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 THE ORDER OF THE CIRCUIT COURT FOR DOUGLAS COUNTY, CASE NO. 17CM218
THE HONORABLE GEORGE GLONEK PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

I. **Did the record show, by clear and convincing evidence, that Mattson knew it was his decision whether to accept a plea agreement such that he freely, voluntarily, and intelligently entered his guilty pleas, where the record included Mattson's signed plea questionnaire wherein he affirmed that he did so enter his pleas, Mattson's answers during a plea colloquy with the judge where he affirmed he was so entering his pleas, the testimony of his lawyer where he was satisfied Mattson had so entered his pleas, and a conversation from three days before the plea wherein Mattson repeatedly indicated that Mattson, not his lawyer, would be the one accepting the agreement?**

The trial court answered "yes."

II. **Did Mattson establish that his trial counsel was ineffective and that he was prejudiced by any ineffectiveness?**

The trial court answered "no."

STATEMENT REGARDING PUBLICATION AND ORAL ARGUMENT

The State does not believe that oral argument or publication is warranted here. Arguments can be sufficiently developed and presented by brief as this case involves application of facts to well-established law.

STATEMENT OF THE CASE AND FACTS

On May 2, 2017, Mattson was charged by Criminal Complaint with three counts of battery, one count of disorderly conduct, and one count of mistreating animals. (R. 2). The alleged victim reported that Mattson had hit her, grabbed her, held her down, and hit her while she was on the floor. (R. 9). The alleged victim reported that earlier in 2017, Mattson had thrown boiling soup at her. (R. 9). In an interview with law enforcement, Mattson admitted he will hold the victim down and does punch her in the arms frequently. (R. 9). Mattson also admitted to flinging soup at the alleged victim. (R. 9).

Attorney Jamy Johansen was appointed to represent Mattson through the public defender's office on May 3, 2017. (R. 6). Attorney Johansen withdrew on June 8, 2017, as Mattson had retained Attorney Stephen Zuber to represent him. (R. 11, R. 13). Attorney Zuber has practiced law since 1991 and estimates 95% of his law practice to be criminal defense work. (R. 62:53).

Attorney Zuber had previously represented Mattson in Douglas County criminal file 11CF322, and Attorney Zuber was able to secure a plea agreement for Mattson in that file in which a deferred judgment of conviction agreement on a felony sexual assault charge was entered. (R. 46:2-3).

Mattson testified that he switched from Johansen to Zuber in this case because he wanted someone to help him more than Johansen was, and he had a preexisting relationship with Zuber. (R. 62:23).

Between June 26, 2017 when Attorney Zuber became counsel of record in this matter, and April 16, 2018 when Mattson entered his pleas, Mattson appeared with Attorney Zuber for five hearings. (R. 46:3). Pursuant to the plea agreement reached in this file, Mattson pled to two misdemeanors and was placed on probation with no additional jail time. (R. 46:3-4). The defense also stipulated that by virtue of the plea, the deferred agreement in 11CF322 would be terminated and a Pre-Sentence Investigation was ordered. (R. 46:4).

Prior to entry of his plea on April 16, 2018, a plea questionnaire/waiver of rights form was filed with the Court. (R. 37). Mattson's signature appears on the second page, and by signing the document, Mattson affirmed that he had read the entire document with his attorney and answered all questions truthfully. (R. 37). The form indicates that Attorney Zuber went through all of Mattson's constitutional rights with him. (R. 37). The form indicates that Attorney Zuber explained the elements of the crimes to Mattson, which is further evidenced by an underlined portion of the

form on Page 1. (R. 37). The form indicates that Mattson was entering his plea of his own free will, that no one had threatened or forced him to enter the plea, and that no promises were made to him to get him to enter his plea. (R. 37). The form also indicates "I am fully satisfied with the legal representation that I have received from my attorney, Stephen R. Zuber" and that statement is followed by Mattson's signature. (R. 37). Attorney Zuber signed the form indicating he had discussed the document with Mattson and that he believed Mattson's pleas were freely, voluntarily, and intelligently made. (R. 37). Attorney Zuber also later testified that he was satisfied Mattson's plea was knowingly, voluntarily, and intelligently made. (R. 62:63).

At the plea hearing, the trial court had a plea colloquy with Mattson. Mattson acknowledged that his signature appeared on the plea questionnaire, and that prior to signing it, he had read through it and understood it. (R. 55:5). Mattson acknowledged that he understood the rights he was giving up by entering a plea. (R. 55:5). Mattson acknowledged that no one had made any promises or threats to get him to enter his pleas. (R. 55:6).

Following the filing of Mattson's motion for postconviction relief, a postconviction motion hearing was

held on September 24, 2018. At the hearing, Mattson testified that the Friday before his plea hearing (which would have been April 13, 2018), he met with Attorney Zuber at his office. (R. 62:30). He claimed that Attorney Zuber forced him to plead guilty. (R. 62:30).

In support of this claim, Mattson introduced a recording of the April 13 meeting, along with a transcript of said meeting. Despite having never heard the recording before (R. 62:9), Mattson testified after hearing a few seconds of the recording in open court that the recording was accurate, and the trial court admitted the recording and transcript. (R. 62:15-16).

Mattson's credibility during the postconviction motion hearing was an issue. In addition to the fact that his testimony contradicted the plea questionnaire and the answers he had given the trial court at the plea hearing, Mattson testified that he had not gone over the plea questionnaire with Attorney Zuber, and had never talked with Attorney Zuber about it. (R. 62:27). But then on re-direct, Mattson testified that Attorney Zuber had had him sign a portion of the document that dealt with his satisfaction with Attorney Zuber. (R. 62:32, 34-35). Mattson was also asked why, if he believed his attorney had the sole authority to accept a plea, his attorney would

need to "bully" Mattson into accepting the same plea when Mattson's consent was apparently not needed, which was something Mattson was unable to explain. (R. 62:30).

A review of the transcript[1] of the April 13 meeting showed that there were numerous points in time where Mattson and Attorney Zuber had discussions about Mattson's decision whether to accept a plea. Following the line highlighted by Mattson in his brief wherein Attorney Zuber talks about letting Mattson plead (which occurs early in the meeting and is made in the context of ensuring Mattson knows the facts of the case), the following exchanges occur:

> P. 22 – After Attorney Zuber says he wants to get three of the five counts thrown out, Mattson replies, "So do I. *Obviously, I'm taking probation*." (emphasis added)
>
> P. 22 – Attorney Zuber asks Mattson, "So, *what do you want to do* Monday?" which would have been the day Mattson entered his guilty pleas. Mattson replied, "*Obviously, I'm taking the probation*." Attorney Zuber replies, "*You want to take the two years probation*, plead to two counts." (emphasis added)

[1] The trial court noted that this transcript was not always accurate, including sometimes designating the wrong person as speaking. (R. 46:10).

P. 25-26 – Following discussion about mitigating factors to be argued at sentencing, Attorney Zuber says of the plea offer, "So let's grab this thing. *Do I have your permission*?" (emphasis added), to which Mattson replies "yes."

P. 26 – Attorney Zuber asks Mattson to tell him what a jury trial is and indicates that they've gone through that "so many times," to which Mattson replied he knew what a jury trial was. Attorney Zuber then pointed out, with regard to the deferred judgment of conviction agreement, that only one conviction was needed to terminate the agreement, and Mattson replied he was already "guilty" of two of the five counts. (R. 36).

The trial court denied Mattson's motions for postconviction relief. The trial court noted that it went through the same colloquy it uses on other cases and that this trial court's specific colloquy was upheld as sufficient in the unpublished case of *State v. White*. (R. 46:6-8). The trial court, having listened to the entire recording of the April 13 meeting and reviewed the transcript, specifically found that "the tone of the entire recorded conversation… is conversational (and sometimes jovial) throughout. In this Court's opinion, Attorney

Zuber is not threatening, bullying or inappropriately confronting Defendant during this meeting." (R. 46:10). The trial court found that, with regard to Mattson's assertion that Attorney Zuber had called him a "dummy," that while this was heard on the tape, it was done by Attorney Zuber "in a somewhat joking matter" and that "during the office meeting, Attorney Zuber repeatedly told Defendant that he was 'not stupid' and actually said to Defendant's sister, 'I think he's intelligent—'". (R. 46:10).

The trial court found that during the April 13 meeting, which was approximately one hour, Attorney Zuber discussed many facets of the case with Defendant and his family, including "the State's plea offer, as well as the difficulties and challenges involving the case." (R. 46:10). During the meeting, Mattson admitted he was disorderly as charged in the Amended Complaint. (R. 46:11). The trial court found that Attorney Zuber correctly explained to Mattson that a conviction on any of the charges in the Amended Complaint would result in termination of the deferred judgment of conviction agreement in 11CF322. (R. 46:11). The trial court noted that several times throughout the meeting, Mattson told Zuber that he was "obviously" taking probation, and when

Attorney Zuber asked his permission to accept the plea offer, Mattson said "yes." (R. 46:11).

The trial court found that the tape recording did not establish that Attorney Zuber improperly pressured or bullied Mattson into entering his guilty pleas three days later. (R. 46:9). The trial court also found Mattson's testimony to be lacking credibility. (R. 46:9).

The trial court concluded that the evidence showed that Mattson entered his pleas knowingly, voluntarily, and intelligently. (R. 46:12). The trial court concluded that Attorney Zuber did not improperly coerce or induce Mattson into entering his guilty pleas. (R. 46:13). The trial court rejected Mattson's assertion that he did not understand it was his option whether to accept a plea agreement. (R. 46:12).

This appeal follows.

ARGUMENT

I. Clear and convincing evidence exists in the record that the defendant's plea was knowingly, voluntarily, and intelligently made, and the defendant has not shown that trial counsel was ineffective or that prejudice resulted from any ineffectiveness.

Whether a defendant's plea was knowing, intelligent, and voluntary is a question of constitutional fact. *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis.2d 594, 716 N.W.2d 906. When a defendant seeks to withdraw a guilty plea after sentencing, the defendant must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in "manifest injustice." *Id.* at ¶ 18. The circuit court, sitting as fact-finder, is the ultimate arbiter of witnesses' credibility. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶ 19, 257 Wis.2d 421, 651 N.W.2d 345.

With regard to the alleged deficiency of a plea colloquy, a defendant must make a prima facie showing that the plea colloquy was defective because the court violated § 971.08 or other court-mandated duties, and that in fact the defendant did not know or understand the information that should have been provided at the plea colloquy. *State v. Howell*, 2007 WI 75, ¶ 27, 201 Wis.2d 350, 734 N.W.2d 48. If a defendant establishes a prima facie showing that the

plea colloquy was defective, then the burden shifts to the State to prove, by clear and convincing evidence, that the plea was knowing, voluntary, and intelligent. *Id.* at ¶ 40. The State may rely on evidence outside the plea hearing transcript in order to make this showing. *State v. Hoppe*, 2009 WI 41, ¶ 47, 317 Wis.2d 161, 765 N.W.2d 794. If the State carries its burden, the plea remains valid. *Id.* at ¶ 44.

With regard to ineffective assistance of counsel, in *Strickland v. Washington*, the Supreme Court set forth a two-part test for determining whether trial counsel's actions constitute ineffective assistance. The defendant must first show that counsel's performance was sufficient, and must then also demonstrate that this deficient performance was prejudicial to his or her defense. 466 U.S. 668, 687 (1984). In order to satisfy the prejudice prong, the defendant must show that there is a reasonable probability, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *State v. Bentley*, 201 Wis.2d 303, 312, 548 N.W.2d 50 (1996).

In this case, Mattson asserts two claims which are incompatible and incongruent. On the one hand, Mattson seeks to withdraw his plea because, at the time the plea

was made, he asserts he did not know it was his decision whether to accept a plea agreement (the *Bangert* claim). Yet, at the same time, Mattson asserts that Attorney Zuber "bullied" and "browbeat" Mattson into accepting the plea agreement (the *Strickland* claim). The former indicates a lack of knowledge about his rights. The latter indicates the opposite, that he did know his rights but the will to exercise those rights in the manner in which he wanted was overcome by the coercive tactics of another. Either Mattson did not know whose decision it was to accept a plea, or he did know and his attorney coerced him into giving up that right against his will. It cannot be both, and yet that is what Mattson is claiming here.

