COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP356-CR **Cir. Ct. No. 2000CF478**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Matthew Schultz appeals pro se from an order denying his postconviction motion to withdraw his no contest plea to child abuse by recklessly causing great bodily harm as a person responsible for the welfare of the child. He argues that he was denied the effective assistance of trial counsel on

his motion to exclude the testimony of the child's mother, that the prosecution failed to disclose exculpatory evidence, that the plea was involuntary because he suffered from mental incapacity at the time of the plea hearing, and that there was inaccurate information presented at sentencing. We reject his claims and affirm the order denying the postconviction motion.

¶2 The circuit court's denial of a motion to withdraw a plea is reviewed under an erroneous exercise of discretion standard. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. A plea may be withdrawn if the defendant establishes the existence of a manifest injustice by clear and convincing evidence. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is met if the defendant was denied the effective assistance of counsel. *See* ***id.***

¶3 To establish that trial counsel was ineffective, a defendant must show that counsel's performance was both deficient and prejudicial. ***Id.*** at 312. The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). Prejudice is established when the defendant shows "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Bentley***, 201 Wis. 2d at 312 (citation omitted). The trial court's findings of what the attorney did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). However, whether the attorney's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶4 Schultz was convicted of causing a child he was babysitting to sustain a skull fracture. The prosecution moved for the admission of other acts evidence based on the written statements to police from the child's mother. The statements indicated that Schultz had been physically rough with the children in the household and at one point Schultz admitted striking the victim. Schultz moved to suppress the statements as involuntary and/or the product of coercion. The trial court found that the mother's statements were voluntarily made, that she had not been pressured by social workers or the investigating police detective to make those statements, and that she was not subjected to any coercive tactics. The motion to suppress the statements was denied.

¶5 Schultz claims that trial counsel failed to explore ways that the mother was being pressured into making the statements. He states that mental health professionals should have been called to illuminate the stress the mother was under, her mental instability, and her inability to comprehend what was going on. He contends "at the very least counsel should have ordered the records for review through the court. By doing so would show how unstable [the mother] was and her constant lying to authority figures to get the results that benefited her." He points to the mother's indication that she was on sleep medication at the time the statements were made and the lateness of the hour as further evidence of the mother's inability to resist pressure and coercion. Finally, he believes he was prejudiced because the denial of the suppression motion forced him to mount a defense to the other allegations in the mother's statements rather than just the one

allegation he was charged with.[1] He implies that he entered his plea to avoid that result.

¶6 The trial court found that at the two motion hearings defense counsel "assiduously attacked the [mother's] credibility, comprehension, and mental capacity." That finding is not clearly erroneous. Not only did defense counsel elicit the mother's recantation of some of her statements that Schultz had spanked the victim very hard and was physical with her other child, but his examination repeatedly inquired about the pressure she was under from her family, the police detective, and social workers. The mother indicated that her children were removed from her home by the social workers, that they threatened that she would not see her children again if she continued to live with Schultz, and that they threatened to take away her unborn child right at birth. The mother revealed that her family was excluding her because of her continued association with Schultz. She also indicated that on the dates she made the statements she had fought with Schultz about their unborn child and his desire to give the child to his parents. Under counsel's examination the mother explained how being pregnant at the time the statements were made was affecting both her physical and mental condition. Indeed, the trial court directly observed that since the mother was further along in her pregnancy when her testimony was taken, frequent breaks were taken and the

[1] It is a recurring theme in Schultz's argument that the mother's statements forced him to represent himself as to four acts while only being charged with one count. Thus, at the outset we reject Schultz's belief that the admission of other acts evidence would have forced him to defend against additional acts not charged. Other acts evidence is admitted for limited purposes and the jury is so instructed. A cautionary instruction is the acceptable way of guarding against the jury's use of other acts evidence for an improper purpose. *See* ***State v Anderson***, 230 Wis. 2d 121, 132, 600 N.W.2d 913 (Ct. App. 1999) (since we presume that jurors follow the court's instruction, a cautionary instruction is normally sufficient to guard against the jury's use of the other acts evidence for an improper purpose).

hearing was continued to accommodate her. The trial court was made aware that the mother is learning disabled, that she had been in special education classes through the eleventh grade, that she has a borderline personality disorder, and that she was then being treated for depression. The mother's ability to comprehend the import of her statements and her reaction to pressure was fully litigated.

¶7 Schultz only speculates that testimony from mental health professionals would have supported his position that the mother was unable to resist pressure or was unable to make a voluntary statement. Schultz fails to demonstrate what the missing witnesses or records would have revealed with respect to the voluntariness of mother's statements. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed. ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶8 Moreover, Schultz's claim that more damaging testimony could have been presented, including a suggestion that counsel should have investigated and raised allegedly false accusations the mother made about her two older children being abused by their father, bear only on credibility of the statements and the mother's testimony. The credibility of the mother's statements was not a consideration in determining whether they were involuntarily made. Credibility of the witness and her statements to police were matters that a jury would determine at trial. *See* ***Henning v. Ahearn***, 230 Wis. 2d 149, 180, 601 N.W.2d 14 (Ct. App. 1999) (witness's significant interest in the outcome of the proceeding goes to the weight and credibility of the proffered testimony, not its admissibility); ***State v. DeSantis***, 151 Wis. 2d 504, 511, 445 N.W.2d 331 (Ct. App. 1989) ("[T]hat the witness's testimony may be false, however, does not go to the question of admissibility. Witness credibility is a separate determination to be made by the

trier of fact."), *rev'd on other grounds*, 155 Wis. 2d 774, 456 N.W.2d 600 (1990). Schultz was not prejudiced by trial counsel's failure to make a full out assault on the mother's credibility at the motion hearing, particularly where her testimony supported his claim for suppression. Schultz was not denied the effective assistance of counsel on the suppression issue.

