COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP467-CR **Cir. Ct. No. 2011CF568**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY L. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Reversed and cause remanded with directions.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Gary L. Johnson appeals a judgment convicting him on his pleas of no contest to one count of attempted second-degree intentional homicide and two counts of aggravated battery, all with use of a dangerous weapon. Postconviction, the circuit court allowed him to withdraw his plea on the attempted homicide charge on grounds that the plea taking did not state the elements of that offense, such that Johnson pled to a nonexistent offense. On the State's motion for reconsideration, the court reversed itself and reinstated Johnson's conviction. Johnson also appeals the order granting the State's motion.

¶2 We conclude the circuit court got it right the first time. Accordingly, we reverse the judgment of conviction and the order granting the motion for reconsideration and remand the matter to the circuit court so that Johnson may withdraw his no-contest plea to attempted second-degree intentional homicide.

¶3 In 2011, Johnson stabbed his wife, M.L.J., inflicting life-threatening injuries. He was charged with attempted first-degree intentional homicide and first-degree reckless injury by use of a dangerous weapon and as domestic abuse.

¶4 A plea of not guilty by reason of mental disease or defect (NGI) was considered and Johnson's competence was questioned. By September 2013, five doctors examined him and two competency hearings were held. On review of the doctors' reports and testimonies, the court concluded that the State had proved by the greater weight of the credible evidence that Johnson was competent to stand trial. In early 2015, the defense told the court its two doctors supported an NGI plea, which Johnson entered. Trial was set for April 20, 2015, nearly four years after he was charged.

¶5 The parties reached a plea agreement on the morning of trial. Johnson agreed to waive the NGI defense and the charges were amended to one

count of attempted second-degree intentional homicide, two counts of aggravated battery, and one count of felony intimidation of a victim, again with dangerous-weapon and domestic-abuse enhancers. Johnson would plead no contest to the first three charges; the intimidation count, as well as a child-abuse charge in another Kenosha County case, would be dismissed and read in; and three other charges in the second case would be dismissed outright. Only Johnson's plea to the charge of attempted second-degree intentional homicide is at issue here.

¶6 At the plea hearing, the court began to recite the charge of attempted second-degree intentional homicide, a violation of WIS. STAT. §§ 940.05(1)(b) and 939.62 (2015-16).[1] Johnson almost immediately spoke up.

> THE COURT: The charge against you in the first count is that on the 15th of June of 2011, at the City of Kenosha in this county, you attempted to cause the death of [M.L.J.]….
>
> ….
>
> THE DEFENDANT: Attempt to kill? No.

[1] WISCONSIN STAT. § 940.05(1)(b) provides:

> (1) Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class B felony if:
>
> ….
>
> (b) The state concedes that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist. By charging under this section, the state so concedes.

An attempted crime is committed by one who, with intent to commit that crime, "does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." WIS JI-CRIMINAL 580.

All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

> MR. KRAUS [Assistant district attorney]: It's whoever causes the death of another human being with intent to kill that person. However, it's under [WIS. STAT. § 940.05](1)(b), which is—the State concedes that it's unable to prove beyond a reasonable doubt the mitigating circumstances specified in [WIS. STAT. §] 940.01(2). For the purposes of plea agreement, the State is acknowledging that there are issues involving adequate provocation, which would be a mitigating circumstance and reduce the first degree to attempted second degree….

¶7 Defense counsel, Attorney Terry Rose, then pointed out that the Judicial Council Note accompanying WIS. STAT. § 940.05 states that current second-degree intentional homicide is analogous to the prior offense of manslaughter.[2] The court responded:

> THE COURT: Right. It was a lot easier to understand in those cases. Either passion or excessive.
>
> MR. ROSE: That's the way I explained it to him.
>
> THE DEFENDANT: That's not how it was explained, not intentionally to kill anybody.
>
> THE COURT: Well, it is—They thought they were improving it and I think it's been a serious error.
>
> ….
>
> THE COURT: All right. The charge against you is that on the 15th of June of 2011, at the City of Kenosha, you attempted to commit the crime of intentional homicide in the second degree. A person who—a person attempts to commit a crime if he does acts which demonstrate unequivocally, under all the circumstances, that he intended to commit the crime and would have committed it except for the intervention of some other fact or some other extraneous factor. In this case it's alleging that you attempted to cause the death of another.

[2] The manslaughter statute read: "Whoever causes the death of another human being under any of the following circumstances is guilty of a Class C felony: (1) Without intent to kill and while in the heat of passion…." *See* WIS. STAT. § 940.05(1) (1985-86).

> Cause means that your act would have been a substantial factor in producing the death and that you acted with the mental purpose to take the life of another human being but were—and were aware that your conduct was practically certain to cause death. However, there may have been adequate—
>
> Well, what the charge is, is that you attempted to cause the death of another human being with intent to kill that person but that the District Attorney concedes that there was adequate—District Attorney has failed to prove that there was not adequate provocation for your conduct or that you were defending yourself. Do you understand the charge against you?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Neither do I.

¶8 Rose then offered that he thought the sticking point might be "lack of adequate provocation," one of the mitigating circumstances specified in WIS. STAT. § 940.01(2). The prosecutor once more conceded the State was unable to prove beyond a reasonable doubt that any of those mitigating circumstances did not exist. The court reiterated the elements as set forth above and asked if Johnson understood the charge against him. As before, he answered, "No, sir."

¶9 At that point, the court said, "All right. Let's have a trial. Unless someone has a better definition of what this crime is…. Anybody come up with a better definition of what this crime is—what the elements of the crime are? Because I can't take the plea and if I can't take a plea, then there's going to be a trial…. He says he doesn't understand the charge[]."

¶10 Rose responded that he had "tried to explain it [to Johnson] based upon the historical definition of manslaughter, which involved the heat of passion, which I think he understood." The prosecutor added that, "for the purposes of the

plea … there was an adequate provocation, otherwise colloquially known as the heat of passion."

¶11 Saying that it "still ha[d] to get through the elements," the court addressed Johnson:

> THE COURT: And he says—See, this would be the equivalent of a charge that you, for, adequate reason, became so enraged that although you did intend to take human life, and would have done so but for the intervention of some other person or some other extraneous factor, that your conduct was not the same as a premeditated murder because you were provoked to such an extent that you were deaf to the voice of reason. That's the—
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> THE DEFENDANT: I agree with that.
>
> THE COURT: Huh?
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> THE DEFENDANT: I can agree with that.
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> THE COURT: Let's make sure we understand. What's alleged here is that you attempted to commit—
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> THE DEFENDANT: Wording. I'm sorry, Your Honor. The wording—the wording is that I intended to kill that person, cause[] death.
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> THE COURT: Well, the statute and the charge is that—that we're going to—I'm sorry to interrupt.
>
> ….
>
> THE COURT: Here's the charge: That you had formed the intent and would have committed the crime of second degree sexual—excuse me, intentional homicide while using a dangerous weapon except for being prevented from doing so by the intervention of another person or some other extraneous factor and circumstances demonstrate that unequivocally. That you intended to bring about the death of another person with the mental purpose of taking life but that in doing so, you were adequately provoked by the heat of passion—the circumstances which cause the heat of passion in which you became deaf to the voice of reason.
>
> THE DEFENDANT: I can go with that. I just can't go with this.
>
> THE COURT: Well, this is what the charge is[,] restated.

THE DEFENDANT: All right. Well, let's go with it. I'm sorry.

THE COURT: You understand it?

THE DEFENDANT: Yes, sir.

THE COURT: All right. How do you plead?

THE DEFENDANT: No contest.

¶12 At Johnson's request, Rose withdrew as counsel before sentencing. Newly appointed counsel filed a motion for presentence plea withdrawal. In it, Johnson alleged that he repeatedly rejected plea deals because he wanted to proceed at trial on his NGI plea but that Rose coerced and "bull[ied] him" into entering a plea, which, despite his frustration, confusion, and inability to think clearly, he did, just to be finished with Rose. Accordingly, he asserted, his plea was not knowing and intelligent.

¶13 After reviewing the transcript of the "arduous" plea taking, the court was satisfied that Johnson fully understood the effect of plea withdrawal but that "there were difficulties with the explanation as to the precise charge of … attempted intentional homicide of the second degree," such that the court was "not confident that [the plea] met all the elements of the crime that was charged in this case." Rather, "we ended up taking a plea to manslaughter, which isn't a crime anymore." The court thus concluded that Johnson presented a fair and just reason to permit him to withdraw his plea to the charge of attempted intentional second-degree homicide.

¶14 The State moved for reconsideration. It argued at the hearing that, despite the back-and-forth during the plea taking, the discussion about heat of passion was "extraneous and perhaps helped frame it," and "the final recitation of

the charges and the elements that the defendant actually pled to does contain enough of each element."

¶15 The State's arguments and another transcript review persuaded the court that count one had been adequately explained to Johnson, that he indicated an understanding of the charge, and that his plea was properly accepted. The court granted the State's motion, denied Johnson's motion to withdraw his plea, and found him guilty of attempted second-degree intentional homicide by use of a dangerous weapon. Johnson was sentenced. He appeals.

¶16 In the typical situation of a motion to withdraw a plea before sentencing, the matter is left to the sound discretion of the circuit court, and the court should freely allow withdrawal "for any fair and just reason, unless the prosecution will be substantially prejudiced." ***State v. Bollig***, 2000 WI 6, ¶28, 232 Wis. 2d 561, 605 N.W.2d 199. Factors for a court's consideration include hasty entry of the plea, confusion on the defendant's part, coercion on the part of trial counsel, and whether the motion was brought expeditiously. ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989).

¶17 This is not the typical situation. As we see it, the sole issue here is whether the circuit court erred in annulling its initial determination that Johnson pled no contest to manslaughter and concluding that, in fact, he pled no contest to attempted second-degree intentional homicide. Our review of the record persuades us that Johnson did not understand the elements of attempted second-degree intentional homicide, not because of his documented mental health issues or that counsel or the court ignored their duty to explain matters to him, but because the plea colloquy more closely captured the elements of manslaughter.

¶18 We appreciate that the attorneys and the court struggled to articulate the elements of the offense with which Johnson was charged. Rose virtually conceded that Johnson did not grasp the statutory elements when he told the court that he ended up explaining them to Johnson "based upon the historical definition of manslaughter, which involved the heat of passion, which I think he understood." The prosecutor said that adequate provocation is "colloquially known as the heat of passion." The court's efforts related above prompted it to observe that the manslaughter statute was "a lot easier to understand," and to reply to Johnson's response that he did not understand the attempted second-degree intentional homicide charge, "Neither do I."

¶19 The most telling portion of the colloquy comes in the final recitation of the elements just before Johnson entered his no-contest plea. Although stated above, we repeat it here, with our emphasis added.

> THE COURT: Here's the charge: That you had formed the intent and would have committed the crime of second degree sexual—excuse me, intentional homicide while using a dangerous weapon except for being prevented from doing so by the intervention of another person or some other extraneous factor and circumstances demonstrate that unequivocally. That you intended to bring about the death of another person with the mental purpose of taking life *but that in doing so, you were adequately provoked by the heat of passion—the circumstances which cause the heat of passion in which you became deaf to the voice of reason.*
>
> THE DEFENDANT: I can go with that. I just can't go with this.
>
> THE COURT: *Well, this is what the charge is[,] restated*.
>
> THE DEFENDANT: All right. Well, let's go with it. I'm sorry.
>
> THE COURT: You understand it?
>
> THE DEFENDANT: Yes, sir.

¶20 Johnson balked each time it was explained that he would be admitting that he intended to cause M.L.J.'s death. First with his counsel, then with the court—only when the elements were cast in the "heat of passion" language of manslaughter, a statute not recognized in Wisconsin for three decades, did he indicate he could "go with it" and that he understood. But "heat of passion" is an element of manslaughter, not of second-degree intentional homicide.

¶21 We conclude Johnson entered a plea to manslaughter. "A court does not have subject matter jurisdiction over a nonexistent offense." ***State v. Cvorovic***, 158 Wis. 2d 630, 634, 462 N.W.2d 897 (Ct. App. 1990); *see also* ***State v. Briggs***, 218 Wis. 2d 61, 65, 579 N.W.2d 783 (Ct. App. 1998). Whether the court properly permitted and reversed its decision on plea withdrawal therefore was not a matter of discretion. We reverse the judgment of conviction and the order granting the motion for reconsideration and remand the matter to the circuit court so that Johnson may withdraw his no-contest plea to attempted second-degree intentional homicide, as charged.

By the Court.—Judgment and order reversed and cause remanded with directions.

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