STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP49-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RUSSELL L. WILSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A PLEA WITHDRAWAL MOTION ENTERED IN WASHBURN COUNTY CIRCUIT COURT, THE HONORABLE EUGENE D. HARRINGTON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

COURTNEY K. LANZ
Assistant Attorney General
State Bar #1087092

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8947
(608) 266-9594 (Fax)
lanzck@doj.state.wi.us

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ISSUE PRESENTED

Is Defendant-Appellant Russell L. Wilson entitled to withdraw his guilty plea to the repeated sexual assault of the same child because of an alleged *Bangert*[1] violation?

The circuit court answered "no."

This Court should answer "no" and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither.

INTRODUCTION

In late 2015, the State charged Wilson with the repeated sexual assault of a child in his care. Throughout the process, the parties and the court labored under the incorrect assumption that a penalty enhancer would apply, increasing the maximum sentence from 40 years' imprisonment to life imprisonment without the possibility of extended supervision.

In exchange for Wilson's guilty plea, the State agreed to cap its initial confinement recommendation at 15 years. The court sentenced Wilson to 20 years of initial confinement and 15 years of extended supervision. Wilson then discovered that the penalty enhancer never actually applied. Based on that error, he filed a postconviction motion for plea withdrawal alleging a *Bangert* violation. The circuit court held a hearing and denied the motion.

On appeal, Wilson renews his argument that he is entitled to plea withdrawal. He contends that the penalty enhancer error was a *Bangert* violation that rendered his plea unknowing and involuntary.

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[1] *See State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

Wilson's claim fails because the error did not rise to the level of a *Bangert* violation. Given Wilson's age at the time he pled, there was no substantial difference between the possible maximum sentence the court communicated and the legally permissible maximum. Moreover, allowing the plea to stand would not result in a manifest injustice. Wilson is therefore not entitled to withdraw his plea.

STATEMENT OF THE CASE

Wilson's charge

On November 30, 2015, a high school guidance counselor reported that Wilson had been sexually assaulting his girlfriend's daughter, A.B. (R. 99:3.) That same day, a Washburn County juvenile officer interviewed A.B., her mother, and a friend living with the family. (R. 92:2; 99:5.) A.B. had just turned 16. (R. 99:3.)

A.B. told the officer that Wilson, who she called "daddy," had sexually assaulted her before school that morning and had been doing so repeatedly for weeks. (R. 92:2–5; 99:3.) A.B. had repeatedly told her mother, who admitted to being aware of Wilson's behavior and to witnessing some of the assaults. (R. 99:3–4.) A.B.'s mother said she told Wilson to stop but Wilson threatened her. (R. 92:4–5; 99:4.) A.B.'s mother put her daughter on birth control "just in case." (R. 92:5; 99:4.)

The family friend stated that she had come downstairs that morning to find A.B.'s mother crying because Wilson had assaulted A.B. again. (R. 99:5.) She told police that after she moved in, A.B.'s mother told her about the assaults. (R. 99:5.) The friend had advised that A.B. tell her school counselor, and later told A.B. that Wilson's behavior "was not ok." (R. 99:5.)

The State charged Wilson on December 4, 2015, with the repeated sexual assault of A.B. in violation of Wis. Stat. § 948.025(1)(e). (R. 99:2.) The complaint accurately reflected that this offense is a Class C felony that carries a maximum

penalty of 40 years' imprisonment. (R. 99:2.) The December 14 information attached a penalty enhancer to the charge pursuant to Wis. Stat. § 939.618(2)(b), increasing the maximum term of imprisonment to life without the possibility of extended supervision. (R. 6.) As a postconviction letter from the Department of Corrections (DOC) would later explain, however, the application of that enhancer was not appropriate in Wilson's case. (R. 45:1.)

The plea agreement and Wilson's plea colloquy

Wilson entered into a plea agreement with the State. (R. 29.) In exchange for his guilty plea, the State agreed that it would cap its sentencing recommendation at 15 years' initial confinement. (R. 87:7.) Wilson's plea questionnaire and waiver of rights form reflected that he was 49 years old and that he understood the elements of the charged offense. (R. 29:1.) The form also indicated that the maximum penalty was 40 years' imprisonment for the underlying offense and up to life without extended supervision via the penalty enhancer. (R. 29:1.)

Wilson pled guilty with the penalty enhancer intact. (R. 88:39–40.) The circuit court began the plea colloquy on October 10, 2016, but aborted the proceeding after Wilson asserted that he could not make rational decisions for himself that day due to stress. (R. 91:1, 6–7.)

Three days later, the court accepted Wilson's guilty plea. (R. 88:39–40.) The court began by discussing certain procedural events in the case related to Wilson's competency, and found that Wilson's "level of depression [was] not unusual given" the circumstances. (R. 88:2–5.) The court explained that Wilson could "have a break to talk with" defense counsel at any time. (R. 88:4.) After taking a brief recess to speak with his attorney, mother, and sister, Wilson stated that he was ready to plead. (R. 88:9, 12.)

The court continued with a review of the constitutional rights Wilson would give up by pleading guilty. (R. 88:12–23.) The court's inquiry was searching, and it asked Wilson supplemental questions such as whether he knew how many people were on a jury or what the right to remain silent or the right to testify entailed. (R. 88:12, 14, 17.) The court also addressed certain statements Wilson made when he was arrested and discussed the importance of the right to confrontation, confirming that Wilson did not want a trial at which A.B. would have to testify. (R. 88:14–17, 20–22.) Next, the court, using the relevant jury instruction as a guide, had a dialogue with Wilson about the presumption of innocence, the State's burden of proof, and the jury's duty to deliberate. (R. 88:24–31.) Wilson twice assured the court that he had no questions. (R. 88:23, 31.) The court found that Wilson had freely waived his constitutional rights and that despite "anxiety and situational depression," he was able to proceed. (R. 88:31–32.)

At that point, the court explained the elements of the offense to Wilson and confirmed that he understood them by asking him to explain what sexual intercourse was. (R. 88:33–36.) Wilson responded that he had inserted his penis into A.B.'s vagina, and although he could not recall the exact dates, he understood that the State would have to prove that he did so at least three times before the victim's sixteenth birthday. (R. 88:34–36, 39.) Wilson also understood the maximum penalty for that offense was 40 years' imprisonment and that if the State proved at sentencing its allegation that he had a prior conviction for first-degree child sexual assault, the maximum penalty would become life imprisonment without extended supervision. (R. 88:36.)

The State offered A.B.'s statement and the interviewing officer's preliminary hearing testimony as a factual basis for the plea. (R. 88:37.) Defense counsel stipulated, noting that he had spent "a fair amount of time with Mr. Wilson . . . going

through all the evidence and those details." (R. 88:37–38.) After another brief recess during which Wilson conferred with defense counsel regarding the stipulation, the court found that there was a factual basis for the plea. (R. 88:39.)

After noting that the State would have to provide proof of Wilson's prior qualifying conviction at sentencing "if it want[ed] the penalty enhancer," and reiterating that, with the penalty enhancer, Wilson's maximum sentence would be life imprisonment without extended supervision, the court accepted Wilson's guilty plea. (R. 88:39–40.)

Wilson's sentencing

Approximately a year later, the court sentenced Wilson to 20 years of initial confinement and 20 years of extended supervision. (R. 87:19.) The court later commuted Wilson's extended supervision to 15 years. (R. 96:2.)

The sentencing hearing began with Wilson waiving his right to a preliminary examination in a related 2016 case in which he had been charged with two counts of conspiracy to commit first-degree intentional homicide. (R. 87:2–6.) The court bound Wilson over for trial and accepted his not guilty plea to both counts. (R. 87:5–6.)

The court then pivoted to the sentencing at hand. (R. 87:6.) The State recommended no more than 15 years in prison per the plea agreement and made no additional argument. (R. 87:7.) After hearing defense counsel's arguments and Wilson's apology, the court began its remarks by explaining that the maximum sentence would be 40 years' imprisonment but for the penalty enhancer, which increased the maximum to life. (R. 87:15–16.)

The court declined, however, to impose a life sentence. In reaching that conclusion, the court emphasized the gravity of the offense, Wilson's betrayal of the victim's trust and his threats toward A.B. and her mother, and Wilson's prior convictions, including his sexual assault of a prior girlfriend's

daughter. (R. 87:15–17, 19.) The court acknowledged Wilson's family support, and his struggles with mental illness as well as drugs and alcohol, but it emphasized that Wilson planned his crime. (R. 87:17–18.) Because Wilson had committed a similar offense before and given the gravity of his latest offense, the court imposed a sentence in excess of what the State recommended "to protect society and to not unduly depreciate this offense." (R. 87:19–20.)

Wilson's postconviction motion for plea withdrawal

Wilson subsequently moved to withdraw his plea. (R. 59.) He asserted that the court had incorrectly informed him of the maximum penalty he faced and requested a hearing. (R. 59:1.) The court held the requested hearing. (R. 97:3.)

At the hearing, the parties agreed the penalty enhancer did not apply in Wilson's case and that he had been incorrectly informed otherwise throughout the plea process. (R. 98:15.) The parties disagreed as to whether those circumstances entitled Wilson to plea withdrawal. (R. 98:15.)

Although Wilson did not testify, the court heard testimony from trial counsel. (R. 98:31.) Counsel began by discussing the strength of the State's case against his client, asserting that there was DNA evidence linking Wilson to A.B., that he could not assert a consent defense, and that Wilson had made inculpatory statements to jail personnel about being a "child molester" that were likely to be admitted at trial. (R. 98:18–22.) Moreover, counsel noted that A.B.'s mother, who had witnessed some of the sexual assaults, would have testified against Wilson, as would have the family friend. (R. 98:22–23.)

Although counsel admitted that the uncertainty surrounding whether some of the assaults occurred when A.B. was 15 or 16 could have been favorable to Wilson's defense, he explained that it was not possible to establish that fewer than three of the assaults occurred before A.B.'s sixteenth

birthday. (R. 98:27, 29.) Counsel believed that a guilty verdict at trial was likely and advised Wilson to plead. (R. 98:23–24, 26.)

Counsel asserted that the State's offer to cap its sentencing recommendation at 15 years induced the plea. (R. 98:25.) Counsel testified that he did not tell Wilson that the penalty enhancer would be dismissed and agreed that the enhancer was not "bargained away" as part of the deal. (R. 98:25–26.) Counsel acknowledged that he discussed the possibility of a life sentence with Wilson. (R. 98:28.) Counsel said this was "a significant factor" in the decision to plead in that avoiding the "emotional trauma" of trial would greatly reduce the "threat" of a life sentence. (R. 98:28, 30.)

The court admitted that it erred regarding the penalty enhancer, but it denied Wilson's motion. (R. 98:59–60.) Its failure to accurately advise Wilson of the maximum penalty he faced, concluded the court, "did not affect [Wilson's] decision to accept the . . . offered plea from the State" or otherwise have a "significant impact on the outcome of this case." (R. 98:63–64.)

Wilson appeals that ruling. (R. 81.)

STANDARDS OF REVIEW

Whether a defendant "has pointed to a plea colloquy deficiency that establishes a violation of Wis. Stat. § 971.08 or other mandatory duty at a plea hearing is a question of law" that a court reviews de novo. *State v. Taylor*, 2013 WI 34, ¶ 26, 347 Wis. 2d 30, 829 N.W.2d 482.

