OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

November 10, 2021

To:

Hon. Wynne P. Laufenberg
Circuit Court Judge
Electronic Notice

Hon. Emily S. Mueller
Circuit Court Judge
Electronic Notice

Samuel A. Christensen
Clerk of Circuit Court
Racine County
Electronic Notice

Timothy M. Barber
Electronic Notice

Patricia J. Hanson
Electronic Notice

George Tauscheck
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2020AP130-CR State of Wisconsin v. Lushious L. Hand (L.C. #2017CF172)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lushious L. Hand appeals from a judgment convicting him of one count each of attempted first-degree intentional homicide (count four) and first-degree recklessly endangering safety (count five)[1] and an order denying his postconviction motion for plea withdrawal. Based

[1] Hand pled guilty to and was convicted of both counts as a party to the crime. On count five, he pled guilty as a repeater.

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[2] We affirm.

While travelling in a vehicle at a high rate of speed, Hand fired more than six shots at another moving vehicle. The high-speed shoot-out ended in two crashed vehicles and six different victims. The State charged Hand with the following eleven felonies: four counts of attempted first-degree intentional homicide; six counts of first-degree recklessly endangering safety; and one count of felon in possession of a firearm. Four of the six endangering safety counts involved the same victims as the attempted homicide charges (victims G.E.M., D.C.N., D.S.H., and A.M.M.) and the remaining two counts involved separate victims (S.W. and A.H.).

Pursuant to a negotiated settlement, Hand pled guilty to the attempted first-degree intentional homicide of A.M.M. (count four), and to first-degree recklessly endangering the safety of G.E.M. (count five).[3] Counts one, two, three, six and eleven were dismissed and read in, while counts seven through ten were dismissed outright. The sentencing court imposed an aggregate bifurcated sentence totaling thirty-five years, with twenty years of initial confinement followed by fifteen years of extended supervision.

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[3] There was some confusion at the plea hearing, which was originally scheduled as a status conference. Trial counsel told the circuit court that there was a "slight development" and the court told the parties to "use the conference room" so that the court could "call some other things in the meantime." The transcript shows that the court went on to call other cases, and that Hand's case recessed for thirty minutes. When the case reconvened, trial counsel handed the court a completed plea questionnaire with attached jury instructions reflecting the offense elements. The plea questionnaire mistakenly asserted that Hand would be pleading to counts one and five, rather than to counts four and five. The attached jury instruction reflected that Hand intended to plead to the attempted homicide of A.M.M., which was count four. The scrivener's error was corrected on the record with Hand's consent.

Postconviction, Hand filed a motion for plea withdrawal alleging that "he entered his [guilty] pleas pursuant to an illusory plea bargain because he pled guilty in exchange for the dismissal of lesser-included offenses for which he could not have been convicted at trial." Hand's motion focused on the fact that counts five through eight were lesser-included offenses of counts one through four, and that pursuant to WIS. STAT. § 939.66(3), as to each victim, he could be punished for either the lesser or the greater crime, but not both. Hand's motion asserted that he was unaware that he could not be convicted of both the attempted homicide and the reckless endangerment charges and that therefore, he entered his guilty pleas with a misunderstanding of the value of his plea bargain. Alternatively, Hand claimed that trial counsel was ineffective for failing to explain that Hand could not be sentenced on both the greater and the lesser offenses as to any one victim. Hand's motion alleged that he would not have accepted the plea agreement had counsel provided this information.

The circuit court held an evidentiary hearing on Hand's postconviction motion. Trial counsel testified that the case was set for a status hearing when Hand asked him to negotiate a plea agreement. Trial counsel testified that he and Hand went over the plea questionnaire in a conference room and had a "discussion about the fact that you cannot be convicted of recklessly endangering safety and attempted first degree homicide of the same victim because that would be a lesser included offense."

Hand testified that he never went into the conference room to discuss the plea agreement with trial counsel, and that counsel "briefly went over the [plea] form with me in the courtroom." Hand testified that he never understood that he could not be convicted of both attempted homicide and reckless endangerment with respect to the same victim.

The circuit court denied the postconviction motion in full, finding that Hand's testimony was "incredible as compared to [trial counsel's] testimony," and that it was contradicted by the plea-hearing record, including the transcript indicating that Hand and counsel left the courtroom to discuss the plea agreement for "a fair amount of time" in the conference room. In denying Hand's ineffective assistance of counsel claim, the postconviction court found that Hand never testified that he would have insisted on going to trial absent counsel's alleged misinformation, and that even excluding the four multiplicitous counts that would have been dismissed outright (either the attempted homicide charges or four of the reckless endangerment charges), Hand still faced seven felony counts with "a tremendous amount of potential prison years." As such, Hand failed to establish prejudice. The postconviction court acknowledged that the change-of-plea hearing was not as "clean" as it could have been but determined that ultimately, Hand pled to the two offenses contemplated in the plea agreement and received the benefit of his plea bargain. Hand appeals.

