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 REPLY BRIEF

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ARGUMENT

Nathaniel L. Mattson, the defendant-appellant, replies to the State's brief as follows:

I. Mr. Mattson's two stated claims for relief are not "incompatible" and "incongruent" as claimed by the State.

Contrary to the State's Claims, Mr. Mattson's two asserted claims, that being that he did not know it was his right alone to decide whether to enter a plea and that Attorney Zuber had successfully browbeaten him into acquiescence, are not "incompatible and incongruent." (State's Br. at 10–11.). Specifically, the State asserts that this incompatibility and incongruency is because the former indicates a lack of knowledge about his rights and the latter indicates the opposite. (*Id*. at 11.) However, this is incorrect. Mr. Mattson's lack of knowledge allowed counsel to browbeat him into agreeing to a plea that he did not understand and did not want. Attorney Zuber 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.) Counsel's statement itself demonstrates how counsel both misinformed Mr. Mattson and coerced his plea.

II. Mr. Mattson has provided clear and convincing evidence that his plea violates fundamental due process.

Once Mr. Mattson has stated a prima facie case that he did not know a necessary component of his plea, the burden shifts to the State to prove that he did understand his plea, but the State has failed this duty entirely. While the State claims Mr. Mattson did in fact know his rights, it has offered no clear and convincing evidence that corroborates this claim. Mr. Mattson, however, has furnished a clear and undisputed recording of his conversation with Attorney Zuber that proves by clear and convincing evidence that his plea was not knowing, intelligent, and voluntary. Accordingly, unlike the State, Mr. Mattson has provided clear and convincing evidence that his plea violates fundamental due process, and as such, constitutes a manifest injustice. ***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).

Additionally, in refuting Mr. Mattson's claim that 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, the State asserts in a footnote that there is a difference between "unacceptable and undesirable." (State's Br. at 13.) However, this assertion gravely misconstrues the issue in this case. Mr. Mattson's eventual acceptance of the pleas in this case was the direct result of what he thought was *possible* and *impossible*. He believed Attorney Zuber when counsel told Mr. Mattson during their meeting that he was "not gonna let [Mr. Mattson] plead" except for certain conditions. (R. 35 at 19:18–19:20.) As such, 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.)

Further, this Court should find unconvincing the State's argument that Mr. Mattson shows a level of understanding during his recorded conversation with Attorney Zuber that negates the veracity of his claim that he did not know it was his right alone to decide whether to enter a plea. On the contrary, the recorded conversation between Mr. Mattson and Attorney Zuber occurred one business day before the motion hearing, and the tape shows that Mattson could not explain to counsel the difference between battery and disorderly conduct, a fact which caused Attorney Zuber to belittle Mr. Mattson. (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. The State has not proven that Mr. Mattson learned differently by the time of his plea. Nor does the record reflect any reason to find 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, any assertion by the State that Mr. Mattson shows an understanding that he is the one making the decision about "taking probation" is disproven by the recorded conversation between Mr. Mattson and Attorney Zuber.

III. The State concedes that the plea colloquy was perfunctory and insufficient to defeat a claim that Mattson was confused.

The colloquy at Mr. Mattson's April 16, 2019 plea hearing was perfunctory. Mr. Mattson provided only one-word answers to the trial court's questions throughout the entire hearing. (R. 55 at 1–11.) This is not sufficient to establish a knowing, intelligent, and voluntary plea. 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." ***State v. Bangert***, 131 Wis. 2d 246, 268–69, 389 N.W.2d 12 (1986)**.** Specifically, 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 establishing a knowing plea. As listed in ***State v. Brown***, 2006 WI 100, ¶¶ 71–77, 293 Wis. 2d 594, 716 N.W.2d 906, 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.

The perfunctory colloquy was not sufficient in this case given Mr. Mattson's inherent difficulty in understanding complex or new concepts, especially when under stress. 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 establish that Mr. Mattson understood his fundamental right to a jury trial.

The State concedes Mattson's claim that "the colloquy was perfunctory," (Mattson brief at 16) because it never denies it. *See* ***Charolais Breeding Ranches, Ltd., v. FPC Securities Corp.,*** 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted). In fact, the State's brief does not address the issue because it has avoided it entirely and never mentions the word "perfunctory." The plea was both perfunctory and insufficient, given the recorded discussion of the plea. The State has not and cannot carry its burden of proving that the plea was knowing, intelligent, and voluntary.

IV. The State's brief relies extensively on an unpublished case which is very much distinguishable from this case.

The State's reliance on ***State v. White***, 2015 WI App 20, 360 Wis. 2d 491, 864 N.W.2d 121, demonstrates how weak the State's case is. ***White*** is unpublished and does not address claims of coercion, as is the case here. As this Court is aware, pursuant to Rule 809.23(3)(a), an unpublished opinion is neither precedent nor authority.

In addition, unlike White, Mr. Mattson has furnished a recorded conversation between him and Attorney Zuber that is evidence of coercion and confusion. This conversation took place on the Friday prior to Mr. Mattson's April 16 plea hearing the next Monday. This recording conclusively demonstrates that Attorney Zuber did have reasons to believe that Mr. Mattson was confused. Specifically, 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.) These facts are distinguishable from ***White*** where this Court found that counsel testified that he "didn't have any indication that would lead [him] to believe that [White] was confused," and where White was unable to disprove counsel's testimony by furnishing the reviewing court with a recorded conversation between White and counsel. 2015 WI App 20 at ¶ 10. The State's only response is to say that several different times Mr. Mattson acceded to statements that indicated he understood that the decision to plead was his. As addressed below, this claim is wrong. Since the State cannot carry its burden, this Court must reverse.

V. Mr. Mattson's apparent acceptance of the plea agreement was itself coerced.

The State attempts to undercut Mr. Mattson's coercion argument by pointing to the fact that Mr. Mattson signed the plea questionnaire form and further arguing

that the plea hearing "dispel[s] any notion that [Mr.] Mattson believed that Attorney Zuber alone had the right to accept a plea agreement." (State's Br. at 14.) However, while Mr. Mattson signed the plea questionnaire indicating that he was content with Attorney Zuber's representation and that he further represented on the form that he had "not been threatened or forced to enter this plea," that signed acknowledgement itself was coerced. As the evidence proves, 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.) Importantly absent in ***White*** is any claim by White that counsel had coerced him into accepting the plea.

VI. This Court cannot assume understanding on a silent record.

The Wisconsin Supreme Court has made it abundantly clear that neither a defendant's understanding nor knowledge can be "inferred or assumed on a silent record." ***Brown***, 2006 WI 100 at ¶ 56 (citing ***Bangert***, 131 Wis. 2d at 269); *see also* ***State v. Hoppe***, 2009 WI 41, ¶¶ 31–32, 317 Wis. 2d 161, 765 N.W.2d 794 ("A circuit court may not . . . rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. . . . The plea colloquy cannot . . . be reduced to determining whether the defendant has read and filled out the Form, [and the Form] cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant."). As such, the State's great reliance on the fact that Mr. Mattson signed the Plea Questionnaire/Waiver of Rights form is insufficient when all the evidence presented is considered.

VII. Counsel's testimony is not in conformance with the tape recording.

Finally, the State contends that just like in ***White***, the trial court here found Mr. Mattson not credible after hearing him testify. (State's Br. at 11.) However, the record requires that this Court must find, to the contrary, that it is trial counsel who actually lacks credibility. He testified contrary to what the recording demonstrates regarding multiple questions. He testified, for example, that he did not remember using the word "dummy," although he had; he claimed he could not remember laughing at Mr. Mattson because he did not know the word "tumultuous" although the recording reflects that he did laugh;" he did not remember telling Mattson to be smart; he did not remember asking about his education and the fact that Mr. Mattson failed the GED six times; he failed to remember that he had asked Mattson if he could write a check; and he did not remember telling Mr. Mattson to accept blame. (R. 62 at 48–52.) All these statements are incorrect or contrary to the recorded discussion of the plea. Given the many inaccuracies, the trial court erred when it found counsel to be credible. The recording reflects what was said and it makes a finding of credibility unnecessary.

VIII. Given the recording of the plea discussion, this Court should not defer to the trial court regarding what counsel told or failed to tell Mr. Mattson.

Given the recording of the plea discussions and counsel's clear contradictions of what was said, this Court should not defer to the trial court's findings regarding whether the plea was knowing, intelligent, and voluntary. Whether a plea is knowing, intelligent, and voluntary is a question of constitutional

fact. This Court accepts the circuit court's findings of historical fact and evidentiary facts unless they are clearly erroneous, but it determines independently whether those facts establish that the defendant's plea was knowing, intelligent, and voluntary. Generally, this court defers to the trial court's finding of fact because the trial court is better positioned to determine credibility. ***Brown***, 2006 WI 100 at ¶¶ 18-19.

In this case there exists no reason to defer to the trial court's findings because this court is as well positioned as the trial court to evaluate the evidence. Both the plea discussion and the postconviction motion are recorded. The facts are therefore undisputable. It is well settled law that "the application of a well-settled principle of law to an undisputed fact is itself a question of law." ***State v. Pepin***, 110 Wis. 2d 431, 439, 328 N.W.2d 898 (Ct. App. 1982). In ***Pepin***, the Wisconsin Supreme Court found that where the facts were not undisputed, the trial court "would be in no better position to determine this question of law (whether an exculpatory statement was untrustworthy) than are we." ***Id***. The principle has also been used to determine *de novo* whether a child understood the importance of telling the truth, normally a question of fact, where the only evidence was a videotape. ***State v. Jimmie R.R.***, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 158, 606 N.W.2d 196. This Court should apply that law to determine for itself whether the plea was coerced. The recording is the record, and it demonstrates the need for reversal.

The State argues that because the trial court's finding that the tone of the recorded conversation between Mr. Mattson and Attorney Zuber from the April 13

meeting was conversational, and sometimes jovial, this Court should also accept such a finding. However, this Court should not accept the trial court's finding that his counsel was jovial when he was insulting him, laughing at him, and coercing him to accept a plea. Attorney Zuber belittled Mr. Mattson *via* name-calling. Instead, counsel was more coercive than jovial when he called Mattson a "dummy." (R. 35 at 10:14–10:16, 51:44–51:47.) The recording contradicts the court's finding.

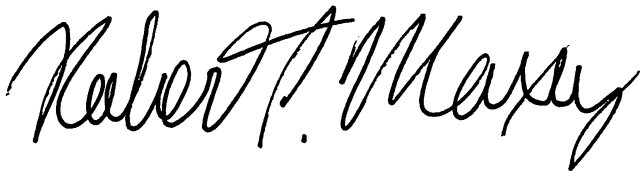
While the State claims that it does not condone some of the language used by Attorney Zuber, this Court must stand for more. This Court serves as the protector of constitutional rights, *see* ***Mayo v. Wisconsin Injured Patients and Families Compensation Fund***, 2018 WI 78, ¶ 89, 383 Wis. 2d 1, 914 N.W.2d 678 ("Serving as the protector of constitutional rights ultimately rests with 'courts of justice …'"), and its role is to promote justice, *see* ***Pierce v. Kneeland***, 14 Wis. 341, 343 (1861) ("[T]he power of the court … ought to be exercised for the promotion of justice …"). This Court can, and it should, listen to the recorded conversation itself. In doing so, it will see that the conversation is not only far from jovial, but it is also coercive in nature.

CONCLUSION

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 10th day of September 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 2731 words.

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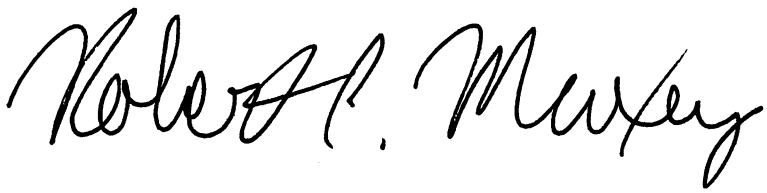

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CERTIFICATE OF COMPLIANCE

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.
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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