Whether a plea is knowing, voluntary, and intelligent is a question of constitutional fact. *State v. Trochinski*, 2002 WI 56, ¶ 16, 253 Wis. 2d 38, 644 N.W.2d 891. While a reviewing court will not disturb the circuit court's findings of evidentiary or historical fact except for clear error, it assesses de novo

whether a plea was knowingly, voluntarily, and intelligently made. *Id*.

If a defendant cannot establish that a court violated a mandatory plea hearing duty, "plea withdrawal remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice." *State v. Cross*, 2010 WI 70, ¶ 45, 326 Wis. 2d 492, 786 N.W.2d 64.

ARGUMENT

Wilson is not entitled to withdraw his plea.

On appeal, Wilson renews his claim that he suffered a *Bangert* violation and argues that the State failed to establish that his plea was nevertheless knowing, voluntary, and intelligent. (Wilson's Br. 1.) Although Wilson was misinformed about the possible maximum sentence he faced, he is not entitled to withdraw his plea as a result.

A. A defendant requesting to withdraw his plea after sentencing must establish by clear and convincing evidence that a manifest injustice occurred.

A defendant requesting plea withdrawal after sentencing must overcome the high hurdle of proving by clear and convincing evidence that allowing the plea to stand would constitute a manifest injustice. *State v. Dillard*, 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44. A manifest injustice occurs when there has been "a serious flaw in the fundamental integrity of the plea." *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). A defendant can satisfy this burden by establishing that he did not knowingly, intelligently, and voluntarily enter the plea. *Trochinski*, 253 Wis. 2d 38, ¶ 15.

The duties imposed on circuit courts at the plea hearing, which are set forth in Wis. Stat. § 971.08 and *Bangert* and its progeny, "are designed to ensure that a defendant's plea is knowing, intelligent, and voluntary." *State v. Brown*, 2006 WI 100, ¶ 23, 293 Wis. 2d 594, 716 N.W.2d 906. Accordingly, during the plea hearing, the circuit court must "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. § 971.08(1)(a).

When a court fails to fulfill its plea hearing duties, a defendant may move to withdraw his plea under *Bangert*. *State v. Howell*, 2007 WI 75, ¶ 27, 301 Wis. 2d 350, 734 N.W.2d 48. A *Bangert* motion "must (1) make a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing." *Brown*, 293 Wis. 2d 594, ¶ 39.

If the defendant makes the requisite showings, then "the court must hold a postconviction evidentiary hearing at which the state is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy. *Brown*, 293 Wis. 2d 594, ¶ 40. The State may use the "totality of the evidence" to satisfy its burden, including testimony from the defendant and defense counsel, as well as the plea questionnaire, waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings. *Id.* ¶ 40.

B. A defendant's failure to understand the precise maximum punishment is not necessarily a due process violation.

"[A]n improper [plea] colloquy does not automatically mandate withdrawal." *State v. Fugere*, 2019 WI 33, ¶ 24, 386 Wis. 2d 76, 924 N.W.2d 469; *see, e.g.*, *State v. Reyes Fuerte*, 2017 WI 104, ¶¶ 37–41, 378 Wis. 2d 504, 904 N.W.2d 773 (holding that the circuit court's errors in giving the immigration plea advisement were harmless); *Cross*, 326 Wis. 2d 492, ¶¶ 30, 37 (concluding "that a defendant's due process rights are not necessarily violated when he is" misinformed of the potential maximum penalty).

For example, "a defendant can be said to understand the range of punishments as required by § 971.08 and *Bangert* when the maximum sentence communicated to the defendant is higher, but not substantially higher, than the actual allowable sentence." *Cross*, 326 Wis. 2d 492, ¶ 38. Such circumstances do "not constitute a *Bangert* violation and will not, as a matter of law, be sufficient to show that the defendant was deprived of" due process. *Id.* ¶ 40.

Whether the difference between "the maximum sentence communicated to the defendant" and "the actual allowable sentence" is substantial "will depend on the facts of the case." *Cross*, 326 Wis. 2d 492, ¶¶ 38, 40–41. If "the difference is significant, or when the defendant is told the sentence is lower than the amount allowed by law, a defendant's due process rights are at greater risk." *Id.* ¶ 39.

