COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0410-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VAN L. SCHWARTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: LEWIS MURACH, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Van Schwartz appeals from an order denying his postconviction motion to withdraw his guilty plea. Schwartz contends that there was no factual basis to support a guilty plea because the record does not establish guilt beyond a reasonable doubt. We conclude that the record does not need to establish guilt beyond a reasonable doubt for the court to accept a guilty plea; the

record simply must show strong proof of guilt. We are satisfied that the record contains strong proof of guilt. We therefore affirm.

FACTS

In July 1993, Van Schwartz, two of his brothers, and a fourth man attacked James Crochiere at a party in Stevens Point, Wisconsin. During the attack, Crochiere suffered deep cuts to his scalp and right forearm. Van Schwartz told a police officer that he hit Crochiere twice in the face and that he "held [Crochiere] on the couch with his hand and hit him as many as six times." Schwartz also stated that other people hit and punched Crochiere while he was holding Crochiere down.

Crochiere's cuts could have come from three different sources. Van Schwartz was seen holding a knife earlier in the evening, and Crochiere told the police that he remembered looking up and seeing Van Schwartz holding a "shiny silver" object during the attack. Tyrone Schwartz stated that he was holding a broken beer bottle when he hit Crochiere, but he did not remember hitting Crochiere with the bottle. Terrill Schwartz told a third party that he was the one who had cut Crochiere. Witnesses identified all three of them as individuals that attacked Crochiere.

Schwartz was charged with being party to the crime of aggravated battery while armed, as a repeat offender. He entered into a plea agreement in which the repeater allegation was dropped. The trial court accepted the guilty plea, and Schwartz was convicted and sentenced to twelve years in prison.

Schwartz filed a motion for postconviction relief. In his memorandum in support of the motion, he asserted that there was no factual basis

for his guilty plea and that he was denied due process of law. The trial court denied Schwartz's motion, and Schwartz appeals.

STANDARD OF REVIEW

A postconviction motion to withdraw a guilty plea is only granted to correct a manifest injustice. ***State v. Johnson***, 207 Wis.2d 239, 244, 558 N.W.2d 375, 377 (1997). The defendant has the burden of proof of showing a manifest injustice by clear and convincing evidence. ***Id.*** A manifest injustice occurs when a trial court fails to establish a sufficient factual basis for accepting a guilty plea. ***Id.*** Determining whether a sufficient factual basis exists is within the discretion of the trial court and will not be overturned unless there has been an erroneous exercise of discretion. ***Id.***

FACTUAL BASIS FOR THE PLEA

Schwartz contends that there was no factual basis for the guilty plea as it relates to the dangerous weapon penalty enhancer. First, Schwartz argues that there was an insufficient factual basis for his guilty plea, because the record does not prove him guilty beyond a reasonable doubt.

Proof of guilt in a plea bargain is not the equivalent of proof beyond a reasonable doubt. ***State v. Spears***, 147 Wis.2d 429, 435, 433 N.W.2d 595, 598 (Ct. App. 1988). For a negotiated guilty plea, a court "need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***State v. Smith***, 202 Wis.2d 21, 25, 549 N.W.2d 232, 234 (quoting ***Broadie v. State***, 68 Wis.2d 420, 423-24, 228 N.W.2d 687, 689 (1975)). The trial court must examine the facts and be satisfied that the defendant voluntarily entered into the plea and that "the facts, if proven, would constitute the

crime charged and that the defendant's conduct does not amount to a defense." ***State v. Harrell***, 182 Wis. 2d 408, 418, 513 N.W.2d 676, 680 (Ct. App. 1994). Therefore, proof beyond a reasonable doubt is not necessary when a guilty plea is entered.

Schwartz next argues that the record does not provide a sufficient basis to show that he used a dangerous weapon. We reject this argument because the State only needed to show that Schwartz was a party to a crime involving a dangerous weapon, not that Schwartz used a dangerous weapon.

A factual basis may be established through testimony of witnesses, reading of police reports, or statements of evidence by the prosecutor. ***White v. State***, 85 Wis.2d 485, 490, 271 N.W.2d 97, 99 (1978). On review, this court considers "the whole record since the issue is no longer whether the guilty plea should have been accepted, but rather whether there was an [erroneous exercise] of discretion in the trial court's denial of the motion to withdraw." ***Id.*** at 491, 271 N.W.2d at 100 (citation amended to reflect current standard).

Party to a crime liability extends to the "natural and probable consequences of an intended crime." ***State v. Hecht***, 116 Wis.2d 605, 624, 342 N.W.2d 721, 731 (1984). If a crime is unintended, but it is the natural and probable consequence of an intended crime, the statute provides that all parties to the intended crime are legally accountable. ***Id.***

In ***State v. Ivy***, 119 Wis.2d 591, 350 N.W.2d 622 (1984), the supreme court concluded that, depending on the facts and circumstances of a given case, an armed robbery can be a natural and probable consequence of a robbery. ***Id.*** at 600, 530 N.W.2d at 627. In ***Ivy***, the supreme court held that the defendant, as party to a crime, did not have to have actual knowledge of the use of a

dangerous weapon. ***Id.*** The supreme court noted that robbery is a violent crime and that there are a numerous situations in which armed robbery would be a natural and probable consequence of robbery. ***Id.*** at 601, 530 N.W.2d at 623. In such situations, a defendant should be on notice of the possibility of the use of a weapon in the commission of the crime. ***Id.***

Crochiere received severe cuts to his scalp and his forearm. Schwartz admits to hitting Crochiere in the face multiple times, and that while he was hitting Crochiere, others were also hitting Crochiere. Given the context of a violent group attack, Schwartz should have been on notice that others might use a dangerous weapon when striking Crochiere. Based on information contained in the record, we conclude that there was a sufficient factual basis to support the guilty plea. Therefore, the trial court's finding to that effect was not an erroneous exercise of discretion.

DUE PROCESS

Schwartz also argues that because the prosecutor "testified as an expert" during his sentencing as to the severity of Crochiere's injuries, he was denied due process of law. Schwartz cites no authority for his argument. We will not consider arguments unsupported by citations to legal authority. ***State v. Schaffer,*** 96 Wis.2d 531, 546, 292 N.W.2d 370, 378 (Ct. App. 1980). Accordingly, we decline to address Schwartz's argument.

By the Court.—Order affirmed.

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