm her, or put her in fear that she would be assaulted, or in fear that an assault was imminent. Moreover, no facts were alleged that Victim 1 and the defendant were in proximity to each other, or in the same room, or together in the same residence when he punched the wall and TV. There was no fact[ual] allegation that the criminal damage occurred during or related to any argument or discord between Victim 1 and Nelson.

The court rejected Nelson’s argument, concluding that the complaint establishes a sufficient factual basis for the domestic abuse modifier:

I think it’s almost self-evident that the conduct, as set forth in the Complaint, meets the criteria for that.

I will grant or concede to Defense Counsel that there is no language, specific language in the Complaint for the victim saying, “I was scared,” or “I thought I was going to be hurt,” but I think that’s unnecessary, given the, per se, violent and scary behavior of putting your hand through a wall and punching a television. You

know, if someone's willing to do that, they're wondering if they're going to be next.

Nelson fails to show that the circuit court's conclusion was in error. The criminal complaint alleges that Nelson engaged in this conduct because he was "pissed." It further alleges that the television was "completely smashed" after Nelson punched it and that he also "punched a hole in the wall." As to Nelson's assertion that the evidence was insufficient to establish that Nelson and Victim 1 were in the same residence when Nelson's violent acts occurred, the complaint notes that the officers contacted both Victim 1 and Nelson at the same apartment at the same time and that Victim 1 told the officers that Nelson lived there off and on. In addition, the complaint states that the officers were dispatched to "investigate a reported domestic incident." As our supreme court has observed, "a factual basis for a plea exists if an inculpatory inference can be drawn from the complaint." *Black*, 242 Wis. 2d 126, ¶16. Here, the criminal complaint alleges sufficient facts to infer that Nelson's conduct "may cause [Victim 1] reasonably to fear imminent engagement in" "[i]ntentional infliction of physical pain [or] physical injury," thereby satisfying WIS. STAT. § 968.075(1)(a)4.⁵

⁵ Although unnecessary to the outcome in this case, I further note that the Probable Cause Statement, signed by the same circuit court judge who took the plea and decided the postconviction motion, makes it clear that Nelson's violent conduct was in response to becoming angry at Victim 1. This statement provides:

On May 2, 2021[,] at 9:29 AM, myself [and another officer] were dispatched to 622 Collins Rd. apartment 7 for a criminal damage complaint. [The other officer] arrived on scene first and made contact with the defendant I made contact with the victim inside their residence. [Victim 1] stated [Nelson] got upset with them and punched a hole in the wall which I observed. The hole was around the size of a human fist. I also saw the TV which was destroyed....

Nelson also argues that there was an insufficient factual basis for the domestic abuse surcharge under WIS. STAT. § 973.055(1). This provision states, in pertinent part:

(1) If a court imposes a sentence on an adult person or places an adult person on probation, regardless of whether any fine is imposed, the court shall impose a domestic abuse surcharge under ch. 814 of \$100 for each offense if:

(a) 1. The court convicts the person of a violation of a crime specified in [WIS. STAT. §] ... 943.01 ...; and

2. The court finds that the conduct constituting the violation under subd. 1. involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child

Nelson argues that there are insufficient facts alleged in the criminal complaint to support a conclusion that his acts were directed “against” Victim 1, as required by § 973.055(1). This argument is rejected for the same reasons stated above. The criminal complaint contains a sufficient factual basis to support the conclusion that Nelson’s acts were directed against Victim 1.⁶

Accordingly,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

⁶ Because the criminal complaint contains a sufficient factual basis to support the plea, this case is substantively distinguishable from the cases upon which Nelson relies, *White v. State*, 85 Wis. 2d 485, 493, 271 N.W.2d 97 (1978), and *State v. Harrington*, 181 Wis. 2d 985, 512 N.W.2d 261 (Ct. App. 1994).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals