COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP92-CR **Cir. Ct. No. 2008CM829**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTY L. KALTENBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL R. MOESER and JOHN W. MARKSON, Judges. *Affirmed*.

¶1 BRIDGE, J.[1] Kristy Kaltenberg appeals from a judgment of conviction and an order of the circuit court denying her postconviction motion to withdraw her pleas of no contest to four counts of providing child care to more

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

children than is permitted under WIS. STAT. § 48.65(1), and to vacate the court's imposition of jail as a condition of her probation for one of the charges to which she pled. Kaltenberg contends that plea withdrawal is appropriate in this case because: (1) the plea colloquy was defective under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and its progeny, and the State failed to prove by clear and convincing evidence that her pleas were nonetheless entered knowingly, voluntarily, and intelligently; and (2) her plea was infirm as a result of the ineffective assistance of her trial counsel. She further contends that reversal of that portion of her sentence imposing six months in jail as a condition of probation was inappropriate because the condition was punitive rather than rehabilitative. We affirm.

BACKGROUND

¶2 In 2007 and 2008, Kaltenberg provided child care in her home for compensation without licensure by the Department of Health and Family Services (DHFS). Because Kaltenberg was providing child care without a license, she was subject to the requirements of WIS. STAT. § 48.65, which restricted the number of children for whom she could provide care. Section 48.65(1) provides that "[n]o person may for compensation provide care and supervision for 4 or more children under the age of 7 for less than 24 hours a day unless that person obtains a license to operate a day care center from the department." This limitation does not, however, apply to "[a] parent, grandparent, greatgrandparent, stepparent, brother, sister, first cousin, nephew, niece, uncle, or aunt of a child, whether by blood, marriage, or legal adoption, who provides care and supervision for the child." Section 48.65(2)(a).

¶3 On August 29, 2007, Kaltenberg was providing care at her home for seven children, including Ahnika Alesch, who were under the age of seven and unrelated to her. That morning, Kaltenberg put Alesch to sleep on her stomach in a broken "Pack 'n Play" in a room with a closed door and without a baby monitor. Approximately thirty to forty-five minutes after she was put in the Pack 'n Play, Alesch died. Kaltenberg did not discover this until she checked on the infant two hours after she had put her to sleep. When she checked, Kaltenberg discovered that Alesch had vomited in the Pack 'n Play at some point and was no longer breathing. Rather than seek immediate medical attention for Alesch, Kaltenberg first cleaned the Pack 'n Play, disassembled it, and hid it in a closet. She then called 911 to seek emergency assistance.

¶4 Following Alesch's death, a licensing specialist with DHFS verified with Kaltenberg that on August 29, 2007, Kaltenberg had in her care seven children under the age of seven who were unrelated to her. On September 4, Kaltenberg was issued an order directing her to immediately cease providing child care in her home, or any other location, for four or more children who are under the age of seven and unrelated to her. Kaltenberg, however, did not do so, and on September 24, Jennifer Zschernitz, a licensing specialist with DHFS, discovered six children at Kaltenberg's residence—one child was her son, three children were unrelated to her, and two children were present with their grandmother, Kaltenberg's neighbor. According to Kaltenberg, her neighbor had been helping her since September 4 and was at her residence two to three times per week. Kaltenberg further stated that the neighbor cared for her grandchildren at Kaltenberg's house but was "basically visiting." Kaltenberg was advised by Zschernitz that all children present in her home were taken into account when determining whether the children in her care exceeded the maximum number of

children allowed under WIS. STAT. § 48.65. Thus, according to Zschernitz, Kaltenberg's neighbor could be present at Kaltenberg's residence with her grandchildren only if, including the neighbor's grandchildren, there were no more than three unrelated children under the age of seven years old present.

¶5 On January 14, 2008, another licensing specialist with DHFS discovered that Kaltenberg was again providing child care in violation of WIS. STAT. § 48.65. On that date, there were six children at Kaltenberg's residence, all of whom were under the age of seven and unrelated to Kaltenberg. On January 24, Kaltenberg was served with a notice of imposed forfeiture based upon "credible evidence" that she had operated a child care center for money without a license in violation of § 48.65. On March 13, a licensing specialist discovered that Kaltenberg was again providing child care in violation of § 48.65. The specialist observed that Kaltenberg was caring for seven children, including two she had attempted to conceal in a closet.

¶6 In March 2008, the State filed a criminal complaint against Kaltenberg charging her with four separate violations of WIS. STAT. § 48.65(1). The complaint alleged that the violations occurred on August 29, 2007, September 24, 2007, January 14, 2008, and March 13, 2008. An individual who violates § 48.65 is subject to a fine of not more than $500 and/or imprisonment for not more than one year. WIS. STAT. § 48.76.

¶7 Pursuant to a plea agreement, Kaltenberg pled no contest to the four charges. Under the terms of the agreement, the State agreed to make a recommendation to the circuit court that the court withhold sentence and place Kaltenberg on probation for two years. The State also agreed that it would not

bring charges against Kaltenberg with respect to the death of Alesch unless new evidence was discovered that was dispositive of Kaltenberg's guilt.

¶8 At the plea hearing, the State informed the court that it and Kaltenberg had reached an agreement which was summarized in a letter dated May 1, 2008. The court then engaged in the following colloquy with Kaltenberg:

> THE COURT: Ms. Kaltenberg, is that what you've agreed to?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: The maximum penalty for each of these four charges is one year in jail and a $500 fine. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: If you had trials in these cases, the State would have to prove that the crimes occurred in the City of Madison, Dane County, Wisconsin. They'd also have to prove that for compensation you provided care and supervision for four or more children under the age of 7 for less than 24 hours a day and that you did it without obtaining a license to operate a day-care center from the requisite department. Do you understand that charge?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Count 1 applies to August 29th of last year. Count 2 applies to September 24th of last year. Count 3 applies to March 15th of this year. And Count 4 applies to January 14th of this year. Do you understand those four charges?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And at least I haven't heard of any agreements, there maybe [sic] some partial agreement, but even if there were agreements you could receive the maximum penalties for each case. Do you understand that?
>
> THE DEFENDANT: Yes.

> THE COURT: I have a plea questionnaire and a waiver of rights form that you have signed. Did you go over that with your lawyer?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: And did he explain everything on that form to you?
>
> THE DEFENDANT: Yes, he did.
>
> THE COURT: Does any medication you are taking interfere with your ability to understand what you are doing?
>
> THE DEFENDANT: No.
>
> THE COURT: Do you have any questions?
>
> THE DEFENDANT: No.

The court found that the complaint was factually sufficient and accepted Kaltenberg's pleas of no contest to each of the four counts.

¶9 Despite the joint recommendation to sentence Kaltenberg only to probation, the court sentenced Kaltenberg to two years' probation for each of the four charges and imposed, as a condition of probation on count three, six months in the Dane County Jail. In sentencing Kaltenberg, the court acknowledged that Kaltenberg was being sentenced for licensing violations, not the negligent homicide of Alesch. The court noted, however, that the death of Alesch was an important factor in deciding the seriousness of the charges. The court stated,

> Perhaps if the rules had been followed and licensing had taken place, perhaps [Alesch's] death would have been avoided. We will never know that for sure.… [I]n my opinion, the violations are serious. Having too many children is a serious violation. Not being properly licensed is a serious violation. There are limits on children so the children receive adequate care. There are rules of licensing so that a person taking care of our most precious asset, our children, knows what to do and knows what they're supposed to do and knows how to do it. So I believe the

> violations here are on the serious side of the licensing violations.

¶10 The court stated further:

> The fact that you kept … doing what you were doing in violation of the law, knowing it, says something about your character.… I don't know if it was because of greed or carelessness or immaturity. But it's a negative on your character.
>
> The fact that you tried to hide evidence and didn't tell the truth for a while tells me something about your character. The fact that you would disobey the wishes of the parents for your convenience tells me something about your character.

¶11 In imposing the jail sentence, the court explained:

> I think there needs to be some jail time here because of the fact that you've committed so many of these violations and the fact that you tried to hide children in a closet to avoid a violation. The question is how much.… But I think to not impose any jail time would make us look at these crimes as less serious than they are, and I think that would be a mistake. I think it will punish you, and some punishment is appropriate, and I think it will deter others, and that's appropriate.

