COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP395-CR **Cir. Ct. No. 2006CF4879**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALTONIO LAROY CHANEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Altonio Laroy Chaney, *pro se*, appeals the judgment, entered following his ***Alford*** plea, convicting him of first-degree sexual assault of a child, as a party to the crime, contrary to WIS. STAT. §§ 948.02(1)

(amended eff. June 6, 2006) and 939.05 (2005-06).[1] He also appeals from the order denying his postconviction motion. On appeal, Chaney contends that: (1) the trial court erred in refusing to allow him to withdraw his plea because a manifest injustice had occurred; (2) his attorney was ineffective in several respects; and (3) his sentence was unduly harsh. Because the record reflects that Chaney knew what "party to a crime" liability was; the complaint contained sufficient facts to provide a factual basis for his plea; Chaney's attorney was not ineffective for failing to investigate a possible misidentification or for failing to move for severance; and no manifest injustice occurred requiring withdrawal of his plea, therefore, the trial court did not err in denying his motion. Moreover, the severance issue was not raised below, and thus, is waived. Finally, this court has no jurisdiction over Chaney's claim that his sentence was unduly harsh. Consequently, we affirm.

I. BACKGROUND.

¶2 The criminal complaint indicates that Regine G., then eleven years old, told police that on September 4, 2006, she went to the home of a girl named Rena G. While there, "Rena told Regine that Regine would have to have various sex acts with men and boys who were at the house." Regine did engage in various sex acts with numerous men and boys. Later, she identified Chaney from photos as one of the men present at the house. According to the complaint, a

[1] "An ***Alford*** plea is a guilty plea in which the defendant pleads guilty while either maintaining his innocence or not admitting having committed the crime." ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995); *see* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

co-defendant, Darnell Gurley, told police that he observed Chaney instructing Regine to strip, and Gurley later saw Regine engage in an act of penis-to-mouth sexual intercourse with Chaney. The criminal complaint also reflects that during the investigation of Chaney, police interviewed his girlfriend, Cierra S., then seventeen years old, who told them she had had penis-to-vagina sexual intercourse with Chaney on August 12, 2006, and she also related that Chaney had told her he was present at a house when a young girl was being sexually assaulted.

¶3 After being charged with two counts, one count of first-degree sexual assault of a child, as a party to the crime, and one count of sexual intercourse with a child age sixteen or older, Chaney brought a motion to suppress the out-of-court identification procedure. A hearing on his motion was begun but adjourned to the trial date. On the initial hearing date, the State filed an amended information charging Chaney with one additional count of first-degree sexual assault of a child, as a party to the crime, one count of first-degree sexual assault of a child, and one count of sexual exploitation of a child. Chaney elected to plead guilty to count five of the amended information, the count involving having sexual intercourse with his girlfriend, Cierra S., and later that day entered an ***Alford*** plea to count one, charging him as a party to the crime of first-degree sexual assault of a child, concerning the victim, Regine. The other charges were dismissed and read in.

¶4 The second plea was entered after Chaney's attorney told the court that because he had just been handed a DVD of an interview with Rena, the girl who originally told Regine she would have to engage in multiple sex acts, he did not think that ethically he could proceed with the trial until he had reviewed the

DVD.[2] Chaney's attorney, however, advised the court that Chaney wished to proceed. After some negotiations with the State, Chaney changed his mind and entered his second plea. At each plea hearing, the trial court used the criminal complaint as a factual basis for the plea. The trial court ordered a presentence investigation report and adjourned both matters for sentencing.

¶5 On the adjourned date of the sentencing hearing, the trial court sentenced Chaney to twelve years of confinement, to be followed by four years of extended supervision on count one, and nine months of incarceration, to be served consecutively, for count five. Chaney's postconviction counsel withdrew at Chaney's request, and Chaney elected to proceed *pro se*.