C. That Wilson was incorrectly informed of the potential maximum term of imprisonment did not rise to the level of a due process violation.

The State concedes, as it must, that the penalty enhancer did not apply here, yet from the information onward, Wilson was informed that he would face up to life

without the possibility of extended supervision once the State proved the repeater allegation at sentencing. (R. 6; 29:1; 87:15–16; 98:36, 39.) That error, however, does not constitute a due process violation because the potential maximum sentence communicated to Wilson was "not substantially higher, than that authorized by law" under the facts of this case.[2] *Cross*, 326 Wis. 2d 492, ¶ 45.

Cross is instructive. In that case, the defendant pled guilty to second-degree child sexual assault. *Cross*, 326 Wis. 2d. 492, ¶ 1. The State, defense counsel, and the circuit court incorrectly informed the defendant that the maximum penalty for his offense was 40 years of imprisonment, rather than 30 years of imprisonment. *Id.* Cross did not discover the correct maximum until postconviction proceedings. *Id.* ¶ 11. The supreme court concluded that, although the defendant was informed of a punishment greater than what the law provided, the difference was not substantial, and his plea was therefore made knowingly, intelligently, and voluntarily. *Id.* ¶ 41. The 10-year difference was simply not substantial.

Here, like in *Cross*, no *Bangert* violation occurred. Whether a "substantial" difference exists between the communicated and actual maximum sentences hinges "on the facts of the case." *Cross*, 326 Wis. 2d 492, ¶ 41. Wilson's legally allowable sentence was a maximum 40-year term of

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[2] As Wilson asserts, the circuit court granted a *Bangert* hearing. (R. 97:3.) At the hearing, the State asserted that no *Bangert* violation occurred on the facts of this case. (R. 98:54–55.) The circuit court also discussed with defense counsel whether there was a substantial difference between life imprisonment and the legally allowable maximum. (R. 98:40, 54–55.) The circuit court concluded that it had "permitted" a *Bangert* violation. (R. 98:64.) But this Court reviews that finding de novo. *State v. Taylor*, 2013 WI 34, ¶ 26, 347 Wis. 2d 30, 829 N.W.2d 482. And this Court can affirm the circuit court's denial of Wilson's motion on alternative grounds. *State v. Heyer*, 174 Wis. 2d 164, 170, 496 N.W.2d 779 (Ct. App. 1993).

imprisonment, consisting of up to 25 years of initial confinement and 15 years of extended supervision. *See* Wis. Stat. §§ 948.025(1)(e), 939.50(3)(c), 973.01(2)(b)3., (d)2. He was aware via the complaint, the information, the plea questionnaire, and the plea colloquy that he faced a maximum of 40 years of imprisonment on the sexual assault charge. (R. 6; 29:1; 88:6; 99:2.) He was also told, however, that his maximum exposure would be life imprisonment without the possibility of extended supervision if the State proved the repeater allegation at sentencing. (R. 6; 29:1; 88:36, 39.) The enhancer in fact did not apply. (R. 45:1.)

Wilson's circumstances are somewhat analogous to those of the *Taylor* defendant. In *Taylor*, the Wisconsin Supreme Court found that a circuit court's failure to inform the defendant at the plea hearing that he faced an additional two-year penalty for a repeater allegation was an "insubstantial defect" that did not render the "*entire* plea . . . not knowing, intelligent, and voluntary." 347 Wis. 2d 30, ¶¶ 2, 39, 45. Although *Taylor* involved an omission rather than an affirmative misstatement of penalty information, and Taylor was aware via other filings that the enhancer could apply, the circuit court in *Taylor*, as in this case, had informed the defendant of the correct maximum penalty he faced for the underlying charge and then sentenced the defendant within that range. *Id.* ¶¶ 2, 39. The supreme court found that Taylor's due process rights were not violated and that Taylor "did in fact plead knowingly, intelligently, and voluntarily to the underlying crime." *Id.* ¶¶ 34, 45.

