COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1599-CR **Cir. Ct. No. 2007CF133**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE ROY CAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Vergeront, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. At a plea hearing in this criminal case, defendant Lee Roy Cain denied a fact that must be proven to support his conviction on the charged offense. However, at the sentencing hearing held two months after the plea hearing, Cain admitted this elemental fact, without having

raised any objection to any aspect of the plea hearing. Cain argues on appeal that the circuit court erred in accepting his plea at the plea hearing, on the grounds that as soon as Cain denied the elemental fact, the court should have adjourned the plea hearing and set the case for trial. Cain also contends that the court's denial of his postconviction motion to withdraw his plea, which rested on the same grounds, results in a manifest injustice.

¶2 We conclude that Cain's first contention is correct, but his second is not. We agree with Cain that the court should not have accepted Cain's plea at the time of the plea hearing, because Cain protested his innocence regarding an elemental fact. However, we also conclude that, based on the entire record of the case, including the court's explanations to Cain of his trial rights as reflected in the extended plea hearing colloquy as well as the record of the sentencing hearing that included his unambiguous admission, Cain has not carried his burden of showing by clear and convincing evidence that allowing him to withdraw his plea is necessary to correct a manifest injustice. Accordingly, we affirm the circuit court.

BACKGROUND

Events Before Plea Hearing

¶3 As relevant to this appeal, Cain was charged with "manufacturing" (in this case, growing) between five and twenty marijuana plants, which is a Class H felony. WIS. STAT. § 961.41(1)(h)2. (2009-10).[1]

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

¶4 The complainant alleged the following. Police executing a search warrant discovered a concealed room in Cain's residence. In the concealed room were sixteen marijuana plants, growing under large lights, and a ventilation system. Police also found a five-gallon bucket containing a "substantial amount" of material that tested positive for the active ingredient in marijuana. This appeal involves Count Three of the complaint, which charged the Class H felony.

¶5 At a bail bond hearing, the prosecutor said that Cain would be charged in the criminal information with "manufacturing a significant number of plants. It appears between fifteen and twenty, although I don't have the exact count yet. Very healthy, thriving plants, from what I viewed on the video from the search warrant." After waiving his right to a preliminary hearing, Cain was arraigned on a criminal information containing charges matching those contained in the complaint.

Plea Hearing

¶6 The parties reached a negotiated plea agreement under which Cain would plead no contest to the Class H manufacturing charge and the other charges (also drug charges arising from the search) would be dismissed. Represented by counsel, Cain told the court that he wanted to enter into this settlement agreement. The district attorney described the charge to which Cain would be pleading as involving growing "in excess of four plants...[,] a class H felony."[2] Following the agreement, the court dismissed the remaining counts in the information. Cain's

[2] Had Cain been charged with growing four or fewer plants, the offense would have dropped down to a Class I felony under WIS. STAT. § 961.41(1)(h)1.

attorney represented to the court that he believed Cain was pleading no contest to Count Three "freely and voluntarily," after he and Cain discussed "the evidence in the case and the benefits of entering a plea, [and] the risks of going to trial."

¶7 The following exchange then occurred.

> Court: And you understand what you're doing?
>
> Cain: *I had four plants in my house[,] okay? That's it*.... I have no other choice.... So I go along with whatever you people say in here.

(Emphasis added). The court did not address the plant-quantity issue in discussion that immediately followed this exchange. When the court subsequently asked Cain if he was entering his plea voluntarily, Cain responded as follows:

> Cain: Yup, yup, yup. I mean, from what I look at, I don't have any other choices. You have a lying detective here that planted stuff in my house....[3]
>
> Court: This isn't the sentencing.
>
> Cain: Get it done[,] get the hell outta here.

In the discussion that immediately followed, the court addressed the rights that Cain was waiving by entering a plea. As most relevant to this appeal, the court stated in part as follows:

> Court: The standard of proof ... is beyond a reasonable doubt. *That jury would have to be unanimous in thinking that every element of the charge against you was proved by the evidence at trial beyond a*

[3] Cain does not ask us to consider this allegation of "planted" evidence as a basis for plea withdrawal. On appeal, Cain rests his argument on the plant-quantity element issue alone. He does not dispute that, as described in the text below, at the sentencing hearing he admitted growing five marijuana plants and did not refer to allegedly "planted" evidence.

> *reasonable doubt.* Do you understand you're waiving that right[?]
>
> Cain: Yes.
>
> Court: On this charge they would have to show ... "manufacture." Controlled substance [alleged to be possessed] in this case [is] tetrahydrocan[n]abinol. *They would also have to show in this particular case that it was more than four plants.* And they would have to show that you were doing that intentionally. Well, not like it was weeds growing somewhere or anywhere, but that you were doing it intentionally. *You understand that you're waiving the right to have those things proved beyond a reasonable doubt*?
>
> Cain: Yup. I'm not an attorney so—
>
> Court: *It has to be a unanimous decision on the part of the jury. You understand that?* [Record does not reflect response to this question] [The] [c]ourt believes that the plea is entered knowingly, voluntarily, and intelligently.

(Emphasis added).

¶8 The court then observed that the criminal complaint could serve to establish a factual basis for the plea. In response, defense counsel said, "So stipulated, Your Honor." The court found that a factual basis was established, and then invited counsel for the State to relate relevant facts, "particularly with regard to the number of plants."

¶9 The prosecutor recited allegations contained in the complaint, including that "underneath those grow lights were 16 plants that had been planted and were growing—were actually, relatively large in size." The following exchange then occurred:

> Cain: Do I have to sit and listen to these lies?
>
> Defense counsel: It's just another minute.

> Court: That's a factual basis. I will accept the plea [and] enter the conviction at this time.

¶10 The sentencing hearing was set for about two months after the plea hearing, to provide time for the preparation of a presentence investigation report. Neither Cain nor his attorney raised with the trial court any alleged defect in the plea hearing immediately following the plea hearing, during the two-month interval between the plea and sentencing, or throughout the course of the sentencing hearing.

Sentencing Hearing

¶11 At sentencing, the prosecutor made the following comment regarding the total quantity of marijuana at issue in the case:

> [T]here was about a pound and a half of marijuana that was seized as a part of this,[4] together with 16 plants. And the average is, is about a pound of marijuana per plant on a mature plant is able to be harvested.
>
> ....
>
> … And these were very mature plants, very healthy, very well cared for and –
>
> ….
>
> .... They were going to yield a substantial [quantity] of marijuana.

[4] We quote this passage for its relevance to the plant-quantity issue only, and not because the reference to the already-harvested marijuana, allegedly seized at the same time as the plants, is relevant to proof on the plant-quantity element. The State does not argue that the weight of the already-harvested marijuana is relevant. Nor does Cain argue that the circuit court relied on the existence of the already-harvested marijuana in an improper way in connection with his conviction or his sentencing. Therefore, we consider reference to the separate quantity of marijuana in itself to be irrelevant to the issues raised on appeal.

¶12 Cain's attorney made reference to the number of plants in the following terms: "I would ask you to consider this particular infraction, *even with the 16 plants*, as on the lower end of [the] continuum of class H felonies." (Emphasis added.)

¶13 Cain gave an extended allocution, toward the end of which, and not in response to any question posed by or statement made by the court, Cain said:

> [T]here wasn't no quantity of marijuana in my house. It was a joint. *And those five plants which got excavated*.[5] *That's what was in my house.* I have no reason to lie about this[,] okay?

Postconviction Motion

¶14 In a motion for postconviction relief, Cain argued for the first time that, because he "directly denied the offense as charged in the Information at the time of his plea[,] Cain must be allowed to withdraw his plea." During oral argument on this motion, Cain's attorney acknowledged that the court had sufficient information before it at the time of the plea hearing to establish a "factual basis" for the plea, including facts supporting a finding of the greater plant quantity. However, Cain's attorney contended that the court erred in accepting the plea in light of Cain's denial of an element, and requested as a remedy allowing Cain to withdraw his plea. The court denied the motion, on the grounds that Cain entered the plea knowingly, voluntarily, and intelligently after a "lengthy colloquy."

