COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3114 **Cir. Ct. No. 98 CF 3523**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AVERY L. DALLAPIAZZA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Avery L. Dallapiazza appeals from the trial court's order denying his WIS. STAT. § 974.06 (1997–1998) motion for postconviction

relief.[1] He alleges that he should be allowed to withdraw his guilty plea and proceed to trial because his plea hearing was inadequate when the trial court allegedly: (1) failed to explain the elements of the crimes; (2) failed to explain the total possible maximum sentence; (3) misled him regarding the maximum sentence he could receive on one of his charges; (4) failed to review the defense of intoxication; and (5) failed to establish that there was a sufficient factual basis for the charges. In the alternative, Dallapiazza alleges that his sentence should be reduced because: (1) the prosecutor "over-charged" him; and (2) a dangerous weapon penalty enhancer was improperly applied to his charges. We affirm.

I.

¶2 Avery L. Dallapiazza was charged with several crimes after he hit Elizabeth Peters with his car.[2] The incident occurred after Peters, Amy Mueller, Jessica Coffee, and Terry Dyson rode a Summerfest shuttle bus to the State Fair Park grounds. Peters went into a bar to see if she could find some friends to give the group a ride to her house. Dallapiazza, Christine Pyatskowit, Jason Wallace, and a "Tim" were in the bar. Wallace asked Peters if she wanted a ride home, but told her "no guys could come along." Peters declined, left the bar, and rejoined her group across the street.

[1] All references to the Wisconsin Statutes are to the 1997–1998 version unless otherwise noted.

[2] Dallapiazza was charged with one count of armed robbery with the threat of force, as a party to a crime; one count of first-degree recklessly endangering safety while armed with a dangerous weapon; one count of first-degree reckless injury while armed with a dangerous weapon; and one count of leaving the scene of an accident after causing great bodily harm. *See* WIS. STAT. §§ 943.32(1)(b) & (2); 939.05; 941.30(1); 939.63; 940.23(1); 346.67(1); and 346.74(5)(c).

¶3 The Dallapiazza group then left the bar. Dallapiazza, Wallace, and Tim decided to rob Dyson. They walked up to the Peters group. Wallace put his hand in his front waistband and told Dyson: "Give me your money and there won't be any problems." Dyson gave Wallace his money clip and commented that he was an undercover police officer. Dallapiazza, Wallace, and Tim became scared and ran to Dallapiazza's car.

¶4 As Dallapiazza was driving away, he became angry, made a u-turn, and drove his car at the Peters group. Dyson and Peters were standing on the median strip. Dallapiazza sped up, drove his car onto the median, and hit Peters. Peters hit the windshield and was thrown over sixty feet. As a result, she sustained compound fractures, neck and cervical injuries, a punctured eardrum, serious head injuries, and lost all of her front teeth. Dallapiazza later admitted, in a statement to the police, that he knew that he should not have been driving that night because he had consumed alcoholic beverages.

¶5 The case was plea bargained. Dallapiazza pled no contest to one count of robbery. *See* WIS. STAT. § 943.32(1). He also pled guilty to one count of first-degree recklessly endangering safety while armed with a dangerous weapon, one count of first-degree reckless injury while armed with a dangerous weapon, and one count of leaving the scene of an accident after causing great bodily harm. *See* WIS. STAT. §§ 941.30(1), 939.63, 940.23(1), 346.67(1), and 346.74(5)(c). The trial court sentenced Dallapiazza to six years in prison on count two (recklessly endangering safety), twelve years in prison on count three (reckless injury), consecutive to count two, two years in prison on count four (duty to stop), consecutive to count three, and imposed and stayed a sentence of five years in prison on count one (robbery), with five years of probation.

¶6 Dallapiazza filed a motion for postconviction relief under WIS. STAT. § 974.06. He sought to withdraw his guilty plea and proceed to trial, claiming that: (1) he was incorrectly informed of the maximum sentence for first-degree reckless injury while armed; (2) he did not understand that he could be sentenced to consecutive periods of imprisonment; (3) he did not understand the elements of the crimes he pled guilty to or that intoxication could possibly have been a defense; (4) he did not understand that his use of an automobile could form the basis for the penalty enhancers for acting with a dangerous weapon; and (5) he did not understand that he allegedly could have been charged with injury by the intoxicated use of an automobile, which carries a lesser sentence.

¶7 The trial court held a ***Machner*** hearing.[3] At the hearing, Dallapiazza's trial counsel testified that he reviewed the elements of the charges with Dallapiazza prior to the plea hearing. Dallapiazza's trial counsel further testified that he reviewed the maximum sentences for each charge with Dallapiazza and informed him of the maximum sentence he could receive if the charges were to "run after each other for a total … number of years."

¶8 Dallapiazza also testified. He claimed that his trial counsel did not explain the elements of some of the offenses to him. Dallapiazza further claimed that he thought the maximum sentence he could receive was ten years in prison because he did not understand the difference between concurrent and consecutive sentences. Dallapiazza admitted, however, that he did not try to withdraw his

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Dallapiazza does not make an ineffective-assistance-of-counsel claim on appeal. Accordingly, it is waived. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

guilty plea before sentencing because "it would cost my family a whole lot more money to get a different attorney."

¶9 The trial court denied Dallapiazza's motion. It found incredible Dallapiazza's testimony and concluded that Dallapiazza had not demonstrated a manifest injustice warranting plea withdrawal because he knowingly, voluntarily, and intelligently entered his pleas.

II.

A. *Plea Withdrawal*

¶10 Dallapiazza alleges that the trial court erred when it denied his WIS. STAT. § 974.06 motion to withdraw his pleas because the plea hearing was inadequate in several respects. We disagree. For the reasons set forth below, we conclude that Dallapiazza's pleas were entered knowingly, voluntarily, and intelligently.

¶11 Whether to permit withdrawal of a plea is a discretionary decision for the trial court and we will not disturb the trial court's findings unless the trial court erroneously exercises that discretion. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 635, 579 N.W.2d 698, 708 (1998). In a motion to withdraw a guilty plea after sentencing, the defendant has the burden to show by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***Birts v. State***, 68 Wis. 2d 389, 392–393, 228 N.W.2d 351, 353 (1975). A manifest injustice occurs when a defendant does not knowingly, voluntarily, and intelligently enter his or her plea. ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144, 149 (Ct. App. 1992).

¶12 A defendant challenging the adequacy of a plea hearing must make two threshold showings. ***State v. Giebel***, 198 Wis. 2d 207, 215–216, 541 N.W.2d 815, 818 (Ct. App. 1995). First, the defendant must show a *prima facie* violation of WIS. STAT. § 971.08 or other mandatory procedures. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986). Second, the defendant must allege that he did not know or understand the information that should have been, but was not, provided at the plea hearing. ***Giebel***, 198 Wis. 2d at 216, 541 N.W.2d at 818. If a defendant makes these showings, the burden shifts to the State to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered despite any inadequacies in the record at the time the plea was entered. ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. Whether a defendant makes a *prima facie* showing that his or her plea was not entered knowingly, voluntarily, and intelligently is a question of "constitutional fact" that we review *de novo*. ***Id.***, 131 Wis. 2d at 283, 389 N.W.2d at 30. We will not upset the trial court's findings of historical facts unless they are clearly erroneous. ***Id.***, 131 Wis. 2d at 283–284, 389 N.W.2d at 30.

¶13 To assure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by WIS. STAT. § 971.08(1)(a) to ascertain whether a defendant understands the nature of the charges to which he or she is pleading, the potential punishment for those charges, and the constitutional rights being relinquished. ***Bangert***, 131 Wis. 2d at 260–262, 389 N.W.2d at 20–21. This can be done by a detailed colloquy between the judge and the defendant, or by referring to some portion of the record or communication between the defendant and his lawyer that reveals the defendant's knowledge of the nature of the charges and the rights he or she relinquishes. ***Id.***, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24. The trial court may also make references to a signed

waiver-of-rights form. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 630 (Ct. App. 1987).

¶14 First, Dallapiazza claims that the plea colloquy was deficient because "[t]he record … is devoid of a sufficient inquiry between the court and the defendant as to the essential elements of the crimes to which he was pleading guilty." We disagree. The record shows that Dallapiazza was informed of and understood the elements of the crimes. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 149, 569 N.W.2d 577, 586 (1997) (a reviewing court may look at the record as a whole to determine if a defendant understood the consequences of his or her plea at the time it was entered). At the plea hearing, the trial court asked Dallapiazza if his trial counsel had "gone over with you that each of these charges has certain parts or elements to it that have to be proven by the State and then has he identified for you what those elements are?" Dallapiazza responded "Yes." Dallapiazza also indicated that he signed and reviewed a plea questionnaire and waiver-of-rights form with his attorney and that he understood it.

¶15 Moreover, at the ***Machner*** hearing, Dallapiazza's trial counsel testified that he informed Dallapiazza of the elements of the offenses prior to the plea hearing: "What we talked about is the elements of the offenses that he was charged with. I believe I delineated, as I always do, the specific elements." The only evidence to the contrary is Dallapiazza's self-serving testimony that his attorney did not explain some of the elements to him. The determination of witness credibility is for the trial court. ***Dejmal v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980). Dallapiazza has not shown that the trial court's finding that his testimony was incredible is clearly erroneous. Accordingly, there

is ample evidence that Dallapiazza was informed of and understood the elements of the charges.[4]

¶16 Second, Dallapiazza claims that the plea hearing was inadequate because the trial court failed "to carefully explain to [him] on the record the full imprisonment exposure." Dallapiazza further alleges that he did not understand that he could receive the sentence that he did, twenty years in prison, because the trial court did not explain to him the difference between concurrent and consecutive sentences. Again, the record belies this contention.

¶17 At the plea hearing, the trial court reviewed the maximum term of imprisonment for each crime with Dallapiazza and, as noted above, referred to Dallapiazza's plea questionnaire and waiver-of-rights form, which contained the maximum penalties for each count. The trial court also ensured that Dallapiazza understood that "no matter what negotiations have taken place, I'm free to impose maximum penalties on all of those offenses if I think that's the right thing to do."

¶18 Moreover, at the ***Machner*** hearing, Dallapiazza's attorney testified that he explained to Dallapiazza that he could receive thirty-six years' imprisonment because "any time I represent somebody in multiple counts, I

[4] Dallapiazza also claims that his plea was defective under ***Henderson v. Morgan***, 426 U.S. 637, 646 (1976), because the trial court failed to discuss the "state of mind" elements of recklessness and utter disregard for human life "on the record, in open court." (Emphasis omitted.) Dallapiazza's reliance upon ***Henderson*** is misplaced. We are not bound by plea-hearing procedures applicable only to the federal courts. *See* ***State v. Bangert***, 131 Wis. 2d 246, 259–260, 389 N.W.2d 12, 20 (1986). Moreover, ***Henderson*** reversed the defendant's conviction because "the trial judge found as a fact that the element of intent was not explained to respondent." ***Henderson***, 426 U.S. at 647. ***Henderson*** explained, however, that "[n]ormally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." ***Id.*** Nowhere does ***Henderson*** require that "state of mind" elements *must* be discussed in open court, on the record.

always advise them of the total amount of time that they're facing." Dallapiazza's trial counsel further testified that he discussed the maximum possible sentence that Dallapiazza could receive with him "several times" so that Dallapiazza would "underst[and] what the maximum exposure was." Again, other than Dallapiazza's testimony, there is no evidence that Dallapiazza's counsel did not explain the maximum possible sentence to him. Thus, there is also ample evidence in the record that Dallapiazza was informed of and understood the maximum potential prison sentence.

¶19 Third, Dallapiazza alleges that the plea colloquy was fatally defective because the trial court "misled" him when it allegedly informed him that the maximum prison sentence for first-degree reckless injury while armed was ten years in prison, instead of the correct maximum prison sentence of fifteen years in prison. Dallapiazza bases this allegation, in part, on the following colloquy:

> **THE COURT:** And first[-]degree reckless injury while armed -- well imprisonment up to ten years with a minimum of three years and a fine of -- is that -- I think it should be ten thousand, shouldn't it?
>
> **[COUNSEL]:** That's just my lousy handwriting. It is ten thousand.
>
> **THE COURT:** Ten thousand dollars or both?
>
> **[COUNSEL]:** Total of 15.
>
> **THE COURT:** Okay. Do you understand that?
>
> **[DALLAPIAZZA]:** Yes, sir.

Dallapiazza claims that this dialog and the fact that the Information incorrectly set forth the maximum penalty for first-degree reckless injury while armed show that the trial court "misinformed" him of the maximum penalty on this count. We disagree for two reasons.

¶20 First, the trial court did not mislead Dallapiazza at the plea hearing. As the colloquy above shows, Dallapiazza's lawyer correctly stated that the maximum term of imprisonment was fifteen years after the trial court mistakenly stated that it was ten years. Moreover, after Dallapiazza's lawyer corrected the trial court, Dallapiazza indicated that he understood the penalty for first-degree reckless injury while armed.

¶21 Second, Dallapiazza's Complaint correctly set forth the correct maximum sentence for first-degree reckless injury while armed as fifteen years. At the ***Machner*** hearing, Dallapiazza's trial counsel testified that he relied on the correct maximum sentence in the Complaint, rather than the incorrect sentence in the Information, when he reviewed the plea questionnaire and waiver-of rights form with Dallapiazza. Dallapiazza's counsel further testified that, despite the illegibility of his handwriting, he wrote the number fifteen on the form and he explained to Dallapiazza that the maximum term of imprisonment was fifteen years when he reviewed the form with Dallapiazza. Thus, the record again supports the trial court's finding that Dallapiazza was *correctly* informed of and understood the maximum term of imprisonment for first-degree reckless injury while armed.

¶22 Dallapiazza also claims that the plea hearing was flawed because the trial court did not inform him that intoxication provided a "clear defense" to the element of utter disregard for human life, an element of first-degree recklessly endangering safety and first-degree reckless injury. We disagree.

¶23 Dallapiazza's claim that intoxication is a "clear defense" to utter disregard for human life is incorrect. The element of utter disregard for human life is evaluated under an objective standard. ***State v. Jensen***, 2000 WI 84, ¶17,

236 Wis. 2d 521, 613 N.W.2d 170. Under an objective test, the focus is on how a reasonable, sober person under similar provocation would act, not how Dallapiazza, who claims that he was voluntarily intoxicated, might have acted. *See* ***State v. Heisler***, 116 Wis. 2d 657, 662–663, 344 N.W.2d 190, 193–194 (Ct. App. 1983). Thus, the trial court was not required to inform Dallapiazza that intoxication was a "clear defense"—Dallapiazza's voluntary intoxication was immaterial to a consideration of the utter disregard for human life element.

¶24 Finally, Dallapiazza appears to claim that the plea hearing was inadequate because there was no factual basis for the charges. Again, we disagree.

¶25 WISCONSIN STAT. § 971.08(1)(b) requires a judge to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." "[A] factual basis is established when counsel stipulate on the record to facts in the criminal complaint." ***State v. Thomas***, 2000 WI 13, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836. The record shows that this is precisely what occurred here. At the plea hearing, the State offered the Complaint as the factual basis for the pleas. Dallapiazza's attorney told the trial court: "Your Honor, it's substantially true and correct however we would take issue with some of the facts and we will address them at sentencing." Moreover, after the trial court ascertained that Dallapiazza reviewed the Complaint with his attorney and understood it, the trial court asked Dallapiazza: "Are you satisfied that it is substantially true and that the State will have -- has the witnesses to give testimony to each of those facts?" Dallapiazza responded "Yes." Thus, Dallapiazza's claim fails—there was a sufficient factual basis for Dallapiazza's charges. Accordingly, for all of the reasons set forth above, the record as a whole demonstrates that Dallapiazza's pleas were knowingly, voluntarily, and intelligently entered. Thus, the trial court properly denied his motion to withdraw his pleas.

B. *Sentence Reduction*

¶26 Dallapiazza also alleges that his sentence should be reduced for two reasons. First, he argues that the prosecutor "over-charged" him because, under the facts of this case, the prosecutor could have charged him with causing great bodily harm by the intoxicated use of a motor vehicle, which carries a lesser sentence than the crimes with which he was charged, first-degree recklessly endangering safety while armed and first-degree recklessly causing injury while armed. We disagree.

¶27 It is an abuse of charging discretion for a prosecutor to bring charges when the evidence is clearly insufficient to support a conviction, or to bring charges on counts of doubtful merit in order to coerce the defendant to plead guilty to a less serious offense. ***Thompson v. State***, 61 Wis. 2d 325, 330, 212 N.W.2d 109, 111 (1973). Prosecutors have "great discretion," however, "to determine whether to commence a prosecution and which of several crimes to file against a defendant." ***State v. Lindsey***, 203 Wis. 2d 423, 445, 554 N.W.2d 215, 223–224 (Ct. App. 1996).

¶28 Here, Dallapiazza does not allege that either instance of prosecutorial misconduct occurred. Moreover, contrary to Dallapiazza's contention, a prosecutor may legitimately base his or her charging decision on the severity of the penalties upon conviction. ***State v. Edwardsen***, 146 Wis. 2d 198, 202–203, 430 N.W.2d 604, 606 (Ct. App. 1988). Accordingly, other than his mere unsupported assertion, Dallapiazza does not point us to anything that shows that the charging was an abuse of discretion.

¶29 Second, Dallapiazza claims that his sentence should be reduced by three years because the dangerous-weapon penalty enhancers were improperly

applied to his charges because, he argues, an automobile cannot "become a 'weapon' for sentence enhancement as an add-on charge if it was an essential element of the underlying crime." This claim also lacks merit. An automobile can be a dangerous weapon, justifying the addition of a dangerous-weapon penalty enhancement where the circumstances are egregious. ***State v. Bidwell***, 200 Wis. 2d 200, 209, 546 N.W.2d 507, 511 (Ct. App. 1996). Thus, Dallapiazza fails to show that he is entitled to sentence reduction. *See* ***State v. Littrup***, 164 Wis. 2d 120, 131, 473 N.W.2d 164, 168 (Ct. App. 1991) (under WIS. STAT. § 974.06, the defendant has the burden to establish entitlement to relief by clear and convincing evidence). Accordingly, the trial court properly denied his § 974.06 motion.

By the Court.—Order affirmed.

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