COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP114-CR **Cir. Ct. No. 2011CF4355**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE E. HORNE,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Jimmie E. Horne appeals from a judgment of conviction for three counts of armed robbery as a party to a crime, contrary to

WIS. STAT. §§ 943.32(2) and 939.05 (2011-12).[1] Horne also appeals from an order denying his postconviction motion to withdraw his guilty pleas. He argues that he should be allowed to withdraw his guilty pleas because they were not knowingly and voluntarily entered. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 The criminal complaint charged Horne with three separate armed robberies, all of which occurred on a single night. The complaint also named at least one co-defendant for each crime. All the defendants were charged as a party to a crime. The complaint alleged that Horne personally shot two of the armed robbery victims and hit a third victim with a gun.

¶3 Horne retained counsel and ultimately entered into a plea agreement with the State pursuant to which he pled guilty to all three crimes. The plea agreement provided that in exchange for Horne's guilty pleas, the State would not charge Horne with additional crimes, including a fourth count of armed robbery, two counts of first-degree reckless injury while armed, and being a felon in possession of a firearm, although those crimes would be read in for sentencing purposes. Both sides were free to argue for an appropriate sentence.

¶4 The trial court conducted a plea colloquy with Horne, accepted his pleas, and found him guilty. During the colloquy, the trial court referenced the guilty plea questionnaire, which contained hand-circled language stating that trial

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

counsel had explained the elements of the crime to Horne, but did not list the elements or have any jury instructions attached. The trial court confirmed with trial counsel that he had "explain[ed] the elements to [Horne] and what party to a crime means." The trial court also read each of the three charged counts to Horne.

¶5 As part of the plea colloquy, trial counsel and the State stipulated that the criminal complaint provided the factual basis for the plea. Horne was ultimately sentenced to three consecutive terms of five years of initial confinement and three years of extended supervision.

¶6 After postconviction counsel was appointed for Horne, he filed a motion to withdraw his guilty pleas. He alleged that the plea colloquy was defective and failed to comply with ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because the trial court did not adequately explain the nature of the charges.[2] Specifically, Horne alleged that the trial court should have done more than ask trial counsel whether he had explained the elements to Horne. In an affidavit, Horne asserted that he "did not understand the elements of armed robbery, especially as it relates to the concept of party to the crime."[3]

[2] Horne also alleged that the trial court did not explicitly "inform Horne that a lawyer might discover legal and factual defenses that were not apparent to him." He argued that if the trial court had done so, "it would likely have prompted Horne to have a further discussion with trial counsel about the elements of the offense and the concept of party to the crime." At the motion hearing, Horne did not pursue an argument that the failure to explicitly inform Horne about what his lawyer might discover provided an independent basis to withdraw the guilty pleas. He also does not raise this issue on appeal. Therefore, we will not discuss this issue further. *See* ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

[3] Horne did not identify any particular element of armed robbery that he claims to not understand, and on appeal he continues to assert generally that he did not have "an adequate understanding of the essential elements of the crime of armed robbery."

¶7 The postconviction motion alleged a second basis for plea withdrawal pursuant to ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and their progeny. Horne asserted that his trial counsel "insisted on a guilty plea and, as part of this process, let Horne know that [trial] counsel was in contact with a key State's witness," who was a former client of trial counsel. (Bolding omitted.)

¶8 The trial court granted Horne's request for an evidentiary hearing. Before hearing testimony, the trial court concluded that the plea colloquy was deficient because when the court read the offenses to Horne at the plea hearing, it "did not completely explain the elements to him." Thus, with respect to Horne's ***Bangert*** claim, the burden shifted to the State to demonstrate that Horne knew and understood the elements of the crime.

¶9 Both trial counsel and Horne testified concerning the discussions they had about Horne's guilty pleas and trial counsel's prior representation of Courtney Bailey, who was one of the armed robbery victims.[4] The trial court found trial counsel's "version of the entire events from the beginning to end are credible and the defendant's versions are incredible."

¶10 With respect to Horne's claim that he did not understand the elements of the crime, the trial court found that trial counsel explained the five elements of armed robbery to Horne before the plea hearing. The trial court found that Horne's discussions with trial counsel before the plea hearing, plus the trial

[4] Because Horne's appeal does not challenge the trial court's credibility determinations or factual findings, we will not summarize all of the testimony.

court's discussion of some of the elements of the crime during the plea colloquy, adequately informed Horne of the elements of armed robbery.

¶11 The trial court found—consistent with trial counsel's testimony—that trial counsel had not reviewed party-to-a-crime liability with Horne. Trial counsel explained the reason for omitting that explanation from his discussions with Horne:

> Party to the crime in my case really wasn't a predominant issue because he was deemed to be the main actor or the person who committed the offense. And party to the crime is by the person who actually committed the offense or was willing to aid and abet. And by him being the person who was supposed to be the shooter and the person who committed the armed robberies, that's what I felt was deemed appropriate.

The trial court accepted this explanation and found, consistent with ***State v. Brown***, 2012 WI App 139, 345 Wis. 2d 333, 824 N.W.2d 916, that because Horne directly committed the offense, the lack of an explanation of party-to-a-crime liability did not entitle him to plea withdrawal.

¶12 The final issue before the trial court concerned trial counsel's prior representation of Bailey. Trial counsel testified that he represented Bailey in a criminal matter in 2007 and recognized Bailey when trial counsel first appeared to represent Horne at the preliminary hearing in 2011. At the preliminary hearing—which Horne waived—trial counsel indicated that he "want[ed] to go on record" concerning a discussion he had with Horne. He stated: "I disclosed to my client that I did represent one of the victims years ago, and also that one of the witnesses, I know her grandfather." That statement led to the following exchange:

> THE COURT: Okay. And Mr. Horne doesn't have any problem with you at least representing him today; is that correct?

> [TRIAL COUNSEL]: No. No. No. No. We're fine.
>
> THE COURT: You might want to explore that for in the future, but I don't think there's any problem or any conflict with you at least representing him today.
>
> [TRIAL COUNSEL]: No.

¶13 At the postconviction hearing, trial counsel indicated that he did not "give Mr. Horne any reason to think that [he was] in any kind of regular communication with [Bailey]. Trial counsel denied that anything about his "past connection to Courtney Bailey … entered into [his] analysis and discussions with Jimmie Horne about whether he should resolve this case or take this case to trial." He testified that the only time he mentioned Bailey to Horne was when he told him that "Bailey was on paper and his probation officer would make sure that he showed up in court."

¶14 The trial court accepted trial counsel's testimony and rejected Horne's testimony that trial counsel had threatened to arrange for Bailey to testify against Horne if Horne refused to plead guilty. The trial court explicitly found that Horne "was not pressured into entering the plea" and that "if there was any type of ethical violation here, it did not affect the defendant's decision in this case to enter a plea."

¶15 Based on its factual findings, the trial court concluded that Horne was not entitled to withdraw his pleas. This appeal follows.

DISCUSSION

¶16 On appeal, Horne implicitly argues that he is entitled to plea withdrawal under both ***Bangert*** and ***Nelson/Bentley***.[5] The ***Bangert*** analysis addresses defects in the plea colloquy, while ***Nelson/Bentley*** applies where the defendant alleges that "factors extrinsic to the plea colloquy" rendered his plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. The burden of proof for these two types of challenges differs. "Once the defendant files a ***Bangert*** motion entitling him to an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Hoppe***, 317 Wis. 2d 161, ¶44. Conversely, "[t]he burden at a ***Nelson/Bentley*** evidentiary hearing is on the defendant," who "must prove by clear and convincing evidence that withdrawal of the guilty plea is necessary to avoid a manifest injustice." ***Hoppe***, 317 Wis. 2d 161, ¶60. One way that a defendant "may demonstrate a manifest injustice [is] by showing that his guilty plea was not made knowingly, intelligently, and voluntarily." ***Id.***

¶17 In determining whether plea withdrawal is warranted, we accept the trial court's findings of historical and evidentiary facts unless they are clearly erroneous, but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. Applying those standards

[5] Horne's brief does not explicitly cite those cases, but his arguments are consistent with those made in his postconviction motion, which cited those cases or their progeny.

here, we conclude that Horne's plea was knowing, intelligent, and voluntary. Therefore, he was not entitled to plea withdrawal.

¶18 We begin with the ***Bangert*** issue. Horne concedes that he "cannot meet the burden of showing that the trial court's findings of historical fact are clearly erroneous." He argues, however, that "[e]ven accepting [trial counsel's] version of what he told Horne concerning the elements of armed robbery, Horne could not possibly have had an adequate understanding of the elements of the offense," and his guilty plea was therefore "not *knowingly* entered." (Bolding omitted.) Horne asserts that when trial counsel testified during the postconviction hearing, he recited the elements he went over with Horne and, in doing so, did not provide a complete list of the elements of armed robbery.[6]

¶19 We reject Horne's arguments. As the State points out, trial counsel provided additional testimony later in the postconviction hearing that expanded on his initial explanation of the elements. His overall testimony touched on each of the elements, and trial counsel also explicitly said that he went over the "five elements" that are contained in WIS JI—CRIMINAL 1480, the pattern jury instruction for armed robbery. Given this testimony, which the trial court accepted, plus the trial court's own citation to several elements at the plea hearing and Horne's answers at the plea hearing indicating that he had sufficient time to talk with trial counsel and had no questions for the trial court, we agree with the trial court that the State met its burden of showing that Horne understood the

[6] To the extent Horne is attempting to argue on appeal that his trial counsel provided ineffective assistance, we agree with the State that Horne forfeited any potential claims of ineffective assistance by not raising them in the trial court. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996) ("Claims of ineffective trial counsel … cannot be reviewed on appeal absent a postconviction motion in the trial court.").

elements of armed robbery. Although Horne testified that as of the date of the postconviction hearing he still did not know "what an armed robbery is," the record contains an abundance of evidence to the contrary, and we accept the trial court's finding that Horne's testimony was not credible. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583-84, 230 N.W.2d 824 (1975) (The trier of fact is the arbiter of witness credibility and its findings will not be overturned unless they are inherently or patently incredible.).

¶20 Next, we consider the fact that the trial court did not review party-to-a-crime liability with Horne at the plea hearing. At the outset, we conclude that Horne has forfeited this issue by not adequately briefing it on appeal. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments). He provides only a single sentence of argument concerning party-to-a-crime liability, after discussing at length his concerns with trial counsel's description of the elements of armed robbery. Horne writes: "And, finally, [trial counsel] gave no explanation of the concept of party-to-the-crime." Horne does not attempt to address the trial court's holding that based on this court's decision in ***Brown***, the lack of discussion of party-to-a-crime liability in this case does not provide a basis for plea withdrawal. His argument is inadequate.

¶21 While we need not address the merits of this inadequately developed argument, *see* ***Pettit***, 171 Wis. 2d at 646, we will briefly address the issue. In ***Brown***, we considered whether the circuit court erroneously denied Brown's motion for plea withdrawal without an evidentiary hearing. *See* ***id.***, 345 Wis. 2d 333, ¶9. We held that Brown was not entitled to relief, explaining that a person could be charged as a party to a crime for directly committing the crime, intentionally aiding and abetting in the crime's commission, or being a party who

conspires "'with another to commit it or advises, hires, counsels or otherwise procures another to commit it.'" ***Id.***, ¶13 (quoting WIS. STAT. § 939.05(2)). We reasoned:

> Because Brown directly committed robbery with the threat of force, contrary to WIS. STAT. § 943.32(1)(b), he also could have been charged—as he was—with party to a crime liability. *See* § 939.05(2)(a). Although the trial court did not explain that, by directly committing the La Quinta robbery, Brown was "concerned" in its commission as defined by the party to a crime statute, it did explain the elements of the crime that Brown directly committed. We therefore agree with the trial court that because the elements of direct liability for the La Quinta robbery were in fact explained, and because Brown admitted the facts demonstrating his direct liability—including that he threatened the hotel clerk with a knife, demanded money, and took approximately $170 from the cash drawer—it was not necessary in this circumstance for the trial court to additionally explain the concept of party to a crime liability.

Brown, 345 Wis. 2d 333, ¶13.

¶22 Applying that same reasoning here, we conclude that it was not necessary for the trial court to explain the concept of party-to-a-crime liability to Horne during the plea colloquy. As the trial court and this court have concluded, Horne was aware of the elements of armed robbery. Horne, through his counsel, stipulated to the facts in the criminal complaint, which indicated that he was directly liable for the three armed robberies.[7] Under these facts, it was not

[7] In a letter he wrote to the trial court before sentencing, Horne said that he "accept[ed] full responsibility for this." Horne also told the presentence investigation writer that he agreed with the accuracy of the criminal complaint, and in his allocution at sentencing, he told the trial court: "I accept full responsibilit[y] for my actions." In response, the trial court indicated that it would give Horne credit for entering a plea and accepting responsibility.

necessary for the trial court to explain party-to-a-crime liability at the plea hearing. *See* ***id.***

¶23 The final issue on appeal is whether Horne is entitled to withdraw his guilty pleas based on his trial counsel's prior representation of Bailey. This is Horne's ***Nelson/Bentley*** claim, in which he alleges that factors extrinsic to the plea colloquy rendered his plea infirm. *See* ***Hoppe***, 317 Wis. 2d 161, ¶3. Specifically, he argues that his pleas were "not *voluntarily* entered, because [trial counsel's] potential conflict of interest created an untenable choice for Horne." (Bolding omitted.)

¶24 Once again, Horne indicates on appeal that he is not challenging the trial court's findings of historical fact. He explains: "Even accepting [trial counsel's] version of what happened concerning Courtney Bailey, Horne established that he was, in fact, intimidated by the relationship between [trial counsel] and Bailey; and, therefore, Horne's guilty plea was not freely entered." (Bolding omitted.) Horne argues that trial counsel's prior representation of Bailey created a conflict and that trial counsel was required to obtain a written waiver of that conflict from Horne. Horne contends that he "was forced to choose between pleading guilty and going to trial with a lawyer who had represented one of the State's key witnesses in the past."[8] Horne concludes: "Even accepting [trial counsel's] version of the facts, that is not a reasonable choice for Horne to have to make. Thus, his guilty plea was not voluntarily entered."

[8] Horne's brief does not address why, if he had concerns about trial counsel, he did not terminate trial counsel's representation and hire a new lawyer or seek an appointed lawyer.

¶25 In effect, Horne is arguing that because trial counsel may have had a conflict and did not obtain Horne's written waiver of the conflict, it automatically follows that Horne's pleas could not have been voluntarily entered. We are not persuaded. It was undisputed that Horne was aware of the potential conflict, because it was discussed in open court at the preliminary hearing. Horne never said anything on the record at any hearing to alert the trial court that he had concerns. While trial counsel testified that Horne's family said at one point that they might hire different counsel, trial counsel indicated that the family did not identify any specific reason and, ultimately, trial counsel's representation was not terminated. When asked whether Horne ever expressed concern about trial counsel representing him in light of trial counsel's prior representation of Bailey, trial counsel answered: "I don't think that that was an issue. I don't believe that that was anything that stands out in my mind as being a concern."

¶26 As noted, the trial court found that trial counsel's testimony was accurate. Based on the trial court's unchallenged findings of fact, we agree with the trial court that Horne has not met his burden of showing that his guilty pleas were entered involuntarily. *See* ***Hoppe***, 317 Wis. 2d 161, ¶60. Those facts do not support Horne's claim that he felt pressured to plead guilty because of his trial counsel's prior representation of Bailey. Further, Horne cites no case law supporting the proposition that as a matter of law, one's pleas cannot be voluntary if one's trial attorney has a potential conflict of interest. Horne's argument fails.

By the Court.—Judgment and order affirmed.

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