COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP352-CR **Cir. Ct. No. 2004CF772**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS FERNANDO MAZARIEGOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Luis F. Mazariegos appeals from the judgment of conviction entered after he pled guilty to first-degree sexual assault of a child. He also appeals from the order denying his postconviction motion seeking to withdraw his guilty plea. Mazariegos contends that he should be allowed to

withdraw his guilty plea because his trial counsel was ineffective for failing to: (1) object to a breach of the plea agreement by the State; (2) pursue a motion to withdraw the guilty plea; and (3) advise him that his stipulation was required or that he would have to admit to the plea's factual basis. He further contends, in the alternative, that even if his counsel was not ineffective he should be allowed to withdraw his plea because his plea was not valid since it was not knowingly, voluntarily and intelligently entered.

¶2 We conclude that Mazariegos's trial counsel was not ineffective for failing to: (1) object to a breach of the plea agreement because the district attorney's statement did not breach the plea agreement; (2) pursue a motion to withdraw the plea because Mazariegos was aware that he could withdraw his plea but chose not to; and (3) advise him that his stipulation was required or that he would have to admit to the plea's factual basis, because his attorney's stipulations to the facts of the complaint were sufficient. We further conclude that the totality of the record shows that Mazariegos's plea was knowingly, voluntarily and intelligently entered. Consequently, Mazariegos is not entitled to withdraw his plea. Therefore, we affirm.

I. BACKGROUND.

¶3 According to the criminal complaint, a City of Milwaukee police officer spoke with a six-year-old girl, who described sexual intercourse to the officer and told the officer that the offender was Mazariegos. During the investigation, Mazariegos admitted to police that he had sexually assaulted the child. On February 14, 2004, Mazariegos was charged with first-degree sexual

assault of a child, contrary to WIS. STAT. § 948.02(1) (2003-04).[1] The case was originally scheduled for a jury trial, then changed to a projected guilty plea, and then scheduled for a jury trial again after Mazariegos changed his mind. A trial date was eventually set for January 31, 2005. All proceedings were conducted through an interpreter because Mazariegos, a native of Guatemala, had indicated that he did not understand English.[2]

¶4 On January 31, 2005, Mazariegos pled guilty pursuant to a plea bargain. In exchange for the plea, the State agreed to recommend a sentence of twelve years' imprisonment, comprised of two to three years of initial confinement, followed by nine to ten years of extended supervision. During the plea colloquy, defense counsel twice asked for, and was granted, time to speak with his client, the first time after the court asked Mazariegos whether he was pleading guilty or not guilty, and the second time after the court asked Mazariegos whether he was satisfied with his attorney's representation. A third break was also taken to fill out the addendum to the Plea Questionnaire/Waiver of Rights form that had not yet been submitted to the court. The court did not ask Mazariegos personally whether he was admitting to the facts as set forth in the complaint, but the court did ask his attorney if he agreed to stipulate to the facts in the complaint, and his attorney said he did. The court accepted the plea, and the case was adjourned for sentencing.

[1] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

[2] Mazariegos has been in the United States since 1995 and is here legally. He informed the court that he does not understand English and that he needed an interpreter, and one was provided for him during the entire proceedings.

¶5 In the meantime, a presentence investigation report (PSI) had been ordered but one was never completed because during its preparation Mazariegos told the writer that he was innocent and wanted to withdraw his plea. He also left numerous telephone messages, in English, with the PSI writer. On March 25, 2005, Mazariegos's attorney stated that his client wished to withdraw his plea and requested permission to withdraw on grounds that communication between him and his client had broken down. The court asked Mazariegos why he was claiming he was innocent after pleading guilty, and Mazariegos responded that he "did not do it," and that he pled guilty only because his attorney had told him that he "would get fewer years" if he did. The trial court concluded that Mazariegos's assertion that he was innocent was only a "naked assertion," and, noting that it would take months for Mazariegos to hire a new attorney, denied counsel's request to withdraw. The matter was adjourned for sentencing, or, alternatively, for plea withdrawal if Mazariegos obtained new counsel and such a motion was filed. The trial court also made a finding that Mazariegos, who was out on bail, was trying to stall the proceedings based on, among other things, his claim that he did not understand English, yet was capable of leaving messages in English.

¶6 Mazariegos's attorney continued to represent Mazariegos, and at a hearing on April 18, 2005, his attorney told the court that the case could proceed to sentencing. The sentencing took place on May 16, 2005. During sentencing, after correctly reciting the plea agreement, the prosecutor noted that he would be discussing the sentencing guidelines worksheet and made the following comment:

> I am not going to indicate where I think the defendant falls on the risk assessment chart because I don't – I think that making such a statement could potentially violate the plea negotiations and I don't wish to do that, but I think it's fine if I comment on where I think the defense [sic] falls and the defendant in the guidelines [sic].

The prosecutor then focused on the sentencing guidelines, and pointed out a number of aggravating factors, including the victim's "extraordinarily young" age,[3] the fact that the sexual assault involved intercourse, not mere contact, that the victim was vulnerable, and that at the beginning of the investigation Mazariegos had tried to blame the victim for initiating the sexual encounter. While giving Mazariegos credit for pleading guilty, the prosecutor added that the problem encountered in preparing the PSI showed that he was creating stories and trying to manipulate the system. Concluding that the court should follow the State's recommendation, the prosecutor noted: "I think the defendant has a ways to go before the community can be safe from him based on what I've read in these reports as well as the police report." Mazariegos's attorney emphasized mitigating factors, and while agreeing with the State's recommendation, asked the court to allow work release privileges. Mazariegos himself admitted making "a terrible mistake," and told the court: "I will never flee from justice. I will confront it."

¶7 In sentencing Mazariegos, the court used the sentencing guidelines worksheet referenced by the prosecutor. The court found the offense to be aggravated and concluded, assessing Mazariegos as a medium risk, that the guidelines indicated ten- to twenty-five years' imprisonment. On that basis, the court observed that the State's recommendation did not adequately protect the community, and sentenced Mazariegos to twenty years' imprisonment, comprised of ten years' initial confinement, followed by ten years' extended supervision. During sentencing, Mazariegos never mentioned a desire to withdraw his plea.

[3] The parties apparently agreed that it was unclear from the record whether the victim was four or five years old at the time of the incident.

¶8 On October 14, 2005, approximately five months after sentencing, Mazariegos filed a postconviction motion to withdraw his guilty plea on the grounds that his trial counsel was ineffective for failing to: (1) object to an alleged breach of the plea agreement by the State; (2) discuss with him the possibility of plea withdrawal; (3) get his permission to stipulate to the facts in the complaint and explain to him the charge to which he pled guilty. Finally, he argued that his plea was not entered knowingly, intelligently and voluntarily because the trial court did not establish an adequate factual basis for the plea.

¶9 On December 2, 2005, the trial court issued a written order denying the motion, except with respect to the assertion that trial counsel was ineffective for failing to discuss the possibility of plea withdrawal before sentencing, and ordered a ***Machner***[4] hearing to find out what transpired between Mazariegos and his attorney between the date Mazariegos entered his guilty plea and April 18, 2005. The ***Machner*** hearing was held on February 2, 2006, and both Mazariegos and his former attorney testified about their interactions after Mazariegos entered his plea. The trial court concluded that the record did not support a finding of ineffective assistance, finding that Mazariegos's motion was really about his being displeased with his sentence because the court exceeded the State's recommendation. The trial court therefore also denied the motion on the last issue. This appeal follows.

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

II. ANALYSIS.

¶10 Mazariegos contends that he should be allowed to withdraw his plea because his trial counsel's assistance was ineffective, and even if his counsel did not provide ineffective assistance, he should be allowed to withdraw his plea because his plea was not knowingly, voluntarily and intelligently entered.

¶11 A defendant seeking to withdraw a guilty plea after conviction and sentencing must establish by clear and convincing evidence that failure to allow a withdrawal would result in a "manifest injustice," *see* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996), that is, the defendant must "show 'a serious flaw in the fundamental integrity of the plea,'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). The decision whether to grant or deny a motion to withdraw a guilty plea is addressed to the sound discretion of the trial court and will not be reversed by this court unless discretion is erroneously exercised. ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999). We will sustain a trial court's ruling denying a motion to withdraw a guilty plea as long as the trial court acted within its discretion, which requires an appropriate consideration of the facts of record and the proper application of the relevant legal standards. ***State v. Canedy***, 161 Wis. 2d 565, 579-80, 469 N.W.2d 163 (1991). We address each of Mazariegos's arguments in turn.

A. Ineffective Assistance

¶12 Mazariegos first claims that he should be allowed to withdraw his guilty plea because his trial counsel was ineffective. A manifest injustice required for plea withdrawal can be satisfied if the defendant's plea was the result of the

ineffective assistance of counsel. ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993).

¶13 Challenges to guilty pleas alleging ineffective assistance of counsel require application of the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). Under that test, a defendant must prove: (1) deficient performance, and (2) prejudice. ***Id.*** at 687; *see* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. In the context of a plea withdrawal, to satisfy the prejudice prong, a defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, he or she would not have pled guilty, and would have insisted on going to trial. ***Bentley***, 201 Wis. 2d at 312. The defendant is entitled to relief only if he is able to show both deficient performance and prejudice, and a court therefore need not address both components if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697.

¶14 Our standard for reviewing this claim involves mixed questions of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The trial court's determination 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. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The ultimate conclusion, however, of "whether the attorney's conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law," which we review independently. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

1. Failure to Object to Alleged Breach of Plea Agreement

¶15 Mazariegos first contends that his trial counsel was ineffective for failing to object to statements by the prosecutor that he alleges constituted a breach of the plea agreement.[5]

¶16 "A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Howard***, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244, *review denied*, 2003 WI 126, 265 Wis. 2d 418, 668 N.W.2d 558. Enforcing a plea agreement raises due process concerns. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). "[O]nce the defendant has given up his [or her] bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled." ***Id.*** (citation omitted).

¶17 "A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement." ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733 (footnote omitted). Technical breaches are insufficient to warrant resentencing or vacation of the plea. ***Id.*** An actionable breach must be a material and substantial breach, that is, "a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.*** "'A prosecutor may not render a less than neutral recitation of the plea agreement.'" ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278 (citing ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986)). "[N]ot only explicit repudiations of plea

[5] In alleging that his counsel was ineffective for failing to object, Mazariegos appears to acknowledge that his right to directly challenge that breach of the plea agreement was waived, and that the only avenue through which he is able to argue that the plea agreement was breached by the State is by arguing that his trial counsel was ineffective.

agreements, but also 'end-runs around them,'" are proscribed ***id.*** (internal quotation marks and citation omitted), which means that "the State may not accomplish through indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended," ***id.*** However, "pertinent factors relating to the defendant's character and behavioral pattern cannot be immunized by a plea agreement between the defendant and the state." ***State v. McQuay***, 148 Wis. 2d 823, 826, 436 N.W.2d 905 (Ct. App. 1989), *rev'd on other grounds by* 154 Wis. 2d 116, 452 N.W.2d 377 (1990).

¶18 When determining whether there has been a material and substantial breach, "it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation." ***Howard***, 246 Wis. 2d 475, ¶14. Whether the State's conduct constitutes a breach of the plea agreement, and whether a breach was material and substantial, are questions of law that we review *de novo*. ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220.

¶19 Mazariegos contends that the prosecutor violated the plea agreement by making statements that constituted an "end-run around" the agreement, within the meaning of ***Hanson***. He first focuses on the statement: "I am not going to indicate where I think the defendant falls on the risk assessment chart because I don't – I think making such a statement could potentially violate the plea negotiations and I don't wish to do that…." Stressing that the prosecutor proceeded to discuss aggravating factors, while using the sentencing guidelines as a guide, Mazariegos maintains that "[i]n making the statement the prosecutor informed the Court that the offer was inconsistent with the guidelines and that the

guidelines called for a harsher sentence and that in fact, a sentence within the guidelines is appropriate for the Appellant."

¶20 Mazariegos also highlights the prosecutor's remark toward the end of his argument: "I think the defendant has a ways to go before the community can be safe from him based on what I've read in these reports as well as the police report." He insists that "[t]his statement when taken into context with the rest of his argument, the sentencing guideline, and the facts of the case, clearly suggest that a more lengthy period of confinement was necessary to protect the public and was actively being requested by the State." We disagree.

¶21 ***Hanson*** is the seminal case for deciding this issue. *See* ***id.***, 232 Wis. 2d 291. ***Hanson*** involved a situation very similar to the one before us where the appellant alleged that the prosecutor had violated the plea agreement by using qualifying language that undercut the agreement and by making statements that "signaled that the trial court should not follow the agreement." ***Id.***, ¶25.

¶22 In ***Hanson***, the court emphasized the importance of "look[ing] to the entire sentencing proceeding to get the true flavor of the prosecutor's remarks." ***Id.***, ¶26. The court then observed that the prosecutor "explained that she was going to be 'very … circumspect' in making her sentencing remarks because she was 'aware what the plea agreement is,'" "stated, 'I certainly stand by the plea agreement,'" and "emphasized that none of her remarks were meant to 'contravene the plea agreement in any way' and that she was 'not attempting in any way, shape or form, to backdoor a different recommendation than that which has previously been represented in terms of sentencing.'" ***Id.*** Examining the prosecutor's remarks, the court noted that "[t]hese kinds of plea agreements represent *a fine line* for the State to walk at a sentencing hearing." ***Id.***, ¶27 (emphasis added).

Ultimately concluding that the prosecutor's remarks had not violated the plea agreement, the court explained:

> On the one hand, the State must obviously abide by its agreement to cap its sentencing recommendation. But on the other, the State is free to argue for an appropriate sentence within the limits of the cap. Here, the prosecutor's opening remarks reflected an understanding of this fine line. She stressed to the trial court that the State stood by its sentencing promise, that she understood the need to be circumspect in her remarks in light of that promise, and that her remarks should not be taken as an effort to undo the plea agreement.
>
> These remarks are important because they reveal a prosecutor who was not simply giving lip service to the plea agreement. To the contrary, the prosecutor emphasized that the State was adhering to the plea agreement and that her sentencing remarks should not be taken in any other light. *Having set the record straight on that point, the prosecutor was entitled under the plea agreement to speak to the aggravating factors relevant to the sentencing and to seek a sentence at the high end of the cap*.

Id., ¶¶27-28 (emphasis added).

¶23 Here, an evaluation of the prosecutor's remarks, in light of the entire sentencing proceeding, reveals the following. The prosecutor began by correctly reciting the terms of the plea agreement: that the State was recommending a twelve year prison sentence comprised of two to three years of confinement and nine to ten years of extended supervision. The prosecutor then noted that he had gone through the sentencing guidelines worksheet and would discuss them, and that he was "not going to indicate where I think the defendant falls on the risk assessment chart because I don't – I think that making such a statement could potentially violate the plea negotiations and I don't wish to do that," adding "but I think it's fine if I comment on where I think the defense falls and the defendant in the guidelines." After these opening remarks, the prosecutor emphasized

aggravating factors, including that the victim was only four or five years old, that the assault involved intercourse, rather than contact, that the victim was vulnerable, and that Mazariegos had tried to blame the victim for initiating the encounter.

¶24 We cannot agree that the statement by the prosecutor that he was going to discuss the sentencing guidelines, together with the subsequent emphasis on aggravating factors, constitutes an "end-run" around the plea agreement that impermissibly asked the court not to follow the State's recommendation. *See* ***id.***, ¶26.

¶25 First, the prosecutor stated that he was not going to indicate where he thought Mazariegos fell on the risk assessment chart because "making such a statement could potentially violate the plea negotiations," and did in fact not give a specific indication with regard to the risk assessment chart. The remark stressed that the prosecutor stood by the sentencing recommendation and was going to merely comment on where he felt Mazariegos fell, and is thus an affirmation of the prosecutor's commitment to the plea agreement. *See* ***id.*** Like in ***Hanson***, the statement shows that the prosecutor was cognizant of the "fine line" between adhering to the terms of the plea agreement and the limits set forth in the sentencing guidelines. *See* ***id.***

¶26 As to the prosecutor's focus on negative aspects of Mazariegos's character in conjunction with referencing the sentencing guidelines, we cannot agree with Mazariegos that they either alone or together with the opening remarks breached the plea agreement. Significantly, the plea agreement did not restrict the prosecutor from going through the facts of the case and Mazariegos's character. *See* ***McQuay***, 148 Wis. 2d at 826. Therefore, as in ***Hanson***, "[h]aving set the

record straight" and emphasizing the State's adherence to the plea agreement, the prosecutor was free under the plea agreement to speak to the aggravating factors relevant to the sentencing and to seek a sentence at the high end of the range. ***Id.***, 232 Wis. 2d 291, ¶28. Here, all of the aggravating factors mentioned by the prosecutor were already in the record and known to the court, and thus did not come as a surprise to anyone.

