COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP268-CR **Cir. Ct. No. 2010CF3782**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO REYES-ORTIZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Antonio Reyes-Ortiz appeals the judgment entered on his guilty pleas to false imprisonment, *see* WIS. STAT. § 940.30, and to first-degree reckless injury, *see* WIS. STAT. § 940.23(1)(a).[1] He also appeals the circuit court's denial of his motion asking to withdraw his plea to first-degree reckless injury on the ground that there was an insufficient factual basis to support it.[2] We affirm.

I.

¶2 According to the criminal complaint, Reyes-Ortiz and the victim, S.B., who had children together, left a bar where they had been drinking. Reyes-Ortiz became angry with S.B., accusing her of being unfaithful and acting "like a slut." The two left in S.B.'s car but Reyes-Ortiz refused to let her drive. S.B. told police that Reyes-Ortiz "began driving crazy" and said "if we're not going to be together, we can die together."

¶3 Reyes-Ortiz stopped the car and pulled off S.B.'s clothes. He roughly pushed his finger into her vagina, causing pain. S.B. cried and begged him to stop. After a while, Reyes-Ortiz began driving again and S.B. pulled on her clothes. Reyes-Ortiz stopped the car a second time, took off S.B.'s clothes, and "threw" her into the back seat. He then "forcibly fingered her vagina and anus," and had forced penis to anus intercourse. S.B. told police that Reyes-Ortiz used anal sex to hurt her "because we don't practice [anal sex]." (Brackets in original.) During the entire time, Reyes-Ortiz hit S.B. "all over her body" and held her wrists behind her back. She cried and begged him to stop.

[1] The Honorable Kevin E. Martens accepted Antonio Reyes-Ortiz's guilty pleas.

[2] The Honorable Jeffrey A. Wagner denied Reyes-Ortiz's motion for postconviction relief.

¶4 After he ejaculated, Reyes-Ortiz got a scissors, put them to his neck, and said "that he was going to kill himself and it would be [SB's] fault." S.B. tried to take the scissors away and Reyes-Ortiz "continued to punch her." When S.B. tried to run away toward a person she saw down the street, Reyes-Ortiz "caught her, pushed her to the ground and continued hitting her with his fists." He then picked her up and carried her to the car. She screamed for help. When he put her back in the car, he punched her "extremely hard on the right side of her face and eye." A bystander came to her rescue and started hitting Reyes-Ortiz with a hammer. A driver stopped and took S.B. to the hospital. S.B. had swelling and bruising on her face and body and had bleeding and leakage from her anus. She also had a fractured eye socket and a fractured nose.

¶5 The State initially charged Reyes-Ortiz with second-degree sexual assault with use of force and substantial battery with intent to cause bodily harm, but later amended the charges to include a second count of second-degree sexual assault, false imprisonment, and first-degree reckless injury. The State and Reyes-Ortiz plea-bargained the case: Reyes-Ortiz agreed to plead guilty to false imprisonment and first-degree reckless injury, and the State agreed to seek dismissal of the two sexual assault counts and also the substantial-battery charge. The plea bargain envisioned that the dismissed charges would be read in for sentencing purposes. *See* WIS. STAT. § 973.20(1g)(b) ("'Read-in crime' means any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.").

¶6 At the plea hearing, the circuit court explained the elements of reckless injury:

> THE COURT: … For the Court to accept your guilty plea on [first-degree reckless injury], the facts that you agree are true must show that you caused great bodily harm to the victim in this case.
>
> Great bodily harm means serious bodily injury and that could include having caused a fracture of bones, do you understand?
>
> [Reyes-Ortiz through] INTERPRETER: Yes.
>
> THE COURT: It further requires that you … caused great bodily harm by engaging in criminally reckless conduct. Criminally reckless conduct means that conduct created a risk of death or great bodily harm, that that risk was unreasonable and substantial, and that you were aware that that conduct created that unreasonable and substantial risk, do you understand?
>
> [Reyes-Ortiz through] INTERPRETER: Yes.
>
> THE COURT: And then finally, the third requirement is that the circumstances of your conduct showed utter disregard for human life.
>
> Do you understand that that is also a requirement?
>
> [Reyes-Ortiz through] INTERPRETER: Yes.

¶7 The circuit then asked about the factual basis for the plea:

> THE COURT: Is Mr. Reyes allowing the Court to accept the facts in the complaint to form a factual basis for the plea and also for the read-in?
>
> ….
>
> [Defense lawyer]: Yes.
>
> THE COURT: All right, Mr. Reyes, do you agree that what the criminal complaint sets forth is substantially true and correct?
>
> [Reyes-Ortiz through] INTERPRETER: Yes.
>
> THE COURT: I find that sufficient to form a factual basis for the guilty pleas entered … and also facts the Court can consider for read-in purposes.

¶8 The circuit court sentenced Reyes-Ortiz to fifteen years of initial confinement followed by ten years of extended supervision on the reckless injury count, and three years of initial confinement followed by three years of extended supervision on the false imprisonment count. The circuit court ordered that the two sentences be concurrent to one another.

¶9 Reyes-Ortiz sought postconviction relief. He wanted to withdraw his plea on first-degree reckless injury, arguing that: (1) the victim's injuries satisfy the definition of "substantial harm," but do not satisfy the definition of "great bodily harm," which is required for conviction of first-degree reckless injury; (2) Reyes-Ortiz acted intentionally, not *recklessly*; and (3) no facts show Reyes-Ortiz acted with "utter disregard for human life." The postconviction court denied the motion, reasoning:

> In this instance, the defendant beat the victim so severely that he fractured her orbital socket and nasal passage. Common sense dictates that a bone fracture is a serious bodily injury. In any case, the court is persuaded by the State's citation to ***LaBarge v. State***, 74 Wis. 2d 327 [246 N.W.2d 794] (1976) that the scope of the phrase "other serious bodily injury," as included [in] the definition of "great bodily injury," is sufficiently broad to include the kinds of physical injuries sustained by the victim in this case. The court also agrees with the State that the court was not required to explain to the defendant how or why his behavior constituted criminally reckless conduct, particularly under circumstances where the court identified facts that demonstrate that the defendant acted intentionally. As the State points out, "[W]hile a criminally reckless act is not necessarily intentional, an intentional act is necessarily criminally reckless." Accordingly, the allegations in the criminal complaint, and the defendant's on-the-record acknowledgement that he acted intentionally, necessarily provided a factual basis for criminally reckless conduct.
>
> Finally, the defendant argues that the record does not provide a factual basis to show that his conduct showed an utter disregard for human life. In determining whether

> the conduct showed utter disregard for human life, the factfinder must consider what the defendant was doing, why he was engaged in that conduct, how dangerous the conduct was, how obvious the danger was, whether the conduct showed any regard for life and all other facts and circumstances relating to the conduct. WI JI-Criminal 1250. *See also*, ***State v. Jensen***, 236 Wis. 2d 521 [613 N.W.2d 170] (2000). The State is not required to establish "utter disregard" in fact; rather, the State satisfies its burden when it proves that the defendant's conduct and the surrounding circumstances, as generally considered by mankind, are sufficient to evince utter disregard for human life. ***State v. Edmunds***, 229 Wis. 2d 67, 76 [598 N.W.2d 290] (Ct. App. 1999).
>
> The criminal complaint alleged that the defendant repeatedly punched the victim as he sexually assaulted her vaginally and anally. The defendant hit the victim so forcefully that he fractured her facial bones. When the victim tried to run, the defendant caught her and continued to beat her. It was only when a third person engaged the defendant that he was distracted long enough from his seemingly endless beating of the victim for her to escape and seek medical attention for her injuries. These facts were sufficient to establish that the defendant acted with utter disregard for the victim's life.

(Internal citation omitted; one set of brackets in original.)

II.

¶10 A defendant may withdraw a guilty plea after sentencing if he or she proves "by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice." ***State v. James***, 176 Wis. 2d 230, 236–237, 500 N.W.2d 345, 348 (Ct. App. 1993). The manifest-injustice test may be satisfied when the circuit court does not make sure that there is a sufficient factual basis for the plea. ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232, 233–234 (1996). "However, in the context of a negotiated guilty plea, [the supreme] court has held that a court 'need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea.'" *See* ***id.***, 202 Wis. 2d at 25, 549

N.W.2d at 234 (citation omitted). Further, we largely defer to the circuit court's determination that there was a sufficient factual basis to support the plea. ***Ibid.*** ("The determination of the existence of a sufficient factual basis lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous.").

¶11 As we have seen, Reyes-Ortiz argues on appeal that he should be permitted to withdraw his guilty plea to the reckless-injury count because, he contends, the victim's injuries did not satisfy the statutory definition of "great bodily harm"; instead, he argues, that her injuries merely constituted "substantial bodily harm." He also argues that there was insufficient evidence to support that he acted with "utter disregard for human life." We disagree.