[5] Cain does not assert on appeal that, in using the term "excavated," he should have been interpreted as conveying any idea other than, "seized by police."

DISCUSSION

I. The Nature of the Appeal

¶15 We begin by clarifying the very narrow issue that Cain raises on appeal and identifying several issues that he does *not* raise. We take this approach because his legal argument is easily confused with legal arguments that he does not make. We conclude that once Cain's ground for appeal is properly understood, it is readily resolved against him under the relevant legal standard given the unusual facts of the case.

¶16 Cain argues that plea withdrawal is required to avoid a manifest injustice, not that the case should be remanded for resentencing. He does not allege any error by the court in connection with sentencing, and indeed asserts that all aspects of the sentencing are "irrelevant" to this appeal. His position is that our analysis should begin and end with the conclusion that the court erred in accepting his plea, because Cain denied the plant-quantity element at the plea hearing, and that the automatic remedy for that error is plea withdrawal, regardless of subsequent events in the case. That is, Cain asserts error involving only "what happened up until and at the time of the plea hearing, specifically Cain's denial of an element of the crime to which he was pleading," and not what occurred at sentencing.

¶17 Moreover, even with respect to the plea hearing, Cain does not allege error by the court beyond the court's decision to accept the plea despite Cain's denial of the plant-quantity element. Significantly, and as we have already

referenced, Cain acknowledges that the court had an adequate "factual basis" upon which to base entry of a conviction, including an adequate basis in facts related to Cain's culpability on the plant-quantity element.[6]

¶18 More broadly, this is not a ***Bangert*** case, one category of which can be an assertion that there was an inadequate factual basis to support the plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). ***Bangert*** requires circuit courts to fulfill their plea colloquy obligations to determine, through a direct dialog with the defendant, "'that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.'" ***Id.*** at 260 (quoting WIS. STAT. § 971.08(1)); *see also* § 971.08(1) (addressing trial court responsibilities in taking plea). Cain does not assert that the court did not conduct an adequate, direct dialog with him at the plea hearing,

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[6] Based on our independent review of the record, this concession by Cain was necessary. That is, the court clearly had before it at the time of the plea an adequate factual basis to enter a conviction on the Class H felony, including but not limited to Cain's attorney's stipulation at the plea hearing that the complaint provided an adequate factual basis. *See* ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836 (in determining whether a plea is supported by a factual basis, circuit courts are entitled to search "the totality of the circumstances" in a case, including "the plea hearing record, the sentencing hearing record, as well as the defense counsel's statements concerning the factual basis presented by the state, among other portions of the record"). The fact of Cain's denial regarding the plant-quantity element, and for that matter also his claim of "planted" evidence, was sufficiently belied by the entire record before the court to allow the court to find a factual basis.

Separately, because Cain does not allege an inadequate "factual basis," we need not address the possible tension in Wisconsin case law regarding the significance of evidence developed after a plea hearing that may be potentially relevant to establishing a factual basis. *Compare* ***Loop v. State***, 65 Wis. 2d 499, 503, 222 N.W.2d 694 (1974) (affirming denial of motion for plea withdrawal on the grounds that evidence presented *after* plea hearing satisfied factual basis requirement), *and* ***Thomas***, 232 Wis. 2d 714, ¶27 (affirming denial of motion for plea withdrawal on grounds that defendant accepted factual basis stipulated by his attorney and prosecutor at plea hearing, rather than on grounds that the overall record supported a finding of a factual basis).

covering the relevant topics, and using accurate descriptions of Cain's rights and the nature of the charge to which Cain was entering a plea. Cain's argument on appeal that the court should not have accepted the plea, in light of Cain's denial of an element, is not an allegation of a ***Bangert*** violation.[7]