That said, facing up to life imprisonment can be different from facing up to 40 years of imprisonment, and specifically up to 25 years of initial incarceration. But as the State and the circuit court discussed at the hearing, Wilson's age alters this view. (R. 98:54–55.) When he pled guilty, Wilson was 49 years old. (R. 29:1; 91:4.) He was 50 years old at sentencing. (R. 87:8, 16.) Wilson would be 74 or 75 years

old after serving 25 years of initial confinement, and 89 or 90 upon completion of the maximum term of extended supervision. Considering that the average life expectancy of a Caucasian American male of Wilson's age is currently estimated to be approximately 80 years,[3] the difference between the legally allowable maximum and life is not substantial here. Accordingly, Wilson "can be said to understand the range of punishments as required by § 971.08 and *Bangert*." *Cross*, 326 Wis. 2d 492, ¶ 38.

D. Wilson's reliance on *Dillard* is misplaced.

In support of his contrary position, Wilson relies on *Dillard*. (Wilson's Br. 9–10.) That case is distinguishable.

Dillard sought plea withdrawal on due process and ineffective assistance of counsel grounds. *Dillard*, 358 Wis. 2d 543, ¶¶ 3–4. Dillard was charged with armed robbery as a persistent repeater and with false imprisonment. *Id.* ¶ 16. The State offered to drop the penalty enhancer and the false imprisonment charge in exchange for Dillard's guilty plea to armed robbery. *Id.* ¶ 19. Had Dillard been convicted of armed robbery as a persistent repeater, he would have faced a mandatory life sentence. *Id.* ¶ 17. The State, however, had erroneously attached a persistent repeater enhancer to the armed robbery charge. *Id.* ¶ 5. The supreme court concluded that considering the totality of the circumstances, Dillard could withdraw his plea. *Id.* ¶ 69.

Wilson's circumstances are unlike Dillard's in three ways. First and foremost, *Dillard* did not involve a *Bangert*

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[3] *See* Elizabeth Arias & Jiaquan Xu, *United States Life Tables*, National Vital Statistics Reports, Vol. 68, No. 7, at 54 (June 24, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf (indicating that a 50-year old American white male has an average of 29.91 years of life remaining).

claim. *Dillard*, 358 Wis. 2d 543, ¶ 20. Because the penalty enhancer was dropped per the plea agreement, the plea colloquy "correctly informed [Dillard] of the penalty for armed robbery without a penalty enhancer." *Id.* This case is therefore closer to *Cross*, which also involved a *Bangert* claim alleging that the circuit court had misinformed the defendant about the potential maximum penalty.

Second, Dillard thought that he faced a mandatory life sentence. *Dillard*, 358 Wis. 2d 543, ¶ 3. Wilson's circumstances were not so dire. He understood when he pled guilty that he faced a maximum of 40 years of imprisonment for the underlying crime and a maximum of life imprisonment because of the repeater enhancer. (R. 88:36, 39.) Dillard was made to believe he had to "bargain for [the] hope" of one day being able to live outside prison walls again. *Dillard*, 358 Wis. 2d 543, ¶ 63. Wilson had that hope. *Cf. id.* ¶ 66 (noting the distinction between facing a life sentence the court must impose and facing "[t]he possibility that a circuit court may impose a sentence less than the statutory maximum"). The coercive circumstance of great concern in *Dillard* was not present here.

Third and relatedly, Wilson did not bargain for an ultimately "illusory benefit." *Dillard*, 358 Wis. 2d 543, ¶ 79. In holding that the defendant was entitled to plea withdrawal, the supreme court in *Dillard* heavily relied on the fact that he had pled guilty in exchange for the illusory benefit of dismissing an inapplicable penalty enhancer. That concern does not apply here. True, Wilson and Dillard's cases are similar in that they both involve a penalty enhancer that in fact did not apply, but unlike Dillard, Wilson pled guilty with the enhancer intact. (R. 88:39–40.) Wilson did not plead guilty in exchange for an illusory benefit.

