**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 10, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP1504-CR** **Cir. Ct. No. 2010CF1111**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID M. MINNICK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

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

¶1 PER CURIAM. David M. Minnick received a sentence quadruple that which he claims defense counsel guaranteed he would get. He seeks to withdraw his no contest pleas because he contends they were induced by counsel's ineffective assistance in making the alleged promises. He also asserts that the trial

court's credibility findings were clearly erroneous and that it erred by refusing to admit documentary evidence relevant to making accurate findings. We reject his contentions and affirm.

¶2 Upset that his wife planned to leave him, an intoxicated Minnick struck her on the head with a rifle butt and attempted to shoot her. She fled to her parents' house down the street. Minnick followed, firing shots in the neighborhood. He then tried to break down the door of his in-laws' house, broke windows, and shot inside their house, grazing his father-in-law.

¶3 Minnick was charged with aggravated battery, attempted first-degree intentional homicide, four counts of first-degree reckless endangerment, and attempted burglary, all by use of a dangerous weapon, and with endangering safety by reckless use of a firearm. The defense investigated a possible NGI plea due to Minnick's diagnosed post-traumatic stress disorder. Ultimately he withdrew the NGI plea in favor of no contest pleas to all but the attempted first-degree intentional homicide charge. That count was dismissed and read in.

¶4 Even with the dismissal of the attempted homicide charge, consecutive sentences could have imprisoned Minnick for over a century. The court imposed a forty-one-year sentence: twenty-seven years' initial confinement and fourteen years' extended supervision.

¶5 Postconviction, Minnick sought plea withdrawal or resentencing. He asserted that his no contest pleas were not knowing, intelligent, and voluntary because they were entered in reliance on defense counsel's assurances that he would get concurrent sentences totaling no more than ten years. The court denied Minnick's motion. This appeal followed.

¶6 A defendant's post-sentencing effort to withdraw a guilty or no contest plea must prove a "manifest injustice" by clear and convincing evidence. ***State v. Negrete***, 2012 WI 92, ¶16, 343 Wis. 2d 1, 819 N.W.2d 749. "The manifest-injustice test is satisfied if the defendant's plea was the result of constitutionally ineffective assistance of counsel." ***State v. Hudson***, 2013 WI App 120, ¶11, 351 Wis. 2d 73, 839 N.W.2d 147, *review denied*, 2014 WI 14, ___ Wis. 2d ___, 843 N.W.2d 707. To establish constitutional ineffectiveness, a defendant must show both deficient representation and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We uphold a trial court's factual findings unless clearly erroneous, but decide de novo the legal question of whether counsel was constitutionally ineffective. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). A finding of fact is clearly erroneous when "it is against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted).

¶7 Minnick and defense counsel Laura Walker testified at the postconviction hearing. Minnick testified that Walker assured him that if he pled no contest, he "would get five to seven years, absolutely no more than ten," and that the sentencing judge "never, never issued a consecutive sentence." He acknowledged, however, that Walker "would say, of course … I can't say exactly" what the sentence would be and that he understood the sentence ultimately was up to the court.

¶8 Walker conceded that she told Minnick she believed he would be "looking [at] anywhere between six to ten years," and "probably would get a concurrent sentence," but denied telling him that the judge never ordered consecutive sentences. She also testified that she told Minnick "repeatedly" that

the disposition she believed likely was her opinion and that it "always had the caveat on the end that it's ultimately up to the judge what's going to happen."

¶9 The trial court found Minnick's testimony not credible and Walker's credible. Deciding which witnesses are to be believed "is the exact function of the trier of fact." ***State v. Christopher***, 44 Wis. 2d 120, 127, 170 N.W.2d 803 (1969). Minnick contends that finding is clearly erroneous, however, because the court based it on a misinterpretation of his testimony and failed to consider the corroborating testimony of his friend, brother, and daughter, who all had spoken to Walker while Minnick was pondering whether to enter no contest pleas.

¶10 The allegedly misconstrued testimony was elicited when postconviction counsel was questioning Minnick about the events leading to the charges against him. Minnick confirmed that he did not dispute that "something very serious" had occurred that night. This exchange followed:

> Q. You're not asserting that you weren't there or that you didn't pull the trigger or that—
>
> A. No.
>
> Q. —you weren't drinking or any of that, correct?
>
> A. No.

¶11 Minnick contends that, as at other points in his testimony, in his nervousness he interrupted counsel's single question with his "No" answer. The court found, however, that Minnick "lied under oath," having told the arresting officers that he had drunk about eight twelve-ounce beers, and the fact that "the defendant under oath tells me he wasn't drinking … goes to his credibility."

¶12 Assuming without deciding that the court's finding about Minnick's testimony was clearly erroneous, the error was harmless. The court made

numerous other findings in regard to Minnick's claim that he pled in reliance on Walker's alleged promises. It found that Minnick had weeks to consider the plea offer, knew that the attempted first-degree intentional homicide charge—with the weapons enhancer, a sixty-five-year felony—would be read in for sentencing and that the presentence investigation report recommended all consecutive sentences totaling twenty-six and one-half years, and understood from the plea colloquy that the court could impose the maximum sentence on each count and that all sentences could be imposed consecutively. The record confirms these findings.

¶13 Minnick also contends the court failed to consider his supporters' corroborating testimony. His friend testified that Walker "was very certain" that Minnick "would do five to seven with an absolute possibility of maybe ten" years and that there was "no way" consecutive sentences would be ordered, but he acknowledged he understood Walker was conveying her professional opinion. The brother testified that Walker told him Minnick's sentence would be "something in the area of less than ten years but right around six and a half," that she was "really careful in her wording not to make an all[-]out guarantee," and, while "it was pretty clear that that's what she was hinting at," it was "somewhat an interpretation." The daughter testified that Walker said she "was strongly believing" "the judge wouldn't give [Minnick] any more than six years," but that she also "told me it was her opinion." The testimony of Minnick and his supporters does not establish that Walker gave unequivocal guarantees.

¶14 Minnick has shown no more than that counsel predicted an outcome that did not come to pass. Her misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim, *see* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272, and Minnick's "disappointment in the

eventual punishment imposed is no ground for withdrawal of a guilty plea," *see* ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

¶15 In a related argument, Minnick contends that the trial court erred by refusing to admit at the postconviction hearing documentary evidence relevant and necessary to a proper assessment of Walker's credibility. The documents were an Office of Lawyer Regulation public reprimand Walker received in regard to her handling of this and other of Minnick's cases and a criminal complaint alleging felony charges against her before she obtained her law license. He claims they would have shown Walker's motivation to protect herself and her "willingness to act extremely when in conflict."

¶16 The admission of evidence is left to the discretion of the trial court. ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). We will not find an erroneous exercise of discretion where the trial court applied the facts of record to accepted legal standards. ***Id.***

¶17 Walker served as power of attorney over Minnick's finances while she represented him and was responsible for paying herself from his accounts. Minnick's complaint to OLR arose from a fee dispute—Minnick claimed he owed Walker $13,000 in fees; she claimed it was $30,000—and the state of his accounts at the end of her representation. Walker was reprimanded for violating supreme court rules relating to fee agreements, her management and maintenance of the trust account and its records, notice and manner of withdrawals, and the failure to provide a full written accounting of the funds held in trust when her representation ended. Minnick argues that the OLR matter should have been admitted as it gave Walker a motive to protect herself through her postconviction testimony.

¶18 We disagree. Consistent with Walker's claim, OLR noted that her original flat rate increased to $30,000 when the scope of her representation expanded beyond the criminal matter. Walker acknowledged failing to amend the fee agreement or draft a new one and violating other ethical rules and consented to the reprimand. And while OLR stated that *Minnick* claimed about $19,000 was unaccounted for at the end, *OLR* did not make a finding that such was the case. As the State notes, evidence that OLR apparently believed Walker's position is not relevant, as it would not have a tendency to make her credibility less probable, and thus not admissible. *See* WIS. STAT. §§ 904.01, 904.02 (2013-14).[1]

¶19 Further, the statement about the allegedly misappropriated, or at least unaccounted-for, sums is double hearsay. To be admissible, each prong of hearsay within hearsay must conform with an exception to the hearsay rule. *See* WIS. STAT. § 908.05; ***State v. Kreuser***, 91 Wis. 2d 242, 249, 280 N.W.2d 270 (1979). Neither does.

¶20 The OLR decision also was not admissible as other-acts evidence of Walker's motive to testify falsely. Assessing the admissibility of such evidence requires the trial court to determine whether the evidence is offered for an acceptable purpose, is relevant, and its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or delay. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶21 While evidence of other bad acts is admissible to prove motive, WIS. STAT. § 904.04(2), the OLR decision is not relevant to prove that Walker misappropriated Minnick's money. It simply did not make that finding.

¶22 Minnick also wanted admitted a copy of a five-count criminal complaint against Walker. She allegedly broke into the home of a love triangle competitor and choked and threatened to kill the person. Walker was convicted of one count of misdemeanor battery; the other counts were dismissed. The incident occurred before Walker was licensed to practice law. The complaint, Minnick contends, would have shown Walker's "willingness to act extremely when in conflict," even to the point of fabricating testimony.

¶23 The complaint was properly excluded. First, a complaint is not evidence and raises no inference of guilt. ***State v. Oppermann***, 156 Wis. 2d 241, 246 n.2, 456 N.W.2d 625 (Ct. App. 1990); WIS JI—CRIMINAL 145. Beyond that, the five-year-old battery conviction would have been used to show that Walker was capable of perjury now because she acted badly in the past. That is classic, unduly prejudicial, "other-acts" propensity evidence that is irrelevant to a determination of credibility. *See* WIS. STAT. § 904.04(2)(a); *see also* ***State v. Clark***, 179 Wis. 2d 484, 491, 507 N.W.2d 172 (Ct. App. 1993).

¶24 The record supports the trial court's credibility findings and evidentiary rulings. We will not disturb them.

*By the Court.*—Judgment and order affirmed.

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