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

**January 8, 2019**

**Sheila T. Reiff**
**Clerk of Court of Appeals**

**NOTICE**

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**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. 2018AP1171-CR** **Cir. Ct. No. 2015CF2006**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DIONTE J. NOWELS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD and CAROLINA STARK, Judges. *Affirmed.*

Before Kessler, P.J., Brennan and Dugan, JJ.

¶1 BRENNAN, J. Dionte J. Nowels appeals a judgment of conviction entered on his guilty plea to three felony charges.[1] The charges related to Nowels' involvement in a series of crimes on April 28, 2015, that started with a carjacking and ended with Nowels driving off during a traffic stop of the stolen car, running a stop sign, hitting a car broadside and killing its driver immediately, and fleeing on foot from the scene. He also appeals the order denying his postconviction ***Bangert***[2] motion to withdraw his guilty plea. He had sought to withdraw the plea on the grounds that in the plea colloquy the trial court omitted two of the elements the State had to prove on the hit and run charge. He alleged that he did not, in fact, understand that the State had to prove that Nowels "knew, before leaving the scene, that the accident involved an attended vehicle" and that Nowels was physically capable of complying with the hit and run statute's requirements. *See* WIS JI—CRIMINAL 2670.

¶2 At the evidentiary hearing, Nowels and his trial counsel testified about what they had discussed prior to the plea hearing. The postconviction court concluded that the State had met its burden of showing that Nowels understood all the elements of the hit and run charge and that his plea was therefore knowing and voluntary even though the trial court had not properly summarized the elements of the charge in the colloquy. Nowels now appeals, arguing that the postconviction court based that conclusion on factual findings that are clearly erroneous.

[1] The Honorable M. Joseph Donald presided over the plea hearing and entered the judgment of conviction. The Honorable Carolina Stark denied the postconviction motion.

[2] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶3 We conclude that "the evidence would permit a reasonable person to make the same finding[s]," and the findings are therefore not clearly erroneous. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530 (citation omitted). We therefore affirm the judgment and order.

## BACKGROUND

¶4 Nowels entered a plea to three charges stemming from his involvement in several crimes committed on April 28, 2015. The criminal complaint alleged that on that day in Milwaukee Nowels and another person had taken a car at gunpoint and terrorized and robbed victims, and that Nowels had taken one of the robbery victims at gunpoint to a bank to withdraw money. At the bank, the victim alerted others to the robbery, and police arrived and found Nowels in the stolen car. After initially complying with the officer, Nowels drove over a concrete barrier and fled. The officer pursued Nowels as he drove north on 53rd Street, drove through a stop sign, and crashed into the driver's side of a car traveling west on Center Street. The driver of that car, Edward Adams, was pronounced dead at the scene.

¶5 Nowels pled guilty and was convicted of operating a motor vehicle without owner's consent, second-degree reckless homicide, and hit and run resulting in death. This appeal relates only to the hit and run conviction.

¶6 In a postconviction motion, Nowels alleged that when the trial court was conducting the plea colloquy for the hit and run charge, it failed to state two of the elements the State would be required to prove: that Nowels knew the car he hit was occupied and that Nowels was physically able to comply with the statute.

¶7 The postconviction court granted an evidentiary hearing on his plea withdrawal motion. The postconviction court found that the trial court had failed to review the two elements or confirm that trial counsel had reviewed them with Nowels. Therefore, the trial court stated, the "burden shift[ed] to the State to prove that the defendant did know and understand the elements when he entered [the] plea." The testimony at the hearing focused solely on whether Nowels understood the two elements omitted from the plea colloquy.

¶8 Nowels' trial counsel testified about her time log, her normal practices over her twenty-three-year career, and the documents she marked up as she talked to him about each charge in their meetings on January 25 and 26, 2016, and February 25 and 26, 2016. She testified that her appointment as counsel in the case came during a period when she had made clear that she was willing to take appointments in cases that were likely to go to trial, and the potential trial posture was likely the reason for her appointment in this case. As she prepared for trial, she had specifically investigated facts related to viable defenses and had focused on whether the State could prove the knowledge element of the hit and run statute, including whether a cell phone call made during his interrogation might corroborate his assertion that he did not know at the time of the crash that there was a person in the car he hit. She testified as follows about her meetings with Nowels:

> [O]n January 22, 2016, I prepared for Mr. Nowels an 85 page document - 83 page document including a letter explaining the plea offer, all of the jury instructions for what he was charged with; the amended charges, if any, and the charges that would not be charged if he went through with the plea negotiations as anticipated.
>
> I wrote that letter on January 22, my time log reflects that I reviewed it with him on January 25. My time log specifically indicates I did not go through the jury instructions with him that were made part of that letter….

