COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1427-CR **Cir. Ct. No. 2009CF3788**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY DEMONE HAWTHORNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Corey Demone Hawthorne, *pro se*, appeals from an amended judgment of conviction for robbery with use of force and fleeing an

officer, contrary to WIS. STAT. §§ 943.32(1)(a) and 346.04(3) (2009–10), and from an order denying his postconviction motion.[1] He argues that there were defects in his guilty plea colloquy that justified a hearing on his motion to withdraw his guilty pleas, that the trial court erroneously exercised its sentencing discretion, and that his trial attorney provided constitutionally deficient representation.[2] We affirm.

BACKGROUND

¶2 Hawthorne was charged with robbery, use of force, as a repeater, and felony fleeing, as a repeater. According to the criminal complaint, the victim left a gas station and saw Hawthorne seated in her parked car. Hawthorne started the car and began to drive away. The victim grabbed the driver's side car door frame and yelled at Hawthorne to stop and let her two-year-old son, who was in the back seat, out of the car. Hawthorne drove away, causing the woman to fall from the car and onto the ground. Shortly thereafter, Hawthorne stopped the car and told the woman, who had run after the car, to take her son. According to the woman, Hawthorne pointed a gun at her. The woman took her son and Hawthorne

[1] All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

[2] Hawthorne has raised a host of subissues in his brief and, in some instances, those issues vary from what he presented in his postconviction motion. Those arguments that we do not specifically address in this opinion are denied on grounds that they are unpersuasive, undeveloped, or raised for the first time on appeal. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 245, 744 N.W.2d 889, 895 (Ct. App. 2007) ("We generally do not review an issue raised for the first time on appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court "may decline to review issues inadequately briefed"). In addition, we note that issues Hawthorne raised in his postconviction motion but did not brief on appeal are deemed abandoned and will not be discussed. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed are deemed abandoned).

drove off in the car. Hawthorne was later apprehended after leading officers on a high-speed chase in the victim's car and on a foot chase after he abandoned the car.

¶3 Hawthorne reached a plea bargain with the State. Pursuant to the plea bargain, the State agreed to dismiss the repeater allegations and recommend a sentence of five years of initial confinement and five years of extended supervision on the robbery, to be served concurrent with one year in the House of Correction on the fleeing charge. Hawthorne pled guilty to the two crimes and the trial court accepted his pleas. Through his trial attorney, Hawthorne stipulated that the criminal complaint could be used as the factual basis for the pleas, except he asserted that he did not have a gun. The trial court accepted Hawthorne's version of events, as well as the State's suggestion that as long as the victim perceived that she was being threatened with a weapon, the facts supported the charge of robbery with use of force. In doing so, the trial court asked Hawthorne if he understood that "as long as the victim perceived you had a gun, that's sufficient," and Hawthorne indicated that he understood.[3]

¶4 The trial court later sentenced Hawthorne to the maximum sentence on both charges: ten years of initial confinement and five years of extended supervision for the robbery and eighteen months of initial confinement and two years of extended supervision for the fleeing. The trial court imposed the fleeing sentence concurrent to the robbery sentence, but ordered that both be served

[3] As we discuss later in this opinion, while a victim's perception of a weapon can satisfy the element that the defendant acted forcibly, a real or perceived weapon is not required. Here, Hawthorne acted forcibly when he drove the car away from the victim as she held onto the door frame, struggling to keep Hawthorne from driving away.

consecutive to any other sentences. The trial court declined to make Hawthorne eligible for the Challenge Incarceration Program (CIP) or the Earned Release Program (ERP). It imposed a $250 DNA surcharge and found that Hawthorne was not eligible for sentence credit.

¶5 Postconviction counsel was appointed for Hawthorne, but he was ultimately permitted to withdraw when Hawthorne elected to proceed *pro se*. Hawthorne filed a postconviction motion seeking to withdraw his guilty pleas on grounds that the plea colloquy did not adequately address the elements of the crimes. He also argued that there was an insufficient factual basis for the robbery charge, asserting: (1) the victim's perception that Hawthorne had a gun was insufficient to establish that he used force; and (2) he did not take property from the victim's person because she was in the gas station when he took the car.

¶6 In the alternative, Hawthorne sought sentence modification, asserting that the trial court had failed to adequately explain the sentence, had erroneously imposed the DNA surcharge, and had failed to grant Hawthorne sentence credit even though the only case for which he was incarcerated prior to his guilty pleas was the instant case.[4] Finally, he alleged in a single paragraph that his trial attorney provided constitutionally deficient representation by not contesting the DNA surcharge or the denial of sentence credit.

¶7 The trial court denied Hawthorne's postconviction motion without a hearing, except it vacated the DNA surcharge and it found that Hawthorne was, in

[4] Hawthorne was on extended supervision when he committed the crimes at issue in this appeal. Ultimately, the Department of Corrections did not pursue revocation of his extended supervision.

fact, entitled to 226 days of sentence credit. It ordered that an amended judgment be entered.[5]

DISCUSSION

¶8 Hawthorne presents three arguments on appeal: (1) the plea colloquy was deficient, so Hawthorne was entitled to a hearing on his motion to withdraw his guilty pleas; (2) the trial court erroneously exercised its sentencing discretion by not adequately explaining its sentence and declining to allow Hawthorne to participate in the CIP or ERP; and (3) his trial attorney provided constitutionally deficient representation. We consider each issue in turn.

I. Alleged deficiencies in the plea colloquy.

¶9 A defendant may move to withdraw a guilty plea if the trial court did not comply with WIS. STAT. § 971.08 or other court-mandated duties during the plea colloquy. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986). If the defendant's motion shows a deficiency in the plea colloquy and includes the allegation that the defendant "did not know or understand the information which should have been provided at the plea hearing," the trial court must hold an evidentiary hearing. ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 401–402, 683 N.W.2d 14, 25. At the hearing, the burden is on the State to establish by

[5] While the amended judgment correctly reflects that Hawthorne will receive 226 days of sentence credit, it does not reflect that the DNA surcharge was vacated. Upon remittitur, the trial court shall direct the clerk of circuit court to enter a second amended judgment of conviction that correctly indicates that Hawthorne is not required to pay the DNA surcharge. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 247–248, 618 N.W.2d 857, 860 (the trial court must correct a clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently made. ***Ibid.***

¶10 Whether a defendant was entitled to an evidentiary hearing on a ***Bangert*** claim is an issue appellate courts review *de novo*. ***State v. Howell***, 2007 WI 75, ¶30, 301 Wis. 2d 350, 369, 734 N.W.2d 48, 57. Specifically:

> A reviewing court first determines as a matter of law whether a defendant's motion "has pointed to deficiencies in the plea colloquy that establish a violation of [WIS. STAT.] § 971.08 or other mandatory duties at a plea hearing." The reviewing court then determines as a matter of law whether a defendant "has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing."

Id., 2007 WI 75, ¶31, 301 Wis. 2d at 369, 734 N.W.2d at 58 (footnotes and citations omitted).

¶11 Here, Hawthorne argues that he was entitled to a hearing on his claim that the trial court failed to do two things during the plea colloquy: "[e]stablish the defendant's understanding of the nature of the crime with which he is charged" and "[a]scertain personally whether a factual basis exists to support the plea." *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 617, 716 N.W.2d 906, 917.

A. Nature of the robbery-with-use-of-force charge.

¶12 Hawthorne asserts that the trial court failed to adequately explain the nature of the robbery-with-use-of-force charge. Specifically, he alleged in his postconviction motion and accompanying affidavit that the colloquy did not establish Hawthorne's understanding of the elements of that crime. As ***Brown*** explained, there are a number of non-exhaustive methods of establishing a

defendant's understanding of the charges, such as summarizing the elements of the crime at the plea hearing, having trial counsel summarize the elements of the crime that were discussed with the defendant, and referring "'to the record or other evidence of defendant's knowledge of the nature of the charge.'" *See* ***id.***, 2006 WI 100, ¶¶46–48, 293 Wis. 2d at 622–623, 716 N.W.2d at 920 (citation omitted).

¶13 Here, during the plea colloquy, the trial court explicitly referred to the signed guilty plea questionnaire, which stated that Hawthorne understood there were elements to each of the crimes to which he was pleading guilty and indicated that the elements were attached to the guilty plea questionnaire. The trial court also referenced the fact that Hawthorne's trial attorney had attached the elements of the crime, which were listed on the pattern jury instructions stapled to the guilty plea questionnaire. The trial court asked Hawthorne's attorney if he had "go[ne] through the elements of both robbery [with] use of force and fleeing from an officer with [Hawthorne]," and Hawthorne's attorney replied that he had. Asked if that was correct, Hawthorne replied, "Yes, sir." We conclude that this colloquy satisfies ***Bangert*** and ***Brown***; the representations of Hawthorne and his trial attorney, in combination with the signed guilty plea questionnaire and its attachments, were sufficient to establish that Hawthorne understood the nature of the charges.

¶14 Hawthorne points to two problems with the colloquy that he alleges undermine that conclusion. First, the jury instructions for robbery with use of force that were attached to the guilty plea questionnaire contain two copies of page one and no page two. Thus, only the first three elements of the crime are actually attached to the guilty plea questionnaire, and the fourth element—that "[t]he defendant acted forcibly"—is not attached. *See* WIS JI—CRIMINAL 1479 (2009). The State responds:

> [Hawthorne's trial attorney] explained in a letter to Hawthorne that he copies the jury instructions for his files and the most likely explanation is that he mixed up the copies—filing two copies of page one with the court and keeping two copies of page two for his files. Such an obvious clerical error does not warrant an evidentiary hearing.

¶15 We agree with the State. Where Hawthorne's trial attorney said he went through the elements of the crime with Hawthorne, where he attached the jury instructions to the guilty plea questionnaire, and where Hawthorne agreed counsel had gone through the elements of the crimes with him, we cannot agree with Hawthorne that the fact one jury instruction page was not stapled to the guilty plea questionnaire means the trial court violated ***Bangert*** and ***Brown***.[6] The colloquy was not deficient.

¶16 The second problem with the colloquy that Hawthorne identifies arose when Hawthorne's attorney told the trial court that Hawthorne disagreed

[6] We note that Hawthorne never alleged that his trial attorney failed to share with him the second page of the jury instructions. Rather, Hawthorne's affidavit accompanying his postconviction motion baldly alleged that he "was not informed to [sic] the elements for robbery with use of force" and "did not understand the elements of robbery with the use of force." These assertions are contradicted by Hawthorne's own representations to the trial court and do not establish a ***Bangert*** violation. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12, 26 (1986).

To the extent Hawthorne intended to allege a ***Bentley*** claim—that he should be allowed to withdraw his guilty pleas after sentencing because his trial attorney provided constitutionally deficient representation outside the plea hearing by misinforming him about the elements of the crime—Hawthorne's postconviction motion and affidavit were insufficient because he did not identify how he was misinformed, what Hawthorne did not understand, and how that affected his decision to plead guilty. *See* ***State v. Bentley***, 201 Wis. 2d 303, 316, 548 N.W.2d 50, 56 (1996) (defendant not entitled to hearing on "allegation that he pled guilty only because of the misinformation" provided by trial attorney where defendant provides only "'conclusory allegation[s]'" that he would not have pled guilty if he had been properly informed) (two sets of quotation marks and citation omitted). Further, as we hold later in this opinion, Hawthorne's postconviction motion did not allege that his trial attorney provided ineffective assistance with respect to the guilty pleas, and he cannot raise that argument for the first time on appeal. *See* ***Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d at 245, 744 N.W.2d at 895.

with one factual allegation in the criminal complaint: that he pointed a gun at the victim. The following discussion took place:

> [Hawthorne's trial attorney]: … [S]ince he was not charged with armed robbery, I don't think it's an essential element of his plea.
>
> [Prosecutor]: The bigger issue is that the victim perceived that she was being threatened with a weapon. So whether or not he actually had a real gun is not the issue in the case.
>
> THE COURT: Do you understand, sir, as long as the victim perceived you had a gun, that's sufficient. Do you understand that?
>
> [Hawthorne]: Yes, sir.
>
> THE COURT: Even if – And I'll accept for the sake of argument here that there was not a gun.

¶17 Hawthorne argued in his postconviction motion that the trial court misstated the law, because the elements of the crime of robbery with use of force "do not in any way involve either (1) Mr. Hawthorne having a gun[,] real or fake, or (2) the victim perceiving that Mr. Hawthorne had a gun[,] real or fake." Hawthorne is correct that the element of acting "forcibly" does not *require* a real or perceived weapon. But the fact that first the State and then the trial court implied that the victim's perception of a weapon was important does not automatically render the plea infirm. As ***Brown*** noted: "In the absence of a claim by the defendant that he lacked understanding with regard to the plea, any shortcoming in the plea colloquy is harmless." *See* ***id.***, 2006 WI 100, ¶63, 293 Wis. 2d at 629, 716 N.W.2d at 924.

¶18 Hawthorne complains about the trial court's "linguistic[] embellishment," but he does not adequately explain how this exchange at the plea hearing affected his understanding of the charge against him or his decision to plead guilty. We agree with the State's analysis:

> In essence, Hawthorne's complaint is that his liability for Robbery by Use of Force is broader than his understanding at the time he entered his plea. The jury could have found him guilty of the offense without any evidence of his use of a weapon or the victim's perception that he possessed a weapon. This is not a situation in which the court's explanation of the offense at the plea hearing led Hawthorne to waive a possible defense that might have been presented at trial.
>
> ….
>
> … Hawthorne's conclusory allegation that he did not understand the elements of Robbery by Use of Force is not sufficient to entitle him to an evidentiary hearing…. Any belief that the State would have to prove at a trial that the victim perceived that he had a weapon in order to convict him would only have made a guilty plea less palatable. The court's comments at the plea colloquy concerning the victim's perception that Hawthorne possessed a weapon should be considered harmless … [because "r]equiring an evidentiary hearing for every small deviation from the [trial] court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights."

(Quoting ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 509, 786 N.W.2d 64, 72.) We reject Hawthorne's claim that the trial court's comments about the victim's perception of a weapon constituted a ***Bangert*** violation and, therefore, Hawthorne was not entitled to a hearing.

B. Factual basis for the pleas.

¶19 Although Hawthorne's argument is not clear, he appears to argue that the plea colloquy was flawed because the trial court did not personally ascertain the basis for the pleas and because there was not a sufficient factual basis for his plea to the robbery-with-use-of-force charge. He is mistaken. Hawthorne's trial attorney told the trial court that Hawthorne was stipulating to the accuracy of the facts in the criminal complaint (except the victim's allegation that Hawthorne had a gun). He referred specifically to page two of the criminal complaint, which

the trial court had before it, and there was a discussion about Hawthorne's position that he did not show the victim a gun. The trial court personally ascertained a sufficient factual basis for the pleas. *See* ***Brown***, 2006 WI 100, ¶35, 293 Wis. 2d at 617, 716 N.W.2d at 917.

¶20 Further, the facts alleged in the criminal complaint more than satisfy each of the elements of the crime of robbery with use of force. *See* WIS JI—CRIMINAL 1479 (2009). First, the victim owned the property, in this case the car (element one). Second, Hawthorne took the car from the victim (element two). While the victim was not present when Hawthorne first entered the car, she confronted him as he was about to drive away, and she was present as he drove away. Third, it is undisputed that Hawthorne took the car with the intent to steal it (element three). Finally, Hawthorne acted forcibly (element four) when he accelerated and drove away with the victim still hanging onto the car door frame, causing her to fall. For these reasons, we reject Hawthorne's argument that the plea colloquy was deficient with respect to the establishment of a factual basis for the pleas.

II. Challenge to the trial court's sentencing discretion.

¶21 Hawthorne argues that the trial court erroneously exercised its sentencing discretion "by not stating on the record why [it] imposed the maximum sentence" for the robbery and by not finding Hawthorne eligible for the CIP and ERP. At sentencing, a trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004

WI 42, ¶41, 270 Wis. 2d 535, 557–558, 678 N.W.2d 197, 207. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207.

¶22 Sentencing decisions are afforded a strong presumption of reasonability because the trial court is best situated to consider the relevant factors and the defendant's demeanor. ***Id.***, 2004 WI 42, ¶18, 270 Wis. 2d at 549, 678 N.W.2d at 203. On appeal, our review is limited to determining whether the trial court erroneously exercised that discretion. *See* ***id.***, 2004 WI 42, ¶17, 270 Wis. 2d at 549, 678 N.W.2d at 203. The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy against interference with the [trial court's sentencing] discretion.'" ***Id.***, 2004 WI 42, ¶18, 270 Wis. 2d at 549, 678 N.W.2d at 203 (citation omitted).

¶23 In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the nature of the crime, which it called "one of the worst and egregious robberies [with] use of force I've seen." It noted that Hawthorne did not abandon the robbery even after he stopped so the victim could take her child from the car, and it discussed the trauma the victim suffered when she saw her child being driven away. The trial court also commented on the fact that Hawthorne eluded the police when they began to chase him and eventually led them on a foot chase after abandoning the car.

¶24 The trial court called twenty-two-year-old Hawthorne's prior criminal record "horrible." Hawthorne had previously been found delinquent three times as a juvenile and had been convicted of four crimes as an adult, including fleeing, retail theft, and felony operating a motor vehicle without the owner's consent. At the time he stole the victim's car in this case, he was on extended supervision. The trial court observed: "So you've been locked up before, you've been to jail and you haven't learned your lesson. You're out of control. Your drug problem is out of control." It also said that Hawthorne had accepted responsibility by entering a guilty plea, but said that Hawthorne showed "very little insight." It was not impressed by Hawthorne's statement: "I suddenly realize it now. You know, this [is] not a place for me to be."

¶25 The trial court found that Hawthorne was "a danger to the community" and that he needed punishment. It said that it could not "in good conscience go along" with the State's recommendation and that a maximum sentence on the robbery charge was "called for." It also determined that Hawthorne was not "a good candidate" for the CIP or the ERP, noting: "You were at Wales [juvenile facility] already and obviously they didn't turn you around." It added that a risk reduction sentence would not be appropriate "because it would cut down the amount of time on extended supervision, and we need the five years of extended supervision." Finally, the trial court said that it would make the fleeing sentence concurrent with the robbery sentence in light of Hawthorne's decision to accept responsibility with a guilty plea, but it concluded that the sentences should be served consecutive to Hawthorne's existing sentences.

¶26 In his postconviction motion, Hawthorne argued that the trial court erred when it did not "directly explain the durations it imposed beyond stating that a 'substantial' prison sentence was needed to protect the public." He explained:

"The court failed to link the durations it imposed to objectives determined in the light of the facts and their application to sentencing factors." He also complained that the trial court did not compare "Hawthorne's criminal record to any other offender who has been charged, convicted and sentenced to Robbery, Use of Force, and Fleeing and Eluding an Officer."

¶27 The trial court was not convinced that it failed to follow the dictates of ***Gallion*** and neither are we. As the State points out:

> A sentencing court is not required to explain its rationale for the amount of confinement imposed with any greater specificity than was done here. *See* ***Gallion***, [2004 WI 42, ¶¶54-55, 270 Wis. 2d at 564, 678 N.W.2d at 210]. That is because "the exercise of discretion does not lend itself to mathematical precision…. As a result, we do not expect [trial] courts to explain, for instance, the difference between sentences of 15 and 17 years." ***Id.***[, 2004 WI 42, ¶49, 270 Wis. 2d at 562, 678 N.W.2d at 209]. What *is* required is that the court provide an explanation for the general range of sentence. *See* ***id.*** That happened here.

(Bolding added; italics in original.) We conclude that the trial court's thorough discussion of the sentencing factors and its explanation of the sentence comply with the dictates of ***Gallion***.

¶28 Hawthorne also suggests that his sentence was excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). While the trial court sentenced Hawthorne to the maximum sentence on each count, it sufficiently explained its reasoning. Moreover, Hawthorne had already received the benefit of the plea bargain that removed the repeater enhancers, reducing his exposure by ten years. In addition, the fleeing sentence was imposed concurrent to the robbery sentence, further reducing the time Hawthorne will spend in prison. Given Hawthorne's criminal history, the seriousness of the crimes, and the

reduction in exposure that he achieved with the plea bargain, we cannot say that the sentence would "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***ibid.*** For these reasons, we reject Hawthorne's challenge to the trial court's sentencing discretion and the severity of the sentence.

III. Constitutionally deficient representation.

¶29 Hawthorne alleges that his trial attorney provided constitutionally deficient representation when he did not adequately inform Hawthorne about the robbery charge and its elements and when he did not seek 226 days of sentence credit. We reject Hawthorne's argument without discussion because all but one of his allegations about his trial attorney's performance are being raised for the first time on appeal. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 245, 744 N.W.2d 889, 895 (Ct. App. 2007). Further, the argument he made in a single paragraph in his postconviction motion—that his trial attorney should have objected to the imposition of the DNA surcharge and the denial of sentence credit—was successful, so there is no reason to further consider his trial attorney's performance with respect to sentence credit.

By the Court.—Judgment and order affirmed.

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