¶9 Schultz claims that his plea was not knowingly entered because the prosecution withheld exculpatory evidence. His claim is based on the prosecutor's ongoing investigation over the false statements in the written statement the mother gave to police and that the mother was subsequently charged with false swearing for the contradictory testimony she gave at the motion hearings.[2] He claims he should have been provided that information as it relates to the truth of the mother's statements.

¶10 When a defendant seeks plea withdrawal based upon a claim that the prosecution violated his constitutional due process rights by failing to produce exculpatory evidence within its exclusive control, withdrawal is required as a matter of right when the defendant demonstrates: "(1) that a violation of a constitutional right has occurred; (2) that this violation caused the defendant to plead guilty; and (3) that at the time of the plea, the defendant was unaware of the

[2] For the first time on appeal, Schultz asserts that the prosecution gave him false information that he would be able to see his newborn son who was born two days before the plea hearing. Also, for the first time in his reply brief Schultz claims that the prosecution should have turned over to him materials in the ongoing CHIPS cases concerning the mother's children. He also throws in a claim that trial counsel was ineffective for not asking for an in camera review "as he knew of some of the material out there." We do not address any of these claims because they are raised for the first time on appeal, raised for the first time in the reply brief, and inadequately argued. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889, *review denied*, 2008 WI 140, 308 Wis. 2d 611,749 N.W.2d 662; ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878; ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

potential constitutional challenge to the case against him or her because of the violation." ***State v. Sturgeon***, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). Schultz does not satisfy these requirements because he was present at the motion hearings where the mother gave the testimony that resulted in the false swearing charge. Indeed, Schultz attempted to show that the mother had made false statements to the police. At all times he was questioning the mother's veracity. That false swearing charges were contemplated or filed months after Schultz entered his plea does not negate his knowledge that the mother had given testimony contradicting her written statements. Schultz had the false statements that the prosecutor would have been required to disclose. His claim that his plea was not knowingly entered because of withheld information is meritless.

¶11 As additional reason why his claim was not voluntarily or knowingly entered Schultz states that at the time he "was not of total sound mind." Schultz points to a suicide attempt he made four months before entry of his plea, that he remained under the care of mental health professionals at the time of his plea, and that he was distressed over being denied access to his newborn son. Not only does this claim rely on facts outside the record which this court cannot consider, ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981), but it also is raised for the first time on appeal and we do not consider it. ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889, *review denied*, 2008 WI 140, 308 Wis. 2d 611, 749 N.W.2d 662. We note that the plea colloquy inquired about Schultz's treatment for emotional disorders and he replied that he was being treated just for depression. Schultz confirmed that his treatment medication did not interfere with his ability to understand the proceeding. Schultz's new suggestion that he was impaired is without a factual basis.

¶12 Schultz's final argument is that he was sentenced on the basis of inaccurate information in the presentence investigation report (PSI). We first point out that plea withdrawal is not the remedy when a defendant has been sentenced on the basis of inaccurate information. The error in the sentence is not related in any way to the plea. Resentencing is the remedy. *See* ***State v. Walker***, 117 Wis. 2d 579, 583, 345 N.W.2d 413 (1984) (resentencing is the appropriate remedy where the sentence is "legally impermissible," "unlawful," or otherwise "not in accord with the law"). Schultz does not seek resentencing.

¶13 We reject Schultz's claim for plea withdrawal based on inaccurate information at sentencing for two additional reasons. First, the PSI was made available to Schultz prior to sentencing and it was confirmed at the commencement of the sentencing hearing that he reviewed the PSI with counsel. Only two corrections were noted to the PSI information at that time. Where the information stated in the PSI is not challenged or disputed by the defendant at the time of sentencing, the sentencing judge may appropriately consider that information.[3] ***State v. Mosley***, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996); ***State v. Peters***, 192 Wis. 2d 674, 697, 534 N.W.2d 867 (Ct. App. 1995). Also, to establish a due process violation, the defendant must show that the information was inaccurate. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. Schultz only points to the PSI author's belief that Schultz has "some control issues." This is only the author's opinion. It is not an objective fact

[3] Schultz attempts to cast his claim as one of ineffective assistance of counsel—that trial counsel did not object to or correct other inaccuracies in the PSI. It is but a single sentence in his postconviction motion and his appellant's brief (which is virtually an identical copy of his postconviction motion). He did not develop that claim and we do not consider it. ***Pettit***, 171 Wis. 2d at 646.

that is capable of being accurate or inaccurate. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995) ("Factual objectivity refers to *facts* in the sense of what is *really* true, while opinion subjectivity refers to mere 'opinion' or personal taste." (citation omitted)). The trial court confirmed the opinion nature of the PSI comment when it stated that it "shares the sentiment expressed" by the PSI author. Schultz has not demonstrated that the sentence was based on inaccurate factual information.

By the Court.—Order affirmed.

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