Dillard was highly motivated to plead to avoid the penalty enhancer and the mandatory life sentence it required. *Dillard*, 358 Wis. 2d 543, ¶¶ 45–46, 62. He testified that he

had intended to go to trial because the State's case was weak, but he could not risk a mandatory life sentence. *Id.* ¶¶ 41, 44. Wilson, by contrast, faced the possibility of a maximum sentence and a very strong State's case, and he was advised not to go to trial. (R. 98:24.) He bargained for the State to cap its initial confinement recommendation at 15 years, and thus to reduce the probability of a maximum sentence; there is no evidence that he also wanted to remove the enhancer. (R. 87:7; 98:24, 30.) The offer of a 15-year cap was "the offer that induced the eventual plea." (R. 98:25.) Wilson made a deal for something the State could and did deliver. (R. 87:7.) Dillard agreed to plead in exchange for no benefit. *Dillard*, 358 Wis. 2d 543, ¶ 78.

In sum, *Cross*, not *Dillard*, controls here. Pursuant to *Cross*, "the circuit court has still fulfilled its duty to inform the defendant of the range of punishments" despite the misinformation about the penalty enhancer. 326 Wis. 2d 492, ¶ 45. That misinformation was not a substantial defect that would render Wilson's plea invalid.

E. Wilson has not otherwise demonstrated that a manifest injustice will result if his plea is allowed to stand.

Wilson disagrees and argues in reliance on *State v. Finley*, 2016 WI 63, 370 Wis. 2d 402, 882 N.W.2d 761, for the general proposition that he is entitled to withdraw his plea where there is no evidence in the record indicating that he understood what the correct range of punishment was when he entered his guilty plea. (Wilson's Br. 10–11.) He also faults the circuit court for deviating from *Bangert* by concluding that the penalty enhancer error did not have a significant impact on the outcome. (Wilson's Br. 11–13.)

As acknowledged, Wilson was informed that he would be subject to a higher maximum once the State proved a repeater allegation at sentencing even though the enhancer

in fact did not apply. (R. 6; 29:1; 87:15–16; 88:36, 39.) But, as discussed above, Wilson, like the defendant in *Taylor*, did not plead in ignorance of the correct penalty information for the underlying charge and was sentenced within the correct range. (R. 87:19; 88:39.) Wilson thus understood what the maximum penalty was for first-degree repeated sexual assault of a child.

Wilson's points are premised on the assumption that he established a due process violation, which the State maintains he has not.[4] And where a defendant seeking to withdraw his guilty plea cannot show that the circuit court failed in its duties during the plea hearing, "plea withdrawal remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice."[5] *Cross*, 326 Wis. 2d 492, ¶ 45; *see*

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[4] In *State v. Finley*, the supreme court decided what the remedy should be for an undisputed *Bangert* violation. 2016 WI 63, ¶ 9, 370 Wis. 2d 402, 882 N.W.2d 761. Unlike Wilson, Finley was told that he faced a lower potential punishment than what was allowed by law. *Id.* ¶¶ 8, 33. Such circumstances place "a defendant's due process rights . . . at greater risk and a *Bangert* violation may be established." *State v. Cross*, 2010 WI 70, ¶ 39, 326 Wis. 2d 492, 786 N.W.2d 64.

