COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1800-CR **Cir. Ct. No. 2010CF1069**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENISE A. BILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Denise A. Bilton pled no contest to transferring encumbered property, as a party to a crime, in violation of WIS. STAT. § 943.84(1)

(2011-12).[1] Bilton appeals from an order denying her motion for postconviction relief by which she sought to withdraw her no-contest plea on the basis of ineffective assistance of counsel. The thrust of Bilton's argument is that her attorney, Gerald Boyle, represented the offense to her as a strict liability offense when the State was required to prove her mental state. We conclude that Bilton did not receive ineffective assistance of counsel because she was not prejudiced by any alleged deficient performance. Accordingly, we affirm.

¶2 The offense that Bilton pled to stems from the transfer of a piece of real estate, which Bilton purchased from Donald and Joanne Chapman. To finance the purchase, Bilton obtained one mortgage from JP Morgan Chase Bank and a second mortgage from the Chapmans. Years later, Bilton sold the property to Milwaukee House Buyers LLC. Bilton warranted that the property was not encumbered by any mortgages by signing an affidavit by owner. However, the property was still encumbered by both the Chase Bank and Chapman mortgages. Although two satisfaction of mortgage documents were recorded at the Waukesha County Register of Deeds, neither Chase Bank nor the Chapmans had filed or authorized the filing of those documents.

¶3 The State filed a criminal complaint charging Bilton with transferring encumbered property, to which Bilton entered a plea of no contest. In addition, Bilton completed and signed a related plea questionnaire and waiver of rights form. During Bilton's plea hearing, the court questioned Bilton as to whether she and Boyle had enough time to go over the plea questionnaire. Bilton

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

responded affirmatively. The court also outlined the elements of the offense, including that the State would have to prove beyond a reasonable doubt that she knew another person held a security interest in the real estate and that she transferred the property with intent to defraud. Bilton acknowledged that she understood the elements of the crime. The court accepted Bilton's no-contest plea.

¶4 After sentencing, Bilton moved to withdraw her no-contest plea on the basis of ineffective assistance of counsel. Bilton argued that Boyle represented the crime as a strict liability offense when, in fact, intent to defraud and knowledge that the property is encumbered are elements of the offense. Bilton contends that Boyle's advice is evidenced by a statement that he made at the sentencing hearing, where he referred to the crime as a "strict liability type of thing." After holding a ***Machner*** hearing,[2] the circuit court denied Bilton's motion. Bilton appeals.

¶5 A defendant is entitled to withdraw a no-contest plea after sentencing if doing so is necessary to correct a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A defendant can establish a manifest injustice by showing with clear and convincing evidence that he or she was denied the effective assistance of counsel. ***Id.*** Whether a defendant was deprived of the effective assistance of counsel presents a mixed question of law and fact. ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. The underlying factual findings regarding what actually happened will be upheld unless they are clearly erroneous. ***Id.*** Whether the facts establish that the

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where trial counsel's performance is questioned, counsel is required to explain the reasons underlying his or her handling of the case on the record).

defendant received ineffective assistance of counsel is a question of law reviewable de novo. ***Id.***

¶6 To prove ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it falls short of the performance that a reasonably prudent attorney would have given. ***Id.*** at 690. We give great deference to counsel's performance, so the defendant must overcome a strong presumption that counsel performed reasonably. ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801. Even if the attorney's performance was deficient, the defendant also must show that he or she was prejudiced. ***Id.*** To satisfy the prejudice prong, the defendant must show that, but for the attorney's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. ***Id.*** To be reasonably probable, the probability must be sufficient to undermine confidence in the outcome. ***Id.*** It is unnecessary to address both prongs if the defendant fails to sufficiently establish one of them. ***Mayo***, 301 Wis. 2d 642, ¶61.

¶7 Bilton argues that she would not have pled no contest had Boyle not misstated the elements of the offense. Bilton's argument fails as she has not proved that she was prejudiced. Even if Boyle's performance was deficient, there is ample evidence in the record indicating that Bilton understood the elements of the offense. Because Bilton understood the elements of the offense, there is not a reasonable probability that the outcome would have been different, i.e., that Bilton would not have pled no contest, had Boyle not given the allegedly incorrect legal advice.

