COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2717-CR

Cir. Ct. Nos. 2012CF127
2012CF819

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE W. BUCKLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto and Brown Counties: TAMMY JO HOCK, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kyle Buckles appeals a judgment of conviction entered pursuant to a plea agreement and an order denying his motion for postconviction relief in these consolidated cases. Buckles argues he is entitled to plea withdrawal because a particular provision in the plea agreement—that several

offenses would be dismissed and read in "for restitution only and not for sentencing"—was illusory, and because he received ineffective assistance of counsel by virtue of his attorney's negotiation of an ambiguous plea agreement. In the alternative, he contends the State breached the plea agreement by its comments at sentencing. We reject Buckles' arguments and affirm.

BACKGROUND

¶2 Buckles embarked on a crime spree on July 7, 2012, that began in Oconto County and ended in Brown County. Buckles stole a Dodge Viper from S.M.'s garage, leading to charges in Oconto County for burglary, theft of moveable property, and operating a motor vehicle without the owner's consent. While driving the Viper, Buckles rear-ended a vehicle being driven by M.H., damaged a guardrail, and fled the scene, leading to additional charges for hit and run and criminal damage to property. Buckles then led police on a high-speed chase on Highway 41, during which he sped through a construction zone and swerved through traffic, resulting in an Oconto County charge for fleeing and eluding an officer.

¶3 The chase continued in Brown County, at speeds between 90 and 100 miles per hour. Buckles drove over "stop sticks" deployed by Brown County police officers. The Viper's tires eventually deflated, and the car's hood flew off, but officers were nonetheless unsuccessful at apprehending Buckles. One of the officers pursuing Buckles, R.M., lost control of his vehicle while attempting to avoid the stop sticks, crossed the median, and struck a vehicle on the other side of the highway. R.M. sustained serious injuries, and the driver of the other vehicle, M.L., suffered life-threatening injuries. Buckles continued on at a high speed, eventually exiting the highway. He jumped from the moving vehicle, abandoning

the Viper, and ran into nearby woods, ignoring officers' commands to stop. As a result of this conduct, Buckles was charged in Brown County with fleeing or eluding an officer causing great bodily harm, first-degree recklessly endangering safety, and resisting an officer, all as a repeat offender. Buckles was apprehended the next day after committing a theft at a motel.

¶4 The State commenced separate actions against Buckles in Oconto and Brown Counties.[1] Pursuant to a plea agreement, Buckles pled no contest to amended Brown County charges of fleeing or eluding a traffic officer causing damage to property, second-degree recklessly endangering safety, and resisting an officer. The repeater penalty enhancers associated with each charge were dismissed. The State also agreed to cap its sentencing recommendation at five years' initial confinement and four years' extended supervision. Further, Buckles and the State agreed to make a joint recommendation for the payment of $6,000 to M.L.[2]

¶5 At the Brown County plea hearing, Buckles represented that the parties had planned to consolidate the Oconto and Brown County charges, but Buckles no longer wished to do so because separate plea offers had originated in each county. Soon after the hearing, Buckles changed his mind and, with the consent of the Oconto County district attorney, applied for consolidation. The Brown County circuit court granted consolidation at a September 30, 2013, plea

[1] Buckles retained separate defense attorneys in each proceeding. Because the Oconto County charges are the focus of this appeal, we refer to defense counsel in the singular to refer to the attorney representing him on those charges.

[2] The State characterized this payment as restitution, although Buckles refused to do the same. Buckles' counsel wanted "to make it clear on the record … that Mr. Buckles admits no liability for [M.L.'s] injuries, but is in agreement to pay that amount of money."

hearing on the Oconto County charges, which, by an amended information, were added to the Brown County charges to which Buckles had already pled.

¶6 At the September 30, 2013, plea hearing, the prosecutor recited the parties' plea agreement on the Oconto County charges. The prosecutor stated Buckles had agreed to enter pleas of guilty or no contest to operating a motor vehicle without the owner's consent and to fleeing or eluding an officer, with the remaining four charges "dismissed and read in for purposes of sentencing." Defense counsel corrected the State, asserting that the offer was to have those charges "dismissed and read in for restitution only and not for sentencing." The prosecutor, after conferring with defense counsel, agreed with defense counsel's statement of their agreement. The court responded, "That must be a policy unique to Oconto County to only include [the read-in offenses] for restitution, because I have never heard the [Brown County] D.A.'s office … make that recommendation." The prosecutor concurred, but stated, "I'll certainly honor the plea agreement."

¶7 Following a plea colloquy, the court accepted Buckles' no contest pleas to operating without consent and fleeing an officer, found Buckles guilty of those offenses, and granted the State's motion to dismiss and read in for restitution purposes only the remaining Oconto County charges. The parties stipulated to the amounts of restitution for the remaining victims prior to the joint sentencing hearing on both sets of charges. At that hearing, the State recommended a total sentence of nine years' imprisonment, consisting of five years of initial confinement and four years of extended supervision on the recklessly endangering safety conviction. The State recommended sentences of varying lengths on the other convictions, with all but a probation recommendation on the Oconto County charge of fleeing an officer to run concurrent to the nine-year sentence for

recklessly endangering safety. The State also recommended the court order restitution in the amount agreed to by the parties. Buckles, for his part, expressed remorse for his conduct and in particular for causing injuries to M.H., M.L. and R.M.

¶8 The circuit court sentenced Buckles to a total of ten years' initial confinement and ten years' extended supervision and ordered restitution as outlined by the parties.[3] Buckles filed a postconviction motion seeking plea withdrawal on the grounds that his pleas were not knowing, intelligent, and voluntary because the plea agreement was illusory and he received ineffective assistance of counsel when he entered his pleas. In a supplemental motion, Buckles asserted that even if the plea agreement was valid, the State breached the plea agreement and Buckles was entitled to a new sentencing hearing. Both motions involved only the provision of the plea agreement requiring that the four dismissed Oconto County charges be read in for restitution purposes only.

¶9 The circuit court denied the motion following an evidentiary hearing at which both Buckles and his attorney testified. Defense counsel explained that he had "extensive conversations" with Buckles regarding the meaning of the read-in provision. He told Buckles the read-in offenses could be used by the State for restitution purposes only and not as "aggravating" factors during sentencing.

[3] The total sentence was comprised of the following: (1) six years' imprisonment (three years' initial confinement and three years' extended supervision) on the Brown County fleeing/eluding charge; (2) ten years' imprisonment (five years' initial confinement and five years' extended supervision) on the recklessly endangering safety charge, consecutive; (3) nine months' imprisonment on the resisting an officer charge, concurrent; (4) four years' imprisonment (two years' initial confinement and two years' extended supervision) on the operating without consent charge, consecutive; and (5) three and one-half years' imprisonment (one and one-half years' initial confinement and two years' extended supervision) on the Oconto County fleeing/eluding charge, concurrent.

Buckles' testimony regarding his understanding of the read-in provision was inconsistent; at one point, Buckles agreed with his defense counsel about the provision's meaning, but at another point, he stated he believed the elements of the crimes "should not be discussed" at all during sentencing, meaning "any part" of the charges that were dismissed and read in for restitution purposes only. Following the testimony, the prosecutor opined that the read-in provision "essentially is meaningless to me" because "a read-in for purposes of restitution is a read-in," and the provision was "really very illusory" in this case because there was no way to separate the facts applicable to each offense "where you have just this chain of acts that the Defendant commits all within maybe an hour or two." Nonetheless, the prosecutor argued Buckles was not prejudiced.

¶10 The circuit court found the plea agreement "was that the State not argue the dismissed charges were an aggravating factor" at sentencing. It concluded, based on defense counsel's testimony, that there were tangible benefits to Buckles vis-à-vis the read-in provision, and, regardless, even if Buckles thought the provision meant something different, he would still have agreed to the plea bargain. The circuit court also determined the State had not breached the plea agreement, because the challenged comments were either appropriate sentencing argument regarding the charges for which Buckles was convicted or provided a basis for the restitution the State requested.

DISCUSSION

¶11 Buckles raises two issues on appeal. First, he asserts he is entitled to plea withdrawal because he demonstrated manifest injustice, both because his plea was not knowingly, intelligently, and voluntarily entered, and because he received ineffective assistance of counsel. Second, and alternatively, Buckles argues he is

entitled to resentencing before a different judge because the State materially and substantially breached the plea agreement. We reject both arguments.

I. Plea Withdrawal

¶12 A defendant is entitled to withdraw a guilty or no contest plea if the circuit court's "refusal to allow withdrawal of the plea would result in a manifest injustice." ***State v. Hoppe***, 2009 WI 41, ¶60, 317 Wis. 2d 161, 765 N.W.2d 794. A defendant can demonstrate manifest injustice by showing by clear and convincing evidence that the guilty or no contest plea was not made knowingly, intelligently, and voluntarily. ***Id.*** In cases of alleged constitutional violations, we accept the circuit court's findings of historical fact unless they are clearly erroneous, but independently determine whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. ***Id.***, ¶61.

¶13 Citing ***State v. Dawson***, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12, and ***State v. Woods***, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), Buckles argues that if a defendant is induced to enter into a plea agreement by virtue of a promise that is legally impossible for the State to fulfill, the plea is not knowing and voluntary as a matter of law. In ***Woods***, we concluded the defendant was allowed to withdraw his plea as unknowingly and involuntarily made, because his attorney and the State had agreed to make an illegal sentence recommendation, and because the record was "clear that Woods, at least in part, made the decision to plead guilty based on inaccurate information provided to him by the lawyers and judge." ***Woods***, 173 Wis. 2d at 140. In ***Dawson***, we similarly held that the defendant had demonstrated his plea was not made knowingly and voluntarily because the State had no legal authority to promise it would reopen and amend the judgment of conviction upon successful completion of the

defendant's probation term, and because the record showed the possibility of avoiding a felony conviction was the "primary inducement" for Dawson's no contest plea. ***Dawson***, 276 Wis. 2d 418, ¶¶10, 13.

¶14 Here, Buckles has not shown the prosecutor's promise that the dismissed charges would be read in for restitution purposes only was a legal impossibility. The circuit court found Buckles' defense counsel credibly testified that the prosecutor was prohibited from arguing that the facts or the elements of the dismissed charges should increase Buckles' sentence, at least to the extent those facts or the elements of the offenses did not overlap with the other offenses to which Buckles pled. However, the prosecutor was allowed to argue in favor of the restitution recommendation, including by mentioning that the read-in offenses had occurred. For example, counsel testified the State could permissibly mention that M.H. suffered significant injuries, but it could not argue that Buckles deserved a harsher sentence because he knowingly left the scene of the accident without rendering aid.[4]

[4] We take no position on whether the plea agreement in this case—particularly the provision authorizing the dismissed offenses to be read in for restitution purposes only—was legally impermissible on grounds other than those argued. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (we will not abandon our neutrality to develop arguments for the parties). We do, however, observe that the restitution statute, WIS. STAT. § 973.20(1g)(b) (2013-14), defines a "read-in crime" as any crime that is "uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted." Further, when a prosecutor agrees to dismiss and read in charges, the defendant acknowledges those charges are true and they cannot be prosecuted separately in the future. ***State v. Frey***, 2012 WI 99, ¶43, 343 Wis. 2d 358, 817 N.W.2d 436. The State benefits from this procedure because it is *expected* that the charges will be considered at sentencing and could potentially increase the sentence for the convicted crimes. ***Id.***, ¶68. We question whether the parties could receive these benefits if the plea agreement limits consideration of the dismissed charges to the issue of restitution.

¶15 Buckles also has not shown the prosecutor's promise to read in the dismissed charges for purposes of restitution only was the primary inducement, or even a significant inducement, for him to enter into the plea agreement. The circuit court found the plea agreement "contained other, more important, considerations to Buckles," specifically the dismissal of four charges, including two felony charges, and a favorable sentencing recommendation from the prosecutor. Although Buckles testified the promise was "one of the major reasons" and a "substantial reason" for taking the plea agreements, the circuit court found this testimony incredible, stating it was "disingenuous for Buckles to suggest that he would not have entered the agreement had he known" that certain aspects of the dismissed and read-in counts would be mentioned at sentencing.

¶16 Buckles heavily relies on the prosecutor's statements at the postconviction hearing that the read-in provision of the plea agreement was "meaningless" and "really very illusory" given the facts of the case. However, the State's view of the legal enforceability of the plea agreement is neither relevant to the applicable standard nor binding upon this court.[5] *See* ***State v. Carter***, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516 (appellate court is not bound by the parties' interpretation of the law or obligated to accept a party's concession of law). To establish manifest injustice, Buckles must show that the particular provision at issue was both a legal impossibility and the primary (or at least a significant) inducement for entering into the plea agreement. *See* ***Dawson***, 276

[5] Notably, on appeal the State does not concede the provision of the plea agreement at issue was meaningless or illusory, and it specifically argues the provision was neither of those things.

Wis. 2d 418, ¶¶10, 13; ***Woods***, 173 Wis. 2d at 140. As we have explained, he has done neither.

¶17 A defendant may also demonstrate manifest injustice by showing that he or she received ineffective assistance of counsel. ***State v. Dillard***, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. This requires the defendant to prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defendant. ***Id.***, ¶85 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). An attorney's performance is deficient if it falls outside the wide range of professionally competent assistance. ***Id.***, ¶88. In the plea withdrawal context, a defendant is prejudiced if there is a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citing ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)). We review ineffective assistance claims as questions of constitutional fact. *See supra* ¶12.

¶18 Buckles asserts he received ineffective assistance of counsel because his attorney negotiated an ambiguous plea agreement without confirming both parties understood the agreement's meaning. Buckles' deficiency argument again relies on the prosecutor's professed misunderstanding of the plea agreement at the postconviction hearing, as Buckles asserts that if "trial counsel never clearly explained the agreement to the Brown County prosecutor, it is likely he also did not explain it well to … Buckles." Buckles argues he was prejudiced because he entered a plea "not knowing the consequences." Buckles claims that "if he knew the agreement regarding the read-in offenses had no impact, he would have insisted on going to trial."

¶19 On this record, we conclude defense counsel was not deficient. Buckles' deficiency argument rests on the premise that defense counsel never explained the read-in provision to the prosecutor, and therefore likely did not explain it to Buckles. This premise is flawed because Buckles' defense attorney *did* explain the meaning of that provision to the prosecutor at the plea hearing, where the State by its own admission "overlooked" that aspect of the parties' bargain. Moreover, at the postconviction hearing, Buckles' attorney testified he and Buckles "had extensive conversations" about the meaning of that provision. Defense counsel recounted in detail the location and content of the conversations:

> Um, physically, … I believe he was incarcerated in Brown County at that time. So, we met at the jail. And the way that I explained it to him was that … there could be a record created about the convictions and they could use the convicted … charges as aggravating circumstances. So, the two things [in Oconto County] he pled to and was convicted of. But as to the dismissed and read in for restitution only purposes, they could only be used for the purposes of collecting restitution.
>
> [Postconviction counsel then questioned what that meant.]
>
> I think that the … State can state that it happened, because there has to be a basis for the restitution. That was part of our conversations as well. But if they start going down the road of using it to argue that … those convictions are worse because of what happened in the dismissed and read in for restitution only purposes, they start going down the road of arguing the facts and saying, Judge, this is worse because A, B, C, D, E, and F, then that would have been a breach of the plea agreement. And that's what I explained to him.

The circuit court determined this testimony was more credible than Buckles' and, as a result, there is no legitimate basis to conclude defense counsel did not adequately explain the agreement to Buckles in the manner indicated.

¶20 Even if Buckles could somehow show his attorney performed deficiently, we conclude Buckles was not prejudiced because the plea agreement

was not ambiguous and he did not misunderstand it. Buckles cannot assert the circuit court was forbidden from considering the dismissed counts during sentencing. *See* ***State v. Frey***, 2012 WI 99, ¶56, 343 Wis. 2d 358, 817 N.W.2d 436. However, as Buckles correctly observes, a defendant may be entitled to relief upon showing that defense counsel negotiated an ambiguous plea agreement and that he or she would not have entered into the agreement had he or she known of this uncertainty. *See* ***State v. Wesley***, 2009 WI App 118, ¶24, 321 Wis. 2d 151, 772 N.W.2d 232. Buckles has established neither that the agreement was ambiguous nor that he misunderstood it such that he would not have accepted the plea agreement if he knew the agreement's true meaning.

¶21 Plea agreements, like all contracts, are ambiguous if they are reasonably or fairly susceptible to more than one construction, which is a question of law. ***Id.***, ¶12. Buckles argues he "reasonably believed the [S]tate could not use any part of the counts dismissed and read-in for restitution purposes in its sentencing argument." This is not a reasonable interpretation. Restitution is a component of sentencing, *see* WIS. STAT. § 973.20(1r) (2013-14), and, beyond the fact that the victim (or the State) must show that the defendant's criminal activity was a "substantial factor" in causing pecuniary injury, *see* ***State v. Longmire***, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 534, the prosecutor could permissibly advocate in favor of the restitution recommendation. Accordingly, the read-in provision cannot be read as the State promising not to mention at all the dismissed and read-in counts during its argument.

¶22 The record also does not establish Buckles understood the agreement as completely prohibiting mention of the dismissed charges. The circuit court deemed incredible Buckles' testimony regarding this professed understanding of the read-in provision. Given Buckles' inconsistent testimony at the postconviction

hearing regarding his understanding of that provision, the court's credibility finding was not erroneous as a matter of law. At one point during the postconviction hearing, Buckles testified he understood "basically exactly what [defense counsel] had stated. That all the charges that were dismissed and read in for restitution purposes only were not going to be considered as aggravating factors in determining a sentence." Buckles' comments during his allocution—during which he explicitly acknowledged causing M.H.'s injuries—also suggest Buckles did not misunderstand the agreement. Not only did the agreement unambiguously contemplate that the State would use the read-in offenses during its sentencing argument for the limited purpose of restitution, but the record supports the circuit court's finding that this use of the read-in charges was also Buckles' understanding.

II. Breach of Plea Agreement

¶23 Buckles asserts that even if the read-in provision was neither illusory nor ambiguous, and it meant that the State could not use the read-in counts as aggravating factors but it could mention them for restitution purposes, the State materially and substantially breached the plea agreement during its sentencing argument. Specifically, Buckles takes issue with the prosecutor's statements that: (1) "there were terrible consequences here. You know, [M.H.] and [R.M.] for sure had significant injuries"; (2) "[S.M.'s] property didn't matter"; and (3) "the result of [Buckles'] actions, you know, [were] two people got hurt, [M.H.] directly and certainly [M.L.] indirectly." Buckles argues certain aspects of these statements were prohibited by the plea agreement because they impermissibly suggested that Buckles should receive a higher sentence based on the dismissed but read-in offenses, particularly the burglary and hit-and-run charges.

¶24 Buckles did not object to the prosecutor's allegedly improper remarks, so he is entitled to relief only if he can demonstrate that defense counsel's failure to object constituted ineffective assistance of counsel. *See* ***State v. Sprang***, 2004 WI App 121, ¶¶12-13, 274 Wis. 2d 784, 683 N.W.2d 522. We must first determine whether the prosecutor breached the plea agreement. ***Id.***, ¶13. If we conclude there was no breach, then defense counsel's failure to object would not constitute deficient performance. ***Id.*** If, however, we conclude there was a breach, we must then determine whether defense counsel performed deficiently by failing to object, and, if so, whether that deficiency prejudiced Buckles. *See* ***id.***, ¶25.

¶25 An actionable breach is not merely technical. ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. Rather, the breach must be material and substantial. ***Id.*** A material and substantial breach is "a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.*** Whether the State breached a plea agreement is a mixed question of fact and law. ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. The precise terms of the plea agreement, and the historical facts regarding the State's alleged breach of that agreement, are questions of fact reviewed under the clearly erroneous standard. ***Id.*** "Whether the State's conduct constitutes a material and substantial breach of the plea agreement is a question of law that this court reviews de novo." ***Id.***

¶26 Buckles asserts the State's comments that there were "terrible consequences" and that M.H. had "significant injuries" violated the plea agreement because they referred to the victim of the hit-and-run offense, which was read in for restitution purposes only. Buckles argues these comments were not useful for restitution purposes because the parties stipulated to the amount of

restitution, and therefore no additional discussion was needed. However, Buckles ignores that the State was still permitted to argue in favor of the parties' joint restitution recommendation, including restitution to M.H, given the circuit court still had discretion over whether and how to order restitution. Moreover, the State's reference to "terrible consequences" was generic and equally applicable to the charges for which Buckles was convicted.

¶27 Next, Buckles challenges the prosecutor's statement that S.M.'s "property didn't matter." This statement was a component of the State's argument that Buckles was "very, very focused on himself and his needs" over the welfare of others, during which argument the State repeated that Buckles "didn't care about [S.M.'s] property" and "the result of his actions, you know, [were] two people got hurt, [M.H.] directly." Buckles observes that S.M. was the victim of the burglary, and M.H. was the victim of the hit and run, both charges that were dismissed and read in for restitution purposes. Buckles argues the State, by these comments, attempted to use the burglary and hit-and-run offenses as aggravating factors.

¶28 Although the State did argue that Buckles was being selfish on the date of his offenses, it did not impermissibly use the read-in offenses to argue for an increased sentence. The State's comments that Buckles did not care about S.M.'s property were permissible because they equally referred to the facts and circumstances surrounding the operating-without-consent charge for which Buckles was convicted. Indeed, the prosecutor's theme that Buckles' behavior as a whole was reckless, dangerous and impulsive fits well with the actual circumstances of this charge. Further, the prosecutor's statement that M.H. was injured did not breach the plea agreement because, again, the State was permitted

to argue in favor of the joint restitution recommendation, even if the parties stipulated to the amount of restitution.

¶29 Because there was no breach of the plea agreement, we need not consider whether Buckles' attorney was deficient for failing to object during sentencing. We therefore reject Buckles' argument that his attorney performed deficiently by failing to object to the allegedly impermissible comments, and we also reject his related argument that his attorney was deficient because he failed to consult Buckles before deciding whether an objection was warranted. *See* ***Sprang***, 274 Wis. 2d 784, ¶¶27-28 (even if defense counsel possesses strategic reasons for failing to object to sentencing remarks that breach a plea agreement, counsel may nonetheless perform deficiently if he or she does not consult with the defendant before reaching that decision). We perceive no basis to order resentencing in this case.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).