COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1658-CR **Cir. Ct. No. 2004CF268**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TENG VANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Judgment affirmed; order reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Teng Vang appeals a judgment of conviction for two counts of first-degree reckless endangerment as party to a crime and one count of felon in possession of a firearm. He also appeals an order denying his motion

for plea withdrawal. Vang contends he alleged a fair and just reason for withdrawal and the court therefore erred when it denied his motion. We conclude the court failed to exercise its discretion because it denied the motion without an evidentiary hearing. Accordingly, we reverse the order and we remand the cause with directions to conduct an evidentiary hearing.

Background

¶2 In Eau Claire on April 12, 2004, Vang, his brother Chang Vang, Fue Yang, and three others traveled to Omaha Street in a van driven by Chang. They parked across from the home of Chomphou Her, who was outside. From the driver's seat, Chang began a discussion with Her about the gangs each belonged to as Vang and Yang got out of the van. Three to five shots were fired in Her's direction and towards the homes behind him. Vang and Yang got back in the van and Chang drove off. Following a high-speed chase through Eau Claire, police eventually were able to stop the van. Vang, Chang, and Yang were arrested. Vang was charged with one count of attempted first-degree intentional homicide; five counts of first-degree recklessly endangering safety as party to a crime and with a habitual criminal enhancer; and one count of felon in possession of a firearm.

¶3 After an initial challenge to his competency, Vang was found fit to assist in his own defense. He entered a plea agreement and pled no contest to two counts of first-degree recklessly endangering safety and the felon in possession of a firearm charge. In exchange, the other charges were dismissed, the State dropped the penalty enhancers and agreed to cap its sentencing recommendation.

¶4 The court found Vang's plea to be knowing, intelligent and voluntary, accepted the plea, and found Vang guilty. It scheduled sentencing for January 21, 2005, and ordered a presentence investigation.

¶5 On January 18, 2005, Vang moved to withdraw his plea. He averred that he had never possessed or fired the gun, although he admitted he had intended to fight Her. He also claimed that he tried to prevent Yang from firing the gun. Vang stated he had accepted the plea agreement because he had no corroborating witnesses—according to the State, the van's occupants all identified Vang as the shooter—and he knew that if he went to trial and testified on his own behalf, he would likely be impeached with his criminal record. However, Vang's motion was also premised on the claimed discovery of a new witness, Arron Ambrose. Ambrose claimed he befriended Yang through various jail programs, and Yang purportedly confessed he had been the shooter, not Vang. Ambrose also stated Yang confessed that Vang never had the gun and, in fact, Vang had tried to stop him from shooting the weapon.

¶6 The State objected to the motion, claiming it stated no fair and reasonable ground for withdrawal. The State also challenged Ambrose's credibility, submitting a letter allegedly from Ambrose's attorney and a memo from Barb Gorman, both of which detailed Ambrose's history of mental illness.

¶7 The court denied the motion after brief argument but without an evidentiary hearing. It noted that Ambrose's affidavit was convincing only until the court considered the letters the State submitted. It also noted that even if Ambrose testified consistent with his affidavit, he would likely be impeached with the letters about his mental history. Vang appeals.

Discussion

¶8 A motion to withdraw a plea prior to sentencing should be "freely allowed" if the defendant presents a fair and just reason to justify the withdrawal. ***State v. Timblin***, 2002 WI App 304, ¶19, 259 Wis. 2d 299, 657 N.W.2d 89. Freely does not mean automatically; a fair and just reason is some "adequate reason for defendant's change of heart other than the desire to have a trial." ***Id.*** (citation omitted). "The defendant bears the burden of proving a fair and just reason by a preponderance of the evidence." ***State v. Leitner***, 2001 WI App 172, ¶26, 247 Wis. 2d 195, 633 N.W.2d 207.

¶9 "Whether a defendant's reason adequately explains his or her change of heart is up to the discretion of the [trial] court." ***State v. Kivioja***, 225 Wis. 2d 271, 284, 592 N.W.2d 220 (1999). We do not upset discretionary determinations unless discretion was erroneously exercised. ***Id.*** We uphold discretionary determinations if the trial court reached a reasonable conclusion based on the proper legal standards and a logical interpretation of the facts. ***Id.*** If the trial court finds the defendant's proffered reason is incredible, it may deny the motion. ***Leitner***, 247 Wis. 2d 195, ¶26. But when the defendant makes the necessary showing, withdrawal should be permitted unless the State has been "substantially prejudiced by reliance upon the defendant's plea." ***State v. Shanks***, 152 Wis. 2d 284, 288-89, 448 N.W.2d 264 (Ct. App. 1989).

¶10 Vang argues—and the State concedes—that, at the very least, the trial court erred by failing to conduct an evidentiary hearing on his motion. We agree. "[A]n evidentiary hearing on whether a defendant has presented a fair and

just reason for plea withdrawal is necessary to resolve 'issues of fact and credibility.'"[1] ***Kivioja***, 225 Wis. 2d at 289-90 (citation omitted).

¶11 An evidentiary hearing is also an opportunity for the trial court to exercise its discretion. Here, the trial court never truly determined whether Vang offered a fair and just reason supported by a preponderance of the evidence justifying his change of heart. Instead, it rejected his motion because it concluded Ambrose's proffered testimony was patently incredible, and therefore unusable, given his history of mental illness—something else the State concedes was error. *See* ***Thomas v. State***, 92 Wis. 2d 372, 383, 284 N.W.2d 917 (1979) ("We know of no case law holding that evidence of … mental defectiveness of itself renders a witness'[s] testimony incredible as a matter of law.").

¶12 The State argues that we should nonetheless affirm the trial court because Vang does not state a fair and just reason for his motion. First, we decline to exercise the trial court's discretion for it, particularly in the absence of a developed evidentiary record. *See* ***Milwaukee Women's Med. Serv. v. Scheidler***, 228 Wis. 2d 514, 528 n.5, 598 N.W.2d 588 (Ct. App. 1999).

¶13 More importantly, the State's primary argument for affirmance is that Vang has failed to show Ambrose's testimony would be admissible at trial. However, the future admissibility of evidence provoking the defendant's change of heart does not necessarily relate to the reason the defendant seeks to withdraw a plea. Indeed, the standard is only that the defendant must offer a fair and just

[1] Also, it is axiomatic that the arguments of counsel do not constitute evidence.

reason for the withdrawal, not that the defendant must show he or she would have a successful case at trial.

¶14 In addition, contrary to the State's admissibility arguments, we are not prepared to say that it is a legally forgone conclusion that Ambrose's testimony could never be admitted at trial. Although there are statutes to guide the trial court—the State points to the hearsay rules—the decision to admit or exclude evidence is ultimately a discretionary one. "The inquiry into a circuit court's exercise of discretion in making an evidentiary ruling is highly deferential." ***State v. Shomberg***, 2006 WI 9, ¶11, __ Wis. 2d __, __ N.W.2d __ (citation omitted). Accordingly, we decline to pass judgment on evidence's admissibility before the trial court has even been asked to exercise its discretion. *See* ***Barrera v. State***, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980) (supreme court cautioning court of appeals against usurping role of trial court).

¶15 The State also asserts we should nonetheless affirm the trial court because it would be substantially and unfairly prejudiced. This, though, is part of the discretionary decision the trial court should make.[2] The State will have the opportunity present its prejudice argument to the trial court on remand.[3]

¶16 Accordingly, the order denying the motion for plea withdrawal is reversed. The cause is remanded for further proceedings consistent with this

[2] For the same reason, we decline Vang's invitation to hold that he offered a fair and just reason, and to order his plea withdrawn.

[3] The State told the court it was prepared to make its prejudice argument if the court found Vang offered a fair and just reason for withdrawal. Because the court denied the motion, the State was not called upon to make that argument. Accordingly, we do not view this as a case where the State could have presented an argument but did not.

opinion. The court shall hold an evidentiary hearing on Vang's motion. It shall consider whether Vang offered a fair and just reason to justify his plea withdrawal supported by a preponderance of the evidence and, if so, whether the State would be substantially prejudiced by the withdrawal. If the facts so dictate, the court is free to deny Vang's motion a second time. Otherwise, the court should grant the motion and, if it does so, the judgment of conviction must be vacated accordingly.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

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