COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP845 **Cir. Ct. No. 1999CF989**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMANUEL M. MCCOTRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Emmanuel M. McCotry, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2011-12)[1] motion for postconviction relief. McCotry, who was granted an evidentiary hearing on his motion by the circuit court, argues that the circuit court: (1) erroneously exercised its discretion when it did not refer McCotry to the state public defender for an indigency determination and the appointment of counsel; and (2) erred when it determined that McCotry's guilty pleas were knowingly, intelligently, and voluntarily made.[2] We affirm.

BACKGROUND

¶2 McCotry was charged with two counts of first-degree intentional homicide in connection with the February 1999 shooting deaths of two individuals. According to the criminal complaint, one victim was shot twice in the head and the other was shot three times in the head. The victims were found sitting next to each other on a couch.

¶3 McCotry, who was seventeen years old at the time of shooting, told the police that he sold drugs for one of the victims and got into an argument with him about the amount of payment McCotry received. McCotry said the victim pulled out a gun and the two men fought over the weapon, which ultimately came into McCotry's possession. McCotry said that as the victim came toward him, McCotry fired the gun at him multiple times and then fled the home.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] In this decision, we refer to the judge who accepted McCotry's pleas and sentenced him as the trial court, and we refer to the judge who decided McCotry's WIS. STAT. § 974.06 motion as the circuit court.

¶4 The parties reached a plea agreement pursuant to which the charges were amended to two counts of second-degree intentional homicide while armed and both sides were free to argue for an appropriate sentence. The State explained its reasons for reducing the charges: the only evidence against McCotry was his incriminating statement, and although his self-defense theory was "somewhat inconsistent with the evidence," the State had decided that the safest course would be accepting McCotry's pleas to the reduced charges, rather than "taking a chance and going to trial."

¶5 The trial court conducted a plea colloquy with McCotry, accepted his guilty pleas, and found him guilty. It later sentenced McCotry to forty-five years of imprisonment on each count, to be served consecutively. Postconviction counsel was appointed for McCotry, but he did not pursue a direct appeal.

¶6 Ten years later, McCotry filed a *pro se* petition for *habeas corpus* with this court, alleging that his postconviction counsel provided ineffective assistance "because she never initiated a direct appeal and because she failed to challenge trial counsel's performance." *See* ***State ex rel. McCotry v. Thurmer***, No. 2009AP2476-W, unpublished order at 1 (WI App Feb. 19, 2010) (footnote omitted). This court denied McCotry's petition *ex parte* after concluding that the documentation showed that McCotry "suggested, or at least acquiesced, in the decision to close the file without a direct appeal." ***Id.*** at 4.

¶7 In November 2011, McCotry filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. He alleged that at the time he entered his guilty pleas, he "did not have a full understanding of the essential elements of second degree intentional homicide." (Some capitalization omitted.) He identified two elements of the crime that he claimed he did not understand the

State would have to prove: (1) that McCotry intended to kill both victims; and (2) that McCotry "did not reasonably believe that he was preventing or terminating an unlawful interference with his person or did not reasonably believe that the force used was necessary to prevent imminent death or great bodily harm" to McCotry. In doing so, McCotry was apparently referring to the elements identified in WIS JI—CRIMINAL 1052 (2006), which is used in cases "where second degree intentional homicide is charged and where evidence of the complete privilege of self-defense is in the case." *See* ***id.*** at 5 n.1. In such cases, "[t]he absence of the privilege becomes a fact necessary to constitute the crime of second degree intentional homicide." ***Id.*** McCotry also noted that the guilty plea questionnaire did not list the elements of the crime and he asserted that the trial court did not ascertain his understanding of the charges.

¶8 The circuit court concluded in a written order that McCotry had "made a showing sufficient to require an evidentiary hearing at which the State will have the opportunity to prove whether Mr. McCotry understood the elements of the offense before he decided to plead guilty." The circuit court explained that the "guilty plea colloquy was flawed because the court was not thorough enough in establishing that Mr. McCotry understood the elements of second degree intentional homicide."[3] The circuit court cited ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), which held the following:

> Where the defendant has shown a *prima facie* violation of [WIS. STAT. §] 971.08(1)(a) or other mandatory duties, and alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by

[3] For purposes of this appeal we will accept the circuit court's assessment of the plea colloquy.

> clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Bangert, 131 Wis. 2d at 274. The circuit court concluded that the burden had shifted to the State pursuant to ***Bangert*** and scheduled an evidentiary hearing.

¶9 Prior to the hearing, McCotry filed a motion asking the circuit court to appoint counsel for him. He cited WIS. STAT. § 974.06(3)(b), which states: "If it appears that counsel is necessary and if the defendant claims or appears to be indigent, [the circuit court shall] refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977." The motion also noted that McCotry had unsuccessfully attempted to secure public defender representation for his § 974.06 motion and hoped that the circuit court's decision to grant an evidentiary hearing "may cause the public defender to reverse that denial."

¶10 The circuit court addressed McCotry's motion for the appointment of counsel at the beginning of the evidentiary hearing, which led to the following exchange with McCotry:

> THE COURT: … If there are legal issues that arise today that I think that you have difficulty dealing with, I'm happy to appoint an attorney to represent you. We are going to try to focus on one main thing today and that's to find out some facts. We are going to find out what [trial counsel] who is here today remembers about what she advised you and we will find out from you what you remember being advised about what the State would have to prove if you had decided that you wanted a trial rather than to plead guilty. In the process of establishing those facts, if I feel like you can't handle this yourself, I will interrupt and appoint an attorney for you. Or if as a result of finding those facts there are some legal issues that are more complicated than you can handle, then I will appoint an attorney for you.

THE DEFENDANT: Okay.

THE COURT: Is that okay with you?

THE DEFENDANT: Yes.

McCotry never renewed his request to have counsel appointed for him and it was not discussed again at the hearing.

¶11 After addressing McCotry's request for counsel, the circuit court explained its written decision ordering the hearing and what would happen at the hearing. It stated:

> [A]s I explained in my decision, when a person pleads guilty, the Court has to be satisfied that they understand the nature of the charge against them, and the way that we talk about the nature of the charge is by talking about the elements, the things that the State has to prove before a person can be found guilty. Ten years ago or so when you pleaded guilty, it was not unusual for a court to handle it the way that [the trial court] did and simply ask you whether you understood the elements. In the years that have passed since then we've become a little bit more penetrating in our questions about what a person knows or doesn't know. For the time being, I think it's fair for me to have shifted the burden to the State to prove that you knew the elements of the offense to which you were pleading guilty. The State has to prove that clearly and convincingly. So at this point the burden is on [the State] to prove that you knew the nature of the charges against you. Do you understand how the case sets up at this point?

In response to the circuit court's question, McCotry responded, "Yeah."

¶12 The State called trial counsel as its only witness. Trial counsel, who at the time of the hearing had served as an assistant public defender for twenty-eight years, testified that she had reviewed her file on McCotry but still did not have an independent memory of speaking with him thirteen years earlier, given the passage of time. She testified, however, that she had a practice of explaining the elements of the crime to defendants she was representing. She discussed what she

would have done in a case like McCotry's, where he was charged with first-degree intentional homicide and had been offered a plea bargain that required him to plead guilty to second-degree intentional homicide.

¶13 The record indicates that McCotry completed a written plea questionnaire, which he and trial counsel both signed. That standard plea questionnaire stated that McCotry understood "the elements of the offense and their relationship to the facts in this case and how the evidence establishes [his] guilt," although it did not include a space where trial counsel could have written the elements of the crime. Trial counsel testified that if she had not advised McCotry about the elements of the crime, she would not have signed the plea questionnaire or allowed McCotry to tell the trial court that he had gone over the elements with trial counsel.

¶14 McCotry testified in support of his motion. He said he had trouble remembering his guilty pleas and trial counsel's representation, as detailed in this dialogue with the circuit court:

> THE DEFENDANT: I don't really recall [trial counsel] too much. She only came to see me about four times -- four or five times during my incarceration in the County Jail. We never really talked about anything. I was going through a lot at that time. My mother had just passed. So when the plea -- when the plea came along, it just -- she just came and -- at -- basically said that this is what the State's offering. I didn't really know a lot about the law or -- I just knew that like with first degree intentional homicide, that I was getting life in prison. I was just a 17 year old, so that -- I was scared of that. And with the difference with second degree, that I -- that I have a possibility of going home, so that's what I -- that's what I accepted, the possibility of going home. I was never told anything about elements or -- or none of that.
>
> THE COURT: Weren't you curious?

> THE DEFENDANT: I mean I didn't -- I didn't know what that meant. I didn't -- I didn't -- I was just here. I didn't really know what was going on. I admit that I agreed to a lot of things in the guilty plea questionnaire answering yes to everything, but I was just answering. I didn't know nothing.

¶15 When questioned by the State, McCotry reiterated that he could not "really recall a lot of the things that [trial counsel] was saying back then," noting that thirteen years had passed. McCotry also acknowledged that he did not indicate at the plea hearing that he did not understand his pleas. He explained:

> I did answer [the trial court] in the affirmative that I understood the elements and that I had gone over them with my attorney, but again I was just -- basically just going along with -- with -- with the proceedings. I didn't know anything about no elements. They was never told to me.

¶16 Although McCotry's WIS. STAT. § 974.06 motion asserted that he had intellectual limitations, he did not raise that issue during the hearing. After McCotry finished testifying, the circuit court asked him whether he had other witnesses or facts he wanted the circuit court to know. McCotry indicated that he did not.

¶17 The circuit court found trial counsel's testimony to be credible and made detailed findings explaining why it found trial counsel's testimony to be compelling. It found that trial counsel had spoken with McCotry about the elements of the crime in preparation for trial and when discussing the plea, consistent with her regular practice of doing so. The circuit court also acknowledged that McCotry said he did not remember discussing the elements with trial counsel, given his young age, his concern about being "sent away to prison," the death of his mother around the time of his plea, and the passage of time. It found that McCotry's lack of memory "kind of weakens" his testimony

because McCotry could not be sure that trial counsel did not discuss the elements with him.

¶18 The circuit court concluded that the State had proven by clear and convincing evidence "that at the time you pleaded guilty, you did know the things that had to be proven before you could be found guilty of second degree intentional homicide." The circuit court denied McCotry's WIS. STAT. § 974.06 motion seeking plea withdrawal. This appeal follows.

DISCUSSION

¶19 McCotry presents two arguments on appeal. First, he argues that the circuit court erroneously exercised its discretion when it declined to refer McCotry to the public defender for an indigency determination and the appointment of counsel. Second, he contends that his plea was not knowingly, intelligently, and voluntarily made. We consider each issue in turn.

I. Appointment of counsel.

¶20 As noted above, prior to the hearing McCotry sought the appointment of counsel pursuant to WIS. STAT. § 974.06(3)(b), which states that the circuit court shall refer a defendant to the public defender's office "[i]f it appears that counsel is necessary and if the defendant claims or appears to be indigent." This statute provides a mechanism for a circuit court to refer a defendant to the public defender for representation related to a § 974.06 motion, even though the defendant is not constitutionally entitled to counsel. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998) ("Defendants do not have a constitutional right to counsel when mounting

collateral attacks upon their convictions, such as … § 974.06 postconviction motion[s].").

¶21 McCotry argues that the circuit court should have referred him to the public defender because "he was once dia[g]nosed as an intellectually low functioning adolescent" and would have benefitted from the assistance of counsel.[4] In response, the State argues that the circuit court "did not violate [WIS. STAT.] § 974.06(3)(b) when it declined McCotry's request for a referral under [] § 974.06(3)(b)." It states: "The circuit court considered whether representation by counsel at the evidentiary hearing was necessary and determined that it was not necessary." The State argues that this exercise of discretion was not erroneous, asserting that "McCotry's *pro se* representation did not hamper the circuit court's ability to decide his claim." (Italics added.) The State concludes: "While McCotry may have wished that he had the assistance of counsel, McCotry

[4] McCotry also argues that the circuit court's consideration of his request for counsel was negatively affected when the circuit court erroneously analyzed whether the trial court complied with ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and shifted the burden of proof to the State to prove that McCotry's plea was knowingly, intelligently, and voluntarily entered. McCotry asserts that the circuit court should not have considered whether there was a ***Bangert*** violation because ***Bangert*** violations cannot be raised in a WIS. STAT. § 974.06 motion. *See* ***State v. Carter***, 131 Wis. 2d 69, 81-82, 389 N.W.2d 1 (1986) ("[A] trial court's failure to follow the procedures of [WIS. STAT. §] 971.08 [] does not amount to a constitutional violation" and is therefore "beyond the scope of a [§] 974.06 motion."). Even if the circuit court need not have considered the plea colloquy within the context of ***Bangert***, we are unconvinced that this alleged error affected the circuit court's decision not to refer McCotry to the public defender's office. Ultimately, the issue before the court was the same whether the burden of proof was shifted to the State or not: whether McCotry's pleas were knowingly, voluntarily, and intelligently entered. The circuit court was able to assess before and during the hearing whether the assistance of counsel was needed to explore that issue, and it determined that counsel was not necessary. In addition, we note that McCotry never brought this alleged ***Bangert*** application error to the circuit court's attention after he received the circuit court's written decision ordering the evidentiary hearing or at the hearing itself. Thus, McCotry forfeited his right to complain about the circuit court's decision to shift the burden of proof to the State. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (to preserve arguments for appeal, a party must raise them before the circuit court).

has not shown that the circuit court erred when it denied McCotry's motion for a referral to the state public defender's office for the appointment of counsel."

¶22 We agree with the State's analysis. The circuit court conducted a thorough hearing at which both trial counsel and McCotry testified in response to numerous questions from the parties and the circuit court. The issue of McCotry's knowledge of the elements of second-degree intentional homicide and his conversations with his trial counsel were fully explored. Based on the evidence presented, the circuit court was able to make detailed findings and fully analyze the legal issues. We are unconvinced that the circuit court erroneously exercised its discretion when it determined that counsel was not necessary and declined to refer McCotry to the public defender's office.

¶23 In addition, we conclude that McCotry forfeited his right to complain about the circuit court's decision to refer him to the public defender's office. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (to preserve arguments for appeal, a party must raise them before the circuit court). After the circuit court responded to McCotry's motion for the appointment of counsel by telling him that it would consider appointing counsel if it seemed like McCotry needed it, McCotry said that was "[o]kay" and never again asked the circuit court to appoint counsel. The circuit court had no reason to revisit its assessment that it did not appear counsel was "necessary." *See* WIS. STAT. § 974.06(3)(b).

II. Voluntariness of the pleas.

¶24 McCotry argues that his pleas were not knowingly, intelligently, or voluntarily made because he did not have a full understanding of the elements of second-degree intentional homicide. He presents numerous arguments concerning

his IQ and his background, and he complains about how the trial court conducted the plea colloquy.

¶ 19 "When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea 'violates fundamental due process.'" ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Id.*** (citation omitted).

¶25 Applying those legal standards here, we affirm the circuit court. The circuit court's finding that trial counsel had, consistent with her practice, spoken with McCotry about the elements of the crime in preparation for trial and the plea, is not clearly erroneous. Trial counsel testified at length about her general practices, and the record supports her testimony that she would have discussed the elements with McCotry and would have not signed the plea questionnaire or allowed McCotry to tell the trial court that he understood the elements if trial counsel had not discussed the elements with him.

¶26 Further, McCotry himself admitted that he did not remember much of what he talked about with trial counsel and that he told the trial court that he understood the elements of the crimes. Also, the plea hearing transcript indicates that McCotry never stopped the trial court or his trial counsel during the plea hearing to indicate that he did not understand the proceedings. The circuit court's

finding that McCotry was familiar with the elements of the crime is not clearly erroneous.

¶27 We accept the circuit court's findings of historical and evidentiary facts in this case because they are not clearly erroneous. *See* ***id.*** We further conclude that those facts, as well as the plea questionnaire, waiver of rights form, and transcripts, demonstrate "that the defendant's plea was knowing, intelligent, and voluntary." *See* ***id.***

¶28 Finally, we note that McCotry devotes several paragraphs to his assertion that he suffers from "significant cognitive and educational deficits" and also suggests several questions that trial counsel should have had to answer at the hearing related to McCotry's ability to communicate. The problem with McCotry's arguments is that he never raised those issues or asked those questions at the evidentiary hearing. Indeed, he presented no evidence or argument concerning his intellect and ability to understand the legal definition of his crimes. The circuit court was aware of general assertions about McCotry's intellect that were raised in his motion, including a psychological evaluation that was written when McCotry was fourteen that indicated he was mildly retarded, but McCotry presented no additional information at the evidentiary hearing that would lead to the conclusion that he was incapable of understanding the elements of the crime. We will not address issues that were not properly raised in the circuit court. *See* ***Manke v. Physicians Ins. Co. of Wisconsin, Inc.***, 2006 WI App 50, ¶64, 289 Wis. 2d 750, 712 N.W.2d 40. We affirm the order denying McCotry's WIS. STAT. § 974.06 motion.

By the Court.—Order affirmed.

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