COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2571-CR **Cir. Ct. No. 00-CF-3013**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW TYLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and DANIEL L. KONKOL, Judges. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. Matthew Tyler entered a guilty plea and was convicted of second-degree sexual assault of a child. Tyler argues that the trial court erroneously denied his motion to withdraw his guilty plea. He contends his trial counsel provided ineffective assistance in connection with the entry of his

plea and that the trial court failed to conduct an adequate plea colloquy under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). We disagree with Tyler's arguments and affirm.

Background

¶2 Tyler was charged with one count of second-degree sexual assault of a child, pursuant to WIS. STAT. § 948.02(2) (1997-98).[1] The complaint alleged that Tyler fondled the genitals of a fifteen-year-old, at the boy's home, while Tyler was helping the boy with a computer problem. Prior to the date scheduled for trial and prior to Tyler's plea, the prosecutor sought a ruling admitting several prior instances of sexual conduct with boys for the purpose of showing that, when Tyler touched the present victim's genitals, Tyler did so for the purpose of sexual gratification. The trial court granted the prosecutor's motion to admit other acts evidence with respect to several of the prior incidents.

¶3 The other acts evidence ruled admissible involved numerous incidents, dating back to 1979, in which Tyler had sexual contact or sexual conversations with twelve adolescent boys and young men. Nine of these victims were from ten to seventeen years old, and the conduct relating to these boys, for the most part, involved Tyler fondling their genitalia, both over and under their clothing. Some incidents involved no touching, but did involve Tyler asking the boys questions of a sexual nature. We will not detail all of the incidents here because their admissibility is not at issue. However, a few examples will give context to the discussion that follows.

[1] All further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 Incidents involving two victims occurred in 1979 in Louisiana while Tyler was employed at a residential treatment facility. Two boys asserted, among other allegations, that Tyler masturbated them. Other boys at the treatment facility asserted that Tyler subjected them to strip searches and asked them about their sex lives.

¶5 Several other acts involved incidents occurring in 1987 and 1988 while Tyler was employed as a "preacher" in Missouri. These victims, ranging in age from ten to fourteen, alleged that Tyler fondled their genital area, both over and under their clothing. Most of these incidents occurred after Tyler had taken the boys places, such as out to eat pizza, roller-skating, or swimming.

¶6 One 1996 other acts incident, in which Tyler touched a seventeen-year-old boy's penis while Tyler was employed by the University of Wisconsin-Milwaukee, resulted in a Wisconsin conviction for fourth-degree sexual assault.

¶7 On the day of his final pretrial conference, Tyler's trial counsel, Calvin Malone, persuaded Tyler that certain damaging other acts evidence would be admitted at trial, and that Tyler should enter into a plea agreement with the prosecutor rather than proceed to trial. Tyler was offered a plea agreement. In exchange for a guilty plea to the charged crime, the prosecutor would recommend four to five years of initial confinement. Tyler accepted the offer and entered a plea under this agreement. Prior to the pretrial conference day, Tyler had hired Attorney Martin Kohler to explore challenging the trial court's other acts ruling by means of an interlocutory appeal, but when Tyler entered his guilty plea, the idea of pursuing an interlocutory appeal was apparently dropped.

Discussion

Ineffective Assistance of Counsel

¶8 Tyler asserts that the trial court erred by denying his motion to withdraw his guilty plea based on Tyler's claim of ineffective assistance of counsel. Decisions on plea withdrawal are discretionary and will not be overturned unless the trial court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is filed after sentencing will be granted only if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). In such a case, the defendant has the burden of proving by clear and convincing evidence that a manifest injustice exists. ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

¶9 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). In order to prove ineffective assistance, Tyler must prove both that his counsel's conduct was deficient and that counsel's errors were prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id***. at 697.

¶10 To prove prejudice, Tyler must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985) (footnote omitted). A prejudice claim presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. The trial court's factual findings will not be disturbed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634,

369 N.W.2d 711 (1985). Whether counsel's performance was deficient and prejudicial, however, are questions of law that we review independently. ***Id***.

¶11 Tyler asserts on appeal that he was denied the effective assistance of counsel prior to entering his plea. Tyler contends his counsel performed deficiently when counsel failed to discuss with Tyler the possibility of proposing a ***Wallerman*** stipulation. When a ***Wallerman*** stipulation is used at trials, defendants deny engaging in charged conduct, but admit that if they engaged in the charged conduct they did so with the mental state required for commission of the crime. Taking the charges in this case as an example, at a trial on the charge of second-degree sexual assault of a child, the jury would be instructed that Tyler denies he touched the boy's genitals, but admits that if he did touch the boy's genitals it was for the purpose of sexual gratification. If a stipulation of this type were to be accepted by the court and the prosecutor for purposes of a trial, the trial judge would exclude other acts evidence offered to show that, when Tyler touched the boy's genitals, he did so for the purpose of sexual gratification.

¶12 Tyler asserts that his trial counsel was aware of the decision in ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), but neglected to inform Tyler that he might be able to stipulate away highly damaging other acts evidence. Tyler states this failure constituted deficient performance. Further, Tyler asserts the alleged deficient performance caused prejudice because, had Tyler known of the possibility of a ***Wallerman*** stipulation, he would have insisted on going to trial, rather than enter a plea. The State responds that the logical extension of the supreme court's decision in ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447, defeats Tyler's ineffective-assistance-of-counsel claim. We agree with the State.

¶13 In ***Veach***, the supreme court addressed whether Veach's counsel provided ineffective assistance when counsel failed to inform Veach of the possibility of a ***Wallerman*** stipulation and failed to offer such a stipulation at Veach's sexual assault trial. ***Veach***, 255 Wis. 2d 390, ¶¶4-5, ¶107. Similar to Tyler's claim, Veach asserted that had his counsel informed him of the ***Wallerman*** stipulation, he would have agreed to enter into such a stipulation. ***Veach***, 255 Wis. 2d 390, ¶110.

¶14 Tyler's ineffective assistance claim fails for the same reason Veach's similar claim failed. Although both Tyler and Veach might have been willing to enter into a ***Wallerman*** stipulation, there is no reason to think that the prosecution or the trial court would have agreed to such a stipulation. Both Tyler and Veach wrongly assume that both the prosecutor and the trial court would have been required to accept a ***Wallerman*** stipulation. *See* ***Veach***, 255 Wis. 2d 390, ¶¶119-23. The prosecution in Tyler's case was entitled to prove its case "'by evidence of its own choice [and] a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.'" ***Id.***, ¶125 (quoting ***Old Chief v. United States***, 519 U.S. 172, 186-87 (1997)). Indeed, "a ***Wallerman*** stipulation in a child sexual assault case is directly contrary to the greater latitude rule for the admission of other acts evidence in child sexual assault cases. The purpose of a ***Wallerman*** stipulation in [cases involving alleged child sexual assault] is to *preclude* the admission of other acts evidence. The purpose of the greater latitude rule in cases involving allegations of child sexual assault is to '*permit a more liberal admission* of other crimes evidence.'" ***Veach***, 255 Wis. 2d 390, ¶122 (citations omitted).

¶15 Accordingly, we agree with the State that Tyler has not and cannot demonstrate prejudice. Since the prosecution was under no obligation to accept a

Wallerman stipulation, it is pure speculation that, but for counsel's failure to raise the topic, Tyler would not have entered into the plea agreement offered. Further, if prejudice is not demonstrated by the failure of a defense attorney to discuss with a defendant, or offer to the prosecution and the trial court, a ***Wallerman*** stipulation when a defendant goes to trial, it follows that prejudice is not shown when counsel fails to discuss a ***Wallerman*** stipulation prior to entry of a plea.

¶16 Tyler points out that the supreme court's ***Veach*** decision had not been issued at the time he entered his plea. He contends that we should not assess his ineffective assistance claim under ***Veach***, but rather under the controlling law at the time, ***State v. DeKeyser***, 221 Wis. 2d 435, 585 N.W.2d 668 (Ct. App. 1998). In ***DeKeyser***, we concluded that an attorney's failure to know about and seek a ***Wallerman*** stipulation was deficient performance and prejudiced the outcome of the trial. ***DeKeyser***, 221 Wis. 2d at 443.

¶17 Tyler fails to understand that he is in no better position than Veach himself. At the time Veach's counsel failed to tell Veach about ***Wallerman*** and failed to pursue a ***Wallerman*** stipulation, ***DeKeyser*** was also the "law." Tyler does not explain why he should benefit from ***DeKeyser*** when Veach was denied that benefit.

¶18 Furthermore, Tyler is like the defendant in ***Lockhart v. Fretwell***, 506 U.S. 364 (1993), who asked that his ineffective assistance claim be decided under "the laws existing at the time of [his] trial" and not subsequent correction of that law. *See* ***id.*** at 371. Thus, like the defendant in ***Fretwell***, Tyler seeks the windfall of an incorrect interpretation of law accepted at a prior time, rather than the application of correct law. Such an approach to ineffective assistance claims was rejected in ***Fretwell***, and we reject it here.

Compliance with ***Bangert***

¶19 Tyler next contends that the trial court did not comply with ***Bangert***, 131 Wis. 2d 246, because it did not ascertain whether Tyler understood the nature of the charge against him. He asserts the trial court erred when it ruled that he failed to make a prima facie showing under ***Bangert***. We disagree.

¶20 Under ***Bangert***, defendants must make a prima facie showing that their guilty or no contest pleas were accepted without compliance with WIS. STAT. § 971.08 or another court-mandated duty. ***Bangert***, 131 Wis. 2d at 274. A prima facie showing must also include a defendant's assertion that he or she did not know or understand the information at issue. ***Id.*** Whether a defendant has established a prima facie case presents a question of law that we review without deference to the trial court's determination. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). If a defendant makes this initial showing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. ***Bangert***, 131 Wis. 2d at 274-75.

¶21 Tyler argues that the trial court engaged in an inadequate plea colloquy under ***Bangert*** because the court asked only whether Tyler had read the complaint or had it read to him and whether he understood the charge of second-degree sexual assault of a child. Tyler asserts the record does not show when the criminal complaint was reviewed and, in any event, the complaint does not list the elements of the offense. Tyler acknowledges that the plea questionnaire indicates he reviewed "Wisconsin JI 2104," but notes that the jury instruction is not a part of the record and the trial court "did not individually go over the elements" with Tyler. Tyler argues that the State's reliance on the plea questionnaire misses the mark because the trial court never inquired whether Tyler read the plea

questionnaire, and the plea questionnaire does not list the elements of the offense. Tyler also contends that he did not in fact understand the elements of the charge against him.

¶22 We conclude that Tyler failed to make a prima facie showing because the plea hearing transcript and related documents show that the trial court sufficiently inquired into Tyler's understanding of the nature of the charge against him.

¶23 The record shows that the trial court complied with its obligation under ***Bangert***. The court informed Tyler that the prosecutor would have to prove every element of the offense and asked if Tyler understood that. Tyler said yes. The trial court asked Tyler if he had gone over the elements of the offense with his lawyer. Tyler said yes. The court asked if Tyler understood the elements. Tyler said yes. The court made reference to the "Guilty Plea Questionnaire and Waiver of Rights Form that you've signed." The record contains a signed plea questionnaire. It indicates that Tyler reviewed WIS JI—CRIMINAL 2104. That jury instruction, with its cross-references to other related instructions, details all the elements of the charged crime.

¶24 Although WIS. STAT. § 971.08(1)(a) directs courts to "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge," neither ***Bangert*** nor § 971.08 says that a court must *personally* inform a defendant of the nature of the charges or that the court must ask detailed questions regarding the defendant's understanding. ***Bangert***, 131 Wis. 2d at 267-69. To the contrary, ***Bangert*** and subsequent cases explain that the method of complying with the requirement to address defendants personally and determine that their pleas are voluntary and knowing varies from

case to case, and may include reliance on documents or portions of the record predating the plea hearing. *See* ***id.***; ***State v. Moederndorfer***, 141 Wis. 2d 823, 826-27, 416 N.W.2d 627 (Ct. App. 1987). In general, a circuit court may ascertain a defendant's knowledge through a combination of questions and reference to the record or to a prior communication. *See* ***Bangert***, 131 Wis. 2d at 267-68; *see also* ***State v. Brandt***, 226 Wis. 2d 610, 619-20, 594 N.W.2d 759 (1999); ***Hansen***, 168 Wis. 2d at 754; ***Moederndorfer***, 141 Wis. 2d at 827-28.

¶25 Similarly, the court was not required to ask Tyler if he had read the plea questionnaire before relying on that questionnaire to ascertain Tyler's understanding of the nature of the charge. The context of the hearing, including the court's reference to the plea questionnaire during the plea colloquy, and the signed plea questionnaire itself, make it apparent that the trial court reasonably assumed that Tyler had reviewed and signed the questionnaire. The court was not required to specifically ask Tyler if he had reviewed and signed it when that fact was so apparent. In any event, the court's questions, apart from reliance on the questionnaire, established that Tyler's attorney had explained the elements of the offense and that Tyler understood them.

¶26 As ***Bangert*** and subsequent cases make clear, there is no fixed manner of complying with the requirement that a court ascertain a defendant's understanding of the nature of the charges against him or her. In this case, the trial court was faced with a highly educated (among other advanced degrees, Tyler has a Ph.D.), forty-five-year-old man with criminal justice experience (Tyler was convicted in Wisconsin in 1996 for fourth-degree sexual assault). *See* ***Bangert***, 131 Wis. 2d at 267-68 (the method employed by the circuit court when taking a plea "depends on the circumstances of the particular case, including the level of

education of the defendant and the complexity of the charge"); *see also* ***State v. McKee***, 212 Wis. 2d 488, 494-95, 569 N.W.2d 93 (Ct. App. 1997).

¶27 Accordingly, we conclude that the trial court's plea colloquy regarding the nature of the charge was sufficient and that the trial court correctly held that Tyler had failed to present a prima facie case under ***Bangert***.[2]

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[2] Tyler raises but does not sufficiently develop two related arguments. First, Tyler contends his plea was involuntary because he was confused, pressured, and distressed when he pled guilty. Our review of the record reveals that this argument is inextricable from Tyler's claim that his attorney failed to explain the option of a ***Wallerman*** stipulation and, instead, pressured Tyler by repeatedly telling him he faced a trial with highly damaging other acts evidence and that he should plead guilty. As the trial court found, Tyler contended that, if he had known of the option of offering a ***Wallerman*** stipulation, he would have chosen to go to trial, rather than plead guilty. We conclude that Tyler's argument that his plea was involuntary because he was confused, pressured, and distressed has no stand-alone merit from his claim that his trial counsel pressured him by painting a bleak picture of the expected trial involving damaging other acts evidence rather than informing him of the possibility of a ***Wallerman*** stipulation. More to the point, Tyler did not below, and does not on appeal, sufficiently develop a separate argument.

Tyler's assertion that he did not understand the plea agreement recommendation because he believed the agreement "did not require a recommendation of incarceration for any specific number of years" is also undeveloped. Moreover, we observe that in Tyler's presence at the plea hearing the prosecutor informed the court that pursuant to the plea agreement he was going to recommend "four to five years" of initial confinement. This statement was immediately followed by the court addressing Tyler personally and informing Tyler that it was not bound by such a plea agreement. Tyler responded that he understood.