COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1677-CR **Cir. Ct. No. 98-CF-720**
98-CF-749

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL F. HOWARD,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Howard appeals from an order denying his motion to withdraw his no contest plea. Howard also appeals from the denial of his subsequent motion for postconviction relief. Howard argues (1) the circuit court erred by denying his motion for plea withdrawal; and (2) his convictions for

recklessly endangering safety violate double jeopardy. We reject these arguments and affirm the orders.

BACKGROUND

¶2 In Brown County Circuit Court case No. 98-CF-720, an information charged Howard with two counts of second-degree sexual assault of a child. In Brown County Circuit Court case No. 98-CF-749, an information charged Howard with four counts of being party to the crime of first-degree recklessly endangering safety while possessing a dangerous weapon.[1] Pursuant to a plea agreement, the two cases were consolidated. In exchange for his no contest pleas to one count of second-degree sexual assault and four counts of being party to the crime of first-degree recklessly endangering safety while possessing a dangerous weapon, the State agreed to dismiss the remaining sexual assault charge and recommend a concurrent sentence on the sexual assault conviction. The State further agreed to recommend sentences totaling no more than twenty-five years in prison.

¶3 At the sentencing hearing, the State recommended consecutive five-year prison sentences on each of the five counts. Howard's counsel did not object to this recommendation despite the State's failure to recommend that Howard's sentence on the sexual assault conviction be served concurrently, rather than consecutively, to his sentences on the four counts of recklessly endangering safety. Howard was ultimately convicted upon his no-contest pleas to consecutive six-year prison terms on each of the recklessly endangering safety counts. With respect to the sexual assault conviction, the court imposed and stayed a

[1] The charges arose from allegations that Howard fired twenty-eight bullets into a dwelling because he was mad at its occupants, with whom he used to live.

fifteen-year prison sentence and placed Howard on ten years' probation, all consecutive to the sentences imposed on the convictions for recklessly endangering safety. Howard did not pursue a direct appeal; however, in May 2000, he filed a WIS. STAT. § 974.06[2] postconviction motion seeking plea withdrawal based on ineffective assistance of counsel and the State's breach of the plea agreement. The circuit court denied Howard's motion.

¶4 On appeal, this court reversed the order denying Howard's motion for postconviction relief. *See* ***State v. Howard***, 2001 WI App 137, ¶1, 246 Wis. 2d 475, 630 N.W.2d 244. We concluded that the State materially and substantially breached the plea agreement and remanded the matter to the circuit court to conduct a ***Machner***[3] hearing and determine whether Howard's counsel performed deficiently. ***Id.*** We held: "If the trial court concludes counsel was deficient, the court should exercise its discretion and select the appropriate remedy for the State's breach." ***Id.***

¶5 On remand, trial counsel testified at a ***Machner*** hearing that she was not aware at the time of sentencing that the plea agreement had been violated. Counsel further testified that the violation "slip[ped] past her" and her failure to object was not a strategic decision but, rather, an error on her part. The circuit court, concluding that counsel's performance was deficient, denied Howard's motion for plea withdrawal and ultimately resentenced Howard to a concurrent sentence of ten years' imprisonment on the sexual assault conviction and

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] See ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

consecutive sentences of eight years' imprisonment on three of the four convictions for recklessly endangering safety. With respect to the remaining conviction for recklessly endangering safety, the court imposed and stayed an eight-year sentence and ordered ten years' probation.

¶6 Howard subsequently filed a motion for postconviction relief arguing that the sentence was unduly harsh and the convictions for recklessly endangering safety were multiplicitous and therefore a violation of double jeopardy. The court denied Howard's motion for postconviction relief and this appeal follows.

