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

**January 14, 2014**

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



**Appeal No. 2013AP497-CR** **Cir. Ct. No. 2010CF104**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ERIC G. VANDYNHOVEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Forest County: JAMES R. HABECK, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Eric VanDynHoven appeals judgments convicting him of burglary, false imprisonment and eleven misdemeanors. He also appeals an order denying his motion to withdraw his no-contest pleas. He contends the plea colloquy was defective because the court failed to ascertain his understanding of the terms of the plea agreement and failed to inform him it was not bound by

the plea agreement. He also contends his trial counsel, Brian Bennett, was ineffective for failing to ensure VanDynHoven's understanding of the plea agreement. We reject these arguments and affirm the judgments and order.

¶2 A defendant seeking to withdraw no-contest pleas after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. ***State v. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177. A defendant can meet this burden by showing the pleas were not knowingly, intelligently, and voluntarily entered. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. When a defendant shows that the plea hearing failed to satisfy the requirements of WIS. STAT. § 971.08(1) or other court-mandated duties, and alleges he or she did not know or understand information that should have been provided at the plea hearing, the burden shifts to the State to prove by clear and convincing evidence that the plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy. ***State v. Hoppe***, 2009 WI 41, ¶44, 317 Wis. 2d 161, 765 N.W.2d 794. Whether a plea is knowing, intelligent and voluntary is a question of constitutional fact. ***Brown***, 293 Wis. 2d 594, ¶19. We view the evidence in the light most favorable to the circuit court's decision, but independently determine whether those facts establish valid pleas. ***Id.***

¶3 The State concedes the plea colloquy was defective in two respects. First, the court did not ask whether the plea agreement included a sentence recommendation. At the sentencing hearing, the district attorney made a sentence recommendation that he indicated was required by the plea agreement, four to five years' initial confinement and four to five years' extended supervision. In his postconviction motion, VanDynHoven claims he believed the agreement called for a joint recommendation for probation, with one year in jail as a condition of

probation, and for the court to consider amending the felonies to misdemeanors upon VanDynHoven's successful completion of probation.

¶4 The circuit court properly denied VanDynHoven's postconviction motion based on its finding that the State met its burden of proving VanDynHoven's understanding of the plea agreement. Attorney Bennett testified that the agreement called for the State to recommend a sentence no greater than the presentence investigation (PSI) recommendation. Bennett testified he told VanDynHoven the correct terms of the agreement and never told him the State was going to join in the defense probation recommendation. The circuit court found Bennett's testimony more credible than VanDynHoven's. That finding is supported by several facts. First, Bennett's written description of the agreement, sent to VanDynHoven before he entered the pleas, says as to each charge "state free to argue within the confines of their PSI, defense free to argue." Second, the defense ordered its own PSI. It would make little sense to challenge the State's PSI if the parties had agreed to a joint sentence recommendation. Third, after the district attorney recited his version of the plea agreement at the sentencing hearing, VanDynHoven did not contradict or question that version of the agreement.

¶5 VanDynHoven contends he was confused at the plea hearing regardless of what he was told. Other than his self-serving testimony, which the circuit court found not credible, the record does not support his contention. Nothing in the record suggests VanDynHoven could have legitimately misunderstood the terms of the agreement after they were explained orally and in writing. The circuit court is not obligated to accept VanDynHoven's testimony that he was confused. *See* ***Birts v. State***, 68 Wis. 2d 389, 394, 228 N.W.2d 351

(1975). Therefore, the record supports the circuit court's finding that the State met its burden of proving VanDynHoven knew the terms of the plea agreement.

¶6 The second defect in the plea colloquy consists of the court's failure to inform VanDynHoven it was not bound by the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. However, VanDynHoven has not established a manifest injustice on that basis because he received the benefit of the plea agreement. The agreement called for the State to make a recommendation within the confines of the recommendation made in the PSI, and the defense was free to argue for a lesser sentence. The PSI and the district attorney recommended four to five years' initial confinement and four to five years' extended supervision. The court imposed concurrent sentences totaling five years' initial confinement and two years' extended supervision. Because the sentence imposed was less than the State's recommendation, VanDynHoven has not established a manifest injustice arising from the court's failure to inform him it was not bound by the sentence recommendations.

¶7 Finally, VanDynHoven contends his trial counsel was ineffective for failing to inform him of the correct plea agreement. To establish ineffective assistance of counsel, VanDynHoven must show deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He has not established deficient performance because the circuit court found, and the record establishes, that attorney Bennett informed VanDynHoven of the correct plea agreement orally and in writing.

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

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