COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP279 **Cir. Ct. No. 2000CF777**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRENTON E. WHITE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Trenton E. White appeals the order denying his WIS. STAT. § 974.06 (2011-12) motion to withdraw his guilty plea or, in the

alternative, to modify his sentence.[1] White argues: (1) there was an insufficient factual basis to support his guilty plea; (2) the prosecutor breached the plea agreement; and (3) his trial counsel was ineffective for stipulating that the criminal complaint was sufficient to support White's plea and for failing to object to the prosecutor's breach of the plea agreement. We conclude White's plea was supported by the facts and the prosecutor did not breach the plea agreement when she conveyed the wishes of the victim's grandmother who did not want to address the circuit court personally at White's sentencing hearing. As such, White's trial counsel was not ineffective on these bases. Accordingly, we affirm.

BACKGROUND

¶2 According to the criminal complaint, authorities were called to White's home in the early morning hours of February 13, 2000. When they arrived, they found an eight-year-old girl in distress. She died on the way to the hospital.

¶3 The child had bruising on her upper arms, chest, buttocks, and thighs. The medical examiner concluded that the child died from "exsanguination" due to blunt force trauma in the buttocks area.[2]

[1] The Honorable Jeffrey A. Wagner issued the order that is the subject of this appeal. The Honorable John J. DiMotto accepted White's plea and sentenced him.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The definition of "exsanguinate" is "to make bloodless: drain of blood." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 804 (1993).

¶4 The child was the daughter of A.E., a woman with whom White had been living for several years. The police interviewed White. He told them that the child had been "acting up," so he decided to start a "boot camp" for her. This involved forcing her to do push-ups, lift weights, and run outside. White additionally admitted that from time to time, in the three weeks prior to the child's death, he would give her "whoopings." On those occasions, White used a cloth belt, and struck the child at least ten times, using "'a great amount of force,'" sometimes with the child's pants down.

¶5 During the evening hours of February 12, 2000, White said that he had caught the child getting sweets from the kitchen without permission. When confronted, the child lied about what she was doing. At that point, White hit her hands with the belt. When the child admitted to lying to him, White proceeded to strike her on the buttocks approximately eight times with the belt—these were described in the complaint as powerful strikes with a lot of force. White then made the child do various exercises.

¶6 The child's mother, A.E., returned home around 11:00 p.m. White told A.E. that the child had gotten a whooping. He then told the child to get dressed and they went outside. White made the child run with him outside for thirty minutes. When the two got back inside, White punched the child in the chest and sent her to her bedroom.

¶7 When A.E. checked on the child, she reported to White that the child's stomach hurt. White checked on the child and saw that her hands and feet were cold, so he and A.E. gave the child hot chocolate and put water bottles in the bed in an effort to warm her. At one point when White went to check on the child,

she was vomiting through her mouth and nose. A.E. and White later discovered that the child was not breathing. A.E. attempted CPR and called 911.

¶8 At the plea hearing, the parties stipulated that the criminal complaint could serve as the factual basis for White's guilty plea, and the circuit court relied on those facts when it accepted White's plea.

¶9 White was sentenced to forty years of initial confinement and twenty years of extended supervision. He did not pursue a direct appeal from his conviction.

¶10 Nearly twelve years after his conviction, White filed a postconviction motion under WIS. STAT. § 974.06.[3] The postconviction court denied White's motion without a hearing.

DISCUSSION

A. Sufficiency of the factual basis as set forth in the complaint.

¶11 White argues that he should be allowed to withdraw his plea because there was an insufficient factual basis to support it. After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). "One type of manifest injustice is the failure to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads." ***State v. Johnson***,

[3] The postconviction court indicates in its order that White's originally appointed postconviction/appellate lawyer "dropped the ball and closed out his file without contacting the defendant more than ten years ago." New counsel was subsequently appointed and represents White in these appellate proceedings.