The only time during this case that Mattson indicated that he believed his lawyer was in control of whether he could accept a plea, or alternatively that his lawyer bullied him into taking a deal he did not want to accept, was at his postconviction motion hearing. At that hearing, the trial court found Mattson to lack credibility, a finding that is supported by the record. First, Mattson's credibility is obviously an issue because his claims made at the postconviction motion hearing directly contradict what Mattson told the judge during the colloquy (that no one had threatened or promised him anything to get him to

enter this plea), and directly contradict the plea questionnaire (wherein he affirmed that no one forced him to enter the plea and that he had gone over the form with his lawyer). Additionally, Mattson testified at the postconviction motion hearing on cross-examination that he had had no discussions about the plea questionnaire form with Attorney Zuber. He then contradicted himself again on re-direct when he testified that Attorney Zuber directed him to fill out information on the form regarding his satisfaction with Attorney Zuber. After Mattson testified that Attorney Zuber bullied him into accepting the plea agreement, Mattson was unable to reconcile why Attorney Zuber would have to bully Mattson into doing anything if the decision whether to accept a deal was solely Attorney Zuber's to make.

Mattson claims that Attorney Zuber's conduct, three days removed from the actual plea hearing itself, coerced him into taking the plea deal. In particular, Mattson points to one moment from his meeting with Attorney Zuber on April 13, 2018, less than 20 minutes into the conversation, where Attorney Zuber says he is not going to let Mattson plead unless they went over the file again. At numerous points *after* that is stated, however, the transcript conclusively establishes that Mattson understood

it was his decision to accept or reject the deal and that this isolated comment did not confuse that understanding.

Following the 45-minute mark of the conversation after much has been discussed about the case and Mattson's rights, Mattson shows an understanding that *he* is the one making the decision about "taking probation," which was what the plea offer contemplated. Attorney Zuber confirms with Mattson, "*You want to take the two years probation*, plead to two counts?" Attorney Zuber later says to Mattson, regarding the plea agreement, "So let's grab this thing. *Do I have your permission?"* to which Mattson replied, "Yes." If there was any sort of confusion about who could accept a plea agreement (which the State does not concede), it plainly was not present at the end of the meeting when Attorney Zuber repeatedly defers to Mattson on whether to accept the agreement, including asking his permission to "grab" it, as well as Mattson repeatedly indicating the agreement is his to take.[2]

[2] Mattson repeatedly argues that, because his goals at the outset of the case were to avoid a conviction and probation and that either outcome was "unacceptable," his eventual acceptance of both of those things must have been the result of Attorney Zuber bullying and browbeating him into accepting them. There is a difference between unacceptable and undesirable. While Mattson no doubt hoped for a better outcome, his lawyer went through the facts of the case with him and pointed out that only one conviction would be required to terminate the deferred judgment of conviction agreement. Mattson conceded that he engaged in conduct that would support at least one new criminal conviction, if not more. Faced with this information, Attorney Zuber explained to Mattson

The plea questionnaire form and the record from the plea hearing further dispel any notion that Mattson believed that Attorney Zuber alone had the right to accept a plea agreement. Boxes are checked regarding *Mattson's* constitutional rights that *he* is giving up. On the second page of the form, the form explicitly states "I have not been threatened or forced to enter this plea," refuting a claim that his attorney forced him to take a plea he did not want to take. Mattson signed the form indicating he had gone through it with his lawyer and understood it. Mattson then affirmed on the record during the colloquy that he had gone through the plea questionnaire, and that no one had threatened or promised him anything to get him to give up *his* rights and plead guilty.

The trial court specifically found, after reviewing the audiotape from the April 13 meeting and reviewing the transcript of the same, that the tone of the entire conversation was conservational, and sometimes jovial. The court specifically found that Attorney Zuber was not threatening, bullying, or inappropriately confronting Mattson during this meeting. These findings are supported by review of the transcript and the recording itself.

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why going to trial and losing (which was substantially likely) would be worse than accepting a plea agreement now.

