COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1581-CR **Cir. Ct. No. 2014CF310**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY L. STEWART, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Timothy Stewart, pro se, appeals a judgment of conviction and an order denying postconviction relief. Stewart contends that: (1) he is entitled to sentence modification, resentencing, or plea withdrawal based on evidence as to Stewart's mental health and the extent of the victim's injury; (2)

Stewart's trial counsel was ineffective; (3) the circuit court erroneously exercised its discretion by denying Stewart's trial counsel's motion to withdraw so that new counsel could be appointed; (4) Stewart did not waive his preliminary hearing as to his substantial battery charge; (5) Stewart's appointed postconviction counsel was ineffective; and (6) Stewart is entitled to an in-camera inspection of the victim's mental health records. For the reasons set forth below, we reject these contentions and affirm.

¶2 In February 2014, the State charged Stewart with false imprisonment, intimidation of a victim, violation of a domestic abuse restraining order, trespass, two counts of misdemeanor battery, and disorderly conduct. The complaint alleged that Stewart violated a domestic abuse restraining order as to K.A., who is the mother of Stewart's children. According to the complaint, Stewart entered K.A.'s residence without her permission, and later in the evening punched K.A. with a closed fist in the face multiple times. K.A. attempted to block Stewart's punches, and sustained injury to her pinky finger. K.A. told the investigating officer that she believed her finger was broken.

¶3 After Stewart was bound over for trial, the State filed an information containing the same charges as in the criminal complaint, except that one of the misdemeanor battery charges was elevated to substantial battery. Pursuant to a plea agreement, Stewart pled guilty to false imprisonment, intimidation of a victim, and substantial battery. At the plea hearing, defense counsel informed the circuit court that the factual basis for the substantial battery conviction was that K.A. had a broken finger. The court addressed Stewart personally and repeated that the court had been informed that K.A. had a broken finger as a result of Stewart's actions, and asked Stewart whether Stewart disputed that. Stewart responded, "Actually a mildly fractured broken finger, yes."

¶4 At sentencing, defense counsel moved to withdraw at Stewart's request. Counsel explained that Stewart was no longer confident in counsel's ability to represent him. The court addressed Stewart personally and asked what his problem was with his current counsel. Stewart responded that his counsel was not doing anything Stewart asked him to do. The court found that there was no reason for counsel to withdraw, but granted a continuance to allow defense counsel additional time to prepare for sentencing.

¶5 Following sentencing, Stewart was appointed postconviction counsel, who pursued a postconviction motion and then a no-merit appeal on Stewart's behalf. While the no-merit appeal was pending, Stewart asked his postconviction counsel to withdraw so that Stewart could pursue additional postconviction issues pro se in the circuit court. The circuit court allowed postconviction counsel to withdraw, and this court dismissed the no-merit appeal and reinstated the time for Stewart to file a postconviction motion. Stewart pursued a pro se supplemental postconviction motion, seeking plea withdrawal or sentence modification on multiple grounds. The circuit court denied the motion, determining that Stewart had not set forth an adequate basis for relief.

¶6 Stewart contends first that his plea was invalid because the circuit court failed to make a determination as to whether Stewart was suffering from a mental illness or taking medication that impaired his ability to enter a knowing and voluntary plea. He asserts that, at the time he entered his plea, he was suffering from and taking medication for depression, anxiety, and hypertension. He asserts that the possible side effects from his medication included effects on a person's mental state. He also asserts that, on the day he pled guilty, he was suffering from headaches and that he has since been treated for kidney problems. Stewart asserts that his plea questionnaire incorrectly stated that Stewart was not

receiving treatment for mental illness or disorder at the time of his plea. Stewart also contends that his psychiatric evaluations indicated he needed to be on antipsychotic and psychotropic medication. He asserts that, based on his mental and physical health issues and medication, he was in an "unconscious/altered state of mind" when he entered his plea.

¶7 To withdraw a guilty plea after sentencing, a defendant must establish that plea withdrawal is necessary to prevent a manifest injustice. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A defendant can show plea withdrawal is necessary to prevent a manifest injustice by establishing that the plea was not knowingly, intelligently, and voluntarily made based on a defect in the plea colloquy or facts extrinsic to the plea colloquy. ***State v. Howell***, 2007 WI 75, ¶¶70, 74, 301 Wis. 2d 350, 734 N.W.2d 48.

¶8 Stewart's claim that he is entitled to withdraw his plea on grounds that the circuit court's plea colloquy was insufficient because the court did not conduct an adequate inquiry into Stewart's ability to understand the proceedings is governed by ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). A defendant seeking plea withdrawal under ***Bangert*** must identify a defect in the plea colloquy *and* allege that he or she in fact did not know or understand required information due to the defect. *See* ***Brown***, 293 Wis. 2d 594, ¶¶35-36.

¶9 Here, Stewart contends that the colloquy was defective because the circuit court did not inquire into Stewart's mental health or the effects of the medication Stewart was taking. In support, Stewart cites federal cases as to a court's duty to inquire further when there is any indication that the defendant is under the influence of a medication at the time of the plea hearing, *see* ***United States v. Rossillo***, 853 F.2d 1062, 1066 (1988), and Wisconsin cases requiring a

competency hearing when there is reason to doubt a probationer's competency during revocation proceedings, *see* ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 516, 563 N.W.2d 883 (1997). However, Stewart does not cite any Wisconsin law that requires a circuit court to inquire into a defendant's mental health and medication to satisfy the court's obligation to assess the defendant's ability to understand the proceedings. *See* ***Brown***, 293 Wis. 2d 594, ¶¶35-36.

¶10 Although the circuit court did not expressly ask Stewart about his mental health and medication, the court did personally address Stewart as to his decision to enter a plea. The court noted that Stewart had signed a plea questionnaire and waiver of rights form, and asked Stewart whether he had read it carefully and talked to his lawyer about it. Stewart confirmed that he had. On the plea questionnaire, Stewart indicated that he had completed twelve years of school and had a GED. He indicated that he was not receiving treatment for a mental illness or disorder, but had taken medication within the past twenty-four hours. The court conducted a thorough colloquy with Stewart, obtaining relevant responses to the court's questions. The court asked Stewart whether he was satisfied with his attorney, and Stewart stated, "Somewhat." The court asked Stewart whether he wanted to talk to his attorney, and Stewart responded, "No, not right now." The colloquy, together with the plea questionnaire, allowed the circuit court to assess Stewart's general comprehension. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827–28, 416 N.W.2d 627 (Ct. App. 1987); *see also* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794 ("A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties."). Moreover, Stewart has not asserted, either in his postconviction motion in the circuit court or his briefs in this court, that he failed to understand any information necessary for his plea due to any possible effects of

his mental illness or medication. Accordingly, we reject Stewart's argument that he is entitled to plea withdrawal under ***Bangert***.

¶11 Stewart's claim that he is entitled to withdraw his plea because he was suffering from mental illness and physical ailments, and taking medications is also potentially cognizable under ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). A motion seeking plea withdrawal under ***Bentley*** must allege that factors outside the plea colloquy rendered the plea invalid. ***Howell***, 301 Wis. 2d 350, ¶74. The motion must allege facts that, if true, would entitle the defendant to relief. ***Id.***, ¶75. Here, Stewart claims that he was suffering from mental and physical ailments and taking medications that had the potential to impact his mental state. However, Stewart has not alleged that he did not understand any necessary information at the time he entered his plea or that he was unable to enter a voluntary plea at that time. Accordingly, Stewart has not established a basis for plea withdrawal under ***Bentley***.

¶12 Stewart also contends that he is entitled to sentence modification based on the new factor that Stewart had unreported mental illnesses at the time of sentencing. A motion for sentence modification must demonstrate the existence of a new factor and that the new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" for sentence modification purposes is a fact or set of facts highly relevant to the imposition of sentence, but not known to the sentencing judge, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Here, at sentencing, defense counsel informed the court that Stewart had been prescribed medication for depression and anxiety. Stewart exercised his right of allocution, and informed the court that he was suffering from mental health issues and was

receiving treatment. Because Stewart's mental health issues were before the court at sentencing, they are not a new factor warranting sentence modification.

¶13 Alternatively, Stewart argues that he was sentenced on inaccurate information, again based on Stewart's assertion that the circuit court did not have the information as to Stewart's mental health and treatment before it at the time of sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1 (motion for resentencing "must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information."). As with Stewart's sentence modification argument, we reject this argument on the basis that the circuit court was presented with information as to Stewart's mental health issues and treatment.

¶14 Next, Stewart contends that he is entitled to withdraw his plea based on newly discovered evidence that K.A.'s finger was not broken. A motion claiming newly discovered evidence must establish "by clear and convincing evidence that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). If the motion meets those criteria, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.***, ¶44 (quoted source omitted).

¶15 Here, Stewart contends that he discovered after his conviction that K.A.'s finger was not broken. Stewart asserts that he has obtained orthopedic evidence with a note indicating that "K.A.['s] hand was not broken." In support, Stewart cites his own affidavit stating that "the medical record evidence utilized

against me, is not supported by expert orthopedic evaluation. Specifically, [K.A.'s] hand was not fractured." Stewart's affidavit also asserts that he "was not provided with any X-Rays, or information regarding the orthopedic appointment which took place after the victim received further treatment for her hand." Stewart argues that he learned about the evidence after his conviction; that he has been diligently attempting to obtain K.A.'s medical records but has been unable to do so; and that evidence that K.A.'s finger was not broken is material to determining the severity of the charge against him.

¶16 We conclude that Stewart has not offered any newly discovered evidence that K.A.'s finger was not, in fact, broken. While Stewart asserts his belief that K.A.'s finger was not broken, he does not offer any evidence to support that belief. In fact, Stewart asserts he has been unable to obtain K.A.'s medical records as to the injury to her finger. Because Stewart has not offered any evidence to support his assertion that K.A.'s finger was not broken, he has not established that he is entitled to plea withdrawal based on newly discovered evidence.[1]

¶17 Stewart also argues that he is entitled to withdraw his plea because he was denied the effective assistance of trial counsel. A claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the

[1] Stewart argues, separately, that this plea lacked a factual basis, on the premise that K.A.'s finger was not broken. Because Stewart offers only his own speculation that K.A.'s finger was not broken, we reject this argument as well.

deficient performance prejudiced the defense." *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984).

¶18 Stewart contends that his trial counsel was ineffective for several reasons. First, Stewart complains that his trial counsel failed to interview K.A. prior to Stewart entering his plea. Stewart contends that he wanted his trial counsel to interview K.A. because he believed K.A. would recant her allegations of abuse, because K.A. had filed allegations of abuse against Stewart in the past and later recanted them. Stewart asserts that his counsel told him that K.A.'s recantation would not be an effective defense in this case. Stewart asserts that, at Stewart's insistence, Stewart's counsel eventually attempted to contact K.A., that K.A. informed Stewart's counsel she did not wish to speak with him, and that counsel then refused Stewart's requests that counsel further pursue contact with K.A. Stewart also asserts that he requested that his trial counsel obtain Stewart's cellular phone to retrieve text messages between Stewart and K.A. that, according to Stewart, would contradict K.A.'s statements to police as to the events on the day of Stewart's arrest and show that Stewart and K.A. made plans to spend time together that day. Stewart asserts that he believed the evidence was relevant to his defenses to the trespass and violating a restraining order charges. Stewart asserts that his counsel refused to obtain the text messages, and told Stewart that the text message evidence was not relevant to Stewart's more serious charges.

¶19 We reject Stewart's first claim of ineffective assistance of counsel. According to Stewart's allegations, Stewart's counsel attempted to contact K.A. and K.A. informed counsel she did not wish to speak to him. We do not agree with Stewart that a reasonable attorney would have continued to make requests for contact despite K.A.'s clear statement she did not wish to have any contact with counsel. Moreover, we are not persuaded that Stewart was prejudiced by his

counsel's failure to interview K.A. Based on K.A.'s communication to counsel, it does not appear K.A. intended to recant her allegations. Moreover, even if K.A. would have recanted, in light of the other overwhelming evidence against Stewart—including K.A.'s immediate report of the abuse to the responding officers, the police documentation of K.A.'s injuries, and other medical evidence as to K.A.'s injuries and reports that Stewart had caused them—we are not persuaded that counsel's failure to obtain the recantation prejudiced the defense. As to the text messages from Stewart's phone, while Stewart believes the text massages could have assisted his defense to trespass and violating a restraining order, Stewart ultimately entered a plea agreement that resulted in dismissal of both of those charges. Additionally, as with the recantation evidence, we fail to see how Stewart was prejudiced by his counsel's failure to obtain the text messages. Even if the text messages showed that K.A. and Stewart made plans to spend time together at K.A.'s residence on the day of Stewart's arrest, Stewart does not explain why he would have insisted on going to trial on all of the charges against him rather than entering his plea had counsel obtained that evidence.

¶20 Second, Stewart asserts that he changed his mind about entering a plea on the day after he entered his plea, and that his trial counsel informed him it was too late to withdraw his plea. Stewart asserts that advice was erroneous. However, a motion for pre-sentencing plea withdrawal may not rest upon a desire for a trial alone. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861–62, 532 N.W.2d 111 (1995) (pre-sentence motion for plea withdrawal must set forth fair and just reason to withdraw plea, beyond the simple desire to have a trial). Accordingly, Stewart has not shown his counsel gave him erroneous advice.

¶21 Third, Stewart complains that his trial counsel failed to investigate a possible connection between K.A.'s friendship with police officers and this case.

