STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2035

Mitchell Le Dac Ho, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 14, 2020
Affirmed
Gaïtas, Judge

Hennepin County District Court
File Nos. 27-CR-17-32319, 27-CR-18-7511

Charles L. Hawkins, Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Gaïtas, Judge.

U N P U B L I S H E D O P I N I O N

GAÏTAS, Judge

Appellant Mitchell Le Dac Ho challenges the postconviction court's order denying his petition for postconviction relief. Ho argues that he is entitled to withdraw his guilty pleas to two counts of third-degree criminal sexual conduct because his trial attorney

provided ineffective assistance of counsel by misinforming him about the availability of a consent defense, and by misleading him about the possibility of a life sentence. He also argues that his guilty pleas were invalid because they were not knowing, intelligent, and voluntary.

We conclude that Ho's attorney was not ineffective and that Ho's guilty pleas were valid. We affirm.

FACTS

Ho worked as a massage therapist at a massage franchise. In 2017 and 2018, the state filed three criminal complaints, each charging Ho with a single count of third-degree criminal sexual conduct under Minnesota Statutes section 609.344, subdivision 1(o) (2016). The complaints alleged that Ho had sexually assaulted three female clients while providing massages during his employment. Two complainants were adults and one was a juvenile.

Guilty pleas and sentencing

In June 2018, Ho entered into a plea agreement with the state, pleading guilty to third-degree criminal sexual conduct in two cases, including the case involving the juvenile complainant. The state dismissed the third case and agreed not to charge a fourth case involving a fourth complainant. Additionally, the state agreed to a sentencing cap of 82 months' imprisonment. Under the agreement, Ho would be free to pursue a downward departure at sentencing.

At the plea hearing, the district court found that Ho's waiver of his trial rights was knowing, intelligent, and voluntary. To establish a factual basis for the pleas, Ho admitted

that he sexually assaulted two paying clients while performing massages. He testified that, in January 2016, he digitally penetrated an adult client's vagina without her consent. Ho admitted that in September 2017, he digitally penetrated a juvenile client's vagina without her consent.

After the plea hearing, Ho's attorney filed a motion for a downward departure from the sentencing guidelines, requesting either a dispositional or durational departure. At the sentencing hearing, Ho expressed remorse, stating that he had "believed [his] actions were consensual at the time," but he had "misread the situations." He accepted that his actions were criminal, and he apologized for the pain that he caused the victims and their families. The district court acknowledged that Ho had expressed remorse and accepted responsibility, and noted that the defense had submitted an "excellent" sentencing memorandum and many favorable letters on behalf of Ho. But the district court also stated that it had to consider the nature of the offenses, which were committed against multiple women in a vulnerable position over a span of many months. The district court ultimately sentenced Ho to concurrent prison sentences of 42 months and 62 months.[1]

Postconviction proceedings

Several months later, in January 2019, Ho petitioned for postconviction relief. He alleged that his trial counsel had been ineffective and that his guilty pleas had not been knowing, voluntary, and intelligent. The postconviction court held an evidentiary hearing.

[1] The record shows that the district court thought that it sentenced within the guidelines range, but it inadvertently sentenced three months below the bottom of the range, which was 65 months. *See* Minn. Sent. Guidelines 4.B.

During the hearing, the postconviction court received several exhibits and heard testimony from Ho, his trial attorney, his mother, and a criminal-defense expert witness.

Ho's trial counsel testified that she had mistakenly informed Ho that consent was not a defense in the case involving the juvenile complainant. The information was incorrect; in each of the charged cases, the state had to prove nonconsensual sexual conduct in order to obtain a conviction. *See* Minn. Stat. § 609.344, subd. 1(o). Based on trial counsel's misinformation, however, Ho believed that consent was not a defense in the case involving the juvenile at the time of his guilty plea.

According to the testimony at the postconviction hearing, Ho discovered after he pleaded guilty, but before sentencing, that consent was, in fact, a possible defense to the case involving the juvenile. Ho contacted his trial attorney, who immediately arranged to meet with Ho and his mother.

During a lengthy meeting on July 11, 2018, Ho's attorney acknowledged the mistake and advised Ho about his options. First, she offered to assist Ho in withdrawing his guilty pleas based on her error. Second, she offered to withdraw as counsel from the case if Ho wished. Third, if Ho did not opt to withdraw the pleas, she offered to pursue a downward departure as originally planned.

Ho's attorney also assessed the likely success of a consent defense at trial. She advised Ho that, in her opinion, the defense would be difficult because four unrelated complainants had alleged factually similar sexual assaults. She told Ho that testimony from

all the complainants would likely be used as evidence in each trial, as the prosecutor had specifically advised her of the state's intention to admit this testimony as *Spreigl* evidence.[2]

The trial attorney also advised Ho about his potential sentencing exposure without the plea bargain. She observed that to "beat" the state's plea offer, which capped sentencing at 82 months, Ho would have to obtain not-guilty verdicts for three of the four alleged incidents.[3] The attorney also discussed mandatory life sentences for repeat sexual offenders under Minnesota Statutes section 609.3455 (2018), advising Ho that he could potentially face such a sentence if he was convicted in each of the cases. Although she believed it was a remote possibility, she believed she was ethically obligated to inform Ho of all potential sentences.

Ho's attorney testified at the postconviction hearing that the possibility of a life sentence was not the "crux" of the conversation at the July 11 meeting. She told Ho on multiple occasions that she believed his exposure, if convicted on the three charged counts, would be about ten years' imprisonment. The trial attorney based this assessment on the Minnesota Sentencing Guidelines grid, which she showed Ho.[4]

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[2] *Spreigl* evidence refers to evidence admitted under Minn. R. Evid. 404(b), which allows "evidence of another crime, wrong, or act" for a purpose other than showing character, such as showing "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *See State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

[3] A second conviction for third-degree criminal sexual conduct in Ho's case yields a range of 65 to 91 months under the sentencing guidelines, with a presumptive duration of 76 months; Ho began with a criminal history score of zero but would gain two felony points from the first conviction. *See* Minn. Sent. Guidelines 2.B.1.b, 4.B (2016).

[4] Ten years (120 months) appears to accurately approximate the presumptive sentence Ho faced for a third conviction of third-degree criminal sexual conduct. The prior two

After the July 11 meeting, Ho decided that he did not want to withdraw his guilty pleas. He instructed his attorney to focus on preparing the sentencing departure motion. His attorney noted in an email to Ho's mother following the meeting that Ho's instruction to focus on sentencing was "unequivocal[]." [5]

At the postconviction hearing, Ho testified that he chose not to withdraw his pleas because he believed that he would face a mandatory life sentence if convicted on the three charges. He explained that his belief was based, in part, on his attorney's discussion of the sentencing statute during the July 11 meeting, where she circled the words "shall" and "for life" in the statutory language. According to Ho, his attorney never told him that, in Minnesota, the state must indict a defendant to seek a life sentence. Ho also testified that he never would have pleaded guilty in the first place had he known that consent was a defense in the case involving the juvenile complainant. Ho's mother offered corroborating testimony, stating that she believed her son pleaded guilty because he did not know consent was a defense and because he felt he had no other option.

Ho called a practicing criminal defense attorney to testify as an expert witness at the postconviction hearing. The attorney testified that, based on his review of the case, Ho's lawyer had been ineffective and her performance had prejudiced Ho.

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convictions would result in two felony points each, and, with a criminal history score of 4, the sex offender grid denotes a range of 100 to 140 months, with a presumptive sentence of 117 months for the third offense. Minn. Sent. Guidelines 2.B.1.b, 4.B (2016).

[5] Ho's mother disagreed with Ho's decision to move forward with sentencing. The record reflects that she believed that any prison time for her son would be an unfair outcome.

In a detailed order, the postconviction court denied Ho's request for postconviction relief. First, the postconviction court rejected Ho's ineffective-assistance-of-counsel claim, concluding that Ho had failed to establish that his trial attorney's performance was deficient and that he was prejudiced by the attorney's performance. And second, the postconviction court determined that Ho had failed to establish that a manifest injustice required the withdrawal of his pleas because his guilty pleas were accurate, voluntary, and intelligent.

This appeal follows.

D E C I S I O N

An appellate court reviews the denial of a postconviction petition for an abuse of discretion. *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016). The reviewing court considers the postconviction court's "legal conclusions de novo and . . . findings of fact for clear error." *Id.* Appellate courts "do not reverse the postconviction court unless the postconviction court exercised its discretion in an arbitrary and capricious manner, based its rulings on an erroneous view of the law, or made clearly erroneous factual findings." *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015) (quotation omitted).

Once a defendant enters a guilty plea, there is no absolute right to plea withdrawal. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). If a defendant moves to withdraw a guilty plea before sentencing, the district court "may allow" withdrawal "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. But when a defendant moves to withdraw a guilty plea after sentencing, the manifest-injustice standard applies. *See id.*, subd. 1. Under that standard, "the court must allow a defendant to withdraw a guilty plea upon a

timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." *Id.* Ordinarily, a manifest injustice exists if a guilty plea is not valid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be valid, a guilty plea must be "accurate, voluntary, and intelligent." *Id.* (quotation omitted). Because ineffective assistance of counsel can render a plea invalid, "a guilty plea based on ineffective assistance of counsel creates a manifest injustice as a matter of law." *State v. Ellis-Strong*, 899 N.W.2d 531, 541 (Minn. App. 2017).

Ho challenges his guilty pleas on two grounds. First, he alleges that his pleas were invalid based on ineffective assistance of counsel. And second, he argues that there was a manifest injustice requiring plea withdrawal because his pleas were not accurate, voluntary, and intelligent. We address each argument in turn.

I. The postconviction court did not err by denying postconviction relief based on ineffective assistance of counsel.

The United States and Minnesota Constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. The right to effective counsel applies during the plea-bargaining process. *See Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387 (2012). To demonstrate ineffective assistance of counsel in the context of a guilty plea, a defendant must satisfy a two-prong test based on the standard from *Strickland v. Washington*, 66 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). First, the defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* (quoting *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064). Second, the defendant must show prejudice by demonstrating that there is "a reasonable probability that, but for

counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Ellis-Strong*, 899 N.W.2d at 536 (quotation omitted). When one prong of the *Strickland* test is determinative, an appellate court need not address the other prong. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

While appellate courts apply a clear-error standard in reviewing the postconviction court's findings of fact, "the postconviction court's analysis of the two *Strickland* requirements is subject to de novo review because the performance and prejudice components of the ineffectiveness inquiry [involve] mixed questions of law and fact." *Pearson v. State*, 891 N.W.2d 590, 600 (Minn. 2017) (quotation omitted).

We analyze each *Strickland* prong in turn, beginning with whether Ho's attorney's performance fell below an objective standard of reasonableness and then turning to whether Ho has demonstrated prejudice.

A. Ho's trial attorney's overall performance did not fall below an objective standard of reasonableness.

"The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotations omitted). The reasonableness of counsel's conduct should be judged by "the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. To determine whether an attorney's representation was reasonable, courts look to "prevailing professional norms" in the legal community. *Ellis-Strong*, 899 N.W.2d at 539 (quotation omitted). The norms of practice

reflected in the American Bar Association (ABA) standards "are guides to determining what is reasonable." *Id.* (quotation omitted).

"[T]here is a strong presumption that counsel's performance was reasonable." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). The Minnesota Supreme Court has noted that:

> Mere improvident strategy, bad tactics, mistake, carelessness, or inexperience do not necessarily amount to ineffective assistance of counsel unless taken as a whole the trial was a mockery of justice. Even misleading advice by counsel to his client is not ground for relief, unless it clearly rises to the level of unprofessional conduct.

State v. Bailey, 132 N.W.2d 720, 724 (Minn. 1965) (quotation omitted). In the plea-bargaining context, "[a] defendant who receives advice that is so substandard that it prevents her from making a knowing and understanding decision regarding her plea receives constitutionally deficient advice under the first prong of *Strickland*." *Anderson v. State*, 746 N.W.2d 901, 909 (Minn. App. 2008), *review denied* (Minn. Nov. 24, 2009), *overruled on other grounds by Wheeler v. State*, 909 N.W.2d 558 (Minn. 2018).

Ho argues that his trial counsel's performance was objectively unreasonable because (1) the attorney misinformed him that consent was not a defense in the case with the juvenile complainant and (2) the attorney told him that he could receive a mandatory life sentence if convicted in three separate third-degree criminal sexual conduct cases. We examine each asserted deficiency in turn, but are mindful that Ho argues that the two alleged errors cumulatively rendered his counsel's assistance ineffective.

1. Misinformation regarding consent

Defense counsel has a duty to conduct "relevant legal research." ABA, *Criminal Justice Standards for the Defense Function* § 4-4.6(a) (4th ed. 2017). "An attorney's 'mistake of law' because of a failure to look up a statute may amount to an objectively unreasonable performance." *Ellis-Strong*, 899 N.W.2d at 539. This court has determined, for example, that counsel's performance was objectively unreasonable when an attorney affirmatively misinformed a defendant about the collateral consequences of a guilty plea even though the statute articulating those consequences was "succinct and clear." *Id.* at 540.

The parties agree that Ho's attorney misinformed him about the availability of a consent defense in the juvenile case. The state contends, however, that Ho's attorney corrected her mistake by offering Ho the opportunity to withdraw his guilty pleas, and that, accordingly, her overall representation was reasonable under prevailing professional norms. The postconviction court agreed with the state, determining that the attorney's corrective measures remedied the deficiency.

The state cites a formal opinion of the ABA's Standing Committee on Ethics and Professional Responsibility, which recognizes that "even the best lawyers may err in the course of clients' representations." ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 481 at 1 (Apr. 17, 2018).[6] If a lawyer errs and the error is material, meaning that the error is reasonably likely to harm or prejudice the client or to

[6] The ABA opinion is available online at this link: https://www.americanbar.org/content/dam/aba/images/abanews/ABAFormalOpinion481.pdf

cause the client to consider terminating the representation, the lawyer must inform the client of the error. *Id.* at 1-2.

Ho's attorney should have known from a review of the charging statute that consent was an available defense in the case involving the juvenile complainant. *See* Minn. Stat. § 609.344, subd. 1(o). Ho was charged under subdivision 1(o), which provides that a person who engages in sexual penetration with another is guilty of third-degree criminal sexual conduct if "the actor performs massage or other bodywork for hire, the complainant was a user of one of those services, and nonconsensual sexual penetration occurred during or immediately before or after the actor performed or was hired to perform one of those services for the complainant." *Id.* Ho's attorney accordingly gave him deficient advice as to potential defenses.

But that does not end the inquiry here, where Ho's attorney took further action upon learning of the mistake. The record shows that, once Ho alerted his attorney to the error, the attorney researched the statute, recognized her mistake, and promptly scheduled a meeting for the next day. At that meeting, which lasted about two-and-a-half hours, the attorney offered to help Ho withdraw the pleas and to submit a supporting affidavit explaining her error. She also offered to withdraw as counsel if Ho wished. Ho's attorney advised Ho, however, about the risks of withdrawing the guilty pleas and going to trial. She reasonably advised him that it would be difficult to succeed on a consent-based defense at trial when the state intended to offer *Spreigl* evidence, which would mean that four unrelated complainants would testify about factually similar sexual assaults.

By taking corrective action and advising Ho about his options for moving forward, Ho's attorney gave him the advice necessary to make a "knowing and understanding decision regarding [his] plea," or, more specifically, whether to withdraw his plea. *Andersen*, 746 N.W.2d at 909. Courts apply a strong presumption that counsel's assistance was reasonable, and mistakes and misinformation do not, by themselves, render assistance ineffective. *Andersen*, 830 N.W.2d at 10; *see also Bailey*, 132 N.W.2d at 724. Because Ho's attorney took prompt corrective action to fix her mistake, we conclude that the postconviction court did not err in determining that Ho's attorney's performance as to the consent defense was not objectively unreasonable.

2. Advice regarding a potential life sentence

In a related argument, Ho contends that his attorney's representation was ineffective because, on top of misinforming him about the consent defense, the attorney gave him the impression that withdrawing his pleas would subject him to a mandatory life sentence. Ho argues that he would have withdrawn his pleas if he had understood that a life sentence was unlikely.

As the postconviction court determined, there *was* a possibility—albeit a remote one—that Ho could have received a life sentence. Minnesota Statute section 609.3455, subdivision 4(3), provides for a mandatory life sentence for repeat offenders convicted of particular crimes, including third-degree sexual conduct offenses under Minnesota Statutes section 609.344 (2016). To qualify for the mandatory life sentence under subdivision 4(3), the following conditions must be met: (1) the person must have two prior sex offense

convictions,[7] (2) the present offense and past convictions must involve at least three separate victims, and (3) one of the following must apply:

> (i) the fact finder determines that the present offense involved an aggravating factor that would provide grounds for an upward durational departure under the sentencing guidelines other than the aggravating factor applicable to repeat criminal sexual conduct convictions;
>
> (ii) the person received an upward durational departure from the sentencing guidelines for one of the prior sex offense convictions; or
>
> (iii) the person was sentenced under this section or Minnesota Statutes 2004, section 609.108, for one of the prior sex offense convictions.

Minn. Stat. § 609.3455, subd. 4(3).

Had Ho taken all three cases to trial, he could have been convicted in the first two, thereby satisfying the first condition. All of the cases involved separate victims, which satisfies the second condition. As to the third condition, the district court reasoned that "the vulnerability of each of the victims while disrobed on a massage table could have met the standard for an aggravated departure." The age of the juvenile complainant also suggested particular vulnerability and could have justified an aggravated factor. *See State v. Mohamed*, 779 N.W.2d 93, 98 (Minn. App. 2010) (acknowledging the "special vulnerability" of those under 18 in considering the age of the victim as an aggravating

[7] A "prior sex offense conviction" is one where "the offender was convicted of committing a sex offense before the offender has been convicted of the present offense, regardless of whether the offender was convicted for the first offense before the commission of the present offense, and the convictions involved separate behavioral incidents." Minn. Stat. § 609.3455, subd. 1(g). A "sex offense" includes third-degree criminal sexual conduct in violation of Minnesota Statutes section 609.344. *Id.*, at subd. 1(h).

factor), *review denied* (Minn. May 18, 2010); *State v. Allen*, 482 N.W.2d 228, 232 (Minn. App. 1992) (concluding that "the [district] court did not abuse [its] discretion in considering age as an aggravating factor justifying upward departure," where the victim was 17 years old), *review denied* (Minn. Apr. 13, 1992).

Ho does not argue that he had no exposure to a life sentence under section 609.3455, subdivision 4(3). Instead, he asserts that a life sentence was an impossibility because the state had not charged him by indictment. In Minnesota, a defendant must be charged by indictment rather than by complaint if the state wishes to seek a life sentence. *See* Minn. R. Crim. P. 17.01, subd. 1; *State v. DeWalt*, 757 N.W.2d 282, 289-90 (Minn. App. 2008).

The state did not charge Ho's cases by indictment. It also appears that the prosecutor never mentioned the possibility of an indictment to defense counsel. But Ho's expert witness testified that the state could seek an indictment even after charging the cases by complaint. And the pending fourth case had not yet been charged, so it was at least a possibility that the state might indict in the future. Thus, Ho's attorney did not misinform Ho that a life sentence was possible under the repeat-offender statute. Her advice was akin to providing information about a statutory maximum sentence, or the unlikely outer limits of what could happen.

Moreover, and significantly, the record shows that Ho's attorney did not repeatedly emphasize the possibility of a life sentence. She never told Ho that this was a certain or even likely outcome; instead, she assessed his risk to be about ten years' imprisonment and advised him accordingly. While an email to Ho's mother following the July 11 meeting did highlight the possibility of a life sentence, Ho's attorney also told Ho on multiple

occasions that she estimated his sentencing exposure to be about ten years, which conformed to the Minnesota Sentencing Guidelines. *See* Minn. Sent. Guidelines 2.B.1.b, 4.B (2016). Given this evidence, we conclude that Ho has not overcome the strong presumption that his counsel's performance was reasonable in this case.

