COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2821-CR **Cir. Ct. No. 2005CF4058**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HOWARD A. PERKINS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Howard A. Perkins appeals from a judgment of conviction and from an order denying his postconviction motion for plea withdrawal. The dispositive question on appeal is whether the State presented

sufficient evidence at the postconviction hearing to prove that Perkins knowingly, intelligently, and voluntarily entered his guilty plea to second-degree reckless homicide as a party to a crime. We conclude that the State met its burden of proof, and we affirm.

BACKGROUND

¶2 Someone in a group of people shot Marquell Beard to death on a residential Milwaukee street in July 2005. The State charged Perkins with first-degree reckless homicide in Beard's death. Perkins maintained that he did not fire the shot that killed Beard, but Perkins admitted to his attorney that he was present at the scene, that he possessed a gun at the time, and that he fired that gun into the air. Pursuant to a plea bargain, Perkins pled guilty to one count of second-degree reckless homicide as a party to a crime and one count of possessing a firearm as a felon.

¶3 After sentencing, Perkins filed a postconviction motion with the assistance of an appellate lawyer.[1] Perkins asserted that the plea colloquy was deficient because it did not include "any reference to Perkins acting as a party to a crime." He further asserted that he "believed that simply being in the vicinity of the shooter would make him guilty as party to a crime," and that he "was not aware of the statutory definition of party to a crime because neither his attorney nor the Court went over it with him." Therefore, Perkins sought to withdraw his

[1] Perkins also filed a *pro se* postconviction motion. The circuit court denied that motion without a hearing and without prejudice because Perkins had representation. *See* ***State v. Redmond***, 203 Wis. 2d 13, 21, 552 N.W.2d 115, 119 (Ct. App. 1996) (defendant does not have the right to proceed both *pro se* and with an attorney). In this appeal, Perkins does not contend that the circuit court improperly denied his *pro se* postconviction motion, and we do not consider that issue.

plea to the homicide charge on the ground that he did not understand party-to-a-crime liability when he pled guilty.

¶4 Thirty months after Perkins entered his plea, the circuit court held a hearing on Perkins's motion.[2] Perkins's trial attorney was the only witness. The attorney testified that, during pretrial discussions, Perkins described a feud between his family and the victim's family. According to the attorney, Perkins acknowledged that on the day of the homicide he and others planned to "drive by [the victim's] house ... [and] display their presence ... in the neighborhood." Perkins denied shooting the victim but he admitted "that in fact he did have a gun and he shot in the air." The attorney testified to "many" discussions with Perkins about party-to-a-crime liability in which the attorney explained "how you can be responsible for a crime when you're not the shooter." The attorney also testified that the discussions took place "throughout the representation because ... it was our theory [Perkins] was not the shooter." Although the attorney was unable to recall the words used during the discussions, the attorney testified that "I know we discussed ... party to a crime."

¶5 In response to questions from the circuit court, the trial attorney indicated that he had a conversation with Perkins explaining that the State "would have to prove that [Perkins] was the shooter or that [Perkins] was aware that some crime was going to occur and that [Perkins] was assisting in the crime or was ready and willing to assist[.]" The attorney also confirmed that the conversation "would have made it clear to [Perkins] that the State would have to prove that he

[2] The Honorable Jeffrey A. Wagner presided over the plea proceedings and entered the judgment of conviction. The Honorable John A. Franke presided over the postconviction hearing.

was more than a bystander or spectator." Based on Perkins's demeanor and responses, the attorney believed that Perkins understood the concepts involved in party-to-a-crime liability.

¶6 The circuit court denied the motion for plea withdrawal, concluding that Perkins entered his plea knowingly, intelligently and voluntarily. This appeal followed.

DISCUSSION

¶7 A defendant may move to withdraw a guilty plea if the circuit court did not comply with WIS. STAT. § 971.08 or other court-mandated duties during the plea colloquy. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986). If the defendant's motion shows a deficiency in the plea colloquy and includes the allegation that the defendant did not know or understand the information that should have been provided at the colloquy, the circuit court must hold an evidentiary hearing. ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 401–402, 683 N.W.2d 14, 25. At the hearing, the burden is on the State to establish by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently made. ***Ibid.*** The State may use any evidence showing that the plea was valid and may rely on any portion of the Record to meet its burden. ***Bangert***, 131 Wis. 2d at 274–275, 389 N.W.2d at 26.

¶8 Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact that we review independently. ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 611, 716 N.W.2d 906, 914. We will not upset the circuit court's underlying findings of historical and evidentiary facts, however, unless they are clearly erroneous. ***Ibid.***

¶9 When a defendant enters a plea to an offense as a party to the crime, the circuit court must establish the defendant's understanding of party-to-a-crime liability during the plea colloquy. ***State v. Howell***, 2007 WI 75, ¶37, 301 Wis. 2d 350, 370, 734 N.W.2d 48, 58. There is no dispute that the circuit court failed to satisfy that obligation here. Perkins asserts that the deficiency in the colloquy is fatal to his plea because the Record does not demonstrate that he understood the nature of party-to-a-crime liability. We disagree.

¶10 The circuit court found that the trial attorney testified credibly at the postconviction hearing. As Perkins acknowledges, we must defer to that finding. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 435, 651 N.W.2d 345, 352 (when circuit court acts as fact finder, it is the ultimate arbiter of witness credibility). The attorney's testimony plainly supports the circuit court's finding that Perkins and his attorney had "a thorough discussion of party to a crime law."

¶11 The circuit court also credited the trial attorney's testimony that Perkins understood party-to-a-crime liability when he entered his plea. While Perkins alleged in his moving papers that he believed mere presence at the scene of the crime would be sufficient to prove his guilt, the circuit court rejected that contention as wholly unsupported by any evidence. Instead, the circuit court determined that Perkins "understood that the State had to prove more than that he was just a bystander."

¶12 The mental state of a person is a fact that must be determined by inference from the established historical facts. ***Pfeifer v. World Serv. Life Ins. Co.***, 121 Wis. 2d 567, 569, 360 N.W.2d 65, 66 (Ct. App. 1984). Further, we must accept reasonable inferences drawn by the fact finder. ***State v. Friday***, 147

Wis. 2d 359, 370, 434 N.W.2d 85, 89 (1989) (drawing of an inference on undisputed facts is a finding of fact that is binding on an appellate court).

¶13 The circuit court's inferences here were reasonably based on the historical facts. Perkins admitted to his attorney that he shot a gun at the time and place of the homicide, and the circuit court reasonably determined that Perkins and his attorney discussed party-to-a-crime liability in the context of that admission. Although the attorney frankly acknowledged an inability to recall the precise words used in the various discussions with Perkins more than thirty months earlier, the attorney did recall that the discussions involved aiding and abetting rather than conspiracy as the basis for party-to-a-crime liability. *See* WIS. STAT. § 939.05(2) (listing the ways that a person may be concerned in the commission of a crime). The circuit court noted that a person who aids and abets the commission of a crime is responsible for the natural and probable consequences of the crime. *See* ***State v. Hecht***, 116 Wis. 2d 605, 624, 342 N.W.2d 721, 731 (1984). The circuit court found that "[the trial attorney] discussed this to the extent appropriate, based on what [Perkins] was telling him about what happened." Accordingly, the circuit court concluded that Perkins "did in fact understand what the State had to prove for a finding of guilt in the context of this case."

¶14 Perkins emphasizes that the circuit court may not base its findings on speculation. In support, he cites ***Howell***, 2007 WI 75, ¶48, 301 Wis. 2d at 375, 734 N.W.2d at 61 (reviewing court "should not speculate about what information [the defendant], counsel, and the circuit court may have shared off the record before the plea hearing"). We agree that the circuit court may not rely on speculation, but we reject Perkins's suggestion that, because his trial attorney could not describe the discussions of party-to-a-crime liability in detail, the circuit court's findings are based on insufficient evidence.

¶15 When a plea colloquy is deficient and a postconviction motion earns the defendant a ***Bangert*** hearing, the circuit court may consider any evidence and the entirety of the Record to determine whether the State met its burden to prove that the defendant's plea was knowing, intelligent, and voluntary. *See* ***Bangert***, 131 Wis. 2d at 274–275, 389 N.W.2d at 26. In this case, the evidence included testimony from Perkins's trial attorney that he and Perkins discussed party-to-a-crime liability "throughout the representation," that the conversation focused on aiding and abetting, and that Perkins understood the concepts discussed.

> [T]he fact-finder may draw reasonable inferences from credible evidence.... An inference is reasonable if it can fairly be drawn from the facts in evidence. While an inference cannot be based on speculation or conjecture, the fact-finder might find any fact which it believes might rightfully and reasonably be inferred from the evidence of the case; the inferences should be logical and natural results drawn from the evidence by proper deduction.

State ex rel. N.A.C. v. W.T.D., 144 Wis. 2d 621, 636, 424 N.W.2d 707, 713 (1988) (citation omitted). The circuit court, as the finder of fact here, was entitled to draw reasonable inferences from the Record.

¶16 To enter a valid plea, a defendant must have "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, 61, 644 N.W.2d 891, 902. The defendant must "be aware of the nature of the offense." ***Id.***, 2002 WI 56, ¶30, 253 Wis. 2d at 62, 644 N.W.2d at 902. The testimony of Perkins's attorney supports the circuit court's conclusion that Perkins had the necessary awareness of party-to-a-crime liability to permit a valid plea.

¶17 The State proffered clear and convincing evidence that Perkins's trial attorney discussed party-to-a-crime liability with Perkins prior to the plea and

that Perkins was aware of and understood the issue when he pled guilty. Accordingly, the circuit court did not err in concluding that Perkins knowingly, intelligently, and voluntarily entered his plea to second-degree reckless homicide as a party to a crime. *See* ***ibid.*** Because this conclusion is dispositive, we do not reach Perkins's argument that an infirm plea to the homicide charge entitles him to withdraw his plea to the charge of possessing a firearm as a felon. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if a decision on one issue disposes of the appeal, we will not address remaining issues).

By the Court.—Judgment and order affirmed.

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