> The meeting on January 25, my time log indicates that I met with him for 3.1 hours; then on Tuesday, January 26, I resumed my meeting with him, that was from 9 a.m. to 11:45 a.m. My time log does not reflect that I went through the jury instructions; however, I believe that I did, that would be my normal practice to continue what I left off on, but I have no independent recollection of that.
>
> ….
>
> I believe I had additional conferences with him, but that would not have been focused on the plea questionnaire until February 25; where my time log indicates that I met with him from 5:15 p.m. to 6:40 p.m., and indicates I had a conference with client, review of plea questionnaire, options, risks/benefits, answer his questions.
>
> I met with him the following morning, February 26, the date of the plea hearing, from 7:15 in the morning to 7:40 in the morning. That was conference with client before court at jail. So I would - I am sure, I am positive that I went through the jury instructions with him in February; I believe I also went through the jury instructions in January, but I have no documentation of that.
>
> The jury instructions that I provided to Mr. Nowels in that 83 page document have no markings on them, the plea questionnaire has appended to it the jury instructions; and my regular markings as I'm going through the jury instructions with the client are on those jury instructions.

¶9 With regard to the knowledge element, trial counsel testified that because it had been a potential issue to contest at trial, she had to confirm that Nowels understood that this was an element he was conceding as part of a guilty plea:

> Q: And you actually looked into the phone call you mentioned, and the reason that's stuck in your mind, it tended to corroborate the notion that he did not know that he hit an attended vehicle?
>
> A: It could.
>
> Q: So then, when the decision was made to enter a guilty plea, that was one obstacle that you had to cover with him, whether or not he in fact did know?

A: Correct.

Q: And ultimately, after talking with him, he in so many words expressed to you that he did know because he knew that the car he hit was driving; and therefore, somebody had to have been driving it?

A: It would have been in more than so many words. I make - my clients need to recite to me, I assume they are going to be grilled in the way that Judge Clevert in federal court grills them and that is how I prepare them. So the client would have to articulate himself, with no prodding, no pulling from them what happened; and they have to acknowledge each element.

Q: All right, and he did ultimately acknowledge each element in this private conversation with you?

A: I have no independent recollection of him doing that.

Q: Is it a routine practice that you've developed in the course of your career?

A: Absolutely.

Q: And do you have any reason to think that you deviated from that routine practice in this case?

A: None.

¶10 As to the document trial counsel prepared and reviewed with him, she testified:

Q: All right, then if we go through to your page number 38, that is the jury instruction for the hit and run charge?

A: Correct.

Q: I see, as we go through the text of the document, there are things that are crossed out and things that are underlined or circled; is that right?

A: That's right and I'll indicate to you that, in my packet, the copy of the 83 pages that I provided to Mr. Nowels, those lines through or under words and circles and scratch outs are not in my copy. And that is precisely what makes me very confident that I then went through the particular jury instructions to which he'd be entering pleas with him in person. These markings are markings that I make

> typically when I am with my client as I am going through the jury instructions, so they can see what parts of the jury instructions apply and which do not in their specific case.
>
> Q: All right. And you are not only believing that you did that with him because you always do it, but because the packet of 83 pages you have doesn't have these underlinings in them?
>
> A: Correct, and also in reliance on my time log.
>
> Q: Okay. And this jury instruction in question here on page one of the instructions, 38 of your numbering, has elements that he knew that the vehicle he was operating was involved in an accident involving an attended vehicle, correct?
>
> A: Correct.
>
> Q: Then on the last page - second page of the instructions, 39th page of your pagination, element number 5 is at the bottom, the defendant was physically capable of complying with the requirements I have just recited?
>
> A: Correct.
>
> Q: All right, and that is another element you talked to him about and had him explain why that element factually existed?
>
> A: Yes.

¶11 Trial counsel acknowledged that she had no independent recollection of going through all the jury instructions on January 26 and that her time logs do not indicate that she did so on January 26. However, she stated, "I would have—and clearly I did go through them in January—I mean in February, 25 and 26."

¶12 Nowels testified. He testified that he did not remember how many times he had met with trial counsel, did not remember reading the elements sheets attached to the plea questionnaire, and did not remember going over them with trial counsel. He testified that the only elements he understood the State had to prove about the hit and run charge were that there was a death and that he had left

the scene. He also testified that he "[v]aguely" remembered trial counsel reading him the plea questionnaire and that they had spent "30, 45 minutes" going over the plea questionnaire.

¶13 The postconviction court made the following findings: (1) that on January 25, 2016, trial counsel gave Nowels an eighty-three-page document that included WIS JI—CRIMINAL 2670; (2) that trial counsel met with Nowels for approximately an hour and a half to prepare for the following day's plea hearing and reviewed "all five elements" of WIS JI—CRIMINAL 2670 with him; (3) that trial counsel met with Nowels in final preparation on February 26 prior to the hearing and had him "tell her in his own words how conduct he admitted to satisfied element number 2 and element number 5"; and (4) that Nowels signed a plea questionnaire and waiver of rights form that stated "I have reviewed and understand this entire document and any attachments, I have reviewed it with my attorney; I have answered all the questions truthfully and either I or my attorney have checked the boxes."

