STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2014AP1246-CR
(Milwaukee County Cir. Ct. Case No. 2008CF1117)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEROMY MILLER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POST-SENTENCING PLEA-WITHDRAWAL MOTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HON. CARL ASHLEY AND THE HON. STEPHANIE ROTHSTEIN PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[1]

QUESTION PRESENTED

Did the circuit court properly deny defendant-appellant Jeromy Miller's plea-withdrawal motion without first holding an evidentiary hearing?

- By its decision, the circuit court implicitly answered "Yes."
- This court should answer "Yes."

[1] To facilitate online reading, the electronically filed version of this brief includes hyperlinked bookmarks.

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[2] Instead, the State will present additional facts in the "Argument" portion of its brief.

STANDARDS OF REVIEW

A. Denial Of A Postconviction Motion Without A Hearing.

Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested presents an appellate court with an issue subject to a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. First, the court determines whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief. ***Id.*** "[An appellate court] will review only the allegations contained in the four corners of [a defendant]'s postconviction motion, and not any additional allegations that are contained in [the

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[2] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2011-12 edition.

defendant]'s brief." ***Id.*** ¶ 27. The court independently reviews this determination as a question of law. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion alleges sufficient facts, the circuit court must hold an evidentiary hearing, ***id.***, unless "the record as a whole conclusively demonstrates that defendant is not entitled to relief," ***State v. Howell***, 2007 WI 75, ¶ 77 n.51, 301 Wis. 2d 350, 734 N.W.2d 48 ("[A]n evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts.").

Second, "if the motion does not raise facts sufficient to entitle the movant to relief, . . . presents only conclusory allegations, or if the record conclusively demonstrates . . . the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Allen***, 274 Wis. 2d 568, ¶ 9. *See also* ***Howell***, 301 Wis. 2d 350, ¶ 77 n.51 ("[A]n evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts."). An appellate court reviews the circuit court's discretionary decision under the deferential erroneous-exercise-of-discretion standard. ***Allen***, 274 Wis. 2d 568, ¶ 9. *See also* ***State v. Balliette***, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

B. Exercise Of Discretion.

When an appellate court reviews a circuit court's discretionary decision, the appellate court asks whether the circuit court exercised discretion, not whether another judge might have exercised

discretion differently. ***State v. Prineas***, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206.

> The term "discretion" contemplates a process of reasoning which depends on facts in the record or reasonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards. The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.

State v. Delgado, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (citations omitted).

> Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. . . . While the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can find facts of record which would support the circuit court's decision.

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (citations omitted).

C. Ineffective Assistance Of Counsel.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). "[T]o establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial." ***State v. Ziebart***, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369.

> To establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of "reasonably effective assistance." *Strickland,* 466 U.S. at 687-88. Reviewing courts should be "highly deferential" to counsel's strategic decisions and make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Carter,* 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland,* 466 U.S. at 689). There is a "'strong presumption' that [counsel's] conduct 'falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland,* 466 U.S. at 689).

State v. Domke, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364.[3] "To prove deficient performance, a defendant must show *specific acts or omissions* of counsel that are 'outside the wide range of professionally competent assistance.'" ***State v. Arredondo***, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (emphasis added) (citation omitted). *See also, e.g.*, ***United States v. Trevino***, 60 F.3d 333, 338 (7th Cir. 1995) ("With regard to the performance prong, defendant must direct us to the specific acts or omissions which form the basis of his claim."); ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999) ("A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered

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[3] The supreme court has rejected "any substantive difference" between "tactical" and "strategic" decisions. ***State v. Harbor***, 2011 WI 28, ¶ 71 n.14, 333 Wis. 2d 53, 797 N.W.2d 828.

the outcome of the proceeding."), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (defendant must identify the specific acts or omissions that form the basis of the claim of ineffective assistance of counsel).

An appellate court strongly presumes that counsel acts reasonably within professional norms. ***Arredondo***, 269 Wis. 2d 369, ¶ 24.

> The function of a court assessing a claim of deficient performance is to determine whether counsel's performance was objectively reasonable. In making this determination, the court may rely on reasoning which trial counsel overlooked or even disavowed. Courts "do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." Professionally competent assistance encompasses a "wide range" of behaviors.

State v. Koller, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838 (citations omitted). *See also* ***State v. Kimbrough***, 2001 WI App 138, ¶ 31, 246 Wis. 2d 648, 630 N.W.2d 752 ("[O]ur function upon appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms.").

"Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694; *Johnson*, 153 Wis. 2d at 129." ***State v. Erickson***, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999). "A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's

deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). *See also* ***Erickson***, 227 Wis. 2d at 774 (speculation does not satisfy the prejudice prong of *Strickland*).

> Whether counsel was ineffective is a mixed question of fact and law. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. *Flores*, 183 Wis. 2d at 609.

State v. Balliette, 336 Wis. 2d 358, ¶ 19. *See also* ***id.*** ¶¶ 21-27; ***State v. Westmoreland***, 2008 WI App 15, ¶ 18, 307 Wis. 2d 429, 744 N.W.2d 919 ("Conclusions by the trial court whether the lawyer's performance was deficient and, if so, prejudicial, present questions of law that we review *de novo*.").

If the defendant fails on either prong — deficient performance or prejudice — the ineffective-assistance-of-counsel claim fails. ***Strickland***, 466 U.S. at 697. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ***Id.*** "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." ***Id.***

D. Plea Withdrawal Generally.

The rationales for plea withdrawal in Wisconsin derive from two lines of cases, one flowing from ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), the other from ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***Bentley***, 201 Wis. 2d 303. *See* ***Howell,*** 301 Wis. 2d 350, ¶¶ 73-74 (discussing dual-purpose *Bangert* and *Nelson/Bentley* motions); ***State v. Brown,*** 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906 (same). *See also* ***State v. Hoppe***, 2009 WI 41, ¶ 3 & n.3, 317 Wis. 2d 161, 765 N.W.2d 794. The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson/Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his or her plea infirm. *See* ***Hoppe***, 317 Wis. 2d 161, ¶ 3.

The burden of proof for these two types of challenges differs. "Once the defendant files a ***Bangert*** motion entitling him to an evidentiary hearing, 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." ***Hoppe***, 317 Wis. 2d 161, ¶ 44.

Conversely, "[t]he burden at a ***Nelson/Bentley*** evidentiary hearing is on the defendant," who "must prove by clear and convincing evidence that withdrawal of the guilty plea is necessary to avoid a manifest injustice." ***Hoppe***, 317 Wis. 2d 161, ¶ 60. One way that "[a] defendant may demonstrate a manifest injustice [is] by showing that his guilty plea was not made knowingly, intelligently, and voluntarily." ***Id.***

In determining whether plea withdrawal is warranted, an appellate court "accept[s] the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Brown***, 293 Wis. 2d 594, ¶ 19.

E. Plea Withdrawal After Sentencing.

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary.

United States v. Broce, 488 U.S. 563, 569 (1989).

> After sentencing, a defendant who seeks to withdraw a guilty or no contest plea carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion. We will only reverse if the circuit court has failed to properly exercise its discretion. An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion.

State v. McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) (citations omitted).

> The higher standard of proof is used after sentencing, because once the guilty plea is finalized, the presumption of innocence no longer exists. *Id.* (quoting *State v. Walberg*, 109 Wis. 2d 96, 103, 325 N.W.2d 687 (1982)). "'Once the defendant waives

> his [or her] constitutional rights and enters a guilty plea, the state's interest in finality of convictions requires a high standard of proof to disturb that plea.'" *Id.* (quoting *Walberg*, 109 Wis. 2d at 103, 325 N.W.2d 687). The "manifest injustice" test requires a defendant to show "a serious flaw in the fundamental integrity of the plea." *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995) (citing *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331, 335 (1973)).

State v. Thomas, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. A defendant can satisfy this burden by showing that he did not knowingly, intelligently, and voluntarily enter the plea. *See, e.g.*, ***State v. Trochinski***, 2002 WI 56, ¶ 15, 253 Wis. 2d 38, 644 N.W.2d 891; ***State v. Merten***, 2003 WI App 171, ¶ 6, 266 Wis. 2d 588, 668 N.W.2d 750; ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). Proof of ineffective assistance of counsel also satisfies the "manifest injustice" standard. ***Bentley***, 201 Wis. 2d at 311. In addition, a "manifest injustice" can exist when the circuit court fails to establish a factual basis for the plea. ***Thomas***, 232 Wis. 2d 714, ¶ 17; ***White v. State***, 85 Wis. 2d 485, 488, 271 N.W.2d 97 (1978).[4]

> Whether a defendant has met the manifest injustice standard is a matter within the sound discretion of the trial court. *Nawrocke*, 193 Wis. 2d at 381, 534 N.W.2d at 627. We will affirm the trial court's determination "if the record shows that the court

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[4] "[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint." ***State v. Thomas***, 2000 WI 13, ¶ 21, 232 Wis. 2d 714, 605 N.W.2d 836.

> correctly applied the legal standards to the facts and reached a reasoned conclusion." *Id.*

State v. Barney, 213 Wis. 2d 344, 355-56, 570 N.W.2d 731 (Ct. App. 1997). *See also, e.g.*, ***Morones v. State***, 61 Wis. 2d 544, 553, 213 N.W.2d 31 (1973) ("[u]pon review of denial of a motion to withdraw a plea of guilty, [an appellate court is] required to find that such withdrawal of plea is necessary to correct a manifest injustice"). "The trial court does not abuse its discretion when the defendant fails to carry his burden." ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

> [W]hen a reviewing court applies the manifest injustice test, "the issue is no longer whether the . . . plea should have been accepted," but rather whether the plea should be withdrawn. Therefore, when applying the manifest injustice test, it is our role not to determine whether the circuit court should have accepted the plea in the first instance, but rather to determine whether the defendant should be permitted *to withdraw* the plea. This is so because while the plea may have been invalid at the time it was entered, it may be inappropriate, in light of later events, to allow withdrawal of the plea.

State v. Cain, 2012 WI 68, ¶ 30, 342 Wis. 2d 1, 816 N.W.2d 177 (footnote omitted) (citations omitted).

F. Plea Withdrawal Based On A Claim That The Defendant Did Not Knowingly, Voluntarily, And Intelligently Enter The Plea.

At the time of entry of a plea, a defendant must have a full understanding of the possible penalty, including both the maximum available penalty and any presumptive minimum term of imprisonment.

> *State v. Mohr*, 201 Wis. 2d 693, 700-01, 549 N.W.2d 497 (Ct. App. 1996). We employ a two-step process when evaluating a trial court's denial of a plea withdrawal motion: first, we read the plea hearing transcript to measure if the defendant has made a prima facie showing that the trial court did not meet the procedures mandated by WIS. STAT. § 971.08. *Mohr*, 201 Wis. 2d at 697. If the defendant meets this burden, then we test whether the State has nevertheless demonstrated by clear and convincing evidence that the defendant entered the plea knowingly, voluntarily and intelligently. *Id.* While the defendant's understanding must be measured at the time of the plea, we may look to the record as a whole to determine if a defendant understood the consequences of his or her plea at that time. *State v. Van Camp*, 213 Wis. 2d 131, 149, 569 N.W.2d 577 (1997).

State v. Quiroz, 2002 WI App 52, ¶ 19, 251 Wis. 2d 245, 641 N.W.2d 715 (footnote omitted). *See also* ***State v. Bollig***, 2000 WI 6, ¶ 48-49, 232 Wis. 2d 561, 605 N.W.2d 199:

> This court in *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), set forth a test to ascertain whether a defendant did not have an understanding of the charges against him, thus rendering his plea constitutionally infirm. First, a defendant must show that the trial court failed to comply with the procedural requirements included in Wis. Stat. § 971.08. *Id.* Then, the defendant must properly allege that he did not understand or know the information that should have been provided at the plea hearing. *Id.*
>
> Once the defendant has made a prima facie showing that his plea was accepted without compliance with the procedures set forth in Wis. Stat. § 971.08 and has also properly alleged that he did not understand or know the information that should have been provided at the plea hearing, the burden shifts to the state to show by clear and convincing

> evidence that the plea was knowingly, voluntarily, and intelligently entered. *Id. See also State v. Moederndorfer*, 141 Wis. 2d 823, 830, 416 N.W.2d 627 (Ct. App. 1987).

Id. ¶¶ 48-49 (footnote omitted). To satisfy its obligation, "[t]he State may utilize the entire record to demonstrate [the defendant]'s knowledge of the nature of his offense and of the constitutional rights he was waiving." ***Id.*** ¶ 53. *See also* ***State v. Garcia***, 192 Wis. 2d 845, 865-66, 532 N.W.2d 111 (1995) (in defending against a motion to withdraw a plea, "the State may utilize the entire record to show that the defendant entered a valid plea").

> On appellate review, the issue of whether a plea was knowingly and intelligently entered presents a question of constitutional fact. We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. We review constitutional issues independently of the determinations rendered by the circuit court and the court of appeals.

Bollig, 232 Wis. 2d 561, ¶ 13 (citations omitted). "Under this standard, an appellate court may look to the entire record in the course of its review." ***State v. Byrge***, 2000 WI 101, ¶ 55, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted).

When a defendant challenges a circuit court's denial of a plea-withdrawal motion, an appellate court looks at the totality of the circumstances and reviews the entire record. ***Thomas***, 232 Wis. 2d 714, ¶¶ 23-24. *See also, e.g.*, ***Christian v. State***, 54 Wis. 2d 447, 456-58, 195 N.W.2d 470 (1972).

G. Plea Withdrawal When The Defendant Claims A Factual Basis Did Not Exist For The Plea.

A challenge to the factual basis of a plea presents a question of law: whether the facts in the record support every element of the offense. ***State v. Merryfield***, 229 Wis. 2d 52, 61, 598 N.W.2d 251 (Ct. App. 1999). The question as to whether a factual basis for the plea exists implicates different standards of review depending on how the parties presented the factual basis to the circuit court. When the State presented testimony to support the factual basis, an appellate court applies the "clearly erroneous" test. ***Broadie v. State***, 68 Wis. 2d 420, 423, 228 N.W.2d 687 (1975). When the factual basis for the plea derived solely from documents of record — *e.g.*, the criminal complaint, the read-in list, the victim impact statement, the voluntary plea and waiver form — an appellate court need not give deference to the findings made by the circuit court and instead reviews this issue *de novo*. ***State ex rel. Sieloff v. Golz***, 80 Wis. 2d 225, 241, 258 N.W.2d 700 (1977) (when reviewing documentary evidence, the court "need not afford a trial court's findings any special deference").

H. Harmless Error.

"Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and is made applicable to criminal proceedings by WIS. STAT. § 972.11(1)." ***State v. Sherman***, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500. The statutory harmless-error rule also applies to appellate procedures. ***State v. Felton***, 2012 WI App 114, ¶ 1 n.1, 344 Wis. 2d 483, 824 N.W.2d 871 (codified version

of harmless-error rule made applicable to appellate procedures by Wis. Stat. § (Rule) 809.84).

"[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[5] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶ 48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189 (footnote added). *See also* ***State v. Martin***, 2012 WI 96, ¶¶ 42-46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors); ***State v. Stuart***, 2005 WI 47, ¶ 40 n.10, 279 Wis. 2d 659, 695 N.W.2d 259 (various formulations of harmless-error test reflect "alternative wording"). "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." ***Sherman***, 310 Wis. 2d 248, ¶ 8, (citing *Harvey*, 254 Wis. 2d 442, ¶ 40).

The harmless-error test applies to errors in plea colloquies. ***State v. Cross***, 2010 WI 70, ¶ 36, 326 Wis. 2d 492, 786 N.W.2d 64.

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5 ***Chapman v. California***, 386 U.S. 18 (1967).

ARGUMENT

I. BECAUSE THE PLEA AGREEMENT INCLUDED MILLER'S AFFIRMATIVE WAIVER OF ANY CHALLENGE TO THE SUFFICIENCY OF THE CRIMINAL COMPLAINT, AND BECAUSE THE CORROBORATION RULE DOES NOT APPLY WHEN DETERMINING THE SUFFICIENCY OF A CRIMINAL COMPLAINT, THE CIRCUIT COURT PROPERLY DENIED MILLER'S PLEA-WITHDRAWAL MOTION.

Miller's appeal presents a single issue: whether the circuit court properly denied Miller's post-sentencing plea-withdrawal motion without holding an evidentiary hearing. Miller contends that both the court and his lawyer misinformed him about whether he could appeal a pretrial order denying his motion to dismiss the criminal complaint as insufficient to establish probable cause to believe he had committed a felony.

This court should affirm the circuit court's order denying the plea-withdrawal motion and should affirm the judgment of conviction. Miller has not borne his burden of showing, by clear and convincing evidence, that a manifest injustice would result from denying withdrawal of his plea. ***McCallum***, 208 Wis. 2d at 473.

A. Miller Filed An Untimely Challenge To The Sufficiency Of The Criminal Complaint.

Miller waived his challenge to the sufficiency of the complaint by filing an untimely challenge.[6] As a general matter under Wis. Stat. § 971.31(2), a defendant's challenge to the sufficiency of the complaint "shall be raised before trial by motion or be deemed waived." The statute, however, refers to Wis. Stat. § 971.31(5) for exceptions to the general rule. In this instance, the exception in 971.31(5)(c) applies: "In felony actions, objections based on the insufficiency of the complaint shall be made *prior to the preliminary examination or waiver thereof* or be deemed waived" (emphasis added). *See also* ***State v. Berg***, 116 Wis. 2d 360, 365, 342 N.W.2d 258 (Ct. App. 1983) ("Challenges to the sufficiency of a complaint must be made prior to the preliminary hearing. Sec. 971.31(5)(c), Stats.").

Here, on March 14, 2008, Miller waived his preliminary examination (6; 66:2-3). On September 9, 2008, Miller filed his motion to dismiss the charges because, according to him, "[t]he state cannot prove their case beyond a reasonable doubt using

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[6] In denying Miller's challenge to the sufficiency of the criminal complaint, the circuit court did not rely on the untimeliness of the motion challenging the sufficiency of the complaint. This court, however, "may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by* Wis. Stat. § 940.225(7), *as recognized in State v. Grunke*, 2007 WI App 198, 305 Wis. 2d 312, 738 N.W.2d 137.

solely an uncorroborated confession by the defendant" (17:2). Even assuming Miller's argument amounts to a challenge to the sufficiency of the complaint (17:2-4; 70:7-8), the challenge came too late.

B. In The Plea Agreement, Miller Explicitly Waived Any Challenge To The Sufficiency Of The Criminal Complaint.

Miller explicitly waived his right to challenge the sufficiency of the criminal complaint. The addendum to the plea questionnaire states: "I understand that by pleading I am giving up my right to challenge the sufficiency of the complaint" (30:3). Miller signed both the plea questionnaire (30:2; 72:5) and the addendum (30:3; 72:5). At the change-of-plea hearing, the circuit court asked Miller whether he "ha[d] any more questions for either your attorney or the Court regarding anything on these forms" (72:6), Miller answered, "No, sir" (72:6). Miller also confirmed that he did not have any questions about anything discussed with his lawyer and that his lawyer had answered all of his questions (72:6). Because Miller had not filed a timely motion to challenge the sufficiency of the criminal complaint, his waiver in the plea agreement could apply only to the post-plea phase of the case, including a challenge in a postconviction motion and on appeal. In addition, the waiver in the plea questionnaire addendum shows that he knew (despite his current claim to the contrary) that he could not challenge the circuit court's ruling on his motion to challenge the sufficiency of the criminal complaint. Consequently, even if the post-sentencing plea-withdrawal motion alleged sufficient facts, "the record as a whole conclusively demonstrates that [Miller] is not entitled to relief."