¶19 Finally in this vein, Cain does not argue that there was a violation of his Sixth Amendment rights under the ***Apprendi/Blakely*** rule, under which any fact except the fact of a prior conviction that exposes a defendant to greater punishment must be subject to the right to trial by jury. ***Blakely v. Washington***, 542 U.S. 296 (2004); ***Apprendi v. New Jersey***, 530 U.S. 466, 477 (2000); ***State v. Warbelton***, 2009 WI 6, ¶¶20-21, 315 Wis. 2d 253, 759 N.W.2d 557; ***State v. Hauk***, 2002 WI App 226, ¶32, 257 Wis. 2d 579, 652 N.W.2d 393.[8] We note, in addition, that the remedy for an ***Apprendi/Blakely*** violation is *remand for resentencing*, not plea withdrawal. *See* ***Schriro v. Summerlin***, 542 U.S. 348, 357 (2004) (***Apprendi/Blakely*** cases do not implicate the accuracy of an underlying determination of guilt or innocence); *see also* ***United States v. Paladino***, 401 F.3d

[7] On the same topic of required aspects of a plea colloquy, Cain also does not argue that, as to the plant-quantity element, his waiver of this fundamental right to trial was not valid because he did not have the benefit of the required personal colloquy in waiving that element. *See* ***State v. Anderson***, 2002 WI 7, ¶¶23-24, 249 Wis. 2d 586, 638 N.W.2d 301 (mandating the use of a personal colloquy for every waiver of the right to trial in a criminal case to determine and document that waivers are knowing, intelligent, and voluntary). Cain did not argue to the circuit court, and does not argue now, that he is entitled to the remedy that is provided when a circuit court fails to conduct an adequate colloquy, namely an evidentiary hearing on whether the waiver of the right to a jury trial was knowing, intelligent, and voluntary. *See* ***id.***, ¶25. Instead, he argues only that he is entitled to withdraw his plea, as manifestly unjust, because the plea hearing should have ended as soon as he protested his innocence.

[8] As noted below, we refer the ***Apprendi/Blakely*** rule, found in ***Blakely v. Washington***, 542 U.S. 296 (2004) and ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), in this opinion, but solely in the context of establishing that the number of plants should be treated as an "element," at least for purposes of determining that this is an issue the court should have addressed when denied by the defendant. We resolve that particular issue in Cain's favor.

471, 482 (7th Cir. 2005) (an argument that sentences were enhanced on the basis of facts not determined by jury in violation of Sixth Amendment is not "a question of guilt or innocence," but instead a question of whether an illegal sentence was imposed, subject to remand for resentencing). Cain does not seek resentencing.

II. Manifest Injustice Standard

¶20 With these clarifying points in mind regarding the nature of the appeal, we now address the standards that apply to the remedy Cain seeks. A defendant seeking to withdraw an accepted plea of guilty or no contest after sentencing must demonstrate by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988).

¶21 "The manifest injustice test requires a defendant to show a serious flaw in the fundamental integrity of the plea." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (internal quotations and citations omitted). The following are illustrative examples of circumstances that could produce a "manifest injustice" meriting postsentencing plea withdrawal:

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

State v. Daley, 2006 WI App 81, ¶20 n.3, 292 Wis. 2d 517, 716 N.W.2d 146 (quoting ***State v. Krieger***, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991)).

¶22 Cain does not attempt to characterize whether any of these illustrative examples fit this case, nor does he provide another characterization. It appears, however, that Cain means to argue that a manifest injustice occurred because, in denying the plant-quantity element at the plea hearing, he did not "personally enter or ratify the plea" to the Class H felony, matching the second example in the list, and that his admission at the sentencing hearing cannot stand for ratification.

¶23 However, Cain makes an error of law in asserting that his admission at the sentencing hearing is "irrelevant" to the question of whether the plea accepted by the court represents a manifest injustice. In addressing an argument on appeal that a conviction resulted from a plea that represents a manifest injustice, we "*may consider the whole record* since the issue is no longer whether the guilty plea should have been accepted, but rather whether there was an abuse of discretion in the trial court's denial of the motion to withdraw." ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978) (emphasis added). Thus, we rely on the entire record in evaluating whether Cain has shown by clear and convincing evidence that the court's error in accepting the plea produced a manifest injustice, a record that includes Cain's admission at sentencing. As discussed below, under the unusual facts of this case, the record of the sentencing directly undermines Cain's manifest injustice argument.

¶24 As explained in subsection A. below, Cain is correct that the court erred in accepting his plea at the plea hearing. While it is not necessary that a

defendant personally address the court and admit each element during a plea hearing, when a defendant explicitly denies an element, as occurred here, the court is required to pursue the issue, to make sure that the defendant is not asserting his or her innocence. If the court's effort to clarify the issue does not result in the defendant admitting the element or stipulating to it through counsel, the purpose of the plea hearing cannot be accomplished, and therefore the hearing should be adjourned and a trial date set.

¶25 However, as explained in subsection B. below, because Cain admitted to growing the larger number of plants at the sentencing hearing with knowledge of the import of that admission and while advised by counsel who also acknowledged the number of plants at issue, the error could not have resulted in a manifest injustice, and on this basis we affirm the circuit court. We conclude, based on the entire record, that without question Cain personally "ratified" the plea, including the plant-quantity element, through his personal admission at the sentencing hearing.

A. Entry of Conviction Despite Denial of Element

¶26 As mentioned above, plant quantity is an element of the offense, in the sense that, absent an admission, Cain has a right to have a jury decide whether he manufactured more than four plants.[9] Under ***Apprendi/Blakely***, this is treated

[9] The State disputes use of the term "element" in this context. The State argues that the number of plants is not an "element" of WIS. STAT. § 961.41(1)(h)2. that must be proved to establish guilt, but instead is "simply a matter relevant to the penalty which may be imposed for the violation" of the manufacturing statute. This argument, disputed by Cain, is based on the State's analysis of the terms of § 961.41, relevant jury instructions, and extensive citation to federal case law interpreting analogous federal criminal statutes. However, we conclude that "element" is an appropriate term to use, at least for purposes of this appeal. What matters is whether the fact is one on which Cain has a right to jury trial. As stated in the text, the parties (continued)

as an element to the extent that it is a fact that exposes a defendant to greater punishment and does not relate to a prior conviction. ***State v. LaCount***, 2008 WI 59, ¶51, 310 Wis. 2d 85, 750 N.W.2d 780. The parties in this case agree, correctly, that a conviction for the Class H manufacturing felony, which carries a potential penalty greater than that for the Class I felony, is not possible unless the "more than four" plant quantity is found by a jury, if that fact is not admitted by or stipulated to by the defendant. *See* WIS JI—CRIMINAL 6001, 6021.

¶27 While the plant quantity is an element, it was not required that Cain admit this element at the plea hearing "in his or her own words." *See* ***Thomas***, 232 Wis. 2d 714, ¶18; *see also* ***State v. Black***, 2001 WI 31, ¶22, 242 Wis. 2d 126, 624 N.W.2d 363 (sufficient for factual basis purposes that defendant's counsel agreed that criminal complaint could be used for purposes of the factual basis requirement).

¶28 However, when, as here, a defendant *explicitly denies* an element at a plea hearing, the trial court "is required" to reject the plea based on that denial and set the case for trial. ***Johnson v. State***, 53 Wis. 2d 787, 790, 193 N.W.2d 659 (1972); *see also* ***State v. Garcia***, 192 Wis. 2d 845, 867-68, 532 N.W.2d 111 (1995) (Abrahamson, J., concurring) ("[A] circuit court cannot enter a plea of guilty *coupled with claims of innocence* 'unless there is a factual basis for the plea and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.'") (emphasis

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agree that Cain has this right, and that the plant quantity is an element in at least this sense. We need not, and do not, address the question of whether "element" would necessarily be the appropriate term to use for the plant-quantity issue in any other context.

added) (quoting ***North Carolina v. Alford***, 400 U.S. 25, 38 n.10 (1970)).[10] This rule is part of the requirement that a trial court at a plea hearing is "to determine that the conduct *which the defendant admits* constitutes" a charged offense. ***Thomas***, 232 Wis. 2d 714, ¶17 (emphasis added) (citations, internal quotation marks, and brackets omitted).

¶29 For these reasons, as the State conceded at oral argument on appeal, given Cain's denial of the plant-quantity element at the plea hearing, if Cain had not admitted the element at sentencing, the conviction for the Class H felony could not stand. It was error to adjudicate Cain and enter a conviction for the Class H felony at the time of the plea hearing and set the case for sentencing, instead of adjourning and setting for trial.

¶30 We are mindful that the supreme court has noted that, in the plea withdrawal context, trial court decisions to accept pleas of guilty or no contest

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[10] The State and Cain did not negotiate and propose to the court that it accept an ***Alford*** plea; instead they proposed a non-***Alford*** plea, which the court accepted. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a special category of plea that requires a court to make a record adequate to find a knowing, intelligent, and voluntary plea resulting in a judgment of conviction despite the fact that the defendant maintains his or her innocence on one or more elements of the offense. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 629-30, 579 N.W.2d 698 (1998). The State suggested at oral argument in this case that we should consider the plea hearing to have been the functional equivalent of an ***Alford*** plea, and that we should conclude on that basis that the court did not err in accepting the plea. This is not a tenable position for two reasons. First, the circuit court expressly stated in the course of addressing Cain's motion for postconviction relief that it would not have accepted an ***Alford*** plea in this case, even if it had been asked to do so. Second, circuit courts must take special care before accepting an ***Alford*** plea to make sure that a defendant is well informed as to the meaning of this unusual variety of plea. *See, e.g.*, ***State v. Hampton***, 2004 WI 107, ¶12, 274 Wis. 2d 379, 683 N.W.2d 14 (describing defendant's denial of element, setting up need for potential plea to be categorized as ***Alford*** plea). In this case, so far as the record reflects, Cain's objections regarding the plant-quantity element were not directly addressed by the defense attorney, the prosecutor, or the court during the course of the plea hearing. Instead of receiving the special attention required as part of an ***Alford*** plea, Cain's denial of an element of the offense was essentially ignored.

involve findings of fact, and appellate courts do not disturb such factual findings unless the findings are "contrary to the great weight and clear preponderance of the evidence." ***Thomas***, 232 Wis. 2d 714, ¶13 n.7. However, the court in this case did not make a factual finding at the plea hearing, or in addressing the postconviction motion, to the effect that Cain did *not* deny the plant-quantity element, and the record is clear that he did make the denial. At issue is the legal significance of Cain's denial. ***Johnson*** controls this particular argument advanced by Cain as a matter of law.

¶31 For these reasons, based on the record on appeal, it strongly appears that if Cain had moved to withdraw his plea at any time during the two months between the plea hearing and the sentencing hearing, the circuit court in its sound discretion should have allowed withdrawal under the "fair and just" standard for pre-sentencing plea withdrawal requests. *See* ***State v. Bollig***, 2000 WI 6, ¶28, 232 Wis. 2d 561, 605 N.W.2d 199 (trial court "should freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution will be substantially prejudiced."). However, as discussed below, Cain voluntarily and intelligently decided instead to pursue the benefit of his original bargain under the plea agreement, understanding the charge to which he had pled guilty and the maximum penalty to which he was subjecting himself by ratifying the plea agreement.

B. Manifest Injustice Did Not Result from Denial of Withdrawal Motion.

¶32 We now explain why we conclude that, regardless of the error in accepting the plea, the circuit court did not erroneously exercise its discretion in denying Cain's postconviction motion. The court did not erroneously exercise its discretion because Cain did not meet his burden of showing by clear and

convincing evidence that denial of his request to withdraw his plea would result in manifest injustice.[11] We reach this conclusion for two primary reasons.

¶33 First, as addressed in subsection 1. below, at the plea hearing the court made clear to Cain that he had a right to a jury's determination on the plant-quantity element. That is, Cain understood at the time of the sentencing that any factual admission he made regarding plant quantity could form the basis for a conviction and sentencing for the Class H felony. Second, as addressed in subsection 2. below, with that knowledge, Cain freely and voluntarily admitted at sentencing, with the benefit of counsel, that he manufactured five plants.[12]

1. Cain's Knowledge that his Personal Admission was Sufficient to Establish Element

¶34 As the background facts summarized above reflect, at the plea hearing the court provided clear explanations about the rights Cain was surrendering in entering a plea, including the right that a "jury would have to be unanimous in thinking that every element of the charge ... was proved by the

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[11] For the same reasons that it is not a manifest injustice to deny the withdrawal motion, the court's erroneous decision to accept the plea was harmless error under WIS. STAT. § 805.18(2). We do not reverse a judgment of a circuit court if an examination of the record reveals that the error has not affected the substantial rights of the appealing party under the totality of the circumstances. ***State v. Harris***, 2008 WI 15, ¶48, 307 Wis. 2d 555, 745 N.W.2d 397. In applying the harmless error test to review denial of a request to withdraw a guilty plea, the general standard is whether the alleged error "undermines the court's confidence in the outcome of the judicial proceeding." *See* ***id.***, ¶42 (citing ***State v. Harris***, 2004 WI 64, ¶¶27, 30-31, 33-34, 272 Wis. 2d 80, 680 N.W.2d 737). Our confidence in the outcome is not undermined for the reasons we discuss in the text in rejecting Cain's attempt to establish a manifest injustice.

[12] In resolving the postconviction motion, the circuit court did not explicitly address the significance of Cain's admission at the sentencing hearing. However, this court is not limited to the application of the reasoning of the circuit court in affirming or denying its order; instead, we may affirm based on different or additional reasons. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53.

evidence at trial beyond a reasonable doubt," and also that Cain had manufactured "more than four plants." Based on these clear explanations we can be confident that Cain understood, at least by the time the plea hearing was completed, that manufacturing fewer than five plants could not be a Class H felony, and that manufacturing five or more would be a Class H felony. Further, he unquestionably understood that he could not be convicted of the Class H felony until the greater plant number were proven beyond a reasonable doubt to all members of a jury, unless Cain admitted to having grown the greater number of plants. In sum, at the time of both the plea hearing and the sentencing hearing Cain understood the statutory definition of the charge, and the ways that the elements could be established, consistent with his trial rights, all the while having opportunities to consult with counsel. Cain's well-informed intent at the time of sentencing to proceed with a plea to the Class H felony, admitting the larger number of plants, was clear to all.

¶35 While, as discussed above, this is not a ***Bangert*** case, one such case provides a revealing factual contrast to the issues in the instant case. In ***State v. Lackershire***, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23, a woman was charged with sexually assaulting an underage boy. ***Id.***, ¶6. After sentencing, the defendant argued that the court had not made clear during the plea colloquy that if her alleged conduct was a result of the boy forcibly sexually assaulting her, then she could not be guilty of the charge of sexually assaulting the boy. ***Id.***, ¶26. The supreme court concluded that the factual basis for the plea had not been adequate, because "there remained a substantial question" after the plea colloquy as to whether the defendant realized at the time of the plea "that if the underlying conduct was a sexual assault upon her, that conduct could not constitute the offense charged" against her. ***Id.***, ¶38.

¶36 Here, in sharp contrast, the record reflects no question about Cain's knowledge that growing five or more plants qualified as the more serious Class H felony to which Cain was entering a plea of no contest, and Cain does not argue to the contrary. Cain offers no reason for us to believe that his admission at the sentencing hearing was not made with full knowledge, as outlined in detail by the court at the plea hearing, as to the significance to Cain of any admissions he might make regarding the number of plants he grew. Cain does not argue involuntariness or any other factor that would militate against the finding that he understood the meaning and effect of his admission at the sentencing hearing that he had five plants. Instead, his argument rests on the incorrect legal theory that all aspects of the sentencing hearing, including his knowledge of his rights at that time, are irrelevant to this appeal, because his plea was invalid as a matter of law at the time the court entered the conviction, due to his denial on the plant-quantity element at the plea hearing.

