COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2526-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILTON J. CHRISTENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Milton J. Christensen appeals *pro se* from a judgment entered after he pled guilty to one count of attempted armed robbery, contrary to WIS. STAT. §§ 943.32(1)(b)&(2) and 939.32 (1997-98). He also appeals from orders denying his postconviction motion. Christensen claims that

the trial court should have granted his postconviction motion seeking to withdraw his plea because: (1) the plea was the result of his trial counsel's ineffective assistance; (2) the plea was involuntary; and (3) the State violated the plea agreement. He also claims that because of disputed issues of fact, the trial court should not have denied his postconviction motion without conducting an evidentiary hearing. Because the record conclusively establishes that Christensen received effective assistance of trial counsel, that the plea was knowingly, intelligently and voluntarily entered, and that the plea agreement was not breached, the trial court did not err in summarily denying his postconviction motion seeking plea withdrawal. Therefore, we affirm.

I. BACKGROUND

¶2 On January 3, 1995, at approximately 1:11 a.m., Christensen entered the Amoco Station located at 3200 South 27th Street and started screaming at the clerk, Robert Siegl. Christensen then started pounding on the checkout counter and told Siegl "he was going to shoot him if he did not put it out." Siegl understood this to mean that he was supposed to give the money from the cash register to Christensen or Christensen would shoot him. Siegl observed a round metal object protruding from Christensen's right jacket sleeve, which at first he thought was a sawed-off shotgun, but subsequently he believed the object was a pipe. Siegl then took a baseball bat from under the counter and slammed it on top of the counter. Christensen continued to yell at Siegl and then Siegl took a can of carburetor fluid and sprayed it in Christensen's face. Christensen then fled the store.

¶3 On January 11, 1995, at approximately 9:50 p.m., Christensen entered Marc's Café, located at 5265 North Port Washington Rd., pointed what

appeared to be a silver-colored handgun toward the cashier, Diana Epright, and ordered her to "[g]ive me all your money." Epright could not get the cash register open and called a manager to assist. Christensen got nervous and left.

¶4 Christensen was charged with two counts of attempted armed robbery based on the foregoing incidents. After repeated conflicts with public defender appointments, Christensen's family hired a private attorney to defend him. Christensen's theory of defense depended on knowing whether Siegl would say he felt his life was threatened. Christensen asked counsel to interview Siegl to find out this information. Siegl was never interviewed and, on the date set for trial, the State offered a plea agreement, which involved dismissing the Marc's Café count. Instead of proceeding to trial, Christensen accepted the plea agreement. At sentencing, the State recommended the maximum, setting forth Christensen's past criminal history. The trial court sentenced Christensen to the maximum, twenty years in prison.

¶5 Christensen filed a *pro se* motion seeking to withdraw his plea, which was denied. His motion for reconsideration asking for the same was also denied. He now appeals.

II. DISCUSSION

A. Ineffective Assistance.

¶6 This claim is premised on the fact that Christensen wanted to go to trial, but felt that he could not because, as of the trial date, counsel had failed to interview the victim, Siegl, to see whether Siegl felt his life was threatened. After Christensen was convicted, his family hired an investigator who interviewed Siegl three years after the incident. The investigator's affidavit states that he asked

Siegl if he believed Christensen possessed a gun or weapon and Siegl responded, "no." The investigator then asked Siegl if he felt that his life was threatened by a gun, weapon or otherwise during the incident and Siegl responded, "no." Christensen claims that if Siegl had been interviewed earlier, he would have given the same answers, and if Christensen had known this, he would not have pled guilty, but would have gone to trial because he believed a jury would acquit him on the basis of Siegl's answers.

¶7 Although Christensen's presentation of this argument is somewhat muddled, we construe it to be a claim that counsel was ineffective for failing to interview Siegl, that this ineffectiveness constitutes a manifest injustice and, therefore, he should have been allowed to withdraw his plea on this basis. We reject his claim.

¶8 A defendant seeking to withdraw a guilty plea after sentencing must show by clear and convincing evidence that such relief is necessary to correct a manifest injustice. *See* ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993). The manifest injustice test may be met by establishing the ineffective assistance of counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). In order to establish ineffective assistance, a defendant must satisfy the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). That is, a defendant must show that counsel's conduct was deficient and that the deficient performance prejudiced the defendant. *See* ***id.*** at 694. Under the prejudice prong, the defendant must show that "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** If this claim can be resolved on the prejudice prong, we need not address the deficient performance prong. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). In reviewing the

trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990) (citation omitted).

¶9 Here, we conclude that counsel's failure to interview Siegl did not prejudice the outcome. Christensen's claim is essentially that if counsel had interviewed Siegl, Siegl would have said that he did not feel his life was threatened and Christensen would have insisted on going to trial because, with Siegl's testimony, the jury could not have convicted him of attempted armed robbery. Christensen devotes a substantial portion of his argument discussing the fifth element required to prove attempted armed robbery, which requires showing that the victim believes he or she is subject to death or great bodily harm. Christensen contends that Siegl's testimony would negate the fifth element. We are unconvinced.