Howell, 301 Wis. 2d 350, ¶ 77 n.51. Miller, therefor, has not shown, by clear and convincing evidence, that a manifest injustice would result from the denial of his plea-withdrawal motion. ***Hoppe***, 317 Wis. 2d 161, ¶ 60.

C. The Corroboration Rule Does Not Apply To Factual Allegations In A Criminal Complaint Subject To A Probable-Cause Standard.

The challenge to the sufficiency of the criminal complaint rested on the contention that the incriminating statements by Miller did not have sufficient corroboration elsewhere in the complaint. Miller errs: a complaint need not include corroboration of a defendant's own confession or incriminating statement.[7]

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[7] "The corroboration rule is a common-law standard. Determining if the facts fulfill a common-law standard presents a question of law. We view the facts in evidence in a light most favorable to the jury's verdict." ***State v. Bannister***, 2007 WI 86, ¶ 22, 302 Wis. 2d 158, 734 N.W.2d 892 (citations omitted). So, "[w]hen a court addresses a defendant's claim that his or her confession was insufficiently corroborated, it examines the sufficiency of evidence presented at trial." ***Id.*** ¶ 32 (citations omitted).

> [T]he main concern behind the corroboration rule is that an accused will feel "coerced or induced" when he or she "is under the pressure of a police investigation" and make a false confession as a result. Concerns about police pressure are not implicated, however, when, as in Hauk's case, a confession is made to a *friend* before a police investigation was even initiated.

(footnote continues on next page)

A "complaint is a written statement of the essential facts constituting the offense charged." Wis. Stat. § 968.01(2). A criminal complaint sufficiently establishes probable cause when the complaint recites that a participant in the crime has admitted to his participation in the charged offense. ***Ruff v. State,*** 65 Wis. 2d 713, 720, 223 N.W.2d 446 (1974). Here, the complaint shows that Miller admitted his participation in the charged offense.

In addition, cases dealing with the corroboration rule concern the rule's application in circumstances requiring proof beyond a reasonable doubt. *See, e.g.*, ***State v. Bannister***, 2007 WI 86, 302 Wis. 2d 158, 734 N.W.2d 892 (jury trial); ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393 (same); ***Holt v. State***, 17 Wis. 2d 468, 117 N.W.2d 626 (1962) (same). A sufficient criminal complaint, however, need only establish probable cause that the defendant committed the crime alleged in the complaint. ***State v. Reed***, 2005 WI 53, ¶ 12, 280 Wis. 2d 68, 695 N.W.2d 315

(footnote continues from previous page)

State v. Hauk, 2002 WI App 226, ¶ 25, 257 Wis. 2d 579, 652 N.W.2d 393 (footnote omitted).

> The corroboration rule ensures that a conviction does not stand when there is an absence of any evidence independent of the defendant's confession that the crime in fact occurred. The corroboration rule functions as a "restriction on the power of the jury to convict." A conviction will not stand on the basis of a defendant's confession alone.

Bannister, 302 Wis. 2d 158, ¶ 23 (citations omitted).

(probable cause exists when "facts or reasonable inferences set forth [in the criminal complaint] . . . are sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it"). Hence, "[e]vidence which is obtained through unconstitutional means may be inadmissible at trial but still used as the foundation for a complaint." ***State v. Williamson***, 113 Wis. 2d 389, 398, 335 N.W.2d 814 (1983). Similarly, evidence obtained in violation of the United States Constitution can establish probable cause for bindover. ***State v. Moats***, 156 Wis. 2d 74, 79-80, 457 N.W.2d 299 (1990) ("If unconstitutionally obtained evidence is the sole evidence used at the preliminary examination and the defendant is bound over for trial, the purpose of the hearing is not affected. We hold that the unconstitutionally obtained confession can be used, as here, at the preliminary examination.").

Thus, a criminal complaint can establish probable cause through evidence that would not permit the State to sustain its burden at trial of proving guilt beyond a reasonable doubt. Likewise, a criminal complaint can establish probable cause through a defendant's uncorroborated confession even though the State could not rely on that same confession at trial to prove guilt beyond a reasonable doubt.

