COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2200-CR **Cir. Ct. No. 2011CF1352**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVON ADAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES A. KAHN and JONATHAN D. WATTS, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Devon Adams appeals a judgment of conviction entered upon his guilty plea to one count of second-degree recklessly endangering

safety. *See* WIS. STAT. § 941.30(2) (2011-12).[1] He also appeals a postconviction order that denied his motions to withdraw his guilty plea and to modify his sentence.[2] Because Adams does not show that plea withdrawal is warranted or that the circuit court erroneously exercised its sentencing discretion when it imposed a nine-year term of imprisonment, we affirm.

BACKGROUND

¶2 As reflected in the criminal complaint, a dispute over a woman's missing purse led to a mob brawling in the street, and, during the melee, Adams shot Darril Wynn in the chest. The State charged Adams with first-degree reckless injury by use of a dangerous weapon. *See* WIS. STAT. §§ 940.23(1)(a), 939.63(1)(b).

¶3 Adams demanded a jury trial. On the morning of trial, however, the parties told the circuit court that they had reached a plea bargain in which Adams would plead guilty to a reduced charge of second-degree recklessly endangering safety, and the State would recommend a sentence to the House of Correction as a penalty. Adams filed a signed guilty plea questionnaire and waiver of rights form. The form reflects that, *inter alia*, Adams understood the terms of the plea bargain, understood that the circuit court would not be bound by that plea bargain or by any sentencing recommendation, and understood that the circuit court was free to impose the maximum statutory penalty if it believed such penalty appropriate.

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

[2] The Honorable Charles A. Kahn presided over the plea hearing and imposed sentence. The Honorable Jonathan D. Watts presided over the postconviction proceedings.

¶4 The circuit court engaged Adams in a plea colloquy on the record. Adams confirmed that he had reviewed the plea questionnaire and waiver of rights form with his trial counsel. He told the circuit court that he could read well, and that he understood the form that he signed. The circuit court described the constitutional rights that Adams would surrender by pleading guilty, and Adams told the circuit court that he understood those rights. The circuit court reviewed the elements of the amended charge, and Adams said that he understood the elements. The circuit court explained to Adams that, upon conviction of the amended charge, he faced a maximum possible penalty of ten years of imprisonment and a $25,000 fine, and that the judge alone would decide the penalty after considering the relevant sentencing factors and any recommendations presented. The circuit court emphasized that Adams might receive "the entire ten years." Adams said that he understood.

¶5 The circuit court turned to a discussion with Adams about the specific facts of the case, and Adams suggested that he acted in self-defense. After discussing the law of self-defense with the circuit court, Adams changed his mind about pleading guilty and decided that he wanted a jury trial.

¶6 The circuit court recessed the proceedings to allow Adams to put on street clothes for trial. When the matter reconvened, Adams told the circuit court that he had again changed his mind and wanted to plead guilty but that the State was no longer willing to enter the plea bargain previously negotiated. The matter proceeded to jury selection.

¶7 After a *voir dire* that the circuit court described as "very short," the circuit court again went into recess. When the parties were back on the record,

they advised the circuit court that Adams wanted to continue with his guilty plea to the amended charge and that the State was again willing for Adams to do so.

¶8 The circuit court reminded Adams of the plea proceedings conducted earlier in the day, and Adams indicated that he remembered the earlier proceedings and understood them. The circuit court resumed discussing self-defense with Adams. He said he understood that by pleading guilty, he gave up his right to claim his actions were necessary in self-defense. His trial counsel confirmed that she had reviewed the guilty plea questionnaire with Adams and that, in her opinion, Adams was pleading guilty freely and voluntarily with a knowledge of the rights that he surrendered by doing so. The circuit court found him guilty.

¶9 At sentencing, the State explained why it did not seek a prison sentence for Adams. The State acknowledged that the victim suffered serious injury and spent a long time in the hospital. Nevertheless, in light of Adams's limited contacts with the criminal justice systems in Wisconsin and in his home state of Indiana, and in light of the mayhem that preceded the shooting, the State recommended time in the House of Correction as a disposition. Adams asked the circuit court to follow the probation recommendation made by the author of the presentence investigation report. The circuit court, however, rejected these recommendations and imposed a nine-year term of imprisonment, bifurcated as five years of initial confinement and four years of extended supervision.

¶10 Adams filed a postconviction motion alleging that he was entitled to withdraw his guilty plea because the circuit court failed to advise him properly that it could disregard the plea bargain and sentence him to a maximum term of imprisonment. He also alleged that the circuit court erroneously exercised its

sentencing discretion and improperly imposed a DNA surcharge.[3] The circuit court vacated the DNA surcharge and otherwise denied relief without a hearing. Adams appeals.

DISCUSSION

¶11 A defendant who wishes to withdraw a guilty plea after sentencing must establish that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Annina***, 2006 WI App 202, ¶9, 296 Wis. 2d 599, 723 N.W.2d 708. "One way the defendant can show manifest injustice is to prove that his plea was not entered knowingly, intelligently, and voluntarily." ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482.

¶12 To help ensure that a defendant's guilty plea is knowing, intelligent, and voluntary, the circuit court must perform certain statutory and court-mandated duties on the record during the plea hearing. ***Id.***, ¶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 ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986).

¶13 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 complete its duties; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing. ***State v. Brown***, 2006 WI 100, ¶39, 293 Wis. 2d 594,

[3] Adams filed an earlier postconviction motion challenging aspects of the preliminary examination. The order denying that earlier motion is not at issue in this appeal.

716 N.W.2d 906. To make a *prima facie* showing, a defendant "must point to deficiencies in the plea hearing transcript." ***State v. Cross***, 2010 WI 70, ¶19, 326 Wis. 2d 492, 786 N.W.2d 64. If the defendant's postconviction motion fails to satisfy the twin ***Bangert*** requirements, the circuit court may deny the motion for plea withdrawal without a hearing. *See* ***State v. Brown***, 2012 WI App 139, ¶¶10-11, 345 Wis. 2d 333, 824 N.W.2d 916.

¶14 In this appeal, Adams claims that the plea colloquy was defective because, he alleges, the circuit court failed to explain adequately that the State's sentencing recommendation would not bind the circuit court. *See* ***Brown***, 293 Wis. 2d 594, ¶35 (reflecting that the circuit court has an obligation during the plea proceedings to "[e]stablish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement"). We disagree. In fact, the record reflects that the circuit court thoroughly and carefully explained to Adams at the outset of the plea proceeding that the plea bargain did not bind the circuit court and that it was free to impose a maximum sentence. Adams told the circuit court that he understood and had no questions about this consequence of his guilty plea.

¶15 Adams expressly acknowledges that, at the start of the plea hearing, the circuit court advised him "that it did not have to accept the recommendation of the State at sentencing." He nonetheless contends that the explanation he received was inadequate. He asserts that the circuit court should have conducted "a full plea colloquy immediately prior to accepting Adams's plea." At bottom, his position is that, when the circuit court reconvened to complete the plea colloquy after a recess, the circuit court was required to repeat the portions of the colloquy

conducted before the recess. We are not persuaded. No governing Wisconsin law imposes such an obligation on the circuit court.

¶16 "The ***Bangert*** requirements exist as a framework to ensure that a defendant knowingly, voluntarily, and intelligently enters his plea." ***Cross***, 326 Wis. 2d 492, ¶32. ***Bangert*** does not, however, require the circuit court to conduct a plea colloquy in a ritualized or formulaic way; to the contrary, a circuit court has considerable flexibility to conduct a plea colloquy in a manner that best suits the circumstances. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30, 32 & nn.16, 18, 317 Wis. 2d 161, 765 N.W.2d 794. "A circuit court is given discretion to tailor the colloquy to its style and to the facts of the particular case provided that it demonstrates on the record that the defendant knowingly, voluntarily, and intelligently entered the plea." ***State v. Brandt***, 226 Wis. 2d 610, 620, 594 N.W.2d 759 (1999).

¶17 In this case, the circuit court established at the beginning of the plea colloquy that Adams understood the maximum sentence he faced upon conviction and that he understood the circuit court's freedom to impose that sentence regardless of any interested party's recommendation. Adams offers no basis for concluding that this was inadequate to establish that he understood these same matters when the colloquy concluded a few hours later after a recess. We are satisfied that no such basis exists. We add that sister jurisdictions reach a similar result when faced with similar challenges to the validity of a guilty plea. *See* ***People v. Sharifpour***, 930 N.E.2d 529, 543 (Ill. App. Ct. 2010) (trial court need not repeat admonishments given at outset of plea hearing when plea hearing is temporarily interrupted by a recess lasting several hours); ***State v. Topasna***, 16 P.3d 849, 865 (Haw. Ct. App. 2000) (no error when trial court did not begin plea colloquy anew after a recess to permit defendant to discuss his situation with

counsel); *see also* ***State v. Currier***, 758 A.2d 818, 822-23 (Vt. 2000) (defendant's argument that trial court erred by failing to repeat advisements given during colloquy conducted a week earlier "exalts ritual over reality").

¶18 In sum, we reject the contention that Adams satisfied the first prong of a ***Bangert*** motion for plea withdrawal. The record does not show that the circuit court failed to fulfill its obligations during the plea colloquy here. Accordingly, the circuit court did not err by denying his motion for plea withdrawal without a hearing.

¶19 Adams next asserts that the circuit court "erroneously exercised its discretion when it imposed a sentence substantially greater than the sentence recommended by the State and [the] presentence investigation." Relatedly, he contends that his sentence was unduly harsh. Again, we disagree.

¶20 Our standard of review is well settled. Sentencing rests within the circuit court's discretion, and we review a sentence to determine whether the circuit court properly exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "[T]he defendant bears the heavy burden of showing that the circuit court erroneously exercised its discretion." ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409.

¶21 The circuit court must identify "the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. The circuit court "must also identify the factors that the court considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d

76. The circuit court must consider the primary sentencing factors, which are "the gravity of the offense, the character of the defendant, and the need to protect the public." ***Id.*** The court may also consider numerous other factors, including:

> (1) [p]ast record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Gallion, 270 Wis. 2d 535, ¶43 & n.11 (citation and quotation marks omitted). The court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶22 The sentence that the circuit court selects should reflect "'the minimum amount of custody' consistent with the appropriate sentencing factors." ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483 (citation and one sets of quotation marks omitted). In determining the necessary amount of custody, the circuit court "must navigate the fine line between what is clearly too much time behind bars and what may not be enough." ***Id.*** We will sustain the circuit court's sentencing decision "if the conclusion reached by the [circuit] court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion." ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶23 The circuit court here thoroughly discussed the primary sentencing factors and numerous other factors as well. The circuit court determined that

Adams "seriously [and] substantially" injured Wynn by shooting him in the chest. As the State pointed out, Adams was "lucky that Mr. Wynn did n[o]t die." The circuit court considered Adams's character, focusing on his difficulties with self-control and noting that Adams himself, when addressing the court, acknowledged the need for help in managing his anger. The circuit court observed: "[t]he presentence report as well as this Gary Community School Corporation report go into great detail of some times that Mr. Adams has gotten himself in trouble because of anger issues." In this regard, the circuit court took into account that, although Adams had no prior criminal record, he had "violent or disruptive ... municipal court cases, in 2008, 2009, and 2010, all together four of them." Additionally, the circuit court recognized that Adams was only twenty-one years old and that he had family support, but the circuit court also considered that he had not completed his GED and that he had no work history as an adult.

¶24 The circuit court discussed the need to protect the public, noting that Adams had received services as a juvenile, including residential treatment, and the circuit court described as "key" that Adams "has had numerous, repeated, continual, ongoing opportunities for correction, for counseling." In the circuit court's assessment, Adams's history suggested reason to question "his ability to deal with stress in a nonviolent way."

¶25 The circuit court selected protection of the public and deterrence as the primary goals of the sentence. The circuit court determined that "a lot of people ... have been trying to help [Adams] all along the way," and that Adams "should have known better" than to shoot someone during a dispute. The court emphasized that it could not "risk that [happening] again." Further, the circuit court explained: "[e]very single night guns are going off.... [P]eople in our neighborhood[s] don't deserve it. The peace-loving people do not deserve it, and

someone has to send a message that we are not putting up with it." The circuit court concluded that, to meet the sentencing goals in this case, Adams must serve five years of initial confinement and four years of extended supervision.

¶26 On appeal, Adams complains that the circuit court "greatly exceeded" the recommendations of the State and the presentence investigator. In his view, "it was quite improper for the [circuit] court to disagree" with the assessments reflected in the presentence investigation report. He shows no error. The recommendations of the parties and the presentence author may be helpful to the court at sentencing, but "[t]he recommendations of the prosecutor, defense counsel, victim and presentence investigation report author are nothing more than recommendations which a court is free to reject." ***State v. Bizzle***, 222 Wis. 2d 100, 105 n.2, 585 N.W.2d 899 (Ct. App. 1998). The circuit court explained here that it had considered all of the recommendations presented to it, but that it declined to follow them in light of the sentencing factors and goals. Because the circuit court relied on relevant factors and selected appropriate goals when fashioning a sentence in this case, we cannot agree with Adams that the circuit court erroneously exercised its sentencing discretion.

¶27 Moreover, we cannot agree with Adams that the sentence was unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). The nine-year sentence imposed was significantly less than the maximum penalties of ten years of imprisonment and a $25,000 fine that he faced upon conviction of the reduced charge. Accordingly, the sentence was presumptively not unduly harsh.

See ***id.***, ¶32. Adams fails to overcome the presumption here. His sentence is neither shocking nor disproportionate in light of the gravity of the offense and the risk he poses to the community. For all of these reasons, we affirm.

By the Court.—Judgment and order affirmed.

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