STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP784-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW ALLEN LILEK,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A POST-REMAND POSTCONVICTION MOTION TO WITHDRAW PLEA, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. Neither is warranted, because the briefs of the parties adequately develop the law and facts necessary for

the disposition of the appeal, and this case can be decided by applying well-established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF FACTS

After Lilek's initial appeal, this court reversed and remanded for an evidentiary hearing under *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986) (A-Ap. 103-122), because Lilek had met his *prima facie* burden of proof in showing his plea was not voluntarily, knowingly, or intelligently entered, given Lilek's disabilities (A-Ap. 119-122). This court did not consider Lilek's other claims (A-Ap. 104).

On March 25, 2014, the circuit court held the *Bangert* hearing, at which time Lilek's trial counsel, Steven Kohn, was the only witness (132:5-50 [R-Ap. 101-146]). Attorney Kohn, a criminal defense lawyer for 37 years (132:6 [R-Ap. 102]), testified that he was aware of Lilek's limitations; believed Lilek was "not able to function other than at a very low level" because Lilek "did not understand many of the terms … or words that were used when first spoken to him"; and did not know "how well [Lilek] retained them after we took the time to go through things" (132:8 [R-Ap. 104]).

Attorney Kohn "had doubts about [Lilek's] competency from the day I met him" (132:27 [R-Ap. 123]), but deferred to the circuit court's competency determination (132:27-28 [R-Ap. 123-124]), even though his "personal opinion was oftentimes at odds with what the doctor said" (132:28 [R-Ap. 124]). He "always questioned whether [Lilek] truly understood every word he was told or heard" (132:28 [R-Ap. 124]).

But Attorney Kohn also explained that once he took "a long time" to explain things to Lilek, he believed Lilek could understand "what certain words meant, what different theories were, how the process worked," and "the very, very basic concepts that we were dealing with" (132:8 [R-Ap. 104]). So long as he would "take a lot of time with him to explain things and be very patient with him," he believed Lilek was competent and could understand the legal proceedings (132:45 [R-Ap. 141]).

Attorney Kohn would explain legal concepts and processes to Lilek in terms of Lilek's preferred television show, "Matlock," "because [Lilek] was schooled and had seen, I believe, all of those TV shows, we were able to talk to him in terms of what he had seen as far as courtroom drama, interaction between attorney and client, etcetera, in terms of the Matlock TV series" (132:10 [R-Ap. 106]).

Attorney Kohn further explained that Lilek was "very adept" (132:22 [R-Ap. 118]) at using the concepts in "Matlock," so Attorney Kohn used the show to draw analogies to explain the legal process to Lilek:

> [W]e used that TV show as far as [explaining the roles of the various people involved]. You know, what does the prosecutor do? What does the judge do? What does the defense attorney do? How do you try a case? What evidence comes in? So—what do you have to talk about in an opening statement or closing argument? *Well, he plugged right into the TV show*. So as far as competency was concerned, it was through that subject matter that we were able to talk about it.

(132:22-23 [R-Ap. 118-119]) (emphasis added). Lilek also brought up different episodes of "Matlock" during the discussions of the plea process, and was "in a position" where he could envision, "to a certain degree, what was going on or

what would go on in court and in some of the crimes that were reflected in the TV shows" (132:23 [R-Ap. 119]).

As Attorney Kohn further testified, he explained the concepts related to Lilek's trial rights, and the waiver of those rights, by comparing those concepts to the show, which "was of a great assistance to us" because "Mr. Lilek had a concept of what went on in that television show as far as what a trial was" (132:29 [R-Ap. 125]).

When they discussed the items on the plea form, Attorney Kohn explained the concepts using a "very basic level of conversation" (132:30 [R-Ap. 126]). He used "Matlock" examples, given Lilek's "familiarity with the television show" and because Matlock was the "hero oftentimes through his cross-examination of witnesses" (132:31 [R-Ap. 127]).

Attorney Kohn also explained to Lilek "as best we could the difference between a guilty plea and a no contest plea" (132:14 [R-Ap. 110]), and broke down the substantive elements of the crimes contained in the jury instructions:

> Again, I believe that we explained it all to him on a very—on a level he could understand. We went through everything repetitiously. In other words, we didn't just ask him once and say: Okay. Do you understand that? My recollection is that we explained everything.
>
> When we got to the substantive crimes, I believe we went through the elements of the jury instructions and broke those down. But rather than just do it once, we did it many times and at the end of the day, asked [Lilek] to say back to us that which we had just explained to him.

(132:14-15 [R-Ap. 110-111]).

Attorney Kohn spent as much, if not more, time explaining to Lilek "what everything meant" than with any other client he had represented, and Lilek was "probably No. 1" in terms of explaining definitions and terms (132:15 [R-Ap. 111]). Attorney Kohn usually only spent 10 to 15 minutes with a client preparing for a plea hearing, but spent three hours with Lilek the week before the plea (132:16-17 [R-Ap. 112-113]). As Attorney Kohn added: "And my recollection is that was not the only night that we went through this. I believe we had met with [Lilek] on a number of other occasions. And I think one of those occasions was the prior week" (132:16 [R-Ap. 112]).

If Attorney Kohn felt that Lilek did not understand the plea agreement, he would not have allowed the plea hearing to go forward (132:19 [R-Ap. 115]). He also believed, at the time of the plea, that Lilek truly did understand the very basic rights he was giving up (132:20 [R-Ap. 116]).

Attorney Kohn believed it was his "duty to, as best I could," to "try to ensure that [Lilek] understood everything that was in [the plea questionnaire and waiver of rights] form," given Lilek's challenges (132:33 [R-Ap. 129]). He ensured Lilek understood him by first explaining things to Lilek very thoroughly, and then having Lilek tell him afterwards what Lilek understood about the concepts:

> [B]y use of example, by use of basic words and terms, by questioning him after each line, you know, does he understand that but more importantly after we explained it to him, we wanted him to regurgitate back to us what we were talking about so that this was not a situation where he was simply mimicking the answer that he thought we were seeking by saying "yes" or "no."

(132:33 [R-Ap. 129]).

As Attorney Kohn explained, "I didn't want to be in a situation where [Lilek] was simply mirroring what I said," so he "spent more time on this plea regarding the terminology and meaning and having the client, Mr. Lilek, tell me what he understood after we had talked about it before we moved on to the next line" (132:34 [R-Ap. 130]).

Attorney Kohn also explained all the elements of the crimes to Lilek, including sexual contact with the victim (132:20-21 [R-Ap. 116-117]). But as Attorney Kohn testified, he did more than just read the elements to Lilek; he used the jury instructions, and Lilek's recollections from the earlier discussion about the facts of the crimes, to show Lilek

> how those facts that [Lilek] had talked about fit the legal definitions that were in the jury instructions. For example, sexual contact. Did you touch a breast? Did you touch a breast because you were sexually aroused or had sexual interest, whatever the words were as far as the jury instruction. And the same with the other conduct that he described to us.

(132:21 [R-Ap. 117]).

Attorney Kohn had discussions with Lilek "in phases that way" (132:21 [R-Ap. 117]), first discussing facts and then later scaffolding those facts with the legal principles:

> [W]e first had him recite what he remembered what occurred and what his motivation was for it. The second night when we came back . . . would have been where we plugged in what [Lilek] had told us [about the facts of the crimes] and used our notes of that to use as far as examples of the definitions of the terms we were talking about, the jury instructions.

(132:21-22 [R-Ap. 117-118]).

Attorney Kohn followed this pattern throughout the discussions because Lilek "had some mental challenges that the rest of us do not share," and he had not ever "represented an individual … who is as challenged mentally as Mr. Lilek is" (132:24 [R-Ap. 120]). He knew he had to take "detailed time to make sure that [Lilek] underst[ood] the issues" (132:24-25 [R-Ap. 120-121]). Although Attorney Kohn spoke with Lilek at a very basic level, he "[c]ertainly didn't talk to him like a child. I think that would have been demeaning. It would not have served well. But to kind of use the KISS principle which is Keep It Short and as Simple as possible" (132:26 [R-Ap. 122]). Attorney Kohn testified:

> I thought it was important, first, to hear from [Lilek] what he remembered and what facts he could admit to to see whether we could get to a plea. So the first phase was: Let's see what he remembers. Let's see what the fact scenario is that he lays out. Then if we feel there is a factual basis for a plea that he agrees with, then we can move on to the legal terminology.

(132:25 [R-Ap. 121]). Attorney Kohn also wanted to have the discussions over more than one sitting, so as not to stress Lilek out or cause seizures (*id.*).

When discussing the facts of the case, Lilek "indicated he knew [the victim] had not agreed to have him in the apartment or do the things that he was doing" (132:24 [R-Ap. 120]), and Attorney Kohn later discussed with Lilek the elements of sexual contact and the victim's lack of consent (132:20-24 [R-Ap.116-120]). Similarly, they first discussed how Lilek "carried [the victim] into the bathroom and put her into the bath tub [*sic*]," and how that "probably would have hurt her," and then later discussed the elements of battery (132:26-27 [R-Ap. 122-123]).

Attorney Kohn summarized: "We used what [Lilek] told us the previous visit as far as what he remembered factually and plugged it into trying to use his own words to explain how they fit the jury instruction elements" (132:27 [R-Ap. 123]).

Attorney Kohn testified he would not have checked off the boxes on the plea form if he believed that Lilek did not understand each line after their conversations (132:36 [R-Ap. 132]). Although Lilek struggled with some words, "many of the words he would understand" (*id.*). Attorney Kohn also believed it was "everybody's job to participate in making sure that the defendant knows what he's doing" (132:40 [R-Ap.136]).

Attorney Kohn had concerns that the court would not accept Lilek's plea (132:43 [R-Ap. 139]), but still believed Lilek's plea was knowing and voluntary based on his interactions with Lilek (132:49 [R-Ap. 145]), because "what [Lilek] was saying in court that day mirrored what I had gone through with him on the 12th and the week before" (132:48 [R-Ap. 144]). Although Attorney Kohn did not know exactly what Lilek was thinking the day of the plea, he believed that "on a very basic level" Lilek understood when Attorney Kohn was questioning him (132:49 [R-Ap. 145]).

In deciding Lilek's motion, the postconviction court relied on the plea court's summary to Lilek of the elements of the crimes; defense counsel's explanation of how he explained the plea process and the nature of the charges to Lilek; and other evidence in the record showing Lilek's knowledge of the charges (132:69 [A-Ap. 125]). The postconviction court then found that Lilek's argument as to his lack of knowledge was "very speculative" (*id.*).

Although acknowledging that the plea court "certainly [was] obligated to make special inquiry and make sure that the defendant understands what's going on in the courtroom," the postconviction court stated it could only determine Lilek's understanding by "the appropriateness of the responses of the defendant [at the plea hearing] along with what the lawyer says" at the *Bangert* hearing (132:71 [A-Ap. 127]).

The postconviction court found that Lilek talked with his attorney about his plea less than 48 hours before the plea hearing (132:72 [A-Ap. 128]), and had discussed the maximum penalties, the items on the plea form, and the no contest pleas and guilty pleas (132:72-73 [A-Ap. 128-129]). For example, when the plea court asked Lilek if he had discussed the plea questionnaire with his lawyer, Lilek replied, "'I did on Tuesday actually'" (132:72 [A-Ap. 128])—a remark the postconviction court understood to mean that "Mr. Lilek himself demonstrates to the Court that he has an independent recollection of his conversations with his attorney that Tuesday night" (132:73 [A-Ap. 129]).

As to Lilek's misunderstanding about the maximum monetary penalty, the postconviction court found "it is not unusual for individuals to focus more on the amount of time in their life that is at stake rather than the monetary amount" (132:73 [A-Ap. 129]), but also that the plea court "adequately addressed and cleared up" the monetary penalty (132:74 [A-Ap. 130]).

As to Lilek's understanding of the plea form and elements of the offenses, the postconviction court called Attorney Kohn's testimony "helpful and enlightening" in showing Lilek's "particular level" of understanding (132:74

[A-Ap. 130]). Attorney Kohn first asked Lilek to explain what Lilek did, then talked about what the elements or parts of the charge were, and then went "back and ask[ed] Mr. Lilek to relate what he did to each part of each element of the offense" (*id.*). The postconviction court found that Attorney Kohn was "truthfully able to answer" that Lilek understood the plea court's questions (*id.*).

As to the plea court's own questioning of Lilek, the postconviction court found that Lilek demonstrated his understanding not only by "interject[ing] and answer[ing] about what he knows on the particular point" (132:76 [A-Ap. 132]), but also by "readily tell[ing]" the plea court "'I'm not quite sure what that means'" when he did not understand (132:76 [A-Ap. 132]). As the postconviction court explained:

> So there are points in the [plea] colloquy where he isn't just parroting "yes" or "no." He is interjecting. He interjects when he misunderstood the amount of the fine. He interjects when the judge says: Here is the maximum penalty and he wants the judge to know he's already spent 20 months [in prison]. He interjects and says that he was told exactly what the definition was when he talked to his lawyer on Tuesday, less than two days before, and he answers every question that the judge asks and in an affirmative fashion indicating that he understands.

(132:75 [A-Ap. 131]).

For example, when the plea court asked Lilek about whether he understood the sexual contact element, Lilek answered "appropriately" and also said "'I was told exactly that by my attorney'" (132:75 [A-Ap. 131]). Similarly, in response to the plea court's admonition about the firearms prohibition, Lilek responded that he already knew he could not have guns because of his visual handicap (132:76 [A-Ap.

132]). With that, "Mr. Lilek is demonstrating by his language to the [plea] Court that he understands" (*id.*).

As to the psychology intern, the postconviction court found that Lilek's plea colloquy answers made more sense with Attorney Kohn's clarifications (132:76 [A-Ap. 132]). Specifically, the intern went with Attorney Kohn to the jail to help explain the plea process to Lilek (132:76-77 [A-Ap. 132-133]). The court found it "apparent" from Lilek's remarks that "the presence of that intern assisted [Lilek] in relating to his counsel and certainly was of some benefit to the defense as a whole" (132:79 [A-Ap. 135]). But Lilek did not rely on the intern as his attorney, because Lilek also acknowledged that "my lawyer, Mr. Kohn" would explain things if he did not understand (132:77 [A-Ap. 133]).

The postconviction court concluded that the State had proven by clear and convincing evidence that Lilek understood the nature of the charges, the plea agreement that he entered into, and the likely consequences of his plea (132:78 [A-Ap. 134]). As the court summarized: "He's demonstrated that he has a relationship with his lawyer. He's demonstrated that he's able to answer—ask the Court questions when he says: 'I'm not sure I understand that, judge'" (132:77 [A-Ap. 133]).

Lilek also had an adequate understanding of the elements of the offenses he was pleading to—including the sexual assault—and had done "nothing by his interaction with the Court to give the Court any reason to think otherwise" (132:78 [A-Ap. 134]). Moreover, Attorney Kohn had spent an "adequate and appropriate amount of time with Mr. Lilek reviewing all of these matters" before the plea hearing (*id.*).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING LILEK'S POST-SENTENCING MOTION TO WITHDRAW HIS PLEA.