D. Even If The Corroboration Rule Applies To A Criminal Complaint, The Complaint Contained Sufficient Corroboration.

The corroboration criterion "requires that the State corroborate '*any* significant fact'" in the de-

fendant's confession. ***Bannister***, 302 Wis. 2d 158, ¶ 26 (emphasis added). *See also* ***id.*** ¶ 27.

> All the elements of the crime do not have to be proved independent of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. Such corroboration is required in order to produce a confidence in the truth of the confession. The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.

Holt, 17 Wis. 2d at 480.

> *Jackson v. State,* 29 Wis. 2d 225, 138 N.W.2d 260 (1965), also illustrates that the significant fact need not independently establish a specific element of a crime. In *Jackson,* the defendant was convicted for using heroin. During her arrest, she had admitted that she used heroin. The court noted that "needle marks, together with the laboratory report that traces of opium alkaloid were found on some of the seized paraphernalia, did supply sufficient corroborating evidence to sustain the conviction." *Id.* at 231-32. The needle marks and laboratory report alone would not establish that the defendant actually used heroin. Nevertheless, that evidence sufficiently corroborated her confession.

Bannister, 302 Wis. 2d 158, ¶ 28. In ***Bannister***,

> the evidence of morphine being present in Michael Wolk's body at the time of his death constitutes a significant fact. The presence of morphine is evidence of the fact that Michael used morphine. That fact corroborates Bannister's confession that he delivered morphine between December 2002 and mid-January 2003 to the Wolks because it gives confidence that he in fact gave the Wolks morphine.

Id. ¶ 34. In neither ***Jackson***[8] nor ***Bannister*** did the significant fact establish that the defendant committed the charged crime or even establish an element of the charged crime.

Here, the criminal complaint included Miller's acknowledgment "that he was watching pornography at his dad's house and he was 'jacking off', which means to masturbate[,] . . . to the pornographic movie" while at home with nobody else except his daughter (2:1). The complaint also included information from the victim's mother "that she had been to the residence where Miller was living and had observed that he had a Playstation in his bedroom. She also observed that there a pornographic movie in the Playstation during this same time period" (2:2). In accord with ***Jackson*** and ***Bannister***, the mother's references to the pornographic movie satisfied the corroboration rule.

E. Miller Has Not Established That His Lawyer's Assistance Amounted To A Manifest Injustice Justifying Plea Withdrawal.

Although ineffective assistance of trial counsel can satisfy the "manifest injustice" standard, ***Bentley***, 201 Wis. 2d at 311, Miller has not shown by clear and convincing evidence that he received ineffective assistance. In his motion, he declared that he would not have entered his plea (and would instead have gone to trial) if his lawyer had correctly advised him that if he entered a no-

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[8] *Jackson v. State,* 29 Wis. 2d 225, 138 N.W.2d 260 (1965).

contest plea, he could not appeal the order denying his challenge to the sufficiency of the criminal complaint (52:3, ¶ 16). The record, however, refutes that declaration: on the day of his change of plea, Miller signed an explicit waiver of any further challenge to the sufficiency of the criminal complaint (30:3), and he told the circuit court during the change-of-plea hearing that he had gone over the plea questionnaire and addendum with his lawyer, that his lawyer had answered all of his questions, and that he did not have any questions for either the court or his lawyer (72:6).

In any event, in light of the explicit written waiver in the addendum to the plea questionnaire, the motion inadequately explains how defense counsel's alleged advice could have caused Miller any harm. If defense counsel provided that advice before Miller signed the waiver, Miller nonetheless chose to go ahead and sign a waiver that clearly rejected that advice. And if counsel provided that advice after Miller signed the waiver, the advice did not influence Miller's decision one whit. In either scenario, defense counsel's advice did not cause Miller any prejudice.

Defense counsel's pretrial challenge to the sufficiency of the complaint also did not cause Miller any prejudice. Assuming (as Miller asserted in his plea-withdrawal motion) that a challenge to the adequacy of corroboration "can only be litigated at trial" (52:3, ¶ 16), a premature effort to litigate the issue cannot cause any prejudice. At worst, the judge denies the motion as premature, leaving counsel to litigate the issue when it becomes ripe. Miller did not lose the opportunity to litigate the corroboration issue because his lawyer raised the

issue too soon; Miller lost the opportunity to raise the issue at the proper time because he explicitly waived the opportunity.

