COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-3012-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LASHUN T. MCGEE, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and ELSA C. LAMELAS, Judges. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Lashun T. McGee, Sr., appeals from a judgment entered after he pled guilty to one count of neglecting a child with death as a

consequence, *see* WIS. STAT. § 948.21 (1997-98),[1] and one count of physical abuse of a child, *see* WIS. STAT. § 948.03(3)(c). He also appeals from an order denying his motion for postconviction relief. He argues: (1) that the guilty plea was not knowingly, voluntarily and intelligently entered; (2) that the State improperly withheld exculpatory evidence; (3) that he received ineffective assistance of counsel; and (4) that there is no factual basis to support his conviction for physical abuse of a child. We affirm.

BACKGROUND

¶2 On September 5, 1996, McGee's three-year-old son was shot in the head with a .38 caliber revolver. The child died as a result of the gunshot wound.

¶3 McGee told the police that only he and his son were present in his basement bedroom when his son was shot. He said that he had gone to sleep with the gun next to him and that he woke up when he heard the gun being fired. He then saw his son bleeding from his forehead and found the gun next to him. McGee said that he took his son upstairs and put him on the living room couch while he went to get a towel to place on his son's head. The child fell off of the couch while McGee was getting the towel. McGee said that when he returned, he put his son back on the couch and called 911; he then attempted to perform cardiopulmonary resuscitation on his son.

¶4 McGee also told the police that he took the gun that his son had been shot with and fired a shot through his bathroom window to make his son's shooting look like a drive-by shooting. He said that he then hid the gun in the attic

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

of his home. McGee said that he also hid the sheet from his bed, which had his son's blood splattered on it.

¶5 McGee was originally charged with first-degree reckless homicide.[2] At the preliminary hearing, the medical examiner testified that it was highly unlikely that McGee's son shot himself. He testified that the wound to the child's forehead was a contact wound, and that the trajectory of the bullet was nearly horizontal through the center of the child's forehead. He testified that the child's hands and arms were not large enough to place the gun in that position. The medical examiner also testified that the child would not have been able to fire the revolver.

¶6 Thereafter, McGee entered a plea bargain with the State and pled guilty to one count of neglecting a child with death as a consequence and one count of physical abuse of a child. Prior to the plea, the State explained that it was amending the information to reflect the plea-bargained charges because there was evidence supporting McGee's claim that his son shot himself. Specifically, the State explained that although the medical examiner had testified that it was highly unlikely that the child shot himself, two of the State's ballistics experts believed that it was possible for McGee's son to have shot himself. Further, McGee's son had gunshot residue on his hands. The State acknowledged that this evidence weakened its case against McGee, but concluded that the amended charges should be filed against McGee because he had made the gun accessible to his son, he had

[2] The State later sought to amend the charge to first-degree intentional homicide; however, as noted, McGee eventually pled guilty to one count of neglecting a child with death as a consequence and one count of physical abuse of a child.

implicated himself as culpable in the shooting by hiding the evidence relating to the shooting, and he had failed to provide prompt aid to his son after the shooting.

¶7 The trial court questioned McGee regarding his understanding of the plea bargain, and confirmed that McGee knew that the court was not bound by the negotiated sentencing recommendation. The trial court further questioned McGee regarding his understanding of the information set forth in the guilty plea questionnaire and waiver of rights form. Finally, the trial court confirmed with McGee's attorney that he had reviewed the form with McGee. The trial court then accepted McGee's guilty pleas.

¶8 At sentencing, the State reiterated that its ballistics experts believed that McGee's son could have shot himself, but that McGee's convictions were nonetheless justified because McGee left the loaded gun where his son could get it and had acted culpably after his son was shot. The State further revealed that its ballistics experts had met with the medical examiner and showed him how McGee's son could have pulled the trigger on the revolver, and that the medical examiner then conceded that it was possible that the child could have pulled the trigger.

¶9 Subsequently, McGee filed a postconviction motion raising the issues that he argues on appeal. The trial court denied the motion without a hearing.

DISCUSSION

¶10 McGee asserts that the guilty plea colloquy was inadequate under WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12

(1986).[3] He asserts that the trial court failed to sufficiently question him about his educational background and failed to assure that he was aware of the consequences of his plea and the nature and elements of the crimes to which he pled guilty. Therefore, McGee asserts, his guilty pleas were not knowingly, voluntarily and intelligently entered.

¶11 After sentencing, a plea may be withdrawn only if doing so is necessary to correct a manifest injustice. *See* ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). A defendant has the burden of proving by clear and convincing evidence that a manifest injustice has occurred. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996). A manifest injustice occurs when a plea is not entered knowingly, voluntarily and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815, 817 (Ct. App. 1995).

¶12 Whenever WIS. STAT. § 971.08(1) or other court-mandated duties are not fulfilled at a plea hearing, a defendant may move to withdraw his plea. *See* ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. The defendant must make a

---

[3] Section 971.08 of the Wisconsin Statutes provides, in relevant part:

> **(1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.
> (b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial or naturalization, under federal law."

WIS. STAT. § 971.08(1).

prima facie showing that the court violated its mandatory statutory duties, and allege that he or she did not know or understand the information that the trial court failed to provide. *See* ***id.***; ***State v. Kywanda F.***, 200 Wis. 2d 26, 38, 546 N.W.2d 440, 446 (1996). Once the defendant makes this showing, the burden shifts to the State to demonstrate by clear and convincing evidence that the defendant's plea was knowingly, voluntarily and intelligently made. *See* ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26.

¶13 Whether a plea was knowingly, voluntarily and intelligently entered is a question of constitutional fact, subject to *de novo* review. *See* ***id.***, 131 Wis. 2d at 283, 389 N.W.2d at 30. The trial court's findings of historical or evidentiary facts, however, will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***id.***, 131 Wis. 2d at 283–284, 389 N.W.2d at 30.

¶14 The record reveals that the plea colloquy satisfied the requirements of WIS. STAT. § 971.08 and ***Bangert***. Before McGee entered his plea, the State explained that the charge of neglecting a child with death as a consequence was based upon the evidence that McGee intentionally placed his loaded gun on the bed, where his son could get it, and that his son shot and killed himself with the gun; alternatively, the State explained, the charge was also supported by the evidence supporting the inference that McGee shot his son. The charge of physical abuse of a child was based upon the evidence that McGee failed to seek prompt medical care for his son after the shooting, but instead carried his son upstairs and placed him on the couch while he hid the evidence related to the shooting and the evidence that McGee left his loaded gun within his son's reach. After the State explained the bases of the charges to which McGee was to plead

guilty, the trial court personally asked McGee whether the State had accurately recited the terms of the plea bargain and McGee responded affirmatively.

¶15 The trial court then informed McGee of the charges set forth in the information and the potential penalties for each of the charges. McGee affirmed that he understood. The trial court confirmed with McGee that nobody had pressured him into entering his pleas, and that he understood that the trial court was not bound by the negotiated sentence recommendation.

¶16 The trial court then questioned McGee under oath regarding his understanding of the information on the guilty plea questionnaire and waiver of rights form. Specifically, the trial court asked McGee whether he reviewed the form with his attorney, whether he understood everything on the form and whether he had signed the form. McGee answered these questions affirmatively. The trial court asked McGee whether he understood that he would be giving up the rights set forth in the form by pleading guilty, and McGee again responded affirmatively. The trial court also asked McGee whether he understood the elements of the offenses, and the facts set forth in the criminal complaint related to those offenses. McGee replied that he understood. McGee also told the court that he was entering his pleas freely and voluntarily after having discussed the matter with his attorney, that he was satisfied with his attorney's representation, and that he was pleading guilty because he was guilty.