2. Cain's Admission

¶37 Turning to the nature of Cain's admission at the sentencing hearing, when the details are evaluated in light of the direction that we consider the entire record to evaluate an assertion that a plea represents a manifest injustice, ***White***, 85 Wis. 2d at 491, it is plain that the details surrounding the admission only undermine a conclusion of manifest injustice.

¶38 Cain and his attorney did not merely stand by silently or tacitly acquiesce to a statement made by someone else about the number of plants. Having offered a negotiated plea to the Class H felony, accepted by the court, Cain and his attorney appeared for the sentencing on that charge, not on the lesser Class I felony charge. Cain's attorney referred to "the 16 plants," without

qualifying that as being a reference merely to what the State alleged. Later during the hearing, Cain directly admitted to having five plants, expressing no confusion or hesitancy on the issue.

¶39 It is true that there is a difference between the sixteen plants that the State alleged (and that Cain's counsel appeared to adopt as the correct number at sentencing) and the five plants admitted by Cain at the sentencing hearing. However, this is not a discrepancy that undermines the integrity of the plea. The court could reasonably have treated Cain's direct and unambiguous admission of five plants as a conscious, well-informed retreat from his earlier denial, calculated to gain whatever benefit Cain believed that he might gain by admitting that he had five plants. An obvious potential motivation of Cain's would have been to place himself in a better light with the court by being seen as more honest than he had been at the plea hearing. Regardless of his precise motivation, it cannot be said that it would have been "'a serious flaw in the fundamental integrity of the plea,'" *see* ***Thomas***, 232 Wis. 2d 714, ¶16 (citation omitted), for the trial court to take Cain at his word that he had grown five plants.

¶40 Thus, while Cain asserted his legal innocence at the plea hearing as to one element of the Class H felony, he unambiguously took back that assertion on the record at the sentencing hearing, after appearing at the sentencing hearing for the very purpose of being sentenced on the Class H felony. At both hearings, he had the benefit of counsel.

¶41 Moreover, Cain does not argue that there is not strong, indeed videotaped, evidence of his having grown sixteen plants, as the record appears to

reflect.[13] The record reflects no likelihood of the ultimate injustice: a conviction based on an untrue allegation; actual innocence. Cain has not attempted to advance an explanation for his shifting positions based on a claim of actual innocence, that is, that he actually grew only four or fewer plants.

¶42 Neither ***Johnson***, nor any other authority cited by Cain, stands for the proposition that it would be a manifest injustice to deny a motion for plea withdrawal because a defendant denied an element at a plea hearing under the unusual circumstances presented here: a full colloquy at the plea hearing and then a subsequent, direct admission to the elemental fact before the court pronounces sentence. This was an explicit ratification of the plea. Ultimately, Cain makes no arguments that approach the manifest injustice standard on this record. Therefore, we agree with the trial court's conclusion that Cain did not prove by clear and convincing evidence that withdrawal of the no contest plea is necessary to correct a manifest injustice.

CONCLUSION

¶43 For these reasons, we affirm the judgment of conviction and the postconviction order of the court denying Cain's motion to withdraw his plea of no contest to the Class H felony.

By the Court.—Judgment and order affirmed.

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[13] "[N]ormally the question of innocence need not be deeply pursued on a motion after sentencing" seeking plea withdrawal. ***State v. Booth***, 142 Wis. 2d 232, 238, 418 N.W.2d 20 (Ct. App. 1987). However, facts supporting an assertion of innocence could be relevant to the question of "whether the plea of guilty was voluntarily, advisedly, intentionally and understandingly entered or whether it was, at the time of its entry, attributable to force, fraud, fear, ignorance, inadvertence or mistake such as would justify the court in concluding that it ought not to be permitted to stand." *See* ***id.*** (citation and internal quotation marks omitted).

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