A defendant seeking to withdraw their plea after sentencing must prove by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Dillard***, 2014 WI 123, ¶36, 358 Wis. 2d 543, 859 N.W.2d 44. "A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea which rendered it unknowing, involuntary, and unintelligently entered." ***State v. Denk***, 2008 WI 130, ¶71, 315 Wis. 2d 5, 758 N.W.2d 775.

There are two procedural avenues by which a defendant can establish that his plea was unknowing, involuntary or unintelligent. A defendant may assert that the plea colloquy was defective on its face, and that he or she did not otherwise know the information that should have

been provided. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The second avenue applies when it is alleged that factors extrinsic to the plea colloquy, such as trial counsel's conduct, rendered a defendant's pleas infirm. ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Hand asserts that he is entitled to withdraw his pleas under both ***Bangert*** and ***Bentley***.

To set forth a ***Bangert*** claim, Hand must show that the procedures outlined in WIS. STAT. § 971.08 or other court-mandated duties were not followed at his plea colloquy. Hand asks this court to determine that his plea colloquy was defective because the circuit court did not affirmatively inform Hand that he could not be convicted of both the greater and lesser-included offenses with respect to the same victim.

We are not persuaded. The record conclusively demonstrates that the plea-taking court fulfilled its duties under WIS. STAT. § 971.08 and ***Bangert***, including ascertaining that Hand understood the nature of the charges to which he was pleading and the range of punishments he faced if the court accepted his guilty pleas. Additionally, Hand provides no authority for the proposition that where a defendant is pleading to alternative counts included in a single information, the plea-taking court must point this out as part of its colloquy. There is no freestanding obligation requiring the circuit court to explain this circumstance, especially where the defendant is not *pleading* to multiplicitous charges. *See* ***Denk***, 315 Wis. 2d 5, ¶¶70, 76 (defendant not entitled to plea withdrawal where, regardless of whether dismissed charge might have lacked a factual basis, he did not plead to that charge and received the benefit of his bargain). Like ***Denk***, Hand "did not plead to the charge in question," here, to any allegedly multiplicitous count, and he bargained for "exactly what happened[,]" namely, the dismissal of nine counts and the State's agreed-upon sentencing recommendation. ***Id.***, ¶76.

The cases on which Hand relies do not apply to a ***Bangert*** analysis and at any rate, are materially distinguishable. Here, the circuit court correctly informed Hand that on count four, attempted homicide, it could impose up to sixty years' imprisonment, and that on count five, recklessly endangering safety as a repeater, it could impose up to eighteen and one-half years' imprisonment. The court did not tell Hand that if he went to trial, he could be convicted of and sentenced on all eleven counts. *Cf.* ***State v. Douglas***, 2018 WI App 12, ¶11, 380 Wis. 2d 159, 908 N.W.2d 466 (plea involuntary where defendant was "incorrectly informed that he faced a potential sentence of 100 years if convicted of both first and second-degree sexual assault" despite the fact that legally, he could not be convicted of both offenses). *See also* ***Dillard***, 358 Wis. 2d 543, ¶¶19, 34-35, 69 (plea withdrawal permitted where the State, the court, and trial counsel all "mistakenly advised the defendant that he was facing a mandatory sentence of life in prison" if he did not accept the plea agreement, which included dismissal of a legally inapplicable repeater enhancer). Nowhere in the record, including on the plea questionnaire, is it stated that Hand could be sentenced on both the attempted homicide and the reckless endangerment charges. Indeed, that the State and the plea-taking court discussed dismissing some counts outright but reading in others shows an awareness that Hand could not be convicted of both the greater and the lesser charges.

Hand asserts that the circuit court improperly dismissed but read in count one (involving G.E.M., the victim in count five), and counts two and six (both involving victim D.C.N.). He suggests that this somehow affected the value of his plea bargain. We are not persuaded. If this was error, it was harmless. As the postconviction court determined, the sentencing court did not mention any of the read-in charges when imposing sentence and focused primarily on the gravity of the offenses and Hand's long criminal history and gang affiliation.

We also conclude that Hand is not entitled to plea withdrawal based on the ineffective assistance of counsel. Here, Hand must prove that trial counsel's conduct was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Hand must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. ***Dillard***, 358 Wis. 2d 543, ¶¶95-96.

Hand fails on both prongs. With regard to deficient performance, the postconviction court credited trial counsel's testimony that he explained to Hand that he could not be convicted of both the greater and the lesser-included offenses. The court's credibility findings are not clearly erroneous and we must accept them. ***State v. Domke***, 2011 WI 95, ¶58, 337 Wis. 2d 268, 805 N.W.2d 364.

With regard to prejudice, Hand offered no testimony that counsel's alleged error affected his decision to accept the plea agreement. This alone dooms his claim. Regardless, even if Hand faced only seven rather than eleven charges, his plea agreement for two convictions greatly reduced his exposure. Postconviction, Hand admitted that his sentence was "[q]uite a bit less" than he was facing on the four attempted homicide charges alone, and that had he gone to trial and been convicted, he would have expected to receive the maximum sentences. He has not met his burden to show prejudice.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals