**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

July 3, 1996



**NOTICE**



**No. 95-3165-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**CARLOS L. VASQUEZ,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Reversed and cause remanded with directions*.

Before Eich, C.J., Dykman and Vergeront, JJ.

VERGERONT, J. Carlos L. Vasquez appeals from a judgment of conviction for robbery in violation of § 943.32(1)(a), STATS., and intimidation of a victim in violation of §§ 940.44 and 940.45(2), STATS. Vasquez's primary contention is that the trial court erred in not permitting him to withdraw his ***Alford*** plea[1] to the charge of robbery before sentencing. We conclude that

[1] An ***Alford*** plea is a guilty plea in which the defendant pleads guilty while either

Vasquez has met the two threshold requirements for plea withdrawal. We therefore reverse the judgment and remand for further proceedings.

## BACKGROUND

The criminal complaint charged Vasquez with armed robbery contrary to § 943.32(1)(b) and (2), STATS., and burglary contrary to § 943.10(1)(a), STATS. Vasquez pleaded not guilty to the information containing those charges. An amended information changed the burglary count to armed burglary contrary to § 943.10(1) and (2)(a), and added a third count of intimidation of a victim contrary to §§ 940.44 and 940.45(2), STATS.

After a twenty-minute adjournment of a hearing on various motions held on February 15, 1995, the prosecution introduced a second amended information and presented a plea agreement. The second amended information amended the first count from armed robbery to robbery in violation of § 943.32(1)(a), STATS., eliminated the burglary charge and kept the intimidation of a victim charge.[2] The prosecutor explained that Vasquez would plead as follows:

> The first one is simple robbery, that would have been amended over from armed robbery. So that's a fine not to

(..continued)

maintaining his innocence or not admitting having committed the crime. ***State v. Garcia***, 192 Wis.2d 845, 856, 532 N.W.2d 111, 115 (1995).

[2] The first count of the second amended information stated:

> **FOR A FIRST COUNT:** With intent to steal, take property from the person or presence of the owner by the threat of use of force against the person of the owner with intent thereby to over come her physical resistance to the taking or carrying away of the property, to-wit: did steal the purse and it's contents from Lorrine Kostner, contrary to section 943.32(1)(a) Wis. Stats.
>
> PENALTY: Class C Felony - A fine not to exceed $10,000 or imprisonment not to exceed 10 years or both.

> exceed $10,000, and not to exceed 10 years, or both. And the second count is the count that we had added to the Information today. That being the grabbing the phone and the damaging of the telephone in an effort to prevent the victim from reporting the crime.... It is my understanding that they want to enter an ***Alford*** plea to these counts. I have no objection to that sort of a plea given the fact situation.... Both sides would ask for a presentence investigation. That's my understanding, and we are free to argue as we please.

Defense counsel stated, "That is correct, your Honor," and went on to explain the reasons for the ***Alford*** pleas. The court asked Vasquez whether it was his wish "to enter these ***Alford*** pleas to these two charges," and Vasquez answered "yes."

Vasquez had signed and submitted a Plea Advisement and Waiver of Rights form (Plea Advisement form) to the court. The court asked Vasquez whether he had gone over every line of this form with his attorney and Vasquez answered "yes."

Pertinent portions of the Plea Advisement form are:

> 10. I have ~~(have not)~~ entered in a plea agreement. My understanding of the plea agreement is:
>
> Amended Information--simple burglary (Class C fel) and intim. of witness (Class D felony.)--both sides free to argue.
>
> ....
>
> 12. I understand that by pleading guilty or no contest, I am admitting each and every element of every offense charged. These elements are:

> 1) burglary--intentionally enter a building without consent of person in lawful possession and w/ intent to steal; 2) knowingly and maliciously attempt to prevent a victim of a crime from reporting the crime to law enforcement.

The trial court questioned Vasquez on his understanding of the rights he was giving up by entering ***Alford*** pleas, including the right to have the district attorney "prove each and every element of the offense beyond a reasonable doubt that are listed in paragraph 12." The court also questioned Vasquez on his understanding of the maximum sentence and the significance of an ***Alford*** plea. The district attorney summarized the evidence from the preliminary hearing that provided a factual basis for the pleas. The trial court did not, other than by its above-cited reference to paragraph 12 of the Plea Advisement form, question Vasquez on his understanding of the elements of the crimes to which he was pleading, and no one at the hearing stated what the elements of the crimes were. After the initial statement by the prosecutor, no one, including the trial court, referred by name to the charges to which Vasquez was pleading. Other than the court's first question to Vasquez--whether he wished to enter ***Alford*** pleas to these two charges--the court did not ask him to state that he was pleading to specifically-named crimes, and he did not so state.

The court found there was a substantial probability that Vasquez would be found guilty by a jury, and that he entered his ***Alford*** pleas and waived his rights freely, voluntarily and intelligently. In making these findings, the court did not name the charges. The court then ordered a presentence report.

