COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1184-CR **Cir. Ct. No. 2011CF1458**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVELL D. GATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Lavell D. Gates appeals the amended judgment entered on his guilty pleas to third-degree sexual assault and strangulation and suffocation, all as acts of domestic abuse. *See* WIS. STAT. §§ 940.225(3),

940.235(1), 968.075(1) (2011-12).[1] After sentencing, Gates sought to withdraw his pleas, contending that the circuit court did not adequately fulfill its responsibilities under WIS. STAT. § 971.08 to ensure that his pleas were, as phrased by § 971.08(1)(a), "made voluntarily with understanding of the nature of the charge." The circuit court denied Gates's motion without a hearing, and we affirm.

BACKGROUND

¶2 In April 2011, Gates was charged with one count of second-degree sexual assault and one count of strangulation and suffocation, all as acts of domestic abuse (Milwaukee Cnty. Case No. 2011CF1458). The State later filed an amended criminal complaint adding a charge of misdemeanor bail jumping as an act of domestic abuse.

¶3 In May 2011, Gates was charged in a second complaint with one count of felony intimidation of a witness, as a party to a crime (Milwaukee Cnty. Case No. 2011CF2081). The two cases were subsequently joined for trial with an earlier case charging Gates with battery, as an act of domestic abuse, and criminal damage to property (Milwaukee Cnty. Case No. 2010CM2225).[2]

¶4 After a jury was selected for Gates's trial, a plea agreement was reached. Pursuant to the agreement: in Case No. 2011CF1458, Gates would plead guilty to an amended count of third-degree sexual assault and to strangulation and

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

[2] Milwaukee Cnty. Case Nos. 2011CF2081 and 2010CM2225 are not at issue for purposes of this appeal.

suffocation, all as acts of domestic abuse; and in Case No. 2011CF2081, Gates would plead guilty to felony intimidation of a witness. In exchange, the State would seek to dismiss and read-in the other counts, as well as an uncharged arson, and would make a global recommendation of fourteen years in prison broken down as nine years of initial confinement and five years of extended supervision. The circuit court accepted the pleas.

¶5 Prior to sentencing, Gates—by newly appointed trial counsel—moved to withdraw his plea. He argued that he did not enter his pleas freely and voluntarily because the pleas were hastily made during the initial stages of a jury trial, he was medicated, he was stressed, and his previous attorney exerted pressure on him. The circuit court held a hearing on Gates's presentence motion at which both Gates and his previous attorney testified. The circuit court then denied the motion, stating that it did not believe Gates was confused, coerced or misled when he entered his pleas. It subsequently sentenced Gates as follows: third-degree sexual assault, eight years' imprisonment, broken down as four years of initial confinement and four years of extended supervision; strangulation and suffocation, four years' imprisonment, broken down as two years of initial confinement and two years of extended supervision; felony intimidation of a witness, eight years' imprisonment, broken down as four years of initial confinement and four years of extended supervision. The sentences were ordered to run consecutively.

¶6 Gates filed a postconviction motion to withdraw his plea. He argued that during the plea colloquy there was no listing or statement addressing the elements of the charges, his trial counsel did not summarize any discussions he had with Gates regarding the elements, and the circuit court did not expressly refer to the record or other evidence of Gates's knowledge of the nature of the charges.

Gates further asserted that the jury instructions were not located in the court file, nor were they attached to the Plea Questionnaire/Waiver of Rights Form, and the only elements listed on the form were the elements for third-degree sexual assault. Consequently, Gates argued that he did not knowingly, intelligently and voluntarily enter his guilty pleas because the circuit court did not establish that he understood the nature of the charges against him.

¶7 After ordering briefing, the circuit court denied the motion without a hearing.

ANALYSIS

¶8 Gates and the State agree that the only issue before us is whether the circuit court properly denied Gates's postconviction motion without a hearing.

¶9 A defendant may move to withdraw a guilty plea if the circuit court did not comply with WIS. STAT. § 971.08 or other court-mandated duties during the plea colloquy. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). If the defendant's motion shows a deficiency in the plea colloquy and includes the allegation that the defendant "did not know or understand the information which should have been provided at the plea hearing," the circuit court must hold an evidentiary hearing. ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14.

¶10 Whether a defendant was entitled to an evidentiary hearing on a ***Bangert*** claim is an issue appellate courts review *de novo*. ***State v. Howell***, 2007 WI 75, ¶30, 301 Wis. 2d 350, 734 N.W.2d 48. Specifically:

> A reviewing court first determines as a matter of law whether a defendant's motion "has pointed to deficiencies in the plea colloquy that establish a violation

> of WIS. STAT. § 971.08 or other mandatory duties at a plea hearing." The reviewing court then determines as a matter of law whether a defendant "has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing."

Id., 301 Wis. 2d 350, ¶31 (footnotes and citations omitted).

¶11 Here, even if we were to assume, without deciding, that the plea colloquy was defective, Gates's appeal would still fail. He has not sufficiently alleged that he did not know or understand the information that should have been provided at the plea hearing.

¶12 Gates's relevant assertions in this regard, as set forth in his postconviction motion, consist of the following:

> The defendant contends that the [c]ourt did not conform to the ***Bangert*** plea requirements by not establishing that the defendant understood the nature of the charges against him. He further contends that he did not understand the nature of the charges based on the fact that the plea hearing lacked any discussion of the elements of the offenses to which he pled guilty.

¶13 We recognize that the second ***Bangert*** prong may be satisfied in some cases by a conclusory allegation that the defendant did not know or understand. *See* ***Hampton***, 274 Wis. 2d 379, ¶57. However, our supreme court later elaborated: While "[a] defendant is not required to submit a sworn affidavit to the court, … he is required to plead in his motion that he did not know or understand some aspect of his plea that is related to a deficiency in the plea colloquy." ***State v. Brown***, 2006 WI 100, ¶62, 293 Wis. 2d 594, 716 N.W.2d 906. "In the ordinary case, … [a] defendant must identify deficiencies in the plea colloquy, state what he did not understand, and connect his lack of understanding to the deficiencies." ***Id.***, ¶67.

¶14 On this point, we agree with the State's assessment that "Gates'[s] allegations … amount to a blanket assertion that he did not understand the 'elements' on all charges." As set forth in the circuit court's decision denying Gates's postconviction motion:

> The defendant's motion does not set forth with any particularity what it is he claims he didn't understand about the nature of the charges. He states he didn't understand "the elements," but specifies nothing with respect to what he didn't understand about them. Which element didn't he understand in sexual[ly] assaulting the victim by use of force? What did he think having sexual intercourse with the victim without her consent meant? Which element didn't he understand in intentionally strangling and suffocating the victim? All of these terms are in plain English and mean exactly what they say.

(Record citations omitted.) We agree with this analysis and conclude that the circuit court's decision to deny Gates's postconviction motion without a hearing was proper. *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2013) ("When the [circuit] court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the [circuit] court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion.").

By the Court.—Amended judgment and order affirmed.

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