¶8 During the ***Machner*** hearing, Boyle and Bilton provided conflicting testimony regarding whether Boyle explained the elements of the offense to her. Boyle testified that he explained the elements to Bilton and that Bilton knew what the elements were. Specifically, Boyle testified that he never told Bilton that strict liability was the standard of proof and that there was "not a chance" that he did not explain intent to defraud. In contrast, Bilton testified that she had never heard the phrase "intent to defraud" prior to the plea hearing. She also testified that the elements were not explained to her at the time she signed the plea questionnaire form. We do not make credibility determinations, and "[a]ny conflicts or contradictions in the testimony are exclusively for the trial court." ***State v. Hoppe***, 2008 WI App 89, ¶34, 312 Wis. 2d 765, 754 N.W.2d 203, *aff'd on other grounds*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794. At the conclusion of the ***Machner*** hearing, the court was satisfied that Bilton understood the elements of the offense.

¶9 Bilton's understanding of the elements of the offense is evidenced by her signature on the plea questionnaire and waiver of rights form. During the ***Machner*** hearing, Bilton stated she did not recall going over this form. However, she testified that she did remember that the page of the form containing the elements of the offense was not attached. Despite this testimony, the page containing the elements was entered into the record and the form indicates that the elements are contained in an attached sheet. Importantly, Bilton's signature appears next to a statement representing that she had reviewed and understood the entire document and any attachments.

¶10 In addition, during the plea hearing, the court questioned Bilton regarding the plea questionnaire form. The court asked Bilton if she had reviewed the form and had enough time to do so. Bilton confirmed that she had reviewed

the form, that she had enough time, and that she did not need any more time. The court then asked whether Bilton had any questions regarding the plea questionnaire that she wanted to ask either Boyle or the court. Bilton replied that she did not. Thus, despite Bilton's vague recollection of the plea questionnaire during the ***Machner*** hearing, she represented to the court during the plea hearing that she completely understood the plea questionnaire.

¶11 More evidence of Bilton's understanding of the elements is demonstrated by the plea hearing. During the hearing, the court stated the elements of the offense not once, but twice. At the outset of the hearing, the court recited the statutory language of the offense, which contains the mental state elements. In response, Bilton pled no contest. Later in the hearing, the court again recited the elements of the offense, to which Bilton stated that she understood. In addition to being told the elements of the offense, Bilton indicated to the court that she had actually read through the charge she was pleading to. That document also included all of the elements of the crime of transferring encumbered property. Lastly, Bilton confirmed that she had thoroughly discussed the case and her plea decision with Boyle.

¶12 Despite a thorough plea colloquy, Bilton argues that she relied on Boyle's allegedly incorrect legal advice when she entered her plea. During the ***Machner*** hearing, Bilton testified that Boyle urged her to answer affirmatively to all of the judge's questions, including whether she understood the recitation of the elements of the offense. As the court pointed out during the ***Machner*** hearing, however, Bilton did not merely answer "yes" to all of the questions; she also answered "no" to some questions. Thus, Bilton demonstrated that she understood the questions and provided the appropriate responses. The court also expressed its

belief that Bilton did not equivocate or appear to have questions during the plea hearing.

¶13 The purpose of a plea colloquy is to ensure that defendants understand the offense to which they are pleading. ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986). The court in this case conducted a sufficient plea colloquy, thereby ascertaining Bilton's understanding of the charge against her. Because Bilton understood the elements of the offense that she pled to, she was not prejudiced by any inaccurate legal advice that Boyle may have given. Having determined that Bilton was not prejudiced, we need not decide whether Boyle's performance was deficient to conclude that Bilton did not receive ineffective assistance of counsel. *See* ***Mayo***, 301 Wis. 2d 642, ¶61.

By the Court.—Judgment and order affirmed.

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