A. Relevant legal principles.

1. To withdraw his plea post-sentencing, the defendant must demonstrate that plea withdrawal is necessary to correct a manifest injustice.

To withdraw a plea after sentencing, the defendant must meet the heavy burden of establishing by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *State v. Cain,* 2012 WI 68, ¶25, 342 Wis.2d 1, 816 N.W.2d 177. *See also State v. Johnson*, 2012 WI App 21, ¶16, 339 Wis.2d 421, 811 N.W.2d 441 (defendant's heavy burden reflects State's substantial interest in finality and recognizes that presumption of innocence no longer exists).

In order to prove a manifest injustice, the defendant must show there was a serious flaw in the fundamental integrity of the plea, such as showing he did not knowingly, intelligently, and voluntarily enter the plea. *State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis.2d 38, 644 N.W.2d 891; *State v. Brown,* 2006 WI 100, ¶18, 293 Wis.2d 594, 716 N.W.2d 906.

After the defendant meets his *prima facie* burden in showing the plea colloquy was defective in some way, the

burden shifts to the State to prove, by clear and convincing evidence, that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy. *Brown*, 293 Wis.2d 594, ¶40. The *Brown* court summarized the rationale behind the *Bangert* burden-shifting procedure:

> If a defendant does not understand the nature of the charge and the implications of the plea, he should not be entering the plea, and the court should not be accepting the plea. On the other hand, if a defendant does understand the charge and the effects of his plea, he should not be permitted to game the system by taking advantage of judicial mistakes.

Id. ¶37.

Thus, the issue at the *Bangert* hearing is no longer whether the plea should have been accepted in the first instance, but whether the defendant should be allowed to withdraw his plea for a manifest injustice. *Cain*, 342 Wis.2d 1, ¶30 (while plea may have been invalid at time it was entered, it may be inappropriate, in light of later events, to allow plea withdrawal).

To satisfy its evidentiary burden, the State may refer to the totality of the record, and much evidence will be found outside the plea hearing record. *Brown*, 293 Wis.2d 594, ¶40. For example, the State may present testimony of the defendant and defense counsel to establish the defendant's understanding. *Id.* The State may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden. *Id.*

Importantly, the State may also show the defendant's understanding by using evidence that occurred after the plea took place, including the sentencing hearing. *Cain*, 342 Wis.2d 1, ¶¶29-31. It "would simply not make sense to vacate a conviction as the result of an error at a plea hearing when later proceedings unambiguously demonstrate that the error did not give rise to a manifest injustice and that the plea was valid." *Id.* ¶31.

If the State cannot meet its burden in showing that the plea was knowing, intelligent, and voluntary, the defendant is entitled to withdraw his plea as a matter of right. *State v. Cross*, 2010 WI 70, ¶20, 326 Wis.2d 492, 786 N.W.2d 64; *State v. Hoppe*, 2009 WI 41, ¶44, 317 Wis.2d 161, 765 N.W.2d 794. If, however, the State carries its burden of proof that the guilty plea was knowing, intelligent, and voluntary, the plea remains valid unless the defendant can show a manifest injustice has occurred. *Id.*

2. This court reviews the circuit court's discretionary decision by looking to the totality of the record in determining whether a manifest injustice occurred.

Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. *Brown*, 293 Wis.2d 594, ¶19. This court accepts the circuit court's factual findings unless they are clearly erroneous, but independently determines whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *Id.* Moreover, the circuit court, not this court, determines witness credibility at a *Bangert* hearing. *State v. Plank*, 2005 WI App 109, ¶11, 282 Wis.2d 522, 699 N.W.2d 235.

If, however, the State meets its burden in showing that the plea was knowing, intelligent, and voluntary, post-sentencing withdrawal of a plea is left to the circuit court's discretion, and will not be disturbed on appeal unless the defendant demonstrates that a manifest injustice will result from the court's refusal to allow the plea to be withdrawn. *Cross*, 326 Wis.2d 492, ¶20. In determining whether the defendant has shown manifest injustice, this court should consider the entire record. *Id.* ¶43. *See also State v. Payette*, 2008 WI App 106, ¶35, 313 Wis.2d 39, 756 N.W.2d 423 (when ample basis exists in record to support circuit court's decision to deny defendant's plea withdrawal motion, this court should uphold decision that no manifest injustice has resulted).

B. The State Met its Burden in Showing That Lilek Entered His Plea Knowingly, Voluntarily, and Intelligently.

Lilek argues that the State did not meet its burden of showing, by clear and convincing evidence, that he knowingly entered his plea (Lilek's brief at 11-30). But the postconviction court properly relied on Lilek counsel's testimony in determining that the State had met its burden.[1]

---

[1]Lilek also contends that the plea colloquy was insufficient (Lilek's brief at 14-19). Because this court ordered an evidentiary hearing based on the insufficient plea colloquy, the State assumes this court will again find that the original plea colloquy was insufficient, in and of itself, to show Lilek's understanding. On remand, however, the State can rely on the totality of the record, including the plea colloquy, in showing Lilek's understanding.

1. The postconviction court properly relied on Attorney Kohn's testimony in establishing Lilek's understanding.

Lilek first argues that the postconviction court impermissibly relied on his counsel's assertions to determine what Lilek understood (Lilek's brief at 28-29). But this argument has no basis in law.

Although the plea court may not rely solely on counsel's assertions to establish the defendant's understanding, *see Bangert*, 131 Wis.2d at 270, the postconviction court can. *Id.* at 274-75. *Bangert* and its progeny are clear that, after the defendant has met his *prima facie* burden in showing the plea colloquy's defectiveness, the State may utilize any evidence at the postconviction hearing that substantiates the plea was knowingly and voluntarily made, including an examination of defendant's counsel to shed light on the defendant's understanding. *Id. See also Brown*, 293 Wis.2d 594, ¶40; *Hoppe*, 317 Wis.2d 161, ¶47; *Cain*, 342 Wis.2d 1, ¶¶31-32.

Thus, the postconviction court properly relied on the entire record, including Attorney Kohn's testimony, in determining that Lilek entered his plea knowingly, voluntarily, and intelligently (132:69 [A-Ap. 125]).

2. The totality of the record, including Attorney Kohn's testimony, showed that Lilek entered his plea knowingly, voluntarily, and intelligently.

Lilek next argues that his counsel's testimony did not dispel the concerns raised by the inadequate plea colloquy because counsel could not "vouch for" Lilek's understanding

at the time of the plea (Lilek's brief at 29). Specifically, Lilek argues that Attorney Kohn's testimony did not shed any light on Lilek's "confusion" surrounding the nature of the offenses, the length of his sentence and the amount of monetary penalties, and the medications that he took (*id.* at 25-26). But these arguments have no basis in fact.

a. Lilek understood the elements of the offenses, the nature of the charges, and the rights he was waiving.

Contrary to Lilek's contention (Lilek's brief at 25-26), Attorney Kohn did not testify that he could not remember whether he discussed the definition of sexual contact with Lilek (132:40-42 [R-Ap. 136-138]). Rather, he testified that he could not specifically remember which jury instruction he took with him to the discussion with Lilek (*id.*). But he testified he did remember explaining the concept of sexual contact to Lilek (132:20-21 [R-Ap. 116-117]). They also discussed Lilek's motivation for the sexual assault (132:21-22 [R-Ap. 117-118]), the elements of sexual contact, and the victim's lack of consent (132:23-24 [R-Ap. 119-120]).

