STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2019AP000201 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NATHANIEL LEE MATTSON,

Defendant-Appellant.

**APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR DOUGLAS COUNTY, CASE NO. 17 CM 218
THE HONORABLE GEORGE L. GLONEK, PRESIDING**

DEFENDANT-APPELLANT'S BRIEF

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ISSUE PRESENTED

Did the circuit court err when it denied Mr. Mattson's postconviction motion for plea withdrawal where Mr. Mattson testified that he, a person with learning difficulties and diagnosed depression, wrongly believed that the right to plea or go to trial belonged to counsel and not to him, and a recording of a conservation between Mr. Mattson and counsel corroborated his assertions?

Counsel's discussions with Mr. Mattson were recorded and they reveal that counsel dismissed any possibility of a trial, called Mr. Mattson a "dummy" and ignored Mattson's claims that he was innocent and that he could not accept any sentence with probation as it would keep him from seeing his children. The circuit court found that counsel had called Mr. Mattson a "dummy" in a "joking manner" and found Mr. Mattson to not be credible, and it denied Mr. Mattson's postconviction motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The facts necessary to resolve this case are largely undisputed as counsel's plea discussions with the defendant were recorded. The facts present an issue of first impression: (1) Where the defendant makes a clear and convincing claim that he did not understand that it was his right and not counsel's to decide and ratify whether to enter a plea, must the trial court shift the burden to the State to prove that he did know that it was his decision? Given this issue, this is a case possibly worthy of publication. Mr. Mattson would welcome oral argument if it would assist the Court.

STATEMENT OF THE CASE AND FACTS

On May 2, 2017, the State charged Mr. Mattson with three counts of misdemeanor battery, contrary to Wisconsin Statute § 940.19(1); one count of disorderly conduct, contrary to Wis. Stat. § 947.01(1); and one count of mistreating animals, contrary to Wis. Stat. § 951.02. On May 10, 2017, the State filed an amended complaint, which modified counts 1, 2, 4, and 5 to include the domestic abuse penalty enhancer under Wis. Stat. § 968.075(1)(a), and which left count 3 as previously charged.

Mr. Mattson, who never graduated from high school, failed to pass the GED examination six times, had a court-ordered payee appointed for him, has a "care plan" identifying him as having (1) labile moods, low self-efficacy, shaking, sweating, racing thoughts, obsessive thoughts, overly fearful, social anxiety, childhood abuse trauma; (2) a diagnosis of post-traumatic stress disorder; (3) a history of suicidal ideation; and (4) a diagnosis of major depressive disorder. (R. 62 at 17; R. 33 at 1–2; R. 34 at 1–3)

On April 16, 2018, Mr. Mattson appeared for a plea and sentencing hearing. (R. 55 at 1.) The trial court, the Hon. George L. Glonek presiding, accepted his pleas to counts 1 and 2. (R. 55 at 8.) Count 1 alleged that he committed misdemeanor battery by hitting Alyssa Crandall, his girlfriend, on the arm multiple times. (R. 2 at 1.) Despite his plea, Mr. Mattson has contended that his conduct was "playful." (R. 35 at 25:28–25:31, 32:17–32:23, 43:54–43:57.) Count 2 alleged that he was

disorderly for yelling, screaming and throwing boiling hot soup at her. (R. 2 at 1.) The complaint does not allege that he harmed anyone by doing so. (R. 2 at 1–3.)

The court accepted Mr. Mattson's guilty pleas, adjudicated him guilty, entered judgments of conviction, withheld sentence on both counts, and placed Mr. Mattson on probation.[1] (R. 55 at 9.) On May 7, 2018 Mr. Mattson timely filed notice of intent to pursue postconviction relief, pursuant to Wis. Stat. (Rule) 809.30(2)(b). (R. 19.)

On July 31, 2018 Mr. Mattson filed a motion for postconviction relief. (R. 25.) In it he alleged that he should be allowed to withdraw his pleas because they were not knowing, intelligent, and voluntary, and because counsel was ineffective. (R. 25.) Specifically, counsel had insulted him, calling him a "dummy," and insisted that he, counsel, did not want to go to trial. (R. 25 at 2,6; R. 35 at 28:23–28:29, 41:53–42:04, 46:24–46:37, 51:44–51:47.) As a result, counsel coerced his plea, and Mr. Mattson did not understand that it was his right and his right alone to determine whether or not to go to trial. (R. 25 at 2,6,8; R. 33 at 1–2.)

In support of his claims, Mr. Mattson's postconviction motion alleged that prior to the plea, he met with counsel in counsel's office and made clear that; (1) he primarily wanted to avoid probation because he did not want to be barred from seeing his children; (2) he did not want to plead guilty to battery or disorderly

[1] These pleas also formed the basis for the revocation of a deferred judgment of conviction ("DJOC") agreement in Douglas County case number 11CF322, which resulted in a conviction for third-degree sexual assault, and carries the requirement of sex offender registration.

conduct because he was not guilty; and (3) he did not want to plead guilty to mistreating animals as he was not guilty of that as well. (R. 25 at 2–3.) Counsel responded by interrogating Mr. Mattson and insulting him. (R. 25 at 3.)