At the beginning of the sentencing hearing, defense counsel advised the court that, after Vasquez had reviewed the presentence report, which included recommended sentences for the robbery charge and the intimidation of a victim charge, Vasquez told his attorney that he had not pleaded to robbery, he had pleaded to burglary. Defense counsel acknowledged that he had written out the elements for burglary, not robbery, on the Plea Advisement form. According to defense counsel, even though both the burglary charge and the robbery charge are Class C felonies, there is a difference in how the parole board looks at the two offenses because robbery is considered a violent crime while burglary is not. Defense counsel made an oral

motion to withdraw the plea to the robbery charge and proceed to trial on the first amended information.

The sentencing hearing was adjourned so that a transcript of the plea hearing could be prepared. The court heard argument on the motion for a plea withdrawal at a later date. The court acknowledged that the Plea Advisement form referred to burglary and described the elements of burglary. However, based on the transcript of the plea hearing, in particular the initial comments by the prosecutor about the plea agreement and the defense's response to the court's questions immediately following, the court determined that Vasquez understood "the effect of this charge ... [and] the facts of the charge ... and what the charge was worth." The court did not permit withdrawal of the plea and sentenced Vasquez to eight years on the robbery count and five years on the intimidation of a victim count, to be served consecutively to each other and consecutively to the term he was presently serving.

## DISCUSSION

As a matter of constitutional right, a defendant is entitled to withdraw a plea if he demonstrates it was not knowingly, voluntarily and intelligently made. ***State v. Bangert***, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986).[3] A plea is not voluntary unless the defendant has a full understanding of the charges against him. ***Id.*** at 257, 389 N.W.2d at 19.

***Bangert*** establishes the procedure a trial court must follow when accepting a plea of guilty or no contest. As required by § 971.08(1)(a), STATS., the court must ascertain the defendant's understanding of the nature of the charge. ***Bangert***, 131 Wis.2d at 267, 389 N.W.2d at 23. In addition, the court has the mandatory duty to first inform the defendant of the charge's nature or,

[3] Prior to sentencing, the court should freely allow a defendant to withdraw his plea if it finds any fair and just reason for withdrawal, unless the prosecution has been substantially prejudiced by reliance on the plea. ***State v. Garcia***, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). After sentencing, the defendant must show a manifest injustice by clear and convincing evidence. ***State v. Nawrocke***, 193 Wis.2d 373, 378-79, 534 N.W.2d 624, 626 (Ct. App. 1995). However, as the State concedes, if Vasquez proves that he did not understand that he was pleading to robbery but instead thought he was pleading to burglary, there is a ground for withdrawal under either standard.

instead, to ascertain the defendant possesses such information. ***Id.*** Methods by which the court may fulfill this requirement include summarizing the elements of the crime charged by reading from the appropriate jury instructions; asking defense counsel whether he or she has explained the nature of the charge to the defendant and requesting that counsel summarize the explanation, including a reiteration of the elements of the crime, at the plea hearing; and referring to documents in the record, including a statement signed by the defendant which demonstrates that the defendant has notice of the nature of the charge. ***Bangert***, 131 Wis.2d at 268, 389 N.W.2d at 23-24.

When a defendant maintains that the § 971.08, STATS., procedure is not undertaken or the court-mandated duties are not fulfilled at a plea hearing, the defendant must meet two threshold requirements: (1) a *prima facie* showing of a violation of § 971.08(1)(a) or other mandatory duties, and (2) an allegation that the defendant did not know or understand the information that should have been provided at the plea hearing. ***State v. Giebel***, 198 Wis.2d 207, 216, 541 N.W.2d 815, 818 (Ct. App. 1995). Once these threshold requirements are met, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently entered. ***Bangert***, 131 Wis.2d at 274, 389 N.W.2d at 26. The State may examine the defendant or defendant's counsel and may rely on the entire record to demonstrate the defendant's knowledge and understanding. ***Id.*** at 275, 389 N.W.2d at 26. Whether a defendant has made a *prima facie* showing that his plea was accepted without compliance with § 971.08(1)(a) or other mandatory duties is a question of law, which we review de novo. ***State v. Hansen***, 168 Wis.2d 749, 755, 485 N.W.2d 74, 77 (Ct. App. 1992).

Vasquez contends that he has met the two threshold requirements for proving that he did not knowingly plead to the charge of robbery. He has met the first threshold requirement, he argues, because the trial court at the plea hearing did not ascertain that he understood the nature of the charge to which he was pleading. He has met the second requirement, he argues, because he alleged, through counsel when he orally made the motion to withdraw his plea, that he did not understand that he was pleading to robbery rather than burglary. According to Vasquez, the burden has shifted to the State to prove by clear and convincing evidence that he did knowingly, voluntarily and intelligently plead to that charge and the State has not met its burden.

The State responds that Vasquez has not met the two threshold requirements and therefore the burden has not shifted. The State acknowledges that at the plea hearing the trial court did not summarize the elements of robbery for the defendant or otherwise fulfill its obligation to ascertain the defendant's understanding of those elements. However, the State contends that Vasquez has not alleged that he did not understand those elements and so has not met the second threshold requirement.

