COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP3304-CR
2004AP3305-CR

Cir. Ct. Nos. 2003CF123
2003CF124

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHONG LENG LEE,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Chong Leng Lee appeals judgments convicting him of burglary as party to a crime, armed burglary, and possession of burglarious tools. He also appeals an order denying his postconviction motion to withdraw his

pleas. Lee argues the circuit court's plea colloquy was confusing and did not adequately inform him of the weapon element of armed burglary. Therefore, he contends, his pleas were not intelligently and voluntarily entered and the court erred when it denied his motion to withdraw his pleas. We conclude Lee has failed to meet his prima facie burden to demonstrate that the court's plea colloquy was defective.[1] Accordingly, we affirm the judgments and order.

BACKGROUND

¶2 On March 3, 2003, Lee was charged in two cases with a total of five counts. He was charged with party-to-a-crime burglary and misdemeanor theft arising from the burglary of a Dairy Queen restaurant, and armed burglary, possession of burglarious tools, and misdemeanor criminal damage to property related to the armed burglary of Sairam Indian Cuisine restaurant.

¶3 Lee entered into a plea agreement in which he agreed to plead no contest to the three felony charges. In exchange, the State agreed to dismiss the misdemeanor charges and recommend a fifteen-year sentence. The court accepted Lee's pleas and judgments were entered accordingly. The court sentenced him to concurrent sentences totaling ten years, including five years' initial confinement and five years' extended supervision.

¶4 On September 21, 2004, Lee filed a motion to withdraw his pleas. The circuit court denied Lee's motion.

[1] Because we conclude Lee is not entitled to withdraw his armed burglary plea, we need not decide his additional argument that he should be allowed to withdraw all his pleas because those pleas were entered as part of a global plea agreement. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

DISCUSSION

¶5 A defendant may withdraw a no contest plea after sentencing by establishing by clear and convincing evidence that the plea was not knowingly and voluntarily entered. ***State v. Bangert***, 131 Wis. 2d 246, 283-84, 389 N.W.2d 12 (1986). ***Bangert*** sets forth a procedure to determine whether a defendant's plea was knowingly and voluntarily entered. First, a defendant must make a prima facie showing that his or her no contest plea was accepted without complying with WIS. STAT. § 971.08[2] or another court-mandated duty. ***Id.*** at 274. We accept the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891. However, whether a defendant has established a prima facie case presents a question of law that we review independently. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992).

¶6 If a defendant makes this initial showing, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly and voluntarily entered, despite the inadequacy of the colloquy at the time of the plea's acceptance. ***Bangert***, 131 Wis. 2d at 274-75. We review the circuit court's determination on this prong for an erroneous exercise of discretion. ***State v. Mohr***, 201 Wis. 2d 693, 701, 549 N.W.2d 497 (Ct. App. 1996).

¶7 Lee contends he was not adequately informed of the elements of the armed burglary charge and he did not know what weapon formed the basis for the charge. Lee's arguments challenge whether the circuit court complied with two

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

statutory mandates. First, before accepting a no contest plea, the court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." WIS. STAT. § 971.08(1)(b). The court may find this factual basis for the charge in the probable cause section of the complaint. *See* ***State v. Harrington***, 181 Wis. 2d 985, 988, 512 N.W.2d 261 (Ct. App. 1994). The facts of the crime need not be admitted by the defendant's own words. ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836. Rather, defense counsel's statements are sufficient. ***Id.*** Second, a court must determine that the plea is made "with understanding of the nature of the charge." WIS. STAT. § 971.08(1)(a). A court complies with this duty when it summarizes the elements of the charged crime by reading the jury instruction. ***Bangert***, 131 Wis. 2d at 268.

¶8 Lee contends that because he was not charged as party to the crime, weapons carried by his co-defendants could not form the basis for an armed burglary charge against him. The plea questionnaire listed the elements of armed burglary, including "codef had hatchet" and "codef had a crowbar." However, during the plea hearing, the court asked the prosecutor to explain the factual basis for the charges. The prosecutor offered the probable cause sections in the complaints, and Lee's counsel indicated Lee had no objection to those facts.

¶9 The complaint containing the armed burglary charge asserts that Lee and two others were apprehended at or near Sairam Indian Cuisine. Lee was found hiding under a vehicle with a twelve- to sixteen-inch crowbar.[3] All three suspects admitted to the burglary. One of Lee's accomplices indicated that Lee

[3] The record refers to this tool as both a crowbar and a prybar. For clarity, we refer to the tool as a crowbar.

"carried a backpack containing three screwdrivers, an axe and a crowbar." Lee told police that "the hatchet was brought along for protection and that he had thought about throwing it at the cops when he was being chased." These facts establish that Lee had both the hatchet and the crowbar in his possession at some time. The facts also establish that Lee anticipated needing "protection" if he and his accomplices encountered anyone in the building. Accordingly, there was a factual basis to charge Lee with armed burglary, without charging him as party to the crime.