207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). "Unless it was clearly erroneous, we will uphold the circuit court's determination that there existed a sufficient factual basis to accept the plea." ***State v. Sutton***, 2006 WI App 118, ¶8, 294 Wis. 2d 330, 718 N.W.2d 146.

¶12 According to White, the postconviction court overlooked the standard for criminal recklessness, which requires proof that the defendant had actual knowledge of the risk his or her conduct created. *See* WIS. STAT. § 940.02(1) (1999-2000) ("Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony."); *see also* WIS JI-CRIMINAL 1020 (explaining that criminally reckless conduct means the defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and the defendant was aware that his conduct created such a risk).

¶13 White submits: "Here, there was no direct evidence that White actually knew of the risk his behavior created; nor are there facts which would permit an inference that White actually knew of the risk." He writes:

> Firstly, White had imposed similar punishments in the past and it had not resulted in death or great bodily harm. Thus, if anything, the inference to be drawn is that White had no reason to subjectively believe that striking [the child] with the belt, and making her exercise was likely to cause death or great bodily harm.
>
> Secondly, White's behavior was not the sort of inherently dangerous conduct that, almost as a matter of law, demands an inference that the defendant subjectively knew of the risk that his behavior created. For example, every reasonably intelligent person can be said to appreciate the profound risk of firing a shotgun into a crowded room. Here, though, the same cannot be said about spanking a child with a belt.

This court disagrees with White's assessment of the facts presented.

¶14 White argues that because he never *said* that he knew his conduct created a risk of death or great bodily harm for the child, there is no direct evidence that would permit the court to conclude that he subjectively knew of the risk his behavior created. There is, however, no need for such an admission. An inculpatory inference that White had actual knowledge of the risk can be drawn from the facts and circumstances set forth in the complaint and agreed to by him. *See* ***State v. Spears***, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988) ("'A factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts ... even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference.'") (citation omitted; ellipses in ***Spears***).

¶15 White minimizes the facts and circumstances that surrounded the eight-year-old child's death, as set forth in the complaint. The complaint provides that during the three-week period leading to her death, the child was subjected to numerous whoopings, where White, by his own admission would strike her with a belt using "a great amount of force." On February 12, 2000, after striking her with a belt numerous times "with a lot of force," White proceeded to make the child do push-ups, knee bends, leg presses, and run in the house. When the child's mother came home at 11:00 p.m., he made the child run around the block for thirty minutes in February as further punishment. After this, White punched the child in the chest. The medical examiner ultimately concluded that the child died from blood loss due to blunt force trauma in the buttocks area. The inculpatory inference from these facts and circumstances—facts and circumstances White admitted were true during his plea hearing—was sufficient to support White's

plea, even though he now asserts that exculpatory inferences could also be drawn. *See* ***id.***

¶16 White additionally argues that the facts in the complaint are insufficient to establish the "utter disregard" element of first-degree reckless homicide. Again, we disagree. Beyond the facts set forth in the preceding paragraph, the complaint relays that at one point when White went to check on the child, she was vomiting through her mouth and nose. The complaint continues:

> White said that they [i.e., he and A.E.] started to take some of [the child]'s clothes off because they didn't know what was wrong with her and why she was vomiting. He and [A.E.] left [the child] in the room for a[]while; when [White] went back to check on her, he found that she wasn't breathing.

The facts were sufficient to establish that White acted with utter disregard for the life of the child. *See* ***State v. Edmunds***, 229 Wis. 2d 67, 76-77, 598 N.W.2d 290 (Ct. App. 1999) (Utter disregard for human life is an objective standard of what a reasonable person in the defendant's position is presumed to have known and is proved through an examination of the acts that caused death and the totality of the circumstances surrounding the conduct.).

¶17 Because a challenge to the factual basis for White's guilty plea was meritless, his trial counsel was not ineffective for failing to pursue it. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996); *see also* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.").