Regarding the battery, they first talked about how when Lilek "carried [the victim] into the bathroom and put her into the bath tub [*sic*], [Lilek] agreed that that … probably would have hurt her" (132:27 [R-Ap. 123]). Lilek also "indicated that he knew [the victim] had not agreed to have him in the apartment or do the things that he was doing" (132:24 [R-Ap. 120]).

Attorney Kohn's *Bangert* testimony was entirely consistent with Lilek's plea hearing colloquy testimony,

where Lilek acknowledged that he understood that sexual contact was an intentional touching, because he was "told exactly that by my attorney" (121:11). Lilek also acknowledged that he intentionally touched the victim's breast and vagina, either directly or through clothing, with the intent to become sexually aroused or gratified (121:11-12).

Attorney Kohn's *Bangert* testimony was also consistent with his remarks at the plea hearing that Lilek understood that Lilek's conduct—physically forcing the victim into the bathtub—caused her to sustain injuries rising to the level of aggravated battery, even though Lilek did not hit her (121:21-22). As Attorney Kohn told the plea court, Lilek acknowledged that he had ripped off the victim's clothing, physically forced her into the bathtub, and sustained injuries from Lilek's actions, rising to the level of battery (121:22). Attorney Kohn also told the plea court that Lilek "understands and admits that he did commit acts which fit all of the elements of those two counts" (121:16).

Also consistent with his remarks at the plea hearing that Lilek understood the rights he was giving up (121:17-18), Attorney Kohn testified at the *Bangert* hearing that he believed, at the time of the plea, that Lilek truly did understand the very basic rights he was giving up (132:20 [R-Ap. 116]). Indeed, Lilek independently brought up various episodes of "Matlock" and was able to analogize his rights and the trial process thereto (132:31 [R-Ap. 127]).

In finding that Lilek understood the elements of the crimes, the nature of the offenses, and the rights he was giving up, the postconviction court called Attorney Kohn's testimony "helpful and enlightening" in showing Lilek's

"particular level" of understanding (132:74 [A-Ap. 130]). The postconviction court also found that Attorney Kohn was "truthfully able to answer" that Lilek understood the plea court's questions (*id.*). In contrast, the postconviction court found that Lilek's argument as to his lack of knowledge was "very speculative" (132:69 [A-Ap. 125]).

This court should not disturb the circuit court's explicit credibility determinations, and should uphold the postconviction court's ruling that Lilek possessed the requisite knowledge and understanding for a valid plea. *Plank*, 282 Wis.2d 522, ¶11 (circuit court determines witness credibility).

b. Lilek understood the length of his sentence, the monetary penalties, and the medications he took.

Lilek next argues that Attorney Kohn's testimony did not shed any light on the "confusion" surrounding the length of his sentence, the amount of monetary penalties, and the medications he took (Lilek's brief at 25-26, 29-30). Although Attorney Kohn did not recall any specific examples of misunderstandings (132:43-44 [R-Ap. 139-140]), the plea colloquy itself defeats Lilek's claims.

For example, with respect to the maximum penalties, the plea court told Lilek that he was subject to a maximum fine of $100,000 and a maximum imprisonment of 40 years (121:4). Lilek responded that he was originally told the fine was $5,000, and the court responded that $100,000 was the maximum fine, and 40 years of imprisonment, or both (*id.*). Upon being asked if he understood, Lilek replied, "Yes, but it

was told originally. I'm just telling you what I was told" (121:5).

The plea court then ascertained that Lilek and his counsel had spent approximately three hours going through the maximum penalties, after which counsel wrote down the maximum penalties on the plea questionnaire (121:5). The plea court then had the following exchange with Lilek:

> THE COURT: And you understand that of the 40 years, I could give you 25 years that you would initially serve in prison, and I could give you a maximum of 15 years after that for supervision; do you understand?
>
> THE DEFENDANT: Yes, but I spent 20 months here also.
>
> THE COURT: Okay. That is good to know.

(121:5-6).

Based on the plea colloquy and Attorney Kohn's testimony at the *Bangert* hearing, the postconviction court found that Lilek understood the maximum penalties, the items on the plea form, and the no contest pleas and guilty pleas (132:72-73 [A-Ap. 128-129]). Lilek did not just parrot "yes" or "no," but interjected when he misunderstood the amount of the fine, and when he wanted the court to know that he had already spent 20 months in prison (132:75 [A-Ap. 131]). The postconviction court also properly found that the plea court had "adequately addressed and cleared up" the alleged confusion about monetary amount of the penalty (132:74 [A-Ap. 130]).

Regarding Lilek's medication, the plea court found that Lilek had said in no uncertain terms that his

medication did not interfere with his ability to understand what was going on, and that he understood everything that was going on (94:3; 121:9-10).

c. Lilek had the requisite understanding at the time he entered his plea.

Finally, Lilek argues that his counsel's *Bangert* testimony corroborates Lilek's assertion that Lilek does not retain information after it is presented to him, such that his plea was unknowing at the time it was entered (Lilek's brief at 25-29). But Attorney Kohn's undisputed testimony shows that Lilek was able to retain information and understood the relevant concepts at the time the plea was entered.

Attorney Kohn testified that once he took "a long time" to explain concepts to Lilek, he believed that Lilek could understand the basic concepts of "what certain words meant, what different theories were, how the process worked" (132:8 [R-Ap. 104]). Attorney Kohn also heeded the advice of Lilek's doctors to take plenty of time to patiently explain things to Lilek (132:45 [R-Ap. 141]).

As Attorney Kohn also testified, Lilek would bring up different episodes of "Matlock" during the plea discussions, showing that Lilek could remember the episodes and analogize them to the legal process at hand (132:23 [R-Ap. 119]). He "plugged right into" the show when they were talking about Lilek's case (132:23 [R-Ap. 119]).

At the end of the plea discussions, Lilek was able to "say back to us that which we had just explained to him" (132:15 [R-Ap. 111]), again demonstrating Lilek's capacity to

later recall what he had clearly understood at an earlier point in time. Indeed, Attorney Kohn testified he would not have allowed the plea hearing to go forward if he felt that Lilek did not understand at the time of the plea (132:19 [R-Ap. 115]).

Attorney Kohn ensured Lilek understood him by first explaining things to Lilek very thoroughly and then having Lilek tell him afterwards what Lilek understood about the concepts (132:33 [R-Ap. 129]). Lilek was able to explain back to Attorney Kohn the concepts they discussed on the plea form, and was not "just simply mimicking the answer that [Lilek] thought we were seeking by saying 'yes' or 'no'" (*id.*). Lilek could actually tell Attorney Kohn "what he understood after we had talked about it before we moved on to the next line" on the plea questionnaire (132:34 [R-Ap. 130]).

Attorney Kohn also specifically testified that he believed Lilek's plea was knowing and voluntary at the time it was entered, because "what [Lilek] was saying in court that day [at the plea hearing] mirrored what I had gone through with him on the 12th and the week before" (132:48 [R-Ap. 144]). He believed that, "on a very basic level," Lilek understood what was going on during the plea hearing (132:49 [R-Ap. 145]).

Based on this testimony, the postconviction court properly concluded that Lilek's pleas were knowingly, voluntarily, and intelligently entered at the time of the plea (132:78 [A-Ap. 134]). This court should uphold that determination, because the postconviction court found Attorney Kohn's testimony truthful, helpful, and enlightening in showing Lilek's understanding (132:74 [A-Ap. 130]), whereas it found "speculative" Lilek's claims that

he did not understand (132:69 [A-Ap. 125]). *Plank*, 282 Wis.2d 522, ¶11 (sustaining circuit court finding that defendant's testimony was "just not believable").

C. Lilek Has Not Shown That a Manifest Injustice Will Result From the Circuit Court's Refusal To Allow the Plea To Be Withdrawn.