¶12 Following her sentencing, Kaltenberg moved to withdraw her no contest pleas under ***Bangert*** as well as ***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).[2] She argued that plea withdrawal was appropriate for two reasons: (1) the plea colloquy was defective because it failed to conform with WIS. STAT. § 971.08 and its progeny; and (2) under ***Nelson/Bentley***, the plea was infirm for reasons

[2] Kaltenberg's plea was accepted by Judge Daniel R. Moeser who was also the sentencing judge. After Kaltenberg moved to withdraw her plea, she also moved that Judge Moeser recuse himself, which he did. Kaltenberg's postconviction motions were then heard before Judge John W. Markson.

extrinsic to the plea colloquy—specifically, the ineffective assistance of her trial counsel which she claimed resulted in her being unaware that the court was not bound by the parties' plea agreement.

¶13 With respect to Kaltenberg's ***Bangert*** motion, the circuit court concluded that Kaltenberg failed to meet her burden of making a prima facie showing that the plea colloquy was inadequate for all purported errors except the court's failure to make a personal inquiry of her regarding her understanding of the constitutional rights she was giving up by her pleas. Thus, as to the ***Bangert*** motion, the court held an evidentiary hearing that was limited to the "narrow issue" of whether Kaltenberg understood the constitutional rights she was giving up. Following the hearing, the court concluded that the State had met its burden of establishing that, despite the deficiency in the plea colloquy, Kaltenberg understood the constitutional rights she was giving up. Accordingly, the court denied Kaltenberg's ***Bangert*** motion.

¶14 With respect to Kaltenberg's ***Nelson***/***Bentley*** motion, the court concluded that Kaltenberg failed to meet her burden of proving by clear and convincing evidence that she did not know or understand information necessary to enter her pleas knowingly, intelligently, and voluntarily. With respect to Kaltenberg's claim that she was misled into believing the court would not deviate from the sentencing recommendation set forth in the plea agreement, the court found the testimony of her trial attorney to the contrary to be more credible. The court also rejected Kaltenberg's assertion that her attorney failed to inform her about a possible defense to one of the charges against her. The court found that there was "strong evidence" that the defense had been considered and ultimately rejected. Accordingly, the court denied Kaltenberg's ***Nelson***/***Bentley*** motion.

¶15 Kaltenberg also moved to vacate that portion of the court's sentence imposing jail time as a condition of her probation on the basis that it was an erroneous exercise of the court's discretion. The circuit court denied this motion as well. Kaltenberg appeals.

STANDARD OF REVIEW

¶16 A circuit court's denial of a motion to withdraw a plea "is a matter of discretion, subject to the erroneous exercise of discretion standard of review." ***State v. Thomas***, 2000 WI 13, ¶13, 232 Wis. 2d 714, 605 N.W.2d 836.

¶17 A defendant who is able to show that his or her plea was not entered knowingly, voluntarily, or intelligently is entitled to withdraw the plea as a matter of right. ***State v. Hoppe***, 2008 WI App 89, ¶7, 312 Wis. 2d 765, 754 N.W.2d 203, *aff'd*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794. The determination of whether a plea was entered knowingly, voluntarily, or intelligently presents a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. This court reviews constitutional questions independently of the circuit court's determination. ***Bangert***, 131 Wis. 2d at 283. We will not, however, reverse a circuit court's findings of evidentiary or historical fact unless the findings are clearly erroneous. ***Id.*** at 283-84.

DISCUSSION

¶18 On appeal, Kaltenberg first contends that the circuit court erred in denying her motion to withdraw her no contest pleas. She asserts that plea withdrawal is appropriate in this case because the plea colloquy was inadequate and her pleas were therefore not entered knowingly, voluntarily, and intelligently, and because, for reasons extrinsic to the colloquy—specifically the ineffective

assistance provided by her trial attorney—she did not appreciate all potential risks of her plea, resulting in manifest injustice. Second, Kaltenberg contends that the circuit court abused its discretion in imposing jail as a condition of her probation for count three and argues in the alternative to her position on plea withdrawal that this court should reverse that portion of her sentence. We address each argument in turn.

PLEA INFIRMITY UNDER ***BANGERT*** AND ITS PROGENY

¶19 Kaltenberg seeks to withdraw her pleas on the grounds that the plea colloquy was defective within the meaning of ***Bangert*** and ***Hoppe,*** 312 Wis. 2d 765, and the State did not meets its burden of establishing by clear and convincing evidence that, despite the deficiencies in the plea colloquy, her pleas were entered knowingly, voluntarily, and intelligently. She claims the plea colloquy was defective for two reasons. First, she argues that the circuit court failed to establish that a factual basis existed for her pleas, as is required by WIS. STAT. § 971.08(1)(b). Second, she argues that the court failed to do the following, which she asserts undermined the sufficiency of the colloquy: (1) ask her personally if she was entering her pleas knowingly, voluntarily, and intelligently; (2) specifically find that she was entering her pleas knowingly, voluntarily, and intelligently; (3) place the terms of the plea agreement on the record; (4) personally address her and indicate that the court was not bound by the terms of the plea agreement; and (5) "ask or ascertain" whether she understood the rights she was waiving by her plea.

¶20 ***Bangert*** and its progeny, including ***Hoppe***, govern plea colloquies between the circuit court and a defendant. "For a plea to satisfy the constitutional standard, a defendant must enter it knowingly, voluntarily and intelligently."

Hoppe, 312 Wis. 2d 765, ¶10. To ensure that a defendant's plea is knowingly, voluntarily, and intelligently entered, the circuit court is obligated by WIS. STAT. § 971.08[3] to determine whether the defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment for the charge, and the constitutional rights being given up. ***Bangert***, 131 Wis. 2d at 260-62. The purpose of this colloquy is "to assure a voluntary and intelligent plea, as well as fundamental fairness in the taking of pleas." ***State v. Howell***, 2007 WI 75, ¶26, 301 Wis. 2d 350, 734 N.W.2d 48 (citation omitted).

¶21 A defendant seeking to withdraw his or her plea carries the initial burden of making a prima facie showing that the court violated WIS. STAT. § 971.08 or other mandatory procedures in accepting the plea, and that he or she did not know or understand the information that should have been addressed in the plea colloquy. ***Hoppe***, 312 Wis. 2d 765, ¶12. If a defendant satisfies this burden, he or she is entitled to an evidentiary hearing on the plea withdrawal motion. ***Id.*** At the hearing, the burden shifts to the State to show "by clear and convincing evidence that the plea was knowingly and voluntarily entered." ***Id.***

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[3] WISCONSIN STAT. § 971.08 provides in relevant part:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
>
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
>
> ….
>
> (d) Inquire of the district attorney whether he or she has complied with s. 971.095(2).

¶22 As noted in paragraph 13 above, the circuit court found that Kaltenberg failed to make a prima facie showing that the plea colloquy was deficient in any respect other than that the court failed to make a sufficient inquiry into whether she understood the constitutional rights she was giving up, and that despite this deficiency, Kaltenberg's pleas were knowingly, voluntarily, and intelligently entered. Accordingly, our analysis of all alleged errors, except her claim that the court failed to make a sufficient inquiry into whether she understood the constitutional rights she was giving up, begins with an analysis of whether Kaltenberg made the necessary prima facie showing. Because the circuit court determined that Kaltenberg met her burden with respect to her claim that the court's inquiry into whether she understood the constitutional rights she was giving up was insufficient, our analysis centers on whether the State met its burden of establishing by clear and convincing evidence that Kaltenberg's pleas were nevertheless entered knowingly, voluntarily, and intelligently.

Factual Basis to Support Pleas

¶23 Kaltenberg argues that the plea colloquy was deficient because the circuit court failed to determine that there was a factual basis for her pleas. Prior to accepting a defendant's plea, the circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b). This requires a showing that the defendant "in fact committed the crime charged." ***State v. Lackershire***, 2007 WI 74, ¶¶33 & 38, 301 Wis. 2d 418, 734 N.W.2d 23 (citation omitted). If the court fails to fulfill its statutory obligation under § 971.08(1)(b), manifest injustice occurs, and the defendant may withdraw his or her plea upon establishing by clear and convincing evidence that the withdrawal will correct that injustice. ***Thomas***, 232 Wis. 2d 714, ¶16-17; ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997).

¶24 Kaltenberg does not contend that a factual basis did not exist for her pleas. Instead, she asserts that the court's *inquiry* was insufficient to ascertain that factual basis. She suggests that to satisfy its obligation under WIS. STAT. § 971.08(b), it was necessary for the court to make a specific inquiry of her or her defense counsel.

¶25 Kaltenberg does not explain what an inquiry of her or her counsel must have entailed. Nor does she cite to any legal authority indicating that a circuit court must personally address a defendant or his or her trial counsel in order to satisfy its obligation under WIS. STAT. § 971.08(b). We generally do not consider arguments unsupported by citation to authority. ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286. That being said, we observe that the precise method by which a circuit court can ascertain whether a factual basis exists for a defendant's plea is left to the discretion of the circuit court, *see* ***Edwards v. State***, 51 Wis. 2d 231, 236, 186 N.W.2d 193 (1971), and we see no reason why a court must personally address a defendant or his or her trial counsel in order to properly exercise that discretion.

