COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1270-CR **Cir. Ct. No. 2012CF1625**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL R. FIERRO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Order reversed and cause remanded for further proceedings.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. The circuit court denied Daniel Fierro's postconviction motion for plea withdrawal without an evidentiary hearing. Fierro contends that the circuit court erred because, Fierro asserts, his motion alleged

sufficient facts to entitle him to such a hearing. We agree. Therefore, we reverse and remand for further proceedings.[1]

BACKGROUND

¶2 Fierro was charged with two counts of second-degree sexual assault of a child under sixteen years of age and one count of misdemeanor bail jumping, based on allegations that Fierro had sexual intercourse with a fifteen-year-old girl on at least two occasions. Pursuant to a plea agreement, Fierro pled guilty to one count of second-degree sexual assault of a child under sixteen years of age. After sentencing, Fierro moved to withdraw his plea, asserting that his plea was unknowing and involuntary because he was unaware of the nature of the charge to which he pled.

¶3 Specifically, Fierro alleged that during the plea colloquy the circuit court did not explain the elements of the charge of *sexual intercourse* with a child under the age of sixteen. Fierro alleged: "The court referred to a jury instruction that was attached to [the] plea questionnaire and asked [him] if his attorney explained those elements to [him]…. The jury instructions attached to the plea questionnaire were signed by [him]; however, they were instructions for *sexual contact* with a child under the age of sixteen." (Emphasis added.) Fierro alleged that he did not understand the elements of the charge of sexual intercourse, to which he entered his plea of guilty. Fierro asserted that his plea was taken in violation of WIS. STAT. § 971.08(1)(a) (2013-14), which requires the court to

[1] While Fierro appeals from both a judgment and an order, we address only the order for the reasons set forth in the opinion.

"determine that the plea is made voluntarily with understanding of the nature of the charge."[2]

¶4 After hearing arguments from counsel on Fierro's motion, the circuit court stated that Fierro "did fully understand the nature of the crime against him," and denied the motion without an evidentiary hearing. Fierro appeals.

DISCUSSION

¶5 "When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.' One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea." ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citations omitted). As in ***Brown***, the issue presented in this case does not require us to determine whether Fierro's guilty plea *was* knowing, intelligent, and voluntary. Our task is to determine whether Fierro's motion contained sufficient allegations to entitle him to an evidentiary hearing. *See* ***id.***, ¶20.

A. The Sufficiency of Fierro's Motion

¶6 Fierro's postconviction motion concerns an alleged deficiency in the plea colloquy. "A circuit court's failure to fulfill a duty at the plea hearing will necessitate an evidentiary hearing if a defendant's postconviction motion alleges

[2] All references to the Wisconsin Statutes are to the current 2013-14 version. Fierro does not contend that there have been any relevant changes in the statutes since the time his crime was committed.

he did not understand an aspect of the plea because of the omission." ***Id.***, ¶36. At the evidentiary hearing, the State has the burden of showing "that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy." ***Id.***, ¶40. While the postconviction motion addresses only what took place, and what the defendant understood, at the plea hearing, ***State v. Bangert***, 131 Wis. 2d 246, 269, 389 N.W.2d 12 (1986),[3] at the evidentiary hearing the state "may rely 'on the totality of the evidence, much of which will be found outside the plea hearing record.'" ***Brown***, 293 Wis. 2d 594, ¶40 (quoted source omitted).

¶7 In order to be granted an evidentiary hearing, a postconviction motion that concerns an alleged deficiency in the plea colloquy "must (1) make a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing." ***Id.***, ¶39 (citing ***Bangert***, 131 Wis. 2d at 274). "Whether [a defendant] 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 is a question of law that we review de novo. Likewise, whether [a defendant] has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing is a question of law." ***Id.***, ¶21 (citations omitted). For the following reasons, we conclude that Fierro has met his relatively low pleading burden here.

[3] *See also* ***State v. Howell***, 2007 WI 75, ¶70, 301 Wis. 2d 350, 734 N.W.2d 48 ("The State cannot circumvent a defendant's right to an evidentiary hearing under *Bangert* by arguing that based on the record as a whole the defendant, despite the defective plea colloquy, entered a constitutionally sound plea.").

1. Allegation of Plea Colloquy Deficiency

¶8 The State concedes that Fierro has met his burden of showing a plea colloquy deficiency.

¶9 As noted, Fierro alleged in his motion that the circuit court did not fulfill its duty under WIS. STAT. § 971.08(1)(a) to ascertain whether Fierro understood the nature of the charge, because the circuit court never explained the elements of the charge. Rather, the circuit court noted that Fierro had gone through the jury instruction attached to the plea questionnaire with the elements of the crime and asked Fierro whether his attorney had explained to him each of the elements of the crime, and Fierro answered, "Yes." However, the jury instruction to which the court referred was for the charge of sexual contact, not sexual intercourse, with a child under sixteen years of age. Fierro alleged that the circuit court "never explained the elements of the charge of sexual intercourse with a child under the age of sixteen" to him, and he did not understand those elements.

¶10 The State concedes that "the circuit court's colloquy was inadequate to determine that Fierro understood the nature of the charge because the jury instruction Fierro confirmed he reviewed with counsel did not contain the elements of the offense to which Fierro pled guilty."[4]

[4] As the State notes, generally "reliance on a defendant's representation that counsel went over the jury instruction for the charge … is sufficient to determine that the defendant understood the nature of the charge," citing ***Bangert***, 131 Wis. 2d at 268, where our supreme court set forth a non-exhaustive list of the different ways in which a circuit court may ascertain the defendant's understanding. The problem here was that the jury instruction that counsel reviewed with Fierro was for the wrong charge. Thus, the plea colloquy defect conceded by the State appears to have been the result of defense counsel's error in explaining the charge by reference to the wrong jury instruction. Nevertheless, the result is the same as if the circuit court itself went over the wrong charge or instruction with the defendant—a plea colloquy defect that forms the basis for Fierro's postconviction motion.

2. Allegation that Defendant did not Understand

¶11 The dispute here concerns the adequacy of Fierro's motion with respect to what Fierro knew or understood. As noted above, in addition to identifying a plea colloquy defect, the motion must "allege that the defendant did not know or understand the information that should have been provided at the plea hearing." ***Brown***, 293 Wis. 2d 594, ¶39. Here, Fierro's motion alleges that he did not understand the sexual intercourse element of the charged crime and, thus, seemingly complies with the second pleading requirement. We continue discussing the matter because the State presents three reasons why Fierro's motion fails to satisfy this requirement. We address and reject each reason as follows.

¶12 First, the State argues that Fierro's motion fails because "the motion does not contain a necessary allegation—namely, that *Fierro would not have entered his plea* if the missing information had been provided at the plea colloquy." (Emphasis added.) The State's sole support for this pleading requirement is ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). However, the State has seemingly confused a plea withdrawal motion based on ***Bangert*** (the type of motion we have here), with a plea withdrawal motion that requests a hearing in which the defendant will have the burden (the type of motion at issue in ***Bentley***).

¶13 When the court in ***Bentley*** states the requirement that plea withdrawal motions must allege that the defendant would not have entered his or her plea if the missing information had been provided, the court is talking about motions in which "the defendant alleges that some factor extrinsic to the plea colloquy, like ineffective assistance of counsel or coercion, renders a plea infirm." ***Howell***, 301 Wis. 2d 350, ¶¶74-75. The State does not argue that Fierro's motion

is a ***Bentley*** rather than a ***Bangert*** motion, and does not cite any case that applies the higher ***Bentley*** pleading burden to a ***Bangert*** motion.

¶14 Second, the State argues that Fierro's motion must allege something more than the "blanket assertion that Fierro 'did not understand' 'the elements'" of the charge. For this legal proposition the State cites the following statement in ***Brown***: "A defendant must identify deficiencies in the plea colloquy, state what he did not understand, and connect his lack of understanding to the deficiencies." ***Brown***, 293 Wis. 2d 594, ¶67. The State argues that this statement means that a defendant's plea withdrawal motion based on a plea colloquy deficiency must allege something more than the "generalized allegation" that the defendant did not understand what the plea colloquy was missing. Elaborating on what it means by something more, the State suggests that the problem is that the motion fails to say exactly what Fierro did not understand and fails to explain how Fierro could not understand the elements of the charge of sexual intercourse when the complaint alleged that he had sexual intercourse with the victim. Similarly, the State suggests that Fierro must give reasons why he does not understand the meaning of sexual intercourse. The State's legal argument does not persuade us.

¶15 Reading the statement that the State cites in ***Brown*** in context, it is apparent that our supreme court was not adding to the well-established two-part pleading requirement applicable to ***Bangert*** plea withdrawal motions: (1) identify a plea colloquy deficiency, and (2) allege that the defendant did not understand what the plea colloquy did not convey. Rather, the ***Brown*** court was concluding a discussion in which it addressed the need to both identify a deficiency in the plea colloquy *and* actually allege a lack of understanding. As to the latter requirement, Brown made only a general allegation that he understood "'very little of what transpired in connection with the entry of his guilty pleas.'" ***Id.***, ¶61, 66. The

problem identified by the ***Brown*** court was that Brown's motion did not directly allege "that he did not know or understand some aspect of his plea that [was] related to" any one of the identified deficiencies. ***Id.***, ¶62. The court effectively explained that the lack of an express statement in the motion asserting a connection between Brown's lack of understanding and a plea colloquy deficiency made the task of assessing the sufficiency of Brown's pleading more difficult. It was in this context that the ***Brown*** court suggested that, "[i]n the ordinary case," the motion should plead with greater particularity. ***Id.***, ¶¶66-67.

¶16 Indeed, the defendant in ***Brown*** did not plead with the particularity that the State here asserts ***Brown*** requires. In order to conclude that Brown's motion was sufficient, the ***Brown*** court drew the inference from the allegations as to what Brown did not understand. ***Id.***

¶17 In sum, the State fails to explain and we do not perceive why ***Brown*** adds to the pleading burden in ***Bangert***-type motions.

¶18 As the State's appellate brief demonstrates, there are several reasons to question the credibility of Fierro's assertion that he did not understand the elements of the charge of sexual intercourse. And, we stress that nothing in this opinion should be read as suggesting that Fierro's asserted failure to understand should be believed or not believed. But the question here is *not* Fierro's

credibility. At the evidentiary hearing, the State will have the opportunity to prove that Fierro was aware of the elements of the crime of sexual intercourse.[5]

¶19 Third, the State argues that Fierro's motion fails to explain why his alleged lack of understanding of the elements of the charge of sexual intercourse "matters to the disposition of his case." The State notes that the outcome—conviction of the Class C felony of sexual assault of a child—is the same whether the underlying conduct is sexual contact or sexual intercourse because the crime of second-degree assault of a child is defined as "sexual contact or sexual intercourse." *See* WIS. STAT. § 948.02(2). The State also speculates that the sentence would also be no different because the sentencing court would not ignore the actual conduct alleged in the criminal complaint to have been sexual intercourse. The State provides no legal support for its "harmless error" type argument, and, therefore, we do not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 ("Arguments unsupported by references to legal authority will not be considered.") Moreover, the State's references to matters outside the plea hearing seem to run contrary to the approach to such motions found in cases on the topic. *See, e.g.*, ***Howell***, 301 Wis. 2d 350, ¶7 ("In keeping with *Bangert*, we examine the record at the plea hearing; we do not confabulate about facts and conversations not on the record. We stay focused. A defendant's right to an evidentiary hearing under *Bangert* cannot be circumvented

[5] *See* ***State v. Hampton***, 2004 WI 107, ¶72, 274 Wis. 2d 379, 683 N.W.2d 14 ("The State has offered several arguments as to why the defendant in fact understood that the court was not bound by the plea agreement. This case, however, is not really about Corey Hampton's understanding at the time of his plea. It is about the circumstances under which a defendant is entitled to an evidentiary hearing when the court errs at a plea hearing. We hold that Hampton is entitled to an evidentiary hearing on his motion. At the hearing the State will have the opportunity to prove that Hampton was aware in fact that the court was not bound by the terms of the plea agreement.").

by either the court or the State asserting that based on the record as a whole the defendant, despite the defective plea colloquy, entered a constitutionally sound plea.").

B. The Proper Remedy

¶20 Fierro argues that, if we conclude that his motion makes the required showing "that the plea colloquy was defective" and "that he in fact did not know or understand the information that should have been provided at the plea hearing," ***Howell***, 301 Wis. 2d 350, ¶¶68-69, then the proper remedy is for this court to order the circuit court to allow Fierro to withdraw his plea. Fierro acknowledges that generally the proper remedy is to remand for an evidentiary hearing at which the State has the burden of showing that the defendant did understand the nature of the charge and that his plea was therefore knowing and voluntary. *See* ***Bangert***, 131 Wis. 2d at 274-75. However, Fierro argues that in this case the State did not seek to present any evidence at the hearing that was held on Fierro's plea withdrawal motion, and therefore the State failed to meet its burden to show that Fierro's plea was knowing and voluntary.

¶21 We reject Fierro's argument, because the hearing that took place was plainly a hearing at which the circuit court only heard arguments from counsel as to whether Fierro's motion sufficed to entitle him to an evidentiary hearing. Prior to that hearing, the State had responded to the motion with a memorandum of law asking that the circuit court either deny the motion or grant Fierro an evidentiary hearing, at which the State "reserve[d] the right to make additional legal and factual arguments." The circuit court denied the motion, without such an evidentiary hearing. Because we have concluded that the motion suffices to entitle Fierro to an evidentiary hearing, at which the State will have the opportunity to

prove that Fierro was aware of the elements of the charge to which he pled and that his plea was therefore knowing and voluntary, we reverse and remand for just that remedy.

CONCLUSION

¶22 For the reasons stated above, we reverse the circuit court's denial of Fierro's postconviction plea withdrawal motion and remand for an evidentiary hearing on that motion.

By the Court.—Order reversed and cause remanded for further proceedings.

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