¶12 First-degree reckless injury has three elements: (1) the defendant caused great bodily harm to the victim; (2) the defendant caused great bodily harm by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* WIS. STAT. § 940.23(1). Great bodily harm means: "injury which creates a substantial risk of death, *or* which causes serious permanent disfigurement, *or* which causes a permanent *or* protracted loss or impairment of the function of any bodily member or organ *or* other serious bodily injury." WIS. STAT. § 939.22(14) (emphasis added). Substantial bodily harm means: "bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechia; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth." WIS. STAT. § 939.22(38).

¶13 ***LaBarge v. State***, 74 Wis. 2d 327, 246 N.W.2d 794 (1976) held that the phrase "other serious bodily injury" expanded the scope of the definition of

"great bodily injury" to include injuries not specifically identified within WIS. STAT. § 939.22(14). ***LaBarge***, 74 Wis. 2d at 333–334, 246 N.W.2d at 797. As we have seen, the circuit court here found that the beating Reyes-Ortiz inflicted fell under "other serious bodily injury" and therefore it was sufficient to satisfy the element of "great bodily harm." Reyes-Ortiz argues that the legislature's 1994 enactment of WIS. STAT. § 939.22(38) *after* ***LaBarge***, to define "substantial bodily harm" by listing specific types of injuries, overruled ***LaBarge***'s interpretation that § 939.22(14)'s "other serious bodily injury" expanded the definition of "great bodily harm." *See* 1993 Wis. Act 441, §1 (enacted April 25, 1994) (creating WIS. STAT. § 939.22(38) defining "substantial bodily harm").

¶14 ***State v. Ellington***, 2005 WI App 243, 288 Wis. 2d 264, 707 N.W.2d 907, however, decided long after the enactment of WIS. STAT. § 939.22(38), disproves Reyes-Ortiz's argument. ***Ellington*** reaffirmed ***LaBarge***'s holding that the "other serious bodily injury" language in WIS. STAT. § 939.22(14) broadens what injuries may fall under the definition of "great bodily harm." ***Ellington***, 2005 WI App 243, ¶¶7–8, 288 Wis. 2d 264, 274–276, 707 N.W.2d 907, 912. And this is also indicated by the series of "or"s separating the discrete ways a person may cause "great bodily harm" as defined by WIS. STAT. § 939.22(14). The legislature has not amended the statute after the ***Ellington*** decision, and thus, we presume it approves of our interpretation. *See* ***Blazekovic v. City of Milwaukee***, 225 Wis. 2d 837, 845, 593 N.W.2d 809, 845 (Ct. App. 1999) (the legislature is presumed to know the law as decided by our appellate courts and if we wrongly

interpreted the statute, the legislature would amend the statutes), *aff'd*, 2000 WI 41, 234 Wis. 2d 587, 610 N.W.2d 467.[3]

¶15 We also reject Reyes-Ortiz's contention that there was insufficient evidence to show he acted in "utter disregard for human life." The test for "utter disregard" is an objective one and focuses on "what a reasonable person in similar circumstances would have known." ***Jensen***, 2000 WI 84, ¶3, 236 Wis. 2d at 524, 613 N.W.2d at 172. In determining whether Reyes-Ortiz acted with "utter disregard for life":

> [W]e consider the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries and the degree of force that was required to cause those injuries. We also consider the type of victim, the victim's age, vulnerability, fragility, and relationship to the perpetrator. And finally, we consider whether the totality of the circumstances showed any regard for the victim's life.

See ***Edmunds***, 229 Wis. 2d at 77, 598 N.W.2d at 295 (internal citation omitted).

¶16 The complaint, which formed the basis for the plea, asserted that Reyes-Ortiz: (1) drove after drinking; (2) drove in a "crazy" manner while threatening to kill himself and the victim; (3) viciously vaginally and anally assaulted the victim despite her cries for him to stop; (4) repeatedly punched the victim all over her body so forcefully that he broke her nose and eye socket among other serious injuries; and (5) chased after her when she tried to escape. Any

[3] Moreover, Reyes-Ortiz did not mention ***State v. Ellington***, 2005 WI App 243, 288 Wis. 2d 264, 707 N.W.2d 907, in his brief-in-chief to this court, and he did not submit a reply brief in an attempt to dispute the State's assertion that ***Ellington*** controls. Accordingly, he conceded the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (matters not refuted in reply brief are deemed admitted).

contention that Reyes-Ortiz showed *any* regard for the victim's life borders on the absurd.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.