COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP929-CR **Cir. Ct. No. 2010CF112**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON J. LISNER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed*.

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Brandon Lisner appeals an order denying a motion to vacate his sentence and an order denying his motion for reconsideration. Lisner contends that the repeater portion of his sentence should be vacated because the State did not prove the prior conviction forming the basis of his repeater status,

and he did not admit to the prior conviction. For the reasons discussed below, we conclude that Lisner admitted to the prior conviction and, therefore, we affirm.

BACKGROUND

¶2 Lisner was initially charged with one count of arson, as a repeater. In an amended information, Lisner was subsequently charged with one count of arson and two counts of first-degree reckless endangerment, each as a repeater as a result of a prior felony conviction. Pursuant to a plea agreement, Lisner pled no contest to two counts of first-degree recklessly endangering the safety of another, class F felonies, each of which carried a maximum sentence of twelve and one-half years. *See* WIS. STAT. § 941.30(1) (2009-10), and WIS. STAT. § 939.50(3)(f) (2009-10). One of those counts included a repeater enhancer, which increased the maximum sentence on that count by six years. *See* WIS. STAT. §§ 939.62(1)(c) (2009-10) and 973.12(1) (2009-10). On that count, Lisner was sentenced to an eighteen and one-half year sentence, consisting of thirteen and one-half years of initial confinement and five years' extended supervision. *See* WIS. STAT. § 973.01 (2009-10) (explaining bifurcated sentence).

¶3 Following sentencing, Lisner moved the circuit court to vacate that portion of his sentence attributable to his status as a repeater, on the ground that the State failed to prove, and he did not admit to, the prior conviction forming the basis for the repeater enhancer. The circuit court denied Lisner's motion, as well as Lisner's subsequent motion for reconsideration. Lisner appeals.

DISCUSSION

¶4 Lisner contends that the circuit court erred in denying his motion to vacate that portion of his sentence that is attributable to his status as a repeater.

"To sentence a defendant as a repeater, WIS. STAT. § 973.12(1) [(1991-92)] requires the State to prove, or the defendant admit, any prior convictions that form the basis of the defendant's repeater status." ***State v. Liebnitz***, 231 Wis. 2d 272, 275, 603 N.W.2d 208 (1999). Lisner argues that the State did not prove, and he did not admit to, the prior conviction that forms the basis for his repeater status. For the reasons explained below, we conclude that Hill admitted to the prior conviction underlying his repeater charge.

¶5 A defendant's admission of a prior conviction may not "be inferred … but rather, must be a direct and specific admission by the defendant," ***State v. Farr***, 119 Wis. 2d 651, 659, 350 N.W.2d 640 (1984), and it is not enough for the defendant to merely admit that he or she is a "repeater." ***State v. Watson***, 2002 WI App 247, ¶5, 257 Wis. 2d 679, 653 N.W.2d 520. However, cases addressing a defendant's admission to a prior conviction that forms the basis for a repeater charge establish that "a defendant's plea to a charge containing the repeater enhancer may constitute an admission to the prior convictions necessary to apply that enhancer." ***State v. Hill***, 2016 WI App 29, ¶13, 368 Wis. 2d 243, 878 N.W.2d 709.

¶6 Lisner argues that his plea here did not constitute such an admission, but his argument is based on an incorrect reading of the two cases on which he relies, ***State v. Rachwal***, 159 Wis. 2d 494, 465 N.W.2d 490 (1991), and ***State v. Liebnitz***, 231 Wis. 2d 272, 603 N.W.2d 208 (1999). As we explain, in both those cases our supreme court concluded that a defendant's no contest plea constituted an admission to a prior conviction supporting a repeater charge based on the totality of the circumstances in the record before the court. *See* ***Rachwal***, 159

Wis. 2d at 512; ***Liebnitz***, 231 Wis. 2d at 288. As we explain, we reach a similar conclusion here.[1]

¶7 In ***Rachwal***, 159 Wis. 2d at 511-12, our supreme court concluded that the defendant's no contest plea constituted an admission to the prior convictions underlying the repeater enhancer in that case, where the defendant was fully and expressly informed that his no contest plea would subject him to the penalties to which his prior convictions and consequent repeater status rendered him liable. In ***Rachwal***, the complaint specifically alleged that the defendant had been convicted of four prior misdemeanor charges, and the complaint included the dates of the prior convictions and the nature of the offenses. ***Id.*** at 500-01. During the plea colloquy, the defendant did not specifically acknowledge the prior convictions underlying the repeater enhancer in that case. ***Id.*** at 502-03. However, the circuit court drew the defendant's attention to the repeater provision of the complaint and advised the defendant of the increased penalty he faced as a result of the repeater enhancer. ***Id.*** at 502-03. The defendant affirmed that he understood the consequences of entering a plea to a charge containing a penalty enhancer. ***Id.*** The supreme court presumed that the defendant chose to enter a no contest plea "because he honestly knew the allegations as to his prior convictions to be true and because he considered it futile to require proof by the prosecution." ***Id.*** at 511. The court explained that under these circumstances, "the colloquy into the defendant's understanding of the meaning of the allegations he was facing can be said to have produced a direct and specific admission." ***Id.*** at 509.

[1] Lisner also argues that the State failed to prove the prior conviction, and that as a result, the repeater enhancer was not permitted by law. Because we conclude that by his plea he admitted the prior conviction, we need not reach these additional arguments.

¶8 Our supreme court reached a similar decision in ***Liebnitz***. In ***Liebnitz***, the complaint charged the defendant with five counts, each as a repeater. ***Liebnitz***, 231 Wis. 2d at 285-86. The complaint set forth the nature of the previous convictions, including the date of conviction, and the number of years added to a possible term of imprisonment for each count as a result of the defendant's repeater status. ***Id.*** At the defendant's initial appearance, the circuit court read aloud the charges against the defendant, including the repeater allegation, and the court confirmed as to each charge that the defendant understood the penalty enhancement resulting from the repeater enhancer. ***Id.*** at 277-80, 286. During the plea colloquy for the defendant's no contest plea, the circuit court ascertained that the defendant understood the nature of the charges against him, and that the defendant understood the Request to Enter a Plea and Waiver of Rights form, on which the defendant acknowledged that a factual basis for his plea was established by the complaint and preliminary exam. ***Id.*** at 282, 286. The circuit court did not advise the defendant of the maximum penalties faced by entering his pleas, nor did the court confirm with the defendant that he had been convicted of the crimes set forth as the repeater offenses. ***Id.*** at 282, 284. However, the court did confirm with the defendant that he had chosen not to contest the allegations in the complaint. ***Id.*** at 286.

¶9 The supreme court explained that a guilty or no contest plea admits all material facts alleged in the charging documents, and that in the case before it, "the criminal complaint clearly set forth the repeater charge attached to each count … and [the defendant] specifically stated on the record that he would not contest any allegation in the complaint." ***Id.*** at 286-87. The court concluded that the record demonstrated that the defendant "was fully aware of the repeater charge and its consequences" and that, based on the totality of the record, Liebnitz's plea

to the information constituted an admission of his prior convictions supporting the repeater provision. ***Id.*** at 284-85, 288.

¶10 As in ***Rachwal*** and ***Liebnitz***, we conclude that the totality of the record here demonstrates that Lisner was "fully aware" of the repeater allegation and its consequences when he entered his no contest plea, and therefore, his plea constituted an admission to his prior conviction. *See* ***id.*** at 285.

¶11 The complaint and the amended information alleged that Lisner had committed the crime of arson as a repeater. Both the complaint and the amended Information contained the following language:

> because the Defendant is a repeater, having been convicted of a Felony within the last 5 years, to wit: Oneida County Case No. 2009-CF-63, which conviction remain of record and unreversed, the maximum term of imprisonment for the underlying crime may be increased by not more than 2 years if the prior convictions were for misdemeanors and not more than 6 years if the prior conviction was for a felony.

¶12 As pointed out by Lisner, the complaint and information do not specify the date of conviction. However, the omission of the conviction date is not fatal to a determination that Lisner understood the repeater allegation and admitted by virtue of his plea that he qualifies as a repeater.

¶13 In the present case, the charging documents specified the case number of the conviction on which the State relied to support the repeater enhancer. The State also attached to the complaint the CCAP record of the offense, which specified the case number and the offense for which Lisner had been found guilty, information that was already contained in the charging document. The numbers preceding the case-type designation indicate the year when the criminal complaint is issued, which, in this case, is 2009-CF-63. This

number means that the prior conviction arose from a criminal case filed in 2009, which clearly falls within the five-year period required for that conviction to serve as a basis for the repeater enhancement. We conclude that from the charging documents in this case, the conviction on which the State was relying to support the repeater enhancer was sufficiently clear.

¶14 Turning to the entry of Lisner's plea, Lisner acknowledged that he signed a Plea Questionnaire/Waiver of Rights form, that he had had sufficient time to review the form, and that the form specified the charges added by the amended information to which he intended to plead no contest. The Plea Questionnaire/Waiver of Rights form contains a spot on the form in which the maximum penalties faced by a defendant are to be specified. The form has not been made part of the record, so we cannot know for certain that this portion of the form was completed. However, as pointed out by the State, as the appellant Lisner is responsible for ensuring that the record on appeal contains all materials necessary for this court to review the issues raised. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). When an appellate record is incomplete, we assume that the missing material "supports every fact essential to sustain the [circuit] court's [decision]." ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Accordingly, we will assume that the Plea Questionnaire/Waiver of Rights form accurately specified the maximum penalties faced by Lisner, including the enhancement portion of that penalty.

¶15 During the plea hearing, the court explained to Lisner the allegations in the amended information, including the allegation with the repeater enhancer attached. The court explained, and Lisner acknowledged his understanding, that by entering a plea of no contest, Lisner "neither admit[s] [n]or den[ies] the[]

charges but that [he does not] want to contest them any further," and that the court "will find [Lisner] guilty" upon his plea. The court also explained:

> THE COURT: Those matters as charged, in counts two and three, are Class F felonies. Upon conviction you could be subject to a fine of up to $25,000, or imprisoned for up to twelve years and six months, or both. Ordinarily there would be a maximum initial confinement of seven and one half years on each count, and a maximum extended supervision of five years on each count. However, the second count in this matter charges a repeater enhancement, which alleges that you have been convicted [of] other felonies within the last five years, and, therefore, the maximum term of imprisonment in count two could be increased by up to an additional six years; do you understand that?
>
> MR. LISNER: I do, sir.
>
> THE COURT: … Understanding the elements of the offenses now and potential penalties, do you still wish to plead no contest?
>
> MR. LISNER: I do, your Honor.

¶16 The plea colloquy in this case contained more information than the colloquy in ***Liebnitz***, wherein the circuit court did not address the repeater enhancers. *See* ***Liebnitz***, 231 Wis. 2d at 282. As noted above, we assume that the Plea Questionnaire/Waiver of Rights form stated that Lisner committed one of the offenses to which he was pleading as a repeater, which was also not true in ***Liebnitz***. *See* ***id.*** at 281. We conclude that the plea colloquy and the Plea Questionnaire/Waiver of Rights form, combined with the charging documents which specify the offense forming the basis for the repeater charge, demonstrate that Lisner understood "the nature and consequences of the charges against him and the consequences of his plea." *See* ***id.*** at 287. Accordingly, we conclude that by pleading no contest to first-degree reckless endangerment as a repeater, Lisner admitted the repeater allegation. *See* ***Rachwal***, 159 Wis. 2d at 509 ("[W]hat is

admitted by a guilty or no contest plea is all the material facts alleged in the charging document."). Accordingly, we conclude that the circuit court did not err in denying Lisner's motion to vacate the portion on his sentence attributable to his repeater status and his motion for reconsideration.

CONCLUSION

¶17 For the reasons discussed above, we affirm.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).