¶27 We also disagree with Mazariegos's assertion concerning the prosecutor's remarks "I think the defendant has a ways to go before the community can be safe from him based on what I've read in these reports as well as the police report." As noted, Mazariegos asserts that "[t]his statement when taken into context with the rest of his argument, the sentencing guideline, and the facts of the case clearly suggest that a more lengthy period of confinement was necessary to protect the public and was actively being requested by the State." This assertion is wholly misleading because Mazariegos has *not* viewed the statement in "context with the rest of the argument." In fact, the sentence in question was followed immediately by the prosecutor's concluding remarks, which read:

> I think the state's recommendation is reasonable based on all of the circumstances of this case, and I would ask the court to follow it. I think that this is obviously a case where probation is not a reasonable sentence for the defendant. It would unduly diminish the seriousness of the crime, and I think the State's recommendation for prison properly balances the seriousness of the crime and the defendant's character in all its facets.

Mazariegos has thus picked a single sentence and invented an argument that is inconsistent with even the immediately following paragraph. Clearly, when viewed in context, the end of the prosecutor's argument reaffirmed the State's

commitment to the plea agreement and assured that the State was not trying to undo the plea agreement or backdoor a different recommendation. *See* ***id.***, ¶26.

¶28 Accordingly, we conclude that the prosecutor's remarks during sentencing did not violate the plea agreement. Because the State did not breach the plea agreement, it follows that Mazariegos's trial counsel was not ineffective for failing to object, and we therefore do not reach the issue of ineffective assistance.

2. Failure to Move for Plea Withdrawal Before Sentencing

¶29 Mazariegos next submits that his trial counsel was ineffective for failing to pursue a motion to withdraw his guilty plea. The events that underlie this argument are somewhat complicated and deserve to be recited here in some detail.

¶30 Mazariegos, as mentioned, pled guilty on January 31, 2005. Although a PSI was ordered, one was never completed because Mazariegos told the PSI writer that he was innocent, and left numerous messages with the PSI writer, in English, apparently trying to explain his claim of innocence. When the parties next appeared in court on March 25, 2005, and Mazariegos's attorney requested permission to withdraw, the court asked Mazariegos why he was now claiming he was innocent and what had changed between the date he pled guilty and the date he talked to the PSI writer. Mazariegos responded, "I know I did not do it." When asked why he had pled guilty, he responded "[t]he truth is because my attorney told me I would get fewer years if I pled guilty." The trial court, as noted, was unimpressed with Mazariegos's claim of innocence, denied counsel's request to withdraw, adjourned the matter for sentencing, or alternatively plea

withdrawal if Mazariegos obtained new counsel, and made a finding that Mazariegos was stalling the proceedings.

¶31 Because Mazariegos did not obtain new counsel, he and his attorney appeared in court on April 18, 2005, when his attorney informed the court that the case could proceed to sentencing. The sentencing took place on May 16, 2005. During sentencing, Mazariegos made no references to his previous assertion that he had wanted to withdraw his plea, and instead, admitted making a mistake.

¶32 After he was sentenced, Mazariegos filed a postconviction motion seeking to withdraw his plea. The trial court denied his motion, except with regard to his claim that his trial counsel had provided ineffective assistance for failing to discuss with him the possibility of withdrawing his plea before sentencing. The trial court ordered a ***Machner*** hearing on grounds that it was unclear what transpired between Mazariegos and his attorney between March 25, 2005, the date Mazariegos announced that he wanted to withdraw his plea, and April 18, 2005, the date his attorney announced that they were ready to proceed to sentencing.

¶33 At the ***Machner*** hearing on February 2, 2006, both Mazariegos and his former attorney testified about their interactions after Mazariegos entered his plea. Mazariegos's former attorney testified that despite indicating in court on March 25, 2005, that he wanted to withdraw his plea, the reason Mazariegos did not withdraw it was because "[h]e chose to move forward with the case." He told the court that on March 25, 2005, Mazariegos had told him that he was scared and "wasn't ready to finish the case," and that they discussed the possibility of withdrawing the plea, but that Mazariegos was concerned about money and hiring a new attorney and stated that he did not want to withdraw the plea. He further

testified that between March 25, 2005, and April 18, 2005, he and Mazariegos had several conversations during which Mazariegos "vacillated back and forth" about withdrawing the plea; and that on April 18, 2005, he specifically asked Mazariegos what he wanted to do, and that Mazariegos decided that he did not want to withdraw the plea. When asked what he said to Mazariegos about the advisability of withdrawing the plea, the attorney testified that he told Mazariegos that it was completely up to him, if he wanted to go to trial, they would, if he wanted to withdraw the plea, they would, and if he wanted to go to sentencing, they would, stressing that if he really was innocent he should withdraw the plea. He emphasized, however, that "[t]he problem was he kept going back and forth," and added that he was concerned that Mazariegos would be perceived as stalling, in light of his confession to police and the fact that he was out on bail.

¶34 Mazariegos, by contrast, testified that his attorney had told him that if he did not plead guilty he would be sentenced to sixty years in prison. He also testified that he told his attorney that he wanted to withdraw the plea, that he and his attorney did not meet between March 25, 2005, and April 18, 2005, and that when he was in court on April 18, 2005, he wanted to withdraw his plea. He stated that he never wanted to plead guilty, that he always wanted to go to trial, and that after he entered his guilty plea he never wavered, always wanted to withdraw it and wanted a new attorney. When asked why he nonetheless went to sentencing and did not tell the judge during sentencing that he wanted to withdraw his plea and wanted a new attorney, he responded that he "was tired of all of this." He also admitted that he was not pleased with the sentence he received and insisted that he had been lied to and promised only two to three years.

¶35 The trial court found Mazariegos's former attorney to be credible and Mazariegos to be not credible, and ruled that the record did not support a

finding of ineffective assistance because there was "not only a lack of a manifest necessity but even a just and good reason to vacate [the plea]." The court also agreed with the State that Mazariegos's behavior showed that he had on numerous occasions tried to stall the proceedings, and concluded that Mazariegos's postconviction motions were really an indication that he was displeased with his sentence because the court exceeded the State's recommendation.

¶36 Against this backdrop, Mazariegos contends that his trial counsel was ineffective in failing to "discuss with [him] the possibility of withdrawing his plea and failing to explore whether there was a basis to withdraw his plea," claiming that the ***Machner*** hearing established that he "constantly wavered, maintained his innocence to the Court and the presentence written [sic] and was adamant that the [sic] did nothing wrong."[6] Because Mazariegos raised the same issue in his postconviction motion, and the trial court held a ***Machner*** hearing on the issue, we examine Mazariegos's argument as essentially challenging the trial court's factual finding at the ***Machner*** hearing that his attorney's testimony was credible and that his testimony was not credible.

¶37 It is the province of the trial court to resolve factual ambiguities by making credibility determinations. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). When the trial court has made a credibility determination, "it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort***

[6] Mazariegos presents a number of arguments for why trial counsel would have had the legal basis to file a motion to withdraw the plea before sentencing. These arguments are not properly before this court, however, because given that the trial court already addressed this issue in a postconviction motion, we are authorized to review the issue only as it relates to the trial court's credibility determination at the ***Machner*** hearing.

Villas, Inc., 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted). We will also defer to the trial court's factual findings which resolve conflicts in the testimony. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. The trial court's determinations of a witness's credibility will not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 389-90, 588 N.W.2d 67 (Ct. App. 1998). A determination by the trial court is clearly erroneous only if we conclude "as a matter of law, that no finder of fact could believe the testimony." ***Teubel v. Prime Dev., Inc.***, 2002 WI App 26, ¶13, 249 Wis. 2d 743, 641 N.W.2d 461 (citations omitted).

¶38 We cannot agree with Mazariegos. His claims that he maintained his innocence and was adamant that he did nothing wrong are based on his own testimony at the ***Machner*** hearing. His attorney, by contrast, testified that they had numerous conversations about the possibility of withdrawing the plea, that Mazariegos "vacillated back and forth" about withdrawing his plea, and ultimately decided that he did not want to withdraw the plea and wanted to proceed to sentencing. The trial court expressly found that Mazariegos's former attorney was credible and that Mazariegos was not credible with respect to the events between March 25, 2005, and April 18, 2005. Mazariegos has not even come close to meeting the high burden of proving that "no finder of fact could believe" his former attorney's testimony, as is required for us to conclude that the trial court's credibility determination was clearly erroneous. ***Teubel***, 249 Wis. 2d 743, ¶13 (citations omitted). We therefore accept the trial court's credibility determination.

¶39 Accordingly, because we discern no reversible error in the trial court's credibility determination, and the credible evidence supports the

conclusion that Mazariegos was well aware of the possibility of withdrawing his plea before sentencing, Mazariegos's trial counsel was not ineffective.

3. Failure to Advise Mazariegos that His Stipulation was Required

¶40 Finally, Mazariegos asserts that his trial counsel was ineffective for failing to get his permission to stipulate to the facts in the complaint or tell him that he would have to admit to a factual basis when entering a plea, and insists that had his attorney sought his permission to stipulate or informed him that he would have to admit to the factual basis for the plea, he would not have pled guilty.

¶41 It is well-settled that if a circuit court fails to establish a factual basis that the defendant admits constitutes the offense to which the defendant pled, a manifest injustice has occurred, necessitating plea withdrawal. ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). In ***Thomas***, 232 Wis. 2d 714, ¶18, our supreme court was asked to determine: "to what extent a defendant must admit the facts of a crime charged in order to accept the factual basis underlying a guilty plea." ***Id.***, ¶18. The court held that "a defendant does not need to admit to the factual basis in his or her own words; the defense counsel's statements suffice." ***Id.*** The court explained:

> While a judge must ensure that a defendant realizes that his or her conduct does meet the elements of the crime charged, he or she may accomplish this goal through means other than requiring a defendant to articulate personally agreement with the factual basis presented. A factual basis may also be established through witnesses' testimony, or a prosecutor reading police reports or statements of evidence. Finally, a factual basis is established *when counsel stipulate on the record to facts in the criminal complaint*.

Id., ¶21 (citations omitted; emphasis added).

¶42 Mazariegos appears to argue that there is a requirement that the defendant personally stipulate to the facts in the criminal complaint. He cites no law as support for his apparent claim however. Rather, he sidesteps the issue by instead insisting that he continued to maintain his innocence and that he entered his plea only because of pressure from his attorney. We are not convinced.

¶43 Here, it is clear from the record that Mazariegos reviewed the complaint with his attorney and that the complaint was read to him. Indeed, during the plea colloquy, Mazariegos himself acknowledged going through the complaint with his attorney. At the end of the plea colloquy, the court asked Mazariegos's attorney: "And will you stipulate to the criminal complaint to serve as a basis for the plea?," to which the attorney responded, "Yes, sir."

¶44 Under ***Thomas***, this response by Mazariegos's defense counsel is sufficient to satisfy the requirement of establishing an admission to the factual basis of the plea. Since there is no requirement that the defendant personally stipulate to the factual basis of the plea, it follows that Mazariegos's attorney could not have been ineffective for failing to advise Mazariegos of such a requirement.

B. Validity of Plea

¶45 In the alternative, Mazariegos also contends that even if his trial counsel was not ineffective, he should nevertheless be allowed to withdraw his plea because it was not knowingly, voluntarily and intelligently entered.

¶46 A manifest injustice, necessitating plea withdrawal, exists if the plea was not knowingly, voluntarily, and intelligently entered. ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. To ensure that a plea is

knowingly, voluntarily, and intelligently entered, the trial court must ascertain whether a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment for the charge, and the constitutional rights being given up. WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 262, 389 N.W.2d 12 (1986). The trial court can do this by: (1) colloquy with the defendant; (2) referring to some portion of the record or communication between the defendant and his or her lawyer that shows the defendant's knowledge of the nature of the charge and the rights he or she gives up; or (3) referring to a signed plea questionnaire and waiver-of-rights form. ***Bangert***, 131 Wis. 2d at 267-68. A trial court's duty to ensure that a defendant's plea is knowing, voluntary, and intelligent does not require "magic words or an inflexible script," ***State v. Hampton***, 2004 WI 107, ¶43, 274 Wis. 2d 379, 683 N.W.2d 14, and "a valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements," ***Trochinski***, 253 Wis. 2d 38, ¶29.

¶47 Mazariegos claims that his plea was not knowingly, intelligently and voluntarily entered because he never agreed to the factual basis underlying the plea. He points to the fact that the court never asked him personally whether the facts in the complaint were true, and never reviewed the elements of the offense with him, emphasizing that after the court asked him for his plea, defense counsel asked for a moment to speak with him. He contends that the record as a whole shows that he hesitated, that he never wanted to enter a plea, and instead wanted a trial. He also insists that he maintained his innocence, that he told the PSI writer, his attorney and the court that he was innocent, that he wanted to withdraw his plea, and entered his plea only because his attorney told him he would receive a shorter sentence if he did. Finally, he admits apologizing at the sentencing, but

nonetheless claims that he "did not admit to the elements of the offense or the underlying facts supporting the plea." We are not convinced.

¶48 The record reveals that on the day Mazariegos entered his plea, the following exchange took place as part of the plea colloquy:

> THE COURT: To the charge of first degree sexual assault of a child, which alleges that between October 1st, 2001, and November 30th, 2001, … you did have sexual intercourse with a child …, a person who had not attained the age of 13 years, contrary to Wisconsin Statutes section 948.02 subsection (1), what is your plea, guilty or not guilty?
>
> [DEFENSE COUNSEL]: Your Honor, could we have one second, please? Thank you.
>
> (Discussion off the record between defendant and his attorney.)
>
> [DEFENSE COUNSEL]: Sorry, Your Honor, you – continue, please.
>
> THE COURT: I'm waiting for his answer to my question whether or not he's pleading guilty or not guilty.
>
> DEFENDANT: Guilty.
>
> THE COURT: And did you sign the guilty plea questionnaire and waiver of rights form after going through this with your attorney?
>
> DEFENDANT: Yes.
>
> THE COURT: And did you go through the criminal complaint with your attorney?
>
> DEFENDANT: Yes.
>
> THE COURT: Do you understand what you're charged with, why you're charged, and the elements of the offense? The elements of the offense are what the state would have to prove in order to convict you beyond a reasonable doubt as to each and every element of the crime charged. Do you understand that?
>
> DEFENDANT: Yes, I understand.

¶49 During the course of the plea colloquy, the court also asked Mazariegos whether he understood the constitutional right he was giving up by entering a plea of guilty and whether he understood that the court could ignore the State's recommendation and sentence him to the maximum sentence. Mazariegos told the court that he understood. A signed Plea Questionnaire/Waiver of Rights form is also in the record.

¶50 Mazariegos's claim that he never agreed to the factual basis underlying the plea is contradicted by both the plea colloquy and the Plea Questionnaire/Waiver of Rights form. As both the colloquy and the Plea Questionnaire/Waiver of Rights form make plain, Mazariegos had reviewed the complaint with his attorney, knew the contents of the complaint and understood what he was charged with. Contrary to what Mazariegos appears to assert, this is clearly sufficient to satisfy the requirements of ***Bangert***, regardless of whether the court asked Mazariegos personally whether the facts in the complaint were true or went over the individual elements of the offense with him. We also disagree with Mazariegos that the break in the colloquy implies that he hesitated, that he is innocent or did not want to plead guilty. Not only are such conclusions entirely speculative, but also they do not change that fact that had Mazariegos indeed not wanted to plead guilty, his response to the court following his conversation with his attorney should have been "not guilty," rather than "guilty."

¶51 Finally, Mazariegos's concession during sentencing that he had made "a terrible mistake" and his statement to the court that he will "never flee from justice" and that he will "confront it," are also consistent with a knowingly, voluntarily and intelligently entered plea.

¶52 In sum, we are satisfied that the record as a whole indicates that Mazariegos's plea was knowingly, intelligently and voluntarily entered, and we therefore reject his argument that he should be allowed to withdraw his plea due to an allegedly invalid plea.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.