¶6 Chaney filed a postconviction motion on January 9, 2008. In his motion entitled "Defendant's Motion to Withdraw Guilty Plea and Brief in support of Defendant's Motion to Withdraw Guilty Plea," Chaney sought to have his conviction to count one, first-degree sexual assault of a child, as a party to the crime, vacated (he did not seek to have the judgment for count five, sexual intercourse with a child age sixteen or older, vacated), arguing that his plea, for a variety of reasons, was not knowingly, intelligently, and voluntarily entered. At the very end of his twenty-page motion, he wrote: "In the alternative, substantially reduce the defendant [sic] sentence to six (6) years." This was Chaney's first and only reference to the severity of his sentence in his motion. In a notice of appeal filed on February 7, 2008, Chaney, still acting *pro se*, commenced this appeal of

[2] The transcript reflects that the DVD contained an interview of Regine G., with the "G." standing for Rena's last name. It appears the numerous references to Regine were in error, and that the trial court and the parties were discussing a DVD of Rena.

the judgment and the January 17, 2008 trial court order denying his motion for postconviction relief.

¶7 On March 4, 2008, Chaney filed a second postconviction motion, seeking sentence modification. The trial court denied the motion on March 5, 2008. Chaney did not subsequently file a notice of appeal, but nonetheless argues in this appeal—from the judgment and the January 17 order—that the trial court's March 5, 2008 order should be reversed.

II. ANALYSIS.

*A. Chaney's **Alford** plea was entered knowingly, voluntarily, and intelligently, and sufficient information was contained in the criminal complaint to form a factual basis for the plea; thus, Chaney presented no evidence of a manifest injustice that would permit him to withdraw his plea.*

¶8 Chaney argues that his plea was not knowingly, voluntarily, or intelligently entered because he did not "have a full or complete understanding of the charges" or a complete understanding of the constitutional rights he was waiving. Although Chaney argues that he did not understand the charges or the constitutional rights he was waiving, his argument is limited to his complaint that the trial court "did not sufficiently summarize the elements to [p]arty to a [c]rime in order that he could make a sound[,] reasonable, intelligent, and voluntary plea decision." We are satisfied that Chaney's plea colloquy was sufficient to inform him of the meaning of "party to a crime."

¶9 A defendant looking to withdraw his or her guilty plea after sentencing must show that if he or she is refused the chance to withdraw the plea, that refusal would result in manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. "A plea which is not made knowingly, voluntarily or intelligently entered is a manifest injustice." ***State v. Giebel***, 198

Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact." ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. "One of the grounds for finding manifest injustice is that no factual basis for the plea exists." ***State v. Booker***, 2006 WI 79, ¶36, 292 Wis. 2d 43, 717 N.W.2d 676. Also, ineffective assistance of counsel has been recognized as a manifest injustice requiring a guilty plea to be withdrawn. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

¶10 WISCONSIN STAT. § 971.08(1) requires that before a trial court may accept a guilty plea, it must engage in a colloquy with the defendant to ensure that the plea is being made "voluntarily with understanding of the nature of the charge," among other things. *See also* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). For a plea to be valid, the defendant must have a "knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements." ***State v. Trochinski***, 2002 WI 56, ¶29, 253 Wis. 2d 38, 644 N.W.2d 891.

¶11 WISCONSIN JURY INSTRUCTION—CRIMINAL 400 (2005), defining "party to a crime" liability states, in part, as follows:

> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he)(she) knowingly either:
>
> • assists the person who commits the crime; or
>
> • is ready and willing to assist and the person who commits the crime knows of the willingness to assist.
>
> To intentionally aid and abet [first-degree sexual assault of a child], the defendant must know that another person is committing or intends to commit the crime of

> [first-degree sexual assault of a child] and have the purpose to assist the commission of that crime.
>
> However, a person does not aid and abet if (he)(she) is only a bystander or spectator and does nothing to assist the commission of a crime.[3]

(Footnote and bracketed information added.)

¶12 In a claim for plea withdrawal based on an inadequate plea colloquy,

> the defendant [must] make a *prima facie* showing that his plea was accepted without the trial court's conformance with [WIS. STAT.] § 971.08 or other mandatory procedures as stated herein. Where the defendant has shown a *prima facie* violation of [§] 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 [S]tate to show by 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 (citations omitted).

¶13 We review the trial court's summary denial of a defendant's plea withdrawal motion as a question of law. *See* ***State v. Howell***, 2007 WI 75, ¶¶30-31, 301 Wis. 2d 350, 734 N.W.2d 48. Here, the threshold allegation is that the plea colloquy was inadequate with respect to "party to a crime" liability. We have examined the record, the transcript of the plea hearing, and the plea questionnaire and waiver of rights form to determine the adequacy of the plea colloquy. We are satisfied it was sufficient.

[3] The final sentence of the instruction is to be used "if supported by the evidence." WIS JI CRIMINAL—400 (2005).

