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March 28, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP1087-CR State of Wisconsin v. Prentice S. Sanders (L.C. # 2011CF3640)

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Prentice Sanders appeals a judgment of conviction for two counts of attempted first-degree intentional homicide, as an act of domestic abuse. Sanders also appeals a circuit court order denying his motion for postconviction relief. Sanders argues that he should have been allowed to withdraw his guilty pleas because they were not knowing, voluntary, and intelligent. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We reject Sanders' arguments and affirm.

Sanders was charged with two counts of attempted first-degree intentional homicide after running down his sister and her boyfriend with a pickup truck, causing serious injuries. Sanders pleaded guilty. Three aspects of the plea questionnaire are significant: (1) the questionnaire indicated that Sanders had read the criminal complaint and that his attorney had read it to him; (2) the questionnaire indicated that Sanders understood the charges and that his attorney had explained their elements; and (3) the questionnaire indicated that Sanders had three years of schooling and did not have a high school diploma or GED.

During the plea hearing, Sanders confirmed that his attorney had reviewed the plea questionnaire with him and that the information it contained was accurate. Sanders also confirmed that he understood the terms of the plea agreement. At other points in the hearing, however, Sanders sought clarification from his attorney or the court. For example, when the court asked Sanders if he understood the domestic abuse assessment, Sanders' attorney took a short break to confer with him. After an off-the-record discussion, Sanders confirmed that he understood. In addition, when the circuit court asked Sanders if his attorney had gone over the elements of the charges, Sanders responded, "Not really. I would like to go over that again." The circuit court went through the elements with Sanders and twice explained the intent element of attempted intentional homicide. Sanders confirmed that he understood these elements and that, by pleading guilty, he was admitting these elements. The circuit court accepted Sanders'

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

plea and subsequently sentenced Sanders to two consecutive sentences of seven years of initial confinement and five years of extended supervision.

Sanders' appellate attorney filed a no merit notice of appeal. However, Sanders filed a pro se response in which he questioned the validity of his pleas. We concluded that Sanders had made a sufficient showing to warrant an evidentiary hearing and, therefore, remanded the matter to determine whether Sanders' plea was knowing, voluntary, and intelligent.[2]

At the hearing, the State relied on testimony from Sanders' former attorney, who testified that it was his customary practice to use jury instructions to go over the elements of the offense with his clients, and that the plea questionnaire accurately reflected his interactions with Sanders. The attorney further testified that he specifically remembered Sanders' plea negotiations because the assistant district attorney was (in the attorney's estimation) "extremely unreasonable" in not allowing Sanders to plead to lesser charges such as reckless endangerment. The attorney recalled "extensive discussions" with Sanders about whether the facts fit the elements of the charged offenses, and further recalled that Sanders informed him that he did not want to go to trial. The attorney did not recall any confusion, hesitation, or misunderstanding on Sanders' part.

Sanders' testimony contradicted much of the attorney's testimony. Sanders denied that his attorney had reviewed the elements of the offenses with him. Sanders felt that the attorney

[2] Sanders also argued that he received ineffective assistance of counsel. However, the circuit court found that Sanders' attorney provided effective representation and, in the alternative, that any deficiency in his performance did not prejudice Sanders. Sanders does not appeal this aspect of the circuit court's decision.

gave him no choice but to take the plea offer and tried to belittle Sanders in order to prevent him from asking questions. Sanders further testified that he had not understood anything about the plea hearing, and that he just answered the court's questions based on what he thought the judge wanted to hear. Regarding the elements of the offenses, Sanders testified that he did not understand them even after the circuit court explained them, and that he would not have pleaded guilty if he had understood them.

Sanders also testified about his weak reading skills at the time of the plea hearing. He offered conflicting testimony about his educational background but indicated that he stopped attending school at age 12 or 13, and that classes he attended while at a boys' home were "a disaster" because he "never completed anything." The court questioned Sanders about various pro se filings, and Sanders stated that he had drafted them with "a little help." He also testified that his reading and writing skills had improved since 2012 due to regular medication and the classes he had taken while in prison.