Fortunately, the office visit was recorded. It included the following:

1). When Mr. Mattson explained that he acted in self-defense, counsel said the victim was "never gonna be charged." (R. 35 at 32:39–32:41.)

2). When Mr. Mattson said that he wanted to go to trial, counsel discouraged him by saying, "What's my argument?" (R. 35 at 37:39–37:40)[2]

3). When Mr. Mattson and his family said that Mr. Mattson did not sexually assault anyone in a different case, counsel responded by saying that the present case was indefensible because Mr. Mattson "had repeated acts of sexual relations with a child" in the prior case. (The victim in the prior case was a 15-year-old teenager with whom Mr. Mattson, then 21-years-old, had mutually agreeable sex). (R. 35 at 38:04–38:12.);

4). When Mr. Mattson told counsel that he did not want to plea to battery or disorderly conduct because he did not believe that he was guilty, counsel berated his intelligence, called him a "dummy" but said he was not "retarded." (R. 35 at 10:14–10:16, 51:44–51:47.)

Attached to his postdispositional motion was an affidavit in which he explained:

[2] Mr. Mattson told counsel firmly that he was innocent. *Infra.*

> 1) he never completed high school, and failed six attempts at passing the GED exam;
>
> (2) he recalled Mr. Zuber calling him a "dummy" during their discussions about the state's offer to resolve his case;
>
> (3) he did not want to plead guilty and have his lawyer *ask this Court* to put him on probation;
>
> (4) he only acquiesced to Attorney Zuber's statements that Attorney Zuber "did not want" Mr. Mattson to go to trial because he was fatigued from Attorney Zuber's repeated refusals to even consider the possibility;
>
> (5) he did not understand – and Attorney Zuber never specifically told him – that the decision to go to trial was his own, and his alone; and
>
> (6) but for that failure to explain, Mr. Mattson would not have entered a guilty plea in this case.

(R. 33 at 1–2.)

Mr. Mattson testified at the postdispositional motion hearing that he did not believe that he had a choice concerning the decision to plead guilty based on his conversation with counsel the Friday before his plea. (R. 62 at 30.) He pleaded guilty because counsel "forced [him] to do that." (R. 62 at 30.) He testified that he did not fully understand the consequences of the plea agreement. (R. 62 at 34.)

Attorney Zuber, who represented and counseled Mr. Mattson prior to and during the plea and sentencing hearing, testified that he did not remember using the word "dummy;" he did not take notes of his meeting with Mr. Mattson; did not remember laughing at Mr. Mattson because he did not know the word "tumultuous;" did not remember telling him to be smart; did not remember asking about his education and the fact that Mr. Mattson failed the GED six times; did not ask him if he could write a check; and did not remember telling Mr. Mattson to accept blame. (R. 62 at 48–52.)

The transcript of the recorded pretrial meeting of April 13, 2018, between Mr. Mattson and counsel disproves many of counsel's claims. It was introduced into evidence as Exhibit 3 and the transcript of that meeting was introduced as Exhibit 4 (*see* R. 36). The transcript includes the following statements:

A.	ZUBER:	I want you to wake up and pay – *be really smart here* – because it's important.
(R. 36 at 1.)		
B.	ZUBER:	What did you admit to?
	MATTSON:	*I didn't assault her.*
	ZUBER:	Same thing. . . . I can work out an agreement where you plead to two counts in that complaint, and you can get a sentence of two years' probation.
(R. 36 at 2.)		
C.	ZUBER:	That [plea deal] sounds easy, *doesn't it*?
	MATTSON:	Yeah, except for probation. I can't see my kids –
	ZUBER:	[Interrupting.] Do you think you have to –
(R. 36 at 2.)		
D.	ZUBER:	Your relationship with Alyssa . . . was pretty, what – tumultuous? Do you know what that word means? [Laughs.] You don't know tumultuous?
(R. 36 at 3.)		
E.	ZUBER:	[Mr. Mattson] is not focusing on what's important all the time.
(R. 36 at 5.)		
F.	ZUBER:	Can I say this, just, crassly? To be blunt, you're not retarded, okay?
	MATTSON:	That I know.
	ZUBER:	You're not stupid. Have you ever been declared incompetent by a court of law? You know what I mean – the word incompetent. Unable to write a check. Can you write a check?
	MATTSON:	No.
	SISTER:	I'm his payee.

	ZUBER:	I understand that – that wasn't my question.[3]

(R. 36 at 6.)

G.	ZUBER:	Your brother, let's just call him your brother, you love him dearly – would you say he's insane?
	SISTER:	No, but I think he definitely struggles.
	ZUBER:	That's not a defense.

(R. 36 at 7.)

H.	ZUBER:	That's the dumbest thing I've ever said in my life. What's your opinion of your son? Is he insane?
	MOM:	No.
	ZUBER:	Is he capable of doing, what, work?
	MOM:	Nope.

