COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP42 **Cir. Ct. No. 2001CF100**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANCISCO A. CARRION,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Forest County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Francisco Carrion appeals the denial of a postconviction motion to withdraw his pleas based on newly discovered evidence. We affirm.

BACKGROUND

¶2 According to the criminal complaint, L.W. reported to police that Carrion came to her home to retrieve some personal property on October 2, 2001, and, during that visit, he forced her to engage in oral and vaginal intercourse. The next day, Carrion entered L.W.'s home uninvited and forced oral and vaginal intercourse with her at knifepoint.

¶3 Carrion was arrested and, while in the Forest County Jail, he wrote to L.W., apologizing and admitting "what happened was wrong." In the letter, Carrion asked that she "not take his life from him" and "let['s] work something out with my attorney …." Meanwhile, the jail intercepted incoming mail to Carrion indicating he was attempting to have his family offer L.W. a plane ticket to Puerto Rico and a thousand dollars to drop the charges.

¶4 An Information charged Carrion with two counts of third-degree sexual assault, based on the allegations of what occurred on October 2; two counts of first-degree sexual assault and one count of armed burglary, based on the allegations of what occurred on October 3; and one count of intimidation of a victim.

¶5 At the preliminary hearing, L.W. testified that on October 2, Carrion pulled her down as he was leaving her residence. L.W. stated, "I was telling him, no, you have to go. Please leave. And then he pulled me down and I was crying and I told him to stop." Carrion then forced nonconsensual vaginal and oral sex. L.W. testified that the day after this incident she learned Carrion had previously been with another woman "in [L.W.'s] home and in her bed." L.W. called Carrion that evening to let him know that she was very upset. Carrion then came over and entered L.W.'s home without her knowledge or consent. Shortly thereafter,

Carrion threatened L.W. with a knife from the kitchen and told her not to disrespect him. Then, continuing to use the knife to threaten her, Carrion bent her over and forced vaginal and oral sex against her will. Carrion told L.W., "[I]t's my word against yours." Shortly after Carrion left, L.W. called a friend, Peggy Stenz, and then left the house with her young daughter.

¶6 Carrion entered no contest pleas to one count of third-degree sexual assault and to an amended count of simple burglary. The two first-degree sexual assault charges, one of the third-degree sexual assault charges and the intimidation charge were dismissed. The circuit court adopted the parties' joint sentencing recommendation of ten years' probation with time served and an imposed-but-stayed concurrent prison sentence of ten years' initial confinement and five years' extended supervision.

¶7 In July 2003, Carrion's counsel filed a motion to vacate the conviction, or in the alternative to modify the sentence, based on newly discovered evidence that L.W. recanted her allegations against Carrion. The motion was not taken up by the circuit court, and it appears that no further activity occurred in the case until June 2012, when Carrion's probation was revoked and he began serving his stayed prison term. Carrion then retained a new attorney and filed a "supplemental" postconviction motion for plea withdrawal.

¶8 On July 24, 2013, the circuit court held a hearing on the plea withdrawal motion. L.W. confirmed her signature on several letters and identified other statements from 2003, some of which recanted her allegations of rape. However, L.W. consistently maintained throughout the postconviction hearing that the 2003 recantations were untruthful, and that Carrion had sexually assaulted her as she originally reported in 2001. L.W. further testified that she had little or no

recollection of writing the letters in 2003. She explained that the letters and statements were made during a time when she "was very high on cocaine." She testified in one instance, "We were up for two days doing cocaine." L.W. also testified, "My mind was very altered. Very sick time in my life." She said she wrote the letters with Carrion's help, "[s]o we agreed together that this is what would convince them." Carrion also testified at the hearing and denied that he prompted or assisted L.W. with the 2003 letters.[1]

¶9 The circuit court denied Carrion's motion to withdraw his pleas. The court ultimately concluded that Carrion "has not demonstrated a reasonable probability of a different result if a jury trial is set now." Carrion now appeals.

DISCUSSION

¶10 Carrion argues, for the first time on appeal, that the district attorney should have recused himself from Carrion's case because L.W. was friends with the district attorney's wife, Peggy Stenz.[2] Normally, we do not consider arguments raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). Carrion also waived any such challenge by entering his no contest pleas, as a valid no contest plea constitutes a waiver of all nonjuridictional defects and defenses. *See* ***State v. Damaske***, 212 Wis. 2d 169, 188, 567 N.W.2d 905 (Ct. App. 1997).

[1] Three other witnesses also testified at the postconviction hearing, all of whom were acquaintances of Carrion or L.W.

[2] Carrion failed to file a reply brief. Arguments not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶11 The record demonstrates Carrion knew about L.W.'s friendship with the district attorney's wife at the time of his pleas. L.W. testified at the preliminary hearing that she called her friend Peggy Stenz following the October 3 altercation. Peggy Stenz prepared a written police report on October 4 regarding L.W.'s call alleging Carrion had raped her.

¶12 Regardless of his waiver, Carrion's recusal argument fails on the merits. Carrion does not explain why the district attorney had a duty to withdraw simply because his wife knew L.W. He also fails to explain why such a relationship created improper lines of communication or to present any evidence of impropriety in his case resulting from the relationship. To the extent Carrion suggests the district attorney was overly zealous in the prosecution due to his wife's friendship with L.W., the record belies that suggestion. At the preliminary hearing, the circuit court found probable cause for a bindover on the charges, and Carrion thereafter reached a very favorable plea agreement that dismissed or downgraded the most serious charges. There is also nothing in the record to suggest that the lack of activity in the file from 2003 until 2013 was the district attorney's fault, or that Carrion had any complaints about the inactivity.

¶13 As to Carrion's argument for plea withdrawal based on newly discovered recantation evidence, we are unpersuaded by Carrion's arguments, especially in light of the record and our standard of review. A defendant who seeks to withdraw a plea after sentencing based on newly discovered recantation evidence bears the heavy burden of establishing by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Plea withdrawal under this standard is within the circuit court's sound discretion. *See* ***id.***

¶14 Carrion insists he is entitled to plea withdrawal because newly discovered evidence creates a reasonable probability that a jury would acquit him. In a situation where the circuit court finds credible both the original statement and the recantation, the task of weighing that evidence goes to the jury. *See* ***id.*** at 475. If, however, the circuit court finds that a recantation is incredible, that finding "necessarily leads to the conclusion that the recantation would not lead to a reasonable doubt in the minds of the jury." *See* ***id.***

¶15 Here, the circuit court found L.W.'s testimony at the postconviction hearing credible. The court stated:

> She clearly testified [that she has not recanted] at the motion hearing and the Court observed her demeanor and found her credible. She did not pause, hesitate or have the appearance of a witness that is uncertain or untruthful …. Although [L.W.] indicated there were some gaps in memory due to dark years of cocaine usage, some of which was with this defendant, she was very clear on the circumstances of the assault.

¶16 The court further found credible L.W.'s explanation that her recantations in 2003 were influenced by her cocaine addiction and Carrion's involvement:

> [L.W.] also indicated that she had written different letters in the Spring of 2003 seeking to exonerate the defendant. She indicated at the time these letters were written, she was under the influence of cocaine and the letters were written with the defendant being present. This Court does not regard these circumstances to be a valid reason for doubting the credibility of testimony observed at the motion hearing. Mr. Carrion had a motive to assist [L.W.] in changing her story.

The court's finding that L.W.'s recantations were incredible is supported by the record and is entitled to this court's deference. *See* ***id.*** at 473.

¶17 Carrion's recantation argument has other deficiencies. Because of the inherent unreliability of recantations, courts have also long held that recantation testimony must be corroborated by other newly discovered evidence. ***Id.*** at 476. The corroboration requirement in a recantation case is met if: "(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78.

¶18 In Carrion's case, the State concedes there was a feasible motive for the initial false statement based on L.W.'s potential motivation to punish Carrion for sleeping with another woman in L.W.'s bed. Despite this fact, we conclude there are not circumstantial guarantees of trustworthiness in L.W.'s recantations.

¶19 Significantly, the recantations were not given under oath. The circuit court properly assessed the reliability of L.W.'s in-court allegations made under oath at the preliminary and postconviction hearings against unsworn, out-of-court recantations made during a period of drug abuse and alleged influence by Carrion that otherwise reasonably explain why L.W. might falsely recant. *See* ***id.*** at 478.

¶20 In addition, the recantations themselves are internally inconsistent. On March 24, 2003, L.W. stated to a sheriff's department investigator that "the count which was dismissed really happened, but the one which he was convicted on, didn't." However, in other letters L.W. claimed no sexual assaults whatsoever occurred.

¶21 Other circumstances also call into question the trustworthiness of L.W.'s 2003 recantations. As mentioned previously, evidence suggested Carrion was pressuring L.W. to recant, both in 2003 and even shortly after he had been charged in 2001. There was also evidence that L.W. and Carrion were again in an

amorous relationship with each other in 2003, which could have motivated L.W. to make false recantations.

¶22 In all, Carrion has failed to establish the circuit court erroneously exercised its discretion in concluding it is not manifestly unjust to deny Carrion's request to withdraw his no-contest plea on the basis of newly discovered recantation evidence.

By the Court.—Order affirmed.

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