[5] Based on a concession from the State, the *Taylor* court held that the traditional "harmless error doctrine [does] not apply" to "alleged violation[s] of Wis. Stat. § 971.08 or other court-mandated dut[ies] during the plea colloquy." 347 Wis. 2d 30, ¶¶ 40 n.10, 41. More recently, the supreme court held that Wisconsin's harmless-error statute, Wis. Stat. § 971.26, does "apply to" any defects in the plea colloquy warning required by Wis. Stat. § 971.08(1)(c) (related to the immigration consequences of pleading guilty). *State v. Reyes Fuerte*, 2017 WI 104, ¶¶ 4, 21, 378 Wis. 2d 504, 904 N.W.2d 773. The supreme court has not yet clarified whether that holding extends to all plea colloquy errors, overruling *Taylor*'s wholesale rejection of tradition harmless-error analysis. The State preserves its right to argue that harmless error analysis should apply to all plea colloquy errors, and that any such error was harmless here, if

also Taylor, 347 Wis. 2d 30, ¶ 27 (noting that "the proper analysis" when a defendant moves for plea withdrawal based on a *Bangert* violation is to determine whether such a violation occurred and, if not, "whether the failure to withdraw the plea would otherwise result in a manifest injustice"). Wilson does not argue that a manifest injustice occurred on a ground other than *Bangert*. (Wilson's Br. 10–13.)

When deciding whether a manifest injustice has occurred in the penalty misinformation context, the supreme court has considered factors including how favorable the agreement was to the defendant and the defendant's admissions. *Cross*, 326 Wis. 2d 492, ¶ 43.

Those factors, among others, do not favor plea withdrawal here. Like Cross, Wilson's "solemn admission in open court that he had [repeated] sexual contact with" a 15-year-old child in his care "should not be thrown aside." *Cross*, 326 Wis. 2d 492, ¶ 43. Moreover, the State's case against Wilson was very strong, and included DNA evidence matching him to the minor victim, the unavailability of a consent defense, victim and other witness testimony, and his own inculpatory statements to jail personnel. (R. 98:18–24.)

Although the State was incentivized to avoid subjecting the victim to a trial, it was Wilson who stood to gain the most from a plea, enhancer or no. As Wilson's trial counsel testified, "if the matter proceeded to trial it was likely that there would be a guilty verdict." (R. 98:24.) The opportunity to plead and avoid trial, his attorney advised, would greatly reduce the possibility of a maximum sentence, a possibility that was reduced even further with the State's agreement to cap its initial confinement recommendation at 15 years, or 10 years

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either party petitions the Wisconsin Supreme Court for review of this Court's decision in Wilson's case.

below the legally allowable maximum. (R. 98:26, 30.) There is no evidence that the enhancer was ever part of the plea negotiations. (R. 98:25–26.) Wilson was ultimately sentenced to 20 years of initial incarceration, or 5 years below the statutory maximum for the Class C felony to which he pled. (R. 87:19.) The State kept its end of the bargain, to Wilson's benefit.

And there is no dispute that, penalty enhancer information excepted, the plea colloquy was otherwise sound. Indeed, the court engaged in a thorough and thoughtful plea colloquy during which it took extra steps to ensure that Wilson, who had a mental health history, understood the proceedings and was ready to enter his plea. (R. 88:9–10.) For example, the court inquired about Wilson's mental state and allowed Wilson to take breaks and speak with his family and his lawyer. (R. 88:2, 9, 38.) The court also paused frequently to ensure Wilson understood the various legal concepts involved. (R. 88:18 ("You have the right to testify. Tell me what that means to you."); R. 88:19 ("Do you know what a subpoena is?"); R. 88:20 ("Confront in court. What's that mean to you?").) The court took every available precaution to ensure that Wilson's plea was knowing, voluntary, and intelligent.

Wilson has not shown that he is entitled to withdraw his plea on manifest injustice grounds.

CONCLUSION

This Court should affirm Wilson's judgment of conviction and the circuit court's order denying Wilson's postconviction motion to withdraw his guilty plea.

Dated this 14th day of August 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

COURTNEY K. LANZ
Assistant Attorney General
State Bar #1087092

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8947
(608) 266-9594 (Fax)
lanzck@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 5,407 words.

Dated this 14th day of August 2019.

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COURTNEY K. LANZ
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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. § 809.19(12).

I further certify that:

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 14th day of August 2019.

_____
COURTNEY K. LANZ
Assistant Attorney General