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

**September 29, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2009AP3154-CR** **Cir. Ct. No. 2007CF196**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CANDICE L. CLARK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Candice Clark appeals a judgment convicting her of being party to the crime of multiple felonies, including second-degree reckless homicide, and an order denying her motion for postconviction relief. She contends that: (1) her plea was unknowingly entered because she did not fully

understand the intent element of the homicide charge and the trial court did not advise her about a potential innocent bystander defense; (2) her confession was involuntary because it was induced by a threat that she would never see her children again and she was denied food, sleep, and medication for her diabetes while in custody; and (3) her sentence was unduly harsh. For the reasons discussed below, we reject each of these contentions and affirm.

## BACKGROUND

¶2 The State initially charged Clark with first-degree intentional homicide, hiding a corpse, false imprisonment, aggravated battery, mayhem, child enticement, physical abuse of a child, mental harm to a child, contributing to the delinquency of a child, and obstructing an officer, all as party to a crime. The charges stemmed from allegations that Clark was one of several adults living in the same residence who severely burned, beat, strangled, confined in small spaces, starved, and otherwise abused an eleven-year-old boy, and also tortured the boy's mother until she was eventually killed and buried her in the backyard.

¶3 The police discovered the boy emaciated and near death in a closet of the house during the course of investigating an unrelated claim of custodial interference against Clark. At the hospital, the boy described a daily regimen of abuse he had suffered and named Clark as one of his abusers. One of the boy's treating physicians described his condition as "by far, one of the most egregiously beaten children [she had] ever seen who is still living." His burns alone covered 20 percent of his body and required the amputation of several fingertips and toes.

¶4 Clark gave a series of three statements to police in which she admitted to whipping the boy with an extension court; holding the bathroom door closed while her boyfriend scalded the boy with hot water; smacking the boy's

mother; and directing others in the household to "take care of" scalding, beating, and strangling the boy and his mother into unconsciousness in what she described as a "game" in which her boyfriend was the number one person and she was the number two person. Clark told the police that she and her boyfriend had discussed needing to get rid of the mother in order to keep her from disclosing what had been going on in the house, and that her boyfriend had talked about buying some land on which to bury the boy, his mother, and another household member. Some unspecified time after that conversation, and directly after Clark told her boyfriend she "couldn't deal with it anymore," Clark claimed that her boyfriend went into a bathroom with the mother, came out ten minutes later and said either that the mother was dead or that it wouldn't be long. Clark admitted to having subsequently driven around in a car with the mother's body in the trunk, and she eventually showed police where the body was buried.

¶5 At the preliminary hearing, the boy's sister testified to the following. The sister had also scalded, whipped, and strangled her brother at the direction of Clark and Clark's boyfriend. On the day of the mother's death, Clark had directed the sister to take her mother downstairs to use the bathroom, because her mother was too badly injured to be able to walk. The sister returned to request assistance with lifting her mother up to the toilet. Clark said she was sick and tired of the mother "shitting" all over the floor and she was going to bury the boy and his mother alive. Clark told the sister to go upstairs, and when the sister came back down half an hour later, Clark and her boyfriend told her that her mother had died, and that she had to help bury her because she was now an accessory to murder. Clark backed the car up to the house and her boyfriend wrapped the mother in a blanket and passed her through a window. As the sister helped put her mother in the trunk, she thought she saw her mother's knees moving, and later thought she

heard breaths or sighs coming from the trunk as she drove around with Clark. Later that night, the sister and Clark's boyfriend buried the mother while Clark kept watch.

¶6 The forensic pathologist who performed the autopsy concluded that the probable cause of death was manual strangulation, but could not say how long after the injury the mother might have survived with a compromised airway.

¶7 After the court denied a motion to suppress Clark's statements to police, Clark negotiated a plea agreement with the State in which several charges were dismissed and the count relating to the mother's death was reduced to second-degree reckless homicide as party to the crime. After the court imposed sentences totaling 55 years of initial confinement and 40 years of extended supervision, Clark filed a motion for postconviction relief seeking to withdraw her pleas or, alternatively, modify the sentences. The court denied Clark's postconviction motion, and she now appeals the trial court's rulings on her motions for plea withdrawal, suppression of her statements to police, and sentence modification. We will set forth additional facts relevant to each of those issues in our discussion below.

## STANDARD OF REVIEW

¶8 "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (citations omitted).

¶9 When we review a suppression motion, we will likewise defer to the trial court's credibility determinations and will uphold its findings of fact unless they are clearly erroneous, but will independently determine whether those facts establish that a particular action violated constitutional standards. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

¶10 We review sentence determinations under the erroneous exercise of discretion standard, affording them a strong presumption of reasonableness because the trial court is in the best position to evaluate the relevant factors and the demeanor of the defendant. ***State v. Klubertanz***, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116.

