

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2080-CR

Cir. Ct. No. 2006CF1100

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN E. WHITE,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Kevin E. White appeals from a judgment of conviction, entered upon his guilty plea, to three various counts, each charged as party to a crime. White also appeals an order denying his motion to withdraw the plea. He alleges his plea was unknowing because he did not understand the party-

to-a-crime element. We conclude the State has shown by clear and convincing evidence that White understood the party-to-a-crime theory. We therefore affirm the judgment and order.

BACKGROUND

¶2 Jeniquea Graham and LaKisha Stinson believed that Tyrone A. had stolen money from them. The women hit Tyrone A. with a chair and began beating him. Graham made a phone call and three men—Jeniquea’s brother Javerne, Javier Salazar-Wetzel, and White—responded to her call by coming to the house. When they arrived, they joined the women in assaulting Tyrone. Tyrone was burned on his face and legs with an iron, had a microwave dropped on his head, was beaten with multiple items, had plastic bags tied over his head, had a broomstick or other object repeatedly inserted into his anus, and suffered other injuries. Tyrone A. specifically stated White had hit him in the back of the head with a hammer and had beaten him with an extension cord.

¶3 Additionally, when the three men arrived, three other individuals in the home—Frank R., Kim C., and Jacob C.—were forced to remove their clothes and were sequestered in the bathroom. Frank R. told police he was not permitted to leave the bathroom.

¶4 The State originally charged White with nine counts: battery, robbery with the use of force, false imprisonment, and five counts of substantial battery, all as party to a crime, and one count of first-degree sexual assault aided and abetted by others. A second amended information charged battery, robbery, false imprisonment, first-degree sexual assault aided and abetted by others, and aggravated battery, all as party to a crime.

¶5 White agreed to plead guilty, as a party to the crime, to: false imprisonment; second-degree sexual assault, reduced from first-degree sexual assault; and substantial battery, reduced from aggravated battery. The remaining battery and robbery charges were dismissed and read in. In December 2006, the court sentenced White to three years' initial confinement and two years' extended supervision on the false imprisonment charge; ten years' initial confinement and fifteen years' extended supervision on the sexual assault; and sixteen months' initial confinement followed by sixteen months' extended supervision on the substantial battery.¹ The sentences were to be concurrent to each other and concurrent to any other sentence White was then serving.

¶6 In February 2008, White moved to withdraw his plea, contending he did not understand what "party to a crime" meant and that the circuit court had not adequately explained that element to him during the plea colloquy. The court granted an evidentiary hearing at which White and trial counsel both testified. Counsel testified he had explained party-to-a-crime liability and, further, had explained that he thought White was guilty under a "continuing criminal enterprise" theory. White testified that he did not think he was guilty of the charges because he was only looking for money in the house and did not know the sexual assault was happening, although he admitted he might be guilty of simple battery. The court denied the motion.

¹ The initial sentence called for twenty years' extended supervision on the sexual assault, but that exceeded the statutory maximum and was amended by the court.

DISCUSSION

¶7 To withdraw his guilty plea after sentencing, White must show, by clear and convincing evidence, “that failure to allow a withdrawal would result in a manifest injustice.” *See State v. Trochinski*, 2002 WI 56, ¶15, 253 Wis. 2d 38, 53, 644 N.W.2d 891, 898. One situation where withdrawal is necessary to correct a manifest injustice is where the plea is not knowing, intelligent, or voluntary, or is entered without knowledge of the charge. *See id.*, 2002 WI 56, ¶15, 253 Wis. 2d at 53–54, 644 N.W.2d at 898. Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. *Id.*, 2002 WI 56, ¶16, 253 Wis. 2d at 54, 644 N.W.2d at 898–899.

