COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1754-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMIE S. GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Tommie S. Gray appeals pro se from a judgment of conviction of eluding a police officer, first-degree recklessly endangering safety as a habitual criminal, and obstructing a police officer, and from an order denying his postconviction motion to withdraw his plea. Gray argues that for various reasons, including deficient trial counsel, he should be permitted to withdraw his guilty

plea to the charge of first-degree recklessly endangering safety and that he was entitled to an evidentiary hearing on his postconviction motion. We affirm the judgment and the order.

Gray was observed driving at an excessive speed on an interstate highway. He stopped his vehicle in response to the state trooper's signal to pull over, but he sped away as the trooper approached his vehicle. A chase ensued during which Gray operated his vehicle at speeds in excess of 100 miles per hour, wove in and out of 4:00 p.m. traffic, and passed on the right-hand shoulder. Eventually, Gray pulled over and fled on foot.

In order to withdraw a guilty plea after sentencing, a defendant must show that a manifest injustice would result if the withdrawal were not permitted. *See* ***State v. Booth***, 142 Wis.2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987). The defendant bears the burden to establish manifest injustice by clear and convincing evidence. *See* ***id.*** at 237, 418 N.W.2d at 22. A motion to withdraw a plea is addressed to the trial court's discretion and we will reverse only if the trial court has failed to properly exercise its discretion. *See* ***id.***

Ineffective assistance of counsel is a recognized factual scenario that could constitute "manifest injustice." *See* ***State v. Washington***, 176 Wis.2d 205, 213-14, 500 N.W.2d 331, 335 (Ct. App. 1993). Determining whether a defendant who has entered a plea has been denied effective assistance of counsel requires the application of a two-part test. *See* ***State v. Littrup***, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct. App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *See* ***id.*** If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense. *See* ***id.*** To prove prejudice, the defendant

must show there is a reasonable probability that, but for counsel's errors, he or she would not have pled to the charges and would have insisted on going to trial. *See* ***State v. Harvey***, 139 Wis.2d 353, 378, 407 N.W.2d 235, 246 (1987).

The standard of review we utilize for determining whether trial counsel's conduct was ineffective is a mixed question of fact and law. *See* ***id.*** at 376, 407 N.W.2d at 245. The trial court's findings of what counsel did or did not do and the basis for the challenged conduct are findings of fact that will be upheld unless they are clearly erroneous. *See* ***id.*** However, whether counsel's conduct deprived the defendant of the effective assistance of counsel is a question of law that we review without deference to the trial court. *See* ***id.***

Gray claims that trial counsel was ineffective in advising him to enter a guilty plea without informing him that intent to do harm was an element of the offense of first-degree recklessly endangering safety.[1] This claim, as well as many of Gray's other claims for plea withdrawal, rests on his belief that because he did not intend to harm any person and no one was harmed, he lacked the requisite intent to be found guilty of first-degree recklessly endangering safety.

There are three elements to the offense of first-degree recklessly endangering safety under § 941.30(1), STATS: (1) the defendant endangered the safety of another human being (2) by criminally reckless conduct and (3) that the circumstances of his or her conduct showed utter disregard for human life. *See*

[1] Gray specifically contends that trial counsel failed to advise him of the elements of the offense, counsel failed to research the elements of the offense, counsel ill-advised him to plead guilty, counsel failed to "pre-try" the case with the prosecution, counsel was irresponsible in missing court dates and not keeping him apprised of the status of the case, counsel was dishonest, counsel attempted to get another attorney to attend the plea hearing, counsel allowed personal problems to interfere with counsel's representation of Gray, and counsel failed to file a notice of intent to file an appeal.

State v. Holtz, 173 Wis.2d 515, 518, 496 N.W.2d 668, 669 (Ct. App. 1992). There is no requirement that the defendant intended harm to anyone. *See* ***State v. Kanarowski***, 170 Wis.2d 504, 510, 489 N.W.2d 660, 662 (Ct. App. 1992).

Gray misreads ***State v. Dolan***, 44 Wis.2d 68, 72, 170 N.W.2d 822, 824 (1969), as holding that a general "intention to do harm" is an element of the offense of first-degree recklessly endangering safety. The description of the offense in ***Dolan*** has been considered overbroad and not specifically related to the "depraved mind" element which is equated with the third element noted above—that the defendant's conduct showed utter disregard for human life.[2] *See* ***Wagner v. State***, 76 Wis.2d 30, 47, 250 N.W.2d 331, 341 (1977). Indeed the "depraved mind" element does not

> require the existence of a[ny] particular state of mind in the actor at the time of the crime but only requires that there be conduct imminently dangerous to human life, which conduct evinces a depraved mind. The qualities of conduct which render it imminently dangerous and evincing a depraved mind regardless of life are to be found in the conduct itself *and* in the circumstances of its commission. [T]he only intent necessary for the purposes of establishing the element of "depraved mind" is the intent to do the act and not the intent to cause any harm.

State v. Blanco, 125 Wis.2d 276, 281, 371 N.W.2d 406, 409 (Ct. App. 1985) (quoted sources omitted).

Moreover, ***Dolan*** itself approved of the then-existing standard jury instruction, WIS J I—CRIMINAL 1345, which illustrates that the elements are not

[2] The earlier statutory provision proscribed endangering the safety of another by "conduct imminently dangerous to another and evincing a depraved mind, regardless of human life." Section 941.30, STATS., 1985-86. The present requirement in § 941.30(1), STATS., that the circumstances of the conduct show utter disregard for human life is analogous to the former depraved mind element. *See* ***State v. Holtz***, 173 Wis.2d 515, 519 n.2, 496 N.W.2d 668, 670 (Ct. App. 1992).

focused on the defendant's internal state of mind but rather simply on what he or she did. *See* ***Blanco***, 125 Wis.2d at 281, 371 N.W.2d at 409. The approved instruction provided in part:

> The depravity of mind referred to exists when the conduct endangering the safety of another demonstrates an utter lack of concern for the life and safety of another and for which conduct there is no justification or excuse. It is not necessary that there be an intent to endanger the safety of another, but it is sufficient if the safety of another is endangered by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life.

Dolan, 44 Wis.2d at 74 n.2, 170 N.W.2d at 825.

Inasmuch as a general intent to do harm is not an element of the offense of first-degree recklessly endangering safety, Gray's trial counsel was not deficient by not suggesting that Gray lacked the requisite intent to be convicted if the matter had gone to trial. Trial counsel did not render assistance under a mistaken view of the law.[3]

Gray's other claims of ineffective counsel are that counsel failed to appear at several status hearings, failed to keep in touch with Gray, allowed personal problems to interfere with his representation, and failed to negotiate with the prosecution. Although Gray suggests that his confidence in his attorney was undermined, he has not demonstrated that had counsel appeared and been in more frequent contact that Gray would have insisted on going to trial. Indeed, it was Gray himself who indicated to the court his desire to enter a guilty plea in order to "get this over with." Gray, aware of and apparently unhappy about the alleged inattentiveness of trial counsel, indicated a desire to proceed pro se but he did not

[3] Trial counsel's remark at sentencing that Gray had not intended any harm was merely argument of mitigating circumstances.

follow through on the request. Rather, Gray entered his guilty plea. There is no connection between the alleged deficiencies of trial counsel and Gray's decision to enter a guilty plea.[4]

Gray contends that his plea was not properly entered because he denied an element of the offense—an intent to do harm.[5] We have already explained that an intent to do harm is not an element of the offense of first-degree recklessly endangering safety.[6] The trial court was not obligated to reject Gray's plea because he denied any intent to harm anyone. Nor did the trial court's failure to ascertain Gray's understanding that an intent to harm was an element of the offense render the plea colloquy inadequate. Gray's alleged failure to understand

[4] Gray's contention that trial counsel was deficient for failing to file a notice of intent to pursue postconviction relief is patently without merit. Even if counsel failed to act, Gray was not denied his appeal and was not prejudiced.

[5] Whether a plea was correctly entered is a question of constitutional fact and is examined independently on appeal, while the trial court's findings of historical fact will not be reversed unless contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Kywanda F.***, 200 Wis.2d 26, 42, 546 N.W.2d 440, 448 (1996).

[6] With respect to this claim, Gray cites ***State v. Stuart***, 50 Wis.2d 66, 72, 183 N.W.2d 155, 158 (1971), as requiring proof of an intent to do harm. The statement of the elements in ***Stuart***, like the intent to harm reference in ***State v. Dolan***, 44 Wis.2d 68, 72, 170 N.W.2d 822, 824 (1969), was overly broad. *See* ***Wagner v. State***, 76 Wis.2d 30, 47, 250 N.W.2d 331, 340 (1977).

a nonexistent element of the offense is of no consequence to the validity of the plea.[7]

Finally, that Gray denied an intent to harm anyone did not negate a factual basis for his plea. The complaint was used as a factual basis for Gray's plea. It establishes that by fleeing police at an excessive speed on a public interstate highway, weaving between other vehicles and passing on the shoulder, Gray engaged in criminally reckless conduct which endangered the safety of others and showed a disregard for human life. It is ridiculous to suggest that Gray did not act in disregard for human life because he slowed down periodically to save himself from collision and eventually pulled off the road rather than slamming into another police car in an attempt to pass. Prior to such action, Gray's conduct had already crossed the threshold for endangering safety. *See* ***Holtz,*** 173 Wis.2d at 520, 496 N.W.2d at 670 (voluntary desistance after conduct

[7] We acknowledge that during the plea colloquy the trial court did not review the elements of the offense with Gray and that the guilty plea questionnaire and waiver of rights form did not list the elements. Thus, Gray may have established a prima facie showing that the proper procedures were not followed at his plea hearing. *See* ***State v. Hansen***, 168 Wis.2d 749, 756, 485 N.W.2d 74, 77 (Ct. App. 1992). However, Gray only suggests that he did not understand the intent to harm element—a nonexistent element of the offense. (Gray's reply brief may be read to raise, for the first time, a claim that he did not understand any of the elements of the offense. We will not address an issue raised for the first time in a reply brief and not raised in the trial court. *See* ***State v. Caban***, 210 Wis.2d 597, 605, 563 N.W.2d 501, 505 (1997)). So even if the burden shifted to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered, *see* ***Hansen,*** 168 Wis.2d at 754-55, 485 N.W.2d at 76-77, as a matter of law the plea was not invalid by Gray's failure to understand a nonexistent element.

which has shown no regard for life does not negate elements of the offense). The factual basis was adequate to establish the elements of the offense.[8]

Gray argues that the trial court erred in denying his request to proceed pro se. Apparently Gray contends that because he was forced to proceed with previously retained counsel, he could not make the choice to proceed to trial and, therefore, his plea was involuntary.

When presented with Gray's request to proceed pro se, the trial court attempted to impress upon Gray the seriousness of the charges. The trial court "strongly encourage[d]" Gray to obtain representation. The court required Gray to at least contact the state public defender's office to see if representation would be made available to him. The court indicated that Gray's request to proceed pro se would be taken up after that contact was made. Although Gray wrote the court a letter again requesting to proceed pro se, Gray did not renew his request at the hearing at which he appeared with trial counsel and entered his guilty plea.

The trial court's decision to defer Gray's request to proceed without counsel was in line with its obligation to make sure the defendant is making a deliberate choice to proceed without counsel and is apprised of the difficulties and disadvantages of self-representation. *See* ***State v. Klessig***, 211 Wis.2d 194, 205-06, 564 N.W.2d 716, 721 (1997). Because Gray expressed an interest in self-

[8] Gray argues that because the trial court erroneously assumed there was a plea agreement, he has demonstrated the mere perfunctory nature of the plea colloquy. The trial court was apprised that there was no actual plea agreement. When it questioned Gray about his understanding of what the State represented would be its sentencing recommendation the trial court did not demonstrate any confusion. Whether or not there was a negotiated plea ultimately has no bearing on the trial court's function. *See* ***State v. Comstock***, 168 Wis.2d 915, 927, 485 N.W.2d 364, 368 (1992) ("Circuit courts in this state may not involve themselves in the plea agreement process and are not bound by any plea agreement between a prosecutor and a defendant.").

representation only after his retained counsel failed to appear, it was not clear whether Gray really wanted to proceed pro se or if he just felt he had no representation options. Requiring Gray to contact the state public defender to see if another attorney would be available was reasonable. Also, given the potential disadvantages of self-representation, it was reasonable for the trial court to require Gray to consider his decision further. It was not error to defer deciding Gray's request to proceed pro se. Gray did not raise the issue on the day he entered his plea and it was waived.[9] *See* ***State v. Aniton***, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App 1994).

We conclude that Gray has failed to establish that a manifest injustice would result if he is not allowed to withdraw his plea. Consequently, the trial court properly denied Gray's motion without conducting an evidentiary hearing because the record conclusively demonstrates that Gray is not entitled to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996).

By the Court.—Judgment and order affirmed.

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

[9] In any event, Gray attained the result he wanted by his request to proceed pro se—a disposition of his case by a guilty plea so that the case would be over with.