In short, under the standards for assessing a claim of ineffective assistance of counsel (pp. 4-7, above), Miller has not established a claim of ineffective assistance of trial counsel.

In the end, the conflict between (on one hand) unverified allegations in a motion and (on the other hand) facts shown on the record in open court precludes Miller from satisfying the "clear and convincing evidence" standard for establishing ineffective assistance of trial counsel as a manifest injustice warranting plea withdrawal. At the least, Miller's plea-withdrawal motion needed more detailed allegations about defense counsel's representations — including, perhaps, a sworn affidavit — to clear the hurdle created by a record that shows Miller twice waived his right to challenge to the sufficiency of the complaint and that he did so knowingly, intelligently, and voluntarily at the change-of-plea hearing.

F. The Circuit Court's Statement Did Not Create A Defective Plea Colloquy.

In his plea-withdrawal motion, Miller asserted that "[t]he court's plea colloquy was defective because the judge gave Miller inaccurate information about his appeal rights, and Miller relied on this inaccurate information in entering his guilty plea" (52:3, ¶ 17). The alleged inaccuracy concerned this exchange:

> THE COURT: You also need to know that you have the right to challenge certain legal matters

> such as you are the identified person that committed this offense, *challenges to the sufficiency of the complaint*, suppression of statements you might have made to law enforcement, or suppression of other evidence. Now, you have had some motion hearings and those issues are preserved. So if you appeal, the Court will look at those issues. Those issues that you haven't addressed though, you are waiving; do you understand that?
>
> DEFENDANT MILLER: Yes, sir.

(72:9 (emphasis added).)

The circuit court erred, but not in any way that harmed or actually misled Miller. Just moments earlier, Miller had acknowledged his understanding of the plea questionnaire and addendum. The addendum contained his unqualified waiver of his right to challenge the sufficiency of the criminal complaint. He thus knew, regardless of the court's statement, that he had pled away any right to challenge the complaint's sufficiency.

G. Summary.

To withdraw his no-contest plea, Miller had to allege facts that, if proved, would establish by clear and convincing evidence that a manifest injustice would occur if he could not withdraw his plea. But if the record conclusively refuted those alleged facts, the circuit court could properly deny the motion without holding an evidentiary hearing. As shown in the preceding sections of this brief, the record trumps Miller's allegations. The circuit court therefore properly denied Miller's plea-withdrawal motion. This court should affirm that decision.

II. If This Court Disagrees With The State's Contentions, The Remedy Consists Of A Remand For An Evidentiary Hearing.

This appeal concerns the circuit court's decision not to hold an evidentiary hearing. Although the State believes the circuit court correctly denied Miller's plea-withdrawal motion and that this court should affirm the circuit court's decision, the State agrees that if this court rejects the State's defense of the circuit court's decision, the proper remedy consists of reversal of that decision followed by a remand for an evidentiary hearing.

CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's order denying Miller's plea-withdrawal motion and should affirm the judgment of conviction. But if this court overturns the circuit court's decision, this court should remand the case for an evidentiary hearing on the motion.

Date: November 21, 2014.

Respectfully submitted,

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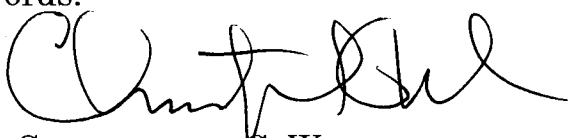
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8): FORM AND LENGTH REQUIREMENTS

In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 6,492 words.



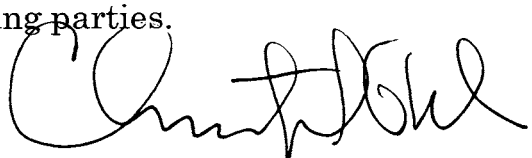
CHRISTOPHER G. WREN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12): ELECTRONIC BRIEF

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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.



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