¶14 The trial court addressed the concept of "party to a crime" liability during the second plea proceeding when the following exchange took place:

> THE COURT: You also understand the concept of party to a crime?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: You have discussed that with your lawyer?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And counsel, you have discussed that with him as far as the concept of party to a crime?
>
> [DEFENSE COUNSEL]: Yes, I have, Your Honor.
>
> THE COURT: You understand you don't have to directly have committed the offense. You understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: As far as the concept of party to a crime and you have discussed that with your lawyer?
>
> DEFENDANT: Yes, sir.

Thus, as is clear, the trial court was told that Chaney and his attorney had discussed the "party to a crime" concept, and the trial court also explained to Chaney that he could be found guilty of first-degree sexual assault of a child even if he did not directly commit the offense. Chaney also told the trial court that he understood what "party to a crime" meant.

¶15 Chaney insists that the circumstances surrounding his plea hearing are identical to those in ***State v. Howell***. We disagree. In ***Howell***, the supreme court determined that the trial court's explanation of "aiding and abetting" was insufficient, ***id.***, 301 Wis. 2d 350, ¶47, and that the trial court failed in its duty to

"establish[] a factual basis for the crime charged" to support Howell's guilty plea," ***id.***, ¶68. However, the facts in ***Howell*** differ significantly with those here.

¶16 Howell was originally charged with first-degree reckless injury. ***Id.***, ¶13. The victim told the police that Howell was the shooter. ***Id.***, ¶12. On the trial date, Howell's cousin, who was with Howell when the shooting took place, admitted that he fired the gun. ***Id.***, ¶13. An adjournment was sought and granted. ***Id.*** At the next hearing date, the State successfully moved to orally amend the charge to first-degree reckless injury, as party to a crime. ***Id.***, ¶14 & n.6. In describing what the State would be prepared to prove, the prosecutor said: "[Howell's] position and his argument to the court will be that his cousin was the shooter and *he was there with him, observed him with the gun as they got out of the car and would have approached the victim in this situation.*" ***Id.***, ¶42 (italics in original). The supreme court concluded that the last minute addition of "party to the crime" liability, coupled with this factual rendition supplied by the prosecutor suggesting accompanying the shooter, without more, falls within "party to a crime" liability, "d[id] not amount to a clear explanation of the charge." ***Id.***, ¶48.

¶17 Chaney, on the other hand, was charged as being a party to the crime of first-degree sexual assault from the very beginning, and the issue of Chaney's role as the person who told the victim what to do was raised as early as the preliminary hearing. Thus, Chaney had significantly more time to familiarize himself with "party to a crime" liability and, unlike the plea hearing in ***Howell***, the State never confused Chaney with a hypothetical concerning "party to a crime" liability that placed Chaney at the scene as a mere spectator. Consequently, we conclude that Chaney was adequately explained the meaning of "party to a crime" liability and understood it at the time he entered his plea.

¶18 Next, Chaney contends that no factual basis for his conviction for first-degree sexual assault of a child as a party to a crime can be found in the criminal complaint. Before accepting a guilty plea, courts are required "to establish a sufficient factual basis that the defendant committed the crime to which he or she is pleading." ***State v. Smith***, 202 Wis. 2d 21, 26, 549 N.W.2d 232 (1996). Chaney points to the fact that he was not present when the episode began with Rena telling Regine that she had to have sex with the boys and men in the house, and he buttresses his claim that the complaint is invalid and flawed by noting that the victim told the police that Chaney did not commit any sex act with her. Chaney also asserts that the statements of co-defendant Darnell Gurley, who told the police he saw Chaney engaged in a sex act with Regine, were later recanted. Chaney is mistaken on both accounts.

¶19 The criminal complaint places Chaney at the scene. The victim identified him as one of the people present, and Chaney's underage girlfriend told police that he admitted to her that he was present. Indeed, in his briefs Chaney admits to being present during the incident. Chaney glosses over the statement of Gurley found in the complaint who said he saw Chaney "telling the victim, Regine, what to do," and later saw Chaney "having an act of penis-to-mouth sexual intercourse performed by Regine." Chaney downplays his actions during the incident, comparing his role to someone who merely "laughed at and mocked the victim for the acts as alleged by Regine [G]." With regards to Gurley's statements, Chaney claims that Gurley lied and later recanted his allegations. His brief directs us to his appendix as validation for this contention. However, the cite sets out only one of the statements given by Gurley to the police on September 13, 2006, some time between 2:41 a.m. and 5:02 a.m. In this statement, Gurley says he originally lied to the police about *his* involvement. The document contains no

statement that he lied about Chaney's involvement. Nor do any of the other documents in Chaney's appendix contain a recantation by Gurley that Chaney told the victim what to do and performed a sex act with the victim. While it is true that an officer who wrote down one of Gurley's statements wrote only that Gurley said Chaney "told victim what to do" and no sex act is listed, as it is for some of the others whose actions Gurley was describing, this does not amount to Gurley recanting his claim that Chaney had sex with the victim. This may simply have been an oversight on the officer's part. Moreover, even if Gurley's accusation concerning Chaney's sex act with the victim is not considered, the complaint has a factually sufficient basis for the crime because Chaney's act of telling the victim what to do clearly demonstrates that he was aiding and abetting the commission of the crime. Thus, a factual basis existed for the crime of first-degree sexual assault of a child, party to a crime.

B. Chaney's trial attorney was not ineffective.

¶20 Chaney next submits that he should be allowed to withdraw his plea because his trial attorney was ineffective. He contends that his attorney failed to "properly and thoroughly … investigate the issue of identification" and failed to move for severance. Neither argument is viable.

¶21 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show

prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690. It is not ineffective assistance of counsel to fail to bring futile motions. *See* ***Quinn v. State***, 53 Wis. 2d 821, 827, 193 N.W.2d 665 (1972).

¶22 Chaney contends that his attorney should have investigated the issue of identification. He appears to fault his attorney for not investigating the possibility that those who implicated him in the assaults in their statements to the police possibly misidentified him.[4] Chaney asserts that his trial attorney

> knew that the Chaney[]s [were] relatives, and also knew they looked very much alike one another save for the complexion being lighter and darker, as such, counsel simply dropped the ball rather than litigate and fight[. H]e simply wanted to give [the S]tate a victory perhaps for a later favor. As is often done.

We disagree.

¶23 Chaney fails to understand that his attorney could have easily explored this line of defense during the trial by cross-examining the State's witnesses. He supplies us with no information as to what his attorney should have done that was not done. Moreover, the fact that some of the State's witnesses knew Chaney personally before this incident makes misidentification unlikely.

[4] It should be noted that Chaney's attorney did file a motion challenging the identification procedure used by the police. Testimony was taken but not completed, and the hearing was adjourned. On the adjourned day, Chaney apparently withdrew his challenge to the identification process used by police when Regine identified Chaney. Later, he elected to proceed with a guilty plea and an ***Alford*** plea, effectively eliminating the trial court's need to rule on the motion.

¶24 Finally, even if Chaney could prove that his attorney failed to do something, Chaney has not proven any prejudice. While the complaint only names Gurley as the person who implicated Chaney, other police reports in the record are replete with statements from others who were present that state Chaney was instructing the victim on what to do and who to do it with.

¶25 Chaney's claim that his attorney was ineffective for failing to move for severance is equally unavailing. As the State points out, this issue was never raised below. An appellate court "will not consider issues raised for the first time on appeal. The burden is upon the party alleging error to establish by reference to the record that the error was specifically called to the attention of the trial court." ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977) (footnote omitted). Further, Chaney was not being tried with any co-defendants. All the other co-defendants had either pled guilty or had indicated they were going to plead guilty.[5] Chaney's claim that his attorney should have filed a motion severing the defendants for trial earlier in the proceeding is without merit. No co-defendants were left to be tried with Chaney. Any deficient performance in this regard, and we see none, must fail because Chaney suffered no prejudice.

C. This court lacks jurisdiction to review Chaney's sentence modification motion.

¶26 As the State points out in its brief, we lack jurisdiction to review Chaney's complaint concerning his sentence. The trial court denied the first postconviction motion in a decision and order dated January 17, 2008. The trial

[5] Wisconsin Circuit Court Access (CCAP) records show that by the time of the scheduled first day of Chaney's trial, all of the co-defendants had pleaded guilty or did so before Chaney's trial would have ended.

court's decision is entitled, "Decision and Order Denying Motion to Withdraw Guilty Plea." Following that, Chaney filed a notice of appeal of the postconviction motion on February 7, 2008. Almost one month later, on March 4, 2008, Chaney filed another motion entitled "Postconviction Motion, Motion for Sentence Modification." On March 5, 2008, the trial court denied his motion in another decision and order. In this decision, the trial court wrote that "[s]uccessive motions are not permitted. In addition he has filed an appeal, and the record is ready to be transmitted."