B. Ho has not shown prejudice.

Even if his attorney's representation was deficient, Ho is not entitled to relief unless he can show prejudice. *Ecker*, 524 N.W.2d at 718. We conclude that he has not done so.

To show prejudice, Ho must demonstrate "a reasonable probability that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial." *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012) (quotation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In considering whether there was actual prejudice, the appellate court reviews the evidence that was before the district court. *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004). "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017).

Ho asserts that but for his attorney's erroneous advice about consent, he would not have pleaded guilty, and that but for his attorney's erroneous emphasis on a mandatory life sentence, he would have elected to withdraw his guilty pleas once he learned that consent was an available defense in the juvenile case.

Regarding Ho's first contention, the best contemporaneous evidence of what Ho would have done is what he *did do* once he learned of the consent defense. He elected not to withdraw his guilty pleas, following reasonable advice from his attorney about the strength of a consent-based defense at trial. On appeal, the contemporaneous evidence that Ho points to suggesting that he always wished to proceed to trial on a consent defense consists primarily of correspondence between his attorney and his mother. But the fact that Ho's mother wanted Ho to go to trial is not persuasive. That Ho decided not to withdraw his plea when given the opportunity, and "unequivocally" elected to focus on seeking a departure at sentencing, shows that he wanted to maintain his guilty pleas regardless of whether consent was available as a defense.

As to the attorney's advice regarding a potential life sentence, the postconviction court found that "three groups" of factors assisted in analyzing whether Ho would have maintained the guilty pleas but for the allegedly deficient advice: first, Ho's decision to plead guilty before the emphasis on the exposure to a life sentence; second, Ho's feelings about his innocence and the strength of his case; and third, the risk of facing a lengthy sentence, even if not a life sentence.

Concerning the first factor, the postconviction court determined that, because Ho's attorney did not discuss life sentences with him until *after* he entered the guilty pleas, the timing of the discussion suggested that the potential exposure to a life sentence was not a "but-for" cause of pleading guilty. In considering the second factor, the postconviction court examined the evidence of Ho's remorse for his actions. Ho expressed remorse to his

attorney as they prepared for sentencing, during the presentence investigation, and during the sentencing hearing.

Finally, as to the third factor, the postconviction court determined that Ho was motivated to plead guilty by his desire to avoid a lengthy prison sentence in general—not specifically to avoid a life sentence. Ho's attorney advised him that she believed it was unlikely that he would win at trial and that, if convicted on three counts, he faced a presumptive sentencing range of 100 to 140 months. *See* Minn. Sent. Guidelines 2.B.1.b, 4.B. A fourth case of fourth-degree criminal sexual conduct would have exposed Ho to a presumptive sentencing range of 102 to120 months. *Id.* Ho could have faced even more time if the state proved an aggravating factor or if the court imposed permissive consecutive sentences. The postconviction court noted that Ho's strategy in directing his attorney to forgo a plea withdrawal motion and to focus on the argument for a sentencing departure reflects that he knew keeping the plea deal was his best opportunity to minimize his sentence or to avoid prison altogether.

We agree with the postconviction court's assessment of the totality of the circumstances surrounding Ho's decision-making. Overall, the contemporaneous record does not suggest that Ho pleaded guilty to avoid a mandatory life sentence; it suggests that he wanted to minimize prison time generally by taking responsibility, showing amenability to probation, and arguing for a downward departure. Given the timing of the life-sentence discussion—which occurred after the guilty pleas—as well as Ho's expressed remorse, and apparent overall strategy of minimizing prison time, Ho has not demonstrated a reasonable probability that, but for his attorney's advice about a life sentence, he would not have

pleaded guilty. *See Campos*, 816 N.W.2d at 486. We conclude that the postconviction court did not err by determining that Ho failed satisfy the prejudice prong of the *Strickland* test.

