COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2916-CR **Cir. Ct. No. 2005CF136**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY D. SCHWIGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Gary D. Schwigel appeals a judgment convicting him of one count of sexual assault of a child under thirteen and an order denying his postconviction motion to allow him to withdraw his plea. Schwigel pled guilty

to the charge but asserted a defense of not guilty by reason of mental disease or defect (NGI). Schwigel contends that his intellectual deficits and statements at the plea hearing misallocating the burden of proof undermined his plea. He argues in the alternative that the court should not have accepted his plea because, he claims, it found him incompetent. Finally, Schwigel asserts that his jury waiver was invalid because the court misinformed him as to jury unanimity in the responsibility phase. None of his arguments persuades us. We affirm.

¶2 In April 2005, the State charged Schwigel with one count of sexual assault of a child under thirteen, contrary to WIS. STAT. §§ 948.02(1) and 939.50(3)(b) (2005-06).[1] At defense counsel's request, the court ordered a competency evaluation. Dr. Kenneth Smail concluded that Schwigel had a full-scale IQ of 73 but was competent to stand trial.

¶3 Schwigel then entered an NGI plea. Dr. George Palermo evaluated Schwigel by court order in connection with the NGI defense. Dr. Palermo concluded that Schwigel—"on the high side of mental retardation"—was legally responsible for his actions. The defense privately retained Dr. James Paquette to assess Schwigel's cognitive, academic and adaptive skill levels, not to offer an opinion as to Schwigel's responsibility. Dr. Paquette concluded that Schwigel was mildly mentally retarded with substantial cognitive and social deficits. Defense counsel explained at the plea hearing that Dr. Paquette would not offer an opinion supporting Schwigel's NGI plea, per se. Rather, counsel would employ a "unique" and "creative" approach and use Dr. Paquette's opinion about Schwigel's various deficits solely to undermine Dr. Palermo's opinion that, at the

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

time the crime was committed, Schwigel appreciated the wrongfulness of his conduct and could conform his conduct to the requirements of the law.

¶4 Schwigel entered a plea of guilty to the first phase of the bifurcated proceedings and waived his right to a jury trial on the second phase. After trial to the court, the court rejected Schwigel's NGI defense since he could not carry his burden with no expert to support his defense. The Court sentenced Schwigel to nine years' confinement followed by ten years' extended supervision.

¶5 Schwigel then moved to withdraw his plea. The sole reason offered was that at the plea hearing both the parties and the court misstated who had the burden of proof at trial. Claiming unawareness that the burden was his and having no expert to support his defense, Schwigel complained that the court virtually automatically found him guilty. The court concluded that Schwigel's plea did not result from a misunderstood burden of proof because any discussion of allocating the burden occurred after Schwigel informed the court that he had decided to plead guilty. Schwigel appeals. The facts will be supplemented as needed.

BURDEN OF PROOF

¶6 A defendant who seeks to withdraw a guilty plea after sentencing must prove by clear and convincing evidence that denying the request would result in "manifest injustice." ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Proof that the plea was not entered knowingly, intelligently or voluntarily satisfies this burden. ***Id.*** Conclusory allegations are not enough. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). Whether the plea was properly entered is a question of constitutional fact. ***Brown***, 293 Wis. 2d 594, ¶19. The trial court's factual findings stand unless they are clearly erroneous but

we determine independently whether they demonstrate that the plea was knowing, intelligent and voluntary. ***Id.***

¶7 At the very outset of the phase one plea hearing, Schwigel's counsel advised the court that he and Schwigel had reviewed the plea questionnaire/waiver of rights form and that Schwigel was prepared to enter a plea of guilt. Counsel further advised the court that Schwigel wanted to waive his right to a jury trial in favor of a trial to the court on his NGI defense. Counsel said he and Schwigel had gone over the complaint and had several discussions "and I believe that he understands what I have just related to the Court and agrees with that." The court responded: "Let's talk about the NGI phase of the proceedings then."

¶8 Defense counsel and the court further discussed the opinions Drs. Palermo and Paquette would offer and whether the court would accept Schwigel's waiver. Defense counsel reiterated that Schwigel preferred a court trial. This colloquy ensued:

> THE COURT: Well, then let's talk about this issue. Why a day and a half [to try the case to the court]? I mean, if we waive the jury trial in this case, we have got doctor—first of all, refresh my memory. *It's an affirmative defense. Does that mean the defendant has the burden at this stage of the proceedings?*
>
> MS. BUNCH [Assistant district attorney]: *No.*
>
> THE COURT: It is an affirmative defense under case law, but [the] State still has the burden to prove competency. (Emphasis added).

¶9 NGI is an affirmative defense, as the court noted, but the burden is on the defendant, not the State. *See* WIS. STAT. § 971.15. Defense counsel did not

correct the prosecutor's misstatement or the court's acceptance of it.[2] The court then proceeded with the plea colloquy.

¶10 Although the burden-of-proof discussion preceded the plea taking, Schwigel fails to forge a causal link in the chain of events. He came to court prepared to plead guilty and never has claimed that he misunderstood the burden of proof at that juncture. He does not allege that the burden of proof played at all into his decision to plead guilty, let alone induced it. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 129, 332 N.W.2d 744 (1983).

¶11 Moreover, Schwigel got his theory into evidence. Defense counsel spent some time at the plea hearing explaining how he intended to proceed in the responsibility phase. Rather than offering expert testimony to support Schwigel's NGI defense, counsel explained that he would use Dr. Paquette's opinion about Schwigel's intellectual deficits to undermine Dr. Palermo's opinion of legal responsibility. Counsel proceeded with his strategy, which he described as "a little unique and … a little bit creative," just as he planned to before the burden-allocation misstatement was made. Schwigel has no basis for now saying he would not have entered his plea.

COMPETENCE TO ENTER PLEA

¶12 Schwigel alternatively contends that the trial court erred in accepting a guilty plea that his cognitive deficits prevented him from comprehending, especially when, he asserts, the court made findings that he was not competent.

[2] At the trial to the court, however, the parties followed the proper order, with Schwigel presenting his evidence first.

He contends the remedy where the colloquy misstates the law is a new trial. *See* ***State v. Hauk***, 2002 WI App 226, ¶37, 257 Wis. 2d 579, 652 N.W.2d 393. We disagree with the State that Schwigel waived the claim because he did not raise it in the trial court. A defendant cannot waive the defense of incompetency to stand trial. ***State v. Guck***, 176 Wis. 2d 845, 851, 500 N.W.2d 910 (1993).

¶13 We also disagree with Schwigel, however, that his cognitive deficits warrant plea withdrawal. The matter of his competency was addressed early on, and to his apparent satisfaction. He accepted Dr. Smail's report and waived his competency hearing. Until now, Schwigel never put his competency on the table. We are not saying that Schwigel waived the issue; we are saying that, judging from Schwigel's choice of actions to this point, there was no issue to waive.

¶14 We also think Schwigel mischaracterizes as a "finding" of incompetence a comment the trial court made at the postconviction hearing. He refers to the trial court's remark that it did not believe that Schwigel, "with his cognitive deficits, his academic deficits and his adaptive functioning deficits … had any idea of what was going on there in our discussion about who was going to go first and how this was going to proceed." Read in context, the court's observation referred only to the burden-of-proof dialogue, not to Schwigel's ability to understand or follow the larger proceedings. Significantly, the court made the comment *after* Schwigel indicated his intention to plead guilty.

JURY WAIVER

¶15 Schwigel claims he is entitled to a new trial on the responsibility phase because his jury waiver was negated by the trial court misinforming him on the law. The court told Schwigel during the waiver colloquy that a unanimous verdict of twelve jurors is required. A five-sixths verdict on an NGI plea is

sufficient, however. *See* WIS. STAT. § 971.165(2). Schwigel asserts that "the record is quite clear" that he made his waiver in reliance on jury unanimity. It is not so clear to us.

¶16 Schwigel came to court ready to waive his right to a jury trial. He reaffirmed that position at least three times before the court ever mentioned jury unanimity. At the postconviction motion hearing, in the midst of a discussion on the burden of proof, defense counsel for the first time mentioned the five-sixths jury issue. He did not raise it in the postconviction motion, he explained, because he did not "necessarily believe it's very significant," and "if [jury unanimity] was the only issue, I don't know that we would be here today." Schwigel never has raised the issue to the trial court beyond that brief reference tucked into the burden-of-proof dialogue. A party must raise and argue an issue with some prominence to allow the trial court to address the issue and make a ruling. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). Our role is to correct errors the trial court made, not to rule on matters it never considered. ***State v. Hanna***, 163 Wis. 2d 193, 201, 471 N.W.2d 238 (Ct. App. 1991). Schwigel makes no showing of reliance or claim of prejudice. Schwigel's failure to allege that he was unaware that five-sixths, rather than all, of the jurors had to find him NGI is fatal to his claim of a deficient jury waiver. *See* ***State v. Grant***, 230 Wis. 2d 90, 102, 601 N.W.2d 8 (Ct. App. 1999).

By the Court.—Judgment and order affirmed.

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