COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0570-CR **Cir. Ct. No. 02CF001689**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DION C. MITCHELL,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Dion C. Mitchell appeals from a judgment entered after he pled guilty to first-degree recklessly endangering safety, and from an

order denying his postconviction motion. *See* WIS. STAT. § 941.30(1) (2001–02).[1] He claims that the trial court erroneously exercised its discretion when it denied his motion to withdraw his guilty plea because, he contends: (1) the plea was not knowingly and voluntarily entered; (2) there was no factual basis for the charge; and (3) the trial court denied his ineffective-assistance-of-counsel claim without a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). We affirm.

I.

¶2 Dion C. Mitchell pled guilty to first-degree recklessly endangering safety after he injured a police officer during a traffic stop. At the plea hearing, Mitchell advised the court that he had reviewed the guilty-plea questionnaire and waiver-of-rights form with his lawyer and understood the elements of the charge. Neither party disputes that the assistant district attorney then summarized the facts from the complaint. According to the assistant district attorney's recitation, police officers Leland Feldman and Scott Wheeler stopped Mitchell's car on 1551 North 62nd Street in Milwaukee on March 23, 2002. Mitchell was outside the car when the officers asked Mitchell if he had any identification. After Mitchell told the officers that he had identification in the car, the officers allowed Mitchell to get into the car on the driver's side. Feldman stood between the car and the driver's side door.

¶3 The assistant district attorney told the court that Mitchell then put the key in the car's ignition and drove forward, catching Feldman between the car and

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

the driver's side door.[2] Mitchell sped away with Feldman "hanging out of the car," until the car hit a tree and Feldman was thrown from the car. When the car stopped, Mitchell ran away, leaving Feldman lying on the ground. Feldman received medical treatment for two broken front teeth, cuts on his upper lip and chin, and a separated AC joint.

¶4 After the assistant district attorney finished summarizing the facts, the trial court asked Mitchell's attorney if he wished to add anything. Mitchell's attorney told the court that he did not. The trial court then had the following colloquy with Mitchell:

> THE COURT: Mr. Mitchell, did you hear the facts as stated by the district attorney?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you wish to add or subtract anything from what [s]he said?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Is what she said, is that what happened?
>
> THE DEFENDANT: Yes.

The trial court determined that there was an adequate factual basis for the charge and accepted Mitchell's guilty plea.

¶5 The trial court sentenced Mitchell to ten years in prison, with five years of initial confinement and five years on extended supervision. Mitchell filed a postconviction motion to withdraw his plea, claiming that: (1) the plea was not

[2] The complaint charged that Mitchell put the car in reverse and drove it backward at a high rate of speed. Whether the car was driven forward or in reverse is not material.

entered knowingly and voluntarily; (2) there was no factual basis for the charge; and (3) his trial counsel rendered ineffective assistance. The trial court denied the motion without a ***Machner*** hearing, concluding that Mitchell was not entitled to withdraw his plea.

II.

¶6 Mitchell first claims that he should be allowed to withdraw his guilty plea because it was not knowing and voluntary. After sentencing, a defendant is entitled to withdraw a plea if he or she establishes by clear and convincing evidence that failure to allow the withdrawal would result in a manifest injustice. ***State v. Black***, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. The "manifest injustice" test requires a showing of a serious flaw in the fundamental integrity of the plea. ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331, 335 (1973).

¶7 To assure that a plea is knowingly, voluntarily, and intelligently entered, the trial court is obligated by WIS. STAT. § 971.08(1)(a) to ascertain whether a defendant understands the essential elements of the charges to which he or she is pleading, the potential punishment for those charges, and the constitutional rights being relinquished. ***State v. Bangert***, 131 Wis. 2d 246, 260–262, 389 N.W.2d 12, 20–21 (1986). The trial court can fulfill these requirements by: (1) engaging in a detailed colloquy with the defendant; (2) referring to some portion of the record or communication between the defendant and his or her lawyer that shows the defendant's knowledge of the nature of the charges and the rights he or she relinquishes; or (3) making references to a signed waiver-of-rights form. ***Id.***, 131 Wis. 2d at 267–268, 389 N.W.2d at 23–24; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987).

¶8 A defendant challenging the adequacy of a plea hearing must make two threshold allegations. ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. First, the defendant must show a *prima facie* violation of WIS. STAT. § 971.08 or other mandatory procedures. ***Bangert***, 131 Wis. 2d at 274, 389 N.W.2d at 26. Second, the defendant must allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***State v. Giebel***, 198 Wis. 2d 207, 216, 541 N.W.2d 815, 818–819 (Ct. App. 1995).

¶9 Mitchell claims that his plea was not knowingly and voluntarily entered because there is no evidence in the record that he understood the elements of first-degree recklessly endangering safety. We disagree. The record demonstrates that the trial court reasonably found Mitchell's plea was knowingly, voluntarily, and intelligently made.

