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District II

May 6, 2020

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

2019AP781-CR State of Wisconsin v. Daylon Md Ward (L.C. #2016CF1817)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

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).

Daylon Ward pled no contest to child abuse—recklessly causing great bodily harm. He appeals from the judgment of conviction and from the order denying his postconviction motion by which he sought to withdraw his plea on grounds of ineffective assistance of counsel and a flawed plea colloquy. Upon reviewing the briefs and the record, we conclude the case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm the judgment and order.

Ward broke into the home of a woman who had a no-contact order against him. When she attempted to defend herself with a baseball bat, Ward, the woman, and KV, the couple's then sixteen-year-old daughter struggled. Ward struck KV in the head with the bat, knocking her to the floor. Ward was charged in separate cases with six felonies and four misdemeanors. The subject of this appeal is count two in Racine County Case No. 16CF1817 ("count two"), physical abuse of a child—intentionally causing great bodily harm. The charge exposed Ward to fifty-one years' imprisonment, including weapon-possession and habitual-offender penalty enhancers.

Ward and his attorney, Joshua Hargrove, discussed globally resolving the various charges and Ward's other pending cases. The State agreed to amend count two from intentional child abuse causing great bodily harm, a Class C felony, to reckless child abuse causing great bodily harm, a Class E felony. *See* WIS. STAT. § 948.03(2)(a), (3)(a). The modification reduced Ward's prison exposure to a total of twenty-six years' imprisonment with the penalty enhancers.

The amended information, presented to Ward and discussed with him the day before the plea hearing, accurately stated the charge and the penalties. The elements sheet attached to the plea form contained a few errors, however. It referenced WIS. STAT. § 948.03(2)(b) (intentionally causing bodily harm), instead of § 948.03(3)(a) (recklessly causing *great* bodily harm) and stated that the repeater enhancer exposed him to four, not six, more years' imprisonment.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

At the plea hearing the next day, the State accurately indicated that count two was changed from physical abuse of a child intentionally causing great bodily harm to recklessly causing great bodily harm. The court discussed the charges to which Ward was pleading no contest, the penalty enhancers, and charges that would be dismissed or read in. Both attorneys agreed that count two would be pled to as charged, "which would be physical abuse of a child, recklessly causing great bodily harm." Ward verbally affirmed that the court's summary tracked his understanding of the plea agreement and the charges to which he would be pleading.

The court then addressed with Hargrove the effect of the enhancers as to count two, but mistakenly stated that the underlying charge was "recklessly causing bodily harm," omitting the word "great" before bodily harm. When asked if he had taken the enhancers into account when advising Ward of the maximum penalties, Hargrove conceded he may have erred on the elements sheet. The court immediately interjected that it wanted "to make sure [Ward] knows what he may be dealing with," and advised Ward that count two was a Class E felony, then accurately described the maximum penalties Ward faced. Ward again verbally acknowledged that he understood. The court also noted there had been some changes to the complaint and asked Ward if he needed more time to speak with counsel before entering his plea. Ward declined. The court again accurately described count two. Ward pleaded no contest.

Represented by new counsel, Ward moved for postconviction relief.[2] He asserted that (1) the errors in the elements sheet constituted ineffective assistance of counsel and (2) the plea colloquy was defective because Hargrove answered for him when the circuit court asked if he,

[2] The Honorable Emily S. Mueller presided over the plea and sentencing hearings. The Honorable Faye M. Flancher presided over postconviction matters.

Ward, understood the charges to which he was pleading, and because the circuit court omitted the word "great" when describing the offense of recklessly causing great bodily harm. The court granted Ward a ***Machner***[3] hearing.

The postconviction court denied Ward's motion. It found that, while at one point Judge Mueller omitted the word "great" in describing count two, she overall had accurately described the offense and the associated penalties, Ward understood them, and she specifically asked Ward if he needed more time to confer with his attorney and whether he understood the charges to which he pled no contest, such that the plea colloquy corrected any errors on the elements sheet.

In this appeal, as in his postconviction motion, Ward seeks to withdraw his no-contest pleas based on ineffective assistance of counsel and a flawed plea colloquy. "A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted). Examples of a manifest injustice include a showing that the plea was infirm due to ineffective assistance of counsel, *see* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48, or that the plea was not knowing, intelligent or voluntary, ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

Ineffective Assistance of Counsel

Challenges to no-contest pleas based on alleged ineffective assistance of counsel invoke the two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), so that Ward must

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

show that counsel's performance was both deficient and prejudicial, *see* ***Bentley***, 201 Wis. 2d at 311-12. The standard of review is a mixed question of law and fact. ***Strickland***, 466 U.S. at 698. The circuit court's findings of fact will not be overturned unless clearly erroneous but the ultimate determination of whether counsel's performance was deficient and prejudicial are questions of law that this court reviews independently. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The ineffective-assistance-of-counsel claim does not succeed if it fails on either prong. ***Strickland***, 466 U.S. at 697.

The alleged errors in the elements sheet do not establish deficient performance. The amended information accurately set forth the changes to count two, the elements, and the maximum penalties. Hargrove testified that he discussed everything with Ward just the day before the plea hearing, and Ward testified similarly. The elements sheet thus was not Ward's sole source of information. As Ward has not established deficient performance, his ineffective-assistance claim must fail.

Defective Plea Colloquy

A defendant's guilty plea must be knowing, voluntary, and intelligent. ***State v. Cross***, 2010 WI 70, ¶16, 326 Wis. 2d 492, 786 N.W.2d 64; ***Brown***, 293 Wis. 2d 594, ¶25; *see also* WIS. STAT. § 971.08. Before accepting a no-contest plea, a court must ensure that the defendant is aware of the nature of the charge and the range of punishments. Section 971.08(1)(a); ***Brown***, 293 Wis. 2d 594, ¶35. The court may fulfill its obligation by summarizing the elements from the appropriate jury instruction, asking if defense counsel has explained the nature of the charge to the defendant, or referencing the record. ***State v. Bangert***, 131 Wis. 2d 246, 267-68, 389 N.W.2d 12 (1986). If a court fails to do so, a "***Bangert*** violation" occurs, and, unless the State

can show that the plea nonetheless was knowing, voluntary, and intelligent, the defendant may be entitled to withdraw his or her plea. ***Cross***, 326 Wis. 2d 492, ¶¶20, 22; ***Bangert***, 131 Wis. 2d at 261-62. Such a claim presents a question of constitutional fact; an appellate court thus "accept[s] the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but … determine[s] independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary." ***Brown***, 293 Wis. 2d 594, ¶19.

A defendant whose postconviction motion fails to make a prima facie showing of a ***Bangert*** violation is not entitled to an evidentiary hearing. ***Cross***, 326 Wis. 2d 492, ¶¶19-20. Ward's motion did not specify how the circuit court allegedly failed to perform its obligations under WIS. STAT. § 971.08 or ***Brown***, but the postconviction court nonetheless granted him a hearing.

While Ward first testified that he did not have second thoughts about the plea agreement and that Hargrove accurately informed him of the potential penalties for count two, including the weapon-possession and repeater enhancers, he then claimed he was not "fully clear" about whether he was pleading to a Class H or Class E felony or what the penalties were for a Class H felony, and only vaguely claimed that Hargrove "basically push[ed]" him to plead because "it would be better." But Ward never testified that he would have gone to trial but for the mistakes on the elements sheet or that he ever thought a Class H felony was a possibility. The court also correctly informed Ward before taking his plea that he was pleading to a Class E felony and of the associated penalties, including the penalty enhancers. He raised no objection.

Hargrove testified that, just the day before the plea hearing, he and Ward reviewed the changes to count two on the amended information, the penalties for a Class E felony, the

additional exposure due to the penalty enhancers, and that the essence of the plea agreement was that they "finally got the State to agree to amending it to the reckless instead of the intentional." Hargrove indicated that he believed Ward understood those changes and that Ward never indicated anything to the contrary. The court expressly found no material defect in the colloquy.

Here, Ward renews his claim that the plea colloquy was flawed because when Judge Mueller advised him of and asked whether he understood his maximum exposure, Hargrove, not he, responded in the affirmative,[4] and because Judge Mueller at one point excluded the word "great" from the term "causing bodily harm." We understand him to mean that Judge Mueller did not adequately ensure that he understood the nature of the offense and associated penalties.

Ward's arguments here are no more compelling than his arguments below. His claimed errors are based on quotations from the plea hearing transcript that are taken out of context. When Judge Mueller omitted the word "great" from "great bodily harm," it was during a discussion with Ward's counsel about the applicable enhancers, not with Ward. She asked Ward three times if he understood the charges and penalties contained in count two; the second two times occurred *after* the transcript suggests that Hargrove answered for him. The court also verified with Hargrove that he had discussed the penalty enhancers with Ward ("I want to make sure that your client knows what he may be dealing with"), and Ward affirmatively declined the court's express offer of additional time to discuss with Hargrove the elements of the amended

[4] After the court stated that Ward faced a maximum sentence of twenty-six years on count two, Hargrove replied, "Yes." The court then asked Ward, "You understand that, Mr. Ward?" The transcript indicates that *Hargrove* replied, "Yes, ma'am," although the court had directed the question to Ward. The court then responded, "Okay," without asking for a response directly from Ward. Whenever Ward answered the court in the affirmative, he replied, "Yes, ma'am." Hargrove never used "ma'am" when addressing the court. We are not persuaded that it was Hargrove who answered, "Yes, ma'am."

count two. Finally, when addressing Ward just before accepting his plea, the court stated, "Then on case 16CF1817, referring to the amended information, as to count two, physical abuse of a child, recklessly causing great bodily harm with use of a dangerous weapon as a repeater or habitual offender, what is your plea?" Ward replied, "No contest."

The circuit court employed all three methods outlined in ***Bangert***, 131 Wis. 2d at 268, to ensure that Ward understood the charge and penalties he faced: it verbally summarized the elements of the offense through a substantive colloquy, inquired whether defense counsel explained the nature of the charge, and referenced the charge contained in the amended information, which Ward indicated he had reviewed. When read as a whole, the record demonstrates that the plea colloquy was not deficient and that no ***Bangert*** violation occurred.

IT IS ORDERED that the judgment and order are summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals