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May 5, 2021

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

2020AP552-CR State of Wisconsin v. Michael K. Brown (L.C. #2018CF347)
2020AP553-CR State of Wisconsin v. Michael K. Brown (L.C. #2018CF371)

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).

Michael K. Brown appeals from a judgment of conviction, following guilty pleas, of one count of robbery of a financial institution as a party to a crime and one count of attempted escape from custody. Brown also appeals from the order denying his postconviction motion for relief. Brown contends that his plea to the robbery charge was not knowing, intelligent, and voluntary because he was unaware of one of the essential elements of the crime. 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 (2019-20).[1]

On July 6, 2018, Brown was charged with one count of robbery of a financial institution as a party to a crime. According to the criminal complaint, on June 19, 2018, Brown entered an Associated Bank in East Troy with his hand over his face, threw a bag on the counter, and demanded that a teller fill the bag with money. The complaint further states that Brown ordered the tellers to wait in the bathroom for five minutes before coming out. Citizen witnesses told police that a tan or gold Buick was in the vicinity of the bank at the time of the robbery, that a male jumped into the back of the car, and the female driver drove away. Witnesses provided a partial license plate number, eventually leading police to identify the vehicle as belonging to Brown's great-aunt. Brown's sister later saw photos from the bank robbery and identified Brown as the robber. Another person who knew Brown identified him from photos of the bank robbery.

Following his arrest, Brown was charged in a separate complaint with one count of attempted escape. According to the complaint, Brown attempted to escape from a squad car after he was arrested on the warrant for robbery when officers were transporting him to the Walworth County Jail.

Brown pled guilty to both charges. At the plea hearing, the circuit court conducted a colloquy with Brown in which the court, as relevant to this appeal, ascertained that Brown reviewed the plea questionnaire/waiver of rights form with his counsel, Brown understood the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

constitutional rights Brown was giving up, Brown reviewed the police reports with counsel "as related to each element" of the crimes charged, Brown understood that he was charged as a party to a crime, and counsel reviewed the criminal complaints and charging language with Brown. The circuit court also asked Brown to state his plea to whether "by use of force or threat of imminent force, [Brown took] money from an individual or the presence of an individual of a financial institution, namely, the Associated Bank, commonly called robbery of a financial institution?" Brown responded by pleading guilty. Brown also confirmed that he read the criminal complaints as to both charges and that the assertions in the complaints were true. The circuit court accepted Brown's guilty pleas.

The circuit court sentenced Brown to twenty years' imprisonment on the robbery charge, bifurcated as eight years of initial confinement, and twelve years of extended supervision. On the attempted escape charge, the circuit court sentenced Brown to two years in prison, bifurcated as one year of initial confinement, and one year of extended supervision, consecutive to the first count.

Brown filed a postconviction motion seeking to withdraw his guilty plea to the robbery of a financial institution charge on the ground that he did not understand the nature of the charge. Specifically, Brown's motion alleged that in conducting the plea colloquy, the circuit court relied upon the jury instructions attached to the written guilty plea questionnaire to ascertain whether Brown understood the nature of the offense; however, Brown's counsel attached the wrong jury instruction to the plea questionnaire. Counsel attached the jury instruction for armed robbery, whereas Brown was charged with robbery of a financial institution. Brown's motion alleged that "he did not understand that the [S]tate must prove that the victim was a financial institution."

The circuit court held a hearing on the motion where Brown's defense counsel testified. Counsel acknowledged that he attached the jury instruction for armed robbery to the plea questionnaire, but stated that he was unsure of whether there was an exact jury instruction on point. Counsel also stated that he did not believe he told Brown that an element of the offense required the victim to be a financial institution, telling the circuit court that a majority of his conversations with Brown centered on "the element about force or threat of force." Counsel also stated that he did not believe that he provided Brown with a copy of the robbery of a financial institution statute. However, counsel stated that he reviewed the plea questionnaire with Brown, as well as the charging language, and that he would have kept a copy of the criminal complaint with him while meeting with Brown so that they could reference that document. Counsel also stated that while he could not recall reviewing the specific elements of the robbery charge with Brown, he would have identified the bank as the victim of Brown's offense. Counsel stated that Brown also understood the bank to be the victim of his crime.

The circuit court acknowledged that its plea colloquy was "defective" to the extent that it relied on defense counsel "at the point where we went through the elements," but ultimately denied Brown's motion. Taking the totality of the record into account, the circuit court found that Brown "knew exactly what he was pleading to." The circuit court noted that the criminal complaint specifically charged robbery of a financial institution, that both counsel and Brown acknowledged reviewing the complaint, and that prior to accepting Brown's plea, the circuit court specifically asked Brown about his plea to the crime of "robbery of a financial institution." The circuit court stated that "[t]he gravamen of the offense is the robbery. The fact that it is a financial institution is the fly in the ointment, so to speak, where [defense counsel] and myself

did not realize that the wrong one was appended. But it doesn't change the gravamen of the offense." This appeal follows.

On appeal, Brown contends that the circuit court's plea colloquy was defective because the circuit court failed to establish "that Brown actually knew the elements of the offense to which he was pleading."[2] We disagree.

When a defendant seeks to withdraw a guilty plea after sentencing, he or she must prove by clear and convincing evidence that refusing to allow plea withdrawal would result in a "manifest injustice." ***State v. Finley***, 2016 WI 63, ¶58, 370 Wis. 2d 402, 882 N.W.2d 761. The manifest injustice test requires a defendant to show "a serious flaw in the fundamental integrity of the plea." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A defendant can demonstrate a manifest injustice by showing that he or she did not knowingly, intelligently, and voluntarily enter the plea. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

When a defendant seeks to withdraw a plea based on an allegedly defective plea colloquy, courts use the procedure set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***State v. Sulla***, 2016 WI 46, ¶25, 369 Wis. 2d 225, 880 N.W.2d 659. Under ***Bangert***, circuit courts have an obligation to address the defendant personally when entering a guilty plea and to undertake a colloquy to ensure the defendant understands the nature of the charge, the constitutional rights he or she is giving up by pleading, and the potential punishment

[2] Brown's postconviction motion and brief on appeal only address his guilty plea to the charge of robbery of a financial institution. Accordingly, we do not address the charge of attempted escape.

for the crime. ***Brown***, 293 Wis. 2d 594, ¶¶33-34; *see also* WIS. STAT. § 971.08. "An understanding of the nature of the charge must include an awareness of the essential elements of the crime." ***Bangert***, 131 Wis. 2d at 267.

If the circuit court fails to fulfill a duty at the plea hearing, the defendant may be entitled to an evidentiary hearing if a subsequent postconviction motion alleges that he or she did not understand an aspect of the plea because of the omission. ***Brown***, 293 Wis. 2d 594, ¶36. "Assuming the defendant's postconviction motion is adequate to require a hearing, [the defendant] may withdraw his [or her] plea after sentencing as a matter of right unless the [S]tate can show the plea was entered knowingly, intelligently, and voluntarily, despite the deficiencies in the plea hearing." ***Id.***

Whether a plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact. ***Id.*** We will uphold the circuit court's findings of historical fact unless they are clearly erroneous, but we decide de novo whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. *See* ***id.***

Here, Brown contends that his plea was not knowing, intelligent, and voluntary because he was unaware of a critical element of the robbery of a financial institution charge, namely, that the victim of the crime must be a financial institution. Brown contends that counsel's failure to attach the correct jury instruction to his plea questionnaire and the circuit court's reliance on counsel to explain the elements of the offense constitute a manifest injustice warranting plea withdrawal.

In determining whether a manifest injustice warrants plea withdrawal, we look beyond the plea hearing transcript to the "totality of the circumstances." *See* ***State v. Cain***, 2012 WI 68,

¶31, 342 Wis. 2d 1, 816 N.W.2d 177. "The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well the defense counsel's statements ... among other portions of the record." ***Id.***

The record supports the circuit court's finding that Brown understood the nature of the charge at issue, including the element that the victim of his actions must be a financial institution. Counsel testified at the postconviction hearing that Brown recognized Associated Bank—a financial institution—as the victim of his actions. Counsel also testified that he reviewed the criminal complaint with Brown, which specifically charges the crime of robbery of a financial institution. Brown told the circuit court that he reviewed and understood the complaint, which references Associated Bank multiple times and specifically alleges that Brown, "as a party to a crime, did, by use of force or threat of imminent force take from an individual or the presence of an individual money that is under the custody or control of *a financial institution, Associated Bank*." (Emphasis added.) Brown also told the circuit court that the allegations in the complaint were accurate. Moreover, the circuit court read charging language from the complaint, including asking Brown to state his plea as to whether he took "money from an individual or the presence of an individual of a financial institution, namely, the Associated Bank, commonly called robbery of a financial institution?" Brown replied, "Guilty."

In considering the totality of the record, we also note that while counsel attached the wrong robbery instruction to Brown's plea questionnaire, the handwritten words "robbery of a financial institution" appear on the party to a crime jury instruction. Brown's initials appear next to the instruction. The plea questionnaire itself also lists robbery of a financial institution as one of the charges. The presentencing report and Brown's comments at sentencing also demonstrate that he understood the nature of the offense at issue. The presentencing report states that Brown

and his girlfriend chose to rob a bank in order to help his girlfriend pay off some debts. The two researched how to commit bank robberies and decided not to arm themselves when committing the Associated Bank robbery. At sentencing, Brown apologized to the "bank personnel," confirming counsel's contention that Brown was aware that the bank was the victim of his actions. Accordingly, we conclude that the record supports the circuit court's determination and that the State met its burden in proving that Brown's plea was knowing, intelligent, and voluntary.

For the foregoing reasons, we affirm the judgment of conviction and the order denying Brown's postconviction motion to withdraw his plea.

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