Because the State met its burden at the *Bangert* hearing, this court should affirm the circuit court's exercise of discretion in finding that Lilek had not met his burden in showing that a manifest injustice requires the withdrawal of his plea. *Cross*, 326 Wis.2d 492, ¶20. The issue is no longer whether the plea should have been accepted in the first instance, but whether Lilek should now be allowed to withdraw his plea for a manifest injustice. *Id.* ¶30.

Because Lilek truly understood his plea, he should not be permitted to "game the system by taking advantage of judicial mistakes." *Brown*, 293 Wis.2d 594, ¶37. Based on the entire record, this court can conclude that no manifest injustice resulted when the circuit court denied Lilek's plea withdrawal motion. *Payette*, 313 Wis.2d 39, ¶35.

Specifically, this court can look to evidence from the post-plea proceedings which unambiguously show Lilek's understanding, and demonstrate that the plea court's errors did not give rise to a manifest injustice. *Cain*, 342 Wis.2d 1, ¶¶29-31. For example, the sentencing court found very compelling that Lilek specifically targeted the victim because of her vulnerabilities, which was "really what makes this such a serious crime" (123:118 [A-Ap. 139]). The statements Lilek made to police, to the PSI writer, and to

other inmates all made "very clear that Mr. Lilek specifically targeted [the victim] because she is blind and because she is hard of hearing … because he knew that, and … she wouldn't be able to see him" (*id.*).

Although the sentencing court did not think the crimes were "a grand criminal conspiracy hatched by Mr. Lilek," the court also could not place Lilek amongst offenders "who can't plan and execute" crimes (123:120 [A-Ap. 141]). Lilek's crimes were, instead, "very serious, terrible offense[s]," somewhere in the middle of those two extremes (*id.*).

Moreover, based on the sentencing court's own review of Lilek's prison phone conversations with his mother, the court agreed with Dr. Jurek's opinion that Lilek could be "extremely lucid" and "supremely on task" when he wanted to be (123:124 [A-Ap. 145]). The court shared Dr. Jurek's opinion that Lilek's speech could, at times, be much more "fluid and spontaneous" than with doctors, and Lilek did not make the kinds of "digressive or off-topic statements" to his mother as he did when being examined for competency (123:125 [A-Ap. 146]).

From the taped jail conversations, the sentencing court concluded that Lilek was "capable of the ability to reason and the ability to plan, an ability to have memory of details and direct his own behavior"—character aspects which the court considered "significant given this type of offense" (123:125 [A-Ap. 146]).

Finally, the sentencing court noted that four different people came forward to say Lilek had bragged about the offenses, and provided details of the crimes that were not available publicly (123:121 [A-Ap. 142]). Lilek told them

that he planned the crimes, specifically targeted a vulnerable victim, and then attempted to cover it up—all of which the sentencing court found "disconcerting" (123:123 [A-Ap. 144]).

Thus, the totality of the record demonstrates that Lilek intentionally planned and executed these crimes, clearly understood what he was doing, and later bragged about getting away with it—all of which conclusively defeat Lilek's claim that a manifest injustice has occurred. In light of these later proceedings, Lilek should not be allowed to withdraw his plea. *Cain*, 342 Wis.2d 1, ¶30.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN SENTENCING LILEK.

Lilek also argues the circuit court erroneously exercised its discretion in imposing his sentence (Lilek's brief at 30-40), but the record shows otherwise.

A. Relevant legal principles.

1. This court reviews sentencing determinations only for an erroneous exercise of discretion.

Sentencing is reviewed only for an erroneous exercise of circuit court discretion. *State v. Spears*, 227 Wis.2d 495, 506, 596 N.W.2d 375 (1999) (strong public policy exists against interference with sentencing discretion); *State v. Gallion*, 2004 WI 42, ¶18, 270 Wis.2d 535, 678 N.W.2d 197 (this court presumes circuit court acted reasonably, because circuit court is in best position to assess relevant factors and defendant's demeanor).

This court must therefore begin with the presumption that the circuit court acted reasonably in imposing sentence, and Lilek has the burden to show that the sentencing court relied on some unreasonable or unjustifiable basis in imposing sentence. *State v. Lechner*, 217 Wis.2d 392, 418-19, 576 N.W.2d 912 (1998); *State v. Klubertanz*, 2006 WI App 71, ¶20, 291 Wis.2d 751, 713 N.W.2d 116.

2. The circuit court properly exercises its discretion when it considers all relevant sentencing factors.

The sentencing court must consider the gravity of the offense, the character of the offender, and the need for protection of the public. *State v. Smith*, 207 Wis.2d 258, 281-82 n.14, 558 N.W.2d 379 (1997). Other factors can be considered; but the circuit court is not required to consider every factor on the record. *State v. Echols,* 175 Wis.2d 653, 683, 499 N.W.2d 631 (1993).

The circuit court can base its sentence on any of the three primary factors after considering all relevant factors. *Spears*, 227 Wis.2d at 507-08. The circuit court has wide discretion to attach varying weight to each relevant factor. *State v. Stenzel*, 2004 WI App 181, ¶9, 276 Wis.2d 224, 688 N.W.2d 20.

B. The sentencing court properly considered all relevant sentencing factors before imposing sentence.

First, the court properly considered the gravity of the offenses, including the crimes' impact on the victim. The court characterized the offenses as "very serious" under the

sentencing guidelines, even though they were not binding (123:117 [A-Ap. 138]). The court found it aggravating that the victim was "very vulnerable," because she was very old, "blind," and "mostly deaf," conditions which left her fairly disabled, despite her "outgoing" nature and intact "mental faculties" (*id.*). As noted above, Lilek specifically targeted the victim because of her vulnerabilities (123:118 [A-Ap. 139]).

The court found it aggravating and put "a lot of weight" on the fact that Lilek planned the offense so he would not get caught, choosing a victim who could not see him, making it "easier for him to commit the crime" (123:118 [A-Ap. 139]). The court also found aggravating that the victim's injuries were severe, given her elderly age and frailness (*id.*). To have that kind of force "thrust on her" caused her a lot of injury physically, even if Lilek did not intend those injuries (123:119 [A-Ap. 140]).

Finally, the court found aggravating the way in which Lilek perpetrated the crimes, disguising himself to pretend to be the victim's son in order to gain access into the victim's apartment (123:119 [A-Ap. 140]). The court likened Lilek's *modus operandi* to a disguise or a "form of trickery" because of the victim's blindness and near deafness (*id.*).

Second, the court properly considered Lilek's character—both positive and negative—before sentencing. The court found Lilek's "mental health issues" to be "an important part of this case" and spent a "great deal of time" throughout the case, "trying to get a handle on who Mr. Lilek is, what [e]ffect his abilities have on him as a person, what [e]ffect his mental capacity and his mental illness and seizure disorder all have on him as a person"

(123:120 [A-Ap. 141]). Although it was "hard to know specifically how to put all of that together," the court found it important to look at those aspects (*id.*).

The court, however, also noted that Lilek acted "differently when not being observed," bringing up the possibility of malingering, even though no one disputed Lilek's many true disabilities (123:123-124 [A-Ap. 144-145]). The court fully considered Lilek's many diagnoses—including a seizure disorder, mental health disorders, brain injury, blindness, and mild mental retardation—but was still concerned that Lilek could make up or exaggerate things, "when need be" (123:124 [A-Ap. 145]).

Further, although Lilek lacked a prior criminal record *per se*, Lilek had engaged in this type of behavior before, resulting in police reports (123:125-126 [A-Ap. 146-147]). Even if those prior incidents of bumping into women's breasts were not on purpose, Lilek had engaged in one "serious" incident where he went into a woman's apartment, pushed against her body, lifted up her shirt, and fondled her breasts (123:126 [A-Ap. 147]).

