

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 1, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0729-CR**

**Cir. Ct. No. 99-CF-100**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GEROLD A. HAUT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Gerold Haut appeals from a judgment of conviction entered on a guilty plea to one count of first-degree intentional homicide contrary to WIS. STAT. § 940.01(1)(a)<sup>1</sup> and one count of attempted first-degree intentional

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<sup>1</sup> All statutory references are to the 1999-2000 version.

homicide contrary to § 940.01(1)(a) and WIS. STAT. § 939.32. He also appeals an order denying his motion for postconviction relief. Haut seeks to withdraw his plea, contending there is no factual basis to support it. Specifically, Haut contends the court erred by relying on the complaint and preliminary hearing testimony in accepting the plea. Haut also argues this evidence does not support a finding of his intent to kill. Finally, he contends the court failed to consider whether his conduct amounted to a provocation defense. We determine the court did not err by relying on the complaint and preliminary hearing testimony and that this evidence supports a finding Haut intended to kill. In addition, we determine there is no basis in this evidence to show Haut was provoked and therefore affirm the judgment and order.

## **BACKGROUND**

¶2 Early in the morning of July 15, 1999, Lisa Tucci finished work at the Oasis Bar in Shawano.<sup>2</sup> On her way home, she stopped at the apartment of Lee Hesse, a friend. Almost immediately after Tucci and Hesse sat down, Haut, with whom Tucci had recently ended a relationship, came to the apartment. After Hesse let him in, Tucci told Haut to go home and said she would talk to him later. Without warning, Haut grabbed Tucci, slit her throat and repeatedly stabbed her. He then attacked Hesse, stabbing him numerous times, and left. Tucci managed to call a friend and told her to call 911. When the police arrived, Hesse was dead and Tucci was barely conscious, although she was able to tell one of the officers that Haut had attacked her and Hesse.

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<sup>2</sup> These facts are derived from the preliminary hearing testimony and the criminal complaint.

¶3 Haut pled guilty to one count of first-degree intentional homicide and one count of attempted first-degree homicide. The court sentenced him to life in prison without the possibility of parole for the homicide charge and forty years for the attempt charge, served concurrently. Haut filed a motion to withdraw his plea, arguing it was without any basis in the record. The circuit court denied his motion and Haut appeals.

### DISCUSSION

¶4 To withdraw a guilty plea after sentencing, a defendant must establish the withdrawal is necessary to correct a “manifest injustice.” *State v. Black*, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. The defendant must show the injustice exists by clear and convincing evidence. *Id.* We review a circuit court’s denial of a motion to withdraw a plea under an erroneous exercise of discretion standard. *Id.* A trial court erroneously exercises its discretion if the record shows that the court failed to exercise discretion, the facts fail to support the court’s decision, or it applied the wrong legal standard. *Id.*

¶5 Haut claims the court erred by relying on the complaint and preliminary hearing transcript to establish the factual basis for the plea. He argues he never agreed to allow the court to rely on these sources to establish the factual record. He suggests the court erred by considering these sources absent a stipulation, relying on *Christian v. State*, 54 Wis. 2d 447, 195 N.W.2d 470 (1972).

¶6 We need not address Haut’s precise argument, however, because he did in fact stipulate to use both the complaint and the preliminary hearing transcript to provide the factual basis for his plea. Haut’s plea questionnaire says, in part, “I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal

complaint and/or the preliminary examination and/or as stated in court.” We conclude this constitutes a stipulation by Haut to allow the court to use the allegations in the complaint and the preliminary hearing testimony as a factual record to support the plea. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (use of form to explain rights waived by guilty plea is permissible).

¶7 Haut next claims this evidence does not support a finding he intended to kill. It is a manifest injustice if the trial court does not establish a factual basis for the defendant’s plea. *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). Intent to kill must be found from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case. WIS JI—CRIMINAL 1010.

¶8 Here, the complaint and preliminary hearing testimony support a finding of Haut’s intent to kill. The complaint alleges the police found Hesse dead and Tucci wounded, both with numerous stab wounds. It says Tucci identified Haut as the attacker, and later describes how the police found Haut covered in blood and carrying a knife. At the preliminary hearing, Tucci testified she stayed late at work because a friend called to say Haut’s car was parked outside Tucci’s house. In addition, Tucci said she went to Hesse’s apartment because the car was still there when she left work. Tucci also described the attack, saying after Hesse let Haut in, Haut slit her throat and stabbed her. She then fell behind a chair and heard some scuffling and gurgling noises. Tucci said she then heard footsteps going down the stairs. After she was able to get up, she found Hesse lying in a pool of blood.

¶9 The trial court did not err by finding the facts supported an intent to kill based on this evidence. Intent to kill can be inferred from the savage nature of Haut's attack. See *State v. Stanton*, 106 Wis. 2d 172, 183, 316 N.W.2d 134 (Ct. App. 1982). Further, Haut's intent to kill can be presumed from his use of a deadly weapon. See *State v. Dix*, 86 Wis. 2d 474, 482-83, 273 N.W.2d 250 (1979). The complaint and the preliminary hearing testimony support the court's finding of Haut's intent to kill.

¶10 Next, Haut contends the court erred when it failed to consider whether the facts available to the court at the plea inquiry would amount to a defense. A trial court is required, when accepting a guilty plea, to determine to its satisfaction that the facts, if proved, "constitute the offense charged and whether the defendant's conduct does not amount to a defense." *Edwards v. State*, 51 Wis. 2d 231, 236, 186 N.W.2d 193 (1971). Here, Haut contends there was evidence suggesting adequate provocation, which if proved, would mitigate the charges to second-degree intentional homicide and attempted second-degree intentional homicide. See WIS. STAT. § 940.01(2)(a).

¶11 We conclude the evidence did not require the trial court to find Haut was provoked. "Provocation" is defined in WIS. STAT. § 939.44(1)(b) as "something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death." Haut argues his provocation was finding his ex-girlfriend alone with Hesse. He does not point, however, to any specific evidence suggesting he was actually provoked within the meaning of the statute, as opposed to enraged, and we determine nothing in the record supports a finding Haut reasonably believed Tucci or Hesse had done anything that would have caused him to lack self-control when he attacked them. Although Tucci testified during the preliminary hearing

that Haut had been angry immediately before they broke up, this alone does not suggest he was provoked. Haut has not met his burden of demonstrating by clear and convincing evidence that he should be allowed to withdraw his plea.

*By the Court.*—Judgment and order affirmed.

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