COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 30, 1996

No. 96-0069-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADAM C. HILBERT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Adam Hilbert appeals his judgment of conviction for five felonies.[1] Hilbert argues that the trial court erroneously exercised its discretion when it denied his motion to withdraw his no contest pleas for each

[1] Hilbert pleaded no contest to three counts of first-degree recklessly endangering safety, contrary to § 941.30(1), STATS.; one count of operating a motor vehicle without the owner's consent, contrary to § 943.23(3), STATS.; and one count of fleeing an officer, contrary to § 346.04(3), STATS. Hilbert was convicted as a party to the crime, § 939.05, STATS., and as a habitual criminal, § 939.62, STATS., on all counts.

of the crimes, that the no contest pleas were improperly accepted and that his attorney provided ineffective assistance of counsel. We reject Hilbert's arguments and affirm the judgment of conviction.

The crimes in this case stem from an incident during which Hilbert was a passenger in a stolen car driven by Shannon Surprise.[2] Hilbert sat in the front seat, and a third passenger, Mike Wetzel, was in the back seat. The car was involved in a high-speed chase that ended when the three men fled on foot. Hilbert and Surprise were eventually apprehended in California.

At the preliminary hearing, Wetzel testified that Hilbert had a gun and fired it out the car window at three separate officers during the course of the high-speed chase. The information charged Hilbert with three counts of attempted first-degree intentional homicide, party to a crime. Ultimately, Hilbert pleaded no contest to an amended information that reduced the three counts of attempted first-degree intentional homicide to first-degree reckless endangerment, party to a crime. Hilbert also pleaded no contest to the charges of operating a motor vehicle without the owner's consent, party to a crime, and fleeing an officer, party to a crime.

Approximately seven days after pleading no contest, Hilbert sent to his attorney, the trial court and the State a handwritten letter indicating he wanted to withdraw his no contest pleas. The trial court conducted a hearing on Hilbert's motion, during which Hilbert testified and his attorney, Jane Krueger Smith, questioned Hilbert about his reasons for wanting to withdraw his plea. During his testimony, Hilbert read a statement of facts he had prepared on his own and brought to court. The statement said that Hilbert believed he should be allowed to withdraw his pleas for a variety of reasons, including that he had been told he had thirty days to withdraw his plea, that Smith had threatened him by telling him, "If you ever want to see your son again you will take the plea bargain," and that he was not guilty of the crimes because it was Wetzel who had fired the gun and who had coerced Hilbert and Surprise into continuing the chase by threatening them with the gun.

[2] Hilbert and Surprise were escapees from the Sanger B. Powers Correctional Facility at the time of the incident. Escape charges were filed in another county and are not at issue in this case.

After presenting additional testimony, Smith told the trial court that she felt Hilbert may need new counsel because she might have to testify in the case because Hilbert's testimony involved accusations that she had threatened him and that she was ineffective for not discussing a coercion defense with him. The trial court agreed and continued the plea withdrawal hearing. Hilbert obtained new counsel, who called Smith to testify at the continued hearing. The trial court ultimately denied Hilbert's motion and scheduled the case for sentencing. The trial court sentenced Hilbert to a total of thirty-three years in prison. Additional facts will be discussed as needed throughout this opinion.

Hilbert argues first that the trial court erroneously exercised its discretion when it denied Hilbert's motion to withdraw his plea. Hilbert argues he showed by a preponderance of the evidence that he had three fair and just reasons for withdrawing his pleas, any one of which justified plea withdrawal: (1) he maintains his innocence; (2) he was coerced by his attorney into accepting the plea bargain; and (3) he thought he had thirty days to withdraw his pleas. Hilbert makes three additional arguments: (1) the trial court improperly accepted the no contest pleas because he was not advised of his right to be presumed innocent; (2) there was an insufficient factual basis for two of the counts; and (3) Smith provided ineffective assistance of counsel by violating her duty of confidentiality. We examine each argument in turn.

I. TRIAL COURT'S DENIAL OF MOTION TO WITHDRAW PLEAS

Hilbert argues the trial court erroneously exercised its discretion when it denied Hilbert's motion to withdraw his no contest pleas. The standard for granting a motion to withdraw a plea that occurs before sentencing requires the defendant to show a fair and just reason. ***State v. Shanks***, 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989). The reason must be something other than the desire to have a trial. ***State v. Canedy***, 161 Wis.2d 565, 583, 469 N.W.2d 163, 170-71 (1991). Whether a defendant meets this burden lies within the trial court's discretion. ***Shanks***, 152 Wis.2d at 288, 448 N.W.2d at 266. We will sustain the trial court's ruling denying Hilbert's motion to withdraw his no contest pleas as long as the trial court did not erroneously exercise its discretion. *See* ***Canedy***, 161 Wis.2d at 579, 469 N.W.2d at 169. The trial court's ruling constitutes a proper exercise of discretion if the decision was based on the

relevant facts, as applied to the appropriate law, and resulted in a reasoned and reasonable determination. ***Id***. at 579-80, 469 N.W.2d at 169.

A. Innocence

We begin with Hilbert's claim that he is innocent and that this constitutes a fair and just reason to withdraw his pleas. An assertion of innocence is an important factor to consider, but it is not in itself dispositive. *See* ***Shanks***, 152 Wis.2d at 290, 448 N.W.2d at 266. While an assertion of innocence alone may constitute a fair and just reason for plea withdrawal, it must be supported by evidence in the record, *see* ***id***. at 290, 448 N.W.2d at 267, otherwise any rule that allowed a guilty plea to be withdrawn simply on the basis of a defendant's unproven, and possibly untrue, assertion of innocence would be equivalent to authorizing automatic plea withdrawal, *see* ***United States v. Carr***, 740 F.2d 339, 344 (5th Cir. 1984) (citing ***United States v. Barker***, 514 F.2d 208, 221 (D.C. Cir. 1975).

Hilbert's claim of innocence is based on his assertion that he was not the gunman and that Wetzel forced Surprise and Hilbert to continue with the chase by stating, "I'm the one with the gun, so just do it."[3] Hilbert argues that based on the facts, the prosecution might be unable to prove that Hilbert is guilty of the charges, as a principal or as a party to the crime, because he did not intentionally aid either of those crimes and was merely a passenger in a car over which he had no control.

In support of his claim of innocence, Hilbert points to the testimony of two witnesses who testified that Wetzel told them, in front of Hilbert and Surprise, that Wetzel was the gunman, not Hilbert. One witness, Michelle DeCaluwe, testified at the continued motion hearing that she received a call from Surprise, who asked her to pick up Surprise, Wetzel and Hilbert in Port Washington. DeCaluwe said she picked up the three men as requested

[3] Hilbert also argues that one officer's testimony revealed he could not identify the gunman and that there was no physical evidence of a gunshot. Additionally, Hilbert argues there is a strong probability the gunman could not have seen the second officer when he shot at the officer's car. These two arguments are actually challenging the factual basis for the pleas and are addressed later in this opinion.

and that all three men were extremely intoxicated. She then drove them to the south side of Milwaukee to drop off Wetzel.

DeCaluwe testified that during the drive, Wetzel told her about the high-speed chase. She stated: "[F]rom my understanding, and the way Mike [Wetzel] was talking, he had pulled out this gun, or something, was shooting out the window." DeCaluwe testified that Wetzel seemed very excited and was "almost bragging about it." DeCaluwe also testified that Surprise told her he had been driving and that Hilbert never told her he shot the gun. Finally, DeCaluwe said that a day or two after she gave him a ride, Wetzel repeated his statement that he had shot the gun.

On cross-examination, the State asked DeCaluwe whether she had ever heard Surprise or Hilbert say anything to Wetzel like, "You threatened us to get us to do this. Now, we are involved in this." DeCaluwe answered no and also testified that she had never heard Hilbert complain that he had been forced to be involved in activities with Surprise and Wetzel.

The second witness, Michelle Pentony, testified at the sentencing hearing.[4] She said that Wetzel told her "that Adam [Hilbert] and Shannon [Surprise] were being pussies and they wouldn't shoot and that he—that he was—I don't remember exactly what he was—basically, saying that they wouldn't shoot and he was the only one cool enough."

In addition to arguing that DeCaluwe's testimony supported his claims, Hilbert read a prepared statement at the continued plea hearing, which stated:

> [T]he defendant's attorney, Attorney Krueger Smith, misled the defendant into thinking, even if they could prove he

[4] Michelle Pentony did not appear at the continued plea withdrawal hearing. However, Hilbert's counsel told the court he had expected she would testify about her conversations with Wetzel. We summarize her testimony to illustrate that she was ultimately able to support Hilbert's claim that he was not the gunman, but unable to offer evidence to support Hilbert's coercion theory.

> didn't shoot the gun, that the State could possibly convict him of party to a crime, whereas, the defendant was actually coerced into the crime.
>
> The defendant did not know the coercion—that coercion was a defense. And until he himself picked up a statute book and looked up defenses under statutes 939.46 paren one, Wisconsin Stats.

The trial court examined Hilbert's claim that he was not the gunman and that he was forced to ride in the car. The trial court found that at the time of Hilbert's plea, he knew he had witnesses available to testify that Wetzel, rather than Hilbert, was the gunman. Additionally, the trial court observed that even if Wetzel was the gunman, that does not mean Hilbert could not also be guilty, as a party to the crime. The trial court rejected Hilbert's argument that he had been coerced by Wetzel, stating:

> I find it incredible that he—if Wetzel was making threats against Surprise and against [Hilbert], that he would not convey that to his attorney who had repeated conversations, hours in length, with him prior to making the plea decision on May 3rd, 1995.
>
> He never gave Attorney Smith any indication from the time she entered the case until after his plea was concluded on May 3rd, that Wetzel had threatened him or Surprise inside the car.

The trial court also found Hilbert's testimony that he had been coerced by Wetzel inconsistent with DeCaluwe's testimony that she picked up the three men together. The trial court said DeCaluwe's testimony indicated that the three men were a tightly knit group that sought to escape apprehension by getting DeCaluwe to pick them up and deliver them to different destinations. Additionally, the trial court found Hilbert's claim of coercion inconsistent with the fact that he and Surprise fled to California. The trial court also noted that Surprise told an investigator that since escaping from the Sanger B. Powers Correctional Facility, he and Hilbert had been involved in the theft of three trucks, two cars, one burglary, and entry into a home. The trial court said

these activities indicated not coercion, but that Hilbert and Surprise were like Bonnie and Clyde, stealing and pillaging and doing whatever they wanted.

In sum, the trial court found that Hilbert's assertion of innocence was unsupported by the record, because even if Wetzel was the gunman, there was no evidence, besides Hilbert's assertion, that Wetzel threatened Hilbert with the gun in the car. Based on the trial court's findings, we conclude the trial court did not erroneously exercise its discretion when it concluded that Hilbert's unsupported assertion of innocence was not a fair and just reason to allow him to withdraw his pleas.

B. Coercion

Next, Hilbert claims his attorney coerced him into accepting the plea bargain by stating, "If you ever want to see your son again you will take the plea bargain." The trial court heard Hilbert's claims about what Smith told him at the hearing when Hilbert read his prepared statement. The trial court also heard testimony from Smith at the continued hearing. In response to questions from Hilbert's new attorney, Smith explained the comments she made to Hilbert concerning his child:

> A:[Hilbert] had brought up several times how much he loved his son and how the amount of difficulty he had had seeing his child at times, sometimes because of his incarceration and sometimes because the young lady plain wasn't always cooperative with him.
>
> But, in the conversation that we had—I took it almost as sort of a break from discussing the case. And Adam didn't get a lot of visits. And I think sometimes he wanted to talk about cases in order to clear his brain and think. And he leaned back and asked me about my children. I told him how old they were and—that there is a boy and a girl. And basic cute kid stories for a couple

> minutes and asked about the baby I am now expecting and due.
>
> And he started to tell me now much—about his own and say how much he loved him, cute things he did, and how much he loved him. He said to me, well, I suppose if I ever really want to see him before he is grown up, I better take this deal huh?
>
> Q:What was your response to that?
>
> A:It is a lot more likely the maximum is 49 [years] given the good times rules than if there is a possibility of 195 [years] or so.

The trial court specifically found that Smith did not coerce or badger Hilbert into taking the plea and that Smith had professionally laid out the options, repeatedly emphasizing that the decision was Hilbert's and not hers. The trial court noted:

> Certainly, the talk of the child, is not unnatural or unusual. It is something that he had to take into consideration. From his own testimony and the testimony of his witnesses, the child he loves and the child's very important to him. It was his calculus, it was—it is mathematics that he had to put it all together to make a decision whether it was worth risking going to trial and picking up a significantly lengthier prison sentence than to take the plea bargain and—as recommended by the District Attorney, with a 30-year cap and the 49 year maximum exposure.

In short, after hearing both versions of the conversation concerning Hilbert's child, the trial court believed the attorney and found she had not coerced Hilbert. This credibility determination is left to the trial court. *See* ***State v. Owens***, 148 Wis.2d 922, 930-31, 436 N.W.2d 869, 872-73 (1989). We will not disturb it. Accordingly, we conclude the trial court did not erroneously exercise its discretion when it concluded Hilbert's claim of coercion did not constitute a fair and just reason for plea withdrawal.

C. Misunderstanding

Hilbert claims another fair and just reason for plea withdrawal was his misunderstanding of the consequences of a guilty plea. Genuine misunderstanding of a guilty plea's consequences is a ground for withdrawal. ***Shanks***, 152 Wis.2d at 290, 448 N.W.2d at 266. However, the misunderstanding must actually exist. ***Canedy***, 161 Wis.2d at 585, 469 N.W.2d at 171. Our supreme court has held that a trial court does not unreasonably exercise its discretion where it disbelieves the defendant's contention that he misunderstood the consequences of the plea. *See* ***id***. at 585-86, 469 N.W.2d at 171-72. Here, Hilbert claims that he mistakenly believed he had thirty days to withdraw his pleas after he entered them. The State argues, as the trial court found, that Hilbert's misunderstanding was not genuine.

At the motion hearing, Hilbert conceded that although he thought the trial court had told him at the plea hearing that he had thirty days to withdraw his plea, "After reading the transcript, I see that you must not have said that." Hilbert cited two possible sources for his confusion. The first potential source of confusion was the written waiver of rights form that Smith filled out with Hilbert before his plea. It contained the following paragraph:

> 19. I have been informed by my attorney, and I understand, that should I desire any post-conviction relief from the Judgment of Conviction entered at this proceeding, that I have twenty (20) days after the date of sentencing to file with the trial court (clerk) and serve on the District Attorney a Notice of my intent to pursue post-conviction relief; also, if I desire representation by an attorney appointed by the Office of the Public Defender within thirty (30) days thereafter I must order a transcript of the court reporter's notes of the proceedings held herein, unless represented by an appointed public defender attorney who shall make such request within 50 days after the filing of said Notice of intent to pursue post-conviction relief.

When asked how this paragraph indicated a thirty-day period in which he could withdraw his plea, Hilbert testified, "I cannot say for sure what I was thinking. All I can say, that I thought I had 30 days to withdraw my plea." He also stated that until he looked at the transcript of the plea hearing, "I thought [the trial court] specifically pointed at number 19, asked me if I understood that question, and I understood it, that question, to be that I had 30 days to withdraw my plea."

The only other time the phrase "thirty days" arose at the plea hearing was when the trial court misspoke regarding the district attorney's sentencing recommendation. The trial court stated: "Mr. Hilbert understands that, the 30-day limit—or the 30-year limit by the District Attorney's office is a consecutive recommendation?" Hilbert testified, "I don't know if I might have heard that and understood something different or—I can't say for sure."

The trial court disbelieved Hilbert's claim of misunderstanding, noting that it had gone out of its way to take a meticulously thorough plea that filled over forty-eight pages of transcript. The trial court stated:

> And I think it shows a thorough understanding by Mr. Hilbert on May 3rd, 1995, that of everything that he needed to demonstrate on the record, to show that his plea was freely, voluntarily and intelligently made. I think when he changed his mind, he went about searching and winnowing for an excuse to pull the plug on the plea.
>
> That's why I think he hones in on page 31 where the Court made a reference to 30 days and said, no, it is 30 years. I want Mr. Hilbert to be aware that on the bottom of page 31, that we are talking about the 30-year recommendation from the DA's office as being consecutive to the Outagamie sentence for escape.
>
> And so he latched onto that. ... [I]t doesn't say what he wants it to say, so he kind of searches through this request to enter plea and waiver of rights form. And he sees

> another reference to 30 days, and—at number 19 of the plea questionnaire form.
>
> ....
>
> I am of the opinion that nobody ever told him that he had 30 days to—to back out of the plea. I don't believe Attorney Smith did. Court will find she didn't and the Court never told him that. Not on page 31 of the transcript, and he wasn't given such an indication in number 19 of the waiver of rights request to enter plea form that he filled out.

We will not disturb the trial court's determination of Hilbert's credibility. *See* ***Owens***, 148 Wis.2d at 930-31, 436 N.W.2d at 872-73. We conclude the trial court did not erroneously exercise its discretion when it concluded Hilbert had not advanced a fair and just reason for plea withdrawal, because the trial court implicitly concluded Hilbert's misunderstanding was not genuine.

II. ACCEPTANCE OF THE NO CONTEST PLEAS

Hilbert argues the trial court improperly accepted the no contest pleas because he was not advised of his right to be presumed innocent. Hilbert did not raise this issue at his plea withdrawal hearing, so there are no trial court findings on whether Hilbert was adequately advised of his constitutional rights. Nonetheless, we have examined the plea transcript and will address Hilbert's argument.

Hilbert argues in his brief that he was never advised of his right to be presumed innocent:

> The judge went through Defendant's other rights with him, but failed to advise him of this most fundamental right. The Request to Enter Plea form, which was made a part of the record by the judge, also made no mention of Adam's right to be presumed innocent until proven guilty. Had Adam been aware that he was *presumed innocent* until and unless the

> prosecution proved each and every element beyond a reasonable doubt, he would have been able to hold firm to his desire and right to have a jury trial. (Emphasis in original.)

The transcripts reveal that although the phrase "presumed innocent" was not used in the written plea waiver form or by the trial court, Hilbert was advised of his constitutional rights concerning the State's burden of proof. The trial court told him:

> Mr. Hilbert, by pleading no contest to these 5 counts, you admit you committed the crime, and, thus, you relieve the State of proving at a trial that you committed the crimes.
>
> And by pleading no contest, you also waive, that is, give up important constitutional rights. First, you give up the right to have the State prove you committed each element of the various crimes, and must convince each member of the jury beyond a reasonable doubt that you committed the crime.

This language is almost identical to that in WIS J I-CRIMINAL SM-32, which provides trial courts with specific language that should be used during a plea colloquy. Our supreme court in ***State v. Bangert***, 131 Wis.2d 246, 272, 389 N.W.2d 12, 25 (1986), urged trial courts to closely follow all of the procedures for the taking of a guilty or no contest plea as set forth in SM-32. ***Bangert*** noted, we "believe that careful adherence to SM-32 will satisfy the constitutional standard of a voluntary and knowing plea." ***Id***. Hilbert has offered no authority for his argument that the trial court's instructions on the burden of proof needed to reflect the words "presumed innocent." Indeed, the section on waiver of constitutional rights found in SM-32 does not contain the words "presumed innocent." We cannot conclude the trial court's instructions failed to provide Hilbert with notice of his constitutional right to make the State prove his guilt beyond a reasonable doubt.

Moreover, the written plea questionnaire also informed Hilbert of his rights. It stated, "I will be giving up my right to make the State prove me guilty to the Court or to each member of the jury by evidence beyond a reasonable doubt." For these reasons, we reject Hilbert's claim that he is entitled to relief from the judgment on this basis.

III. FACTUAL BASIS FOR COUNTS TWO AND THREE

Next, Hilbert argues that there was an insufficient basis for counts two and three of the amended information, so it was improper for the trial court to accept the plea. Again, Hilbert raises this issue for the first time on appeal. Nonetheless, we have reviewed the transcripts of the plea hearing and the preliminary hearing and will address the issue.

The trial court concluded there was a sufficient factual basis for Hilbert's pleas to all counts of the amended information. Where the trial court has concluded that the evidence provides a sufficient factual basis to support the plea, an appellate court will not upset that factual finding unless the findings are contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Mendez***, 157 Wis.2d 289, 295, 459 N.W.2d 578, 580 (Ct. App. 1990). This is the equivalent of the clearly erroneous standard of review. ***Id***. at 295, 459 N.W.2d at 581.

Hilbert challenges the factual basis for counts two and three, both of which charge first-degree recklessly endangering safety and relate to the firing of a gun at officers' vehicles during the high-speed chase. The three elements necessary to prove a violation of § 941.30(1), STATS., are: (1) that the defendant endangered the safety of another human being; (2) that the defendant endangered the safety of another by criminally reckless conduct, which requires that the defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that the defendant was aware that his conduct created such a risk; and (3) that the circumstances of the defendant's conduct show utter disregard for human life. WIS J I-CRIMINAL 1345.

Hilbert argues that even if he were the gunman, there is insufficient evidence to show he was aware he was shooting at any people. "The evidence suggests that he was firing at cars that appeared to be unoccupied." Hilbert does not appear to dispute that firing a gun from a speeding car at a person or occupied vehicle would satisfy the elements of first-degree recklessly endangering safety. What Hilbert disputes is whether the facts prove the gunman was aware he was shooting at a human being.

One of the two contested counts relates to the firing of a gun at constable Dale Paust. Paust testified that he was driving his vehicle when he heard about the high-speed chase approaching his location. Paust said he pulled off to the side of the road because of the possibility of a head-on crash with the speeding car. He testified he saw a vehicle speeding toward him and a squad car with its lights flashing following the vehicle. Paust said that as the cars came at him, he laid down in the seat to create less of a target and to give himself some cover. He heard a bang, which he described as a gunshot. He also heard what he assumed was a bullet hit his car. At the time Paust's car was pulled over on the side of the road, its red and blue lights on the dash, grille and back window were activated, as well as the siren.

The second contested count relates to the firing of a gun at deputy Darwin Brown. Brown testified that he was in his squad car when he was notified about the high-speed chase and was asked to set up a road block to stop the chase. He parked his vehicle in the center of the road facing the oncoming vehicles and turned on all his flashing lights, including the headlights. Brown exited the vehicle and stood at the edge of the road by a large oak tree, within two feet of the squad car. He testified he saw a car headed straight toward him and then heard shots fired in his direction.

Given this testimony, we conclude the trial court's finding that there is a factual basis to support these two counts is not contrary to the great weight and clear preponderance of the evidence. When a law enforcement vehicle's lights are flashing, and, as in the case of Paust's vehicle, the siren is sounding, a trier of fact could reasonably infer the gunman knew the car was occupied or that the driver was nearby and could be injured by a shot fired at the car. We therefore reject Hilbert's challenge to the factual basis for counts two and three.

IV. DUTY OF CONFIDENTIALITY

Hilbert's final argument, raised for the first time on appeal, is that Smith provided ineffective assistance of counsel by violating her duty of confidentiality. Hilbert argues Smith violated her duty when she informed the trial court at the first motion hearing that she felt new counsel should be appointed because she may have to become a witness in the case, given Hilbert's testimony that she had coerced him and the fact that some of the statements attributed to her implied facts that were inaccurate.

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986). The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***Id***. However, the ultimate conclusion whether the attorney's conduct resulted in a violation of the right to effective assistance of counsel is a question of law. ***Id***.

Ineffective assistance of counsel claims are reviewed under the two-pronged test set out by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). If the defendant fails to adequately show one prong of the ***Strickland*** test, we need not address the second. ***Strickland,*** 466 U.S. at 697. The first prong requires that the defendant show counsel's performance was deficient; that is, counsel made such serious errors that counsel is no longer functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. ***Id.*** at 687. The second prong requires that the defendant show that the deficient performance prejudiced his or her defense. ***Id***.

Under the ***Strickland*** test, we may reverse the order of the two tests and, if the defendant has failed to show prejudice, omit the inquiry into whether counsel's performance was deficient. ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69, 76 (1996). To show prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. Not every error that conceivably could have influenced the outcome

undermines the reliability of the result of the proceedings. ***Pitsch,*** 124 Wis.2d at 641, 369 N.W.2d at 718 (citing ***Strickland***, 466 U.S. at 693).

We begin with the second prong of the ***Strickland*** test. We conclude Hilbert has failed to show prejudice because there is no reasonable probability that but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.[5] Here, Hilbert took the stand at the plea withdrawal hearing and alleged, among other things, that he had accepted the plea bargain as a "direct result of my attorney saying to me: If you ever want to see your son again you will take the plea bargain." Hilbert argues, "In the present case, had counsel not testified against Mr. Hilbert, had she not advised the judge that her client was, in her opinion, not telling the truth, it is likely that Mr. Hilbert's motion for withdrawal of plea would have been granted." Thus, Hilbert has implicitly argued that he was prejudiced because if his attorney had remained silent about her version of the alleged coercion, the trial court would have granted Hilbert's motion to withdraw his plea.

Hilbert offers no support for this assertion. It is impossible for this court to determine simply by looking at the transcript whether Hilbert's testimony alone would have been sufficient to convince the trial court to exercise its discretion in favor of allowing him to withdraw the plea. We cannot adequately assess Hilbert's credibility as a witness based solely on the transcript; the trial court is better positioned to decide the weight and relevancy of testimony. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995). Also, because Hilbert raises this issue for the first time on appeal, the trial court did not have the opportunity to offer its opinion whether, looking back, it would have granted Hilbert's motion if Smith had not raised the issue of her testifying. Thus, we cannot conclude Hilbert has shown he was prejudiced by Smith's alleged error.

Smith also argues that Smith breached the attorney-client privilege at the continued hearing. We reject this argument because Smith has not

[5] Because we conclude Hilbert's claim of ineffective assistance fails under the prejudice prong of the test enunciated in ***Strickland v. Washington***, 466 U.S. 668 (1984), we do not consider whether Hilbert's attorney's performance was deficient. This opinion should not be interpreted as having dealt with the complex issues that arise when an attorney believes a defendant has testified falsely.

established that Smith's performance was deficient. *See* ***Strickland***, 466 U.S. at 687 (first prong of test). Hilbert argues that Smith erred when she took the stand at the continued motion hearing without asking Hilbert to waive the attorney-client privilege. Hilbert makes this argument despite the fact that it was his own counsel who called Smith to the stand to discuss her alleged coercion of him. In ***State v. Simpson***, 200 Wis.2d 798, 804-05, 548 N.W.2d 105, 107-08 (Ct. App. 1996), we discussed the attorney client privilege:

> Section 905.03(2), STATS., provides that a person who obtains professional legal services from an attorney has a privilege to prevent the attorney from disclosing confidential communications made for the purpose of rendering those services. There is an exception to this privilege, however, when the communications are "relevant to an issue of breach of duty by the lawyer to the lawyer's client." Section 905.03(4)(c), STATS. It is beyond dispute that the privilege disappears when the client ... seeks to reverse a criminal conviction on the grounds that counsel rendered ineffective assistance. ***State v. Flores***, 170 Wis.2d 272, 277-78, 488 N.W.2d 116, 118 (Ct. App. 1992). We conclude, however, that the exception is not limited to these direct attacks on an attorney's performance, but may also apply in seemingly less direct situations.

Simpson noted that the defendant's motion to withdraw his plea on the grounds that it was not knowingly, voluntarily and intelligently made necessarily draws into question the performance of his attorneys' duty to provide proper advice about the nature and consequences of the plea. ***Id***. at 805, 548 N.W.2d at 108. Therefore, we concluded, the defendant could not hide behind the attorney-client privilege to prevent the State from calling his former attorneys to testify regarding communications relevant to the entry of the plea. ***Id***. at 806, 548 N.W.2d at 108. If raising the issue of voluntariness can constitute waiver of the attorney-client privilege such that the district attorney can call a defendant's former attorneys, surely a defendant who raises the issue of voluntariness and calls his former attorney to the stand to testify about her representation has waived the attorney-client privilege. Thus, we conclude Hilbert has not shown Smith was deficient by taking the stand at the continued hearing.

For the foregoing reasons, we reject Hilbert's challenges and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.