

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 21, 2014

v

STEPHEN CORTEZ GARY,

Defendant-Appellant.

No. 313561
Calhoun Circuit Court
LC Nos. 2012-000886-FC;
2012-001161-FC

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by leave granted his plea-based convictions of assault with intent to rob while unarmed, MCL 750.88, and armed robbery, MCL 750.529. We affirm.

Defendant's convictions arose out of two separate incidents, with two separate cause numbers in the trial court. The armed robbery conviction arose from a 2007 hotel robbery. At his plea hearing, defendant pleaded nolo contendere to this robbery. However, at sentencing, defendant moved the trial court for withdrawal of the plea. He claimed that he was innocent of the charge, and that he had mistakenly pleaded nolo contendere because he was confused about the various charges against him. The trial court denied defendant's motion.

On appeal, defendant first asserts that the trial court erred by denying his motion to withdraw his plea. We review the trial court's ruling for an abuse of discretion. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.* "In the case of a plea of nolo contendere, the standard to be applied by an appellate court in its review of the adequacy of factual bases for a plea is whether the trier of fact could properly convict on the facts elicited from reliable sources." *People v Patmore*, 264 Mich App 139, 151 n 4; 693 NW2d 385 (2004) (quotation omitted).

"[A]fter a plea has been accepted by the trial court, there is no absolute right to withdraw the plea." *People v Eloby*, 215 Mich App 472, 474-475; 547 NW2d 48 (1996). MCR

6.310(B)(1) provides that a defendant may withdraw a plea “only in the interest of justice.”¹ The defendant has the burden of establishing “a fair and just reason for withdrawal of that plea. If defendant meets that burden, then the prosecution has the burden of showing that substantial prejudice would result from allowing withdrawal of the plea.” *Patmore*, 264 Mich App at 149-150 (quotations and citation omitted). “Fair and just reasons include reasons like a claim of actual innocence or a valid defense to the charge.” *Fonville*, 291 Mich App at 378. A defendant’s claim to have been confused about the plea does not warrant withdrawal of the plea if the record demonstrates that defendant understood the nature and factual basis of the plea. See *People v Everard*, 225 Mich App 455, 460-461; 571 NW2d 536 (1997).

In this case, defendant claims to have been confused about his plea. The record negates defendant’s claim. At the plea hearing, defendant’s counsel provided a lengthy summary of the factual basis for defendant’s 2007 armed robbery charge. This was sufficient to establish a factual basis for defendant’s plea of nolo contendere. Immediately thereafter, the trial court asked defendant whether his counsel or the prosecutor stated anything causing him to change his mind regarding his plea. In response, defendant reiterated his plea of nolo contendere. The thorough and specific description of the 2007 armed robbery in the record negates defendant’s alleged confusion regarding the charge to which he pleaded nolo contendere. It appears that defendant “simply changed his mind between the date of his plea and the date of sentencing.” *Everard*, 225 Mich App at 461. Defendant therefore failed to establish that his alleged confusion provided a fair and just reason permitting withdrawal of his plea of nolo contendere to armed robbery. *Patmore*, 264 Mich App at 149-150.

Similarly, defendant’s claim of actual innocence is unsupported by the record. Although defendant asserted his innocence at the sentencing hearing, he raised no such assertion at the plea proceeding when his counsel recited the factual basis for his charge. The record contains no evidence that defendant otherwise asserted his innocence to the armed robbery charge. Because there was a factual basis for defendant’s plea on the record and his claim of innocence is not supported by the entire record, defendant has failed to establish a fair and just reason for withdrawal of his plea. Consequently, the trial court did not abuse its discretion in denying defendant’s request to withdraw his plea of nolo contendere to armed robbery.

Defendant also asserts that the trial court lacked jurisdiction because of an alleged violation of the 180-day rule, MCL 780.131. An unconditional plea of nolo contendere waives review of a claim that the 180-day rule was violated. *People v Irwin*, 192 Mich App 216, 218; 480 NW2d 611 (1991). Accordingly, we conclude that defendant waived any assertion of a violation of the 180-day rule.

¹ MCR 6.310(B) was amended effective January 1, 2014, but the amendment has no effect on the analysis in this opinion.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell