COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP535
2015AP536

Cir. Ct. Nos. 1997CF190
1997CF246

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GILBERT R. LAWRENCE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. In these consolidated appeals, Gilbert R. Lawrence appeals pro se from an order denying his postconviction motion to withdraw his

no contest pleas. We conclude that the circuit court properly denied Lawrence's motion and affirm.

BACKGROUND

¶2 In 1997, Lawrence was convicted following no contest pleas to armed burglary and mayhem. The charges stemmed from two separate cases that were handled together in the circuit court. In the first case, Lawrence was accused of entering a trailer home without consent and stealing property, including several guns. In the second case, he was accused of stabbing another inmate in the nose with a pencil following a dispute.

¶3 Seventeen years after he was convicted of his crimes, Lawrence filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2013-14).[1] In it, he asserted three grounds for withdrawing his no contest pleas: (1) the circuit court's plea colloquies were defective, making his pleas unknowing, involuntary, and unintelligent; (2) he did not personally enter or ratify his pleas; and (3) his attorney rendered ineffective assistance by inducing him to plead no contest and by failing to move to withdraw his pleas before sentencing. The circuit court denied the motion without an evidentiary hearing. This appeal follows.

DISCUSSION

¶4 To withdraw a plea after sentencing, a defendant must establish by clear and convincing evidence that refusal to allow withdrawal would result in a manifest injustice. ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

482. One way to show a manifest injustice is to demonstrate that a plea was not knowingly, voluntarily, and intelligently entered. ***Id.*** A manifest injustice also occurs when a defendant did not personally enter or ratify the plea, or when a defendant's attorney rendered ineffective assistance. ***Id.***, ¶49.

¶5 There are two methods by which courts typically review motions to withdraw a plea after sentencing. One method, based on ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), applies when the defendant's motion alleges defects in the plea colloquy. The other method, based on ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), applies when the defendant seeks withdrawal based upon factors extrinsic to the plea colloquy. Here, Lawrence's postconviction motion contains both ***Bangert*** and ***Bentley*** claims. We begin our discussion with his ***Bangert*** claims.

Lawrence's ***Bangert*** *Claims*

¶6 To help ensure that a defendant's plea is knowing, voluntary, and intelligent, the circuit court must perform certain statutory and court-mandated duties on the record during the plea hearing. ***Taylor***, 347 Wis. 2d 30, ¶31. If the defendant believes that the circuit court did not fulfill those duties, the defendant may seek plea withdrawal based on the alleged deficiencies in the colloquy pursuant to ***Bangert***. ***Taylor***, 347 Wis. 2d 30, ¶32.

¶7 A defendant moving for plea withdrawal pursuant to ***Bangert*** must both (1) make a *prima facie* showing that the plea colloquy was defective because the circuit court failed to fulfill its duties and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing. ***Taylor***, 347 Wis. 2d 30, ¶32. If the defendant's postconviction motion fails to satisfy these requirements, the circuit court may deny the motion without

an evidentiary hearing. *See* ***State v. Brown***, 2012 WI App 139, ¶¶10-11, 345 Wis. 2d 333, 824 N.W.2d 916.

¶8 In this case, Lawrence contends that his plea colloquies were defective for two reasons: (1) the circuit court failed to establish that he understood the nature of the charges against him and (2) the court failed to establish a factual basis for the pleas. We disagree.

¶9 With respect to the armed burglary charge, the circuit court carefully recited the elements of the crime:

> THE COURT: The original charge that was here before the Court that we had hearings on already is a charge that on June 17th 1997, in the Town of Hartford in this county, you did feloniously, intentionally, entered the dwelling of another, [R.W.], without the consent of the person in lawful possession and with intent to steal.
>
> That you went in not being armed, but while in the place that was being burglarized you armed yourself. You stole some weapons. A charge of burglary.
>
> Do you understand the charge, sir?
>
> MR. LAWRENCE: Yes, your honor, I understand.

¶10 The circuit court subsequently reiterated the elements, describing the factual basis:

> THE COURT: The basis of this is that you entered a, I believe it was a mobile home belonging to [R.W.], in the Town of Hartford, south of Hartford on Highway 83.
>
> That you went in without his consent.
>
> You went in with intent to steal;
>
> And while in the place you took some weapons. That's what makes it into an armed rob— armed burglary rather.
>
> Do you understand that?

> MR. LAWRENCE: Yes.
>
> …
>
> THE COURT: Do you have any question about either this charge or the possible penalties?
>
> MR. LAWRENCE: No, sir.
>
> THE COURT: What is your plea to the charge?
>
> MR. LAWRENCE: Guilty – or no contest.

¶11 The circuit court then found a factual basis for the charge based on the complaint and preliminary hearing. The complaint alleged that Lawrence personally committed the offense and described a statement to his then-girlfriend, admitting that he "got the guns from a trailer behind the Buffalo Bar." The preliminary hearing also contained testimony implicating Lawrence in the crime.[2]

¶12 With respect to the mayhem charge, the circuit court conducted a similar inquiry as to Lawrence's understanding of the offense:

> THE COURT: On the other file, 97-CF-246, the charge is that on July 13, 1997, in the City of West Bend in this county, you did feloniously, with intent to disfigure another, mutilate the nose of another. That's a charge referred to as mayhem, involving [J.H.], happened in the jail. And that the charge[] alleges that you stabbed him in the nose with a pencil, it went through his nose.
>
> That you did – part of the mayhem is that you disfigured part of the human body by doing this. Do you understand the charge?
>
> MR. LAWRENCE: Yes, sir.

[2] The preliminary hearing contained two competing versions of events. According to the investigating detective, Lawrence admitted to concocting the idea to burglarize the trailer home and persuading his then-girlfriend to implement his plan. Lawrence further admitted that he assisted in the crime by distracting the trailer home's owner and then entered the trailer home himself to steal property. According to Lawrence's then-girlfriend, Lawrence burglarized the trailer home without her assistance.

> …
>
> THE COURT: Do you have any question about this charge or the possible penalties?
>
> MR. LAWRENCE: No, sir.
>
> THE COURT: And what is your plea to this charge?
>
> MR. LAWRENCE: No contest.
>
> …
>
> THE COURT: Do you have -- As far as these two charges, did you discuss them both with your lawyer?
>
> MR. LAWRENCE: Yes, I did.
>
> THE COURT: And did he tell you what the State would have to prove as far as elements and so on?
>
> MR. LAWRENCE: Yes.
>
> THE COURT: On the mayhem, you believe you understand what that's all about?
>
> MR. LAWRENCE: Yes, sir.

¶13 The circuit court then found a factual basis for the charge based on the complaint. The complaint alleged that, with intent to disfigure J.H., Lawrence struck J.H. in the face, and that a pencil in Lawrence's hand lodged in J.H.'s nose and caused profuse bleeding, requiring stitching to repair the hole in his nose. According to the complaint, Lawrence told J.H., "don't fuck with me, I am not the type of person to be fucked with."

¶14 On this record, we are satisfied that Lawrence understood the nature of the charges against him and that a factual basis existed for his pleas. Accordingly, the circuit court properly rejected Lawrence's ***Bangert*** claims without an evidentiary hearing.

Lawrence's ***Bentley*** *Claims*

¶15 A defendant pursuing a ***Bentley*** motion for plea withdrawal must satisfy a higher standard of pleading. *See* ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48. The circuit court has discretion to deny the motion without a hearing, "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***Id.*** (citation and footnote omitted).

¶16 In this case, Lawrence offers two arguments for withdrawing his pleas based on factors extrinsic to the plea colloquies: (1) he did not personally enter or ratify his pleas and (2) his attorney rendered ineffective assistance by inducing him to plead no contest and by failing to move to withdraw his pleas before sentencing. We consider each argument in turn.

¶17 Lawrence's first argument stems from several statements made at the plea hearing and sentencing. At the plea hearing, after the circuit court had completed its colloquies, Lawrence's attorney told the court that, with respect to the armed burglary, "part of what Mr. Lawrence would probably indicate was that he was in the barroom and his cohorts were in the trailer; that he knew what was going on and he knew what happened." Counsel reiterated this at sentencing, stating that Lawrence, "indicated that he didn't go in behind the Buffalo Inn [to the trailer home], that somebody else did, but he's party to it." Also, at sentencing, Lawrence told the court that, with respect to the mayhem charge, "It was an accident stabbing [J.H.] in the nose. I meant to punch him, yes, but I didn't mean to stab him. I didn't chase him around. I didn't stab him on purpose." Counsel echoed this position, saying that Lawrence "didn't realize he had the

pencil in his hand" when he hit J.H. Lawrence submits that these statements show that he did not agree with the elements of the offenses and therefore did not personally enter or ratify his pleas.

¶18 We are not persuaded that the above statements undermine the validity of Lawrence's pleas. To begin, counsel's statement at the plea hearing was equivocal as to what Lawrence might say and never clearly and directly denied that Lawrence had personally entered the trailer home. Moreover, at no point during the plea hearing did Lawrence dispute that he committed the armed burglary as charged or suggest that he lacked the requisite intent to commit mayhem. Instead, he indicated that he understood the charges against him and directly entered his pleas. Based upon our review of the plea hearing, we are satisfied that Lawrence personally entered and ratified his pleas. We view the subsequent statements at sentencing as nothing more than an attempt to minimize his culpability.

¶19 Lawrence's second argument is that his attorney was ineffective by inducing him to plead no contest and by failing to move to withdraw his pleas before sentencing. The circuit court concluded that neither allegation was sufficient to require an evidentiary hearing. We agree.

¶20 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding

would have been different. ***Id.*** at 694. We need not consider both prongs if the defendant fails to make a sufficient showing on either one. *See* ***id.*** at 697.

¶21 Here, Lawrence's allegation that he was induced to plead no contest is conclusory and devoid of any factual support. Furthermore, it rests on the dubious assertion that, had his attorney not induced him, he would have rejected the benefits of his plea agreement[3] and insisted on going to trial. By Lawrence's own admission, he was involved in and guilty of the armed burglary, at least as a party to a crime. Lawrence also admitted that he intended to punch J.H. in the nose. As noted by the circuit court in its decision denying Lawrence's motion, the method of striking is not essential if the other elements of mayhem are met. Thus, there was no reason for Lawrence to try the case, and no reason to believe that he was prejudiced by entering his pleas.

¶22 Lawrence's other allegation of ineffective assistance of counsel fares no better. Lawrence faults his attorney for failing to move to withdraw his pleas before sentencing and complains that, as a result, he unknowingly waived the opportunity to have a fact-finder determine whether he committed the offenses. Again, this allegation is conclusory. In addition, it is contradicted by the record. Prior to the plea hearing, Lawrence reviewed and signed the Request to Enter Plea and Waiver of Rights Form. That form expressly disclosed that by pleading no contest Lawrence was waiving his right to trial, at which a jury would have to unanimously agree that the State had proven his guilt. During the plea colloquies, the circuit court confirmed that Lawrence had reviewed the form with his attorney

[3] Lawrence obtained the dismissal of several felony and misdemeanor charges as part of his plea agreement.

and understood it. Based on this and Lawrence's other admissions of guilt, there was no reason for counsel to pursue a motion to withdraw, and no reason to believe that Lawrence was prejudiced by his failure to do so.

¶23 For these reasons, we conclude that the circuit court properly rejected Lawrence's ***Bentley*** claims without an evidentiary hearing. Accordingly, we affirm.[4]

By the Court.—Order affirmed.

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

[4] To the extent we have not addressed an argument raised by Lawrence on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").