

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 24, 2007

David R. Schanker
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 Nos. 2006AP1223-CR
2006AP1224-CR**

**Cir. Ct. Nos. 2004CF4535
2004CF5893**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICKOLAS JAMES LAUMANN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Nickolas James Laumann pled guilty to a total of four related counts, including one count of second-degree sexual assault of a child (repeated acts), one count of intimidation of a victim, one count of threats to injure

and one count of bail jumping. *See* WIS. STAT. §§ 948.025(1)(b), 940.45(4), 940.46, 943.30(1), 946.49(1)(b) (2003-04).¹ He appeals from judgments of conviction and a postconviction order² denying his motion to withdraw those pleas. In the court below, Laumann claimed that the trial court misinformed him as to the maximum amount of initial confinement and extended supervision he faced upon conviction of the sexual assault, resulting in a manifest injustice as to all four convictions. On appeal, the issues are whether the trial court erred in denying Laumann’s motion without a hearing and, if so, the appropriate remedy. We affirm the trial court’s denial of a hearing and do not reach the second question.

¶2 During the plea colloquy, the trial court correctly informed Laumann of the maximum penalty that he faced on each charge, including a forty-year maximum term of imprisonment for sexual assault. The trial court then stated: “[t]hat can be twenty years of confinement, twenty years of extended supervision.” In fact, the sexual assault conviction carried a twenty-five year maximum term of initial confinement and a fifteen-year maximum term of extended supervision. The trial court ultimately imposed a twenty-year term of imprisonment for the

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Laumann’s pleas were entered in two trial court cases that proceeded in tandem and we granted Laumann’s motion to consolidate his appeals on August 25, 2006.

sexual assault, bifurcated into ten years of initial confinement and ten years of extended supervision.³

¶3 Laumann moved for postconviction relief, arguing that none of the four pleas was knowingly, intelligently and voluntarily entered in light of the misinformation as to his exposure for the sexual assault. In support, he submitted his attorneys' affidavits that at the time of the plea he lacked knowledge and understanding of his exposure to initial confinement and extended supervision.

¶4 After sentencing, a defendant must establish by clear and convincing evidence that failure to allow plea withdrawal would result in a manifest injustice. *State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. A plea which is not knowingly, voluntarily or intelligently entered is a manifest injustice. *Id.*

¶5 The standard and procedure for determining whether a plea is knowing, intelligent and voluntary are laid out in WIS. STAT. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). See *Trochinski*, 253 Wis. 2d 38, ¶17. A defendant is entitled to an evidentiary hearing to withdraw a guilty plea upon: (1) “a *prima facie* showing of a violation of WIS. STAT. § 971.08(1) or other court-mandated duties that points to passages or gaps in the plea hearing transcript”; and (2) an allegation “that the defendant did not know or understand the information that should have been provided at the plea hearing.”

³ Several additional counts were dismissed. With regard to the remaining charges, the court sentenced Laumann to five years of initial confinement and five years of extended supervision for intimidation of a victim; three years of confinement and three years of extended supervision for threats to injure; and three years of confinement and three years of extended supervision for bail jumping. Laumann was also sentenced for an unrelated theft charge that is not at issue in this case.

State v. Brown, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906 (citing *Bangert*, 131 Wis. 2d at 274). Whether Laumann has pointed to deficiencies in the plea colloquy that establish a *prima facie* violation of statutory or other duties is a question of law that we review *de novo*. See *Brown*, 293 Wis. 2d 594, ¶21.

¶6 Laumann’s postconviction motion does not establish a *prima facie* violation of statutory or other duties. The trial court correctly advised Laumann of the maximum term of imprisonment, statutorily defined in WIS. STAT. § 973.01 as the combined total of initial confinement and extended supervision. See *State v. Sutton*, 2006 WI App 118, ¶¶13-15, 294 Wis. 2d 330, 718 N.W.2d 146. This disclosure satisfied the trial court’s obligation to make Laumann aware of the potential punishment he faced on conviction. See *id.*, ¶¶7, 15. Thus, Laumann has not met the first *Bangert* requirement.

¶7 Since Laumann has not satisfied the first prong of *Bangert*, his evidence in support of the second is insufficient to secure a hearing. The trial court was not required to dissect for Laumann the specific components of the potential punishment. See *Sutton*, 294 Wis. 2d 330, ¶¶10-15. Laumann’s allegation that he lacked knowledge of those components therefore does not constitute ignorance of “information which should have been provided at the plea hearing.” See *Bangert*, 131 Wis. 2d at 274.

¶8 While the trial court erred here, it erred as to a matter it had no duty to address. We therefore consider whether the error was harmless: “if a defendant [understands] the charge and the effects of his plea, he should not be permitted to game the system by taking advantage of judicial mistakes.” *Brown*, 293 Wis. 2d 594, ¶37.

¶9 Pursuant to WIS. STAT. § 805.18(2), no judgment shall be set aside unless the error has affected the complaining party's substantial rights. For an error to affect substantial rights, there must be a reasonable possibility that it contributed to the outcome. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A "reasonable possibility" of a different outcome is one sufficient to undermine confidence in the outcome. *Id.* at 544-45. If the error does not undermine confidence in the outcome, the error is harmless. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768.

¶10 The burden of proving harmlessness is on the State as the beneficiary of the error. See *State v. Everett*, 231 Wis. 2d 616, 631, 605 N.W.2d 633 (Ct. App. 1999). The State has met its burden here. Laumann understood the effect of his plea: he knew that he faced a forty-year maximum term of imprisonment, which is all that *Bangert* requires he know as to range of punishment. See *Sutton*, 294 Wis. 2d 330, ¶24. The judicial mistake consisted of minor under- and over-statements regarding Laumann's exposure to initial confinement and extended supervision. This judicial mistake does not undermine confidence in the outcome, however. As to both initial confinement and extended supervision, the trial court imposed shorter terms than those mentioned to Laumann during the plea and shorter than were authorized by statute. Under the circumstances here, Laumann was not prejudiced by the court's mistake. See *United States v. Lewis*, 875 F.2d 444 (5th Cir. 1989) (defendant not prejudiced by an understatement of the maximum parole term where sentence was modified to comport with the misinformation); see also *Allen v. United States*, 634 F.2d 316, 317 (5th Cir. 1981) ("It is inherently incredible that a person would voluntarily submit himself to a possible thirty-five year sentence but would take his chances on getting an acquittal if he faced only [a] twenty-five year sentence.").

¶11 Finally, we reject Laumann’s contention that this matter is governed by those cases holding pleas involuntary where defendants were misinformed about collateral matters of consequence to their plea bargains. *Compare, e.g., State v. Brown*, 2004 WI App 179, ¶13, 276 Wis. 2d 559, 687 N.W.2d 543 (pleas not voluntary where defendant was wrongly informed that negotiated charges would not require him to register as a sex offender or be subject to WIS. STAT. ch. 980 and this was the purpose of the bargain); *State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) (plea not voluntary where defendant was wrongly informed that he would be able to circumvent the guilty-plea waiver rule and this was a purpose of the bargain).

¶12 Laumann’s plea bargain included an agreement that the State was free to request a maximum consecutive sentence for sexual assault of a child. The specifics of the bifurcated sentence were not part of the negotiations. Laumann’s trial attorney submitted an affidavit stating that it was not his practice at the time of the plea to review the periods of initial confinement and extended supervision with his clients, that he did not recall doing so in this case, and that he had no reason to think that Laumann was aware of these specifics.⁴ Laumann pled nonetheless.

¶13 The circumstances here support the State’s position that Laumann shows no manifest injustice stemming from the court’s description of the bifurcation scheme; the information did not affect the outcome and the error was harmless. We therefore affirm the trial court’s denial of a hearing on Laumann’s motion and do not reach the question of remedy.

⁴ This case does not involve a claim of ineffective assistance of trial counsel.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2005-06).

