COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP134-CR **Cir. Ct. No. 2016CF155**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS C. MORALES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Thomas Morales appeals from a judgment of conviction for aggravated battery and an order denying his motion for post-conviction relief. Morales seeks to withdraw his no contest plea because he argues that the circuit court did not establish the necessary factual basis for his plea. We reject Morales's arguments and affirm.

BACKGROUND

¶2 Morales was charged with first-degree attempted homicide after he attacked a fellow inmate, J.A.B., at the Columbia County jail. According to the criminal complaint, Morales attacked J.A.B. from behind while he was cooking. Morales punched J.A.B. in the head and continued to punch him as he tried to get away. Morales then grabbed a pencil and with the pencil in his fist between his forefinger and thumb, Morales began to hit J.A.B., causing puncture wounds to J.A.B.'s chest, abdomen, and back. Morales continued punching J.A.B. until the deputy ordered everyone to return to their cells. Another inmate who witnessed the incident stated that Morales had been stalking J.A.B. and that it looked like he was trying to kill him.

¶3 Morales pled no contest to aggravated battery and was sentenced to four years' probation. He subsequently filed a postconviction motion seeking to withdraw his plea, arguing that there was not a factual basis for the offense to which he pled. Specifically, Morales argued that aggravated battery requires a showing of "great bodily harm" whereas J.A.B. only suffered head pain and small puncture wounds. The circuit court denied the motion, concluding that the complaint and J.A.B.'s victim impact statement were sufficient to establish that Morales had inflicted "great bodily harm" on J.A.B. Morales appeals.

DISCUSSION

¶4 After sentencing, a defendant seeking to withdraw a no contest plea must establish that withdrawal is necessary to correct a manifest injustice. *See* ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). Here, Morales argues that withdrawal is necessary because there was not a sufficient factual basis to establish that he committed the offense of aggravated battery. *See* ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997) ("One type of manifest injustice is the failure to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads."). Morales must show by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***id.***

¶5 Morales points to the language of the statute governing aggravated battery, which requires a showing that he caused "great bodily harm" to J.A.B.[1] In turn, "[g]reat bodily harm" is defined as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14).[2] Morales argues that under both this statutory text and the decisional law applying it, J.A.B.'s head pain and puncture wounds do not constitute "great bodily harm."

[1] Specifically, WIS. STAT. § 940.19(5) states, "Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony."

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

¶6 The State argues that there are two alternate grounds for affirming the circuit court's decision. First, it argues that the facts are sufficient to establish that J.A.B. experienced great bodily harm from the attack. Alternatively, the State argues that because Morales pleaded no contest to aggravated battery in order to avoid the more serious charge of attempted homicide, we need only determine whether the facts are sufficient to support the charged offense. *See* ***Broadie v. State***, 68 Wis. 2d 420, 423, 228 N.W.2d 687 (1975) ("Where as here, the guilty plea is pursuant to a plea bargain, the court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea."); ***State v. Harrell***, 182 Wis. 2d 408, 419-20, 513 N.W.2d 676 (Ct. App. 1994) (a factual basis for the charged offense provides the necessary evidentiary basis for defendant's plea to a less serious, related offense).

¶7 In ***Harrell***, we explained that one purpose of requiring the circuit court to determine the factual basis for a plea is "to protect a defendant who pleads voluntarily and who understands the charges brought, but does not realize that his or her conduct does not actually fall within the statutory definition of the crime." *See* ***id.*** at 418. However, we further explained that the circuit court does not need to go to the same length in a plea bargain context, in recognition of "the reality that often in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct that the factual basis establishes." ***Id.*** at 419. We therefore concluded that a defendant is not permitted to withdraw a plea if "the [circuit] court satisfies itself that the plea is voluntary and understandingly made and that a factual basis is shown for … a more serious charge reasonably related to the offense to which the plea is offered." *See* ***Harrell***, 182 Wis. 2d at 419.

¶8 Here, there is no dispute that the original charge of attempted first-degree homicide is reasonably related to aggravated battery, the charge to which

Morales pled no contest. However, Morales argues that there is not a sufficient factual basis for attempted first-degree homicide. Specifically, the jury instructions for attempted homicide require a finding that the defendant's acts "demonstrate unequivocally, under all of the circumstances, that the defendant intended to kill and would have killed [the victim] except for the intervention of another person or some other extraneous factor." WIS JI—CRIMINAL 1070. Morales argues that the facts of this case do not demonstrate unequivocally that he was attempting to kill J.A.B. *See* ***State v. Hauk***, 2002 WI App 226, ¶28, 257 Wis. 2d 579, 652 N.W.2d 393 ("[U]nequivocally" means "that 'no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts.'") (quoted source omitted); ***State v. Henthorn***, 218 Wis. 2d 526, 533, 581 N.W.2d 544 (Ct. App. 1998) (the conduct element of an attempt is satisfied when the defendant's conduct "demonstrates that only a circumstance beyond the [defendant's] control would prevent the crime," and "that it is unlikely that [the defendant] would have voluntarily desisted"). Instead, Morales argues that the facts suggest that it is equally reasonable to assume that Morales only wanted to beat up J.A.B.

¶9 Morales appears to be arguing that the factual basis for a charge of attempted homicide is insufficient if it does not eliminate all other inferences about the defendant's intent. However, this is not correct. *See* ***State v. Payette***, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423 ("It is not necessary that guilt be the only inference that can be drawn from the facts in the complaint, nor that the inference of guilt is established beyond a reasonable doubt.") Instead, the correct question is whether the inculpatory inference that Morales intended to kill J.A.B. can be drawn from the facts in the complaint. *See* ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. ("[A] factual basis for a plea exists if

an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one.").

¶10 We conclude that the complaint provides a sufficient factual basis to draw the inference that Morales intended to kill J.A.B. Specifically, the complaint states that Morales had been stalking J.A.B. that day, and that he attacked J.A.B. from behind, punched him repeatedly, and did not stop his attack until the Deputy ordered everyone to return to their cells. Morales's use of a pencil as a weapon further indicates his intent, as he used the pencil with such force that it pierced J.A.B. in the chest, abdomen, and back. Morales argues that the puncture wounds created by the pencil were not life-threatening. However, the issue as we see it is not whether the pencil itself would have killed J.A.B. but rather whether the manner in which Morales was using the pencil as a weapon helps demonstrate that Morales acted with the intent to kill J.A.B. The fact that this attack left J.A.B. with several puncture wounds supports the inference that Morales acted with the necessary intent.

¶11 In addition to these facts, the complaint also included a report from an eyewitness that further supports the charge of attempted homicide. Specifically, the complaint states that an eyewitness to the incident thought Morales was trying to kill J.A.B. and told authorities that he "saw someone almost getting murdered." As Morales points out, our Supreme Court has explained that for attempted crimes, the question of a defendant's intent should be evaluated "as though a cinematograph film, which has so far depicted merely, the accused person's acts without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed." *See*

Hamiel v. State, 92 Wis. 2d 656, 665, n.4, 285 N.W.2d 639 (1979). Here, the eyewitness was the audience for Morales's acts, and his report that it looked like Morales was trying to kill J.A.B. and that he almost murdered him helps provide the factual basis for the charged offense of attempted homicide.

¶12 For these reasons, we conclude that the facts support the charged offense of attempted homicide.[3] Because Morales pleaded no contest to a less serious offense that is reasonably related to this charged offense, the requirement of a factual basis for his plea is satisfied. *See* ***Harrell***, 182 Wis. 2d at 419.

CONCLUSION

¶13 Because there was a sufficient factual basis for Morales's plea, the circuit court properly denied his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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

[3] Because we resolve this issue under ***State v. Harrell***, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994), we need not address the parties' arguments about whether the complaint provides a factual basis for the aggravated battery charge. *See* ***Cholvin v. Wisconsin Dep't of Health and Family Servs.***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (if a decision on one point disposes of the appeal, we typically will not decide other issues raised).