¶26 Moreover, even assuming for the sake of argument that the court's inquiry into the factual basis for the charges was insufficient, we would nevertheless affirm the court's determination. On appeal, we will upset a circuit court's determination that a factual basis exists for acceptance of a plea unless the court's decision is clearly erroneous. *See* ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). The court's determination will be sustained so long as there is credible evidence in the record to support it. ***Washington County v. Washington County Deputy Sheriff's Ass'n***, 2009 WI App 116, ¶7, 772 N.W.2d 697.

¶27 When reviewing a circuit court's determination that a sufficient factual basis exists to support a defendant's plea, "we look at the totality of the circumstances surrounding the plea." ***State v. Sutton***, 2006 WI App 118, ¶16, 294 Wis. 2d 330, 718 N.W.2d 146. The totality of the circumstances includes the records from the plea and sentencing hearings, as well as statements by defense counsel concerning the factual basis for the charges. ***Thomas***, 232 Wis. 2d 714, ¶18. Allegations in the complaint may also suffice to support a plea. ***Sutton***, 294 Wis. 2d 330, ¶17.

¶28 The complaint stated that Kaltenberg verified with a licensing specialist with DHFS that on August 29, 2007, she had seven children under the age of seven in her care who were unrelated to her. It stated that on September 24, a licensing specialist observed that Kaltenberg was caring for five children under the age of seven who were unrelated to her. The complaint also stated that on January 14, 2008, a licensing specialist confirmed that Kaltenberg was caring for six children under the age of seven who were unrelated to her. Finally, the complaint stated that on March 13, 2008, a licensing specialist and a police detective with the Madison Police Department observed that Kaltenberg was caring for seven children under the age of seven, including two who Kaltenberg concealed in a closet. We conclude that these allegations, along with Kaltenberg's acknowledgement that the charged offense related to the incidents described above, were sufficient to support Kaltenberg's pleas.

Remaining Alleged Deficiencies

¶29 Kaltenberg asserts that the plea colloquy was also deficient because the court failed to: (1) ask her if "she was entering her pleas knowingly, intelligently and voluntarily"; (2) specifically find that she was entering her pleas

knowingly, voluntarily, and intelligently; (3) "place the terms of the plea agreement on the record or have the parties place the terms on the record"; (4) "personally address [her] and indicate that it was not bound by the terms of the plea agreement"; and (5) "ask or ascertain whether [she] understood the rights she was waiving in entering [the] pleas." With respect to the fifth issue, she argues that the State failed to prove that despite this deficiency, her pleas were entered knowingly, voluntarily, and intelligently.

¶30 Kaltenberg does not sufficiently develop her first, second and third arguments. We therefore do not address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments insufficiently developed do not warrant a response).

¶31 With respect to the fourth alleged deficiency—the plea colloquy was defective because the court failed to personally address her and indicate that it was not bound by the terms of the plea agreement—Kaltenberg's primary claim is that the court failed to ascertain that she fully understood the penalties she faced. WISCONSIN STAT. § 971.08(1)(a) provides that prior to accepting a plea, a circuit court must "[a]ddress the defendant personally and determine that the plea is made voluntarily with [the] understanding of … the potential punishment if convicted." At the plea hearing, the court advised Kaltenberg that "even if there were [plea] agreements[,] you could receive the maximum penalties for each case. Do you understand that?" Kaltenberg indicated that she understood the court's warning. On appeal, Kaltenberg acknowledges that the court advised her that she faced the maximum penalties authorized by law despite the plea agreement. She nevertheless asserts that the court's warning failed to meet the requirement under § 971.08(1)(a) that the court must personally address her to determine whether she understood that the court was not bound by the plea with respect to sentencing,

and that the court's warning was "too ambiguous to discharge its duty to inform [her] that it is not bound by the plea agreement." However, even assuming for the sake of argument that the plea colloquy was defective in this respect, we conclude that Kaltenberg's plea was nonetheless knowingly given.