However, Stewart's speculation that K.A.'s friendship with police officers had a connection to his case is insufficient to show that his counsel performed deficiently by failing to investigate a possible connection or that Stewart was prejudiced by the lack of investigation. We reject this claim of ineffective assistance of counsel, as well.

¶22 Stewart's final ineffective assistance of counsel claim is that his trial counsel should have challenged the evidence that K.A. suffered a broken finger by arguing that the State obtained K.A.'s medical records without a valid medical release from K.A. We are not persuaded that counsel performed deficiently by failing to pursue whether K.A. signed a valid medical release or that Stewart was prejudiced by counsel's failure to do so. Stewart does not explain why he would have insisted on going to trial on all of his pending charges had his counsel discovered a defect in K.A.'s signed medical release.

¶23 Stewart also contends that the circuit court erroneously exercised its discretion by denying Stewart's trial counsel's motion to withdraw. Stewart contends that the trial court's inquiry into Stewart's complaint as to his counsel was too brief; that the motion to withdraw after the plea but before sentencing was timely; and that Stewart voiced his great displeasure with his trial counsel. *See* ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988) (setting forth factors for court to consider in exercising discretion as to whether to allow appointed counsel to withdraw and new counsel to be appointed). When Stewart's counsel moved to withdraw, the court addressed both counsel and Stewart as to the basis for the request. Counsel explained that Stewart no longer had confidence in counsel. Stewart informed the court that his counsel was not doing anything Stewart asked related to this case, including that counsel had not contacted witnesses and had not arranged for Stewart to be able to call his counsel from

prison. The court explained to Stewart that an attorney will make decisions as to what actions to take, and that no attorney would do everything Stewart requested. The court noted that counsel had already been assigned to the case for seven months, and that the court was confident in counsel's abilities. The court thus properly exercised its discretion by considering relevant factors and deciding that withdrawal was not warranted.

¶24 Stewart also argues that he never waived his preliminary hearing as to the substantial battery charge. Stewart contends that he waived his preliminary hearing only as to the original charges against him as listed in his criminal complaint, which did not include substantial battery. However, as the State points out, a court may bind a defendant over for trial if there is probable cause that the defendant committed a felony, and the State may include any transactionally related offenses in the information. *See* ***State v. Richer***, 174 Wis. 2d 231, 247, 496 N.W.2d 66 (1993). Because Stewart waived his preliminary hearing as to the charges in the complaint, the State was allowed to include any charges in the information that were transactionally related to the charges in the complaint. *See* ***State v. Michels***, 141 Wis. 2d 81, 88, 414 N.W.2d 311 (Ct. App. 1987) ("'[A] district attorney may, where a preliminary examination is waived, file an information for any offense or offenses growing out of or relating to the transaction charged in the complaint.'" (quoted source omitted)). Here, the criminal complaint charged battery, and the information charged substantial battery, based on the same underlying facts. We discern no error.

¶25 Next, Stewart contends that he was denied the effective assistance of postconviction counsel because his appointed postconviction counsel failed to pursue the issues that Stewart pursues here. However, Stewart elected to dismiss his no-merit appeal and pursue a pro se supplemental postconviction motion,

raising all of the issues that he believed his postconviction counsel should have raised. Accordingly, this appeal is Stewart's direct appeal as of right under WIS. STAT. RULE 809.30 (2015-16),[2] and Stewart has had the opportunity to raise all of the issues he wished to raise by direct postconviction motion. Because this is Stewart's direct appeal, we reject his claim of ineffective assistance of postconviction counsel on the basis that Stewart was denied his right to raise particular postconviction issues. This is a direct appeal, not a petition for habeas corpus or a motion under WIS. STAT. § 974.06. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-83, 556 N.W.2d 136 (Ct. App. 1996) ("We conclude that a claim of ineffective assistance of postconviction counsel should be raised in the trial court either by a petition for habeas corpus or a motion under § 974.06.").

¶26 Lastly, Stewart argues that he is entitled to an in-camera inspection of K.A.'s mental health records. Stewart asserts that K.A.'s mental health records may contain evidence bearing upon K.A.'s credibility, which Stewart believes may assist his defense. We conclude that Stewart's speculation that K.A.'s mental health records may contain evidence as to K.A.'s ability for truthfulness is insufficient to establish a right to an in-camera inspection of K.A.'s mental health records. *See* ***State v. Green***, 2002 WI 68, ¶¶33-34, 253 Wis. 2d 356, 646 N.W.2d 298 ("[T]he defendant, when seeking an in camera review, must [] make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records.").

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶27 To the extent Stewart raises other arguments not specifically addressed in this opinion, we deem those arguments insufficiently developed to warrant a response. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court may decline to address arguments raised by appellant that do not comply with minimal briefing requirements). We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).