

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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**Appeal No. 2012AP1328-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF97

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN C. DEMARS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Ryan C. Demars appeals from a judgment of conviction entered upon his no contest plea to one count of second-degree sexual assault of a child, and from an order denying his postconviction motion for plea withdrawal after a partial evidentiary hearing. Demars argues that the trial court

erred in declining to hold additional evidentiary proceedings because his postconviction motion alleged sufficient facts which, if true, would entitle him to withdraw his plea. We conclude that the trial court properly denied his motion for plea withdrawal because the record as a whole, including the limited testimony adduced at the postconviction hearing, conclusively demonstrates that plea withdrawal is not necessary to correct a manifest injustice. We affirm.

¶2 In 2009, Demars was charged with one count of repeated acts of sexual assault of a child, B.A.W., and one count of exposing B.A.W. to harmful materials. The complaint alleged that over a nearly two-year period, when B.A.W. was nine and ten years old, Demars engaged in a variety of sexual acts with B.A.W., at least one of which involved intercourse. B.A.W. reported that this happened “maybe 20 or 30” times, and that Demars also showed him pictures and videos that were sexual in nature.

¶3 Pursuant to a search warrant, officers seized computer equipment from Demars’s residence. During a forensic investigation, police found a video and thirty-one images involving child pornography. Based on this discovery, Demars was charged in a separate case with thirty-one counts of possession of child pornography. During the pendency of the present case and pursuant to a plea agreement involving only the child pornography matter, Demars pled to five counts of possessing child pornography, and the remaining twenty-five charges were dismissed and read in.

¶4 Four days before the scheduled trial date in the present case, the State filed a motion in limine requesting “[a]n order permitting the State to introduce testimony that images depicting prepubescent boys engaged in sexual acts were located on the defendant’s computer.” Specifically, the State sought to

introduce an oral description of six of the pornographic images involving young boys that were found on Demars's computer.

¶5 On the morning of trial, over Demars's objection, the court ruled that three of the proffered photo descriptions were admissible as other acts evidence under the three-part *Sullivan*¹ test. The trial court determined that they were admissible to prove motive and intent and were not unduly prejudicial. The court permitted a recess, and the parties negotiated a new plea agreement. Demars pled to an amended count of second-degree sexual assault of a child, and the State agreed to recommend eight years of initial confinement. After Demars entered his plea, the court ordered a presentence investigation (PSI) and set the matter over for sentencing.

¶6 At sentencing, the PSI report stated that Demars admitted to having sexual contact with and showing pornography to B.A.W. According to the PSI report's author, Demars also admitted to having downloaded and viewed child pornography. The trial court imposed an eighteen-year bifurcated sentence, with eight years of initial confinement and ten years of extended supervision.

¶7 Demars filed a postconviction motion for plea withdrawal based on the ineffective assistance of trial counsel. The motion alleged that the State's last-minute other acts motion took the defense by surprise and that trial counsel should have requested an adjournment in order to effectively counter the motion, or to prepare for trial in light of the other acts. The motion alleged that Demars "felt intense pressure to make a decision, caused by the combination of his attorney's

¹ *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

sudden change in outlook as to the case, the prospective jurors which were being assembled, and the visit by the bailiff informing everyone to hurry up and get ready to come back into the courtroom.” Attached was Demars’s affidavit:

I do not feel that I had the time to make a deliberate choice about taking a plea or going to trial. I felt coerced and pressured by the fact that the jury panel was gathering and the limited amount of time that I had to decide whether to go to trial. If I had known that there was an issue pending which could so drastically change my chances at trial I could have weighed my options more carefully leading up to the hearing and not felt so unprepared to make such an important decision.

¶8 Postconviction counsel retained a forensic computer expert, who examined the police reports and concluded that the reports failed to establish that Demars viewed, downloaded, manipulated, or purposely saved any of the images at issue. The postconviction motion averred that according to the expert:

The most one can say from this evidence is that someone using the computer visited a website which, not necessarily with the person’s knowledge, downloaded or dumped a number of images into the temporary internet file of the computer. Unlike the other images of pornography found on the computers, including a few images involving prepubescent females, these temporary internet file images were not moved or manipulated by Mr. Demars or any other user. While a few images were located in files titled “my files” or “my pictures” the six original images the State sought to introduce, and the three among those that the Court approved for introduction at trial, were not located in anything other than the temporary internet file.

The postconviction motion argued that possession of the images in a temporary internet folder did not establish that Demars actually viewed the photos, and that the expert’s conclusion cast doubt on the probative value, and thus, the admissibility, of the other acts evidence.