## DISCUSSION

### *Plea Withdrawal*

¶11 A defendant seeking to withdraw a plea after sentencing must demonstrate that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, a plea that was involuntary or unsupported by a factual basis, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). A defendant who asserts that the procedures outlined in WIS. STAT. § 971.08 (2009-10)[1] or other court-mandated duties were not followed at the plea colloquy (*i.e.*, a ***Bangert*** violation), and further alleges that he or she did not understand the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

omitted information is entitled to a plea withdrawal hearing. *See* ***State v. Howell***, 2007 WI 75, ¶¶27-29, 301 Wis. 2d 350, 734 N.W.2d 48. Once a defendant has made a prima facie case that the plea colloquy was defective, the State carries the burden of showing that the plea was nonetheless knowing, voluntary, and intelligent. ***Id.*** For any claim of manifest injustice other than a ***Bangert*** violation, including that the defendant actually misunderstood the elements of the crime notwithstanding having been given proper information, the burden remains upon the defendant.

¶12 Here, Clark contends that the trial court failed to fulfill its duty under WIS. STAT. § 971.08(1)(a) to determine that she understood the nature of being party to the crime of reckless homicide, because it failed to inform her during the plea colloquy that a person does not aid and abet if she is only a bystander or spectator and does nothing to assist the commission of a crime. Clark points out that the jury instruction for liability as party to a crime directs that the bystander disclaimer be included in the definition of aiding and abetting "if supported by the evidence." *See* WIS. JI—CRIMINAL 400. This is a ***Bangert*** argument. Clark's argument is unpersuasive for several reasons.

¶13 First, a trial court is not required to read a defendant the jury instructions or to provide any specific information about potential defenses. Its obligation is more generally to ensure that the defendant is aware of the nature of the charges. *See* ***State v. Trochinski***, 2002 WI 56, ¶¶21-22, 253 Wis. 2d 38, 644 N.W.2d 891. The court properly informed Clark that she was charged with causing a death by criminally reckless conduct, meaning "conduct that created a risk of death or great bodily harm to another person … and the risk of death or great bodily harm was unreasonable and was substantial, and that the defendant was aware that her conduct created the unreasonable and substantial risk of death

or great bodily harm." The court further advised Clark that, because she was entering a plea as party to the crime, she did not need to have to have committed the elements directly. The court explained:

> [A] person intentionally aids or abets the commission of a crime or is a party to the crime when acting with a knowledge or belief that another person is committing or intends to commit a crime, he or she knowingly either assists the person in the commission of that crime, is ready, willing—or ready and willing to assist, and the person who commits a crime knows of the willingness to assist. To intentionally aid or abet, the defendant must know that the—that another person is committing or intends to commit the crime and [] they have the purpose to assist in the commission of that crime.

We are satisfied that the information provided by the trial court was both accurate and adequate to inform her of the nature of a charge of aiding and abetting second-degree reckless homicide.

¶14 Second, even if we were to accept Clark's premise that the trial court had a duty to advise her of any potential defenses that could have been raised, we do not agree that information before the court would reasonably have led it to believe that Clark had a potential defense as an innocent bystander. Clark stipulated that the complaint and preliminary hearing provided a factual basis for her pleas prior to the court's discussion of the elements of the homicide charge. It was clear from the preliminary hearing testimony, as well as from summaries of Clark's statements to police included in the probable cause portion of the complaint, that Clark was an active participant in the torture of the boy and his mother leading up to the mother's death, and had explicitly discussed getting rid of the mother and/or the boy to avoid disclosure of that torture. That ongoing torture, which left the mother unable to even go to the bathroom unassisted, created an unreasonable and substantial risk of death or great bodily harm to the mother in

and of itself, and would certainly also have impaired the mother's ability to defend herself from the final fatal attack by Clark's boyfriend. Moreover, the comments Clark made immediately before her boyfriend strangled the mother in the bathroom—namely telling the sister that she was sick and tired of dealing with the mother and was going to bury her and her son, and then telling her boyfriend that she couldn't take it anymore—plainly indicated her willingness to assist in ending the ongoing torture by killing the mother. Finally, if—as appears likely from the sister's statements—the mother was actually still alive and struggling to breathe while in the trunk of the car that Clark was driving around, Clark's actions may well have directly contributed to the mother's death.

¶15 In sum, we see nothing in the complaint or preliminary hearing upon which the court relied as a factual basis that would suggest to the court that the term "innocent bystander" in any way applied to Clark's involvement in the mother's death. Nor are we persuaded that the court was required to look further than the actual proffered factual basis for Clark's plea in order to consider whether she had any potential defenses.[2] We therefore conclude that the plea colloquy was not defective.