The State draws a distinction between understanding the elements of the charge of robbery and understanding that one has pleaded to robbery rather than burglary. According to the State, since Vasquez has alleged that he did not understand he was pleading to robbery rather than burglary, in order to meet the first threshold requirement, he must make a *prima facie* showing that the court did not ascertain that he understood he was pleading to robbery rather than burglary. Vasquez cannot make this showing, the State contends, because the transcript of the plea hearing shows that Vasquez answered "yes" when the court asked if he wanted to enter ***Alford*** pleas "to these two charges" following the prosecutor's description of the plea agreement as relating to a charge of robbery and a charge of intimidation of a victim.

The State's distinction between understanding the elements of a robbery charge and understanding that one has pleaded to robbery rather than burglary is not a meaningful distinction. ***Bangert*** requires that the court provide the defendant with information on the elements of the charge, or ascertain that the defendant has such information, precisely in order to establish that the defendant understands the nature of the charge. After outlining possible methods for providing the defendant with information on the elements of the charge or ascertaining that he has such information, the ***Bangert*** court stated:

> [I]t is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant that he understands the nature of the offense, without an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the requirement of sec. 971.08.

> Whether the trial court communicates the elements of the crime at the plea hearing or whether the court refers to a document or portion of the record predating the plea hearing, the operative time period for determining the defendant's understanding of the nature of the charge remains the plea hearing itself. The defendant must understand the nature of the crime at the time of the taking of the plea.

***Bangert***, 131 Wis.2d at 268-69, 389 N.W.2d at 24.

The trial court did not read the elements of robbery and did not ask defense counsel whether he had explained the nature of the charge of robbery to Vasquez. Although the prosecutor referred to the amended information, which described the statutory requirements for robbery without using the word "robbery," the trial court did not ascertain that Vasquez understood the nature of the charge based on the second amended information. The trial court did ascertain that Vasquez had gone over the Plea Advisement form line by line. But that listed the elements of burglary, not robbery. We conclude that Vasquez has made a *prima facie* showing that his plea was accepted without the trial court conforming with § 971.08(1)(a), STATS., and the mandatory procedures stated in ***Bangert*** for ascertaining that Vasquez knew the nature of the crime to which he was pleading.

We also conclude that Vasquez has met the second threshold requirement in that he has alleged, through counsel, that he did not understand the information that should have been provided at the plea hearing--that is, that he did not understand the nature of the crime he was pleading to.[4] The burden

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[4] The State states that it is assuming for the sake of argument that the allegation of counsel is sufficient, but states that, in its view, that is not sufficient. The State "believes that the defendant ought to be required personally to make the required allegation, preferably under oath either by way of affidavit or testimony, so that the matter is really put in issue." The State asserts that its position is supported by a recent decision, ***State v. Klessig***, ___ Wis.2d ___, 544 N.W.2d 605 (Ct. App. 1996), *petition for review granted*, (Wis. May 7, 1996). ***Klessig*** concerned waiver of the right to counsel, not withdrawal of a plea. We noted that in spite of that difference, the ***Bangert*** analysis was applicable. Since Klessig had not made "a prima facie showing or even a contention that he did not have the knowledge and understanding necessary for him to voluntarily and intelligently waive his

therefore shifts to the State to show by clear and convincing evidence that Vasquez did understand the nature of the charge--robbery--in spite of the inadequacy of the plea colloquy.

We interpret the trial court's ruling as a determination that Vasquez did not meet the requirement for making a *prima facie* showing that the plea colloquy was inadequate with respect to the robbery charge. It therefore did not determine that the burden had shifted to the State or provide the State with an opportunity to meet that burden. We reverse the judgment and remand to the trial court for further proceedings in which the State has the opportunity to meet its burden with respect to the robbery charge.

Vasquez also contends that he never actually entered a plea to any charge. In support of this argument, he states simply that at the plea hearing he never stated affirmatively that he was entering an ***Alford*** plea to a particular charge, but instead responded to the court's questions. He does not further develop the argument and does not cite any authority. He does not even contend that he did not intend to enter ***Alford*** pleas to two charges. We conclude there is no merit to this argument.

Vasquez's argument that the court never adjudged him guilty of any offense is also without merit. The court recognized at the hearing on the plea withdrawal, before proceeding to sentence Vasquez, that it had not expressly stated at the conclusion of the plea hearing that it found Vasquez guilty of robbery and intimidating a victim. The court then did find Vasquez guilty of those two offenses.

*By the Court.*—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

(..continued)
right to counsel," we concluded Klessig had not made a minimal showing that he was prejudiced by the court's failure to inquire whether the waiver was knowing and voluntary. ***Klessig***, ___ Wis.2d at ___, 544 N.W.2d at 608. ***Klessig*** does not hold or suggest that "the contention" a defendant must make must be by an affidavit or sworn testimony.