COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2010

A. John Voelker
Acting 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. 2009AP2759-CR

Cir. Ct. No. 2006CF6840

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MORRIS L. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA and MARY M. KUHNMUENCH, Judges.[1] *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

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[1] The Honorable Clare L. Fiorenza entered the judgment of conviction. The Honorable Mary M. Kuhnmuench entered the order denying postconviction relief.

¶1 CURLEY, P.J. Morris L. Harris appeals a judgment of conviction for substantial battery, *see* WIS. STAT. § 940.19(2) (2007-2008),[2] and from the subsequent order denying his postconviction motion. Harris argues that: (1) the trial court erroneously exercised its discretion when denying his motion to withdraw his plea; (2) the trial court conducted an improper, prejudicial preliminary hearing; (3) the trial court erroneously determined that the State's withholding of certain evidence did not constitute grounds for withdrawal of his plea; (4) his counsel was ineffective; and (5) the trial court erroneously exercised its discretion at sentencing. We affirm.

I. BACKGROUND.

¶2 In the early morning hours of December 23, 2006, a man identifying himself as "Matthew" called 9-1-1 to report that his girlfriend had been involved in a fight and that her face had been burned with a curling iron. A couple of minutes into the call, the man supplemented one detail; he made clear that someone else, a woman, had burned her. While the man's girlfriend initially corroborated this story, she told police days later that in fact her boyfriend—whose name was Harris, *not* Matthew—was the one who had pressed a hot curling iron to her face, causing first- and second-degree burns to

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

her left cheek and right temple. She had only gone along with his version of events because she feared Harris would kill her.

¶3 Harris was consequently charged with substantial battery, contrary to WIS. STAT. § 940.19(2), and attempted mayhem, contrary to WIS. STAT. §§ 940.21, 939.32, with enhancers for habitual criminality and offending while armed, *see* WIS. STAT. §§ 939.62, 939.63. The State and Harris entered into a plea agreement. The State moved to dismiss the attempted mayhem charge, as well as the enhancers, provided Harris plead guilty to substantial battery. The State recommended a total sentence of eighteen years divided into twelve years of initial confinement, followed by six years of extended supervision. That recommendation was global; it encompassed the substantial battery charge, as well as felony charges in a separate case where Harris had recently been convicted but not yet sentenced. The court explained to Harris that the global recommendation was just that—a recommendation. The court also explained that the maximum penalty for just the substantial battery was three-and-one-half years in prison and/or a $10,000 fine. Harris stated that he understood. He pled guilty to substantial battery.

¶4 Two months later, Harris moved to withdraw his plea, claiming that his attorney had pressured him to plead guilty and that she had been ineffective. That motion was denied, and Harris was sentenced to one year and six months of initial confinement, followed by two years of extended

supervision, for a total sentence of three years and six months. Harris then filed a postconviction motion, which was also denied. Harris now appeals both the judgment of conviction and the order denying his postconviction motion.

II. ANALYSIS.

A. Denial of Motion to Withdraw Plea

¶5 Harris claims that in denying his presentence motion to withdraw his plea the trial court erroneously exercised its discretion in three ways: (1) by applying the wrong legal standard; (2) by rendering its decision on incorrect facts; and (3) by failing to apply the ***State v. Shanks***, 152 Wis. 2d 284, 448 N.W.2d 264 (Ct. App. 1989), factors. The decision to permit plea withdrawal prior to sentencing is committed to the sound discretion of the trial court. ***State v. Jenkins***, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24. We will uphold the trial court's discretionary decision if "the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** (citation omitted).

1. Legal Standard

¶6 According to Harris, the trial court erroneously substituted a higher standard for a lower one. Harris argues that the trial court erroneously applied the standard applicable to pleas made after sentencing—*see* ***State v.***

Black, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363 (after sentencing, a defendant is entitled to withdraw a plea if he or she establishes by clear and convincing evidence that failure to allow the withdrawal would result in a manifest injustice)—to his motion, which he made *before* he was sentenced, *see* ***Shanks***, 152 Wis. 2d at 288 (a defendant moving to withdraw a plea before sentencing must prove by a preponderance of the evidence that he has a "fair and just" reason to withdraw).

¶7 The record shows, however, that the trial court not only cited the "fair and just" standard several times, but it also applied it. The trial court noted that Harris presented three reasons for withdrawal: lack of an adequate factual basis; lack of understanding of the State's recommendation; and his attorney's lack of preparation. It determined that there was a factual basis for the guilty plea based on the plea colloquy, Harris's answers to the plea questionnaire, and the facts set forth in the criminal complaint, which Harris stated were correct.[3] The trial court next determined that Harris did understand the State's global recommendation. Finally, the trial court determined that trial

[3] Specifically, at the time of the plea colloquy, the trial court asked Harris if he went over the Plea Questionnaire and Waiver of Rights Form with his attorney and if he had signed it, and Harris answered, "yes." The trial court asked Harris if he had any questions about the documents; Harris responded, "no." The trial court then asked Harris if he understood the elements of the crime he was charged with, and Harris answered, "yes." The trial court further noted that the elements of the crime were set forth on the front page of the plea questionnaire, and asked Harris if his attorney explained those elements to him in detail. Harris again answered, "yes." When the trial court asked Harris if the facts set forth in the criminal complaint were correct, Harris answered, "yes."

counsel was prepared and, based on Harris's own testimony, that Harris was satisfied with counsel's representation. In sum, even though the trial court by its own admission took a "liberal rather than rigid view of the reasons given," no fair and just reason for withdrawal existed. Indeed, Harris has pointed to no place in the trial court's reasoning to prove otherwise. His arguments are merely conclusory. The trial court's decision must therefore be upheld. *See* ***id.***

2. Factual Errors

¶8 Harris next argues that the trial court's discretion was "tainted" by factual errors. Specifically, he claims the trial court erred in suggesting that Harris had pled guilty on fifteen previous occasions instead of for fifteen separate cases consolidated into just four separate occasions. He also claims that the court incorrectly stated that Harris's attorney submitted a motion *in limine* when she did not do so. Neither argument has merit. The trial court did not say that Harris pled guilty on fifteen separate occasions. Even if it did, Harris fails to explain how such a suggestion would constitute grounds for plea withdrawal. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (1992) (court of appeals may decline to review inadequately developed issues). Nor does Harris explain how the court's mistake about the motion *in limine* would provide him with grounds for withdrawal. *See* ***id.***

3. Withdrawal under ***Shanks***.

¶9 Harris also argues that "had the court applied the ***Shanks*** factors, it would have found [him] entitled to relief."[4] *See* ***id.***, 152 Wis. 2d at 290. Harris misunderstands what ***Shanks*** requires. We do not overturn a trial court's decision to deny plea withdrawal under ***Shanks*** simply because each of five specific factors was not discussed. Rather, we "uphold a trial court's exercise of discretion if the record shows a process of reasoning dependent on facts of record and a conclusion based on a logical rationale founded upon proper legal standards." ***Id.*** As discussed above, the trial court's decision met this standard.

B. Preliminary Hearing

¶10 Harris next argues that the trial court conducted an improper, prejudicial preliminary hearing. According to Harris, the preliminary hearing was used as a *de facto* evidence deposition for the State, which was improper and prejudicial because it provided his attorney no chance to prepare and showed undue favor toward the State. Harris argues this even though the State's questioning during the hearing was very minimal and both Harris and his attorney were not restricted in the questions they asked. Additionally, Harris argues that the trial court forced Harris to give a "two-headed defense."

[4] Those factors include: assertion of innocence, confusion, hasty entry, rapid reconsideration, and coercion. ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989).

According to Harris, the trial court's decision to allow Harris to question his girlfriend at the hearing after his attorney had finished questioning her—the alleged "forced," "two headed defense"—undermined Harris's confidence in the justice system and resulted in prejudicial testimony. Harris also appears to argue that the mere fact he even had a preliminary hearing was improper, even though he never moved to waive it and nothing prevented him from doing so.

¶11 We will not consider these allegations of error. A guilty plea waives all nonjurisdictional defects and defenses occurring before its entry. ***State v. Bembenek***, 2006 WI App 198, ¶16, 296 Wis. 2d 422, 724 N.W.2d 685; ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437. This includes any defects involving the preliminary hearing. ***Belcher v. State***, 42 Wis. 2d 299, 314-315, 166 N.W.2d 211 (1969).

C. Withheld Evidence

¶12 Harris argues that the trial court erred when it concluded that the State's withholding of certain evidence—a supplemental police report, his girlfriend's signed statement, the 9-1-1 call detail, and the 9-1-1 audio recording—did not support withdrawal of his plea. As the United States Supreme Court held in ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), the suppression of evidence favorable to the defendant violates the defendant's rights if the evidence is material to guilt. Thus, if "there is a reasonable

probability that, but for the failure to disclose, the defendant would have refused to plead and would have insisted on going to trial," a defendant may withdraw his plea as a matter of right. ***State v. Sturgeon***, 231 Wis. 2d 487, 503-04, 605 N.W.2d 589 (Ct. App. 1999). Whether the evidence meets this standard is a constitutional fact question that we review independently. ***State v. Harris***, 2003 WI App 144, ¶36, 266 Wis. 2d 200, 667 N.W.2d 813. We consider five factors: (1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the withheld evidence; (3) the reasons, if any, expressed by the defendant for choosing to plead guilty; (4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy. ***Id.***, ¶14 (citation omitted).

1. Supplemental police report.

¶13 The supplemental report does in fact favor Harris because in it his girlfriend claims that someone else burned her; however, given that Harris questioned his girlfriend about this very subject at the preliminary hearing, we cannot say there is a reasonable probability that, but for the failure to disclose the report, Harris would have refused to plead guilty and would have insisted on going to trial. *See* ***Sturgeon***, 231 Wis. 2d at 503-04. Harris knew well before this evidence was disclosed that his girlfriend originally blamed someone else for burning her. Indeed, he used the preliminary hearing to develop testimony that could have been used to impeach her at trial. Faced

with numerous charges and decades of imprisonment, however, he determined that pleading guilty to substantial battery would be in his best interest. The trial court made sure that Harris understood the bargain he was making by explaining the maximum possible sentence the charge could impart and asking Harris whether he understood the consequences of his plea. Therefore, the failure to disclose the supplemental police report did not violate rights. ***Id.***

2. Girlfriend's signed statement.

¶14 The statement signed by Harris's girlfriend actually strengthens the State's case. By stating that Harris's girlfriend does not want her female friend prosecuted for burning her, it suggests that Harris's girlfriend was merely covering for her boyfriend's actions when she first talked to police and did not want an innocent person to go to jail. Because this statement does not favor Harris and does not impeach any of the State's witnesses, we cannot conclude there is a reasonable probability that, but for the failure to disclose it, Harris would have refused to plead guilty and would have instead gone to trial. *See* ***id.***

3. 9-1-1 call detail.

¶15 The call detail shows that someone calling himself "Matthew" called 9-1-1 from Harris's mother's house at about 3:39 a.m. on December 23, 2006. According to Harris, the report "gives objective confirmation that Harris

called 911 from his mother's home, after [his girlfriend] arrived there from her own house several blocks away." But this report does nothing of the sort. It is simply a transcription of information that Harris personally gave the dispatcher when he called 9-1-1. Just because Harris told the dispatcher that the fight and subsequent burn occurred somewhere else does not make it true. While the report does corroborate Harris's version of events, it also contains some very questionable information. For example, Harris did not give police his real name, but instead called himself "Matthew." Had Harris gone to trial, the prosecutor could have very convincingly used this evidence to show that Harris was trying to hide his true identity from police to conceal his guilt. Similarly, after telling the dispatcher that his girlfriend was involved in a fight and burned, Harris made sure to add that it was someone else, "[an]other female," who battered his girlfriend. This also could have been used to show that Harris was attempting to conceal his guilt.

¶16 Moreover, the call detail is not only unhelpful to Harris's case, but it also adds nothing new to Harris's pre-plea understanding of the evidence. Harris made the 9-1-1 call. He knew what he said to the dispatcher. He knew that he had blamed someone else. He could have testified to the contents of the call at trial whether or not the call detail was available. Simply put, we cannot conclude that the disclosure of this evidence would have persuaded Harris to go to trial. *See* ***id.***

¶17 Furthermore, to the extent that the call detail may have provided Harris with names of additional potential witnesses, the State is not required to disclose information that is only potentially exculpatory. *See* ***State v. Harris***, 2004 WI 64, ¶16, 272 Wis. 2d 80, 680 N.W.2d 737.

4. 9-1-1 audio recording

¶18 The 9-1-1 audio recording in Harris's case was destroyed before Harris had a chance to listen to it. In order to rise to the level of a due process violation, evidence not preserved, lost or destroyed by the State "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (citation omitted). Given that the exculpatory nature of the transcribed 9-1-1 call detail was not readily apparent, and given that the call detail and the audio recording likely contained the same or similar information, we cannot say that the exculpatory value of the recording would have been apparent to the State before it was destroyed. *See* ***id.*** We also cannot say that Harris would have been unable to obtain comparable evidence, as the 9-1-1 call detail was not destroyed. Therefore, Harris's rights were not violated by the destruction of the call recording.

¶19 As a final matter, Harris argues that even if the aforementioned pieces of undisclosed evidence are not separately exculpatory, they are exculpatory when considered in their entirety. Nothing in the record persuades us that there is a reasonable probability that viewed as a whole, this evidence would have, if disclosed, persuaded Harris to go to trial.

D. Ineffective Assistance of Counsel

¶20 Harris next claims that his trial counsel was ineffective. An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We do not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** Whether trial counsel's conduct amounts to ineffective assistance, however is a question of law that we review independently. ***Id.***

¶21 To establish ineffective assistance of counsel, a defendant must show that the lawyer's representation was deficient and that the defendant was consequently prejudiced. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to the lawyer's specific acts or omissions that fall "outside the wide range of professionally competent assistance." ***Id.*** 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. ***Id.*** at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." ***Id.*** This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citations omitted). Furthermore, we need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***id.***, 466 U.S. at 697.

¶22 According to Harris, counsel erred by not filing a ***Crawford***[5] motion to exclude his girlfriend's preliminary hearing testimony. Harris has not shown, however, that counsel's decision was deficient. Counsel stated at the evidentiary hearing that she did not file the motion to exclude this testimony because she was convinced—both by a colleague and her own logical reasoning—that such a motion would not succeed. Indeed, Harris provides us with no information even suggesting that a ***Crawford*** motion in this particular circumstance, one in which the defendant and his lawyer spent much more time questioning the witness than the State, would succeed. Harris

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[5] *See* ***Crawford v. Washington***, 541 U.S. 36, 68-69 (2004) (Confrontation Clause bars out-of-court, testimonial statements unless witness is unavailable and defendant had prior opportunity to cross-examine witness, regardless of whether such statements are deemed reliable by trial court).

does not explain how a successful ***Crawford*** motion in this instance would have altered the course of his pleading. Therefore, Harris has shown neither deficient performance nor prejudice. *See* ***id.*** at 687.

¶23 Harris also contends that trial counsel was deficient in failing to contact family members that he lived with to fully develop an alibi defense. However, he points to no evidence in the record showing that any family members would have in fact testified that Harris was home asleep during the time that his girlfriend was burned. Indeed, Harris admits that "nothing here provides a perfect alibi, because no evidence pertains to the exact time of the crime. Rather, it supports an imperfect but persuasive alibi defense because it creates additional apparent inconsistencies for the state to explain." This claim does not meet either prong of the ***Strickland*** standard. *See* ***id.*** at 687.

¶24 Harris next argues that he was prejudiced because trial counsel would not have allowed him to testify had the case gone to trial. At the evidentiary hearing, counsel explained that this was because Harris told her, "You think I'm an animal because of what I did," which she interpreted as an admission of guilt. Again, Harris fails to show how this decision was deficient, and also fails to show how it prejudiced him. *See* ***id.***

¶25 Harris also argues that trial counsel never demanded discovery. Yet again he fails to explain how this alleged omission constituted deficient

performance or how it prejudiced him. *See **id.*** He merely states, "It is impossible to know exactly how much weight this evidence would have had at trial, but Harris was aware that such an investigation was possible, and that his attorney was, in his fairly accurate view, doing nothing." We are not convinced. *See* ***Pettit***, 171 Wis. 2d at 646; *see also* ***State v. Jackson***, 229 Wis. 2d 328, 343, 600 N.W.2d 39 (Ct. App. 1999) ("[m]ere self-serving conclusions" insufficient to show ineffective assistance of counsel).

¶26 Finally, Harris argues that trial counsel pressured him to plead guilty, and was also openly hostile to him. Again, this argument is undeveloped, conclusory, and void of merit, and therefore, we do not consider it. *See* ***Pettit***, 171 Wis. 2d at 646.

E. Resentencing

¶27 As a final matter, Harris argues that if he is not allowed to withdraw his plea, he must be resentenced. Harris submits, first, that the court improperly considered the fact that he fathered, yet did not support, six children. Harris also argues, somewhat incongruously, that the court did not properly state the objectives of his sentence pursuant to ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

¶28 Our review of sentencing decisions is well-settled. "The trial court has great discretion in passing sentence." ***State v. Wickstrom***, 118

Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). This court will affirm a sentence imposed by the trial court if the facts of record indicate that the trial court "engaged in a process of reasoning based on legally relevant factors," *see* ***id.*** at 355, the primary factors being the gravity of the offense, the character of the offender, and the public's need for protection. ***State v. Larsen***, 141 Wis. 2d 412, 427, 415 N.W.2d 535 (Ct. App. 1987). The weight given each of these factors lies within the trial court's discretion, and the court may base the sentence on any or all of them. ***Wickstrom***, 118 Wis. 2d at 355. The court may also consider:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

State v. Harris, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984) (citation omitted).

¶29 We are reluctant to interfere with the trial court's sentencing discretion given the trial court's advantage in considering the relevant sentencing factors and the defendant's demeanor. ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). Even in instances where a sentencing judge

fails to properly exercise discretion, this court will "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶30 In Harris's case, the record confirms that the trial court engaged in an extremely thorough and thoughtful process of reasoning based on legally relevant factors. The trial court based Harris's sentence, first, on the nature and gravity of the offense—in this case severe burns on his girlfriend's face. The court also considered Harris's habitual criminality—including the fact that Harris had domestic violence issues with each of the mothers of his children—and failure to maintain consistent employment as evidence that he does not respect our society's rules or take responsibility for himself or his family. As for the court's comments about Harris's parenting capabilities, the trial court stated that Harris's fathering several children of a very young age and subsequent failure to support them reflected poorly on his character. These comments formed a very small portion of the sentencing explanation and were not inappropriate. Given the court's well-reasoned and comprehensive explanation of Harris's sentence, we cannot say that it erroneously exercised its discretion when it sentenced Harris to one year and six months of initial confinement followed by two years of extended supervision. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.