COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP307-CR **Cir. Ct. No. 2006CF240**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DERRICK G. PABLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Derrick Pablo appeals pro se from a judgment of conviction of party to the crime of child abuse and two counts of intimidation of a victim by use or attempted use of force. He also appeals from the order denying his postconviction motion to withdraw his guilty plea. He argues that there is no

factual basis to support the convictions, that the complaint failed to state probable cause, and that his trial counsel was ineffective for not moving to dismiss and sever certain charges. We reject his claims and affirm the judgment and order.

¶2 The police reports filed in support of the issuance of an arrest warrant against Pablo reveal that Pablo, at age twenty-seven, kept company with high school teenagers and would supply cigarettes, alcohol, and drugs to them. The amended criminal complaint charged Pablo with thirteen crimes. Two sixteen-year-old males reported unwanted sexual contact from Pablo in the summer of 2004. The first three counts arose from the 2004 sexual contact.[1] The criminal complaint explained those charges had been filed earlier but dismissed when one of the victims indicated he had received threats from Pablo's companions and he was too frightened to testify.

¶3 The complaint charged Pablo with being a party to the crime of child abuse committed against Matthew C. In the middle of January 2006, Matthew was beaten by Austin B., a teen companion of Pablo's. Matthew had been part of a group of teens spending time at Pablo's apartment until his mother, Sheryl Krueger, told Matthew he could not go back to Pablo's apartment. Matthew indicated that after that Pablo was angry and had put a "hit" on him. As he was walking toward a bus terminal, Matthew heard a car pull into a driveway behind him and he was then struck on the back of the head with a metal object which caused him to fall to the ground. He saw Austin running away.

[1] The charges also included party to the crime of misdemeanor battery, possession of drug paraphernalia, exposing a child to harmful material, child enticement, second-degree sexual assault, and causing a child to expose his genitals. As part of the plea agreement, all but the charges of which Pablo is convicted were dismissed and read-in at sentencing. The charge of exposing a child to harmful material was dismissed outright.

¶4 Krueger, Matthew's mother, reported that during the week of February 13, 2006, she called Pablo looking for Matthew. Although no one answered her call, Pablo called her back wondering why she had called and accusing her of continually harassing him. Pablo indicated that he was sick of having the police called on him because of Matthew. Pablo said, "Bitch, you're going to get what you got coming if you keep calling the police," and he made a reference to killing her if she called the police to report his behavior. One week after this phone conversation, the tires of Krueger's car were slashed and some items were shoved into the muffler. One count of intimidation of a victim by use of force or attempted force or violence was charged from these circumstances.

¶5 The second charge of intimidation of a victim by use of force or attempted force or violence relates to the report from Anthony R, a nineteen-year-old high school student. Anthony had once been a part of a group of teens that kept company with Pablo and indicated he was sexually assaulted by Pablo on January 1, 2005. On February 22, 2006, Anthony reported that Pablo had threatened him over the phone. Anthony indicated that earlier that month and before his phone conversation with Pablo, he had been kicked and punched by Austin. In his phone conversation with Anthony, Pablo said, "You think that time was bad; you're not going to get up next time." Anthony was jumped and beaten by three of Pablo's companions as he was leaving school just after making the report that Pablo had threatened him.

¶6 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. In order to withdraw a guilty plea after sentencing, a defendant must show that a manifest injustice would result if the withdrawal were not permitted. ***State v. Booth***, 142 Wis. 2d 232, 235, 418

N.W.2d 20 (Ct. App. 1987). The defendant bears the burden to establish manifest injustice by clear and convincing evidence. ***Id.*** at 237. "One type of manifest injustice is the failure to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads." ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). The manifest injustice test is also met if the defendant was denied the effective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶7 "When we review a circuit court's determination that a sufficient factual basis exists to support a plea, we look at the totality of the circumstances surrounding the plea to determine whether the court's findings were clearly erroneous." ***State v. Sutton***, 2006 WI App 118, ¶16, 294 Wis. 2d 330, 718 N.W.2d 146. We may rely on the entire record. ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978); ***Sutton***, 294 Wis. 2d 330, ¶17.

¶8 Pablo contends that there was no factual basis for the crime of intimidation of Krueger because she was not a victim of a crime. This contention lacks merit. WISCONSIN STAT. § 940.44 (2007-08),[2] defines intimidation of a victim to include any person "who has been the victim of any crime or *who is acting on behalf of the victim*." (Emphasis added). Pablo admitted his guilt to the charge under WIS. STAT. § 940.45, which is the aggravated version of the crime of intimidation of a victim and specifically refers to the violation of § 940.44. Krueger was the mother of Matthew, who had been a victim of a crime. The complaint and preliminary hearing testimony sets forth that Matthew did not

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intend to report the crime but Krueger did. Krueger also made a report to the police about what she knew about the attack on Matthew. Thus, Krueger was a person acting of behalf of a victim of a crime when she was threatened by Pablo.

¶9 Pablo next argues that he cannot be convicted of the aggravated crime of intimidation of a victim because his threats against Krueger and Anthony were made by phone and thus were not threats accompanied by force or violence or attempted force or violence. This contention also lacks merit. Both Krueger and Anthony were exposed to acts of violence in relation to Pablo's threats. Krueger's car tires were slashed days after Pablo's threat against her. Anthony was beaten by Pablo's companions before and after the threatening phone call. A reasonable inference arises from the facts stated in the complaint that the acts of violence were in furtherance of Pablo's desire to intimidate Krueger and Anthony. The crime need not be committed within one moment.

¶10 Even if we considered the violence experienced by Krueger and Anthony to be attenuated from Pablo's phone threats, he admitted conduct constituting a violation of WIS. STAT. § 940.45(3), the intimidation of a victim or person acting on behalf of a victim "by any express or implied threat of force, violence, injury or damage." The maximum penalty for a violation of § 940.45(3) is the same as that recited in the complaint for a violation of § 940.45(1). The failure to designate the crime as one under subsection (3) is a technical defect from which no prejudice can be claimed in light of Pablo's admitted conduct. *See* ***Craig v. State***, 55 Wis. 2d 489, 493, 198 N.W.2d 609 (1972). Pablo admitted to and was convicted of the aggravated crime of intimidation of a victim.

¶11 Pablo claims that there is no factual basis for his conviction of party to the crime of child abuse because the complaint did not set forth any facts that he

undertook some verbal or other conduct to aid and abet the abuse of Matthew or that he directly abused Matthew. This contention lacks merit. Pablo overlooks that a person can be guilty as a party to the crime by procuring another person to commit the crime. WIS. STAT. § 939.05(2)(c). At the preliminary hearing, Matthew indicated that Pablo would get the teens to fight juveniles for him. Matthew also indicated that others were beat up to protect Pablo. There was a sufficient factual basis for criminal responsibility based on Pablo's practice of having his teen companions work over his detractors. It was not necessary that the complaint charge or the trial court make a finding under a specific subsection of the party to the crime statute. *See* ***State v. Zelenka***, 130 Wis. 2d 34, 47, 387 N.W.2d 55 (1986).

¶12 Pablo next argues that the criminal complaint failed to state probable cause on the charge of party to the crime of child abuse and therefore, there was a lack of personal jurisdiction over him on that charge. *See* ***State v. Adams***, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989) (WIS. STAT. § 968.01 requires a criminal complaint to meet probable cause requirements to confer personal jurisdiction). Challenges to the sufficiency of the complaint must be made before the preliminary hearing and the alleged defect in the institution of the criminal proceeding is waived in the absence of the timely objection. ***State v. Berg***, 116 Wis. 2d 360, 365, 342 N.W.2d 258 (Ct. App. 1983). Pablo waived any challenge to the sufficiency of the complaint.

¶13 Even if not waived, Pablo's contention lacks merit.[3] We review de novo whether the complaint was sufficient. ***Adams***, 152 Wis. 2d at 74. Based on just two paragraphs of the complaint Pablo argues that it does not answer the question of why he is charged with child abuse against Matthew. *See* ***State v. Reed***, 2005 WI 53, ¶12, 280 Wis. 2d 68, 695 N.W.2d 315 ("A complaint is sufficient if it answers the following questions: '(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or how reliable is the informant?'"). We are not limited to the single charging paragraph or the related information in the probable cause section of the complaint. We look within the four corners of the entire complaint for facts or reasonable inferences sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it. ***Id.*** The complaint includes information about the attacks on Anthony and how they were carried out by Pablo's known companions, including Austin. Moreover, the complaint recites Matthew's statement that Pablo put a "hit" on him and that he was not surprised that Austin was the one doing the "hit." A reasonable inference exists that Austin carried out the attack on Matthew on Pablo's behest. As we have already recognized, the complaint sets forth a pattern of Pablo threats and enforcement through his teen companions. The complaint establishes probable cause that Pablo committed the crime of party to the crime of child abuse.

[3] Pablo argues that his trial counsel was ineffective for not bringing a motion to challenge the complaint based in part on the alleged failure of the complaint to state probable cause as to the party to the crime child abuse charge. By addressing the merits of the waived issue, we also dispose of any claim of ineffective assistance of counsel because only if there was actual error could counsel's performance be deemed deficient or prejudicial. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to present legal challenge is not deficient performance if challenge would have been rejected).

¶14 The remaining claims to be addressed are that Pablo's trial counsel was ineffective for not challenging his bindover on the counts he pled guilty to and not moving to sever those charges for a separate trial on each. In order to obtain appellate review of an ineffective assistance of counsel claim, trial counsel must testify in the trial court and explain his or her conduct in the course of the representation. *See* ***State v. Krieger***, 163 Wis. 2d 241, 253, 471 N.W.2d 599 (Ct. App. 1991). In the absence of a proper record, we have nothing to review. *See* ***id.*** at 254. No hearing was held and the ineffective assistance claims are not properly before us. Pablo does not argue that it was error to deny his postconviction motion claims of ineffective assistance of counsel without conducting an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 310 (we review the trial court's decision not to hold an evidentiary hearing on a postconviction motion using a mixed standard of review). "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). We need not address the claims of ineffective assistance of counsel and they are waived.[4]

By the Court.—Judgment and order affirmed.

[4] We summarily determine there is no merit to a claim of ineffective assistance of counsel. Pablo's attack on the bindover is nothing more than disagreement with the veracity and reliability of the testimony. Credibility is not an issue at a preliminary hearing. *See* ***State v. Dunn***, 121 Wis. 2d 389, 397, 359 N.W.2d 151 (1984). There was sufficient evidence to support the bindover. Pablo's contention that a motion to sever the charges would have been successful is equally without merit. Crimes are properly joined when they involve "two or more incidents which exhibited the same modus operandi, were close in time, and occurred within the same geographic area, the acts were connected or constituted parts of a common scheme or plan which tended to establish the identity of the perpetrator." ***State v. Davis***, 2006 WI App 23, ¶14, 289 Wis. 2d 398, 710 N.W.2d 514 (citation omitted). Pablo's intimidation and child abuse crimes fit that description.

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