(R. 36 at 7.)

I.	ZUBER:	Can you understand the newspaper, or what the newspaper says?
	MATTSON:	After a while of reading the same sentence over, yes.[4]
	ZUBER:	Okay, but can you understand, if we, you know, this thing going on in Syria with the chemical – have you watched the news lately? If you read something about what's going on . . . [redirecting] Who's the president?
	MATTSON:	[Silence.]
	MOM:	[Laughs.]
	ZUBER:	It doesn't matter if you know or not, because a lot of people don't care. Do you know what month it is?
	MATTSON:	April.
	ZUBER:	April of what year?
	MATTSON:	'18.
	ZUBER:	Now, if you told me it was April of 1841 and Abraham Lincoln's the president, I would have you evaluated.

(R. 36 at 7–8.)

[3] To the contrary, the word "no" was a direct and appropriate response to Attorney Zuber's question – however, it might not have been the one he wished to hear.

[4] With this statement, Mr. Mattson communicated that he required repetition before he could comprehend even somewhat complicated information that was being communicated to him. The ordinarily prudent lawyer would have seized upon this opportunity, and ensured that Mr. Mattson – at the very least – was able to repeat back to Attorney Zuber, in his own words, the concepts that Attorney Zuber meant to convey. The recording shows that Attorney Zuber did not do so. Nor did such statements appear in the plea hearing record.

J.

ZUBER:	You're not accused of [sexual assault] here,[5] but your old case – tell me what you did in your old case – do you even remember? This is where is gets embarrassing.
MATTSON:	Had sex with a minor.
ZUBER:	Huh?
MATTSON:	Had sex with a minor.
ZUBER:	How old?
MATTSON:	Sixteen.
ZUBER:	Hm?
MATTSON:	Sixteen.
. . .	
ZUBER:	Pretty touchy stuff, repeated sexual assault of the same child. At least three violations. Right? . . . Do you think that she should relive the event?
MATTSON:	No.
ZUBER:	I don't think he should. Do you?
SISTER:	I just want him to take it serious.
ZUBER:	I do too, and I don't sense he's doing – taking it serious. I can't have you go to court on Monday and plead to something that you can't even remember. Do you remember?

(R. 36 at 8,10.)

K.

ZUBER:	I don't need to pursue this with your mother and your half-sister, correct?
MATTSON:	Right.
ZUBER:	Is there some reason you want me to upset him?
SISTER:	No, not at all.
ZUBER:	You don't want me to go through this with him again –
SISTER:	No.
ZUBER:	Because I'm satisfied he remembers what he did.
SISTER:	Yeah.
ZUBER:	I think he's intelligent.[6]
. . .	
MATTSON:	*My anxiety kicks in; I'll black out. I will not remember. It happens in court.*
ZUBER:	That is not a defense.[7]

(R. 36 at 11.)

[5] Attorney Zuber's acknowledgement that 11CF322 was different from 17CM218 makes it difficult to understand why, later in the conversation, Attorney Zuber said that 11CF322 affected the advisability of a plea or not in this case.

[6] Attorney Zuber never explained the basis for this opinion, given all the information that came to light during the earlier parts of the conversation.

[7] Again, regardless of whether Mr. Mattson's medical symptoms provide a defense, they are relevant to the whether he was then capable of entering an intelligent, voluntary, and knowing plea.

L.	ZUBER:	Yeah, yeah, *but what I want to do* is not have him plead to all counts. *I want to get* several counts thrown out, does that make sense? And have him plead to two.
	MOM:	I don't think he abused that animal at all.
	ZUBER:	I don't want him to plead to that, because he told me he didn't – he told me he didn't.

(R. 36 at 13.)

M.	ZUBER:	You know what a PSI is? You meet with a probation and probation prepares their recommendation . . .
	MATTSON:	Then we're back to sex offender fucking bullshit, and I don't have money for that. They won't let me around my niece for two years, won't let me around nothing – took away my whole life.
	ZUBER:	Tell me … tell me – tell me, looking back, what you would've done different, if anything at all, back in April of last year. March, April.[8]

(R. 36 at 15.)

N.	ZUBER:	Tell me what counts one and two are in your own words.
	MATTSON:	Basically, saying I hit her.
	ZUBER:	Yup, and you have.
	MATTSON:	Playfully.
	ZUBER:	You didn't say that though, is the problem.
	MATTSON:	I thought I did.
	SISTER:	It is in the statement that it went both ways. That she mainly instigated it.
	ZUBER:	She's never gonna be charged – I'll tell you that, through experience.

(R. 36 at 15.) [9]

O.	ZUBER:	Yeah, I want to get this resolved so we keep him out of prison, is *my* goal.

(R. 36 at 17.)

[8] This reference to Mr. Mattson's charges in this case is a reference to accusations of which Mr. Mattson was then presumed innocent. Until Mr. Mattson was convicted, he could not end up on probation or on the sex offender registry. Given the disposition at stake, it is difficult to see how the *joint recommendation* for those two results advanced Mr. Mattson's goals of *avoiding* them.

