

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2011AP144-CR

Cir. Ct. No. 2007CF1278

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLARENCE G. PRICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Racine County: Faye M. Flancher, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Clarence Price appeals from a judgment of conviction of substantial battery and from an order denying his postconviction motion to withdraw his no-contest plea. On appeal he argues that his trial counsel was ineffective for not subpoenaing a certain witness for trial and in failing to

timely object to the admission of other acts evidence. The trial court determined that by his entry of his plea halfway through the trial, Price forfeited a claim of alleged evidentiary error and that Price was not prejudiced by the alleged ineffective assistance of trial counsel. We conclude that Price is not entitled to withdraw his plea because Price did not establish that but for counsel's allegedly deficient conduct he would have not entered his plea and would have proceeded to a jury verdict and therefore, he was not prejudiced by the alleged deficient conduct. We affirm the judgment and order.

¶2 Price was charged with substantial battery with intent to cause bodily harm as a habitual offender. The victim was his girlfriend at the time. She testified that she and Price were babysitting a two-month-old infant at the home of a friend when a verbal fight started between them. She exited the home but Price followed her and demanded she return. As she was going up the stairs to the porch of the home, Price attacked her with something causing a long, large scratch on her back. Inside the home Price slapped her and then hit her in the face with a glass or jar which caused a cut requiring stitches. The responding police officers indicated that from inside the home they heard a male voice yelling and a female voice sobbing and screaming. When Price realized the police were at the front door, he went to the back door of the house. Price looked out an exit door but quickly shut it when he saw a police officer in the vicinity. Price exited the home through a bathroom window but was captured by a police officer in the backyard.

¶3 At the start of Price's jury trial, his trial counsel brought to the court's attention that Price had requested counsel to do some investigation regarding other acts by the victim that might be potential character evidence. Counsel indicated that he had performed that investigation and concluded there was no relevant evidence to be put forth by the investigated witnesses. Counsel

noted that Price appeared to disagree with counsel's conclusion in that regard. After a short break to permit Price to dress for voir dire, Price's counsel informed the court that Price believed he could not go to trial without the witnesses that were the subject of counsel's investigation. Counsel explained, as an offer of proof, that about three months prior to the charged crime, the victim had a "blowout" with Price and acted aggressively towards him by jumping on top of his vehicle, pounding on the vehicle, and causing a scene in a public area. Although a certain witness could recount the event, the witness was a prison inmate and had told counsel she did not want to testify at Price's trial. The trial court denied Price's request for adjournment noting that counsel had in due diligence investigated the potential witness, that there was no guarantee after an adjournment that the witness would be willing to testify, and that the request for an adjournment was untimely in light of the amount of time that counsel had represented Price and the prosecution's expense in bringing the victim for trial. The trial continued with jury selection.

¶4 On the next day of the trial and before any witness was called, Price's counsel suggested that he had failed to follow up on some additional information Price had given him several months earlier that the victim had given a statement to Price's probation agent about the blowout which had occurred three months before the charged crimes. Counsel believed the victim's statement to the probation agent was relevant evidence as it would show that the victim gave a false statement with regard to her own erratic behavior. It was submitted that this evidence bore on the victim's motive and intent to have "Price basically pay the price for his behavior." Counsel faulted himself for not following up on that aspect of the prior blowout and stated, "I do believe that if this case were to proceed and it were to result in a conviction, the Court of Appeals would find my

representation ineffective....” Counsel asked for an adjournment so he could attempt to get Price’s probation file.¹

¶5 The trial court observed that more than a year prior to trial the defense had asked for an adjournment to investigate the victim’s potential mental or behavioral issues. When the court asked Price to explain how a motive for lying would explain the victim’s battered and bloody face, counsel explained that the theory of defense was that the victim hit herself. The court denied the motion for an adjournment concluding that “whether or not she made an untruthful statement to the probation agent three months prior to this incident really would have no bearing on this.”

¶6 During cross-examination of the victim, Price asked her whether in the months leading up to the charged crime she had become aware that Price had been with another woman and that she had a strong reaction to seeing Price with the other woman. The victim denied any knowledge of the incident alluded to on cross-examination. During the victim’s redirect examination, the prosecutor asked whether during the on-again-off-again relationship with Price the victim had ever called the police. The victim confirmed that there had been a history of abuse in the relationship. A sidebar was then requested by Price’s counsel during which the prosecutor was asked to repeat the questions about the nature of the relationship and history of abuse because Price’s counsel had not heard them as he was doing something else. When the questions were repeated, an objection was made on the ground of improper other acts evidence. The objection was overruled

¹ Based on trial counsel’s near confession of ineffectiveness and to avoid the possibility of a second trial, the prosecutor did not object to the motion for adjournment.

because the questions had already been “asked and answered.” Later Price made a motion for mistrial based on the improper admission of other acts evidence during the victim’s redirect examination. The trial court noted that Price had not raised an objection during the sidebar and the court had ruled.

¶7 Three police officers testified after the victim and the prosecution’s case was concluded. After lunch, Price’s counsel reported to the court that the victim’s statement to a probation agent was a vague allegation against Price and did not provide “a basis for any kind of rebuttal testimony or really any reason to explore the accusations or any motive or other acts issue arising from that.” After an additional short break to allow Price an opportunity to consider a plea offer, Price indicated that he wanted to change his plea and accept the offer which would drop the habitual offender penalty enhancer. Price entered a no-contest plea. In his colloquy with the court, Price acknowledged that no one threatened or forced him to enter that plea, that the plea agreement reduced his exposure from nine and one-half years in prison to three and one-half years, that he was giving up his right to present a defense in the case, and that he was giving up the right to have witnesses subpoenaed on his behalf. He also twice confirmed that he was satisfied with the representation of his trial counsel. When Price’s counsel was asked whether counsel was satisfied that Price was freely, knowingly and voluntarily waiving his right to complete the trial, counsel made a record that Price expressed some hesitancy when the court asked him if he was satisfied with counsel’s representation. Counsel indicated that the hesitancy was related to the witnesses that would not be called.

¶8 Postconviction Price moved to withdraw his no-contest plea on the ground of ineffective assistance of trial counsel. At the postconviction motion hearing, the witness who had seen the blowout three months before the crime

testified. She confirmed she had observed the victim on the hood of Price's truck and that the victim would not get off the truck even though Price was trying to get away from her. The witness also confirmed that she had told Price's attorney that she did not want to testify at the trial. Price's trial counsel testified that Price had told him how the victim had acted erratically in the incident three months before the charged crime and that she had made a false report to his probation agent that Price had battered her that day. Counsel indicated he had not subpoenaed the supporting witness because the defense had not moved to offer other acts evidence. Counsel had no reason for not filing an other acts motion. Counsel explained Price had indicated to counsel that he could not prove his case without the witnesses about the blowout months earlier. Counsel confirmed that Price was told prior to trial that the witness to the blowout did not want to testify at trial and that the other witness to that event could not provide helpful information. Counsel also indicated that there had been discussions with Price throughout the trial about resolving the case. Price did not testify at the postconviction hearing. The trial court denied Price's motion to withdraw his plea.

¶19 On appeal Price argues that his trial counsel was ineffective in not producing the witness of the victim's prior blowout with Price and for not objecting to the prosecution's inquiry into the history of abuse in the relationship between Price and the victim. After sentencing, a guilty plea will not be overturned unless there is a finding of a manifest injustice. *State v. Booth*, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App.1987). Although a guilty plea waives constitutional trial rights,² it does not waive the Sixth Amendment right to counsel.

² The trial court correctly concluded that a claim that other acts evidence was improperly admitted at trial was waived by Price's no-contest plea. The improper admission of evidence is trial error and rendered only the trial, not the plea, suspect.

State v. Kelty, 2006 WI 101, ¶43, 294 Wis. 2d 62, 716 N.W.2d 886. Thus, a defendant may seek to withdraw a guilty plea because he or she received ineffective assistance of counsel in deciding to enter the plea. *Id.* See also *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (the manifest injustice test is met if the defendant was denied the effective assistance of counsel).

¶10 To establish ineffective assistance of counsel a defendant must show both deficient performance and prejudice. *Id.* at 312. To satisfy the prejudice prong when a defendant argues that counsel’s ineffectiveness led to entry of an invalid plea, the defendant must show “that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). More than a self-serving conclusory allegation that the defendant would have proceeded to trial is required; objective factual assertions or special circumstances demonstrating the defendant’s particular emphasis on the alleged deficient performance are necessary. See *id.* at 313-14. In determining whether there is a reasonable probability that, but for counsel’s deficient performance with respect to evidence presented or missing at trial, Price would have refused to plead and insist on continuing to a jury verdict, we may look to:

- (1) the relative strength and weakness of the State’s case and the defendant’s case;
- (2) the persuasiveness of the evidence in dispute;
- (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.

State v. Semrau, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376.

¶11 Nowhere in his postconviction motion did Price allege that he would have chosen to proceed to a jury verdict but for trial counsel’s failure to produce

the witness or make a timely objection to other acts evidence. Price did not testify at the postconviction hearing and provided no direct evidence on the issue of whether he would have pled no contest absent counsel's alleged deficient conduct. *Cf. State v. Ernst*, 2005 WI 107, ¶35, 283 Wis. 2d 300, 699 N.W.2d 92. *See also State v. Holz*, 2008AP1297-CR, unpublished slip op. ¶17 (WI App Aug. 11, 2009).³

¶12 As proof of prejudice, Price relies on his hesitancy during the plea colloquy in confirming that he was satisfied with counsel's conduct and trial counsel's testimony that Price felt he could not proceed without the missing witnesses. However, the record permits a reasonable inference that other factors caused Price to enter his no-contest plea. Price proceeded to trial knowing that the witness to the blowout was not willing to testify. He proceeded to jury selection after trial counsel made it known that the witness would not be produced. At that point Price indicated that he could not go to trial without certain witnesses, and yet he did. Price allowed the trial to continue after an adjournment was denied which the defense requested to obtain Price's probation file and pursue possible evidence of a false statement by the victim regarding the blowout. Price also allowed the trial to continue after hearing what he considered highly prejudicial other acts evidence during the victim's testimony and the denial of his motion for a mistrial. Price proceeded having heard the prosecutor's aversion to the possibility of having to try the matter twice. Price observed the strength of the prosecution's case and

³ We cite to *State v. Holz*, 2008AP1297-CR, unpublished slip op. (WI App Aug. 11, 2009), for persuasive value under WIS. STAT. RULE 809.23(3)(b) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

procured a favorable plea offer from the prosecutor. Then he decided to enter a no-contest plea.

¶13 The overwhelming evidence of Price's guilt, including the scratch to the victim's back that was not likely self-inflicted and Price's attempt to flee evidencing a consciousness of guilt, undermines his implied assertion that he would not have pled no-contest absent counsel's alleged deficient conduct. *See Holz*, unpublished slip op. ¶16. As the trial court concluded, evidence regarding the victim's erratic behavior towards Price months before the crime would not have explained the injury to the victim's back or Price's consciousness of guilt. In short, Price failed to establish that after observing the presentation of the prosecution's case to the jury and its strength that he would have done anything other than accept the favorable plea offer reducing his prison time exposure. *See id.*, ¶20.

¶14 Having failed to establish that he would have proceeded to a jury verdict but for counsel's allegedly deficient conduct, Price was not prejudiced by that conduct. No manifest injustice supporting plea withdrawal was established.

By the Court.—Judgment and order affirmed.

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