COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1063-CR **Cir. Ct. No. 2013CF1369**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY RAINEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY K. WAGNER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Kelly Rainey seeks to void the repeater enhancer portion of his sentence on the basis that he did not admit to and the State did not prove his repeater status. We reject his arguments and affirm the judgment of conviction and the order denying his motion for postconviction relief.

¶2 A criminal complaint[1] charged Rainey with substantial battery (count 1) as a repeater. The subsequent information added battery—bodily harm (count 2) and intimidation of a victim (count 3), both of which also carried a repeater enhancer. Rainey entered no-contest pleas to counts 1 and 3 as a repeater; count 2 was dismissed and read in. The court sentenced Rainey to two years' initial confinement (IC) and two years' extended supervision (ES) on count 1 and one year IC and one year ES on count 3, consecutive to count 1.[2]

¶3 Postconviction, Rainey moved to have the enhancer portion of his sentence commuted on grounds that he did not expressly admit the prior convictions and the State did not prove them beyond a reasonable doubt. He asked to be resentenced to the maximum on each count less the enhancer. The court denied his motion after a hearing. He appeals.

¶4 A prior conviction that increases the maximum possible sentence under WIS. STAT. § 939.62 (2013-14)[3] must be admitted by the defendant or proved by the State. WIS. STAT. § 973.12(1). A no-contest plea by a defendant who is fully aware of the repeater charge and its consequences may constitute an admission of the prior conviction. ***State v. Liebnitz***, 231 Wis. 2d 272, 287-88, 603

[1] The original criminal complaint is not in the circuit court record, although the record index lists it as Document 1. It was Rainey's obligation as appellant to ensure that the record transmitted to this court contained all documents material to his appellate issue. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 212, 474 N.W.2d 753 (Ct. App. 1991). As Rainey's comprehensive appendix includes a file-stamped photocopy of the complaint, which the State indicates it accepts as accurate, we will consider the copy as part of the appellate record. *See* ***Kox v. Center for Oral &Maxillofacial Surgery, S.C.***, 218 Wis. 2d 93, 97 n.5, 579 N.W.2d 285 (Ct. App. 1998).

[2] Without the repeater enhancer, the maximum Rainey faced was eighteen months' IC and two years' ES on count 1 and nine months on count 3. The enhancer added up to two years' additional confinement on count 1 and increased his total exposure on count 3 to up to two years.

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

N.W.2d 208 (1999). Application of § 973.12(1) to undisputed facts presents a question of law that we review de novo. ***Liebnitz***, 231 Wis. 2d at 283.

¶5 We look to the totality of the record to determine if the defendant's plea constitutes an admission under WIS. STAT. § 973.12(1). *See* ***Liebnitz***, 231 Wis. 2d at 275. Relevant factors include whether the charging documents properly charged the defendant as a repeater under WIS. STAT. § 939.62; the circuit court read the repeater charge to the defendant at the initial appearance; the record of the plea agreement, including the plea questionnaire, contains an acknowledgement of the prior convictions; and the defendant understood that his or her no-contest plea was an admission that all material facts in the charging documents were true. *See* ***Liebnitz***, 231 Wis. 2d at 285-87.

¶6 Here, both the complaint, for count 1, and the information, for counts 1 and 3, list prior convictions by offense, date of conviction, case number, and county, thus supporting the application of WIS. STAT. § 939.62 to Rainey.[4] While he waived the reading of the charging documents, from the outset—at the initial appearance—the prosecutor stated that the complaint charged him as a repeater and recited his offenses from the prior five-year period. *See* § 939.62(2). Rainey did not object.

¶7 The plea agreement record contains further acknowledgment by Rainey of his prior convictions. The questionnaire form he completed specifies that he "intend[ed] to plea" to the charged offenses as a repeater. An attached

[4] Rainey stresses that the complaint contained only count 1 and so did not contain all of the allegations he eventually pled to. "[P]rior convictions may be alleged in the complaint, indictment or information." WIS. STAT. § 973.12(1).

description of the victim-intimidation charge indicated it contained a "habitual offender" allegation and stated the increased penalty. Rainey acknowledged by his signature that he reviewed and understood the plea questionnaire and attachments, reviewed them with his attorney, answered all questions truthfully, that either he or his attorney checked the boxes, and that he was "asking the court to accept my plea and find me guilty." He also signed to accept the plea agreement.

¶8 At the plea hearing, the court took Rainey's no-contest pleas to both counts as a repeater. The court explained that, while his pleas did not constitute admissions to the offenses, they reflected his understanding, which Rainey confirmed, that the State could prove beyond a reasonable doubt that he committed the charged offenses. The court also explained how the repeater enhancement could add to the otherwise maximum penalty for the charged crimes. Importantly, Rainey again confirmed that he understood. *See* ***State v. Goldstein***, 182 Wis. 2d 251, 256-57, 513 N.W.2d 631 (Ct. App. 1994) (touchstone of admission component is defendant's expression of understanding that repeater allegations increase possible penalties). Through counsel, Rainey then stipulated that the court could consider the facts alleged in the complaint, which we construe to mean both charging documents, as a basis for his pleas. The alleged facts expressly included his prior convictions.

¶9 Several points about the sentencing solidify our conclusion. One is that the court had before it Rainey's presentence investigation report. The PSI contained detailed information about his criminal record, including the sentences and dispositions in the two Kenosha county cases relied upon to establish his repeater status. Rainey's counsel confirmed he had reviewed the PSI with Rainey and, aside from a matter not relevant here, Rainey agreed there were no errors.

¶10 Another is that the parties engaged in a discussion with the court about sentence credit due Rainey. Some was from Kenosha county case No. 13-CF-204, the felony case that formed the basis for the repeater allegations. *See* WIS. STAT. § 939.62(2). Rainey himself corrected the amount due on another case but did not dispute anything about case No. 13-CF-204.

¶11 Further, Rainey's counsel argued for a sentence on the intimidation charge of "18 months and six months consecutive," stayed, with two years' probation. As noted, without the penalty enhancer Rainey faced just nine months on that charge. Only with the enhancer could he have been sentenced to the "18 months and six months" he requested. He plainly recognized that the penalty enhancer applied.

¶12 Upon the total record, we are satisfied that Rainey was fully aware of the repeater charges and their consequences and thus validly admitted to them. His sentence stands.

By the Court.—Judgment and order affirmed.

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