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DISTRICT I

May 16, 2023

To:

Hon. Jean M. Kies Electronic Notice	Christopher D. Sobic Electronic Notice
Hon. Jeffrey A. Kremers Electronic Notice	Jacob J. Wittwer Electronic Notice
Anna Hodges Clerk of Circuit Court Milwaukee County Safety Building Electronic Notice	

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

2021AP1307-CR State of Wisconsin v. Albert Dewey Burks (L.C. # 2016CF2629)
2021AP1308-CR State of Wisconsin v. Albert Dewey Burks (L.C. # 2016CF5645)
2021AP1309-CR State of Wisconsin v. Albert Dewey Burks (L.C. # 2017CF2411)
2021AP1310-CR State of Wisconsin v. Albert Dewey Burks (L.C. # 2017CF4476)

Before Brash, C.J., Donald, P.J., and White, 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).

In these consolidated appeals, Albert Dewey Burks appeals judgments convicting him of two counts of battery to an injunction petitioner, intentionally contacting a victim in violation of a court order, knowingly violating a domestic abuse injunction, and stalking, all as a domestic abuse repeater. He also appeals the orders denying his motion for postconviction relief.[1] Burks

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[1] The Honorable Jeffrey A. Kremers presided over Burks' plea and sentencing hearings and entered the judgments of conviction. The Honorable Jean M. Kies presided over the postconviction proceedings.

argues that he should not have been subject to the domestic abuse repeater penalty enhancers and that his sentences should be commuted. Alternatively, he seeks to withdraw his pleas on grounds that they were not knowingly, intelligently, and voluntarily entered because he was misadvised that he could be sentenced as both a habitual criminal and a domestic abuse repeater. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).[2] We affirm.

Background

In four separate complaints, the State charged Burks with a total of nineteen offenses committed against T.H., who is his ex-girlfriend and the mother of his children. All but one of the charges against him included the domestic abuse and habitual criminal repeater penalty enhancers. As grounds for the domestic abuse repeaters, the complaints alleged that Burks was convicted of battery and disorderly conduct in Milwaukee County Circuit Court Case No. 2015CF1757, with a domestic abuse surcharge on both counts. In two of the underlying cases, the State attached certified copies of the judgment of conviction and the assessment report in Case No. 2015CF1757.

The cases were consolidated and proceeded to trial. At the end of the first day, trial counsel told the court that Burks wanted to "fire" him and wanted new counsel appointed. The circuit court denied the motion and stated it would not appoint a new attorney in the middle of

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

trial. The next day, Burks pled guilty to five charges containing domestic abuse repeater penalty enhancers.

During the plea hearing, the State made clear that it was dropping the habitual criminal repeater penalty enhancers on the offenses to which Burks was pleading guilty.[3] The circuit court accepted Burks' pleas applied the domestic abuse repeater penalty enhancers, and ordered him to serve sentences totaling eleven years and eight months of initial confinement and seven years of extended supervision.

Postconviction, Burks sought to vacate the domestic abuse repeaters on grounds that the State failed to sufficiently prove them. Burks additionally asked for plea withdrawal, arguing that the circuit court, the State, and his attorney misadvised him that his charges could be enhanced with both a habitual criminal and a domestic abuse repeater penalty enhancer.

The postconviction court denied Burks' request to vacate the domestic abuse repeaters after concluding that they were properly applied to the charges. However, it held a hearing on Burks' claims for plea withdrawal where both Burks and his trial counsel testified. The court ultimately denied these claims as well.

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[3] In doing so, the State explained that it was uncertain whether both the domestic abuse and the habitual criminal repeaters could be applied to the same charges and "to avoid having to deal with that issue on appeal, I'm just going to dismiss the habitual criminality and just use the prior [domestic abuse] repeater."

Discussion

Burks appeals the postconviction court's first order denying his request that it vacate the domestic abuse repeater penalty enhancers and the portion of the postconviction court's second order denying his request to withdraw his guilty pleas on the basis that he was misadvised that he could be sentenced as both a habitual criminal and a domestic abuse repeater.[4] Burks argues that the domestic abuse repeaters should be vacated and his sentences should be commuted to the maximum penalties absent the enhancers. He claims that the qualifying prior convictions supporting the domestic abuse repeaters were never proven and asserts that he did not directly admit them.

As relevant for purposes of this appeal, WIS. STAT. § 939.621, titled "Increased penalty for certain domestic abuse offenses," defines a domestic abuse repeater as follows:

> A person who, during the 10-year period immediately prior to the commission of the crime for which the person is presently being sentenced if the convictions remain of record and unreversed, was convicted on 2 or more separate occasions of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055(1), [or] a felony or a misdemeanor for which a court waived a domestic abuse surcharge pursuant to s. 973.055(4)[.]

Sec. 939.621(1)(b). The statute explains:

> **(2)** If a person commits an act of domestic abuse, as defined in s. 968.075(1)(a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be

[4] On appeal, Burks abandons his postconviction request for plea withdrawal based on what he contends was trial counsel's improper promise as to the length of his sentences and the circuit court's alleged failure to adequately address his desire for a new lawyer during trial.

> increased by not more than 2 years if the person is a domestic abuse repeater.

Sec. 939.621(2).

"[Q]ualifying prior convictions must either be admitted by the defendant or proved by the State beyond a reasonable doubt." ***State v. Hill***, 2016 WI App 29, ¶8, 368 Wis. 2d 243, 878 N.W.2d 709; *see also* ***id.***, ¶9 (explaining "that this standard also applies to the domestic abuse repeater enhancer"). To prove the defendant's qualifying convictions, the State must present an "official report" with the convictions to the court. *See* WIS. STAT. § 973.12(1). A certified or uncertified copy of the judgment of conviction will suffice, as will a presentence investigation report, if it contains information sufficient to prove the conviction beyond a reasonable doubt. *See* ***State v. Saunders***, 2002 WI 107, ¶¶23-32, 255 Wis. 2d 589, 649 N.W.2d 263.

A defendant's failure to object to a judgment of conviction offered in support of a repeater allegation forfeits his or her right to complain of the judgment's adequacy to prove the repeater penalty enhancer. *See* ***id.***, ¶¶62-63 (holding that Saunders waived his challenge to the repeater enhancer by not objecting to the admission of the judgment used to prove the repeater penalty enhancer); ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining that the failure to timely assert a right results in "forfeiture," not "waiver," of that right).

With these standards in mind, for the domestic abuse repeater penalty enhancer to apply to Burks' convictions, the State had to prove beyond a reasonable doubt, or Burks had to admit, that he was convicted on two separate occasions within the ten-year period immediately prior to the commission of the offenses in these cases or an offense for which a court either imposed the

domestic abuse surcharge under WIS. STAT. § 973.055(1) or waived it under § 973.055(4). *See* ***Hill***, 368 Wis. 2d 243, ¶11. Whether Burks was properly sentenced as a domestic abuse repeater is a question of law that we review *de novo*. ***Id.***, ¶7.

Burks continues to argue that the State failed to prove one of the two prior convictions offered as a qualifying prior conviction. Burks maintains that the State failed to prove that a domestic abuse surcharge was imposed on the disorderly conduct conviction (Count 3) in Case No. 2015CF1757.

Burks points to the descriptions of the offenses on the first page of the judgment of conviction in Case No. 2015CF1757. The description of the battery charge (Count 2) references a domestic abuse assessment under WIS. STAT. § 973.055(1). The description of the disorderly conduct charge (Count 3) includes no such reference. Thus, Burks argues, without the domestic abuse assessment in the offense description of the disorderly conduct charge, the certified copy of the judgment of conviction in Case No. 2015CF1757 was inadequate to prove one of the two necessary qualifying convictions, and the domestic abuse repeater penalty enhancers must be vacated.

We disagree. Collectively, the certified copies of the judgment of conviction and assessment report in Case No. 2015CF1757 establish beyond a reasonable doubt that the domestic abuse assessment was applied to the disorderly conduct conviction. Page two of the judgment of conviction in Case No. 2015CF1757 includes in the comments for Count 2, the following: "Court found the Domestic Abuse surcharge is applicable." With regard to Count 3, the disorderly conduct charge, the comment reads: "See Count 2 for conditions."

Notwithstanding the absence of a reference to the domestic abuse surcharge in the offense description, the comments unambiguously demonstrate that the circuit court applied the domestic abuse surcharge to the disorderly conduct charge in Count 3. The certified copy of the assessment report further confirms that the domestic abuse surcharges were assessed to both qualifying prior convictions, battery and disorderly conduct. The State proved both qualifying convictions beyond a reasonable doubt. Consequently, Burks' challenge to the application of the domestic abuse repeater penalty enhancers fails.