B. Whether the prosecutor breached the plea agreement.

¶18 Next, White argues the prosecutor breached the plea agreement when she relayed the wishes of the child's grandmother that White be sentenced to a maximum sentence, a term greater than the State had agreed to recommend—and did recommend—at sentencing.

¶19 The sentencing transcript shows that the prosecutor adhered to the plea agreement and made the agreed-upon sentence recommendation at White's hearing, asking that "the court impose a total of 40 years in the Wisconsin state prison system broken down in terms of 25 years initial confinement and 15 years extended supervision." After making this recommendation, two of the victim's relatives expressed their views that a longer sentence should be imposed.

¶20 First, a cousin of the child's mother addressed the circuit court and stressed that White was a "terribly sick man" who had shown no remorse for the child's death. The cousin asked the court to impose the maximum sentence and "[t]hrow the book at him. Throw the keys at him. Lock him away. Put him under the jail…. Don't let him out."

¶21 After these remarks, the prosecutor noted that the child's grandmother was also in court. The prosecutor stated:

> Your Honor, as I noted … [the child]'s grandmother is also here. I asked her if she wanted to speak, and she said that she didn't think she would be able to because she's very emotional about this.
>
> What she wanted me to convey to the court is that she just doesn't understand why this could happen or how a man could do this to a little girl. That [the child] was just a little girl who could never have done anything to deserve this. It would be her request that the defendant never get out, ever.

> And she wanted the court to know that [the child] was her first grandchild. She was an almost perfect child, and she was completely loved by the family.

¶22 This court agrees with the State's assertions, as set forth in its response brief: "[T]he prosecutor did not breach the plea agreement by acceding to a grandmother's request that she simply convey to the court the thoughts that the grandmother was too emotional to speak for herself." As this court recently explained:

> In Wisconsin, every crime victim has the right "to make a statement to the court at disposition." WIS. CONST. art. I, § 9m; *see also* WIS. STAT. § 972.14(3)(a) ("If a victim wants to make a statement, the court shall allow the victim to make a statement in court or to submit a written statement to be read in court."); WIS. STAT. § 950.04(1v)(m) ("Victims of crimes have the following rights: ... To provide statements concerning sentencing, disposition, or parole[.]"). So important is that right that the legislature has permitted a $1000 forfeiture to be imposed on prosecutors who refuse to allow victims to present statements if they so desire. *See* WIS. STAT. § 950.11. A victim's right to provide a statement at sentencing expressing his or her view as to disposition is to be "honored and protected ... in a manner no less vigorous than the protections afforded criminal defendants." WIS. STAT. § 950.01.

State v. Stewart, 2013 WI App 86, ¶15, 349 Wis. 2d 385, 836 N.W.2d 456 (brackets and ellipses in ***Stewart***); *see also* WIS. STAT. § 950.02(4)(a)4. (providing various definitions of "victim" and where the victim of a crime is deceased, family members qualify).

¶23 Given that the child's grandmother could have submitted a written statement to be read in court, *see* WIS. STAT. § 972.14(3)(a), we see no reason to distinguish what occurred here. The prosecutor did not endorse the views of either the relative who spoke at the sentencing hearing or the grandmother—those sentiments were clearly distinguishable from the agreed-upon sentencing

recommendation. *Cf.* ***State v. Clement***, 153 Wis. 2d 287, 301-02, 450 N.W.2d 789 (Ct. App. 1989) ("The plea agreement applied to the prosecutor's recommendation alone. There is no evidence that the prosecutor advised or encouraged the victim and her fianc[é] to recommend the maximum sentence."). Although the circuit court ultimately imposed a maximum sentence in this case, it was not due to a breach of the plea agreement by the State.

¶24 Again here, because a challenge based on a breach of the plea agreement by the prosecutor was meritless, White's trial counsel was not ineffective for failing to pursue it. *See* ***Cummings***, 199 Wis. 2d at 747 n.10.

By the Court.—Order affirmed.

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