

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 02-2929-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CF-438

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW L. ABAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Matthew Abad appeals a judgment convicting him of second-degree sexual assault and an order denying his motion to withdraw his no contest plea. He argues that the trial court erroneously exercised its discretion when it denied his presentence motion to withdraw the plea. That motion alleged that the decision to plead no contest was based on an evidentiary error at Abad's

aborted trial. He also argues that the court should have granted his postconviction motion to withdraw the plea in which Abad alleged ineffective assistance of counsel based on his trial attorney's failure to advise him that a no contest plea waives his right to appeal the evidentiary ruling. We reject these arguments and affirm the judgment and order.

¶2 Abad changed his plea from not guilty to no contest after his trial commenced. The victim testified that Abad, a guest in her home, invited her outside, pinned her against his car and forcibly assaulted her. When he attempted to open a car door to force her inside, she escaped and ran back into the house. Two other guests testified that she came into the house very upset. Abad entered a short time later and went directly to the bathroom. After he left the bathroom, following a brief conversation, he left the house. At that time, the victim informed her guests about the sexual assault and they called the police. Abad's decision to change his plea occurred after the victim and both of her other guests testified, but before the prosecutor called police officers. The officers would have testified that Abad told them no physical contact took place except for the victim "coming on to him," and that after he went back inside the residence, he masturbated in her bathroom sink before leaving because he enjoyed masturbating in random areas.

¶3 During defense counsel's cross-examination of the victim, counsel asked whether she had ever been convicted of a crime. After scolding counsel for failing to present the issue by pretrial motion as required by WIS. STAT. § 906.09(3), the court nonetheless ruled on the merits, disallowing the question because the convictions occurred after the sexual assault was initially reported. The State correctly concedes that the trial court's ruling was erroneous. Conviction of a crime is a factor in determining the credibility of a witness at trial regardless of whether the conviction occurred after the witness's initial report.

Although direct review of the evidentiary error was waived by the no contest plea, Abad alleged in his presentence motion to withdraw his plea that the plea decision was based on the trial court's erroneous ruling, and we review the trial court's denial of that motion.

¶4 A defendant seeking to withdraw a plea before sentencing must show a fair and just reason, such as a genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea, or coercion. *See State v. Shanks*, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989). Although the trial court is to apply this test liberally, a defendant is not automatically entitled to withdraw his plea. *Id.* A fair and just reason is some adequate reason other than merely the desire to have a trial. *See State v. Garcia*, 192 Wis. 2d 845, 861, 532 N.W.2d 111 (1995). The trial court's findings of historical or evidentiary facts will not be upset unless they are clearly erroneous. *See State v. Bollig*, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. If the trial court does not believe the defendant's asserted reasons for withdrawing the plea, there is no fair and just reason to justify relief. *See State v. Canedy*, 161 Wis. 2d 565, 585, 469 N.W.2d 163 (1991). We will uphold the trial court's decision unless we determine it erroneously exercised its discretion. When, as here,¹ the trial court's reasoning is inadequate, this court independently reviews the record to determine whether the trial court's decision can be sustained when the facts are applied to applicable law. *Shanks*, 152 Wis. 2d at 289.

¹ The trial court denied the initial motion to withdraw the plea because it concluded that its evidentiary ruling was correct. However, findings made at the hearing on the postconviction motion relate to the earlier motion as well.

¶5 The record supports the trial court's finding that Abad's decision to change his plea did not result from the trial court's limitation on the victim's cross-examination. While the trial court's ruling occurred before Abad's decision to change his plea, it does not necessarily mean that the evidentiary ruling was a substantial factor in his plea decision. The plea change did not occur until two additional witnesses testified, and just before police officers would have presented damaging and embarrassing testimony about Abad masturbating in the victim's bathroom sink. The trial was going badly for Abad regardless of the limitation imposed on cross-examining the victim. Abad did not identify any reason for the victim to falsely accuse him, and the other witnesses' testimony strongly corroborates the victim's accusations. Abad's attorney predicted that Abad would be sentenced to prison if he did not accept the prosecutor's offer to plead no contest in exchange for a probation recommendation. Under these circumstances, the trial court reasonably found that Abad changed his plea because the State presented overwhelming evidence of his guilt and a prison sentence was likely. The limitation on the victim's cross-examination did not precipitate the plea change.

¶6 To prevail on his post-sentencing motion to withdraw the plea, Abad must establish a manifest injustice. *See State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The trial court did not believe Abad's contention that his trial counsel erroneously advised him that he could appeal the evidentiary ruling despite his no contest plea. Abad's trial counsel testified that no discussions took place regarding the appealability of the court's evidentiary ruling and the trial court believed counsel's testimony. At the plea hearing, Abad indicated that no promises had been made other than the plea agreement recited in the record. The trial court's finding that Abad's postconviction testimony was not credible

removes the factual underpinning for his argument that he believed he could appeal despite the plea.

¶7 Abad argues that his attorney should have informed him that a no contest plea would waive his right to appeal the evidentiary ruling. Abad was informed that he would give up his right to cross-examine witnesses by entering a no contest plea, but alleges that he nonetheless believed he could appeal an evidentiary ruling that limited the scope of cross-examination. Loss of appeal rights is not listed among the factors that must be explained before a no contest plea can be validly entered. *See State v. Bangert*, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986). To effectively represent his client at a plea hearing, counsel need not inform a defendant of every collateral consequence of his plea or to correct his client's unspoken erroneous preconceptions. Abad's trial counsel's failure to anticipate and correct Abad's mistaken beliefs about his appeal rights does not fall below the prevailing norms of practicing attorneys. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984).

By the Court.—Judgment and order affirmed.

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