¶17 The trial court next asked McGee's attorney whether he had reviewed the guilty plea questionnaire and waiver of rights form with McGee, and whether he believed McGee understood all of the rights he was giving up by pleading guilty. He responded affirmatively.

¶18 McGee's affirmative responses to the trial court's specific questions regarding his understanding of the charges to which he was pleading and of the guilty plea questionnaire and waiver of rights form establish that McGee knowingly, voluntarily and intelligently entered his guilty pleas. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 826–829, 416 N.W.2d 627, 629–630 (Ct. App. 1987) (defendant's representation that he or she has reviewed and understands the information set forth in the guilty plea questionnaire and waiver of rights form is sufficient to establish knowing, voluntary and intelligent plea).[4]

¶19 McGee next argues that he is entitled to withdraw his plea because the State improperly withheld exculpatory evidence. He asserts that he was unaware that the State's ballistics experts believed his son could have pulled the trigger on the revolver until the date of the plea hearing.

¶20 "[T]he suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment." ***State v. Pettit***, 171 Wis. 2d 627, 644, 492 N.W.2d 633, 641 (Ct. App. 1992). Evidence is material "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" ***Id.*** (quoted source omitted).

[4] Although the trial court did not explicitly question McGee regarding his educational background, the guilty plea questionnaire and waiver of rights form reveals that McGee completed eleven grades of primary education and one additional year of vocational education. Moreover, McGee does not allege that he had a comprehension problem because of his educational background. Therefore, McGee has not satisfied his burden to make a prima facie showing that he is entitled to withdraw his plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986) (defendant must make a prima facie showing that the court violated its mandatory duties and allege that he or she did not know or understand the information that the trial court failed to provide); ***State v. Moederndorfer***, 141 Wis. 2d 823, 829 n.2, 416 N.W.2d 627, 630 n.2 (Ct. App. 1997) ("[Although] the trial court failed to determine the extent of defendant's education and general comprehension … we cannot deem the record to be prima facie defective unless defendant also alleges to the trial court that he had a comprehension problem.").

¶21 The record reveals that the State properly disclosed the opinions of its ballistics experts before McGee entered his guilty pleas. Indeed, the State thoroughly explained prior to the pleas that the negotiated charges were offered because of the evidence that McGee's son may have shot himself. The State did not violate its duty to disclose exculpatory evidence.

¶22 Moreover, insofar as McGee's argument relates to the additional information that the State revealed at the sentencing hearing regarding the medical examiner's concession that the child may have been able to pull the trigger on the revolver, McGee fails to explain how this additional information would have affected his decision to plead guilty. *See* ***Bentley***, 201 Wis. 2d at 313–315, 548 N.W.2d at 54–55 (defendant seeking to withdraw guilty plea must provide a specific explanation of why, but for the alleged error, he would have gone to trial rather than plead guilty). At the time McGee entered his plea, the State had already conceded that there was significant evidence supporting an argument that McGee's son shot himself, including the opinions of the ballistics experts and the presence of gunshot residue on the child's hands. Despite this evidence, McGee chose to plead guilty. We therefore cannot conclude that there is a reasonable probability that McGee would not have pled guilty if he had known that the medical examiner conceded the point made by the State's ballistics experts.

¶23 McGee's next claim is that he is entitled to withdraw his plea because he received ineffective assistance of counsel. *See* ***id.***, 201 Wis. 2d at 311, 548 N.W.2d at 54 (a plea that results from ineffective assistance of counsel is manifestly unjust). To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was

deficient and that the deficient performance produced prejudice.[5] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, McGee must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis. 2d at 312, 548 N.W.2d at 54.

¶24 Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633–634, 369 N.W.2d 711, 714 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235, 245 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. *See* ***Pitsch***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

¶25 McGee asserts that his counsel was deficient because he failed to object to the State's disclosure of exculpatory evidence at the plea hearing and at sentencing, and because he allegedly failed to discuss with McGee the consequences of his guilty plea or the nature and elements of the crimes to which he pled.

¶26 As noted, McGee was properly informed of the opinions of the State's ballistics experts before he entered his guilty pleas, and McGee has not explained how the additional information revealed at sentencing would have affected his decision to plead guilty. Moreover, the record refutes McGee's claim

[5] If we conclude that a defendant fails to satisfy this burden on one prong, we need not address the other prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

that his attorney did not discuss with him the consequences of his guilty plea or the nature and elements of the crimes to which he pled. Indeed, McGee testified under oath at his guilty plea hearing that he had reviewed the guilty plea questionnaire and waiver of rights form with his attorney, and that he understood the elements of the offenses and the facts set forth in the criminal complaint related to those offenses. We therefore reject McGee's claim that his attorney was ineffective.

¶27 McGee's final claim is that there is no factual basis to support his conviction for physical abuse of a child. He asserts that the record rebuts an inference that he abused his son because he attempted to aid his son after the shooting by calling 911 and performing cardiopulmonary resuscitation.

¶28 "[A] failure of the trial court to establish a factual basis showing that the conduct which the defendant admits constitutes the offense charged and to which the defendant pleads, is evidence that a manifest injustice has occurred." ***White v. State***, 85 Wis. 2d 485, 488, 271 N.W.2d 97, 98 (1978). "Where[,] as here, the guilty plea is pursuant to a plea bargain, the court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Broadie v. State***, 68 Wis. 2d 420, 423–424, 228 N.W.2d 687, 689 (1975). Indeed, in the context of a negotiated plea, "a defendant can enter a no contest or guilty plea to any crime which is reasonably related to a more serious crime for which a factual basis exists, even if a 'true greater- and lesser-included offense relationship does not exist' between the two offenses." ***State v. Smith***, 202 Wis. 2d 21, 24, 549 N.W.2d 232, 233 (1996) (quoting ***State v. Harrell***, 182 Wis. 2d 408, 419, 513 N.W.2d 676, 680 (Ct. App. 1994)).

¶29 WISCONSIN STAT. § 948.03 provides, in relevant part:

> **948.03 Physical abuse of a child. (1)** DEFINITIONS. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.
>
> ….
>
> **(3)** RECKLESS CAUSATION OF BODILY HARM.
>
> ….
>
> (c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class D felony.
>
> ….
>
> **(5)** PENALTY ENHANCEMENT; ABUSE BY CERTAIN PERSONS. If a person violates sub. (2) or (3) and the person is responsible for the welfare of the child who is the victim of the violation, the maximum term of imprisonment may be increased by not more than 5 years.

WIS. STAT. § 948.03(1), (3)(c) & (5). As noted, McGee's guilty pleas were entered pursuant to a plea bargain. McGee was originally charged with first-degree reckless homicide, and the State later sought to amend the charge to first-degree intentional homicide. Pursuant to the plea bargain, however, McGee pled guilty to the two lesser charges of neglecting a child with death as a consequence and physical abuse of a child. McGee agreed that the factual basis for the pleas could be drawn from the allegations of the criminal complaint and the evidence presented at the preliminary hearing.

¶30 The evidence from the preliminary hearing supports a finding that McGee went to sleep with a loaded gun next to him, and that his son shot and killed himself with that gun. McGee's conduct in going to sleep while a loaded gun was lying in the open next to him created a situation of unreasonable risk of harm to his son, and demonstrated McGee's conscious disregard for his son's safety. This conduct further created a high probability of great bodily harm to the

child, and caused the child's death. Alternatively, the evidence also supports an inference that McGee shot his son in the head. Such conduct also satisfies the foregoing elements of physical abuse of a child. Finally, with respect to the penalty enhancer, the evidence discloses that McGee was the child's father, thus supporting an inference that he was responsible for the welfare of the child. The record provides an adequate factual basis to support McGee's conviction for physical abuse of a child.

By the Court.—Judgment and order affirmed.

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