COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1975-CR **Cir. Ct. No. 2012CF864**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY S. MARISCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jeffrey S. Marisch appeals from a judgment convicting him upon his no-contest pleas to two counts of felony attempted intimidation of a victim and from an order denying his motion for postconviction

relief. The issue is whether he should be allowed to withdraw his pleas to correct a manifest injustice. We reject his contentions that the pleas are without an adequate factual basis and that his counsel's inaccurate advice caused him to misunderstand the charges' intent element. We affirm the judgment and order.

¶2 In Waukesha county case No. 2012CF174, Marisch was charged with first- and third-degree sexual assault, stalking, and fifty-five counts of violating a foreign protection order. While in jail on that pending case, the State filed Waukesha county case No. 2012CF864, charging Marisch with three counts of felony attempted intimidation of a victim. The complaint alleged that Marisch solicited fellow inmates Adam Locke and Jesse Dowling to dissuade the victim in case No. 2012CF174, who had moved to Arizona, from testifying.

¶3 Marisch entered no-contest pleas to one count of stalking in case No. 2012CF174 and two counts of victim intimidation in case No. 2012CF864. The remaining counts in both cases were dismissed and read in at sentencing.[1] The court imposed the maximum sentence on each count, to be served consecutively, for a total sentence of twenty-two and one-half years.

¶4 Postconviction, Marisch filed a motion seeking to withdraw his no-contest pleas on grounds that a factual basis for them was not established and that his pleas were not entered knowingly, intelligently, and voluntarily because his counsel gave him erroneous advice in regard to the intent element. The court denied the motion after a hearing. He appeals.

[1] The sexual assault charges in No. 2012CF174 were read in on an ***Alford***-type basis. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). The judgment of conviction in No. 2012CF174 is not a subject of this appeal.

¶5 To withdraw a no-contest plea after sentencing, a defendant "carries the heavy burden of establishing, by clear and convincing evidence" that a refusal to allow withdrawal of the plea would result in "'manifest injustice.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). The lack of a sufficient factual basis underlying the plea is one circumstance that constitutes a manifest injustice. ***Id.***, ¶17.

¶6 On a motion to withdraw, the court may look at the totality of the circumstances, including the plea hearing, the sentencing hearing, and statements made by defense counsel, to determine whether the defendant has agreed to the factual basis underlying the guilty plea. ***Id.***, ¶18. When a no-contest plea is entered pursuant to a plea agreement, the circuit court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Broadie v. State***, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975). "The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

¶7 To prove attempted intimidation of a victim with threat of force or violence, as is relevant here, the State had to prove that (1) the woman Marisch targeted was a victim of a crime, (2) Marisch attempted to prevent or dissuade her from assisting in the prosecution of an indictment, (3) Marisch acted knowingly and maliciously, and (4) Marisch's act was accompanied by some express or

implied threat of force or violence to the victim or her family members. *See* WIS. STAT. § 940.45(3) (2013-14)[2]; *see also* WIS JI—CRIMINAL 1297.

¶8 Marisch acknowledges that the State and defense counsel agreed at the plea hearing to rely on the criminal complaint as the factual basis for the pleas. The factual basis nonetheless was not established, he contends, because he denied having the intent to knowingly and maliciously attempt to intimidate her.

¶9 Marisch's challenge to the factual basis of the pleas makes it necessary to set forth the allegations of the complaint at some length. The complaint alleged that in letters to Locke from Marisch, Marisch asked Locke for help in contacting and paying off the victim—$500 a month until Marisch died, then a $500,000 life insurance benefit—if she would agree to not testify and to deliver a notarized statement to his attorney recanting her testimony. Marisch allegedly also threatened that, if she did not agree, he would have her prosecuted for various crimes and that she would be arrested, held with high bail, and face a virtual life sentence, but would drop the charges if she did as he asked. Locke told police he refused to cooperate with Marisch.