[9] Mr. Mattson's insistence that he only hit the alleged victim playfully is consistent with defense theories that he neither (1) intended to cause bodily harm, nor (2) caused any bodily harm at all. Moreover, Attorney Zuber's implication in the last line of this excerpt, that the alleged victim would need to be charged for Mr. Mattson to assert self-defense, does not comport with reality.

P.	ZUBER:	I'm just waiting for him to tell me what he wants to do.

(R. 36 at 19.)[10]

Q.	ZUBER:	Do I want you to go to trial on five counts here?
	MATTSON:	No.
	ZUBER:	But you made all these incriminating statements. Why? Then there's no plea agreement on the five misdemeanors, right?

(R. 36 at 20.)

R.	ZUBER:	You want to take the two years probation, plead to two counts. One count of, what?
	MATTSON:	Domestic …
	ZUBER:	Domestic disorderly. Why is it domestic?
	MATTSON:	Because there was another person involved, I think.
	ZUBER:	If your mom smacked you against the head right now, with a closed fist, would that be a domestic against her, if she got caught?
	MATTSON:	Yes.
	ZUBER:	Why? Because she's …
	MOM:	Related.[11]

(R. 36 at 22–23.)

S.	ZUBER:	So tell me what the offer is.
	MATTSON:	2 years' probation. No prison time.[12]
	ZUBER:	Plea to what?
	MATTSON:	Two counts of domestic.
	ZUBER:	What's the first count?
	MATTSON:	Abuse.
	ZUBER:	Domestic abuse what? Disorderly?
	MATTSON:	Yeah.
	ZUBER:	Domestic abuse what?
	MATTSON:	Same thing.
	ZUBER:	Battery.
	MATTSON:	Oh.
	ZUBER:	*What's the difference between battery and disorderly, dummy?*

(R. 36 at 24.)

[10] Apparently, Attorney Zuber missed the several times Mr. Mattson told him that he wanted to pursue a legal avenue that would avoid probation. (R 36 at 2,14–15,17.) Two such avenues existed: (1) jury trial, and (2) a contested sentencing where, *at the very least*, Attorney Zuber would retain the right not to *jointly recommend* that which Mr. Mattson told him to work to avoid.

[11] Notably, Mr. Mattson never explained in his own words, the concept of what makes a charge "domestic." His mother answered the question for him.

[12] Attorney Zuber failed to correct Mr. Mattson's misunderstanding that there was *not* an agreement for "no prison time." In fact, per the plea hearing record, there was no sentencing agreement on 11CF322 at all.

T. ZUBER: Okay. You good to go for Monday? You're not going anywhere Monday, you with me? Just probation after court. You with me?[13]

(R. 36 at 26.)

Mr. Mattson and his loved ones told Attorney Zuber on at least six (6) occasions over the course of the hourlong conversation that he could not simply agree to probation. The *number of convictions* was not the important factor to Mr. Mattson; rather, the *disposition* was the most important part of the equation. (R. 36 at 2,14–15,17,22–23.) For example:

- "*Yeah except for probation. I can't see my kids –*." [Interrupted by Attorney Zuber.] (R. 36 at 2.)
- "*The only problem with probation, I can't –*." [Interrupted by Attorney Zuber.] (R. 36 at 14.)
- "*Then we're back to sex offender fucking bullshit, and I don't have money for that. They won't let me around my niece for two years, won't let me around nothing – took away my whole life.*" (R. 36 at 15.)
- "*But, probation, I lose my child custody –*." [Interrupted by Attorney Zuber.] (R. 36 at 17.)
- [Acquiescing.] "*So obviously I'm taking probation. But then I lose my life.*" (R. 36 at 22.)
- "*The thing with probation is, he loses –." "I lose my kid."* (R. 36 at 23.)

During the final lengthy consultation prior to Mr. Mattson's plea, Attorney Zuber never said: "Okay, then we can have a trial," "The decision of whether to go trial is yours alone," or anything making it clear to Mr. Mattson that the ultimate decision of trial-or-not was the client's – not the attorney's. Rather, Attorney Zuber told Mr. Mattson during their meeting that he was "not gonna let [Mr. Mattson] plead" to the charges unless he agreed to let Mr. Mattson do so. (R. 35 at 19:18–19:20.)

[13] Attorney Zuber was aware that Mr. Mattson would be pleading to two misdemeanors, and that this Court would have been within its rights to order a jail sentence forthwith, despite any agreement regarding sentencing recommendations. Attorney Zuber thus misled his client about the possible likely outcomes prior to the plea hearing.