¶8 To ensure a plea is entered knowingly, the legislature enacted WIS. STAT. § 971.08, which codifies certain obligations that the circuit court must fulfill when accepting a plea. One obligation is to “determine that the plea is made ... with understanding of the nature of the charge[.]” *See* WIS. STAT. § 971.08(1)(a). Here, White alleges the circuit court taking his plea failed to meet this obligation when it did not explain the party-to-a-crime element and ensure his understanding of it.

¶9 Where a defendant seeks to withdraw a plea because of an alleged deficiency in the plea colloquy, he must make a *prima facie* showing that the circuit court failed to fulfill a WIS. STAT. § 971.08 duty or other mandatory plea procedure, and he must allege that he did not know or understand the information that should have been provided at the colloquy. *See State v. Lackershire*, 2007 WI 74, ¶47, 301 Wis. 2d 418, 444, 734 N.W.2d 23, 35–36. If the defendant fulfills these prerequisites, he is entitled to an evidentiary hearing where the burden shifts to the State to show, by clear and convincing evidence, that the plea

was nevertheless knowing, intelligent, and voluntary. *See id.* 2007 WI 74, ¶47, 301 Wis. 2d at 444–445, 734 N.W.2d at 36. Here, the court concluded that White had made the necessary preliminary showings and granted the evidentiary hearing. However, the court ruled that the State met its burden to show the plea was knowing, intelligent, and voluntary despite the court’s initial error during the plea colloquy.²

¶10 White’s main assertion is that the State failed to present adequate evidence to meet its burden and show that he understood party-to-a-crime liability. The majority of the evidence was in the form of trial counsel’s and White’s testimony. The weight and credibility to be given to witnesses’ testimony is left to the circuit court’s discretion; we do not disturb credibility determinations unless clearly erroneous. *See State v. Triplett*, 2005 WI App 255, ¶9, 288 Wis. 2d 515, 519, 707 N.W.2d 881, 883. Additionally, a court may consider the totality of the circumstances to determine whether the plea was knowing, intelligent, and voluntary despite an error in the plea colloquy. *See Lackershire*, 2007 WI 74, ¶60, 301 Wis. 2d at 449, 734 N.W.2d at 38.

² The State argues that it is unclear whether White is presently making a *Bangert* claim based on the court’s failure to fulfill mandatory duties or a *Nelson/Bentley* claim that factors extrinsic to the plea, in the form of mental limitations, adversely impacted his understanding of the plea. *See State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986); *see also State v. Bentley*, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–498, 195 N.W.2d 629, 633 (1972).

White replies that he raises only a *Bangert* claim, because *Bangert* always requires an allegation of some sort of failure to understand. Because the court decided to grant an evidentiary hearing, the difference is only in the burden of proof at that hearing. *See State v. Brown*, 2006 WI 100, ¶42, 293 Wis. 2d 594, 620–621, 716 N.W.2d 906, 919. With a *Bangert* case, the State has the burden to show the plea was still knowing, intelligent, and voluntary. Under *Nelson/Bentley*, White must show that the extrinsic factors impacted his understanding. The dispute is ultimately irrelevant, though—the court’s ruling that the plea was still knowing, intelligent, and voluntary effectively holds that the extrinsic factors, if there were any, had no impact on White’s understanding.

¶11 Here, trial counsel testified that he explained party-to-a-crime liability to White more than once. Counsel stated that although White seemed confused as to how he could be charged with such serious crimes, he ultimately understood what party-to-a-crime liability meant. Counsel further explained that he thought White was participating in a “continuing criminal enterprise” and explained that he believed a jury would be able to infer, based on evidence likely to be offered at trial, that White “had personally been involved” in the crimes, “that he assisted in the enterprise to find the money by the various actions which he had acknowledged,” and “that he was willing and aiding and abetting the individual who did do the other matters, including the sexual assault.” *See* WIS. STAT. § 939.05(2)(b) (a person who intentionally aids and abets commission of crime is a party to the crime).