Attorney Zuber did not inappropriately threaten or coerce Mattson into taking a deal, particularly when one considers that his final decision to accept the deal was three days removed from what Mattson now says is the browbeating and bullying that forced him to plead guilty. While the State does not condone some of the language used by Attorney Zuber (particularly this reference to Mattson being a "dummy"), the trial court found that this comment was done in a somewhat joking manner, and not in the mean, forceful, or bullying manner Mattson wants this Court to believe happened. When considering the dynamics of their relationship, it is worth noting that Attorney Zuber was sought out by Mattson at the outset of this case, partly because of his familiarity with him, and no doubt also because Attorney Zuber had secured him a very favorable result on his 2011 sexual assault file. It is not as if this was the one and only time Mattson met with Attorney Zuber, did not have any familiarity with him, and was browbeaten into submission by the scary authority figure he makes Zuber out to be. To the contrary; Mattson and Attorney had known each other for years and had met several times and discussed the case. Viewing this April 13 conversation in a vacuum is not appropriate (and even if it

is viewed in a vacuum, it still is not the coercive meeting Mattson makes it out to be now).

In its written hearing memorandum, the trial court made specific reference to the unpublished case of *State v. White*, 2015 WI App 20, 360 Wis.2d 491, 864 N.W.2d 121, a case involving the same trial court, virtually the same plea colloquy, and the same sort of *Bangert* claim as this case. The *White* court affirmed the trial court's decision to deny White's motion to withdraw his plea. Mattson does not discuss this case in his brief.

The only difference between this case and *White* is what is claimed to be the part of the plea agreement not understood by the defendant. In *White*, the claim was that White did not understand what an imposed and stayed sentence was[3]. *Id.* at ¶ 22. The trial court concluded, and this Court agreed, that ample evidence existed in the record to show, by clear and convincing evidence, that White's plea was knowingly, intelligently, and voluntarily made. In *White*, this Court looked to the testimony of trial counsel (who contradicted his client and testified that he had explained to him what an imposed and stayed

[3] The *White* court noted that this trial court did not explicitly rule on whether a prima facie showing had been made, but affirmed the trial court based on evidence received at the motion hearing. Similarly, the trial court here did not explicitly rule on whether a prima facie showing had been made. *White*, ¶ 22.

sentence was), the contents of the plea questionnaire itself wherein the concept of an imposed and stayed sentence is explained, and the fact that the trial court explained the concept during the colloquy itself. *Id.* This was also buttressed by the trial court's finding that White was not a credible witness after hearing him testify.[4] *Id.* at ¶ 23.

In this case, the only major difference between White and Mattson for purposes of a *Bangert* analysis is that Mattson claims he did not know it was his decision to enter a plea and thought it was his attorney's decision. Just like in *White*, Mattson's claim is contradicted by his own counsel, the plea questionnaire, the colloquy with the trial court, and additionally by the transcript of his attorney meeting three days before the plea.

In sum, Mattson's claim that he should be allowed to withdraw his plea because he did not know the decision whether to accept the plea was his fails. The evidence establishes clearly and convincingly that Mattson knew the decision was his. At numerous points on April 13, at the

[4] Because the transcript of the April 13 meeting, the plea questionnaire form, and Mattson's answers during the plea colloquy all support the conclusion that Mattson knew it was his decision whether to accept a deal and that no one had forced him to take any deal, contrary to Mattson's arguments now, his credibility at the time of the motion hearing is extremely important, since it is the one and only time during this case that he asserted he did not understand whose decision it was whether to accept a plea offer.

end of the nearly hour-long conversation about the case, Mattson talks about the deal *he* will take and Attorney Zuber asks *Mattson's permission* to accept it.

Similarly, Mattson's claim that Attorney Zuber was ineffective and that Mattson was prejudiced by any ineffectiveness fails. The trial court specifically found that the April 13 meeting on which Mattson now places so much emphasis was not the coercive, bullying encounter that Mattson makes it out to be. Additionally, on the plea questionnaire, Mattson acknowledges the rights he is waiving and that no one forced him to accept the plea. During the plea colloquy, Mattson acknowledged that he knew his rights and that no one had promised him or threatened him to get him to plead guilty.

CONCLUSION

For the foregoing reasons, the State asks this Court to affirm the trial court and deny Mattson's request to vacate the judgments of conviction and permit him to withdraw his guilty pleas in this matter.

Dated this 23rd day of August, 2019

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Mark Fruehauf
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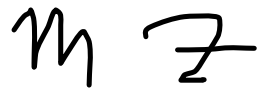
CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is monospaced font, double-spaced, with a 1.5 inch margin on the left side, and a one-inch margin on all other sides. The length of this brief is 23 pages.



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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, which complied 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. 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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