COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP103-CR **Cir. Ct. No. 2010CF88**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARIN E. HAIZEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Darin Haizel entered guilty pleas to two counts of recklessly endangering safety, both with a use-of-a-dangerous-weapon penalty enhancer. Postconviction, Haizel alleged that his plea lacked a sufficient factual

basis, that his counsel rendered ineffective assistance, that he should have been granted a ***Machner***[1] hearing, and that he was sentenced on inaccurate information. He appeals the order denying his motion. We reject his contentions and affirm.

¶2 According to the complaint and law enforcement reports, Haizel's girlfriend left their shared residence just before midnight with their two children. She feared for their safety because an intoxicated[2] and agitated Haizel had a loaded gun. The girlfriend flagged down a deputy and told him she was afraid that Haizel was suicidal. Eight Washington county sheriff's deputies responded.

¶3 Haizel grew more upset with their arrival. He fired a semiautomatic rifle dozens of times from inside the house to the outside, then crawled out a window. He encountered Deputy Dirk Stolz in the yard. Haizel ignored Stolz's order to drop the 45-caliber handgun he now brandished. Stolz and another deputy reported seeing Haizel fire directly at Stolz. Two other deputies in the vicinity reported hearing shots, distinctly different in nature. Two deputies shot at Haizel, injuring him. Detective Hope Demler, one of the officers who later investigated the scene, filed a report stating that, despite a thorough search, no shell casings from Haizel's handgun were located.

¶4 Based on the State's claim that Haizel fired at the deputies and shot at Stolz, the State charged Haizel with one count of attempted first-degree intentional homicide, three counts of recklessly endangering safety with the

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] Haizel's father told a deputy that Haizel had "a couple of beers" in the afternoon. The record suggests Haizel had more beer that evening and he admitted he also consumed a quart and a half of tequila.

dangerous-weapon penalty enhancer, and one count of intentionally pointing a firearm at an officer. Defense counsel moved unsuccessfully to dismiss the reckless endangerment charges on grounds of lack of specificity and multiplicity. Haizel pled guilty to two counts of reckless endangerment with a dangerous weapon; the third was dismissed outright. The attempted first-degree intentional homicide and intentionally pointing a firearm at an officer counts were dismissed and read in for sentencing. The court sentenced Haizel to sixteen years' initial confinement plus ten years' extended supervision.

¶5 Haizel filed a postconviction motion seeking plea withdrawal based on newly discovered evidence.[3] In support, Haizel submitted two reports from firearms consultant John Thorpe, who viewed Haizel's premises a year and a half after the incident. Thorpe found no 45-caliber casings in or around the area where Haizel's weapon had been recovered. Based on his review of the deputies' reports and his own search of the premises, Thorpe concluded that the lack of physical evidence left a reasonable doubt that Haizel had fired his gun while outside. Haizel argued that his attorneys were ineffective for failing to similarly investigate. Concluding that the Thorpe reports merely repackaged already-known information, the circuit court rejected Haizel's argument that the reports presented newly discovered evidence and denied Haizel's motion without a ***Machner*** hearing. This appeal followed.

[3] This was Haizel's second postconviction motion. The first sought to withdraw his guilty plea based on ineffective assistance of counsel. The court denied the motion without a hearing and also denied Haizel's motion for reconsideration. He filed an appeal but voluntarily dismissed it.

¶6 Haizel asserts on appeal that he is entitled to withdraw his pleas because no factual basis existed to support them and he was denied the effective assistance of counsel when his counsel failed to investigate or to object to the lack of a factual basis. He also contends he should be granted a ***Machner*** hearing and, if not allowed to withdraw his plea, he should get a new sentencing hearing because, as the read-in charges depend upon his having fired at Stolz, he was sentenced upon inaccurate information.[4]

¶7 To withdraw a plea after sentencing, a defendant must establish a manifest injustice necessitating withdrawal of the plea. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). The defendant bears the burden of showing a manifest injustice. ***Id.*** at 237. Whether to permit plea withdrawal is within the circuit court's discretion. ***Id.***

Factual Basis

¶8 Haizel entered guilty pleas to two counts of first-degree recklessly endangering safety, with a dangerous-weapon enhancer. The elements of the crime are endangering the safety of another human being by criminally reckless conduct with utter disregard for human life. WIS. STAT. § 941.30(1);[5] WIS JI—

[4] The State urges this court to adopt the circuit court's thorough, well-reasoned decision because Haizel's issues really are subsumed in the overarching issue of newly discovered evidence. The suggestion is tempting. Haizel technically did not raise newly discovered evidence as an appellate issue, however. We therefore will provide our own opinion.

[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

CRIMINAL 1345. The penalty enhancer of course requires proof of use of a dangerous weapon.

¶9 A circuit court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b). A plea has a factual basis "if an inculpatory inference can be drawn from the complaint … even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. We review a circuit court's determination of a sufficient factual basis under a clearly erroneous standard. ***State v. Payette***, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423.

¶10 Haizel asserts that his conduct did not constitute the crime to which he pled because the court failed to "pinpoint[] exactly" whose safety he endangered, there is no proof he endangered the safety of another human being because "[t]here is no telling whether there were multiple persons or even any people at all present," he does not recall shooting at Stolz, and no 45-caliber shell casings were found.

¶11 The circuit court extensively questioned Haizel at the plea colloquy:

> COURT: All right. And let me go back to asking you what your memory was of the events of [that night]. You did indicate you recall having this SKS rifle, right?
>
> DEFENDANT: Yes.
>
> COURT: And you recall discharging it?
>
> DEFENDANT: Yes.
>
> COURT: Okay. At least according to the complaint it happened many times. I didn't count them all. Mr. Boyle [defense counsel], what was your count?

MR. BOYLE: I count 33, Judge.

COURT: Okay, and I don't care whether it's exactly 33 or not, Mr. Haizel. That's not the point but you agree you discharged that SKS rifle a number of times?

DEFENDANT: Yes, Sir.

….

COURT: … Do you remember discharging that SKS rifle while the officers were present?

DEFENDANT: Yes.

….

COURT: Sure. Mr. Haizel, is that the case? That your memory of what happened inside the house is better than what happened outside the house?

DEFENDANT: Yes, it certainly is. I don't believe I did any shooting outside the house.

COURT: Okay. But you did the shooting with the rifle from inside the house?

DEFENDANT: Yes, Sir.

COURT: And again, we don't know for sure. I'm not saying it's important to know the exact number of times but do you know approximately how many times you shot the rifle?

DEFENDANT: I only recall shooting the rifle once or twice, but I certainly don't deny that I did more.

COURT: All right. You understand, if in fact it was only once, that wouldn't support the two charges of first degree reckless endangerment, using a dangerous weapon if you only used it once?

DEFENDANT: I've read through everything and looked at the pictures. I'm pretty comfortable admitting to two counts.

COURT: All right. And in admitting to two counts do you believe that you are guilty of at least—of those two counts?

DEFENDANT: Yes, Sir.

> COURT: And that you fired that rifle on more than one occasion from inside the house to outside the house, right?
>
> DEFENDANT: Yes, Sir.
>
> COURT: And do you admit to doing that at a point in time when you knew law enforcement officers were on the scene outside the house?
>
> DEFENDANT: Yes, Sir.
>
> COURT: And do you admit that, at least generally speaking and I'm not saying you fired it at the officers, that's not what I'm suggesting, but that you fired it in the general vicinity of where law enforcement officers were outside the house?
>
> DEFENDANT: Yes, Sir.
>
> COURT: All right. You did that on at least two occasions?
>
> DEFENDANT: Yes, Sir.

¶12 As the circuit court noted, "The only requirement for each of the two counts is that Haizel have recklessly endangered the safety of 'another human being' under circumstance[s] that show utter disregard for human life." Haizel's express admission that he fired more than once in the vicinity of more than one of the deputies defeats his later assertion that there may have been no people present when he shot. A particular victim need not be specifically identified. Even so, Stolz and another deputy reported seeing Haizel shoot at Stolz. The inability to locate a spent casing does not prove that Haizel did not fire at Stolz or other deputies, especially since, although not included in the Thorpe reports, four witnesses either saw and heard or heard Haizel fire at Stolz.

¶13 As the above colloquy excerpt shows, the court took care to determine if the facts would sustain the charge even though it would not have needed to go to those because of the negotiated plea. *See* ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). The court was satisfied, based on "all of

Mr. Haizel's comments and Mr. Boyle's comments, that Mr. Haizel has agreed with, that they're accurate[,]" that a sufficient factual basis supported Haizel's guilty pleas. That determination is not clearly erroneous. *See* ***id.***

Ineffective Assistance of Counsel

¶14 Haizel next contends that, had his attorneys investigated, they would have discovered the allegedly new evidence Thorpe reported and he would have taken his chances at trial. Haizel also contends that, had his attorneys objected to the lack of a more definite factual basis and renewed their earlier multiplicity objection, the court could not have convicted him.

¶15 To prevail on a claim of ineffective assistance of trial counsel, a defendant must establish both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To prove prejudice, he or she must show that counsel's errors were serious enough to render the proceeding unreliable. ***Id.*** The failure to prove one component eliminates our need to address the other. *See* ***id.*** at 697.

¶16 A defendant seeking a new trial on the basis of newly discovered evidence must establish by clear and convincing evidence that: (1) the evidence was discovered after the conviction, (2) he or she was not negligent in seeking to discover it, (3) the evidence is material to an issue, and (4) it is not merely cumulative. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. We review the circuit court's decision for an erroneous exercise of discretion. ***Id.***, 31.

¶17 The circuit court pronounced Haizel's claim "nonsense." When he pled, Haizel and his lawyers knew from Detective Demler's report that no spent shell casings had been found. Whether Haizel shot outside the house at Stolz related to the dismissed-and-read-in counts, not the ones to which he pled, and, again, the exact identity of the victim is not an element of reckless endangerment. Accordingly, the Thorpe evidence was not new, not material, and it was cumulative. That evidence does not point to deficient performance.

¶18 We likewise reject the second part of Haizel's ineffectiveness claim. First, we already explained why the circuit court's determination that the reckless endangerment charges had a sufficient factual basis is not clearly erroneous. That counsel did not object in that regard thus could not have been prejudicial.

¶19 In addition, there is no valid multiplicity objection because Haizel admitted shooting more than once in the vicinity of more than one deputy. Failure to pursue a meritless argument is not deficient performance. ***State v. Sandoval***, 2009 WI App 61, ¶34, 318 Wis. 2d 126, 767 N.W.2d 291. Beyond that, Haizel's guilty plea waived all nonjurisdictional defects including an objection to multiplicity. *See* ***State v. Kelty***, 2006 WI 101, ¶¶2, 18, 294 Wis. 2d 62, 716 N.W.2d 886. Haizel has not met his burden of establishing that his attorneys made such serious errors that they were not functioning as the "counsel" the Sixth Amendment guarantees. *See* ***Strickland***, 466 U.S. at 687.

Machner *Hearing*

¶20 "If a motion to withdraw a guilty plea after judgment and sentence alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing." ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996) (citation omitted). "Whether a motion alleges facts which, if

true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.*** at 310. If the motion raises sufficient facts or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, it is within the circuit court's discretion to grant or deny a hearing. ***Id.*** at 310-11.

¶21 Haizel contended that, at a minimum, the Thorpe reports warranted an evidentiary hearing. The circuit court disagreed, deeming the allegations in the motion insufficient to raise a question of fact that would merit a hearing. The court properly exercised its discretion. Haizel alleged that he could not recall shooting outside the house, that Thorpe was unable to locate any spent 45-caliber casings, and that Thorpe concluded that the lack of physical evidence showed Haizel did not fire his weapon outside. If true, these statements are little more than a "so what?" Singly or together, they would not entitle Haizel to relief. A hearing was not necessary.

Inaccurate Information

¶22 To prevail on this claim, a defendant must show by clear and convincing evidence that it is "highly probable or reasonably certain" that the circuit court actually relied on "irrelevant or improper factors." *See* ***State v. Harris***, 2010 WI 79, ¶¶30, 34-35, 326 Wis. 2d 685, 786 N.W.2d 409. Haizel has not done so.

¶23 Haizel asserts that the Thorpe reports disproved the factual basis for the read-in charges, such that the circuit court's consideration of them at sentencing constitutes reliance on inaccurate information. The circuit court noted that the lack of physical evidence "does not come close to proving" that Haizel did not shoot at Stolz. We agree.

¶24 The court found that four witnesses corroborated that he did fire at Stolz. Also, when Haizel indicated at the plea hearing that he thought the two read-ins were going to be dismissed outright, the court outlined the difference between "dismissed outright" and "dismissed and read in," clarifying that when a charge is to be dismissed and read in, the court is "aware that those things *actually happened* and … can consider the fact that *those things happened* in deciding … an appropriate sentence." (Emphasis added). The court then gave Haizel time to confer with his counsel. By later assuring the court that he understood and wanted to proceed with the plea agreement, Haizel at least impliedly acknowledged that the conduct underlying the read-ins happened. Finally, Haizel's alcohol-fueled lack of recall does not make the information inaccurate. He has not sufficiently shown that the sentence flowed from a reliance on improper factors.

By the Court.—Order affirmed.

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