COURT OF APPEALS DECISION DATED AND FILED

January 4, 2012

A. John Voelker
Acting 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. 2011AP1476-CR **Cir. Ct. No. 2008CM6426**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KORRY L. ARDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Korry L. Ardell, *pro se*, appeals from a judgment entered after he pled guilty to two counts of knowingly violating a domestic abuse injunction and from the circuit court's order denying his postconviction motion

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

without an evidentiary hearing. Ardell submits that we should reverse the circuit court and remand this case for an evidentiary hearing because his postconviction motion set forth sufficient facts to establish that he was entitled to withdraw his pleas. We disagree and affirm.

BACKGROUND

¶2 In December 2008, the State filed an amended criminal complaint, charging Ardell with three counts of knowingly violating a domestic abuse injunction. The amended complaint alleged that on October 30, 2008, Ardell sent three text messages to Nicole Thomas, in violation of a domestic abuse injunction issued by a Milwaukee County Court Commissioner in July 2008 in Milwaukee County Circuit Court Case No. 2008FA4051.

¶3 In January 2009, during a pretrial conference, the State informed the circuit court that Thomas had "report[ed] violations of the no contact order" since Ardell sent the text messages in October 2008 and that the State was investigating her accusations. Ardell's counsel stated that until the State determined what, if any, additional charges would be brought against Ardell she could not properly advise Ardell in this case. The circuit court adjourned the trial on other grounds, but noted defense counsel's concerns.[2] Ultimately, no additional charges were brought against Ardell based upon Thomas's allegations.

[2] The Honorable Clare L. Fiorenza was originally assigned to the case and presided over the January 2009 pretrial conference. In August 2009, the case was transferred to the Honorable Mary M. Kuhnmuench who presided over the case until its conclusion.

¶4 In November 2009, the circuit court held a plea hearing, during which Ardell pled guilty to two counts of knowingly violating a domestic abuse injunction. The third count was dismissed and read in during sentencing. Ardell was represented by counsel and signed and filed a plea questionnaire and waiver-of-rights form and addendum. A copy of the standard jury instruction was attached to the form and Ardell initialed the instruction where it set forth the elements of knowingly violating a domestic abuse injunction.

¶5 Following the plea hearing, Thomas was permitted to give a victim impact statement to the circuit court. During her statement, she referenced several emails that she believed Ardell had sent, but that were not included in the criminal complaint, stating: "As short as … two weeks ago, he sent an e-mail to my entire staff[,] to the Milwaukee Journal Sentinel[,] claiming that I'm a drug addict and that I'm various horrible things that obviously a schoolteacher cannot be."

¶6 The circuit court held a sentencing hearing a month later, in December 2009. At the beginning of the hearing, Ardell, through counsel, requested an adjournment to investigate the emails Thomas had referenced during her victim impact statement. The State had provided the emails to Ardell on November 20, after the plea hearing but prior to the sentencing hearing. Counsel argued that it was her understanding that the State would be arguing at sentencing that Ardell sent the emails, which Ardell denied, and that the circuit court should consider the emails at sentencing.

¶7 In response, the State opposed adjournment, stating:

> I don't think that the issue at hand is the actual e-mails. He is charged with two counts of Violation of a Domestic Abuse Injunction that he's pled to.

> Now, the conduct since then, because this has been a long ongoing case, I think is relevant for the Court to consider. I can tell the Court that I can't prove them beyond a reasonable doubt that the defendant sent them. I did no initial investigation other than receiving e-mails from Ms. Thomas.

¶8 The circuit court denied Ardell's motion for an adjournment, concluding that "[i]t's up to the Court to decide what weight, if any" to give the emails.

¶9 Following a statement by Ardell—in which he "apologize[d] to the Court for [his] conduct for sending those three text messages"—the circuit court sentenced Ardell to nine months in the House of Correction as to each count, consecutive to each other. However, his sentence was stayed and Ardell was placed on two years of probation. As a condition of his probation, Ardell was ordered to serve ninety days in the House of Correction.

¶10 In March 2011, Ardell, *pro se*, filed a postconviction motion to withdraw his guilty pleas. The motion alleged that: (1) the State intentionally withheld exculpatory evidence from the defense, specifically the emails Thomas referenced in her victim impact statement and the details of the police investigation regarding other alleged violations of the domestic abuse injunction; (2) he did not knowingly enter his guilty pleas; and (3) the State breached the plea agreement.[3]

¶11 The circuit court denied Ardell's motion without a hearing. Ardell appeals.