II. The postconviction court did not err in determining that Ho's guilty pleas were valid.

The validity of a guilty plea is a question of law that appellate courts review de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). Again, there is no absolute right to withdraw a guilty plea, *Perkins*, 559 N.W.2d at 685, and, after sentencing, a guilty plea may only be withdrawn upon a timely motion and a showing that withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice exists where a plea is invalid, and a plea is invalid if it is not "accurate, voluntary, and intelligent." *Theis*, 742 N.W.2d at 646. The burden of establishing an invalid guilty plea rests with the defendant. *Raleigh*, 778 N.W.2d at 94.

To be accurate, a guilty plea must be supported by "[a] proper factual basis." *Theis*, 742 N.W.2d at 647. This requirement "protect[s] a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). The voluntariness requirement protects a defendant from pleading guilty "due to improper pressure or coercion." *Nelson v. State*, 880 N.W.2d 852, 861 (Minn. 2016) (quotation omitted). And to be intelligent, the defendant must understand "the charges, the rights being waived, and the consequences of the guilty plea." *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). "The record must show that the defendant understood the elements of the offense and any available defenses,

and the possible consequences of conviction." *State v. Lyle*, 409 N.W.2d 549, 551-52 (Minn. App. 1987).

Ho argues that his plea was not accurate, voluntary, and intelligent because, when he made it, he "lacked a full and accurate understanding of the law regarding the juvenile case."

The state does not dispute that Ho's attorney misinformed him about the availability of a consent defense before the guilty plea. Rather, the state argues that, because the attorney corrected the misinformation and presented the option of plea withdrawal before sentencing, "[t]he time to remedy the mistake was prior to sentencing." The postconviction court agreed, noting concern about "set[ting] precedent promoting defendants to hold off on remedying potentially deficient pleas when they are made aware of the deficiencies in order to try their odds at sentencing first."

A defendant must be allowed to withdraw a plea "upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. While "[t]here is no explicit time limit barring motions for a plea withdrawal, . . . the motion should be made with due diligence, considering the nature of the allegations quoted therein." *State v. Byron*, 683 N.W.2d 317, 321 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Sept. 29, 2004).

Ho makes a narrow allegation that his plea was invalid due to his misunderstanding of the availability of a consent defense. But the record is clear that Ho learned about the consent defense before sentencing, that his attorney offered to assist him in withdrawing his plea, and that he elected to maintain the guilty pleas and proceed to sentencing. We

therefore agree with the postconviction court that Ho was not diligent in challenging the validity of his guilty plea. *Cf. Trott*, 338 N.W.2d at 252 (declining to allow plea withdrawal based on a misunderstanding by the parties as to the presumptive sentence, in part because the parties became aware of the presumptive sentence before sentencing and "neither the defendant nor his counsel at that time made any motion to continue the sentencing hearing or withdraw the plea for a mistake").

Moreover, during the guilty plea hearing, Ho admitted under oath that the sexual contact with the juvenile complainant was nonconsensual. Ho's admission to this element of the offense at the time of the plea undermines his claim that he would have pursued a consent defense had he known the defense was available.[8]

Under the particular facts of this case, where the record shows that Ho unequivocally elected not to withdraw his plea before sentencing, after he was fully informed about the available defenses, we conclude that the postconviction court did not err by denying Ho's postconviction petition to withdraw his pleas.

Affirmed.

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[8] We note that Ho's argument—while framed as a challenge to the accuracy, voluntariness, and intelligence of his plea—primarily implicates whether his plea was intelligent. His plea was accurate, as it was supported by an adequate factual basis. *See Theis*, 742 N.W.2d at 647. At the plea hearing, Ho entered the factual basis for his plea by admitting that he sexually penetrated both victims, that the penetration occurred while he was performing massages on the victims, that those massages were for paying customers, and that the sexual penetration was nonconsensual. These concessions satisfy the elements of Minnesota Statutes section 609.344, subdivision 1(o). *See* 10 *Minnesota Practice,* CRIMJIG 12.121 (2020). The record also does not suggest that Ho's plea was involuntary, as Ho does not argue that he misunderstood the terms of the plea agreement or that he was improperly pressured or coerced into the initial guilty plea. *See Nelson*, 880 N.W.2d at 861; *Raleigh*, 778 N.W.2d at 96.