¶12 White disagrees that counsel adequately explained any party-to-a-crime theory. Although White conceded that counsel explained he could be found guilty of some crimes even though he had not directly committed them, White argues that counsel never explained his “continuing criminal enterprise” theory to him.³ Instead, White asserts, counsel was actually attempting to match his behavior with the party-to-a-crime theory of WIS. STAT. § 939.05(2)(c). Under that portion of the statute, White asserts, he could only be guilty if sexual assault, false imprisonment, and substantial battery committed by others could be the “natural and probable consequence” of attempting to find stolen money.

³ Although “continuing criminal enterprise” actually has a specific legal meaning, *see* WIS. STAT. § 946.85, the circuit court perceived counsel to be using the term as a sort of shorthand reference, stating that White “wasn’t a spectator at all to any of the events and [trial counsel] used the word enterprise as to the other players that were involved that included Mr. White.”

¶13 Trial counsel had explained, though, that he believed the evidence showed White was willing to assist any actions in furtherance of the search for money. As to the substantial battery, victim Tyrone A. identified White as the individual who struck his head with a hammer. Although that was not the specific instance of battery charged, it provides a sufficient factual basis to indicate White was willing and intended to aid the commission of battery. As to the false imprisonment, counsel recalled that he believed White had helped usher the other occupants of the apartment into the bathroom, and that White had taken some money from one of the occupants' clothes after they had been forced to strip.⁴

¶14 To support his claim that counsel did not adequately explain party-to-a-crime liability, White points out that trial counsel did not attach the party-to-a-crime jury instruction to the plea questionnaire. This, White asserts, shows counsel neglected to discuss it with him. However, counsel testified that it was not his normal practice to attach instructions, although he had attached the instructions for the main crimes here because of the case's complexity. Counsel indicated that he believed he did not include the party-to-a-crime instructions because he likely remembered the elements without them. Given trial counsel's twenty-seven years' experience as a defense attorney, the court did not consider the lack of jury instructions persuasive.

¶15 White also asserts that he had learning disabilities, failed to graduate from high school, had difficulty with "hard words," and was unable to keep pace with a job at Burger King. Based on these issues, White asserts he would have

⁴ One of the false imprisonment victims, Frank R., had told police that someone took money from his pockets after he removed his clothes, although he did not identify which individual did so.

needed additional assistance understanding party-to-a-crime liability. However, the court was free to conclude, based on the testimony, that counsel in fact provided that assistance. Further, while White complains the court did not explain party-to-a-crime liability during the plea colloquy, he ignores the fact that the State added an explanation at the time. The court's failure to explain the theory or to ascertain whether White understood the crimes as charged was only sufficient to warrant an evidentiary hearing. By itself, the court's failure to explain party-to-a-crime liability is insufficient to render the plea unknowing if the State offers evidence to the contrary.

¶16 Ultimately, the postconviction evidentiary hearing provides clear and convincing evidence from which the circuit court could conclude that despite the circuit court's failure to specifically ascertain that White understood party-to-a-crime liability, White nevertheless understood that element and entered a knowing, intelligent, and voluntary plea. Although White disputes much of the evidence offered, the circuit court's conclusion here is based on credibility and factual determinations. Trial counsel testified that he had explained party-to-a-crime liability to White on multiple occasions and explained how he thought the evidence would permit a jury to convict White based on that theory. The court specifically concluded that White's postconviction testimony was incredible, based on inconsistencies throughout. Additionally, although the plea colloquy was imperfect, the State offered an additional explanation of its theory of liability during the colloquy. Thus, the circuit court did not err by concluding that the

State offered clear and convincing evidence to show that White's plea was knowing, intelligent, and voluntary, despite the court's inadequate colloquy.⁵

By the Court.—Judgment and order affirmed.

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

⁵ A plea may be withdrawn based on manifest injustice, even without a faulty plea. The State asserts that White has also failed to show manifest injustice. This is true, although White does not argue in that context, either in his main brief or his reply. We therefore need not discuss it further.