On November 14, 2018, the trial court denied Mr. Mattson's postconviction motion. (R. 46 at 13.) According to the court, counsel testified that he went over the rights Mr. Mattson was waiving by entering a plea, the court conducted a thorough colloquy, and the defendant signed a Plea Waiver Form and Questionnaire. (R. 46 at 6–8.) For the court, this was enough to demonstrate that Mr. Mattson's plea was constitutionally adequate. In addition, the court found Mr. Mattson's claim that he did not understand that it was his right to choose whether to plead belonged to him and not to counsel was not credible. (R. 46 at 9.) The court found the tone of counsel's conversation with the defendant to be conversational rather than threatening, bullying, or confrontational. (R. 46 at 10.) The court found the reference to the defendant being a "dummy" to "have been done in a somewhat joking manner." (R. 46 at 10.)

ARGUMENT

I. The circuit court erred when it denied Mr. Mattson's postconviction motion for plea withdrawal based on Mr. Mattson's undisputed claim that he, a person with learning difficulties and diagnosed depression, wrongly believed that the right to plea or go to trial must be made and ratified by counsel and not by him.

A. Introduction and Standard of Review

This Court must allow Mr. Mattson to withdraw his plea because he did not understand that it was his right alone to decide whether to enter his plea. His pre-plea discussion of whether to go to trial or not was recorded, and it supports his claim that he did not understand that it was his right alone to decide whether to enter a plea or go to trial. Throughout the discussion, counsel belittled Mr. Mattson calling

him a "dummy" and cajoling him to "be really smart." (R. 35 at 0:47–0:50, 51:44–51:47, 54:04–54:08.) At one point, counsel said, "I'm not gonna let you plead…." (R. 35 at 19:18–19:20.) By ignoring this clear and undisputed recording, the trial court misused its discretion when it found that Mr. Mattson had not established a *prima facie* case that his plea was not knowing, intelligent, and voluntary. The trial court further erred when it did not shift the burden to the State to prove that Mr. Mattson did know that it was his right alone as indeed it could not.

The right to enter a plea belongs to a client, *see* ABA Criminal Justice Standards for the Defense Function 4-5.2(b)(i)(2015) and SCR 20:1.2, and a plea cannot be knowing, intelligent, and voluntary where a defendant does not understand that the decision to plea or go to trial – that is, the decision to exercise a fundamental constitutional right – is his, and his alone, to make rather than one made and ratified by the defense attorney. Wis. Stat. § 971.08, does not specifically require that a court engage a defendant in a plea colloquy that informs a defendant that it is his right to choose whether to enter a plea, rather than a decision made and ratified by counsel, but compliance with that statute does not make a plea constitutionally adequate. The statute is merely "designed to assist the trial court in making the constitutionally required determination that a defendant's plea is voluntary." ***State v. Bangert***, 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986). Misunderstanding about who the right to enter a plea belongs to is so fundamental, that it requires a court to allow plea withdrawal as a matter of right. ***Id***. at 283 (denial of constitutional right entitles defendant to withdraw his plea as a matter of right).

Whether Mr. Mattson's guilty plea was "knowing and voluntary" is a question of constitutional fact. ***State v. Brown***, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906. In reviewing whether Mr. Mattson has shown sufficient grounds to permit withdrawal of his guilty plea, this Court will accept the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous, but it determines independently whether those facts demonstrate that the Mr. Mattson's plea was knowing, intelligent, and voluntary. ***Id***. In ***Bangert***, the Wisconsin Supreme Court created the following process for determining whether defendants should be entitled to withdraw a plea on the grounds that it is not knowing, intelligent and voluntary. According to the Court:

> Where the defendant has shown a *prima facie* violation of *Section 971.08(1)(a)* **or other mandatory duties**, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

131 Wis. 2d at 274 (emphasis added).

Here, the pleas were not knowing and voluntary because counsel told Mr. Mattson that he was "not gonna let [him] plead" unless counsel agreed to let Mr. Mattson do so, and Mr. Mattson did not understand that the decision of whether to accept the offer or go to trial was exclusively his, rather than counsel's to make and ratify. (R. 35 at 19:18–19:20; R. 46 at 11.) Mr. Mattson therefore has established a prima facie case that his plea was not knowing, intelligent, and voluntary, and the trial court should have shifted the burden to the State to prove otherwise.

B. Mr. Mattson established by clear and convincing evidence that a manifest injustice occurred when he entered his guilty plea based on the mistaken belief that the decision to enter a guilty plea is one made and ratified by the defense attorney, rather than by the accused.

A defendant must be permitted to withdraw his plea, even after sentencing, where it is necessary to correct a manifest injustice. ***State v. Nawrocke***, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). A defendant seeking a postsentence plea withdrawal must show the manifest injustice by clear and convincing evidence. ***State v. Truman***, 187 Wis. 2d 622, 624, 523 N.W.2d 177 (Ct. App. 1994). However, when a defendant establishes the denial of a constitutional right, withdrawal of the plea is a matter of right. ***Bangert***, 131 Wis. 2d at 283.

The decision to plead guilty is a personal right of a defendant. *See* ***Boykin v. Alabama***, 395 U.S. 238 (1969). A plea that is not knowingly, intelligently and voluntarily entered violates fundamental due process. ***Bangert***, 131 Wis. 2d at 257. A manifest injustice therefore occurs when a defendant does not knowingly and voluntarily enter his plea. ***State v. Woods***, 173 Wis. 2d 129, 141–42, 496 N.W.2d 144 (Ct. App. 1992) (finding that a guilty plea that was neither knowing nor voluntary constitutes a manifest injustice). Thus, a manifest injustice occurs when, as here, the accused enters a guilty plea because of a mistaken belief that the decision to enter a plea or go to trial – that is, the decision to exercise a fundamental constitutional right – must be made and ratified by the defense attorney, rather than by the accused. ***State v. Anderson***, 2002 WI 7, ¶ 23, 249 Wis. 2d 586, 638 N.W.2d

301 (finding a plea invalid where the court did not conduct colloquy regarding right to jury trial).

Mr. Mattson did not knowingly enter his guilty pleas. He did not know that he – and only he – had the right to decide whether to exercise or waive his right to trial. The waiver of fundamental rights "must be an *intentional* relinquishment or abandonment of a *known* right or privilege." ***Id***. at ¶ 23 (emphasis added). Mr. Mattson testified at the postconviction relief hearing that he did not understand the allocation of authority under SCR 20:1.2, or the nature and actual substance of his trial rights. (R. 62 at 20.) Specifically, he did not understand that the decision of whether to accept the offer or go to trial was exclusively his, rather than Attorney Zuber's to make and ratify. (R. 62 at 20.) If Attorney Zuber ever communicated that to Mr. Mattson, it was not during the hourlong conversation, one business day prior to the plea hearing, about whether Mr. Mattson would be accepting the offer. That conversation is devoid of any advice from Attorney Zuber about the allocation of authority regarding such decisions pursuant to SCR 20:1.2. On the contrary, counsel's claim that he was "not gonna" allow Mr. Mattson to enter a plea unless he was satisfied supports Mr. Mattson's claims directly.

As for Mr. Mattson's plea hearing, the colloquy was perfunctory; that is, Mr. Mattson provided only one-word answers to the trial court's questions throughout the entire hearing. (R. 55 at 1–11.) The Wisconsin Supreme Court has specifically said that "it is no longer sufficient for the trial judge merely to perfunctorily question the defendant about his understanding of the charge," nor are perfunctory

affirmative responses by the defendant sufficient to prove that he "understands the nature of the offense." ***Bangert***, 131 Wis. 2d at 268–69.

Additionally, while the trial court paraphrased the seven statements of constitutional rights listed on the plea questionnaire and waiver of rights form and perfunctorily asked Mr. Mattson if he was giving up each right, the colloquy fell short of the Wisconsin Supreme Court's stated requirements. ***Brown***, 2006 WI 100 at ¶¶ 71–77 (explaining that a court's probing questions may not always be necessary, but they help to ensure a defendant's understanding and they help to complete the hearing record, especially where the defendant is at a cognitive disadvantage and where there was no rendition by defense counsel of a meaningful discussion of the defendant's rights). At the time of the plea hearing, Mr. Mattson was a high-school dropout who had attempted to acquire his High School Equivalency Diploma six times, but never passed. (R. 62 at 17; R. 33 at 1–2.) He was diagnosed with severe reading comprehension issues, as well as mental health issues, including severe anxiety and panic disorders. (R. 34 at 1–3; R. 33 at 1–2.) Given Mr. Mattson's meager education and his mental health disorders, the perfunctory colloquy in this case departed from what Wisconsin law requires. "The less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands" the various rights and concepts discussed in plea colloquies. ***Brown***, 2006 WI 100 at ¶52. As such, the record of the plea is inadequate to conclude establish that the trial court determined that Mr.

Mattson understood his fundamental right to a jury trial. Therefore, he did not knowingly waive the right.

Further, Mr. Mattson did not voluntarily enter his guilty pleas. At the postconviction relief hearing, the trial court learned that Attorney Zuber's discussion with Mr. Mattson on the Friday prior to Mr. Mattson's April 16 plea hearing had been recorded. During the discussion, Mr. Mattson made several positions clear: (1) the primary objective of the representation was to avoid probation because he knew or believed that the Department of Corrections' ("DOC") sex offender rules would prevent him from seeing his children;[14] (2) that he did not wish to plead guilty to battery or disorderly conduct, to each of which the agreement called for a plea, because he did not feel that he was guilty; and (3) that he did not wish to be punished for mistreating animals, as he maintained his innocence on that count as well. (R. 35 at 1:56–1:57, 4:01–4:03, 4:09–4:31, 29:06–30:04, 37:06–37:08, 37:37–37:40, 41:16–41:21, 48:09–48:33.)

Rather than presume his client innocent, explain to Mr. Mattson that he has the right to decide himself about whether he wished to have a jury trial, or explore means of achieving Mr. Mattson's stated goals, trial counsel had a different sort of conversation. Trial counsel never told Mr. Mattson that the decision to go trial was

[14] The Wisconsin Rules of Professional Conduct demand that attorneys "abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." SCR 20:1.2(a). Attorneys cannot override a client's clearly stated objectives for the representation. This case illustrates the difference between (1) adversary counsel tasked with abiding by a client's objectives and (2) a guardian *ad litem* tasked with acting in a person's best interests. This case is a classic example of adversary counsel "knowing what's best" for a client and coercing the client into a strategy contrary to his express objectives.

solely Mr. Mattson's. Instead, trial counsel interrogated, belittled, embarrassed, and coerced his own client into pleading guilty. (R. 35 at 0:47–0:50, 4:46–4:56, 8:25–8:27, 16:40–16:46, 26:54–27:07, 30:05–30:17, 51:44–5147, 54:06–54:07.) The framework of the hourlong conversation involved a series of irrelevant and belittling questions where only "correct answers" were accepted and the only "correct answer" was "I waive my right to a trial." (R. 35 at 56:16–56:31.)

Attorney Zuber ignored – and indeed, by the time of the postconviction motion hearing – had forgotten Mr. Mattson's stated reasons for wishing to avoid probation. (R. 62 at 30; R. 43 at 22–23.) Trial counsel mainly used three tactics for fatiguing Mr. Mattson into entering his pleas: (1) insisting on Mr. Mattson's guilt in this case, (2) repeatedly interrupting Mr. Mattson's refusal to have his lawyer *jointly recommend* probation, and (3) irrelevantly bringing up embarrassing prior sexual assault charges from 2011. (R. 43 at 22–23.) The recording reveals that Attorney Zuber dismissed any possibility of a trial, called Mr. Mattson a "dummy," said he would not let Mr. Mattson plea except under certain conditions, and ignored Mattson's claims that he was innocent and that he could not accept any sentence with probation as it would keep him from seeing his children and niece. (R. 35 at 4:01–4:03, 19:18–19:20, 28:23–28:29, 29:06–30:04, 37:06–37:08, 41:53–42:04, 48:09–48:33, 51:44–51:47, 54:04–54:17.) Trial counsel repeatedly made comments to the effect that taking the plea deal was "the smart way to go" and to "be really smart here" by acquiescing to counsel's plan to take the plea deal over Mr. Mattson's protestations that he did not want to simply agree to DOC rules that would

preclude him from seeing his own children. (R. 35 at 0:47–0:50, 54:04–54:08.) Eventually, after an hour of trial counsel refusing to honor Mr. Mattson's wishes, Mr. Mattson wore down and acquiesced to trial counsel's plan to take the plea deal. (R. 35 at 47:04–47:30.) The fact that Attorney Zuber has not had a jury trial in federal or state court in over six years arguably explains his deliberate insistence upon Mr. Mattson's pleading. (R. 62 at 41.)

The record supports Mr. Mattson's claims that he pleaded guilty because he felt that Attorney Zuber forced him to do so and because he felt that he did not have a choice. (R. 62 at 30.) It supports his claims that he never understood that he – Mr. Mattson – had the exclusive authority to decide whether he would accept an agreement or go to trial. (R. 62 at 30.) Mr. Mattson did not know why Attorney Zuber might "badger" him into taking a deal if it was his decision. (R. 62 at 30.) Still, that is what occurred. Accordingly, Mr. Mattson did not enter his pleas knowing, intelligently and voluntary. He entered his pleas in this case because trial counsel made it clear, by his conduct and his statements, that he would not pursue Mr. Mattson's stated goals of avoiding probation and the sex offender registry. (R. 35 at 4:01–4:03, 29:06–30:04, 54:04–54:17.) He believed Attorney Zuber when counsel told Mr. Mattson during their meeting that was "not gonna let [Mr. Mattson] plead" except for certain conditions. (R. 35 at 19:18–19:20.) As such, his plea was not voluntary, intelligent, and knowing.

C. Mr. Mattson established a *prima facie* case that he did not know that it was his right alone to decide whether to enter a plea, and the court should have shifted the burden to the State to prove otherwise.

A defendant establishes a *prima facie* case where he or she demonstrates that the plea colloquy does not "satisfactorily enumerate, explain, or discuss the facts or the elements" in a manner "that would establish for a reviewing court that [the defendant] understood the nature of the charges to which he pleaded guilty." ***Brown***, 2006 WI 100 at ¶ 79. Mr. Mattson easily satisfied this burden on this case. The recorded conversation between Mr. Mattson and Attorney Zuber occurred one business day before the motion hearing, and it provides clear and convincing evidence of Mr. Mattson's lack of understanding of the agreement and the nature of the trial rights being waived. No evidence exists that Attorney Zuber, between the recorded April 13 conversation and the April 16 plea hearing, somehow imparted a deeper and more sophisticated understanding of those things that Mr. Mattson did not understand during the April 13 office consultation. For example, Mr. Mattson could not explain during his recorded discussion with counsel the difference between battery and disorderly conduct, a fact which caused Attorney Zuber to belittle Mr. Mattson *via* name-calling. (R. 62 at 48; R. 35 at 51:44–51:47) Nor could Mr. Mattson explain during that same discussion what made a charge subject to the domestic abuse penalty enhancer under Wis. Stat. § 968.075(1)(a). (R. 35 at 47:30–48:08.) No reason exists for this Court to assume that Mr. Mattson magically came to understand these things between April 13 and April 16, 2018. Nor does any reason exist to assume that Mr. Mattson came to understand the allocation of authority under SCR 20:1.2 prior to the time he entered his pleas in this case. Therefore, Mr.

Mattson has established a *prima facie* case that his pleas were not knowing, intelligent, and voluntary.

The trial court's findings that counsel had called Mr. Mattson a "dummy" in a "joking manner" and that Mr. Mattson is not credible, are both a misuse of discretion and mostly irrelevant. (R. 46 at 9–10,13.) A court misuses its discretion if the record demonstrates that the trial court failed to exercise its discretion, the facts do not support the trial court's decision, or the trial court applied the wrong legal standard. ***Finley v. Culligan,*** 201 Wis. 2d 611, 548 N.W.2d 854 (Ct. App. 1996). In this case, the facts do not support the trial court's finding that Mr. Mattson was not credible. Nothing in the recorded pre-plea discussion contradicts anything that Mr. Mattson has averred on appeal. The trial court, for example, pointed to no specific reasons for doubting Mr. Mattson. However, the outcome of this appeal does not depend upon a credibility determination. It depends upon the circuit court's finding of constitutional fact that Mr. Mattson made a knowing and voluntary plea. On this point, the appellate court pays no deference to the finding of the circuit court. ***State v. Williams***, 2003 WI App 116, ¶ 10, 265 Wis. 2d 229, 666 N.W.2d 58. Even discounting Mr. Mattson's credibility, which this Court should not do, the recording of the pre-plea discussion between Mr. Mattson and counsel is sufficient to establish a *prima facie* case that the plea was not knowing, intelligent, and voluntary. Having failed to find that Mr. Mattson established a *prima facie* case, the

trial court compounded its error by failing to shift the burden to the State to prove that Mr. Mattson's plea was knowing, intelligent, and voluntary.

As such, Mr. Mattson has made a clear and convincing showing that he did not enter a knowing and voluntary plea *because* he did not know or understand that he – and only he – had the right to decide whether to exercise or waive his right to trial, *and* Attorney Zuber had successfully browbeaten him into acquiescence. More importantly, Mr. Mattson's misunderstanding about who the right to enter a plea belongs to is so fundamental that it requires plea withdrawal as a matter of right. See ***Bangert***, 131 Wis. 2d at 283. Having established a *prima facie* case that his plea was not knowing, intelligent and voluntary, the court should have shifted the burden to the State to prove otherwise. Because it did not, it erred as a matter of law when it failed to apply the correct law to the facts.

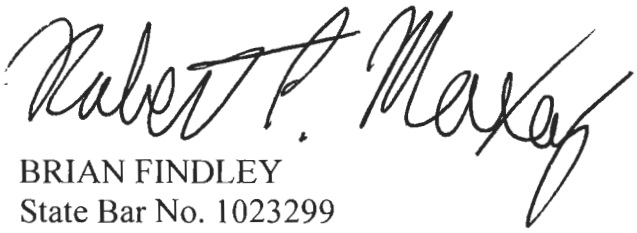
CONCLUSION

This is not a typical plea withdrawal case where counsel and the defendant disagree about what was said. On the contrary, a recording of the pre-plea discussion lists exactly what was said, and it is not pretty. Counsel insulted, browbeat, threatened and cajoled his semi-literate, low-functioning and depressed client into agreeing to enter a plea. More important for the purposes of this appeal, the recording supports Mr. Mattson's claim that he did not understand that it was his right alone to choose whether to enter a plea or go to trial. Because it does so, this Court must allow Mr. Mattson to withdraw his pleas.

For these reasons, Nathaniel L. Mattson, the defendant-appellant, respectfully requests that this Court vacate his convictions, reverse the circuit court's order denying his postconviction motion to withdraw his pleas, and remand for further proceedings.

Dated this 7th day of June, 2019.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 6732 words.

Dated this 7th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

WITH RULE 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 § 809.19(12). I further certify that:
This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2019AP000201 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NATHANIEL LEE MATTSON,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR DOUGLAS COUNTY, CASE NO. 17 CM 218 THE HONORABLE GEORGE L. GLONEK, PRESIDING

DEFENDANT-APPELLANT'S APPENDIX

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INDEX TO APPENDIX

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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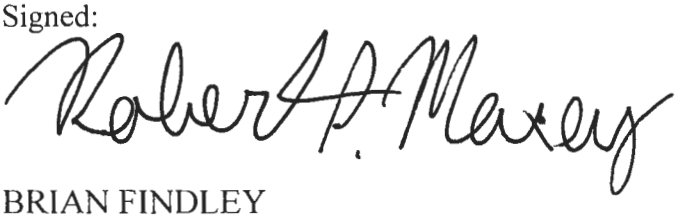

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