COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2596-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL E. HAWKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washburn County: THOMAS J. GALLAGHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Paul Hawkins appeals a judgment convicting him of first-degree intentional homicide, party to a crime, entered upon his guilty plea. He also appeals an order denying him postconviction relief. Hawkins argues that his guilty plea was not knowingly, voluntarily and intelligently entered because he

was not adequately informed of the nature of the charges. We reject his argument and affirm the judgment and order.

FACTS

¶2 Hawkins and two accomplices burglarized the Larry and Bonnie Meier residence in Washburn County, looking for guns, money and jewelry. The Meiers were not home at the time of the burglary. While Hawkins and accomplice Ernest Halford (a/k/a Edward Rollins) were in the home, Peter Barton, a sixty-one-year-old neighbor, drove into the driveway. Hawkins picked up a loaded .357 magnum handgun that he had found in the bedroom and walked outside with Halford to encounter the neighbor. When Barton said he was a friend who was watching the place, Hawkins held the handgun against Barton's throat. Barton showed no fear, which upset Hawkins.

¶3 At this point, Hawkins removed the gun from under Barton's chin, held it at his side pointing it down and started clicking the hammer. According to Hawkins' statement, the gun accidentally discharged into the ground. Halford took the gun from Hawkins and said, "Let's walk." With Barton in front and Hawkins to the rear, the three walked to a wooded area behind the residence. According to Hawkins, Halford carried a rope and the gun.

¶4 Halford then tied Barton to a tree. Hawkins stated that as he turned away, he heard a gunshot. He looked back, and Barton was slightly slumped over. Hawkins was about ten feet away. Hawkins looked away and heard a second shot. When he turned to look back, Barton was farther slumped over. Hawkins and Halford returned to their stolen Cadillac where the second accomplice, Dawn Hugg, was waiting.

¶5 The three returned to Hugg's St. Paul, Minnesota, apartment where they unloaded their stolen property. Hawkins took the empty casings out of the gun, wiped them off and threw them in some bushes across from Hugg's apartment. Barton died as a result of being shot twice in the head. His body was discovered by Larry Meier when he returned home later that day.

PROCEDURAL BACKGROUND

¶6 A criminal complaint was issued charging Hawkins with first-degree intentional homicide, armed burglary, burglary, felony theft of a firearm and felony theft, all as party to a crime. At his initial appearance, the trial court read aloud to Hawkins the criminal complaint in its entirety. The court advised Hawkins that count one charged Hawkins with "intentionally and unlawfully and feloniously caus[ing] the death of another human being, i.e., Peter Barton, with the intent to kill him as a party thereto, contrary to 939.05 (1) and 940.01 (1) of the Wisconsin Statutes."

¶7 Pursuant to plea negotiations conducted after a jury trial had commenced, Hawkins pled guilty to first-degree intentional homicide, party to a crime, in exchange for the State's dismissal of the other four counts. The dismissed charges were read in at sentencing. Hawkins was sentenced to life in prison with a parole eligibility date thirty years from sentencing.

¶8 At Hawkins' plea hearing, the court stated that count one of the information charged that Hawkins "did intentionally and unlawfully and feloniously cause the death of another human being, i.e., Mr. Peter Barton, with the intent to kill him as a party thereto, contrary to Sections 939.05 (1) and 940.01 (1) of the Wisconsin Statutes." In response to the court's questions, Hawkins stated that he read and understood the plea questionnaire form and

discussed it with defense counsel. It described the elements of the charge as "[a]ided or abetted or assisted in the intentional causing of the death of Peter Barton." He said that he had enough time to talk with his lawyer and was satisfied with the legal representation he had received. Hawkins and his attorney signed the form.

¶9 Hawkins' attorney advised the judge that he conferred with Hawkins on a number of occasions and discussed the plea for hours. Defense counsel advised the court that he was satisfied that Hawkins understood the elements of the charge and the entire contents of the plea questionnaire, which had been read and explained to him. The trial court determined that Hawkins' plea was knowingly and voluntarily made and found Hawkins guilty.

¶10 After sentencing, Hawkins moved the court to permit him to withdraw his guilty plea on the grounds that his plea was not knowingly and voluntarily made.[1] He claimed that "[n]either his said trial attorney, nor the Court, nor anyone else, at any time, prior to the taking of his plea and the entry of judgment of conviction and sentence thereon, advised or informed the defendant with respect to the elements of the offense" and, as a result, he was ignorant of those elements. Hawkins also alleged that neither the Court nor anyone else engaged him "in the personal colloquy necessary to assure that his plea was given freely and knowingly."

¶11 The trial court denied Hawkins' postconviction motion. The court observed that the plea hearing occurred on the third day of trial. The court noted

[1] Because on appeal Hawkins does not challenge the effectiveness of trial counsel, we do not address that alternative basis for his motion.

that it had personally advised Hawkins of the elements of the offense and found that "when I took his plea that he understood the nature of the charge and the potential punishment if convicted." This appeal followed.

ISSUE

¶12 On appeal, Hawkins asserts he did not understand the elements of the offense. He contends that he thought that Halford was going to tie Barton to a tree and leave him and did not know that Halford was going to shoot Barton. He claims that no one explained to him that the State would have to do more than show that Hawkins was merely an unwitting participant in Barton's murder. He argues that had he been properly informed of the elements of the offense, he would not have pled guilty. Because the record belies his contention, we reject his arguments.

DISCUSSION

¶13 The issue whether a plea was knowingly, voluntarily, and intelligently entered is a question of constitutional fact that we review de novo. *See* ***State v. Bollig***, 224 Wis. 2d 621, 628, 593 N.W.2d 67 (Ct. App. 1999). A plea may be involuntary because the defendant does not have a complete understanding of the charge. *See* ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986).

¶14 "We employ a two-step process to review a trial court's decision to deny the withdrawal of a plea." ***State v. McKee***, 212 Wis. 2d 488, 490, 569 N.W.2d 93 (Ct. App. 1997). First, we review the plea hearing transcript to determine whether the defendant has made a prima facie showing that the court

failed to comply with WIS. STAT. § 971.08 plea procedures.[2] *See* ***id.*** at 490-91. If the defendant makes the prima facie showing, the burden shifts to the State to demonstrate by clear and convincing evidence that the defendant entered the plea knowingly, voluntarily and intelligently. *See* ***id.*** at 491.

¶15 Although WIS. STAT. § 971.08 is not a constitutional imperative, the procedure outlined in the statute is nevertheless designed to assist the court in making the constitutionally required determination that a defendant's plea is voluntary. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). While § 971.08 requires the court to address the defendant personally and determine that the plea is made voluntarily with an understanding of the nature of the charge, it does not explain how that determination should be made. *See* ***Bangert***, 131 Wis. 2d at 266. An understanding of the nature of the charge, however, must include an awareness of the essential elements of the crime. *See* ***id.*** at 267.

¶16 The trial court must determine a defendant's understanding of the nature of the charge at the plea hearing by any one of a variety of methods. *See* ***id.*** The ***Bangert*** court gave several examples, including: "First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury

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[2] WISCONSIN STAT. § 971.08(1) provides in part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

All references to the Wisconsin Statutes are to the 1997-98 version.

instructions, *see*, Wis. J I—Criminal SM-32, Part IV (1985), or from the applicable statute." ***Id.*** at 268.

¶17 Here, the plea hearing transcript discloses that the court complied with WIS. STAT. § 971.08 plea procedures. On the basis of the plea questionnaire, the trial court ascertained that Hawkins was fifty years old; completed eleven years of schooling and could read, write, and understand the English language; and had read the charges in the case. The court determined that Hawkins knew the constitutional rights he was waiving and that there was a factual basis for the plea.

¶18 The court summarized the offense charged by reading the statutory elements from the information, reciting that Hawkins "did intentionally and unlawfully and feloniously cause the death of another human being, i.e., Mr. Peter Barton, with the intent to kill him as a party thereto, contrary to Sections 939.05 (1) and 940.01 (1) of the Wisconsin Statutes." The court personally addressed Hawkins and asked if he had any questions about the plea proceedings. The court asked Hawkins' lawyer if he was satisfied that Hawkins understood the elements of the charge. Hawkins' attorney replied that Hawkins understood them. The court asked Hawkins if he heard what his lawyer said and if there was anything he disagreed with or had any questions about. Hawkins responded that he did not.

¶19 Hawkins claims that the colloquy was deficient because it failed to apprise him of the precise elements of the offense. We disagree. WISCONSIN STAT. § 939.05(2)(b) provides that a person may be convicted as party to a crime if the person "[i]ntentionally aids and abets the commission of it …." WISCONSIN STAT. § 940.01(1) defines first-degree intentional homicide as "whoever causes the death of another human being with intent to kill that person or another …."

The court's summary of the statutory elements at the plea hearing adequately apprised Hawkins that to be found guilty, he must have "intentionally" caused Peter Barton's death "with the intent to kill him as a party thereto …." No reasonable person would have understood this summary of the elements to require proof of intent solely on the part of Halford. We are satisfied that the court's colloquy adequately informed Hawkins that the State must prove that Hawkins was more than an unwitting participant in Barton's murder.

¶20 Hawkins nonetheless argues that the trial court erred because it did not read the jury instructions to him. We disagree. There is no requirement that the court read the defendant the jury instructions.[3] To "establish a record showing the defendant's understanding of the charge, the form of the inquiry need not be inflexible." *See* ***Bangert***, 131 Wis. 2d at 267. A court's compliance with ***Bangert*** sufficiently reflects a defendant's understanding of the nature of the offense. We have rejected the notion that the court must "explain or insure that [the defendant] understood the elements of the offense as they applied to the specific facts involved." ***McKee***, 212 Wis. 2d at 494-95. We conclude that the court's colloquy, although brief, complied with WIS. STAT. § 971.08 and was constitutionally adequate.

¶21 As the trial court, which was affirmed in ***McKee***, pointed out: "I'm just conceding that more could have been done, but I don't know where that stops, and I couldn't draw a line where it does stop, because I can't jump into [the

[3] In ***State v. Duychak***, 133 Wis. 2d 307, 314 n.2, 395 N.W.2d 795 (Ct. App. 1986), we stated: "While it does not appear that the trial court was expressly working or reading from the appropriate jury instructions or the applicable statues, its review of the elements of the charge with Duychak amounted to the same thing."

defendant's] body and his brain and figure out for myself whether he really knows." ***Id.*** at 496.

¶22 Hawkins further argues that the plea questionnaire was deficient because it stated that the elements of the offense were merely that he "aided or abetted or assisted in the intentional causing of the death of Peter Barton." He contends that the plea questionnaire indicated only that the principal must have acted intentionally, not the aider or abettor. We are unpersuaded. The trial court did not rely solely on the plea questionnaire's recitation of the offense, but undertook a summary of the elements. Therefore, any deficiency in the plea questionnaire did not make the colloquy inadequate. The court's oral summary demonstrated that the crime charged required the State to prove that Hawkins acted with the intent to aid in Barton's death. Because the plea colloquy complied with WIS. STAT. § 971.08, Hawkins' argument fails.

¶23 Hawkins further points out that the statements he made in his presentence investigation, at sentencing and to officers would support a defense that he did not intend to participate in the murder. None of these statements, however, was made at the plea hearing, and they do not demonstrate that the court failed to advise Hawkins of the elements of the offense to which he pled. An equally plausible inference would be that because Hawkins raised the issue of his intent to assist in the murder at times other than at the plea hearing, this was an issue he was aware of but decided to forego when, after three days of trial, he entered into plea negotiations and decided to plead guilty. In any event, because we conclude that Hawkins has not shown that the plea procedure was deficient, it is not necessary to consider other evidence that would indicate whether he understood the nature of the charge. *See* ***McKee***, 212 Wis. 2d at 496.

CONCLUSION

¶24 The transcript of the plea hearing discloses that the trial court adequately complied with WIS. STAT. § 971.08 when it summarized the elements of the offense and personally addressed both Hawkins' and Hawkins' counsel concerning his understanding of the charges. We conclude that it was constitutionally adequate. Therefore, it is not necessary to consider other evidence in the record that would indicate Hawkins understood the nature of the charge. Because Hawkins failed to demonstrate noncompliance with § 971.08, he failed to make a prima facie case that the plea procedure was defective.

By the Court.—Judgment and order affirmed.

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