COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1507-CR **Cir. Ct. No. 2006CF61**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM R. BAUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Judgment reversed in part; order reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. William Baugh appeals the part of a judgment of conviction that convicts him of burglary-committing a battery during the burglary. He also appeals an order denying his postconviction motion to withdraw his guilty

plea. Because we conclude the plea was not properly taken due to misinformation about the elements of the offense, we reverse that part of the judgment and the order denying the postconviction motion and remand the matter for further proceedings.

¶2 Baugh was charged with escape, burglary with battery during the burglary, second-degree sexual assault and aggravated battery of an elderly person. Pursuant to a plea agreement, the State dismissed and read in the escape and battery charges and reduced the sexual assault charge to third degree. Baugh pled guilty to the burglary and sexual assault charges and was sentenced to consecutive terms totaling fifteen years' initial confinement and ten years' extended supervision.

¶3 Throughout the plea hearing, the parties and the court erroneously identified the burglary charge as a simple burglary, i.e., entry with intent to commit a felony. That crime is a Class F felony under WIS. STAT. § 943.10(1m)[1] with a maximum sentence of twelve years and six months imprisonment and a $25,000 fine. The crime reflected in the judgment of conviction, burglary-committing a battery during the burglary, is a Class E felony under WIS. STAT. § 43.10(2)(d) with a maximum penalty of fifteen years' imprisonment and a $50,000 fine. Although the plea questionnaire and waiver of rights form stated the penalty for a Class E felony, it described the crime as "Burglary: breaking + entering the dwelling of another with intent to commit a felony." At the plea hearing, the court asked whether Baugh had a listing of the elements. Baugh's

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

counsel responded, "I recited them in the plea questionnaire, Your Honor." The court asked the district attorney whether Count 2 was amended to be "burglary with battery or just burglary?" The district attorney responded, "It's burglary with intent to commit a felony within the residence of the victim, in this case being sexual assault." At no time during the hearing was the element of battery during the burglary addressed.

¶4 Whether a plea was knowingly and voluntarily entered is a question of constitutional fact. ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). We affirm the trial court's findings of evidentiary or historical facts unless they are clearly erroneous, but we independently determine whether the established facts constitute a constitutional violation that entitles a defendant to withdraw his plea. ***Id.*** To validly plead guilty, a defendant must understand the nature of the crime at the time of taking the plea. ***Id.*** at 269. Because the record shows Baugh was misinformed about the elements of the offense, he has established a manifest injustice that compels the court to allow him to withdraw his plea. ***Id.*** at 283.

¶5 At the postconviction hearing, the trial court concluded Baugh made a prima facie showing that his plea was invalid, but the State proved by clear and convincing evidence that Baugh's pleas were voluntary, knowing and intelligent. The State called no witnesses at the postconviction hearing. It relied solely on the existing record. As a matter of law, that record was not sufficient to establish Baugh's knowledge of the correct elements.

¶6 The State contends that the totality of the circumstances shows Baugh was informed of the correct charge. The State notes the complaint and Baugh's own proposed jury instructions made reference to burglary-committing a

battery during the burglary. The record prior to the plea agreement does not establish Baugh's knowledge of the correct charge at the plea hearing. The agreement involved dismissal of two of the four charges and a reduction of an additional charge. Unless the elements of the correct burglary charge were disclosed in the plea questionnaire or at the plea hearing, Baugh cannot be expected to know the burglary charge was not also reduced.

¶7 The State also quotes Baugh's sentencing memorandum in which the author argues the burglary and sexual assault should be viewed as one event. From this, the State argues that Baugh understood the burglary was "inextricably tied to the sexual assault, i.e., 'battery' of the victim, and he had full understanding of the crimes of which he was convicted." The sexual assault not only could be viewed as a battery, it is also a felony. The acknowledgment that the burglary and sexual assault were linked is not inconsistent with the charge of burglary with intent to commit a felony. Therefore, the record before and after Baugh's plea does not establish his knowledge of the elements of the offense.

¶8 On remand, the trial court shall exercise its discretion to determine whether to vacate the sexual assault conviction as well. *See* ***State v. Roou***, 2007 WI App 193, ¶26, 305 Wis. 2d 164, 738 N.W.2d 173. Although Baugh did not challenge the sexual assault conviction, the court has discretion to return the parties to their pre-plea positions. ***Id.*** Baugh's successful challenge to the burglary plea can constitute repudiation of the plea agreement and can result in reinstatement of all four crimes charged in the complaint. *See* ***State v. Deilke***, 2004 WI 104, ¶¶14-20, 22, 26, 274 Wis. 2d 595, 682 N.W.2d 945.

By the Court.—Judgment reversed in part; order reversed and cause remanded.

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