¶10 Lee argues he was confused about whether the crowbar or the hatchet was the weapon on which the State based the armed burglary charge because the court never made an unequivocal statement. Accordingly, he contends he was not adequately informed of the elements of armed burglary. However, at the plea hearing, the court had the following colloquy with Lee:

> THE COURT: The State would have to prove with respect to each of these burglary offenses four elements: First, that you entered a building; second, that you entered the building without consent of the person in lawful possession of that building; third, that you knew that your entry was without that consent; and, fourth, that you entered that building with the intent to steal. You understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You have to prove that with respect to both of those counts, the Dairy Queen and the Sai Ram restaurant. You understand that?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: The other count the State would have to prove, that you did have in your possession a device or instrumentality intended, designed or adopted for use in breaking into any depository designed for the safekeeping of any valuables, excuse me, or into any building or room, with the intent that such device or instrumentality to break into the depository, building or room, with the intent to use

> such device or instrumentality to break into any depository, building or room, and to steal something from those locations. Do you understand that?
>
> THE DEFENDANT: Yes, I do.

¶11 Later during the hearing, Lee's counsel reminded the court that the Sairam burglary was charged as armed burglary and, therefore, there was an additional weapons element. The court continued to address Lee:

> Mr. Lee, you should be advised that the State would have to prove for this enhanced penalty, that is to get this up to sixty years, besides those four elements which I listed were entry into a building, entry without consent of the person in lawful possession, you knowing that that entry was without that consent, and that you entered with the intent to steal, the State would have also have to prove that you were armed with a dangerous weapon. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Dangerous weapon, Mr. Schmidt [Lee's counsel], is defined as what?
>
> [LEE'S COUNSEL]: There is [sic] a number of things, Your Honor. In this particular case there were two co-defendants.
>
> THE COURT: Right.
>
> [LEE'S COUNSEL]: One of the co-defendants was carrying a hatchet.
>
> THE COURT: Okay.
>
> [LEE'S COUNSEL]: Mr. Lee had a crow bar. And the co-defendant in the police report supposedly told the police that the reason they brought the hatchet was for self protection, so that would seem to indicate they had it as a weapon, so that would appear to qualify for that particular element of the offense.
>
> THE COURT: Right. Mr. Lee had a crow bar?
>
> [LEE'S COUNSEL]: Yes.

> THE COURT: Okay. And you've got that jury instruction in front of you, Mr. Schmidt?
>
> [LEE'S COUNSEL]: Yes, I do.
>
> THE COURT: Did it define dangerous weapon?
>
> [LEE'S COUNSEL]: Yes, it does.
>
> THE COURT: What does it say?
>
> [LEE'S COUNSEL]: 939.22(10). Dangerous weapon means any firearm, whether loaded or unloaded, any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in 941.295; or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.
>
> THE COURT: So a crow bar could classify as that?
>
> [LEE'S COUNSEL]: Yes, it could.

¶12 The court followed up by asking Lee:

> THE COURT: Okay. Additionally, and you understand, did you hear everything that [your attorney] just read, Mr. Lee?
>
> THE DEFENDANT: Yes, I have.
>
> THE COURT: You understand all that?
>
> THE DEFENDANT: I understand it.

¶13 We conclude that this colloquy sufficiently informed Lee of the weapon element. Lee's counsel admitted that Lee was carrying a crowbar. The colloquy identified the crowbar as being the dangerous weapon on which the armed burglary charge was based.[4] Lee's counsel agreed that the crowbar could

[4] Indeed, Lee testified at the postconviction motion hearing that he possessed the crowbar and that he understood it to be the basis of the armed burglary charge.

be the basis for the charge.[5] Thus, the colloquy as a whole adequately informed Lee of the nature of the charge. *See* WIS. STAT. § 971.08(1)(a).

¶14 Finally, Lee points to a portion of the plea hearing transcript where the court asked him, "Any questions about this additional information here?" and Lee answered, "Yes, I do." The court did not ask Lee what his question was and instead continued with the colloquy. Lee contends that he was confused and his questions were never answered and therefore his pleas were not knowingly entered. However, the question and answer cannot be viewed in isolation. The exchange was immediately followed by the court asking, "Any questions about your constitutional rights here, what they would have to prove?" Lee answered, "No questions."

¶15 Our review of the entire plea hearing transcript demonstrates that Lee was given ample opportunity to ask questions and was adequately informed of the elements and factual basis for the armed burglary charge. Lee has failed to meet his prima facie burden of showing the court's colloquy was defective or otherwise demonstrate a manifest injustice on which to withdraw his plea.

By the Court.—Judgments and order affirmed.

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

[5] Lee argues that the crowbar cannot be a weapon, as defined under WIS. STAT. § 939.22(10), because he intended to use it only as a burglarious tool, not a weapon. However, sufficient facts were contained in the complaint and admitted through counsel that Lee intended to "protect" himself if confronted by anyone in the restaurant and that he was carrying a crowbar. Thus, there is a basis to conclude the crowbar was a weapon as defined by the statute.