¶10 The complaint further alleged that Dowling told police that while incarcerated with Marisch, Marisch asked him if he knew anyone "who could take care of a few people." When he told Marisch he did, Marisch promised him money, a house, and a good life in return. Upon Dowling's release from jail, Marisch authorized the release from his jail property of four of his credit cards and his ATM card to Dowling.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶11 In subsequent recorded jail telephone calls between Marisch and Dowling, Dowling led Marisch to believe his "uncle" traveled to Chicago and badly beat up the victim's son; Marisch gave Dowling the victim's address, phone number, and description of her and her car so that the "uncle" could go to Arizona and hurt the victim; and references were made to Dowling's use of the credit cards, someone traveling to "AZ," "something" being taken care of by Friday, April 13, 2012, and activities in Chicago.[3] Police identified an M&I Bank account of Marisch's and spoke with an M&I Bank fraud investigator. The investigator stated that on the same day Dowling obtained Marisch's credit cards, a card linked to Marisch's account was used to withdraw $500 at a particular ATM.

¶12 Marisch concedes his cryptic phone statements could be "interpreted" so as to satisfy the malicious-attempt element but insists they referred to requests he made of Dowling "to order and send [the victim] a dozen yellow roses and wish her luck, not in a sarcastic way," and to drop his wallet off at Marisch's attorney's office. Marisch also claims Dowling "flipped on" him by taking his debit card from the wallet and trumping up the attempted-intimidation allegations when he got caught "doing some shopping" with the debit card.

¶13 Marisch does not, and cannot, dispute that the conduct alleged in the complaint meets the elements of felony intimidation of a victim. He contends, however, that his *admitted* conduct did not rise to the level of attempted intimidation of a victim and the circuit court was obliged to inquire further into the factual basis once he "expressly denied attempting or intending to intimidate." He

[3] Dowling told police he fabricated the "uncle" and the son's beating to satisfy Marisch, and that, despite Marisch's belief to the contrary, he did not arrange with anyone to go to Arizona or Chicago to hurt the victim or her sons.

claims that, had he understood that the mere possibility that his words could be interpreted as attempted intimidation was sufficient to establish criminal liability, he would not have entered his no-contest pleas. We reject this argument.

¶14 First, the parties agreed that the complaint sufficed as a factual basis for the pleas. "[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint." ***Thomas***, 232 Wis. 2d 714, ¶21.

¶15 Second, the court need not look beyond the complaint and conduct a mini-trial to establish the defendant's guilt of the crime charged beyond a reasonable doubt. ***State v. Black***, 2001 WI 31, ¶14, 242 Wis. 2d 126, 624 N.W.2d 363. "If the facts as set forth in the complaint meet the elements of the crime charged, they may form the factual basis for a plea." ***Id.*** "A factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts … even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference." ***State v. Spears***, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted).

¶16 Third, the court gave Marisch the opportunity at the sentencing hearing to contest the accuracy of presentence investigation report, which reiterated the allegations in the complaint, but he did not. WISCONSIN STAT. § 971.08(b) allows the court to establish the factual basis as it sees fit, as long as the defendant is made aware of the elements of the crime and the defendant's conduct meets those elements. ***Thomas***, 232 Wis. 2d 714, ¶21. Marisch confirmed his understanding of the elements and did not dispute the specific allegations in the complaint, except to say he agrees that statements made in the recorded phone calls could be "interpreted" in line with guilt but that he "never, ever" would want to hurt the victim or her sons.

¶17 Marisch leans heavily, but to no avail, on ***State v. Lackershire***, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d 23, as support for his claim that, because of his "misunderstanding," he must be allowed to withdraw his plea. There, Lackershire pled guilty to second-degree sexual assault of a child after having sexual intercourse with a fourteen-year-old boy. ***Id.***, ¶¶1, 6. The investigating officer's incident report, which served as the probable cause section for the criminal complaint, recounted the boy's statement that he and Lackershire had consensual sex and included Lackershire's statement that the boy had raped her. ***Id.***, ¶¶8-10. The boy testified at the preliminary hearing that he initiated the sexual contact with Lackershire. ***Id.***, ¶11.

¶18 At the plea hearing, the court used the criminal complaint and the preliminary hearing testimony as a factual basis. ***Id.***, ¶15. The court neither questioned Lackershire about her claim that the boy had raped her nor informed her that if she had been raped she could not be guilty of sexual assault. ***Id.***

¶19 Lackershire moved to withdraw her plea on the ground that the circuit court did not establish a sufficient factual basis for the plea. ***Id.***, ¶30. The supreme court held that there remained a "substantial question" after the colloquy as to whether the facts forming the basis for Lackershire's plea constituted the offense charged and that the circuit court's inquiry into the factual basis for the plea was insufficient because the version of events alleged in the complaint and relied on by the court as the factual basis for the plea did not constitute a crime by the defendant. ***Id.***, ¶38.

¶20 Here, by contrast, the allegations of the complaint plainly constitute the crimes to which Marisch pled, attempting and intending to intimidate a victim. Marisch pled no contest to the facts as alleged. The circuit court's determination

that there existed a sufficient factual basis is not clearly erroneous. *See* ***Smith***, 202 Wis. 2d at 25.

¶21 Marisch next asserts that he should be allowed to withdraw his pleas because, due to his counsel's ineffective assistance, he misunderstood the intent element, such that his pleas were not knowing, intelligent, or voluntary, and had he properly understood, he would not have entered them. He contends defense counsel led him to believe he could be found guilty if the jury "interpreted" his words as attempted intimidation, regardless of whether he knowingly and maliciously attempted to intimidate the victim. *See* WIS. STAT. § 940.45.

¶22 A defendant is "entitled to withdraw his [or her] plea as a matter of constitutional right if he [or she] demonstrates that he [or she] did not understand the elements of the crimes to which he [or she] pled." ***State v. Garcia***, 192 Wis. 2d 845, 864, 532 N.W.2d 111 (1995). The manifest-injustice test is satisfied if a defendant's plea was the result of constitutionally ineffective assistance of counsel. ***State v. Hudson***, 2013 WI App 120, ¶11, 351 Wis. 2d 73, 839 N.W.2d 147, *review denied*, 2014 WI 14, 843 N.W.2d 707. To establish ineffective assistance, a defendant must show both that counsel's performance was deficient and prejudicial to the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶23 Trial counsel did not testify at the evidentiary hearing, although his or her appearance and testimony is essential to an appellate court determination that counsel was ineffective under the Sixth Amendment. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The lack of counsel's testimony prevents our review of his or her performance. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

¶24 Even so, we agree with the circuit court that Marisch failed to demonstrate that counsel's advice was erroneous or that he did not understand the intent element. A defendant's actions are knowing and malicious if he or she acts with intent to injure or annoy another or with intent to interfere with the orderly administration of justice. WIS JI—CRIMINAL 1297. Knowledge and intent can be found from the defendant's acts, words, and statements and from all the facts and circumstances in a case bearing upon knowledge and intent. ***Id.***

¶25 Marisch does not argue that the allegations in the complaint are false, only that his words and actions *could* be construed in such a manner as to constitute a crime. He testified at the postconviction motion hearing that his counsel showed him the complaint alleging intimidation of a victim, that they discussed the facts alleged, that counsel told him that there was enough evidence to prove him guilty, and that he pled no contest to the attempted intimidation counts because he believed he would be found guilty if his words were "interpreted" in an unintended way. Counsel's advice was not inaccurate. Marisch thus did not prove that counsel performed deficiently. The State's evidence of Marisch's acts, words, and statements lead to a reasonable inference that he attempted and intended to intimidate the victim.

¶26 Marisch also did not prove that his pleas were not knowingly, intelligently, and voluntarily entered, as he did not prove he misunderstood the intent element of the crimes to which he pled. He concedes he was led to believe that his words could be interpreted as reflecting criminal intent. Thus, he correctly understood the offense to which he pled. Further, it does not matter if he did not personally admit intent before the court accepted his pleas. A defendant's personal admission is not required in order to establish a factual basis for his no-contest pleas. ***Thomas***, 232 Wis. 2d 714, ¶22. In any event, the court found that,

given the existence of a restraining order in connection with case No. 2012CF174, even if the "something" he wanted Dowling to do was to send the victim flowers, his actions were knowing and malicious. *See* WIS JI—CRIMINAL 1297. This finding is not clearly erroneous. The acts, words, and statements attributed to him supplied ample evidence that he acted with the required intent for felony intimidation of a victim.

¶27 The circuit court denied his motion to withdraw his plea because Marisch had acknowledged at the plea hearing that defense counsel discussed the elements of the offense with him, he believed defense counsel did a "wonderful" job, he assured the court that he was ready to enter his pleas, and he had been "considering [the plea questionnaire/waiver of rights form] for a week." We agree that Marisch failed to prove by clear and convincing evidence that the refusal to allow him to withdraw his pleas would result in a manifest injustice. The court properly denied his postconviction motion.

By the Court.—Judgment and order affirmed.

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