COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1531-CR **Cir. Ct. No. 2009CF1349**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENNIS B. REYNOLDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Lennis Reynolds appeals from a judgment convicting him of first-degree recklessly endangering safety and from an order denying his postconviction motion. We reject his contention that he should have been allowed to withdraw his guilty plea on grounds that the court did not explain

or personally address him regarding his understanding of the nature of the offense, the elements sheet defense counsel attached to the plea questionnaire did not explain the "concept" of criminally reckless conduct, and the criminal complaint did not provide a factual basis for his plea. We affirm the judgment and order.

¶2 An information charged Reynolds with attempted first-degree intentional homicide by use of a dangerous weapon as a repeater and party to a crime of delivery of marijuana, second or subsequent offense. The complaint alleged that Michael L. Williams was shot in the chest in a Wal-Mart parking lot and transported to the hospital in critical condition, that the shooter fled the scene in a vehicle with a license plate listed to Reynolds, and that a witness positively identified Reynolds from a photo line-up as the shooter.

¶3 The parties negotiated a plea agreement.[1] The court permitted Reynolds an adjournment of a week beyond the original plea hearing date to allow defense counsel, Attorney Dirk Jensen, additional time to meet with Reynolds, who still had questions. Reynolds ultimately pled no contest to an amended charge of first-degree recklessly endangering safety, without the penalty enhancer; the marijuana count was dismissed and read in. Calling the offense "absolutely outrageous" for involving the public in private drug-dealings and unable to " think of one mitigating factor," the court imposed the maximum twenty-five-year sentence.

[1] A separate criminal complaint charged Reynolds with two counts of delivery of cocaine as a repeater. Per the plea agreement, he also would plead guilty to one count without the penalty enhancer. The cocaine delivery conviction is not at issue in this appeal.

¶4 Postconviction, Reynolds moved to withdraw his guilty plea on grounds that the plea colloquy was defective.[2] He alleged that the court did not explain the "essential nature" of the offense to him during the plea colloquy or ask him if he understood the elements but simply relied on Jensen's statement that Jensen had reviewed them with him. He alleged that he entered his plea without understanding the concept of criminally reckless conduct.

¶5 At the evidentiary hearings on the motion, Jensen testified that despite not having a specific memory of all of their conversations, his notes reflected having met with Reynolds eleven times, several meetings lasting at least an hour. He said he "would have explained" criminally reckless conduct to Reynolds because "[t]here are a lot of things that aren't on an element sheet that—or on the plea questionnaire that you go into more detail and discuss with clients when they have questions or to make it more clear to them." He testified that Reynolds was not shy about asking questions. Jensen described his standard procedure:

> I usually continue to ask people if they have any questions, if they understand, if—if there's something that's not clear. That's just a practice I have with all [clients] from like a disorderly conduct on up. So I would have inferred if he wasn't asking a lot of questions from there, the inference to me would have been that he understood what was going on.

[2] Reynolds's first appointed postconviction counsel filed a no-merit report. This court rejected the report and directed counsel to consider whether to file a motion to withdraw Reynolds's no-contest plea on grounds of a defective plea colloquy. Reynolds's motion in that regard was denied after a hearing. Reynolds appealed. While the appeal was pending, current appellate counsel was appointed. Reynolds successfully moved to voluntarily dismiss the appeal and reinstate his original postconvicton/appellate rights. Reynolds then filed the underlying motion to withdraw his guilty plea.

¶6 Reynolds testified to the contrary. He claimed Jensen "never explained anything" to him, including the plea questionnaire or elements of the offense, and "never told me that by me pleading no contest, that I was giving up my rights." Reynolds asserted that he never saw the element sheet, did not understand the concept of criminal recklessness, met with Jensen "probably about two to four times" for only a few minutes, after which Jensen would turn his "attention to other people … in the pod area," and did not understand that a no-contest plea would result in a finding of guilt. While he acknowledged having entered no-contest pleas to past crimes, he testified that he had no understanding of what they meant.

¶7 The trial court found that the State met its burden of proving that Reynolds understood the nature of the offense. The court concluded that Reynolds knowingly, intelligently, and voluntarily entered his no-contest plea to first-degree reckless injury, as Jensen's testimony about his usual procedures and the details of his meetings with Reynolds was credible evidence that Reynolds was well advised of and clearly understood the elements of the charge. *See* ***State v. Hoppe***, 2008 WI App 89, ¶¶24-25, 312 Wis. 2d 765, 754 N.W.2d 203 (citations omitted), *aff'd*, 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794 (the State may use any evidence to satisfy its burden, including evidence of counsel's standard practice).

¶8 The court also found that the complaint contained sufficient detail to serve as a proper factual basis for finding that Reynolds acted in a criminally reckless manner. Reynolds "caused great bodily harm to another person at Wal-Mart during normal business hours. The time, location, and circumstances of the incident provide a factual basis for finding that Reynolds acted in a criminally reckless manner with utter disregard for human life." The court denied Reynolds's motion to withdraw his plea. Reynolds appeals.

¶9 A defendant who seeks to withdraw a plea after sentencing has the burden to prove by clear and convincing evidence that a manifest injustice would result if the withdrawal were not permitted. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea, rendering it unknowing, involuntary, and unintelligently entered. ***State v. Dawson***, 2004 WI App 173, ¶6, 276 Wis. 2d 418, 688 N.W.2d 12.

¶10 When accepting a no-contest plea, WIS. STAT. § 971.08(1) (2013-14)[3] requires trial courts to address the defendant personally and determine that the plea is made voluntarily with an understanding of the nature of the charge and the potential punishment if convicted. ***State v. Garcia***, 192 Wis. 2d 845, 865, 532 N.W.2d 111 (1995). When a defendant alleges a lack of knowledge or understanding of the information that should have been provided at the plea hearing and shows that the trial court failed to follow the procedures necessary to properly accept a plea, he or she has made a prima facie case that the plea was not knowingly and voluntarily entered. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

¶11 Once a prima facie case is made, the burden shifts to the State to show by clear and convincing evidence that the plea was entered knowingly and voluntarily despite the procedural defect. ***Id.*** The State can look to the entire record, including testimony taken at the postconviction motion hearing, to meet its burden to show that the defendant entered a valid plea. *See* ***Garcia***, 192 Wis. 2d at

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

865-66 (entire record); ***State v. Jipson***, 2003 WI App 222, ¶¶11-12, 267 Wis. 2d 467, 671 N.W.2d 18 (postconviction motion hearing).

¶12 During the plea colloquy here, the trial court did not itself summarize the elements, ask Jensen to summarize his explanation to Reynolds or reiterate the elements, or expressly refer to the record or other evidence of Reynolds's prior knowledge of the nature of the charge. *See* ***Bangert***, 131 Wis. 2d at 268 (citations omitted). But a violation of WIS. STAT. § 971.08 by itself is not constitutionally significant. ***Garcia***, 192 Wis. 2d at 865. The record contains clear and convincing evidence from the evidentiary hearings held on Reynolds's postconviction motion that Jensen thoroughly discussed with Reynolds the nature of first-degree reckless injury before he entered his plea. Jensen testified about numerous meetings at which he carefully reviewed the elements of the offense, the potential penalties, and the plea questionnaire and that he answered Reynolds's questions and verified Reynolds's understanding.

¶13 A trial court's determinations of what an attorney did or did not do, and the basis for the challenged conduct are factual determinations that will be upheld unless they are clearly erroneous. *See* ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The weight of the testimony and the credibility of the witnesses is a matter for the trial court. ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736.

¶14 After both counsel and Reynolds testified, the trial court found Jensen's testimony to be more credible than Reynolds's conflicting testimony. It found that Jensen conferred with Reynolds and that Reynolds understood the elements and freely and intelligently entered his no-contest plea. It was not required to accept Reynold's self-serving claim that Jensen abandoned his usual

practice of explaining the nature of the crime and ascertaining his client's understanding. Reynolds has not established that the court's credibility determination is clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶15 Reynolds's overarching protest that he was not advised of the "concept" of criminally reckless conduct fails. Going through the elements is explaining the concept. The record supports the trial court's factual determination that Jensen did that and that Reynolds understood.

¶16 Reynolds next asserts that the court failed to establish on the record that there was a sufficient factual basis for his no-contest plea. He argues that, as the court relied wholly on the criminal complaint at the plea hearing, and the complaint does not allege the circumstances under which he fired the shot that injured the victim, no inference may be drawn that he engaged in criminally reckless conduct. We disagree.

¶17 A manifest injustice occurs when the trial court fails to establish a factual basis for the plea. ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836. When applying the manifest injustice test, a reviewing court may look to the totality of the circumstances. ***Id.***, ¶18. This includes the records of the plea and sentencing hearings, other portions of the record, and defense counsel's statements. ***Id.***

¶18 "The elements of first-degree reckless injury are 1) the defendant caused great bodily harm to another human being, 2) by criminally reckless conduct, and 3) under circumstances which show utter disregard for human life. WIS JI—CRIMINAL 1250; WIS. STAT. § 940.23(1)." ***State v. Jensen***, 2000 WI 84, ¶10 n.2, 236 Wis. 2d 521, 613 N.W.2d 170. The criminal complaint states that Reynolds shot Williams in the chest, critically injuring him. A police investigator

testified at the preliminary hearing that the bullet "grazed [Williams's] lung and penetrated through his body"; that Williams was hospitalized for a week to ten days; that Reynolds explained that he agreed to meet Williams in the Wal-Mart parking lot to repay Williams money owed on previous drug deals; that, upon learning that Reynolds brought only $300 of the $1000 owed, Williams drew a gun and demanded full payment; that Williams lowered the gun when a customer walked by; that Reynolds grabbed it, turned it all the way around, and it went off; and that Reynolds fled, came back for his backpack, and fled again. The officer opined that Williams's chest wound did not comport with Reynolds's explanation.

¶19 Even accepting Reynolds's account, the record permits a finding that he engaged in conduct satisfying the elements of first-degree reckless injury—causing great bodily harm by criminally reckless conduct under circumstances showing utter disregard for human life, both Williams's and others'. He agreed to an early afternoon drug-related deal in a busy store parking lot, engaged in a struggle for a gun with innocent people nearby, and fled twice without giving aid or seeking help for Williams's chest wound. Plea withdrawal was properly denied.

By the Court.—Judgment and order affirmed.

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