¶14 The postconviction court determined that Nowels' account of what he was told about the elements was not as credible as trial counsel's, which was supported by documentation:

> In terms of the defendant's testimony today that the conversations with [trial counsel] about the elements were brief or that she didn't explain all the elements to him the way that she claimed she did. And that, quite frankly, the documentation and handwriting on the plea forms that were submitted to the Court including the jury instructions for the hit and run offense, *I simply don't find his testimony to be more credible than* [*trial counsel's*].
>
> ….
>
> …I find [trial counsel's] testimony to be more believable than the defendant's in terms of the process that she goes through with the client regarding reviewing jury

> instructions with him and the documentation that was filed that support my conclusion that that was what she did with the defendant.

(Emphasis added.)

¶15 The postconviction court concluded that Nowels knew and understood all of the elements of the hit and run charge at the time he entered his guilty plea. The postconviction court therefore denied his motion for plea withdrawal. This appeal follows.

## DISCUSSION

### Standard of review and legal principles.

¶16 "[A] trial judge's failure to personally ascertain a defendant's understanding of the nature of the charge at the plea hearing constitutes a violation of [WIS. STAT. §] 971.08[.]" ***State v. Bangert***, 131 Wis. 2d 246, 273, 389 N.W.2d 12 (1986). "Whenever the Section 971.08 procedure is not undertaken or whenever the court-mandated duties are not fulfilled at the plea hearing, the defendant may move to withdraw his plea." ***Id.*** at 274. "The initial burden rests with the defendant to make a prima facie showing that his plea was accepted without the trial court's conformance with § 971.08 or other mandatory procedures[.]" ***Id.*** When the defendant makes such a showing and alleges that he in fact did not understand the nature of the charge, "the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." ***Id.*** "The state may then utilize any evidence which substantiates that the plea was knowingly and voluntarily made." ***Id.*** at 274-75. "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." ***Id.*** at 275. "The state may … 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." ***Id.***

¶17 "[F]indings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." ***Reusch v. Roob***, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168. A trial court's findings of fact are clearly erroneous when the finding is against the great weight and clear preponderance of the evidence. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

**The trial court's findings are not clearly erroneous.**

¶18 Nowels argues that the postconviction court made a clearly erroneous finding of fact when it found that "during that in person meeting, [trial counsel] did specifically review jury instruction 2670 with the defendant; specifically reviewing element number 2 and element number 5 with the defendant." He argues that trial counsel in fact testified only that her notes stated that she had met with Nowels to discuss the plea questionnaire and to answer questions, and that "[s]he did not testify that she specifically went over element number 2 nor element number 5 on that date." He argues that the trial court's finding that trial counsel "reviewed all five elements of instruction 2670 with him" on February 26 was likewise inconsistent with trial counsel's actual testimony because she had testified only that she believed that the markings on the jury instructions meant that she had gone through them with Nowels even though she acknowledged having no independent recollection of doing so.

¶19 Nowels agrees that trial counsel stated what her typical practice was, but he argues that "[t]he record conclusively demonstrates that Nowels was never informed and was otherwise unaware that the State had to prove elements 2 and 5."

¶20 We affirm findings of fact if "evidence would permit a reasonable person to make the same finding." *See* ***Reusch***, 234 Wis. 2d 270, ¶8. The trial court found that trial counsel did discuss the elements of the hit and run charge with Nowels. The evidence on which this was based was trial counsel's testimony about the documents she provided to Nowels that included a list of the elements of that charge, her testimony about the number of times she met with him, her testimony about her standard practice for preparing defendants for plea hearings over a twenty-three-year practice as a criminal defense attorney, and her testimony about the handwritten markings and underlining on the copy of the jury instructions that she reviewed with Nowels. Nowels argues that trial counsel's testimony was insufficient evidence to support the finding. However, trial counsel did testify, "I am positive that I went through the jury instructions with [Nowels] in February; I believe I also went through the jury instructions in January, but I have no documentation of that." She testified that she had no reason to think she had deviated from her routine practice of having each client facing a plea agreement "acknowledge each element" and "articulate himself, with no prodding, no pulling from them what happened[.]" This constitutes evidence that would permit a reasonable person to make the finding that the trial court did in this case. The trial court's findings are therefore not clearly erroneous.

¶21 For that reason, we affirm the judgment and the order denying Nowels' postconviction motion.

*By the Court*.—Judgment and order affirmed.

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