COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP559-CR **Cir. Ct. No. 2008CF195**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSICA M. ZARLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Jessica M. Zarling appeals a judgment convicting her of second-degree recklessly endangering safety and aggravated battery, both by use of a dangerous weapon. She also appeals an order denying her motion for

postconviction relief. We reject Zarling's contentions that the circuit court's refusal to allow her to withdraw her pleas and defense counsel's alleged ineffective assistance have resulted in a manifest injustice. We affirm.

¶2 An intoxicated Zarling grew angry at her ex-husband, Kevin Heintz, when he would not give her her car keys. Zarling hit Heintz in the head with a cell phone, bit him on the arm, told him she hated him and "want[ed] [him] dead in the worst way," and, grabbing a knife from the kitchen counter, stabbed him in the chest. When Heintz said it felt like he was dying, Zarling responded, "[G]ood[.] I hope you fucking die," and, as he fell to the floor, "[D]ie[.] [Y]ou deserve it." Heintz visually recorded the events on his cellphone. The parties' two young children were nearby during the disturbance. Although the knife pierced Heintz's pericardium, he survived.

¶3 The State charged Zarling with attempted first-degree intentional homicide. She ultimately entered a no-contest plea to second-degree recklessly endangering safety (count 1) and, claiming that her level of intoxication prevented recall of the attack and the ability to form the requisite intent, an ***Alford***[1] plea to aggravated battery with intent to do bodily harm (count 2). Both charges included a use-of-a-dangerous-weapon penalty enhancer. The circuit court sentenced Zarling to consecutive sentences of ten years for count1 and seven for count 2.

¶4 Zarling's postconviction motion for resentencing or sentence modification was denied. Appointed appellate counsel then filed a no-merit

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea in which the defendant pleads guilty while maintaining his or her innocence. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 630-32, 579 N.W.2d 698 (1998). "An ***Alford*** plea is a guilty plea in the same way that a plea of … no contest is a guilty plea." ***Id.*** at 631.

report. Zarling's response alleged that her plea was entered (1) involuntarily because defense counsel, Attorney Gerald Boyle, threatened to withdraw a week before trial if she did not agree to plead to the two "contradictory" charges and (2) unknowingly because Boyle virtually promised her that two charges for a single act would result in a concurrent sentence. For those same reasons, she alleged Boyle was ineffective. This court ultimately rejected the no-merit report and reinstated Zarling's WIS. STAT. RULE 809.30 (2011-12)[2] postconviction rights.

¶5 Zarling filed a postconviction motion reiterating the allegations made in her no-merit response. After a ***Machner***[3] hearing, the circuit court denied the motion. Zarling appeals.

¶6 Determining whether a plea is voluntary, knowing, and intelligent presents a question of constitutional fact. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous, but we review constitutional issues independently. ***Id.*** Whether to permit withdrawal of a guilty or no-contest plea is a matter committed to the circuit court's discretion. ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). We must affirm if the court based its decision upon the facts of record and in reliance on the appropriate and applicable law. ***Id.***

¶7 A defendant who seeks to withdraw his or her pleas after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

to correct a manifest injustice. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698 (1998). A manifest injustice occurs when a plea is not voluntarily, knowingly, and intelligently entered. *See* ***id.*** at 635-36. Ineffective assistance of counsel also may constitute a manifest injustice. ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110.

¶8 Zarling contends that the circuit court should have allowed her to withdraw her pleas because Boyle threatened to abandon her if she did not plead, convinced her that two charges for one act was duplicitous and "unfair" so that pleading would give her a "good" appellate issue, and misled her about her sentencing exposure. She contends plea withdrawal is warranted where trial counsel's affirmative misinformation induces a plea. *See* ***State v. Brown***, 2004 WI App 179, ¶¶13-14, 276 Wis. 2d 559, 687 N.W.2d 543.

¶9 Boyle contradicted Zarling's threat and promise allegations. He did concede that he disagreed with the fairness of charging two felonies for a single act, but advised her to enter an ***Alford*** plea to count 2 after he and the prosecutor sought second opinions from, respectively, a Marquette Law School instructor and the attorney general. And while Boyle also testified that he told Zarling he thought the charging structure presented a good appellate issue, there is no evidence that he guaranteed her she would prevail on appeal.

¶10 The circuit court accepted Boyle's testimony over Zarling's, as it was entitled to do. *See* ***Cogswell v. Robertshaw Controls Co.,*** 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) (where there is conflicting testimony, circuit court is ultimate arbiter of witnesses' credibility). It also found that: Boyle explored possible defenses; Boyle's activities and explanations all were necessary and appropriate to Zarling's defense; Zarling's being "upset" when deciding whether

to plead was "natural"; and the video evidence would have been difficult for any defense attorney to overcome. These findings are not clearly erroneous.

¶11 Indeed, Zarling herself testified that Boyle did not *promise* she would receive concurrent sentences, but said "that should be the outcome." That she felt "stuck" and had to take the plea doubtless is typical among defendants who, perhaps for the first time, find themselves in a position where their options are few and vary only in degrees of repugnance.

¶12 Underlying some of Zarling's reluctance to plead was her insistence that she could not have intended to cause Heintz great bodily harm due to her "intoxication blackout." To conclude that a defendant committed the crime to which he or she is entering a plea, the circuit court is required to find a sufficient factual basis. WIS. STAT. § 971.08(1)(b). When the plea entered is an ***Alford*** plea, the factual basis is deemed sufficient if there is "strong proof" that the defendant committed the crime to which he or she pleads. ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). The circuit court found that the videotape constituted "strong evidence" that likely would have resulted in a conviction, had the matter gone to trial.

¶13 The entire plea colloquy was thorough. Besides acknowledging her understanding of the elements of each crime, Zarling confirmed that she understood the court was not bound by either the plea agreement or any recommendations and could impose up to the maximum on each charge. She also confirmed to the court that her pleas were not induced by any threats or promises. Zarling has not established that she entered her pleas based on threats or misinformation from Boyle.

¶14 Moreover, it strains credulity that Zarling believes she would have fared better at the scheduled bench trial on the attempted homicide charge, considering that the unprovoked violence was filmed. The court called the videotape "chilling," especially so because the events "mount[ed] and escalat[ed]" in front of the two children in the next room. Also, the attempted homicide charge exposed Zarling to a sixty-year prison sentence, compared to the maximum twenty-six years she faced on the two lesser charges. Zarling's arguments fail to persuade that her pleas were not knowing and voluntary.

¶15 Zarling next claims that Boyle's threats, promises, and misinformation constituted ineffective assistance of counsel. A defendant challenging his or her guilty plea based on ineffective assistance of counsel must show that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶16 Based on the findings discussed above, the circuit court concluded that Boyle's performance as an attorney "simply … was not deficient." Its findings are not clearly erroneous. As Zarling's showing on the deficiency prong is insufficient, we need not address prejudice. *See* ***id.*** at 697. Zarling fails to establish the existence of a manifest injustice by clear and convincing evidence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.