In the PSI, Lilek admitted to some of this prior behavior, although not admitting to a different incident where he tried to touch a woman's breasts and vagina (123:127 [A-Ap. 149]). When pressed by the PSI writer, Lilek said "the police don't know their butt from a hole in the ground" and refused to answer any more questions (*id.*).

The court found these incidents to be troubling and concerning aspects of Lilek's character, even if Lilek's underlying reason for the assaultive behavior was to "get a sexual experience" (123:127-128 [A-Ap. 149-150]). Although

Lilek's mental health issues may have contributed to the behaviors, he still knew the behaviors were wrong (*id.*). Those same mental health issues also likely precluded Lilek from being able to stop the behaviors, making the case even more "aggravating" and "disturbing" (123:128 [A-Ap. 150]).

Finally, the court acknowledged that the need to protect the public carried "more weight" than the other factors, and wanted to ensure that "something like this never happens again," because Lilek's "planning ability" demonstrated his dangerousness (123:120-121 [A-Ap. 141-142]).

For example, four different people came forward to tell of Lilek's bragging about the current offense, and provided details of the crimes which were not provided to the press (123:121 [A-Ap. 142]), such as: Lilek's crime was interrupted by the victim's brother ringing the doorbell; Lilek wanted to put the victim into the bathtub in an effort to wash off her DNA; the victim screamed she was blind; and Lilek called his mother the "boss" to the police (123:122-123 [A-Ap. 143-144]).

These details all lent credibility to the accounts of Lilek's bragging, because they were consistent with details that Lilek himself provided to the police (123:123 [A-Ap. 144]). The court was concerned about Lilek's dangerousness: Lilek told others he planned it, specifically targeted a blind person, decided to do it, and then attempted to cover it up (*id.*).

Moreover, the court discussed how Lilek's mental health issues contributed to Lilek's dangerousness and recidivism risk (123:128 [A-Ap. 150]). Although the court

was not required to consider protective placement, it had considered the defense's proposal as an "aspect of really considering every part of the case" (*id.*). Nevertheless, the court concluded the protection of the public was paramount, because it was "obvious" Lilek was unable to "check his own behavior" (123:129 [A-Ap. 151]).

As the court summarized, Lilek was dangerous to the community because:

> he has the ability to plan an attack like this on a vulnerable victim and has shown the willingness to carry it out and to be stopped only by the ringing of a doorbell. I don't know what would have happened, no one knows had that doorbell not been rung that day.
>
> But he was able to carry out this plan and really only stop when he thought he was going to get caught. So I have to take that into consideration, even aside from all of his limitations as part of Mr. Lilek, that he is a man who is able and willing to carry out sexual assaults on a very vulnerable victim, chosen because she was vulnerable and wouldn't report it.

(123:129-130 [A-Ap. 151-152]).

The court needed to ensure this crime did not happen again, and rejected protective placement because "there is absolutely no guarantee in any protective placement that he will remain at that level of security for any period of time" (123:130 [A-Ap. 152]). In protective placement, Lilek would likely be placed in "the least restrictive setting," which would not adequately protect public safety (*id.*).

Indeed, the court likened Lilek's prior living arrangement to a protective placement of sorts, because he lived amongst other people in his apartment complex and near his mother, yet was still a danger to those people, as

demonstrated by his current crimes (123:130 [A-Ap. 152]). Likewise, in protective placement, Lilek would still be dangerous to others, because the level of security provided there would be insufficient to ensure Lilek would not recidivate (123:130-131 [A-Ap. 152-153]).

Accordingly, the court found it had "no choice" and "no alternative" but to put Lilek in prison: probation would unduly depreciate the seriousness of the offenses, and protective placement could not "possibly protect the community" (123:131 [A-Ap. 153]). Moreover, the court trusted the Department of Corrections to ensure Lilek received appropriate medications and was "treated in a humane way" (*id.*).

C. The circuit court properly exercised its discretion in finding public safety to be more important than Lilek's disabilities.

Lilek argues the circuit court placed too much weight on the protection of the public in the face of contravening considerations (Lilek's brief at 32-33, 36-37). Similarly, Lilek argues his disability was not fully considered, and should have been considered mitigating, not aggravating (*id.* at 33-36).

As just discussed, however, the record belies Lilek's claims. The circuit court considered all relevant sentencing factors before imposing sentence, including Lilek's disabilities and mental health issues. The court also considered the protective placement recommendation, but simply chose to reject it.

Once the court considered relevant sentencing factors, it had wide discretion to attach varying weight to each of those factors and could base its sentence on any of the factors. *Stenzel*, 276 Wis.2d 224, ¶9. Although the court placed more weight on the protection of the public than it did on Lilek's disability, assigning this relative weight to these factors does not mean the court erroneously exercised its discretion; it simply means the court found certain factors to be more compelling than others. *Id.*

Moreover, the court was not required to consider Lilek's disability as a mitigating factor merely because Lilek thinks his disability is mitigating. *Stenzel*, 276 Wis.2d 224, ¶¶12-16 (court appropriately exercised discretion when it did not give defendant's advanced age the "overriding and mitigating significance" defendant would have preferred). Indeed, factors which seem mitigating may, in fact, be considered aggravating in the court's discretion, because they can signify the defendant's conduct is especially egregious in light of his otherwise laudable or positive character. *Id.* ¶16 n.5.

Here, the circuit court properly exercised its discretion when it did not give Lilek's disabilities the "overriding and mitigating significance" Lilek would have preferred, and instead considered that factor less important. *Id.* ¶¶12-16.

D. The circuit court properly exercised its discretion in ordering prison, rather than protective placement.

Finally, Lilek asserts his disability rendered him unable to appreciate the wrongfulness of his conduct and unable to check his behavior—"exculpatory" factors which

should have called for commitment for treatment in protective placement, rather than punishment in prison (Lilek's brief at 35-40).

In support of this argument, Lilek cites *State v. Szulczewski*, 216 Wis.2d 495, 504, 574 N.W.2d 660 (1998). There, the defendant was committed for "custody, care and treatment" after he was found not guilty by reason of mental disease or defect ("NGI"). *Id.* at 498-99. While committed, however, he assaulted another patient, and received a five-year prison sentence. *Id.* at 498. On appeal, this court held that Wis. Stat. § 973.15 required that the defendant's prison sentence commence immediately. *Id.* at 498-99. But the Wisconsin Supreme Court reversed, holding an NGI commitment was sufficient "legal cause" to stay the prison sentence, in the court's discretion, until the NGI commitment had been completed. *Id.* at 501, 507-08.

Szulczewski is therefore distinguishable, because Lilek was not found NGI (45; 46). Moreover, to the extent *Szulczewski* has any application, it helps the State, not Lilek.

The *Szulczewski* court identified the NGI statute's purpose to be two-fold: to treat the NGI acquittee's mental illness, and to protect society from the acquittee's potential dangerousness. *Szulczewski*, 216 Wis.2d at 504. Based upon those purposes, it was:

> reasonable to conclude that the legislature intended NGI acquittees to experience the consequences set forth in the criminal code. It is also reasonable to conclude that the legislature intended to effectuate the goals of the NGI statutes, including treatment of an NGI acquittee's mental illness and

> behavioral disorders, even when an acquittee commits a subsequent criminal offense.

Szulczewski, 216 Wis.2d at 505.

Szulczewski also recognized that the criminal statutes and the resulting judgment of conviction and sentence are designed to accomplish the objectives or goals of "retribution, rehabilitation, deterrence and segregation." *Id.* at 507. Thus, even in the case of NGI acquittees/committed-persons, the circuit court retains the discretion to punish the defendant in prison, "similar to the discretion a circuit court exercises when making any sentence decision." *Id.*

Thus, the court might determine the purposes of both the criminal and NGI statutes are best served by allowing the defendant to remain in a mental health institution pursuant to the NGI acquittal, such as when the crime was "less serious" or when the defendant had "serious mental illness or special treatment needs." *Id.*

On the other hand, in other cases, the court might determine that the "goals of retribution, rehabilitation, deterrence and segregation are best served by committing the defendant to the custody of the DOC upon sentencing," such as when the crime requires "severe punishment"; when deterrence is necessary; or when the defendant needs to be segregated from the general NGI population. *Id.*

In Lilek's case, the sentencing court, in its discretion, determined the need to protect the public was greater than Lilek's need for mental health treatment or protective placement. But such a determination is consistent with the

discretion given to all sentencing courts, and was not an erroneous exercise of discretion. *Id.* at 507.

Lilek also criticizes the sentencing court's refusal to grant a continuance to allow the civil protective placement process to be finalized, and asserts that the court should have considered placement options at mental health facilities where he could be properly monitored while still protecting the public (Lilek's brief at 37-40, citing *State v. Wood*, 2010 WI 17, 323 Wis.2d 321, 780 N.W.2d 63)).

The court here, however, did consider—yet nevertheless rejected—protective placement (123:128-131 [A-Ap. 150-153]). Moreover, Lilek's *Wood* argument suffers from the same flaw as his *Szulczewski* argument—namely, Lilek was not an NGI committed-person.[2] Thus, the court's determination of dangerousness here did not mandate protective placement. *Wood*, 323 Wis.2d 321, ¶¶1-2, 35-38. *Wood's* holding has no bearing on the circuit court's sentencing discretion here.

Indeed, under the relevant criminal commitment statutes, the circuit court lacked authority in the first instance to order the kind of protective placement that Lilek seeks. Ordering such criminal commitments for dangerous mentally ill or developmentally disabled offenders is within the sole province of DOC, not the court. *See* Wis. Stat. § 51.37(5).

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[2]After the circuit court found Lilek competent, Lilek's NGI pleas (117) were found unsustainable (45; 46). Lilek then entered his no-contest pleas (121).

Moreover, contrary to Lilek's argument (Lilek's brief at 37, 40), neither the court nor the Department of Health and Human Services could have ordered him committed to a mental health center for protective placement under Wis. Stat. § 55.08, because such commitments require that the court first deem the offender incompetent. *See* Wis. Stat. § 55.08(2) (court may order protective placement only if individual meets all criteria in statute).[3]

Here, Lilek was not deemed incompetent by the circuit court, precluding his protective placement under Chapter 55. Further, DOC has not ordered Lilek criminally committed, precluding his protective placement under Chapter 51.

Thus, the circuit court properly exercised its discretion in imposing Lilek's sentence to prison, and this court should affirm. *Gallion*, 270 Wis.2d 535, ¶18.

III. THE CIRCUIT COURT PROPERLY ADHERED TO THE TIME LIMITS AND STATUTORY PROCEDURES SET FORTH IN WIS. STAT. § 971.14 IN DETERMINING THAT LILEK WAS COMPETENT TO PROCEED.

Finally, Lilek argues the circuit court engaged in improper procedures and violated the "strict time limits" and statutory deadlines set forth in Wis. Stat. § 971.14 when it ordered "serial competency evaluations" after Dr. Knudson's August 28, 2008 report found him to be incompetent (Lilek's brief at 40-49).

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[3]Moreover, under Wis. Stat. § 51.75(9)(a), the circuit court may not order civil commitment placements for individuals found NGI. *State v. Devore*, 2004 WI App 87, ¶9, 272 Wis.2d 383, 679 N.W.2d 890.

Preliminarily, this court need not address the merits of this claim, because Lilek's no-contest plea waived any and all non-jurisdictional claims and defects. *State v. Oakley*, 2001 WI 103, ¶¶22-23, 245 Wis.2d 447, 629 N.W.2d 200.

More importantly, this court should find, as a matter of law, that Lilek's claims are foreclosed by the competency statutes themselves. *State v. Carey*, 2004 WI App 83, ¶8, 272 Wis.2d 697, 679 N.W.2d 910 (statutory construction is question of law reviewed independently by this court).

A. The competency statutes expressly allow the court to appoint more than one examiner to examine the defendant before the competency hearing takes place.

The competency statutes specifically state that the court "shall appoint *one or more*" examiners to examine the defendant "whenever there is reason to doubt" the defendant's competency. *See* Wis. Stat. §§ 971.14(1r) and (2)(a). Another provision specifically permits the State and the defendant to hire their own experts. *See* Wis. Stat. § 971.14(2)(g).

Thus, the statutes themselves foreclose Lilek's claim, because they allow one or more examinations to take place, by one or more experts—including the State's expert—to assist the court in providing relevant information and reports before the competency hearing takes place. *See* Wis. Stat. §§ 971.14(2)(a) and (g).

The facts of the case also foreclose Lilek's claim. As Lilek concedes (Lilek's brief at 6-7, 45), Dr. Knudson's inpatient examination—generating the first report from

August 13, 2008 (8)—fell within the 15-day statutory time limit for inpatient examinations. *See* Wis. Stat. §§ 971.14(2)(am) and (c).[4]

But as Lilek also concedes (Lilek's brief at 6, 45), Dr. Knudson needed more information from Lilek's own physician before rendering his final opinion, thereby constituting good cause for one extension of the 15-day time limit under the statute. *See* Wis. Stat. § 971.14(2)(c). Lilek remained inpatient at Mendota during this time (101:3-4). On August 28, 2008, within the second 15-day time period, Dr. Knudson filed his second report finding Lilek incompetent and not likely to become competent (12).

B. At the competency hearing, the circuit court properly found that Lilek was competent, based upon all the reports and testimony.

Lilek's primary argument is that the State was "doctor shopping" when it asked Dr. Jurek to examine him, after Dr. Knudson had already found him incompetent (Lilek's brief at 46-49). Lilek believes that Dr. Knudson's second report from August 28, 2008 (12) was the end of the story, and that any further "serial" examinations were prohibited.

But the statutes expressly allow the State to hire its own expert, and proffer its own report, before the

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[4]Competency was first raised on July 11, 2008 (100), and Dr. Smail recommended an inpatient examination (6). Lilek arrived at Mendota on July 31, 2008, and Dr. Knudson's first report was dated August 13, 2008 (8:1).

competency hearing takes place. *See* Wis. Stat. § 971.14(2)(g). Only after all the reports are generated can the competency hearing take place. *See* Wis. Stat. §§ 971.14(3) and (4) (requiring examiner(s) to submit written report(s) to court before hearing).

Notwithstanding Dr. Knudson's conclusion in his second report that Lilek was permanently incompetent, the court had not yet found Lilek competent or incompetent. Indeed, the court had not even held the competency hearing.

After Dr. Knudson's second report, the court set the matter over until September 16, 2008 for a competency hearing—but at that proceeding, Lilek refused to go to court, and the court appropriately determined it could not proceed (102:2-3, 16-18), as Lilek concedes (Lilek's brief at 7). The court ordered another examination to take place before the next proceeding (20). Lilek was in jail during this time (102:2-3).

At the September 25, 2008 proceeding, Lilek wanted to proceed on Dr. Knudson's two reports (103:11). Pursuant to Wis. Stat. § 971.14(2) and the court's earlier order, however, the State properly requested another examination of Lilek, this time by its own expert, Dr. Jurek (103:24). When Lilek refused to stipulate to Dr. Jurek's qualifications (103:25), the court's adjournment became unavoidable, as Lilek concedes (Lilek's brief at 46).[5]

[5]At the September 30, 2008 proceeding, Lilek ultimately stipulated to Dr. Jurek's qualifications (104:3-4).

Lilek was not committed throughout this entire time, but was in jail or in the hospital (103:11-23), and would return to Mendota only for the re-examinations (Lilek's brief at 42). But that time, Dr. Jurek examined Lilek in jail (28:2-3).

On October 13, 2008, Dr. Jurek filed his first report, concluding Lilek should be re-assessed for competency after treatment (28:13). On October 15, 2008, the court ordered that Lilek be re-examined at Mendota (33), both by Dr. Knudson (Lilek's expert) and by Dr. Jurek (the State's expert), in order to reconcile the conflicting reports (105:19).[6]

Dr. Jurek ultimately found Lilek competent to proceed (106:11-12). More importantly, however, on November 17, 2008, Dr. Knudson changed his previous position, and found Lilek competent to proceed, based on Lilek's own behavior in talking with his mother in jail (36), as Lilek concedes (Lilek's brief at 8).

Lilek challenged both reports (107:3-5), and the court adjourned yet again upon Lilek's request (Lilek's brief at 8). At the next hearing on January 29, 2009, Dr. Jurek found Lilek competent (108:30-66). Because Lilek was acting inappropriately (108:13-20), however, the matter was adjourned once again out of fairness to Lilek and the victim (110:2-18). Lilek later hired another expert, Dr. Taylor, who

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[6]The 15-day statutory deadline was extended based upon Lilek's refusal to answer questions, but Dr. Jurek once again examined Lilek in jail (106:4-8). Thus, the 30-day statutory deadline for outpatient examinations applied, not the 15-day time limit. *See* Wis. Stat. § 971.14(2)(c).

filed two reports stating Lilek was not competent and not likely to become competent (39; 40).

After all the reports had been filed, the court held a 3-day competency hearing in May of 2009, at which time Drs. Jurek, Knudson, and Taylor all testified, among others (111-115). At the end of the hearing, based on the testimony and the tape recordings of Lilek in jail, the court found that the State had proven by the greater weight of the credible evidence that Lilek was competent to proceed (115:89-93). *See* Wis. Stat. § 971.14(4)(b).[7]

In short, no statutory violations occurred, because the court had authority to order one or more examinations at any point when Lilek's competency came into question. *See* Wis. Stat. §§ 971.14(1r) and (2)(a). The State also had authority to request an examination from Dr. Jurek, even after Lilek had already been examined by Dr. Knudson. *See* Wis. Stat. § 971.14(2)(g).

The court was not required to accept Dr. Knudson's report as the final word, and had authority to order examinations thereafter, not only to resolve the differences in the two experts' conclusions before the competency hearing itself, but also to re-examine Lilek when new information came to light from Lilek's own expert.

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[7]Lilek does not dispute the circuit court's finding that he was competent, but only argues that the court violated the statutory timelines, a matter which this court reviews independently. *Carey*, 272 Wis.2d 697, ¶8. Nevertheless, this court should not disturb the circuit court's competency determination, because it was not clearly erroneous. *State v. Garfoot*, 207 Wis.2d 214, 223-225, 558 N.W.2d 626 (1997) (competency determination is primarily factual).

Importantly, the court never found Lilek incompetent; only Lilek's experts did. After considering all the information, the court actually found Lilek competent.

Lilek's case is analogous to *State v. Carey*, 272 Wis.2d 697, a decision related to re-examinations. In *Carey*, the defendant was found incompetent, but the State sought to re-examine him after the defendant was discharged from his civil commitment. *Id.* ¶¶1-6, 10-12. Similar to Lilek's position here that the circuit court lacked authority to order more examinations after the first 15-day time period had expired, the circuit court in *Carey* reasoned that it lacked authority to order another examination to re-evaluate the defendant after his civil commitment had ended. *Id.* ¶¶6-7.

But this court reversed, holding that, under Wis. Stat. § 971.14(6)(d), the legislature had expressly given the courts authority to order re-examination of defendants. *Id.* ¶12. Such statutory authority "accommodate[d] the constitutional protections against perpetual, unjustified confinement on the one hand and the interests of the public in prosecuting criminal defendants on the other hand." *Id.* ¶14. Once the defendant regains competency, the circuit court retained jurisdiction over the defendant, who could then be prosecuted—thereby ensuring that a competent defendant does not escape the consequences of his criminal behavior, while also protecting the public from a potentially dangerous competent individual. *Id.*

In *Carey*, this court rejected the same claim Lilek advances here:

> Carey's reading of the statute, taken to its logical conclusion, would mean that the criminal proceedings for a person who is found incompetent and unlikely to become competent in the

> foreseeable future, but who also does not meet the standards for involuntary commitment or protective placement under WIS. STAT. chs. 51 and 55, will always remain suspended and open. The defendant will be released into the community and the court will never have the authority to order a reevaluation of the defendant's competency to stand trial. This is so regardless of whether there is evidence demonstrating the defendant's competence. Given that the purpose of the statute, in part, is to protect the interest of the public in prosecuting criminal defendants, Carey's restrictive reading of the statute is not only highly unreasonable, it also runs contrary to the statute's purposes.

Id. ¶15.

So too here, Lilek's strained and restrictive reading of the statutory time limitations are highly unreasonable and run contrary to the statute's purposes. The court was not required to suspend Lilek's criminal prosecution forever merely because one expert had found him incompetent at one point in time. *Id.* Rather, the court retained the authority to order examinations and re-examinations, and retained jurisdiction over Lilek, who could then be prosecuted once he was found competent. *Id.* ¶¶14-15.

The statutes do not require the court to conclude its investigation into the defendant's competency within 15 days. The statutes only require the inpatient competency examinations to take place within 15 days of the defendant's admission to the institution—and even those time limits can be extended 15 more days. *See* Wis. Stat. § 971.14(2)(c). Thereafter, the court retains the authority to order more examinations—and the statute allows the State to request its own experts—before the court holds the competency hearing. *See* Wis. Stat. §§ 971.14(2)(g), (3), and (4).

The statutory scheme contemplates and permits exactly what happened here: the court compiled all of the necessary yet conflicting reports—albeit over the course of 10 months—but then, after the 3-day competency hearing, ultimately concluded that Lilek was competent to stand trial. Moreover, Lilek was not committed throughout the entire time, but was returned to jail each time his inpatient examinations were completed, in compliance with Wis. Stat. § 971.14(2)(d).

Lilek should not be allowed to escape criminal prosecution forever simply because one expert found him incompetent in 2008. *Carey*, 272 Wis.2d 697, ¶¶14-15. The court properly continued the competency hearing until all the relevant information had been compiled, and ultimately found him competent. Lilek was not subjected to "perpetual, unjustified confinement," and the public had an interest in prosecuting him for his crimes, once he was deemed competent. *Id.* ¶14. There were no statutory or constitutional violations here.

CONCLUSION

This court should AFFIRM the judgment of conviction and the circuit court's order denying Lilek's post-remand, postconviction motion to withdraw his plea.

Dated this 17th day of March, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

SARAH K. LARSON
Assistant Attorney General
State Bar #1030446

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-0666
(608) 266-9594 (Fax)
larsonsk@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,853 words.

Dated this 17th day of March, 2015.

_____
Sarah K. Larson
Assistant Attorney General

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 17th day of March, 2015.

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Sarah K. Larson
Assistant Attorney General