ANALYSIS

A. Resentencing vs. Plea Withdrawal

¶7 Citing ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), Howard argues he is entitled to plea withdrawal because the State materially and substantially breached the plea agreement. In ***Bangert***, our supreme court stated that although a breach of a plea agreement does not give rise to a *per se* right to withdraw a plea, "[a] material and substantial breach … amounts to a manifest injustice and would result in the vacating of the plea agreement and the withdrawal of the plea of no contest." Because this court earlier concluded that the State materially and substantially breached the plea agreement, ***Howard***, 2001 WI App at ¶30, Howard contends the circuit court erred by denying his motion for plea withdrawal.

¶8 In Howard's earlier appeal, however, this court noted that our supreme court has not specifically addressed whether the circuit court has discretion to select the appropriate remedy and the factors that should be

considered. ***Id.*** at 34. We acknowledged that the supreme court's language in ***Bangert*** "suggested that where a substantial and material breach occurred, the defendant's request to withdraw the plea should be permitted." ***Id.*** We noted, however, that the ***Bangert*** court concluded there had been no material and significant breach of the plea agreement and therefore did not apply a remedy. ***Id.*** (citing ***Bangert***, 113 Wis. 2d at 289-90). Ultimately, we concluded that the choice of remedy is not up to the defendant but, rather, rests with the court. ***Howard***, 2001 WI App at ¶37. We acknowledged that sentencing courts considering remedies for the State's breach of the plea agreement consider the egregious or minimal nature of the breach, whether much time has passed which would make a vacated plea and a new trial an onerous burden on the parties, and whether the defendant served any or all of the time on the sentence. ***Id.*** at ¶33 (quotations omitted). We stated, however, that "[w]hen selecting a remedy, sentencing courts should bear in mind that specific performance, the less extreme remedy, is preferred." ***Id.*** at ¶37.

¶9 Consistent with this court's instructions on remand, the circuit court conducted a ***Machner*** hearing and determined that trial counsel was deficient. The court then heard argument regarding the appropriate remedy for the State's breach and properly exercised its discretion to select resentencing as the appropriate remedy. *See* ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338 ("A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts."). We discern no error.

B. Double Jeopardy

¶10 Howard also argues that his convictions for recklessly endangering safety were multiplicitous and thus violate double jeopardy. Howard does not dispute that he failed to raise this issue in either his direct appeal or the WIS. STAT. § 974.06 motion forming the basis for his prior appeal. Howard's claim, raised for the first time after resentencing, is outside the scope of the remand. In any event, we conclude his claim is without merit.

¶11 The double jeopardy protections prohibit multiple convictions for the same offense. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996). "Whether a violation exists in a given case is a question of constitutional law which we review de novo." ***Id.*** Howard argues that his reckless endangerment convictions are multiplicitous because they arose from a single course of conduct.

¶12 We analyze claims of multiplicity using a two-prong test: "1) whether the charged offenses are identical in law and fact; and 2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count." ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Here, the parties agree that the four counts of first-degree recklessly endangering safety while possessing a dangerous weapon are the same in law, as they involve alleged violations of the same statute. The dispute arises, however, regarding whether the charges are different in fact. Howard contends that because he was unaware of how many people were at risk when he fired shots into the building, it is "unconstitutional to charge him with multiple counts based on the number of persons that may or may not have been

present." Essentially, Howard is claiming that the number of victims is irrelevant to the multiplicity inquiry. We are not persuaded.

¶13 As a general rule, "when different victims are involved, there is a corresponding number of distinct crimes." ***Austin v. State***, 86 Wis. 2d 213, 223, 271 N.W.2d 668 (1978). In ***State v. Lechner***, 217 Wis. 2d 392, 417, 576 N.W.2d 912 (1998), our supreme court held that where multiple persons were endangered by reckless conduct, multiple convictions under the reckless endangerment statute were not multiplicitous. Here, the charging document alleged the name of a different victim for each of the four charged counts. Because four different people were endangered by Howard's reckless conduct, the four convictions for reckless endangerment are not multiplicitous.[4]

By the Court.—Orders affirmed.

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

[4] To the extent Howard argues he should have more properly been charged under WIS. STAT. § 941.20(3) for discharging a weapon from a vehicle, "if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." WIS. STAT. § 939.65.