COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2017AP939-CR
2017AP940-CR

Cir. Ct. Nos. 2015CF2272
2016CF1161

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARON HENRY,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: JANET C. PROTASIEWICZ, Judge. *Affirmed*.

Before Brennan, Brash and Dugan, JJ.

¶1 BRENNAN, J. Laron Henry appeals two judgments of conviction and an order denying his postconviction motion, claiming that manifest injustice entitles him to withdraw his guilty pleas post-sentencing. Henry pled guilty, as

part of plea negotiations, to battery as a repeater, felony intimidation of a witness, and felony bail jumping. He claims there was a manifest injustice because: (1) he did not "ratify" his plea as is required by ***State v. Cain***, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177; (2) he failed to understand the elements of intimidation of a witness, specifically the element of malicious intent; and (3) there was no factual basis for his plea to the intimidation of a witness charge on the malicious intent element because he denied having the requisite intent. Additionally, he contends that the postconviction court erred in denying his postconviction motion without a hearing.[1] For the reasons following, we affirm.

BACKGROUND

¶2 Henry was charged in May 2015 in Milwaukee County Circuit Court Case No. 2015CF2272 with a total of eight counts, all charged as domestic violence and all involving the same victim, T.T. The charges included three felonies (two counts of strangulation and suffocation and one count of false imprisonment) and five misdemeanors (two counts of battery, two counts of disorderly conduct, and one count of bail jumping). The offenses were alleged to have occurred November 24, 2014, January 24, 2015, and November 16, 2015. Henry was also ordered to have no contact with T.T. as part of a no contact/no firearms order issued on May 22, 2015.

¶3 Henry appeared before Judge Dallet on these eight charges on October 19, 2015, and was ordered to appear at his jury trial on November 16,

[1] The Honorable Janet C. Protasiewicz entered the two judgments of conviction and the order appealed here. Henry's first charged case, 2015CF2272, was originally assigned to the Honorable Rebecca F. Dallet and subsequently judicially transferred.

2015. The CCAP record[2] shows that Henry appeared on November 16 but then left before the case was called.

¶4 On March 16, 2016, the State charged Henry in a new criminal complaint, Milwaukee County Circuit Court Case No. 2016CF1161, with felony bail jumping based on his failure to appear.

¶5 The two cases were joined for trial and on the trial date, August 1, 2016, T.T. and her mother, N.M., appeared in court as two of the State's witnesses. Henry also appeared. The jury was selected. During the recess before opening statements, the State discovered that T.T. and N.M. had disappeared. The trial court issued body attachments for T.T. and N.M. and adjourned the trial to the next day.

¶6 On August 2, 2016, at the start of the morning proceedings, T.T. and N.M. were produced on the body attachments. The State informed the trial court that Henry had made several calls from the jail the previous night attempting to persuade T.T. and N.M. not to show up in court. The calls were made to a third party who then linked T.T. to Henry's call. Henry told the third party to tell "them" that if they did not show up, the State would have to dismiss the charges against him. The State, on the record in the presence of Henry and counsel, further summarized the content of the jail calls, saying:

> Also, further developments, last night detective—I guess this morning, actually, Detective Emanuelson listened to

[2] We take judicial notice of CCAP records. CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online website reflects information entered by court staff. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

> some jail calls that Mr. Henry placed last night. In several of the—it's a series of calls. In one of them, Mr. Henry is explaining to a third party what happened in court, *says if they don't come back tomorrow the whole case will be dismissed*. He asked that person to contact—I believe he uses the term "them." But then you hear on the jail call this third party get on speakerphone and speak to [T.T.] essentially relaying that to them, saying if you guys don't come back to court tomorrow the whole case will be dismissed. [T.T.] explains that they are worried about potential body attachments and her mother's probation status. But that person does relay Mr. Henry's thought, and along with that thought, wish that they not come back to court today.

(Emphasis added.)

¶7 The State then advised the court that a plea deal had been reached.

> So based on that, I made a new offer to defense counsel this morning to plead to one count of felony bail jumping as charged in 16-CF-1161; an additional count on that case, I have amended information for felony intimidation of a witness with a domestic abuse assessment, and one of the battery counts in the 15-CF case as a repeater. At sentencing both sides would be free to argue. It's my understanding that Mr. Henry wishes to accept that offer.

The State advised the court that based on the jail calls, it would at that time file an amended information adding a second count of felony intimidation of a witness to Case No. 2016CF1161. The amended information charged Henry with "maliciously attempt[ing] to dissuade [T.T.], a witness, from attending at a trial[.]" Henry accepted the offer and entered guilty pleas in conformity with the State's offer, the details of which we recite more fully below. The State dismissed and read in the other charges.

¶8 At Henry's request (and against the advice of his counsel and the court), the sentencing took place that same day. Henry was sentenced to five years

of initial confinement and four years of extended supervision for the felony intimidation of a witness charge; a consecutive term of three years of initial confinement and three years of extended supervision for the felony bail jumping charge; and a consecutive term of one year of initial confinement and one year of extended supervision for the battery charge.

¶9 Henry filed a postconviction motion April 27, 2017, seeking plea withdrawal. He argued that he was entitled to plea withdrawal on the grounds of manifest injustice because, as he frames the issues: (1) he failed to ratify his plea; (2) there was no factual basis for the plea; and (3) he did not understand the elements of the charge of intimidation of a witness.[3] The postconviction court denied his motion on May 2, 2017, without a hearing. Henry now appeals, raising the same issues as he did in the postconviction motion.

STANDARD OF REVIEW

¶10 We review manifest injustice claims to determine whether the trial court properly exercised its discretion. ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. The burden is on the defendant to establish by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. To prevail, Henry must prove there is "a serious flaw in the fundamental integrity of his plea," not just disappointment in receiving a sentence that is longer than he expected. *See* ***Taylor***, 347 Wis. 2d 30, ¶49. Our review

[3] On the issue regarding his understanding of the plea, he argued he was entitled to a hearing pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

must encompass "the entire record, including the sentencing hearing." *See* ***Cain***, 342 Wis. 2d 1, ¶29.

¶11 The sufficiency of a postconviction motion seeking an evidentiary hearing is a question of law that we review *de novo*. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion fails to allege sufficient facts or presents only conclusory allegations it is insufficient to require a hearing. ***Id.*** Even if the motion is sufficient on its face, but the totality of the record shows that the defendant is not entitled to relief, it is insufficient to warrant an evidentiary hearing. ***Id.***, ¶¶50, 56-59.

DISCUSSION

¶12 Henry argues for plea withdrawal on the basis of manifest injustice, framing his appellate issues as trial court error in accepting his plea because: (1) he failed to personally ratify the plea; (2) the plea colloquy shows he did not understand the malicious intent element of the intimidation of a witness charge; and, (3) there was an insufficient factual basis for the malicious intent element. Finally, he claims the court erred because he was entitled to an evidentiary hearing based on his postconviction motion.

¶13 All of Henry's arguments fail. We review for a manifest injustice by examining the *entire* record, not just the plea hearing. The entire record here shows that Henry was fully advised of the malicious intent element, acknowledged he understood it, and personally ratified his plea. Additionally, the record shows that there was a sufficient factual basis for the malicious intent element. Accordingly, Henry's postconviction motion was properly denied without an evidentiary hearing.

I. Henry's first claim of manifest justice fails because the record conclusively shows that he personally ratified his plea.

¶14 The premise of Henry's failure-to-ratify argument reflects his misunderstanding of the law of plea withdrawal based on manifest injustice, generally, and language in a footnote, ***Cain***, 342 Wis. 2d 1, ¶30 n.7, in particular. He argues that during the plea hearing when he denied any intent to dissuade T.T. from coming to court, he "denied that his conduct satisfied the mental state element of the crime." This denial, he argues, does two things: first, it entitles him to plea withdrawal under ***Cain***; and second, it shows he did not ratify his plea to intimidation of a witness when he pled guilty after denying that intent.

¶15 Henry's argument fails because the scope of analysis of plea withdrawal claims that are based on manifest injustice arguments is the entire record, not just the plea hearing. ***Id.***, ¶¶31-32. It is true that failure to personally ratify a plea is one of the circumstances that may entitle a defendant to plea withdrawal under a manifest injustice analysis. *See* ***State v. Daley***, 2006 WI App 81, ¶20 n.3, 292 Wis. 2d 517, 716 N.W.2d 146. But we determine whether Henry ratified his pleas by reviewing the entire record. *See* ***Cain***, 342 Wis. 2d 1, ¶32. Here the record shows that he ratified his plea to intimidation and the malicious intent element.

¶16 Another flaw in Henry's argument is his interpretation of language in ***Cain***. Citing to ***Cain***, 342 Wis. 2d 1, ¶30 n.7, Henry argues that ***Cain*** holds that denial of an element of the offense entitles a defendant to plea withdrawal. He is wrong. ***Cain*** specifically holds otherwise. In ***Cain***, the Wisconsin Supreme Court held that the defendant was *not* entitled to plea withdrawal despite his denial at the plea hearing of having more than four marijuana plants—an amount insufficient

for the crime charged. In the footnote, the court noted that the defendant had admitted to five plants at the sentencing. The court also stated in the footnote that his denial of more than four plants at the time of the plea shows that the trial court erred *in accepting the plea*. ***Id.*** This footnote, Henry argues, supports his argument that denial of an element shows that he failed to ratify his plea to intimidation.

¶17 However, Henry's reliance is misplaced because he ignores the rest of the footnote text. In the rest of the footnote, the court defined the proper scope of a manifest injustice review as the entire record, not just the plea hearing. ***Id.*** The court stated that based on Cain's admission at sentencing of five plants, the *entire record*, not just the plea hearing, clearly showed that Cain was not entitled to plea withdrawal. ***Id.*** As the court explained in the body of the opinion, "[f]irst, it has long been clear that when a reviewing court applies the manifest injustice test, 'the issue is no longer whether the … plea should have been accepted,' but rather whether the plea should be withdrawn." ***Id.***, ¶30 (citing ***White v. State***, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978)). For that reason the court went on to state, "Wisconsin courts have uniformly held that when applying the manifest injustice test, 'a reviewing court may look beyond the plea hearing transcript' to the totality of the circumstances.… Accordingly, we conclude that our review properly includes the entire record, not just the plea hearing." ***Cain***, 342 Wis. 2d 1, ¶¶31-32.

¶18 By incorrectly framing this issue as *trial court error in accepting the plea*, Henry tries to limit our review to the plea hearing only. This is what Cain tried and what the holding in ***Cain*** specifically says is wrong. Under ***Cain***, we must review the entire record. ***Id.*** The footnote in ***Cain*** on which Henry relies

would perhaps give him support if this was not a manifest injustice plea withdrawal case. But it is. And nothing in ***Cain*** stands for the proposition that by initially denying the element of malicious intent during one portion of the plea hearing, Henry failed to ratify his plea. The entire record shows he more than sufficiently ratified his plea to intimidation of a witness, as we set forth more fully below.

II. Review of the entire record shows Henry was informed and understood the malicious intent element of the intimidation of a witness charge.

¶19 We next turn to Henry's claim that he did not understand the malicious intent element. Given his denial of malicious intent at the plea hearing, he argues that his plea to the intimidation of a witness charge must have been based on a lack of understanding of the malicious intent element. He relies on this exchange to support his argument:

> The Court: And was that call—were you making those phone calls with the attempts and hopes that the witnesses wouldn't show up for court today?
>
> Defendant: No.

But, as noted above, review here encompasses the whole record, not just one denial at the plea hearing. *See* ***id.*** There is much more in the record that shows that Henry was clearly informed of all of the elements of intimidation of a witness and acknowledged that he understood them when he entered his guilty plea to that charge. We examine each part of the record that shows his full understanding.

¶20 First, at the start of the plea hearing, the State advised the court, Henry, and his trial counsel of the content of jail phone calls that formed the factual basis of the intimidation of a witness charge. Henry made no objection to

the State's recitation of the facts. The State repeated Henry's words to the third party to tell "them," T.T. and N.M., that if they did not appear in court the next day, the whole case would be dismissed. It is undisputed that Henry said those words to the third party with T.T. on the line. Despite his denial of intent, the reasonable inference from his words is that he wanted to dissuade T.T. from coming to court so the case against him would be dismissed. But most significantly to this issue, he did not dispute the calls or his words.

¶21 There is even more evidence in the record that Henry was informed of the malicious intent element. Although no criminal complaint was filed for the intimidation of a witness charge, an amended information was filed in court on August 2, 2016, stating that Henry "did knowingly and maliciously attempt to dissuade [T.T.], a witness, from attending at a trial[.]" The knowing and malicious attempt to dissuade element was clearly stated in the amended information.

¶22 Next, three documents filed at the plea hearing further support both that Henry was informed of the element and admitted, in writing, that he understood it. Henry and his trial counsel filed a Plea Questionnaire/Waiver of Rights form, an addendum to the form, and a copy of the pattern jury instruction that listed the elements of intimidation of a witness. On the plea form, Henry signed and asked the court to accept his plea to all three charges, including the intimidation of a witness charge. The plea form indicated that the jury instructions were attached. On the addendum Henry checked that he read the complaint and understood and waived his rights. The pattern jury instruction for intimidation of a witness, WIS JI—CRIMINAL 1292, clearly stated the elements of the crime, including the one element Henry argues he did not understand, malicious intent. The jury instruction stated:

> Elements of the Crime That the State Must Prove
>
> 1. (Name of victim) was a witness. "Witness" means any person who has been called to testify or who is expected to be called to testify.
>
> 2. The defendant (prevented) (dissuaded) (attempted to prevent) (attempted to dissuade) (name of victim) from attending or giving testimony at a proceeding authorized by law. (A (name of proceeding) is a proceeding authorized by law.)
>
> 3. The defendant acted knowingly and maliciously. This requires that the defendant knew (name of victim) was a witness and that the defendant acted with the purpose to prevent (name of victim) from (attending) (testifying).

¶23 Next, the plea colloquy itself shows that Henry was informed of the malicious intent element and said he understood. The court pointed out to Henry that the jury instructions listed the elements the State would have to prove and specifically asked Henry if he had gone over the jury instruction for intimidation of a witness with his counsel and Henry said, "Yes." The court then asked Henry if he understood them and he again answered "yes." The court later specifically asked Henry if he went over the criminal complaints and the informations with his counsel and he said, "Yes." The court then specifically asked Henry if he understood what he was charged with in the amended information on the intimidation of a witness charge. He answered that he "made a call to somebody and they made a call to somebody else."

¶24 It is at this point in the plea hearing that Henry makes the one denial on which his entire appeal is based. But immediately after the denial, Henry *admitted* calling the third party to dissuade the witnesses from coming to court so that the case would stop. This entire exchange between Henry and the court was as follows:

> The Court: And was that call—were you making those phone calls with the attempts and hopes that the witnesses wouldn't show up for court today?
>
> Defendant: No. (Additional unintelligible speaking.)
>
> The Court: Pardon?
>
> Defendant: No.
>
> The Court: Well, what were you doing that was the crime? You can make phone calls.
>
> Defendant: Talking to—basically talking third party.
>
> The Court: Were you talking to the third party that the case would stop if the witnesses didn't show up?
>
> Defendant: Yes.

The difference between Henry's denial and his admission is insignificant. He admitted telling the third party that the case would be dismissed if the witnesses did not show up. He admitted calling the third party, telling the person to call T.T., staying on the line, and directing the third party about what message to give T.T. Henry's actions and words outweigh his self-serving denial of intent.

¶25 Finally, at the sentencing hearing, held that same day at Henry's request, Henry made no objection to the facts or his understanding of the malicious intent element. In fact, neither he nor his counsel objected to the recitation by the State of the substance of the calls. The prosecutor said that he listened to the tape of the call and could hear Henry tell the third party, D.H., to just tell T.T. that if "they" did not come to court, the case would be dismissed. The prosecutor stated he could hear D.H. call T.T. and place her on speakerphone while Henry was still on the line. The prosecutor stated that he heard D.H. repeat what Henry had just said about the case being dismissed if they did not come to court and heard Henry then say the following: "all they have is the 911 call from

the 2014 incident and the bloody shirt. Without you guys, they don't have anything else."

¶26 Not only did Henry not deny making the calls, at sentencing he affirmed them. First his counsel told the court, "[h]e's also fully admitting to making phone calls to third parties yesterday in regards to the … open case." Then Henry himself told the court: "I would like to say I take full responsibility for what I pled guilty to[.]" So, despite his one denial of intent at the plea hearing, the sum and substance of his subsequent admission at the plea hearing and at sentencing, along with the plain meaning of his words and reasonable inferences therefrom, show that he fully understood that malicious intent was an element when he pled guilty.

III. There was a factual basis for the plea.

¶27 The sufficiency of the factual basis for a plea is a matter for the trial court to determine. *See* ***Thomas***, 232 Wis. 2d 714, ¶20. It is not dependent on the defendant's admission. ***Id.***, ¶21. Our supreme court stated in ***Thomas***: "[A] judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." ***Id.***, ¶22. A sufficient factual basis exists if an inculpatory inference can be reasonably drawn by the trial court from the facts, even if an exculpatory one can also be drawn and the defendant insists that the exculpatory one is the correct inference. ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. When a guilty plea is the product of a negotiated plea agreement, the trial court need not go to the same lengths in assessing whether the facts would sustain the charge as it would if there had been

no negotiated plea agreement. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 645-46, 579 N.W.2d 698 (1998).

¶28 We review the entire record for sufficiency of the factual basis on a manifest injustice review. *See* ***Cain***, 342 Wis. 2d 1, ¶¶29, 31. Here there was ample evidence in the entire record to support the factual basis for the malicious intent element—which is Henry's only argument. As discussed above, Henry never disputed any of the words of his calls from the jail, and they were clearly designed to tell T.T. not to appear and testify. The timing and context support a reasonable inference that that was also Henry's intent. He was in court until 3:30 p.m. on August 1, 2016, and was aware that T.T. and N.M. had appeared, the jury had been selected and sworn and that the trial testimony was to start the next morning. Henry made no objection when the State told the court at sentencing that Henry called the third party, D.H., at 5:21 p.m. the day the jury was sworn—shortly after returning from court—participated in a call to T.T., and directed D.H. to tell T.T. that if she did not come to court the following day, the case would be dismissed. These undisputed facts support the trial court's reasonable inference that in doing so, Henry intended to dissuade T.T. from appearing in court the next day so that his case would be dismissed. That was sufficient for the factual basis.

¶29 The only argument Henry makes to rebut the reasonableness of this inference is his initial denial. The entirety of the record shows that his denial of intent was followed by his *admission* of intent, his counsel's statement that he did not deny the calls, and Henry's acceptance of responsibility for the intimidation of a witness charge, so the trial court reasonably concluded that a factual basis existed on the malicious intent element. We conclude that the entire record supports that conclusion.

IV. Henry's postconviction motion was insufficient for an evidentiary hearing.

¶30 Under ***Bangert*** the trial court must ascertain that the defendant understands the elements of the offense before freely, voluntarily, and knowingly entering a guilty plea. ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 266-72, 389 N.W.2d 12 (1986). Likewise, the court must make sure that the facts supporting the charge actually constitute the offense to which the defendant is about to plead. As fully discussed above, that was done here. Henry has not made a *prima facie* case entitling him to an evidentiary hearing.

¶31 For all of the foregoing reasons, we reject Henry's argument for plea withdrawal based on manifest injustice and affirm.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.