¶10 As noted by the trial court, the record conclusively demonstrates that the fifth element of attempted armed robbery was met here, even in light of the later obtained Siegl affidavit. The complaint, which Christensen indicated the court could rely on as a basis for the guilty plea, states that Siegl told police that Christensen threatened to shoot Siegl. This constitutes a threat of force which, at least for some period of time, caused Siegl to believe that he could be subjected to death or great bodily harm. Even after Siegl decided that Christensen's weapon was a pipe and not a shotgun, the fact remains that a pipe can cause great bodily harm and certainly can be considered a weapon. The trial court pointed out that Siegl's actions certainly indicate that he felt threatened: he took out his own weapon—a baseball bat—and slammed it on the counter. Under these

circumstances, we conclude that there is no reasonable possibility that the outcome of this case would be different even if counsel had interviewed Siegl prior to Christensen's guilty plea. Accordingly, we reject Christensen's claim that he received ineffective assistance of trial counsel.

B. Involuntary Plea.

¶11 Christensen next claims that he was coerced into pleading guilty and therefore he should be allowed to withdraw his plea. We reject this claim.

¶12 We will not reverse the trial court's refusal to allow withdrawal of a plea unless it has erroneously exercised its discretion. *See* ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). The defendant bears the burden to persuade the trial court that withdrawal is necessary to correct a manifest injustice. *See* ***id.*** Christensen has failed to do so here. Further, whether a plea was voluntarily, knowingly, and intelligently entered is a question of constitutional fact, which this court reviews independently. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997).

¶13 We have reviewed the record and the plea colloquy and conclude that it complies with the requirements set forth in ***State v. Bangert***, 131 Wis. 2d 246, 260-61, 389 N.W.2d 12 (1986). Christensen acknowledged that he understood the nature of the charge and the potential punishment. He conceded that there was a sufficient factual basis for a finding of guilt, and stated that he understood the constitutional rights he was waiving. In addition, he affirmatively stated that he had not been threatened into pleading guilty. In fact, he did so twice: first in the guilty plea questionnaire, and second in response to the trial court's inquiry during the plea colloquy. Christensen also stated that he was satisfied with the representation that he had received. Given the fact that he had

previously fired three different attorneys during this case, his acknowledgment of satisfaction is significant. Based on the foregoing, we must reject Christensen's claim that his plea was coerced and involuntarily entered. The record conclusively indicates otherwise.

C. Breach of Plea Agreement.

¶14 Next, Christensen contends that the State breached the plea agreement during the sentencing hearing by "bad-mouthing" him. He contends that one of the promises made in exchange for his agreement to plead guilty was that the prosecutor would simply recommend the maximum sentence, without comment, and without "bad-mouthing" the defendant. Even assuming this to be true, despite lack of documentation in the record, we reject this claim.

¶15 Christensen is not specific with respect to which comments he considers "bad-mouthing." He simply directs us to pages 4-11 of the sentencing transcript. These pages reflect the prosecutor's statement informing the court of the two additional attempted armed robbery "read-ins" which were agreed to; informing the court of Christensen's substantial criminal record and problems with crack-cocaine; and recommending a twenty-year sentence to prevent Christensen from continuing "what is basically a 20 year career of being a criminal."

¶16 Christensen claims this constituted "bad-mouthing." The alleged agreement not to "bad-mouth" Christensen is at best ambiguous. *See, e.g.,* ***State v. Jorgensen***, 137 Wis. 2d 163, 169, 404 N.W.2d 66 (Ct. App. 1987). What may seem like "bad-mouthing" to Christensen may be viewed by the State as simply providing the court with pertinent factual information that it has an obligation to provide. We agree with the State that we must construe the alleged agreement in a manner that is consistent with safeguarding public interest. *See* ***id.*** at 170. Such

construction must permit the prosecutor to provide the court with information relevant to sentencing. The portions of the prosecutor's statement referred to constitute such relevant information and, therefore, do not constitute a breach.

¶17 Christensen also claims that counsel was ineffective for failing to object during the allegedly improper comments by the prosecutor. Because we have concluded that the prosecutor did not breach the plea agreement, and that the comments were proper, no claim for ineffective assistance on this basis can be maintained.

D. Evidentiary Hearing.

¶18 Finally, Christensen also claims that his postconviction motion should not have been denied without holding an evidentiary hearing. We reject this claim.

¶19 If a defendant alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing on the motion. *See* ***Bentley***, 201 Wis. 2d at 309-10. Whether the motion satisfies this standard is a question of law. *See* ***id.*** "However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Id.***

¶20 Here, as noted earlier in this opinion, the record conclusively refutes Christensen's claims. Accordingly, the trial court did not err in summarily denying his postconviction motion.

By the Court.—Judgment and orders affirmed.

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