¶9 At the postconviction hearing, the trial court stated that the first issue to be decided was whether Demars was entitled to an evidentiary hearing on his motion. The trial court inquired whether there were any disputed facts and agreed that for purposes of this inquiry, it would assume the truth of the retained computer expert's conclusions. The State pointed out that Demars had admitted sexually assaulting B.A.W. and viewing child pornography to the PSI author. Postconviction counsel explained that Demars now maintained that he lied to the PSI author because trial counsel informed him that denying the allegations would lead to a greater sentence.

¶10 The trial court permitted both Demars and trial counsel to testify about their pre-PSI conversations. Trial counsel testified that prior to the PSI interview, he counseled Demars to be honest but that he "also need[ed] to accept responsibility." Trial counsel testified that Demars had never made any admissions of guilt, but that he told Demars that "without making some admissions that something happened could be a problem in the ultimate recommendation by the agent." Trial counsel had discussed with Demars how the principles of honesty and responsibility might conflict in this case and "left it up to him as to what he was going to do." Demars testified that after discussing the PSI interview with his attorney, he believed he "had to admit to some things in the report, that otherwise I'm denying that I was guilty and that the judge would be harder on me in sentencing." Demars testified that he "came up with a story off of the police report and told that to the PSI [writer]," but that his admissions were false.

¶11 The trial court considered Demars's unequivocal answers during the plea colloquy and the circumstances surrounding his decision to plead, and concluded that Demars was not entitled to plea withdrawal. Given that Demars

had lied either to the PSI author or during his postconviction testimony, the trial court found that Demars was not credible and rejected any suggestion that he felt undue pressure to plead:

I think this is one of those situations where we're on the courthouse steps and it seems to happen an awful lot where defendants know that the jury's about to come up and the court made a ruling and he had to make a decision. We gave him enough time to make his decision, and a decision was made that he would enter a plea, and I would find that the plea was entered into freely, voluntarily, and intelligently ...

On appeal, Demars argues that the trial court erred by denying his plea withdrawal motion without a further evidentiary hearing.

¶12 A plea withdrawal motion filed after sentencing should only be granted if it is necessary to correct a manifest injustice. *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). A defendant who seeks to withdraw his plea on grounds constituting a manifest injustice need only be given an evidentiary hearing when he alleges facts which, if true, would entitle him to relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). No hearing is required if the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶13 The ineffective assistance of counsel may constitute a manifest injustice. *Bentley*, 201 Wis. 2d at 311. The defendant must prove both that counsel's conduct was deficient, or, outside the wide range of professionally competent assistance, and that counsel's errors were prejudicial. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he

[or she] would not have [pled] guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In deciding whether to allow a defendant to withdraw a plea, the trial court may assess the credibility of the proffered explanation for the plea withdrawal request. See *State v. Kivioja*, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999).

¶14 Demars’s claim presents a mixed question of fact and law. *Strickland*, 466 U.S. at 698. The trial court’s factual findings and credibility determinations will not be disturbed unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). We independently review whether counsel’s performance was deficient and prejudicial. *Id.*

¶15 In this case, we need not decide whether trial counsel performed deficiently because the record conclusively demonstrates that Demars suffered no prejudice. See *Strickland*, 466 U.S. at 697 (a court need not address both ineffective assistance prongs if the defendant fails to make a sufficient showing on either one). Demars has failed to demonstrate a reasonable probability that but for trial counsel’s failure to request an adjournment, he would have proceeded to trial.

¶16 Having learned that Demars lied either in the PSI interview or to the court at the postconviction hearing, the trial court found that Demars was not credible. We will not overturn credibility determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Here, there is no basis to overturn the trial court’s credibility finding. The trial court rejected Demars’s proffered explanation for plea withdrawal based on its credibility finding, as well as the undisputed facts

that Demars discussed the decision with counsel, renegotiated a plea agreement, and expressed no doubt or hesitation during the plea colloquy. Even Demars's postconviction affidavit stops short of alleging that, given an adjournment, he would have insisted on proceeding to trial. All Demars offers in terms of prejudice is that "[he] could have weighed [his] options more carefully leading up to the hearing and not felt so unprepared to make such an important decision." A defendant must show actual prejudice, not simply that trial counsel's error had some conceivable effect on the outcome. *State v. Erickson*, 227 Wis. 2d 758, 773-74, 596 N.W.2d 749 (1999). As stated by the trial court:

I cannot find that there's any type of manifest injustice whatsoever and I can't find that—I mean I think this is just hindsight 20/20. He's now looking for something in which to hang his hat on and—because he didn't get the sentence which he had hoped for and now he's trying to come up with something else....

We agree that Demars failed to meet his burden to establish prejudice.

¶17 The lack of prejudice is further underscored by the inescapable conclusion that an adjournment request would not have altered the circumstances which led Demars to plead in the first instance: the other acts evidence. Even assuming that an adjournment would have been granted,² and further, that trial counsel would have located a computer expert similar to the one retained postconviction, the State would have maintained the ability to introduce the other

² Citing *State v. Fink*, 195 Wis. 2d 330, 536 N.W.2d 401 (Ct. App. 1995), Demars asks us to presume that the trial court's denial of a requested adjournment would have constituted an erroneous exercise of discretion. This is not necessarily true. Before we would hold the decision erroneous, Demars would have to show: (1) that there was actual surprise which could not have been foreseen; (2) that he made some showing that contradictory or impeaching evidence could probably have been obtained within a reasonable time; and (3) that the denial of the continuance was, in fact, prejudicial to Demars. *Id.* at 339-40.

acts evidence of which Demars complains. The expert's conclusion that the police reports do not definitively establish that Demars actually viewed the photos does not mean that actual viewing cannot be reasonably inferred. See *State v. Perkins*, 2004 WI App 213, ¶14, 277 Wis.2d 243, 689 N.W.2d 684 (facts can be established by reasonable inferences as well as direct evidence). Implicit in the trial court's postconviction decision is that it would have admitted the other acts evidence even if presented with the expert's report. Given the reasonable inference that despite their presence in a temporary internet folder, Demars might have actually viewed the photos, it would have remained a proper exercise of discretion to admit the other acts evidence even in the face of the expert's testimony. Demars would have been in the same position as when he decided to accept the plea agreement.

¶18 Demars insinuates that had he been aware of the expert's proffered testimony, he might have proceeded to trial and used the expert to "nullif[y] the impact of the [other acts] evidence." This suggestion is self-serving, speculative, and incredible. See *State v. Davis*, 95 Wis. 2d 55, 60, 288 N.W.2d 870 (Ct. App. 1980) ("Self-serving assertions by a defendant based on mere speculation cannot serve as the grounds for a finding of actual prejudice."). Even with the expert's testimony, the jury could have reasonably inferred that Demars downloaded and viewed the pornographic images of prepubescent boys. Furthermore, as pointed out in the State's brief, given the amount and variety of pornographic materials found on Demars's computers and the fact that B.A.W. alleged that Demars showed him pornography during the assaults, a host of complications would await any attempt by Demars to prove to the jury that the three identified photos were inadvertently downloaded from a benign website. There was available evidence that Demars downloaded, manipulated and saved other pornographic images found

on his computer equipment, some of which constituted child pornography. Had Demars's expert testified consistently with the postconviction proffer, this would have opened the door for the State to introduce evidence of additional images and video containing child pornography in order to demonstrate that the three admissible images were not simply dumped into the temporary internet file of an unwitting, naïve user.

¶19 We also reject Demars's contention that regardless of whether he was likely to succeed on his postconviction claims, he was entitled to a further evidentiary hearing because the motion alleged "the five 'w's' and one 'h'... within the four corners of the document itself," as required by *State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Demars's postconviction motion was thorough in many respects. However, the trial court made a credibility finding and determined that Demars would not have insisted on going to trial had an adjournment been granted.³ Furthermore, in denying Demars's motion, the trial court accepted as true the factual allegations in Demars's motion and allowed for limited testimony. Demars does not specify what additional material facts outside of those contained in his postconviction motion he intended but was unable to present. A court need not hold an evidentiary hearing if the defendant fails to show the necessity of determining additional facts. *See State v. Tatum*, 191 Wis. 2d 547, 558, 530 N.W.2d 407 (Ct. App. 1995).

¶20 In sum, Demars has failed to establish a reasonable probability that he would have proceeded to trial had counsel requested an adjournment. The trial

³ Again, Demars's affidavit itself stopped short of alleging this requisite degree of prejudice.

court's credibility finding along with the plea hearing record and Demars's equivocal affidavit statements permit the trial court's rejection of Demars's proffered explanation for plea withdrawal. Further, Demars has failed to establish that the trial court would have reconsidered its other acts ruling based on the computer expert's conclusion that actual viewership could not be positively established. Given the trial court's pretrial analysis admitting the other acts evidence along with its denial of Demars's postconviction motion, the trial court implicitly found that regardless of the expert's testimony, the court would have admitted the other acts evidence because a jury could have reasonably concluded based on circumstantial evidence that Demars viewed and was aroused by the pornographic photos of prepubescent boys. On this record and given the trial court's rulings, there would have been no way to prevent the State from introducing at least the three other acts photos already deemed admissible, and it was this evidence that led Demars to enter a plea in lieu of trial. That in hindsight Demars would have preferred more time to consider his options does not carry his burden to prove prejudice.

By the Court.—Judgment and order affirmed.

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