Moreover, the State introduced certified copies of the criminal complaint and judgment of conviction in Case No. 2015CF1757 into evidence without objection at Burks' jury trial, before he entered pleas. At the plea hearing, the circuit court asked about the basis for the domestic abuse repeaters, and the State responded: "The certified records that were admitted into evidence yesterday." After the circuit court clarified the nature of the prior convictions, it added: "And those were admitted yesterday without objection so that makes—that's part of the record as well." We conclude Burks forfeited his challenge to the adequacy of the proof provided by the State as to the qualifying prior convictions when he failed to object to it.

Saunders, 255 Wis. 2d 589, ¶¶62-63.[5] In light of these conclusions, we need not address whether Burks admitted the qualifying prior convictions. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

Burks alternatively argues that he should be allowed to withdraw his guilty pleas because they were not knowingly, intelligently, and voluntarily entered. Burks claims he was misadvised that he could be sentenced as both a habitual criminal and a domestic abuse repeater. *See* ***State v. Dillard***, 2014 WI 123, ¶39 & n.13, 358 Wis. 2d 543, 859 N.W.2d 44 (explaining that "affirmative misinformation about the law provided by the prosecutor and defense counsel" during the plea process has, in some cases, prevented a defendant from entering a plea knowingly, intelligently, and voluntarily).

"When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (citation omitted). "One way the defendant can show manifest injustice is to prove that his plea

[5] In his reply brief, Burks takes issue with the State's reliance on ***State v. Saunders***, 2002 WI 107, 255 Wis. 2d 589, 649 N.W.2d 263, arguing that unlike in that case, "this case does not involve a challenge to the State's 'mode' of proof…. Instead, Mr. Burks challenged the sufficiency of the judgment of conviction itself." While Burks' argument on this point is difficult to follow, we agree with him that his lack of an objection did not eliminate the State's proof requirement. *See* ***State v. Bonds***, 2006 WI 83, ¶43, 292 Wis. 2d 344, 717 N.W.2d 133 (explaining that a lack of objection showed that the defendant stipulated to the mode of proof employed by the State but the stipulation did not constitute a "'waiver of the State's overall proof requirement'") (citation and one set of internal quotation marks omitted)). Here, as explained, the certified copies of the judgment of conviction and the assessment report in Milwaukee County Circuit Court Case No. 2015CF1757 were sufficient proof of Burks' qualifying prior convictions for sentence enhancement purposes.

was not entered knowingly, intelligently, and voluntarily." ***State v. Taylor***, 2013 WI 34, ¶24, 347 Wis. 2d 30, 829 N.W.2d 482.

"Whether a defendant's plea was entered knowingly, intelligently, and voluntarily is a question of constitutional fact." ***Dillard***, 358 Wis. 2d 543, ¶38. The circuit court's findings of historical fact made in deciding this question must be upheld unless clearly erroneous. ***Id.*** We independently determine whether those facts demonstrate that the plea was knowing, intelligent, and voluntary, benefitting from the circuit court's analysis. *See* ***id.***

Burks argues, and the State concedes, that his sentences could not be enhanced by both the habitual criminal and the domestic abuse repeaters based on the prior convictions alleged in the criminal complaints. The question before us is whether the mistake in improperly charging Burks with both repeaters prevented him from entering his plea knowingly, intelligently, and voluntarily.

The transcript reflects that during the postconviction evidentiary hearing, Burks repeatedly denied having any discussions with his attorney, the State, or the circuit court about the enhancers. While "the case law does not require that the decision to plead [guilty] be based exclusively on the misinformation the defendant received," *see* ***id.***, ¶60, here, the postconviction court found that there was *nothing* in the evidentiary record indicating that misinformation or lack of information about the repeaters influenced Burks' decision to accept the State's plea offer. We agree and additionally note in passing that Burks' trial counsel—who the postconviction court deemed credible—testified that he thought the State's decision to remove the habitual criminal repeaters was made *after* Burks decided to enter his guilty pleas. Burks has

not shown by clear and convincing evidence that a refusal to allow plea withdrawal would result in manifest injustice.

Therefore,

IT IS ORDERED that the judgments 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