¶16 Finally, as to Clark's claim that she did not understand the required intent and would not have entered her plea to the reduced homicide charge but for an erroneous belief that she could be convicted even if she was an innocent

[2] Clark contends that the court should have been aware that she had alleged that she was afraid of her boyfriend and that he had coerced her participation in the torture, based on allegations she made in a motion to sever. However, those claims were inconsistent with her statement to police that the torture was like a "game" and that she was the second in command, which Clark stipulated could be used as a factual basis for her plea as related through the complaint and preliminary hearing. Moreover, the court explicitly rejected Clark's allegations of coercion at the sentencing hearing.

bystander who failed to summon help, or was coerced to participate by her boyfriend, the trial court noted:

> And I was present at a number of hearings that Ms. Clark was involved in during the course of this prosecution. And it was certainly my understanding that she understood the meaning of those terms and that she understood the fact that she was accepting responsibility for what was done and for whatever elements were required to prove that she had done the crime that she was, in fact pleading to.

Although the trial court did not explicitly frame its discussion in terms of credibility, it is fair to infer from the court's comments that it simply did not believe that Clark had not, in actuality, understood the element of intent. Therefore, even if we were to review Clark's plea withdrawal motion under the standard for non-***Bangert*** claims (despite her having presented a ***Bangert*** claim), the record does not demonstrate that she was entitled to relief either based on the initial hearing or her reconsideration motion.

*Suppression Motion*

¶17 Before introducing a statement made by a defendant during custodial interrogation, the State must establish by the preponderance of the evidence both that the statement was given voluntarily, and that it was made after a knowing and intelligent waiver of applicable constitutional rights. ***State v. Hindsley***, 2000 WI App 130, ¶21, 237 Wis. 2d 358, 614 N.W.2d 48; *see also* ***Miranda v. Arizona***, 384 U.S. 436, 475-76 (1966). A statement is considered voluntary when it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Jerrell C.J.***, 2005 WI 105, ¶18, 283 Wis. 2d 145, 699 N.W.2d 110 (citations omitted). While some form of

coercion or improper conduct is a prerequisite for a finding of involuntariness, police conduct need not be egregious or outrageous to be coercive if the defendant's condition renders him or her uncommonly susceptible to police pressures. ***Id.***, ¶19. Thus, the court must balance the personal characteristics of the defendant (such as age, intelligence, physical and emotional condition, and prior law enforcement contacts) against the tactics used by law enforcement (such as the length of questioning, delay in arraignment, conditions under which the statement took place, and threats or inducements) to determine whether a particular statement was voluntary under the totality of the circumstances. ***Id.***, ¶20.

¶18 Clark contends that one of her statements to police was involuntary because she was "reacting to a threat from the officer that he would see to it that she never saw her children again," under a backdrop of "deprivation of sleep, food and medication." However, after listening to recordings of Clark's statements as well as the testimony presented at the motion hearing, "the court could not discern, in any way whatsoever from the tape, that the defendant was under duress from a lack of sleep, food, water or lack of medications." In particular, the court noted that Clark had not exhibited any symptoms of distress or raised any complaints during her interviews, and that her blood sugar level was normal on the date of the initial interview.

¶19 The court also rejected Clark's assertion that the interrogating detective had threatened to take her children if she did not confess. Rather, the court found that the detective had told Clark that, if it were up to him, she would not see the children again. The court viewed the detective's comment as a statement of revulsion rather than a threat. The court further noted that the recordings showed that Clark was not, in fact, cowed or intimidated, but rather

held her own with the detective throughout the interview, including some yelling confrontations.

¶20 The court's factual findings were not clearly erroneous, and they fully support its conclusion that Clark's statements were voluntary.

*Sentence Modification*

¶21 A sentence may be considered unduly harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32.

¶22 Here, the court imposed the maximum available sentence on five of the counts of conviction: second-degree reckless homicide, mayhem, physical abuse of a child, false imprisonment, and contributing to the delinquency of a child, and had all but one of the sentences run consecutively. Clark argues that those sentences were unduly harsh because the court improperly focused on her failure to save the victims or to report the abuse. We disagree with Clark's characterization of the court's explanation for the sentences, and conclude that the court properly focused on her affirmative criminal acts.

¶23 The court recognized that "it may very well be that what the defendants did in concert, they would never have done had they been alone or had they been with someone else" and observed that the court wanted to send a message that people should not just stand by and watch ongoing abuse.

Nonetheless, the court explicitly rejected the notion that Clark was an innocent bystander who merely failed to get help, or that she acted only under duress. It specifically noted that Clark repeatedly hit the boy with a cooking pan; choked him; kicked him in the belly; burned him with water from the shower and the stove; punched him in the face; and confined him for extended periods in a cubbyhole, closet or bathroom, and that Clark would reportedly laugh while the boy and his mother were being tortured. The court emphasized the severe impact the torture had upon the boy, as well as his sister, stating that "the viciousness or aggravated nature of the crime is astounding, and the degree of the defendant's culpability is significant."

¶24 In sum, we are satisfied that the trial court sentenced Clark based upon what she did, not what she didn't do, and that the length of the sentences was fully justified in proportion to the severity of the offenses.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.