COURT OF APPEALS
DECISION
DATED AND FILED

January 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP192-CR **Cir. Ct. No. 2009CF2761**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROME THOMAS WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and RICHARD J. SANKOVITZ, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jerome Thomas Walker appeals a judgment of conviction, entered after he pled guilty on the second day of trial to one count of second-degree reckless homicide by use of a dangerous weapon and one count of

first-degree recklessly endangering safety. He also appeals an order denying postconviction relief.[1] He seeks plea withdrawal or, in the alternative, sentence modification. Because we conclude that Walker fails to show that his guilty pleas were infirm or that the circuit court improperly exercised its sentencing discretion, we affirm.

BACKGROUND

¶2 According to the criminal complaint, Walker drove into a Milwaukee neighborhood on a May evening in 2009 and fired a gun numerous times through the car window in the direction of two pedestrians. The bullets struck and killed one man and injured another. Police arrested Walker, and the State charged him with one count of first-degree intentional homicide while armed and one count of attempted first-degree intentional homicide while armed. He was unable to post bail, and he was in custody when his trial began on November 9, 2010.

¶3 On the first day of trial, the State moved to admit evidence of a letter mailed on November 6, 2010, from the Milwaukee County Jail to Walker's sister. The letter was unsigned, but the return address block on the envelope included Walker's name, prisoner number, date of birth, and bed and cell location. In the text of the letter, its author asked Walker's sister to contact "Sherita" and direct her to tell witnesses not to appear at Walker's trial, and the letter contained threatening language about the consequences for witnesses who testified. At the

[1] The Honorable Kevin E. Martens presided over the trial and plea proceedings and imposed the sentences in this case. The Honorable Richard J. Sankovitz presided over the postconviction proceedings and entered the order denying postconviction relief.

top of the letter, the author wrote: "[t]ell Sherita to call my attorney cell phone right away," and included the cell phone number of Walker's trial counsel.

¶4 The parties recognized that the letter had evidentiary value to the State, but, as the circuit court observed, the inclusion of trial counsel's cell phone number and the related instruction to "tell Sherita to call" that number raised "concern because the jury might start to speculate or infer th[at] [trial counsel] ha[d] some knowledge [of] or involvement with" the letter. To prevent jurors from drawing such inferences, Walker's trial counsel proposed redacting the letter by deleting the cell phone number and the instruction to "call my attorney." The State opposed that suggestion, arguing that the entire text of the letter was significant and relevant. The parties then discussed alternatives to redaction, namely: (1) defense counsel withdrawing from the case; (2) the State affirmatively arguing that defense counsel was unaware of the letter and its content; and/or (3) the parties stipulating that defense counsel had no involvement with the letter.

¶5 The circuit court ruled that the State would be required both to tell the jury during closing argument that the State did not believe defense counsel had any involvement with the letter and to ask the jury not to draw such an inference. The circuit court also offered to read a stipulation to the jury if the parties so desired.

¶6 Soon after trial began, the parties resolved the case with a plea bargain. Under its terms, Walker pled guilty to amended charges of second-degree reckless homicide by use of a dangerous weapon and first-degree recklessly endangering safety, and the State was free to argue for whatever sentences it believed were appropriate. At sentencing, the circuit court imposed a twenty-

seven-year term of imprisonment for second-degree reckless homicide, bifurcated as twenty years of initial confinement and seven years of extended supervision. The circuit court imposed a consecutive, evenly bifurcated ten-year term of imprisonment for first-degree recklessly endangering safety.

¶7 Walker moved for postconviction relief, seeking plea withdrawal on various grounds or, alternatively, sentence modification. Without conducting a hearing, the circuit court rejected his claim for sentence modification and most of his claims for plea withdrawal. The circuit court then held a hearing on Walker's claims that trial counsel's alleged ineffectiveness warranted plea withdrawal. Following the hearing, the circuit court entered a written order denying the remaining claims, and Walker appeals.

DISCUSSION

¶8 A defendant who wishes to withdraw a plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Fosnow***, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883. Examples of manifest injustice include circumstances where the defendant entered a plea that was not knowing, intelligent, and voluntary, and where the defendant received ineffective assistance of trial counsel. *See* ***State v. Cain***, 2012 WI 68, ¶¶26-27, 342 Wis. 2d 1, 816 N.W.2d 177.

¶9 "The withdrawal of a plea under the manifest injustice standard rests in the circuit court's discretion." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). We will sustain a circuit court's exercise of discretion if that court relied on the facts in the record and applied a proper legal standard to reach a reasonable decision. *See* ***State v. Thiel***, 2012 WI App 48, ¶6, 340 Wis. 2d 654, 813 N.W.2d 709.

¶10 Walker first contends that he should be permitted to withdraw his guilty pleas because, in his view:

> a manifest injustice occurred when the [circuit] court failed to remove counsel or permit counsel to withdraw after the court ruled that the [November 6] letter without redaction would be permitted to be used as evidence at the jury trial. The unredacted letter evidence negatively and falsely implicated Walker's trial counsel as having conspired to intimidate witnesses, and resulted in Walker being required to either proceed with tainted defense counsel, i.e. counsel being rendered ineffective, or to plead guilty.

We understand Walker to argue that he entered his pleas involuntarily because the circuit court forced him to plead guilty, either by: (1) denying his trial lawyer's motion to withdraw; or (2) failing to discharge an ineffective trial lawyer *sua sponte*.

¶11 Whether Walker entered his pleas voluntarily presents a question of constitutional fact. *See* ***State v. Merten***, 2003 WI App 171, ¶5, 266 Wis. 2d 588, 668 N.W.2d 750. We uphold a circuit court's underlying findings of historical or evidentiary fact unless they are clearly erroneous, but we independently determine the constitutional issues involved. *See* ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199.

¶12 We reject the claim that the circuit court compelled Walker's guilty pleas by erroneously denying trial counsel's motion to withdraw, because Walker fails to show that his trial counsel made such a motion. Rather, when the issue of the letter arose, trial counsel indicated that he had considered withdrawing but had not discussed such a step with his client. The circuit court observed: "you did not indicate that you were asking for leave to withdraw or that your client asked you to do that." Trial counsel answered, "correct."

¶13 During the postconviction hearing, Walker questioned trial counsel extensively about whether trial counsel's remarks and argument in regard to the November 6 letter constituted a motion to withdraw. Trial counsel testified that he had not made such a motion.

¶14 Walker nonetheless insists on appeal that his trial counsel's remarks on the first day of trial about the possibility of withdrawing from the case must be understood as "expressing [counsel's] desire to be removed from the case." He does not, however, identify any point in the record at which trial counsel moved to withdraw or any corresponding order denying such a motion. Moreover, following the postconviction hearing, the circuit court found that Walker did not ask trial counsel to withdraw and that trial counsel "was fully determined to try the case if Mr. Walker preferred to do so." These findings are supported by the record, and we will not disturb them. *See* ***id.*** Walker thus wholly fails to support his contention that he was forced to enter guilty pleas because the circuit court denied trial counsel's motion to withdraw.

¶15 We turn to Walker's related contention that, if his trial lawyer did not move to withdraw, then he is entitled to withdraw his guilty pleas because the circuit court forced those pleas by not removing the lawyer from the case *sua sponte*. Walker's position is based on his view that his trial counsel would have been "rendered ineffective" as soon as the State offered the November 6 letter as evidence. Building on this belief, he faults the circuit court for refusing to discharge a lawyer who could not, he says, provide him with effective representation throughout the trial and, as his argument unfolds, he also alleges that his trial lawyer was ineffective for failing to insist on withdrawing from the case.

¶16 When considering whether a lawyer was ineffective, we apply the two-element test set forth in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under ***Strickland***, a criminal defendant must show both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Id.*** To demonstrate deficient performance, the defendant must show that counsel's actions or omissions fell "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶17 To support the claim that trial counsel was "rendered ineffective" by the circuit court's rulings, Walker points to his lawyer's arguments on the first day at trial urging the circuit court to exclude or redact the November 6 letter. He refers us to trial counsel's contention that the jury might "get the impression ... that [counsel] was in cahoots with [Walker] in terms of telling these people not to show up" and he emphasizes trial counsel's related concern that such an impression "might prejudice [Walker]." In the same vein, he points to the observations of the circuit court during postconviction proceedings that, when the November 6 letter surfaced, "everyone" recognized its potential to lead the jury to draw inferences that could seriously undermine the trial lawyer's credibility.

¶18 The circuit court, however, addressed these concerns before jury selection. The circuit court determined that it could alleviate the risk of the jury drawing negative inferences about Walker's trial counsel by requiring the State to assert affirmatively that, in its view, trial counsel had no knowledge of or involvement with the letter or its contents. The circuit court further ruled that it would read a stipulation to the jury that trial counsel had no involvement with the letter if the parties so desired.

¶19 A circuit court has "'broad discretion to admit or exclude evidence.'" ***State v. Nelis***, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619 (citation omitted). Similarly, to limit the risk of unfair prejudice, a circuit court may "provide limiting instructions, give a cautionary instruction, edit the evidence, or restrict a party's arguments." ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399. Here, the circuit court selected several measures to avoid prejudice. Walker believes that the measures chosen would have been inadequate to protect his rights to effective assistance of counsel and a fair trial, but he does not offer any authority to support his position. He merely insists that, as a result of the circuit court's rulings, his lawyer could not have been effective at trial. His insistence is not enough. We require citations specifically supporting relevant legal propositions. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). Absent some citation to case law or statute showing that the circuit court erred and undermined his right to effective assistance of counsel, Walker's arguments are nothing more than conclusory assertions, and thus, they warrant no relief. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433 ("It has been said repeatedly that a postconviction motion for relief requires more than conclusory allegations.").

¶20 Walker also alleges that his trial counsel was ineffective for failing to advise him that, by pleading guilty, he gave up "his right to proceed with the assistance of effective counsel during a jury trial." The State responds that it is "unsure of exactly what Walker means." In his reply brief, Walker offers a clarification, asserting that "trial counsel[] fail[ed] to properly advise Walker of issues waived by pleading [guilty], specifically his right to proceed with effective counsel after the court's ruling concerning the letter evidence."

¶21 In fact, a defendant does not give up the right to effective assistance of counsel by pleading guilty. *See* ***State v. Kelty***, 2006 WI 101, ¶43, 294 Wis. 2d 62, 716 N.W.2d 886. We are therefore unable to determine exactly what Walker believes his trial lawyer should have told him about the right to counsel.

¶22 As a final ground for plea withdrawal, Walker claims that his trial lawyer was ineffective for allegedly failing to explain to him that, by pleading guilty, he gave up the right to a postconviction challenge of the circuit court's rulings regarding the November 6 letter. The general rule is that, by pleading guilty, a defendant forfeits "'all nonjurisdictional defects, including constitutional claims.'" *See* ***Kelty***, 294 Wis. 2d 62, ¶18 & n.11 (citation and brackets omitted). Walker's contention, in effect, is that because trial counsel failed to tell him about this rule, his guilty pleas were not knowing, intelligent, and voluntary. We are not persuaded.

¶23 A defendant must be informed of the direct consequences of a guilty plea in order to enter that plea knowingly, intelligently, and voluntarily. *See* ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999). A defendant who is not so informed is entitled to withdraw the plea. ***Id.*** A defendant is not entitled to plea withdrawal, however, based on lack of information about collateral consequences of a plea. *See* ***State v. Brown***, 2004 WI App 179, ¶7, 276 Wis. 2d 559, 687 N.W.2d 543. Furthermore, "defense counsel's failure to advise a defendant of collateral consequences is not a sufficient basis for an ineffective assistance of counsel claim." ***Id.***, ¶7 n.3. Thus, the contention that trial counsel failed to inform Walker about limits on his ability to challenge rulings related to the November 6 letter can only earn Walker relief if he shows that such limits are a direct consequence of his guilty pleas. He fails to make that showing.

¶24 "'A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment.'" ***Id.***, ¶7 (citation omitted). By contrast, "[a] collateral consequence ... is indirect, does not automatically flow from the conviction, and may depend on the subsequent conduct of a defendant." ***Id.*** Pursuant to these definitions, a limitation on the ability to raise postconviction challenges to evidentiary rulings following a guilty plea is plainly a collateral consequence, not a direct consequence, of the plea. The limitation does not have any effect on the range of punishment and arises, if at all, only in the event that the defendant both concludes that the circuit court's evidentiary rulings were wrong and elects to pursue postconviction relief.

¶25 A manifest injustice does not occur merely because a defendant lacked information about the collateral consequences of his or her guilty plea. *See* ***id.*** Accordingly, Walker is not entitled to withdraw his guilty pleas based on an alleged lack of information about limitations on the opportunity to challenge the circuit court's rulings in regard to the November 6 letter.

¶26 We turn to Walker's claims that the circuit court erroneously exercised its sentencing discretion and imposed sentences that were unduly harsh and excessive. We disagree.

¶27 Sentencing is committed to the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence "has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). We start with a presumption that the circuit court

acted reasonably, and we do not interfere with a sentence if the circuit court properly exercised its discretion. *See* ***id.*** at 418-19.

¶28 When exercising sentencing discretion, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. Additionally, the circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

¶29 Here, the circuit court concluded that the crimes Walker committed were very serious, and it reminded him that the family of the homicide victim suffered an irreparable loss. The circuit court viewed the offenses as aggravated because they involved shooting a gun on a public street, circumstances that pose a risk to "innocent people nearby." The circuit court discussed Walker's character and found that his "very poor" history of juvenile offenses and adult convictions demonstrated "difficulty in adapting to the community's norms and expectations." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal record is evidence of character). The circuit court particularly emphasized the need to protect the community, explaining that members of the public do not want to feel that they live in "the [W]ild [W]est ... [not knowing] who is going to take matters in their own hands, so to speak."

¶30 Walker believes that the circuit court should have put greater emphasis on his remorse, his acceptance of responsibility, and his family's view that he is "capable of love and compassion and a relationship and support." He also points out that the author of the presentence investigation recommended a maximum aggregate sentence of seventeen years of imprisonment. A sentencing court, however, is not required to accept the recommendations in the presentence report. *See* ***State v. Hall***, 2002 WI App 108, ¶16, 255 Wis. 2d 662, 648 N.W.2d 41. In this case, the circuit court concluded that the recommendation in the presentence investigation report did not satisfy the sentencing goals of deterrence and punishment. Further, although the circuit court agreed that Walker had positive attributes, it found that the community needed protection from him for a substantial period of time, until he could "make appropriate pro-social choices." In sum, the circuit court did not weigh the sentencing factors as Walker would have preferred, but that is not an erroneous exercise of discretion. *See* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695 (our inquiry is whether the circuit court exercised discretion, not whether discretion might be exercised differently).

¶31 We similarly review Walker's allegation that he received harsh and excessive sentences by considering whether the circuit court erroneously exercised its discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶29, 316 Wis. 2d 414, 766 N.W.2d 206. A sentence is unduly harsh when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). When we assess a claim that a sentence is unduly harsh, we keep in mind that "[a] sentence well within the limits of the maximum sentence is unlikely to be

unduly harsh or unconscionable." *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449.

¶32 In this case, Walker faced a thirty-year term of imprisonment and a $100,000 fine for second-degree reckless homicide while armed. *See* WIS. STAT. §§ 940.06(1) (2009-10),[2] 939.50(3)(d), 939.63(1)(b). He faced twelve years and six months of imprisonment and a $25,000 fine for recklessly endangering safety. *See* WIS. STAT. §§ 941.30(1), 939.50(3)(f). The sentencing court selected sentences well within the limits of the statutory maximum penalties, and those sentences were thus presumptively not unduly harsh. *See* ***Scaccio***, 240 Wis. 2d 95, ¶18.

¶33 Second, Walker faced sentencing here after killing one person and jeopardizing the life of another. We cannot say that the aggregate sentence of twenty-five years of initial confinement and twelve years of extended supervision was disproportionate to his crimes or shocking to the public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.