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[3] Ardell has abandoned on appeal his claim that the State breached the plea agreement. *See* ***Tatur v. Solsrud***, 167 Wis. 2d 266, 269, 481 N.W.2d 657 (Ct. App. 1992) (An issue raised in the circuit court, but not raised on appeal, is deemed abandoned.).

DISCUSSION

¶12 Ardell argues that the circuit court should have granted him an evidentiary hearing on his postconviction motion because his motion set forth a *prima facie* claim for plea withdrawal on the grounds that: (1) the State improperly withheld exculpatory evidence from the defense prior to the plea hearing; and (2) Ardell did not knowingly enter his pleas.[4] Because Ardell has not demonstrated a manifest injustice occurred in this case, we affirm.

¶13 We review a circuit court's decision granting or denying a motion to withdraw a guilty plea under an erroneous exercise of discretion standard. ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836. When a defendant moves to withdraw a guilty plea after sentencing, as Ardell does here (waiting over a year to file his postconviction motion), he has the burden of establishing by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***id.***, ¶16. "The 'manifest injustice' test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea." ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). Under a manifest injustice standard of review, the circuit court's exercise of discretion will be affirmed if the record shows that legal standards were correctly applied to the facts and a reasoned conclusion was reached. ***Id.*** at 381. Some examples of manifest injustice are:

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[4] To the extent that Ardell may raise other issues in his brief, we conclude that such issues are conclusory and inadequately briefed, and we decline to address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

> "(1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement."

State v. Daley, 2006 WI App 81, ¶20 n.3, 292 Wis. 2d 517, 716 N.W.2d 146 (citation omitted).

Exculpatory Evidence

¶14 Ardell first argues that the circuit court erred in denying his motion for plea withdrawal without an evidentiary hearing because his motion set forth sufficient facts to support his claim that the State improperly withheld exculpatory evidence from the defense prior to the plea hearing. *See* WIS. STAT. § 971.23(1)(h).[5] In particular, Ardell claims that the State was required to disclose, prior to his plea hearing: (1) the emails referenced by Thomas in her victim impact statement; and (2) the details of the police investigation of other alleged violations of the domestic abuse injunction. In conclusory fashion, Ardell asserts, without citing to facts in the record, that both the emails and the details of the police investigation would likely demonstrate Thomas's bad character, affecting her credibility as a witness.

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[5] WISCONSIN STAT. § 971.23(1)(h) requires the State to "disclose to the defendant or his or her attorney … [a]ny exculpatory evidence" in the State's possession "within a reasonable time before trial."

¶15 A claim that a plea is infirm for reasons extrinsic to the plea colloquy invokes the authority of ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). ***State v. Howell***, 2007 WI 75, ¶¶2, 74, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant pursuing a ***Nelson***/***Bentley*** motion for plea withdrawal must satisfy a high standard of pleading. *See* ***Howell***, 301 Wis. 2d 350, ¶75. The circuit court has discretion to deny the motion without a hearing, "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusionary allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***Id.*** (citation and footnote omitted). Moreover, a postconviction motion for plea withdrawal should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

¶16 We review a ***Nelson***/***Bentley*** motion under two standards. We determine as a matter of law "whether a defendant's motion to withdraw a guilty plea 'on its face alleges facts which would entitle the defendant to relief,' and whether the record conclusively demonstrates that the defendant is entitled to no relief." ***Howell***, 301 Wis. 2d 350, ¶78 (citation and footnote omitted). When the defendant fails to meet the pleading requirements and the record does not justify relief, we determine whether the circuit court properly exercised its discretion in granting or denying an evidentiary hearing. ***Id.***, ¶79.

¶17 Even if we accept Ardell's premise as true, that the State was obligated to turn over the emails and details of the police investigation to the defense (and to be clear, we make no such conclusion), Ardell does not argue, either expressly or inferentially, that the State's failure to do so resulted in a manifest injustice. *See* ***Thomas***, 232 Wis. 2d 714, ¶16 (articulating the "'heavy

burden'" on the defendant to demonstrate a manifest injustice) (citation omitted). Instead, Ardell argues in a conclusory fashion, that "[i]f" he could prove the content of the emails true it "would of [sic] strongly weighed on [his] decision to plead guilty," and "[a]ssuming" the police investigation stemmed from Thomas's false accusations, the details of the investigation "may have had a direct affect" on whether he pled guilty. As such, Ardell's claims are speculative and conclusory, and he does not "allege sufficient facts … to raise a question of fact." *See* ***Howell***, 301 Wis. 2d 350, ¶75.

¶18 Moreover, while Ardell works to convince the court that the emails and details of the police investigation would reveal Thomas's allegedly poor character, he does not deny committing the crimes to which he pled guilty—sending multiple texts to Thomas in violation of a domestic abuse injunction. Because Ardell makes no attempt to show that the State's failure to turn over exculpatory evidence resulted in a manifest injustice, the circuit court did not err in denying him an evidentiary hearing on that ground.

Plea Not Knowingly Entered

¶19 A defendant may meet his burden of establishing a manifest injustice by demonstrating that he did not knowingly, intelligently, and voluntarily enter his plea. ***State v. Lopez***, 2010 WI App 153, ¶7, 330 Wis. 2d 487, 792 N.W.2d 199. Here, Ardell argues that his pleas were not knowingly entered because the circuit court did not personally ascertain whether Ardell understood each element of the crime to which he was pleading: knowingly violating a domestic abuse injunction. Ardell submits that had the circuit court personally inquired into his understanding of the elements of the offense, the circuit court would have discovered that Ardell

may have had a defense of which Ardell was unaware, namely, that Thomas gave him written permission to violate the domestic abuse injunction.[6]

¶20 In order to be entitled to an evidentiary hearing on a motion to withdraw his guilty pleas on grounds that his pleas were not knowingly, voluntarily, or intelligently entered, the burden is on Ardell to show that the circuit court accepted his plea without conforming to WIS. STAT. § 971.08 or other mandatory procedures. *See* ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14. To ensure that a plea is knowingly, voluntarily, and intelligently entered, the circuit court is obligated by § 971.08 to ascertain whether a defendant understands the essential elements of the crime to which he or she is pleading. ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986). However, the circuit court is provided some flexibility in how it ascertains the defendant's understanding. ***Id.*** at 267. The court may, among other things: (1) "summarize the elements of the crime charged by reading from the appropriate jury instructions"; (2) "ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation"; (3) "expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing"; or (4) "specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge." ***Id.*** at 268; *see also* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987).

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[6] Ardell asserts that Thomas wrote to him on Yahoo instant messenger and gave him permission to send her the text messages. Ardell, however, cites to no evidence in the record to support his allegation. *See* ***State v. West***, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993) (court is not required to search the record to supply facts to support appellant's argument).

¶21 In the present case, the record conclusively shows that, during the plea colloquy, the circuit court: (1) expressly referred to the plea questionnaire and waiver-of-rights form and addendum, as well as the attached standard jury instruction for knowingly violating a domestic abuse injunction, which Ardell signed; and (2) verified with Ardell's attorney that she went over the relevant elements of the offense with Ardell. The circuit court asked Ardell whether he had read and signed the plea questionnaire and waiver-of-rights form and addendum, as well as the attached jury instruction. Ardell confirmed that he had.[7] The court continued to reference the form and jury instruction when it asked Ardell if he had sufficient time to review all the matters referred to in the documents and discuss them with his lawyer. Again, Ardell replied that he did. The court then expressly asked Ardell if he understood that by pleading guilty he

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[7] In his brief before this court, Ardell alleges that "[t]he plea questionnaire in this case did not have the jury instructions attached to it or list the elements required to be found guilty of the charges." The record belies Ardell's assertion. WISCONSIN JI-CRIMINAL 2040 is attached to the plea questionnaire and waiver-of-rights form in the record; Ardell signed the form, which indicated that it had an attachment, and initialed the elements of the crime on the jury instruction. Furthermore, Ardell engaged in the following exchange with the circuit court during the plea hearing:

> THE COURT: If you would turn to-- I don't know if you kept a copy of the guilty plea questionnaire -- or your lawyer's holding up the jury instructions. That's important too because those are attached to the guilty plea questionnaire. It appears under the defendant's statement that you signed it. Is that, in fact, your signature where it says defendant's statement?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Did you read this form front and back, Mr. Ardell, and have your lawyer go over it with you before you signed it?
>
> THE DEFENDANT: Yes, ma'am.

was "giving up … the right to have a jury trial where the State has the burden of proving each and every element of the offense of violating a domestic abuse injunction?" And Ardell told the court he understood. In addition, the circuit court asked Ardell's counsel whether she "explain[ed] to him the nature of the[] offenses, that is, all the elements that the State would have to prove up for each of these counts if this were to go to trial?" Trial counsel affirmed that she had.

¶22 Because the record conclusively establishes that the circuit court abided by the requirements of WIS. STAT. § 971.08 and ***Bangert*** when accepting Ardell's pleas, Ardell has not met his burden of demonstrating that a manifest injustice occurred and the circuit court did not err in denying him an evidentiary hearing on those grounds.

By the Court.—Judgment and order affirmed.

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