¶10 At the plea hearing, the trial court had the following colloquy with Mitchell:

> THE COURT: The formal charge against you, Mr. Mitchell, is that on March 23rd of this year, at 1551 North 62nd Street in Milwaukee, you recklessly endangered the safety of Leland L-E-L-A-N-D, Feldman, F-E-L-D-M-A-N under circumstances which showed utter disregard for human life. Do you understand that is the charge against you?
>
> THE DEFENDANT: Yes.

Mitchell claims that this colloquy was inadequate, especially with regard to the element of utter disregard for human life, because while the explanation "contained the statutory language[, the trial court] neither explained, nor elaborated on, the elements." We disagree.

¶11 The standard for determining whether the defendant understood the elements of the offense is not as stringent as Mitchell contends. A trial court is not required to "thoroughly … explain or define every element of the offense to the defendant." ***State v. Trochinski***, 2002 WI 56, ¶20, 253 Wis. 2d 38, 644 N.W.2d 891. "[A] valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements." ***Id.***, ¶¶29, 2–3 (defendant knew and understood elements of offense even though meaning of "harmful to children" not explained to him at plea hearing).

¶12 The record in this case shows that Mitchell had "knowledge of the elements of" first-degree recklessly endangering safety, despite his claim to the contrary. The elements of first-degree recklessly endangering safety are: (1) the defendant endangered the safety of another human being; (2) the defendant endangered the safety of another by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed an utter disregard for human life. WIS JI—CRIMINAL 1345; WIS. STAT. § 941.30(1). As we have seen, the trial court adequately explained these elements to Mitchell during the plea hearing. As with the "harmful to children" concept, what Mitchell admitted he had done unambiguously demonstrated the requisite endangering safety under circumstances that showed an utter disregard for human life. *Cf.* ***State v. Weeks***, 165 Wis. 2d 200, 211, 477 N.W.2d 642, 646 (Ct. App. 1991) ("A reasonable view of the facts can only result in the finding that an actor who quickly turns and blindly fires a shotgun in the direction of a wooden door, knowing that a person is standing three feet away on the opposite side of the door, is aware that his conduct is practically certain to cause the death of that person.").

¶13 Moreover, the trial court established that Mitchell read and understood the guilty-plea questionnaire and waiver-of-rights form and that Mitchell's attorney explained the elements of the crime to Mitchell:

> THE COURT: Did you and your lawyer go through this Plea Questionnaire and Waiver of Rights form together?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is this your signature on the form?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Does your signature on this form mean that you understand what is in this paper that you signed?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: *Did your lawyer explain to you each of the elements that the district attorney would have to prove in order to convict you if this case went to trial?*
>
> THE DEFENDANT: *Yes, sir.*
>
> THE COURT: Did he answer all of your questions to your satisfaction?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You wish to ask me any questions about what you're doing here this morning and what the effect of your guilty plea will be?
>
> THE DEFENDANT: No, sir.

(Emphasis added.) Mitchell claims that the guilty-plea questionnaire and waiver-of-rights form was inadequate, however, because it did not list the elements of first-degree recklessly endangering safety or have attachments, such as jury instructions, to explain the elements. Again, we disagree. Mitchell does not point

us to any law, and we know of none, that requires a guilty-plea questionnaire and waiver-of-rights form to contain the elements of the offense.[3]

¶14 The plea colloquy and guilty-plea questionnaire and waiver-of-rights form demonstrate that Mitchell knew and understood the elements of first-degree recklessly endangering safety. Mitchell has not shown a *prima facie* violation of WIS. STAT. § 971.08.

¶15 Second, Mitchell claims that he should be allowed to withdraw his plea because there was no factual basis to support the "utter disregard" element of first-degree recklessly endangering safety. Again, we disagree. Before accepting a plea of guilty or no contest, a trial court must satisfy itself that the defendant in fact committed the crime charged. *See* ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375, 377 (1997); WIS. STAT. § 971.08(1)(b). "[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant." ***Black***, 242 Wis. 2d 126, ¶16.

¶16 As we have seen, the assistant district attorney summarized the facts from the complaint at the plea hearing. *See* ***State v. Thomas***, 2000 WI 13, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836 ("A factual basis may … be established through … a prosecutor reading police reports or statements of evidence."). Mitchell claims that the facts were inadequate, however, to establish the utter-disregard-for-human-life element of first-degree recklessly endangering safety because there was no evidence that he intended to injure Feldman. As proof, he points to a

[3] Mitchell also claims that "[a] plea questionnaire is an adjunct to, not a substitute for, a meaningful colloquy." We decline to address this issue, however, because, as we have seen, the plea colloquy was adequate. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

statement he made to the presentence-investigation report writer in which he claimed that he "was simply trying to elude the police." Mitchell misinterprets the law.

¶17 The element of utter disregard for human life is measured under an objective standard. ***State v. Jensen***, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170. It "does not require the existence of a[ny] particular state of mind in the actor at the time of the crime but only requires that there be conduct imminently dangerous to human life." ***State v. Blanco***, 125 Wis. 2d 276, 281, 371 N.W.2d 406, 409 (Ct. App. 1985) (quoted source omitted). Thus, Mitchell's claim that he did not intend to injure Feldman is irrelevant to our analysis in this case given the inherent dangerousness of his actions. In analyzing the proof of utter disregard for human life, we consider:

> "the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries and the degree of force that was required to cause those injuries. We also consider the type of victim, the victim's age, vulnerability, fragility, and relationship to the perpetrator. And finally, we consider whether the totality of the circumstances showed any regard for the victim's life."

Jensen, 236 Wis. 2d 521, ¶24 (quoted source omitted).

¶18 The totality of the facts and circumstances in this case, as recited by the assistant district attorney and agreed to by Mitchell, are sufficient to show that Mitchell's conduct was imminently dangerous. As we have seen, it is undisputed that Mitchell drove a car at a high rate of speed while Feldman was hanging out of it. When the car hit a tree, Mitchell got out and ran away, leaving an injured Feldman lying on the ground. There is no evidence that Mitchell showed any

regard for Feldman's life. The evidence was sufficient to support the trial court's finding that there was an adequate factual basis for Mitchell's plea.[4]

¶19 Finally, Mitchell alleges that the trial court erroneously exercised its discretion when it denied his ineffective-assistance-of-counsel claims without a ***Machner*** hearing. A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however:

> "the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Id., 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted).

¶20 The two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. Under that test, a defendant must prove: (1) deficient performance; and (2) prejudice. ***Id.*** at 687. To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability

[4] Mitchell also alleges that, "[i]f this court accepts the no factual basis argument (with regard to the utter disregard element) it can vacate the first-degree conviction and order an amended judgment of conviction for second-degree [recklessly endangering safety.]" (Emphasis omitted.) We decline to do so in light of our conclusion above that there was an adequate factual basis for Mitchell's plea.

that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. ***Bentley***, 201 Wis. 2d at 312, 548 N.W.2d at 54.

¶21 Our standard for reviewing this claim involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶22 Mitchell claims that his trial counsel was ineffective because the lawyer failed to: (1) communicate with him; (2) object to the absence of a factual basis for the plea; (3) engage in plea bargaining; and (4) prepare for sentencing. We address each contention in turn.

¶23 First, Mitchell contends that his trial counsel was ineffective for failing to "communicate meaningfully" with him. According to Mitchell, the lawyer never visited him in jail and the only time the lawyer talked to him was right before or after scheduled court appearances. This claim is conclusory and undeveloped. Mitchell does not allege how the meetings with his lawyer before and after hearings were inadequate or how face-to-face meetings at the jail would have affected his decision to plead guilty. Without more, this claim is insufficient to warrant a ***Machner*** hearing.

¶24 Second, Mitchell claims that his trial counsel did not adequately prepare for sentencing. This allegation is likewise insufficient to warrant a ***Machner*** hearing. Mitchell does not allege how the lawyer failed to prepare for sentencing, what the lawyer should have done to prepare for sentencing, or how

his sentence was affected by the lawyer's alleged lack of preparedness. Mitchell appears to claim that his trial counsel was not prepared because the lawyer was surprised when the victim appeared at sentencing. He does not allege, however, how this affected the sentencing proceeding. His failure to do so results in a claim that is factually insufficient.

¶25 Third, Mitchell claims that his trial counsel was ineffective for failing to realize that there was no factual basis for the charge. As discussed above, however, there was an ample factual basis for the crime of first-degree recklessly endangering safety. Accordingly, the record conclusively shows that Mitchell is not entitled to relief.

¶26 Finally, Mitchell contends that his lawyer was ineffective for allegedly failing to engage in any plea bargaining. We disagree for two reasons. First, Mitchell does not point us to any law, and we know of none, that requires a lawyer to try to plea bargain. *Cf.* ***People v. Palmer***, 643 N.E.2d 797, 476–477 (Ill. 1994) (defendant has no constitutional right to be offered opportunity to plea bargain). Second, there is evidence in the record that Mitchell's attorney did try to bargain with the assistant district attorney. At Mitchell's plea hearing, the parties went off the record to clarify the apparent confusion over whether there was a plea bargain. When the hearing continued, the assistant district attorney told the court: "I guess we just discussed this and the State would be recommending prison, length up to the court, and asking that it be consecutive to anything he is serving." Mitchell thus fails to show how his attorney's performance was deficient or prejudicial. We conclude that the trial court did not erroneously exercise its discretion when it denied Mitchell's postconviction motion without a ***Machner*** hearing.

By the Court.—Judgment and order affirmed.

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