¶27 Chaney argues that the trial court erred when it denied his March 4, 2008 motion for sentence modification, but Chaney did not file a notice of appeal from the March 5, 2008 order denying his March 4 motion for postconviction relief. WISCONSIN STAT. RULE 809.10(1)(e) requires a filing of a timely notice of appeal in order to give the court jurisdiction over the appeal. In addition, any notice of appeal from the motion for sentence modification filed now would be untimely. *See* WIS. STAT. § 808.04(1). Consequently, this court cannot review Chaney's claim that the trial court erred when it denied his March 4 motion for sentence modification.

¶28 The dissent suggests that we should address the sentence modification issue because the final sentence in Chaney's January 9, 2008 motion asked the trial court to reduce his sentence to six years, and the final sentence in his affidavit in support of his motion states the sentencing court relied on inaccurate information and a mischaracterization of the facts. We disagree. Chaney presents no argument that he properly raised the issue and that it was erroneously denied. Indeed, Chaney could not have felt he properly raised the sentencing issue in his first postconviction motion because he filed a separate motion seeking sentence modification. Moreover, the trial court did not believe

Chaney properly raised the issue. In its decision denying the sentence modification motion, the trial court wrote: "The defendant's request for sentence modification should have been included in his former motion filed on January 9, 2008."

¶29 Thus, we see no basis to reverse the only postconviction order that is properly before us—the January 17 order. Indeed, were we to agree with the dissent, we would be permitting the appeal of an issue that was only raised after the appeal was filed.[6] Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[6] After reviewing the record, were this court to review the sentence, it is unlikely that we would come to the conclusion that Chaney urges – that his sentence was unduly harsh. Putting aside the sex act allegation, Chaney, at age twenty-two, not only made no attempt to stop this inhumane and depraved repeated sexual assault of a eleven-year-old child victim; but instead, he orchestrated her actions (she told police she felt threatened by Chaney) and those of the participants, all of whom were much younger than him, except for one forty-year-old co-defendant.

¶30 FINE, J. (*concurring in part; dissenting in part*). In his January 9, 2008, post-conviction motion, Altonio Laroy Chaney, *pro se*, asked the trial court, albeit in a passing request for alternative relief, to "substantially reduce the defendant[']s sentence to six (6) years." Chaney's affidavit filed in support of that motion contended: "That when sentencing the defendant the court relied on inaccurate information as well as a mischaracterization of the facts [asserted] by the state." The Majority refuses to address this issue because Chaney further fleshed out his request for a modification of his sentence in another motion, which he brought after he filed his notice of appeal. I believe that is wrong.

¶31 Chaney presented the sentencing issue to the trial court in his January 9 post-conviction motion and supported it with an affidavit. The trial court denied that motion in its order of January 17, 2008. Chaney filed his notice of appeal from that order on February 7, 2008, and has argued the sentencing issue in more than three pages of his appellate brief. Although we may reject an appellate argument as not being sufficiently developed or one that is wrong, we may not use the expedient of saying that we do not have jurisdiction when we do, and certainly we may not rely on the trial court's assessment of what Chaney, a *pro se* prisoner, *should* have done.

¶32 The simple fact is that Chaney raised the sentencing issue in his January 9 post-conviction motion, supported his contention with an affidavit, and the trial court denied the motion. I do not understand why, under our independent obligation to assess whether we have jurisdiction over the issue Chaney raised and argued, the Majority says that we do not.

¶33 While I agree with the Majority that we do not have jurisdiction over the trial court's order denying Chaney's March 4, 2008, post-conviction motion, we do have jurisdiction over the trial court's order denying Chaney's January 9 motion. Thus, I cannot join paragraphs 26–29.

¶34 I also cannot properly assess whether Chaney's request should have been granted because the State has not briefed that issue. Accordingly, I would put this appeal on hold, give the State a chance to address Chaney's contention that the trial court erred in not reducing his sentence as he requested in his January 9 motion, and, because Chaney is the appellant, give him a chance to reply to the State's response.

¶35 I respectfully concur in part and dissent in part from the Majority opinion.