¶32 The circuit court, which is the ultimate arbiter of a witness's credibility, ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979), found the testimony of Kaltenberg's trial attorney, Brian Pfitzinger,[4] more credible than Kaltenberg's. Pfitzinger testified that he certainly conveyed to Kaltenberg on more than one occasion that the parties' sentencing recommendation would likely be followed, but did not promise her that she would not get jail time. He testified, however, that "you always, always advise your client that there is a chance the Court could not follow the agreement." He also testified that it was his standard practice to read every line of the plea questionnaire to a defendant, including the line that states the plea agreement on sentencing is a recommendation and the court is free to sentence the defendant up to the maximum possible penalty. In addition to the warnings she received from her attorney, Kaltenberg was also advised by the court during the plea colloquy that she could receive a sentence of the maximum possible penalties and she acknowledged that possibility.

¶33 The record demonstrates that it was brought to Kaltenberg's attention on numerous occasions that despite the sentencing recommendation contained in the plea agreement, she faced up to the maximum possible sentence.

[4] Shortly after Kaltenberg entered her pleas, Pfitzinger was sworn in as a Dodge County Circuit Court judge.

That Kaltenberg believed the circuit court would not deviate from the parties' sentence recommendation does not render her plea unknowing in light of the clear warnings she had prior to entering her pleas. We therefore conclude that Kaltenberg's pleas were entered knowingly with respect to the possible sentence she faced.

¶34 With respect to the fifth alleged deficiency, Kaltenberg argues that the State failed to show by clear and convincing evidence that she understood the constitutional rights she was giving up by entering her pleas. She argues that Pfitzinger's testimony failed to establish that he advised Kaltenberg that she was "giving up" the rights he recited to her set forth in the plea questionnaire and thus "it cannot be found that he provided her with the information … that indicates that she understands the rights and is willing to 'give them up of her own free will.'" We disagree.

¶35 Because Kaltenberg was found to have met her prima facie burden of showing the plea colloquy was deficient in that the court failed to ascertain that she understood the constitutional rights she was giving up, it was the State's burden at the evidentiary hearing to prove by clear and convincing evidence that, despite the deficiency, Kaltenberg's pleas were entered knowingly, voluntarily, and intelligently. ***Hoppe***, 312 Wis. 2d 765, ¶12. At the evidentiary hearing, Pfitzinger testified that it was his standard practice to read every single line of the plea questionnaire to defendants. This would include the statement, "I understand that by entering this plea, I give up the following constitutional rights …." Pfitzinger testified that he went over with Kaltenberg each and every right she would be giving up, which she acknowledged. He further testified that at no point did Kaltenberg indicate a lack of understanding as to the constitutional rights she was giving up. In addition, prior to entering her plea, Kaltenberg acknowledged to

the court that Pfitzinger had gone over everything on the form with her and that she had no questions.

¶36 We agree with the circuit court that the State proved by clear and convincing evidence that despite any deficiency in the plea colloquy, Kaltenberg was aware of the constitutional rights she was giving up when she entered her plea. Accordingly, for the reasons discussed above, we affirm the court's denial of Kaltenberg's ***Bangert*** motion.

PLEA INFIRMITY UNDER ***NELSON*** AND ***BENTLEY***

¶37 Kaltenberg also contends that plea withdrawal is warranted because Pfitzinger misled her into believing that she would be sentenced only in accordance with the sentence recommendation set forth in the plea agreement and, therefore, her pleas were fatally flawed. Motions to withdraw a plea based on factors extrinsic to the plea colloquy follow cases under ***Nelson***, 54 Wis. 2d 489, and ***Bentley***, 201 Wis. 2d 303. A defendant who challenges his or her plea under the ***Nelson/Bentley*** line of cases bears the burden of proving "by clear and convincing evidence that he or she did not know or understand the information necessary to make the plea knowing and voluntary, resulting in a manifest injustice." ***Hoppe***, 312 Wis. 2d 765, ¶29.

¶38 Kaltenberg testified at the postconviction evidentiary hearing that she pled no contest to the charges because Pfitzinger informed her that the plea provided for no jail time and no fines, and that she did not understand from his explanation that the circuit court could sentence her to jail once she entered her plea. She further testified that Pfitzinger informed her that the circuit court judge "would go along with … the plea agreement." Pfitzinger testified that he discussed with Kaltenberg her concerns regarding a possible jail sentence and the

fact that the plea agreement did not recommend any jail time. He also testified that he "[c]ertainly" gave her assurances that the agreement would likely be followed. He explained:

> In 20 years of practicing I've had, I believe two plea agreements jumped by the Court. So I did tell her that it is likely that the Court will follow the agreement, which I think it is reasonable to believe when [the parties] … make a joint recommendation, more often than not it seems the Court follows those recommendations. But … you always, always advise your client that there is a chance the Court could not follow the agreement.