The circuit court denied Sanders' motion for plea withdrawal. The court's decision began by addressing the credibility of the witnesses, finding Sanders' former attorney to be "very credible in all regards" and Sanders "generally not credible." Sanders' testimony struck the court as "contrived, coached, and/or insincere," in that he always deflected to certain themes rather than directly stating that he had lied during the plea hearing. The court also noted that Sanders appeared intelligent and quite capable while on the stand, engaging in "verbal[] jousting" with the State and carefully parsing his words. In light of Sanders' apparent intellectual ability, the court found Sanders' "absolute and unequivocal" testimony in which he flatly denied any understanding of the plea hearing to be extreme and incredible.

The court then made several factual findings regarding Sanders' plea. Specifically, the court found that Sanders' attorney had given Sanders a copy of the criminal complaint and discussed it with him prior to the hearing. The attorney explained the elements of the attempted first-degree intentional homicide charges to Sanders before the plea hearing. The attorney specifically discussed with Sanders whether the facts fit the elements of the charged offenses, as part of his unsuccessful effort to bargain down Sanders' charges to lesser offenses.

The court also made several findings relating to Sanders' cognitive abilities. The court found that Sanders had been "purpose[ly] evasive" about his level of education. Sanders' testimony was contradictory and reflected an attempt to convince the court that his education was more limited than it actually was. Instead, the court concluded that Sanders had average intellectual abilities based on his performance at the hearing. Although the court credited Sanders' testimony that prison classes had helped him improve his reading and writing skills, the court noted that a mere two years after the plea hearing, Sanders had filed a "cogent and persuasive" no merit response. The court also pointed out that Sanders had asked his attorney or the court for clarification at three points during the plea hearing, which demonstrated that he was listening and was not afraid to ask questions when he did not understand something. For these reasons, the court concluded that Sanders did not have intellectual limitations that prevented him from understanding the elements of the offenses at the plea hearing.

Having made these findings, the circuit court determined that Sanders' guilty plea was knowing, voluntary, and intelligent. Specifically, the circuit court determined that, because Sanders was a reasonably intelligent person, the plea colloquy was sufficient to ensure that he understood the nature of the charge and the elements of the offense. Sanders appeals.

Because Sanders made a sufficient showing to warrant an evidentiary hearing, we review the circuit court's denial of his motion for plea withdrawal to determine whether the State met its burden of establishing that the guilty pleas were knowing, intelligent, and voluntary. *See* ***State v. Hoppe***, 2009 WI 41, ¶45, 317 Wis. 2d 161, 765 N.W.2d 794. We accept the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** We then determine independently whether these facts demonstrate that the pleas were knowing, intelligent, and voluntary. ***Id.***

Sanders' arguments on appeal focus on the circuit court's factual findings regarding his ability to comprehend the plea colloquy. Specifically, he contends that the circuit court's determinations regarding his education level and comprehension abilities were clearly erroneous. Instead, Sanders argues that the evidence conclusively established that he had a third grade education level and was completely unable to comprehend the plea colloquy. According to Sanders, because the circuit court's finding that Sanders had the intellectual capacity to understand the plea hearing was clearly erroneous, the State did not satisfy its burden of demonstrating that his guilty pleas were knowing, voluntary and intelligent. *See* ***State v. Brown***, 2006 WI 100, ¶52, 293 Wis. 2d 594, 716 N.W.2d 906 ("The less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands the essential elements of the charges.").

Sanders acknowledges that he faces an uphill battle in asking us to reject the circuit court's factual findings as clearly erroneous. *See* ***Phelps v. Physicians Ins. Co. of Wis., Inc.,*** 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 ("the circuit court's findings are to be sustained if they do not go 'against the great weight and clear preponderance of the evidence'") (quoted source omitted). Nonetheless, Sanders argues that the circuit court's findings that he was intelligent enough to understand the plea hearing go against the great weight and clear

preponderance of the evidence, because Sanders' testimony about his limited education and inability to comprehend the proceedings was unrebutted.[3]

At the outset, we note that Sanders frequently overstates the conclusions that he contends we must draw from the record. For example, Sanders argues that we should view the plea questionnaire, which states that he had three years of schooling, as unrebutted evidence that he had a third grade education. Yet Sanders himself cast the plea questionnaire into doubt when he testified that his formal education stopped at age 12 or 13, and that he might have received further schooling while in group homes but he "never completed anything." Given these inconsistencies, which the court viewed as purposely evasive, we reject Sanders' argument that the plea questionnaire conclusively establishes that Sanders only had a third grade education.

Likewise, Sanders argues that we are required to disregard his statement at the plea hearing that he read the complaint, because it is contradicted by his assertion at the sentencing hearing that the psych ward nurses read the presentencing report to him. We reject Sanders' assertion that this is the only reasonable conclusion that can be drawn from the record. At the sentencing hearing, Sanders also testified that he could read "pretty good," that he was able to read parts of the report, and that he understood the full report when it was read to him. We

[3] Sanders also argues on appeal that we should consider his "long and extensive mental health history" as part of the analysis. However, the issue raised by the postconviction motion was whether the plea was knowing, voluntary, and intelligent given Sanders' third grade education, limited comprehension, and intellectual limitations. Sanders was competent at the time of the plea hearing, and Sanders does not make any developed argument as to how his past mental health issues relate to his comprehension abilities and intellectual limitations when competent. In the absence of any evidence to suggest that Sanders was experiencing mental health issues at the plea hearing, we see no basis for treating Sanders's past history as evidence that he did not understand the proceeding or that his intellectual ability was limited. Such a conclusion is particularly illogical in light of the record evidence suggesting that Sanders was malingering and intentionally producing false symptoms to avoid prosecution.

further note that the presentence report is a much longer and denser document than the complaint. Accordingly, we disagree that this portion of the sentencing transcript provides conclusive evidence that Sanders lacked the skills necessary to read the complaint, or that he lacked the cognitive abilities to understand the plea colloquy.

Moreover, all of Sanders' arguments suffer from a fatal flaw in that they rely on Sanders' own assertions and testimony about his cognitive abilities. The problem with this entire line of argument is that the circuit court specifically found that Sanders was not credible. "[T]he circuit court's finding on the credibility of a witness 'will not be questioned unless based upon caprice, an [erroneous exercise] discretion, or an error of law.'" ***Jacobson v. American Tool Companies, Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). The circuit court's decision includes an extensive discussion of witness credibility, and we see no argument from Sanders that would call the court's credibility determinations into question. Therefore, the circuit court was entitled to disregard Sanders' non-credible testimony and instead base its factual findings on evidence that it found more credible. This evidence includes the plea questionnaire, the transcript of the plea hearing, the testimony of Sanders' attorney at the evidentiary hearing (which the circuit court found highly credible), and the court's own perception of the cognitive abilities that Sanders demonstrated in his pro se filings and his testimony at the hearing.[4] Because there is ample credible evidence to support the circuit court's factual findings, we reject Sanders' arguments that those findings were clearly erroneous.

[4] Sanders argues that, because of the five year gap between the plea hearing and the evidentiary hearing on his postconviction motion, his performance at the hearing is "thoroughly irrelevant" to his cognitive abilities at the plea hearing. Sanders further contends that his current capabilities are due entirely to the education he has received while in prison. While we appreciate Sanders' vote of (continued)

We now turn to the second part of the analysis, which is whether the facts found by the circuit court demonstrate that Sanders' guilty pleas were knowing, intelligent, and voluntary. *See* ***Hoppe***, 317 Wis. 2d 161, ¶45. As the State noted in its brief, Sanders' only argument on appeal was that the circuit court's factual findings were clearly erroneous. The State further noted that Sanders appeared to agree that, if upheld, these facts demonstrated that his pleas were knowing, intelligent, and voluntary. We see no developed argument from Sanders on this second issue, and Sanders did not dispute the State's characterization of his argument in his reply brief. Accordingly, we deem Sanders to have conceded this issue. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.").

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

confidence in the prison education system, we disagree that the circuit court was required to accept Sanders' testimony that his current cognitive abilities are an entirely recent development.