Pfitzinger also testified, however, that it was his standard practice to read the line in the plea questionnaire which states that the court is free to sentence the defendant up to the maximum possible sentence. He further testified that he never promised Kaltenberg that she would not get jail time, but rather that he told her "there was a substantial likelihood she would not end up going to jail."

¶39 The circuit court found the relative credibility of Kaltenberg and Pfitzinger to be an important factor in its decision to deny Kaltenberg's motion. The court stated that the evidence showed that the plea discussion between Pfitzinger and Kaltenberg "was very much what would be expected on the part of a criminal defense lawyer under those circumstances. Candid advice about likelihoods, at the same time cautious warnings that the Court didn't have to and may not follow the agreement …." The court also noted that the court warned Kaltenberg that it was not bound by the sentence recommendation and Kaltenberg indicated to the court that she understood.

¶40 Credibility determinations are made by the circuit court when a defendant seeks to withdraw a guilty plea. ***Hoppe***, 312 Wis. 2d 765, ¶34. "Any conflicts or contradictions in the testimony are exclusively for the trial court, not

this court." ***Id.*** We agree with the circuit court that Kaltenberg has not shown by clear and convincing evidence that she did not understand that the circuit court need not abide by the sentence recommendation set forth in the plea agreement and that she therefore did not know or understand the information necessary to make her pleas knowing and voluntary. *See* ***id.*** Accordingly, we affirm the circuit court's denial of Kaltenberg's ***Nelson*/*Bentley*** motion

JAIL AS A CONDITION OF PROBATION

¶41 Kaltenberg argues that the circuit court's imposition of six months in jail as a condition of her probation on count three should be vacated because the jail condition was an erroneous exercise of the court's discretion. Although Kaltenberg acknowledges that a court may impose jail as a condition of probation, she contends that in this case the condition was not imposed for rehabilitative purposes but was instead imposed as punishment and to use her as an example for others. She argues that the condition therefore "do[es] not demonstrate appropriate sentencing discretion" on the court's part.

¶42 The circuit court is given broad discretion in fashioning appropriate conditions of probation. ***State v. Simonetto***, 2000 WI App 17, ¶6, 232 Wis. 2d 315, 606 N.W.2d 275. This includes requiring that the probationer serve time in jail as a condition of his or her probation. *See* WIS. STAT. § 973.09(4). We will affirm probation conditions on appeal so long as they "appear to be reasonable and appropriate." ***Id.;*** § 973.09(1)(a). The reasonableness and appropriateness of a condition is measured by how well it serves the objectives of probation: fostering the rehabilitation of the defendant and protecting the state and community interest. ***State v. Nienhardt***, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995).

¶43 Here, the circuit court explained that some time in jail was needed in light of the numerous violations and Kaltenberg's attempt to hide children in a closet to avoid another violation, along with the fact that by her fourth violation, Kaltenberg "should have known better." The court further explained that a failure to impose any jail time "would make us look at these crimes as less serious than they are, and I think that would be a mistake. I think it will punish you, and some punishment is appropriate, and I think it will deter others, and that's appropriate."

¶44 We conclude that the objectives of probation were furthered by requiring that Kaltenberg serve time in jail as a condition of her probation. We observe, as did the circuit court, that Kaltenberg violated WIS. STAT. § 48.65 on multiple occasions despite numerous warnings, and that she attempted to avoid an additional violation by hiding children in a closet, children whose parents had entrusted her with their care. Although the circuit court used the word "punish" in its ruling, it is apparent that the condition of jail in this case serves the rehabilitative purpose of further removing her from the temptation of caring for children in violation of § 48.65 and reinforcing the importance of complying with the law, something she clearly failed to appreciate. Further, the condition serves to protect Kaltenberg from the public. It also illustrates the importance to individuals providing unlicensed child care that compliance with § 48.65 is not something to which courts will turn a blind eye, and thereby protects children from childcare situations such as that fostered by Kaltenberg. Accordingly, we affirm the circuit court's denial of Kaltenberg's motion to vacate that portion of her sentence imposing jail time as a condition of her probation.

CONCLUSION

¶45 For the reasons discussed above, we affirm the judgment of conviction and order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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